Fox Rothschild LLP
ATTORNEYS AT LAW

434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

M. GRAY STYERS, JR.
Direct No: 919.755.8741
Email: GStyers@Foxrothschild.com

November 8, 2022

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Room 5063
Raleigh, NC 27603

Re: In the Matter of
Village of Bald Head Island v. Bald Head Island Transportation, Inc.
and Bald Head Island Limited, LLC; NCUC Docket No. A-41, Sub 21
Post-Hearing Brief

Dear Ms. Dunston:

In accordance with the Commission's October 25, 2022, Notice of Due Date for Proposed Orders and / or Briefs filed in the above referenced docket, on behalf of Bald Head Island Transportation, Inc., Bald Head Island Limited, LLC (Respondents), and SharpVue Capital, LLC, we herewith provide Post-Hearing Brief for filing.

A copy of the Post-Hearing Brief in native Word format is also being e-mailed to briefs@ncuc.net.

Thank you in advance for your assistance with this filing. If you should have any questions concerning this submittal, please contact me.

Sincerely,

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

pbb

Enclosures

cc: NC Public Staff
Commission Staff, Derrick Mertz, Esq.
Counsel and Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

VILLAGE OF BALD HEAD ISLAND, Complainant, v. BALD HEAD ISLAND TRANSPORTATION, INC. and BALD HEAD ISLAND LIMITED, LLC, Respondents, and SHARPVUE CAPITAL, LLC	)	**POST-HEARING BRIEF OF BALD HEAD ISLAND TRANSPORTATION, INC., BALD HEAD ISLAND LIMITED, LLC, AND SHARPVUE CAPITAL, LLC**

The Village of Bald Head Island's Complaint remains, as from its outset, a solution in search of a problem.

Bald Head Island Transportation, Inc. (BHIT), Bald Head Island Limited, LLC (Limited), and SharpVue Capital, LLC (SharpVue) respectfully suggest that a thorough evidentiary hearing showed that:

(i) Limited's parking and barge services are readily available and reasonably priced;

(ii) Limited neither obtained nor maintains its market position as the sole provider of these services through any improper, exclusionary, or predatory behavior; and

(iii) Nothing about the movement of these assets to a new owner, SharpVue,

portends to disturb these prevailing, pro-consumer conditions.

The record reflects a prolonged period of rate stability in which parking and barge pricing has changed little and has generally lagged inflation over the past several decades. While Village witness Scott Gardner testified to "the well-known view among a majority of the island population that [parking and barge] should be regulated" (STG Rebuttal, 4:6-8), the evidence shows that these property owners and residents – and the business owners, employees and contractors who drive the Island's economic engine – benefit from steeply discounted parking and barge rates. As the president of the Bald Head Island Association (BHI Association), Alan Briggs, put it about parking rates:

> "I think that, you know, it's $3 a day for the year. It's a good deal. We have a good deal there. There's no question in my mind. It's reasonable."

(Tr. vol. 3, 171:19-22)

The record further reflects that BHIT's regulated ferry provides access to a unique Island setting, with no bridge connection to the mainland and no private automobiles allowed on the Island. It is undisputed, in the words of Mayor Pro Tem Gardner, "[Bald Head Island] is a highly sought after destination for vacationers, for those who wish to explore the island for a day ("day trippers"), and for those who seek to make the island a home." (Tr. vol. 2, 31:12-15). In 2021, the ferry accommodated more than 373,000 passengers and made over 8,000 round trips. (Tr. vol. 5, 100:1-4). In the same year, Limited's barge made 930 round trip journeys that transported vehicles that brought food, fuel, commercial goods, and household items to the Island. (*Id.* 108:1-2). But what the record lacks is any evidence of supracompetitive pricing, abusive behavior, or exclusionary conduct against potential competitors. The Village's own economist concedes the point.

(Tr. vol. 3, 73:2-7, 8-13). Moreover, quite to the contrary of a predatory monopolist, the evidence shows that Limited voluntarily agreed to limitations on its price increases for parking in a written agreement with the Village that preceded the 2010 rate case. (2010 Rate Case Order, Ex. C).

Further -- and notwithstanding the lack of a factual predicate for regulation of Limited's parking and barge operations -- the contract purchaser of these assets has voluntarily offered conditions on availability and pricing of parking that could be enshrined in a potential transfer of the ferry's Certificate of Common Carrier Authority in the A-41, Sub 22 docket. As SharpVue's managing partner testified, it is plainly motivated to steward the ferry, parking and barge operations in a manner that promotes "a successful island community" that benefits all its stakeholders. "It is in all of our mutual interests to view each other as cooperative partners, working together toward common goals." (Tr. vol. 3, 240:8-16).

Exertion of regulatory authority by a state agency should be neither a response to survey results favoring it, nor a furtherance of a party's purchasing strategy following its rejection of an existing, applicable legislative solution. It is an exacting exercise that is constrained by statute, judicial interpretation and Commission precedent. Here, the "oversight" advocated by the Public Staff can be achieved by conditions in a future transfer of the ferry's certificate. That is both a practical and fair result, as well as an appropriate response to existing pro-consumer metrics and Limited's accommodating stewardship of the assets and businesses.

I. Limited's Parking and Barge Businesses are Available, Reasonably Priced and Operate to Promote Success for the Island Community and the Region

The "good deal" on parking prices that BHI Association's president confirmed also

was made plain during the testimony of the Mayor Pro Tem, Scott Gardner. He testified that he and his family make use of the discounted, long-term parking. "As Bald Head Island is our primary home, our car is parked for many days in the Deep Point lot," Mr. Gardner stated. "Consequently, we have purchased a 'Premium Parking Pass," which allows for unlimited parking days for a flat fee." (Tr. vol. 2, 37:3-6).

The rates for the "premium" lot used by Messrs. Briggs and Gardner, along with those for other rate classes, were set forth in an exhibit Gardner reviewed during his testimony:

DEEP POINT PARKING RATES				
Class	Premium	General *(a)*	Contractor	Employee
Annual Pass	$1,350.00	$1,200.00	$700.00	$650.00
General Daily	n/a	$12.00	n/a	n/a
Contractor Daily	n/a	n/a	$10.00	n/a
QR Exit Pass Coupon	n/a	n/a	$6.00	$6.00
(a) First 2-hours free.	$3.70/day	$3.29/day	$1.92/day	$1.78/day

(STG Cross Examination Ex. 2). Under existing parking rates those owners and residents who tend to park for longer periods and use the Premium lot can buy an annual pass under which their fee is $3.70 per day. If those same islanders wish to buy a pass for the General lot, which is the one most used by vacation visitors, they can park for $3.29 per day. Contractors can purchase annual passes that enable daily parking at the Deep Point facility at an average daily rate of $1.92 per day, and employees also can purchase such annual passes, for which the average daily rate is $1.78 per day. *Id.*

The record shows that passes for full-time employees are often purchased for them by their employers. Brandy Munroe, who owns Bald Head Island Services Rentals and Sales, Inc., the largest rental company on the island, testified that her company "purchase[s] over a dozen yearly parking passes as well as daily parking for our part-time employees." (Tr. vol. 1, 98). David Sawyer, Chief Executive Officer of the BHI Club, also testified that

the Club purchases annual passes for full-time employees, and daily passes for part-time employees. (Tr. vol. 1, 98). The record also reflected that coupon books are available for contractor and employee parking that sets the fee for exiting the lots at $6 so that reduced fees are available even where an annual pass is not preferred by the purchaser. (STG Cross. Ex. 2).

Against this data, perhaps it is not surprising that even the Village's economist could not testify that Limited's pricing behavior has exhibited indicia of improper or abusive behavior. First, Dr. Wright testified that he has made no determination that Limited has secured monopoly rents from its parking or barge operation. (Tr. vol. 3, 70: 17-21). Indeed, he reports that the Village did not even ask him to examine the issue. (*Id.*). Second, given the extended history of discounted parking at Deep Point, Dr. Wright said he had no opinion on the critical issue of whether the pricing behavior of Limited had even left a window of market opportunity in which a competitor might seek to challenge what he views as a *de facto* monopolist. Again, he testified he had not even looked into the issue. (*Id.* 72:17-22, 77:14-18).

Indeed, Dr. Wright's testimony is based on a "regulate first and ask questions later" ethos. He testified that he saw no need to consider whether Limited's pricing of either its parking or barge services was high enough that a potential competitor might be incentivized to compete. Indeed, *only if* a competitor ever did arise would it be appropriate, Dr. Wright testified, to examine Limited's pricing behavior at some future time that it *might be* appropriate to reduce or remove the regulation he urges the Commission to impose now. *Id.* Dr. Wright's tortured analysis of pro-competitive behavior and regulation is set forth below:

> Q So the issue of whether the pricing of parking or barge is such that it's high enough that it should or should not attract competition or where those inflection points are. You've not analyzed that issue with regard to parking or the barge?

> A No. As I say in my statement, at the current time, there is no option. And at such time in the future, if those options do pop up and exist, at that time, that's when you look at deregulating an affiliate service. But if it were regulated right now, you shouldn't – you know, you wouldn't be looking at that issue right now.

(*Id.* 77:19-78:8). Dr. Wright's belief that it is not appropriate to examine the pro-competitive conduct of a market actor *until* a competitor arises is well apart from the settled approach that "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors.*'" *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3rd Cir. 2007)[1].

Both Wright, as well the Village's other witnesses, expressed their speculation and fear of what might happen in the future (Tr. vol 2, 33-35), rather than acknowledging the reality of what has happened and is happening as factual matters, and what a rational market actor (i.e. SharpVue) has committed to do to maintain the successful overall commercial success of the island, as it steps into the shoes of BHIL.

II. Neither the Public Utilities Act, nor Case Law, nor Commission Prcedent Support an Exercise of Commission Regulation on this Evidentiary Record

The Village proposes that the Commission should, against this backdrop of reasonable market behavior, extend its regulatory ambit to include commercial parking and freight barge operations. There is no legal basis for it to do so.

The detailed definition of "public utility" does not include the functions of "parking" or "barge" (i.e., transporting motor vehicles across bodies of water). *See* N.C.G.S. § 62-3(23)(a). While it may be true that there are reegulated Duke Energy

[1] Given the similarities of sections 1 and 2 of the Sherman Act and 75-1 and 75-2 of the state statutes, North Carolina courts recognize "[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in considering our own antitrust statutes." *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996).

facilities that include parking lots that employees or visitors can utilize, that parking is incidental to the regulatory ambit that brings those facilities within the Commission's jurisdiction, and that scenario does not give rise to the regulation of rates and service of that parking provided by Duke Energy. (Cf. Tr. vol. 3, 46:8-16). That analogy provides no precedent to the circumstances presented in the present docket where a separate business entity owns and operates parking services available, for a separate charge, to those using a transportation utility service.

There is no reference anywhere in Chapter 62 of the General Statutes of parking or vehicular barge. The General Assembly could presumably have included these businesses within the definition of a "public utility" but has not.[2] Therefore, the Complainant must look beyond the language of the statutory definitions to find a legal basis for its arguments in this docket. Accordingly, the Village contends that "[t]he ferry and the parking are inextricably related and in fact exist in tandem as one de facto regulated service" and that the Commission should appropriately consider Limited's parking lots as "used and useful" assets that are integral to ferry service and meriting regulation (Compl., ¶ 24), notwithstanding that they have not been so considered by the Commission in the almost 30 years parking has been provided by BHIL. The issues surrounding extension of the Commission's regulatory authority to encompass the activities conducted by other, distinct entities are complex. In service of this analysis, the parties have briefed whether and how the decisions of the Commission and the North Carolina Supreme Court in two cases involving analysis of telephone directory advertising may apply to this docket. For ease of

[2] The General Assembly has demonstrated its willingness to pass legislation to address other issues or needs related to transportation services to or from Bald Head Island. *See* Session Law 2017-120 (authorizing the creation of ferry transportation authorities to serve locations such as Bald Head Island.)

reference, *State ex re. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 299 S.E.2d 763, 307 N.C. 541 (1983) is identified as *Southern Bell I* and *State ex re. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 391 S.E.2d 487, 326 N.C. 522 (1990) as *Southern Bell II*. The common thread to these cases is that Southern Bell was a regulated utility that, as a requirement of its tariff, was mandated to publish a telephone directory. Southern Bell created an affiliated entity, BAPCO, spun off the directory publishing to it, and then contracted with it to publish the directory on its behalf. BAPCO sold advertisements for inclusion in "yellow pages" that it included in the directory. *Southern Bell II*, 391 S.E.2d at 491, 326 N.C. at 529.

In *Southern Bell I*, the Supreme Court held that BAPCO's "expenses, revenues and investments related to directory advertising" could be included in Southern Bell's ratemaking process. It rejected Southern Bell's contention that revenues generated from advertisements included in a directory the utility was required to publish should be excluded from ratemaking. *Southern Bell I*, 299 S.E.2d at 766, 307 N.C. at 547. The court "point[ed] out that the yellow pages have never been and are not now regulated by the Utilities Commission," but that even where "a specific activity of a utility is not regulated . . . the expenses and revenues from that activity . . . [can be] included in determining the rate structure of the utility." *Id.* at 765, 307 N.C. at 545.

In *Southern Bell II*, the court held it had "complaint jurisdiction" over BAPCO related to incorrect listings in the directory where "the regulated utility has delegated to another company the public utility function of publishing its directory which also includes paid advertising." *Southern Bell II*, 391 S.E.2d at 491, 326 N.C. at 529. The court accepted the Public Staff's position that "general regulatory jurisdiction over the entire yellow pages

operation" was not required to ensure a consumer remedy for incorrectly listed numbers. *Id.* at 492, 326 N.C. at 531.

By their express terms, neither of the *Southern Bell* decisions stand for the proposition that the Commission may exert its general regulatory jurisdiction over the activities of non-regulated entities simply because there is a relationship between their activities and those of a regulated utility. *Southern Bell I* and *II* presented a unique situation in which the Commission examined the consequences of a utility spinning off a mandated, historically regulated activity to an affiliate and then seeking to curtail the Commission's jurisdiction over it. As the Supreme Court observed, Southern Bell's contention that the Commission had no jurisdiction over complaints about listings in the yellow pages ignored that the central vehicle at issue – the directory – was a required function of its tariff:

> "If a utility elects to include yellow pages advertising in the directory which it is required to publish, then clearly proper listings in the advertisements in the yellow pages become a part of the utility's 'function of providing adequate service' to the public."

Southern Bell, II, 391 S.E.2d at 491, 326 N.C. at 528.

The Village argues that the Commission should exert general regulatory jurisdiction over the ***historically unregulated*** parking and barge operations of Limited, but that legal theory is not accompanied by the factual premises of *Southern Bell I* and *II*. For example, publishing a directory was a regulated activity of Southern Bell telecommunications service and key analytical points revolved around whether it made any difference that an affiliate performed the function or that it generated revenues from advertisements included *within* the mandated directory. Indeed, the dispute in *Southern Bell II* centered on whether the Commission had jurisdiction to entertain complaints related to BAPCO's yellow pages listings when the Commission already "exercised jurisdiction

over yellow pages complaints from customers of Southern Bell." 391 S.E.2d at 488, 326 N.C. at ___.

Limited's parking and barge businesses are, perhaps, as equally unique in their presentation as the *Southern Bell* facts, but they exhibit none of the historic closeness of a situation where a regulated activity is spun off to an affiliate *created* to receive and conduct the regulated activity. Limited's parking and barge businesses have always had a corporate identity wholly separate from the regulated entity, BHIT. Parking and barge assets do not appear in the original issuance of the ferry's certificate; they were not included in the ferry's rate base in the A-41, Sub 7 rate case[3]; and they do not appear in the detailed quarterly reports of BHIT's utility activities filed with the Commission. (Tr. vol. 5, 41:18-42:2; 41:8-12; Exhibit KWO-2). Moreover, as opposed to BAPCO's creation to conduct a regulated activity on behalf of Southern Bell, Limited works diligently to maintain the distinct natures of the activities performed by BHIT's regulated, and Limited's unregulated, activities because "we have a responsibility to conduct the business lines of BHIT and BHIL in a way that allows the Commission to ascertain that the rates and allowable rate of return on the public utility's business are based only on the used and useful assets of BHIT and the revenues and expenses generated by those activities and assets." (Tr. vol. 5, 35:19-36:1).

As the Public Staff noted in its comments about the *Southern Bell* cases, "[w]hile the courts have found ancillary services such as telephone yellow pages to be unregulated, it nonetheless has deemed some level of oversight short of regulation by the Commission

[3] Village accounting witness Kevin O'Donnell agreed in his hearing testimony that the rate base of the ferry/tram in the 2010 rate case did not contain any parking or barge assets. (Tr. vol. 1, 241:12-18).

to be appropriate. The same approach is appropriate in this case. While the parking operation is not a regulated service, the Commission should exercise its oversight to ensure BHIT provides adequate parking at a reasonable rate to provide adequate service to its customers." (Public Staff Comments, 8).

Southern Bell I and II's precedent is fact-specific and narrow, and applying it in other contexts requires a careful hand. Certainly, at a macro level, Respondents and SharpVue agree with the Public Staff that, just as the yellow pages were not a regulated service under those cases, the more independent, distinct, and financially separate parking and barge operations should likewise continue to be unregulated. As a matter of applicable precedent, however, Respondents and SharpVue also suggest that *Southern Bell I* and *II* fall short of requiring the imputation of parking revenues from Limited to BHIT because of the unique and different natures of the Southern Bell-BAPCO and BHIT-Limited relationships respectively. However, as here, where the contract purchaser agrees to continuing that imputation and other conditions that function to provide the "oversight" advanced by the Public Staff, their inclusion as conditions to a potential ferry certificate transfer in A-41, Sub 22 follows the logic of the *Southern Bell* decisions without interpreting them to apply in the highly attenuated manner that the Village's requests would require.

A. The Imputation of Parking Revenue from Limited does not Support a Conclusion that Parking Should be Regulated as an Integral Function

In his testimony, Dr. Wright speculated that the imputation of $523,725 in parking revenues to the ferry and tram's revenue target in the 2010 Rate Case Order must have indicated that "the parties and the Commission recognized the connection between parking and ferry sufficient to justify the imputation of a significant amount of revenues[.]" ((Tr.

vol. 3, 41:5-7). However, Limited's CFO, Ms. Mayfield, who was personally and directly involved with the settlement negotiations in the rate case, testified that the imputation was the result of an analysis concerning an even larger shortfall – approximately $897,000 – that existed to produce sufficient revenue to support the maximum $23 ferry general ticket that the Public Staff would support. (Tr. vol. 5, 71:11-18). Mayfield stated that the shortfall was addressed through several sources, one of which was the $523,725 imputation calculated by the Public Staff's chief accountant Jim Hoard. (*Id.* 71:16-72:3)

The testimony of Ms. Mayfield was uncontroverted and consistent with the language of the stipulation in the rate case that this imputation part of the settlement of the rate case was contrary to BHIT's legal position in that case and subject to appeal if not accepted by the Commission. (Tr. vol 5, 87-88), and Mayfield Commission Questions Ex. 1). Moreover, the 2010 rate case order also explicitly acknowledged that the "imputation of the revenues of the Deep Point parking facilities . . . established no binding precedent for future cases . . and shall not be binding in future cases as a reason for or against . . . any other regulatory treatment of parking operations." (KWO Cross-x Exh. 5, Finding 9)

As the Public Staff pointed out in its comments, "[t]he fact that parking revenues have been imputed in the calculation of ferry rates does not indicate that operation of the parking lot should be a regulated function. In *Southern Bell I*, the Court said, '[w]e wish to point out that the yellow pages have never been and are not now regulated by the Utilities Commission'. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility." *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel Co.*, 307 N.C. 541, 544 299 S.E.2d 763, 765 (1983) (PS Comments, 7). The

Public Staff's comments highlight the essence of *Southern Bell I* and its import here: the imputation of funds from a non-regulated source to a regulated utility may occur, but by full regulation is not required to allow that result.

The Public Staff's view of the balance between regulation and consumer protection is considered and reasonable:

> "While owning and operating a parking lot is not a utility service per se, the availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers. Nonetheless, requiring that the utility provide this service does not require the Commission to approve or regulate the specific terms and conditions of the parking service or include particular assets in rate base, as long as the parking is adequate and reasonably priced."

(Public Staff Comments, 5). In this unique setting, where imputation was not an element of rate design but rather an accounting exercise to identify revenue sufficient to support a desired rate outcome, there is no cause to double-down on its existence as a justification to regulate the source from which it flowed.

III. Limited's operations of its parking business does not present the characteristics of a natural monopoly or exhibit anticompetitive behavior that would support the extension of regulatory jurisdiction by the Commission as a policy matter.

Dr. Wright bases his opinion of the need to regulate Limited's parking and barge businesses on the fact they are the single providers of a service. Yet, this "analysis" of alleged monopoly power in a market merely echoes the citizen refrains from a BHI Association survey that he quotes in his report:

- "It's a monopoly! Why shouldn't it be regulated?"
- "The entire BHI transportation system is a commercially-owned monopoly and should be regulated as such."
- "The parking and barge are monopolies . . . no real alternative for BHI owners. Rates should be regulated and limited to costs plus a reasonable return on investment."

(Tr. vol. 5, 190:3-17). A more thorough and in-depth inquiry requires more:

> "As an initial matter, monopoly power requires "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Broadcom, 501 F.3d at 306-07. *See e.g., Sitelink Software, LLC. V. Red Nova Labs, Inc.*, 2016 WL 3918122, *10 (N.C. Super. June 14, 2016) (same).[4]

Here, while witnesses for the Village, Respondents and other parties offered varying descriptions of Limited's position in the relevant market, there seems little disagreement that (i) parking services reasonably available to users of the ferries and (ii) freight barge conveyance of vehicles to and between BHI and Southport are currently being provided only by BHIL. Dr. Wright testified that while Limited's parking operation is not a natural monopoly, he believed it to be a *de facto* monopoly in its current operational posture. (Tr. vol. 3, 72:8-73:1). But the distinction between a natural monopoly, in which competition *cannot* occur, and simply a current operational posture in which competition has not yet occurred, is of great legal significance. The former may require regulatory intervention; the latter does not.

Currently being the only provider of a service is only a first step to an appropriately lodged monopolization claim. The second "willful acquisition or maintenance of the

---

While recognizing that antitrust legal mechanisms are different from utility regulation, they both arise from the same policy goal: to protect the consuming public from anticompetitive conduct. Therefore, reference to antitrust law can be instructive in analyzing whether regulation is necessary in a particular instance consistent with sound regulatory policy and the public interest. Given the similarities of sections 1 and 2 of the Sherman Act and 75-1 and 75-2 of the state statutes, North Carolina courts recognize "[f]ederal case law interpretations of the federal antitrust laws are persuasive authority in considering our own antitrust statutes." *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996).

power" element of the analysis is essential because "[i]t is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors.*'" *Broadcom*, 501 F.3d at 308 (citations omitted). Thus, it is now well-settled that "the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor." *Id.* Anticompetitive conduct:

> "may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive."

Id.

Dr. Wright testified that he did not believe that Limited had obtained or maintains its market position in the parking sphere through any improper conduct. He further testified that he had no first-hand knowledge that Limited had engaged in any exclusionary or predatory conduct in support of its market position. (Tr. vol. 3, 73:2-7, 8-13). Nor does he have any evidence that Limited has sought or secured monopoly rents. (*Id.* Vol. 3, 70:17-21, 115:1-6).

Moreover, on the issue of potential exclusionary conduct there was testimony regarding the activities of water taxi services that operate between Southport and BHI. BHI Club's president, Mr. Sawyer, testified that the Club often arranges for such services to transport workers back to the mainland who have had to work later than the last ferry departure time. He testified that the Club has had "great success" with BHIT "allowing us to use water taxis whenever needed," noting that mainland-bound taxi use the Deep Point terminal to dock. (Tr. vol. 3, 216:7-18, 217:19-22). Mr. Sawyer was asked by the Village on cross-examination whether Limited had indicated "it will stop allowing the water taxis to operate at some point?" Sawyer testified "[t]hat is not correct," and confirmed that

Limited's CEO Paul had confirmed water taxis could continue to operate and that the Club's access to this late-night resource would continue. (*Id.* 218:4-19).

The record evidence supports the conclusion that Limited has not acted to obtain, or maintain, a pricing regime emblematic of a monopolist. Notable on this point is that in April 2009, shortly before Deep Point opened, Limited reached a five-year agreement with the Village under which parking rate increases would not exceed the annual inflation experienced in the prior year. (2010 Rate Case Order, Ex. C). A rate case in 2010 followed, and its settlement terms not only incorporated this agreement by Limited but also extended the agreement on price increases an additional two years, to run through 2016. (Id., ¶ 9.a.ii.). A private agreement to restrain pricing over a multiple-year period that directly benefits consumers is, plainly, not indicative of abusive or supra-competitive pricing behavior.

Moreover, data of record indicates that General Daily parking has increased a total of $2 over the 13 years since the Deep Point parking opened (from $10 to $12), and that an annual pass for that same lot has increased $100 (from $1,000 to $1,100). Over those same 13 years, an annual pass for contractors has increased from an average daily rate of $1.37 to its current daily rate of $1.92; for employees that average daily rate has increased from an average daily rate of $1.37 to its current daily rate of $1.78. (*Id.*) As well, the record shows that rates for transporting vehicles on the barge did not change from 2006 (well before the opening of Deep Point) until July 2019, and today are set at $60 per 6-foot length. (Tr. vol. 5, 109:11-15)[5].

Finally, and perhaps most importantly to the conclusion that the parking facilities are not a natural monopoly, there is available land in Southport that could accommodate a parking competitor to Deep Point, and even substantial acreage "available for purchase in and around Southport – and, in fact, directly across Highway 211 from Deep Point" (*Id.*

[5] There is not a single instance in the record of any Village witness or citizen advancing a complaint about the prices for transporting vehicles on the barge.

11:12-22; *see also Vol 5, 169-171.*). BHIT previously operated its ferry services from a mainland terminal at Indigo Plantation in Southport, located approximately 3.5 miles from Deep Point, and those parking facilities at Indigo Plantation are unused and have not been redeveloped.

Access to the Deep Point Terminal is unrestricted, whether by any potential parking competitor or any member of the public. Limited's CEO, Chad Paul, testified that, "No payment is required, no gate needs to be opened, and no other barriers exist for shuttles, carpools, buses, or any other vehicles to reach the entrance to the ferry terminal at Deep Point." (Tr. vol. 5, 105:6-8). SharpVue's managing partner, Lee Roberts, testified that this open, unfettered access to the Deep Point Terminal would continue unabated under its ownership. (Tr. vol. 3, 244:4-9). In fact, easements have been recorded, in anticipation of the sale of BHIL's assets to the Bald Head Island Authority, ensuring public access to and from the Deep Point Termination and the nearest public road. (Tr. vol. 5, 127:4-128:17; CAP Redirect Exhibits 1A and 1B).

The ready availability of reasonably priced services by Limited has created no injury – real or prospective – to the public, but they have reduced the economic opportunities for a potential competitor. If pricing changes, as the Village's witnesses fear, to the extent that opportunities are created for competition, then alternatives will arise. This market structure and dynamics do not support the intervention of price regulation as a matter of basic economics or policy.

IV. The "Consolidation" Theory Advanced by the Village's Accounting Witness Provides no Basis for Regulation

Lacking a credible theory of regulation based on the actual, empirical operation of the parking and barge businesses, or on an economics model regarding their relationship to the market and potential competitors, the Village tried a third tact: inventing it.

Primarily through its accounting witness, Mr. O'Donnell, the Village contends that the Commission should ignore the distinct corporate and financial nature of the Limited

and BHIT assets for purposes of considering their regulatory status. O'Donnell suggested that it was appropriate to analyze the ferry/tram, parking, and barge operations in a consolidated fashion because the ferry typically has operated at a loss, and Limited was apparently "balanc[ing] the books of its overall transportation operations" with revenues from its parking activity. (Tr. vol. 1, 168:13-16, 170:13-15). Through this purported "consolidation," and some unilateral choices about asset valuation that conveniently avoid the lengthy Commission process that would determine them at a later date, O'Donnell opines that Limited has over-earned on the activities of its regulated and unregulated subsidiaries and departments, if considered together. Thus, based on a hypothetical construct and subjective decisions on its critical inputs, the Village suggests invasive regulation to solve a supposed financial calamity that was merely "workshopped" by its retained accountant. [6]

First, there is no evidence that demonstrates Limited or BHIT failed to conduct their businesses and financial affairs separately, in furtherance of the requirement that the activities of regulated and unregulated entities be distinct. Ms. Mayfield, the CFO of Limited, testified that the financial statements of the ferry/tram, of the parking operations, and of the barge operations are separately kept, maintained, *and audited.* (Tr. vol 5, 49, 121). In addition, she has signed and filed with the Commission each quarter for the last twelve years "an income statement and plant schedules listing all of the asset categories and accumulated depreciation for the rate base assets of BHIT." (Tr. vol 5, 36-37). Mayfield further noted that no parking and barge assets are included in those public filings because they "are not owned by BHIT and have never been considered to be part of BHIT's rate base." (*Id.* 4:9-11). The outside entity retained to prepare a pre-sale due diligence report on the assets of Limited and BHIT found the same. "Our analysis included an

[6] O'Donnell acknowledged that he had no opinion as to the operational relationship of parking, barge, and ferry businesses , and had never visited or toured the facilities at the Deep Point Terminal. (Vol 1, p.200: 15-24). He also had not spoken to Mr. Paul, Ms. Mayfield, or anyone with the Bald Head Island Transportation Authority. (Tr. vol. 1, 222-223).

examination of the finances of the involved business lines (to extract the cost data and cost relationships needed to construct our model), and we did not identify concerns about whether each of the activities was appropriately accounting for its costs." (Tr. vol. 4, 67:14-17).

The consolidated financial analysis set out by O'Donnell proposes a theoretical construct of Commission regulation over all of Limited's and BHIT's operations *as if* the threshold regulatory question at issue in this docket had already been resolved. Thus, in a proceeding to *determine* whether Limited's parking and barge operations should be regulated, O'Donnell posits that the Commission should consider his estimations about the rate of return that he believes BHIT and Limited regulated and unregulated assets generated in 2021 - if considered in a way they are neither held nor audited. (*Id.* Vol. 1, 171:3-8). It is creative, for sure, but premature and a poor substitute for the evidence-based process the Commission follows when analyzing utility rate bases and the many variables that allow the parties, the Public Staff, and the Commission to establish required revenue targets, rates of return, and rates. The O'Donnell analysis makes assumptions about the appropriate valuation of assets (like the parking operation) that *might* go into the rate base of the ferry *if* the Commission determined that was an appropriate regulatory path. The Village's economist, Dr. Wright, recognized that this analysis is not at issue here. As Wright noted, "the valuation of the parking facilities presents various public policy considerations that should be considered at the appropriate time[.]" He testified that "all of these issues and any arguments Limited and others may bring forward will be under consideration when the subject of this property's valuation is ripe for consideration." (Tr. vol. 5, 223:9-224-5).[7]

[7] In a related vein, the Village contends that BHIL should be regulated as a public utility because its parking facilities have "a direct effect on the rates and services of BHIT's ferry operation" because BHIL "revenues derived in connection with the parking operation can be used to offset, supplement or otherwise impact the revenues derived from the ferry service." (Compl., ¶ 57). The record does not support that inference. It demonstrates that the corporate and financial affairs of BHIT and BHIL are accounted for separately, as required in a situation where a parent company conducts regulated and unregulated activities under its auspices. Moreover, the apparent assertion of the Village that the Commission should use the O'Donnell "lens" to view all

O'Donnell further contends, in support of his "one company" analysis, that BHIT has not returned for a rate case since 2010 because it has feared consideration of the regulatory requests made here by the Village. (Tr. vol. 1, 222:4-8). While O'Donnell was not involved in the 2010 rate case, nor did he seek input from BHIT or BHIL about its actions regarding rate cases, he testified that he "had an assumption and . . . a theory that made perfectly good sense to me. (*Id.* vol. 1, 214:2-4, 222:10-21, 223:21-224:1).

However, the struggling finances of the ferry/tram system are not the goal or intention of BHIT, Limited, or the Commission. Indeed, the order which finalized settlement of the ferry/tram's 2010 rate case found it just and reasonable that BHIT would have the opportunity to earn an overall rate of return of 8.33% on a rate base of $3,943,335. (2010 Rate Case Order, ¶ 7). As Mayfield testified at the hearing, BHIT had requested a new ferry rate of $28 but that was met with opposition from the Public Staff that believed a $23 ticket was the maximum advisable because of possible "rate shock." (Tr. vol., 5, 71:4-9)

It is undisputed that BHIT has not filed a rate case for the ferry since the 2010 docket. Ms. Mayfield testified, however -- based upon her first-hand knowledge -- that the Public Staff was slated to audit the ferry operations in the 2015-2016 period and that BHIT anticipated that would have made the decisions about whether it "should go in or we should not go in" for a rate case based upon that audit. (*Id.* Vol. 5, 81:1-6). However, BHIT met with the Public Staff at this time and advised that it believed that legislation to create the Bald Head Island Transportation Authority was pending. Mayfield testified that the Public Staff expressed that the Authority seemed poised to "be a good resolution, good

---

of the activities of BHIL and its subsidiaries as a unified whole would ignore the organizational boundaries that Limited and BHIT have honored (and which the Commission recognized in the rate case order in Docket No. A-41, Sub 7.) Further, it would conflate Limited's overall financial condition into a construct in which BHIT's rates have been "impacted" merely because other BHIL departments or activities may fare better financially and thus Limited's bottom line appears more favorably. Such an outcome would serve as a slippery slope toward ignoring the distinction between regulated and unregulated businesses of any utility holding company, such as Duke Energy Corporation, some of which are inevitably more profitable than others.

opportunity for us, and they agreed, and we did not come back in for audit at that time." (*Id.* Vol. 5, 69:13-19). The Public Staff never performed the audit, and BHIT proceeded to then focus its energy and attention on the sale of the assets to the Authority. (Tr., vol 5, 89: 15-24).

V. The Barge Provides an Intermodal Transport Service to Actual Carriers of Supplies, Fuel, and Products Including Household Goods But is not a Transporter of Household Goods itself.

The Complaint also poses the question of whether a freight barge that transports vehicles across the Cape Fear River is also engaged in the transport of whatever items or goods those vehicles carry. The Public Staff aptly explained why North Carolina's regulatory regime does not convert a barge's intermodal transportation services into a regulated public utility activity:

> "The transportation services currently provided by Bald Head Island's barge operations (Barge) do not fall within the scope of the regulated services prescribed under Maximum Rate Tariff No. 1. While the Barge does indirectly transport household goods [HHG] by ferrying vehicles engaged in the transportation of household goods, the barge service does not involve the specialized functions associated with a household goods mover."

(Public Staff Comments, 10). Limited's CEO, Mr. Paul, explained it this way:

> "[I]f a family relocated its residence to Bald Head Island, an HHG mover that is responsible for moving the family's belongings from their prior residence to their new Island home could drive its truck onto the barge in Southport and off it on the Island to continue its trip to the owner's new home. The HHG mover would be the entity subject to the Commission's regulations, not the barge."

(Tr. vol. 5, 110:16-21).

The Public Staff elaborated on why this is so. It notes that the Commission previously has "weighed the nature of the transportation services provided against the content being transported" in Docket No. T-100, Sub 61 (PODS Docket). There, the

Commission believed that services furnished by a portable on-demand storage company "do not constitute household goods transportation in North Carolina and a certificate of exemption was not required. The Commission reasoned that the service[] provided by PODS was construed as a general transportation service instead of the more specific type of services provided by a household goods mover, such as packing, loading, and unloading." (Public Staff Comments, 9; see Order issued March 23, 2004 in Docket No. T-100, Sub 61).

The Village urges a contrary view, contending that it "is a distinction without a difference," as Mayor Pro Tem Gardner testified, because "[t]he barge transports household and many other types of essential goods, [and] foods and staples" when it carries vehicles to the island. (Tr. vol. 5, 184:11-14). The Commission, however, has found that there is a difference. In explaining the distinction between the services of regulated household movers, who are regulated public utilities, and portable storage container carriers (PSCCs), who are not, the Commission stated:

> Household goods movers provide many specialized services for their customers that PSCCs [portable storage container carriers] do not. Moving companies provide packing and unpacking, loading and unloading, valuation on the goods transported, and many more accessorial services not offered or provided by PSCCs. In addition, PSCCs derive their main income from the rental of the storage container, not the fee for delivering the container either to the customer location or into storage, which is incidental to the rental of the unit.

Order issued March 23, 2004 in Docket No. T-100, Sub 61. This explanation and distinction applies equally to the service provided by the barge, which derives its income from the utilization of specific areas (six-foot lane length) of deck space, regardless of what vehicle is on that space (or what that vehicle carries), and does not provide any of the other

specialized services provided by moving companies.

The Village's advocacy for "double" regulation over the movement of household goods misses the purpose of the Commission's point-to-point regulatory scheme applicable to movers of household goods. The Commission promulgates and enforces a variety of consumer protection measures that relate, among other things, to timing, pricing, and handling concerns that arise when an owner relocates to a new residence. Limited's barge may well transport a certificated HHG mover from Southport to BHI, but the regulations are not intended to reach an intermodal transportation link that assists an HHG mover on its regulated journey.

In addition to the detailed description or the barge operations by Mr. Fulton and Mr. Paul, the Village witnesses offered testimony that underscores the role of Limited's barge as a step in the transportation process of vehicles that, themselves, are transporting goods or other items to and from BHI. David Cox, the director of technology for the Village, testified that the Village takes custody of packages from carriers such as UPS, FedEx and DHL on the mainland in Southport and then are placed on pallets "that are then placed on warehouse trucks. The trucks are then driven onto the barge to be transported to the island." (." (Tr. vol. 1, 130:16-17). Then, upon their arrival on the island, "we unload them, manifest the packages . . . and then distribute the packages to the island addresses." (Tr. vol. 1, 130:20-23).

Similarly, the development services director for the Village, Stephen Boyett, offered an example of how the barge assists the actual mover of items or goods. Boyett testified that the Village picks up "household items," including furniture, of which residents wish to dispose and takes them to the mainland for donation to charities. "Public

Works regularly picks up furniture in its truck," Boyette testified, "loads the truck and the furniture on to the barge, and then disposes of the furniture on the mainland." (Tr. vol. 1, 151:5-9).

Finally, the Village contends that the Commission should regulate the barge because, in allowing drivers to remain in the cabs of transported vehicles, it is conveying "persons" between Southport and BHI. Yet, allowing the driver of a tanker carrying gasoline to remain with a truck that will be driven on to and off the barge to its final destination on the island does not bring the barge within the letter or spirit of the statute that defines a "common carrier". The "roll-on/roll-off" nature of the barge's activity was described by Limited witness James W. Fulton as follows: "Owners-operators load their vehicles and equipment directly onto the barge and typically remain with the vehicle during the transit to and/or from the island where they offload their vehicle from the barge to continue to their destination." (Tr. vol. 4. 188-189).

As Mr. Paul confirmed, the drivers of vehicles are not charged a passenger fee but remain as incidental to safe transportation of the vehicle across the river. The charge for the vehicle (or, more accurately, the space that the vehicle occupies on the barge) is the same regardless of whether the driver stays with the vehicle or not. There is no separate charge for a "passenger," because "passengers" are not allowed on the barge. (Tr. Vol 4, 186:5-18).

Under the applicable statute, a "common carrier" is one that is "engage[d] in the transportation of persons . . . for compensation." N.C.G.S. § 62-3(6). The *Brandon Randall* is regulated and inspected by the U.S. Coast Guard as a "freight barge" not engaged in the transport of "passengers," and that designation fits seamlessly with the state

regulatory regime in which Limited is not a public utility because it is not carrying passengers for compensation.

CONCLUSION

After a multi-day hearing, the Village failed to identify a problem for its legal theory to solve. It seeks regulation over reasonably priced and readily available services that merit no formal regulation, but in any event would have been subject to them if the Village had not withdrawn its support from the public authority it helped create. Its witnesses then prophesy doomsday scenarios (Vol, 1, pp. 101, 111, 114; Vol 2, 33-35) to justify the need for regulation while ignoring the reality of the current pricing and conduct of BHIL and the fact that SharpVue is simply stepping into the shoes of BHIL, with the same market position and motivations as BHIL has.

If the Commission should decide it serves the public interest and convenience to transfer the ferry/tram certificate to SharpVue with conditions that include the voluntary commitments offered in this docket, the Village will have received the "oversight" which the Public Staff commends for future operation of the parking and barge businesses. The evidence of record supports that reasonable step, but nothing more.

Respectfully submitted, this 8th day of November, 2022.

FOX ROTHSCHILD LLP

/s/ M. Gray Styers, Jr.

M. Gray Styers, Jr.
N.C. State Bar No. 16844
Bradley M. Risinger
N.C. State Bar No. 23629
Jessica L. Green
N.C. State Bar No. 52465
434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Telephone: (919) 755-8700
Facsimile: (919) 755-8800

Email: gstyers@foxrothschild.com
Email: brisinger@foxrothschild.com
Email: jgreen@foxrothschild.com

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

NEXSEN PRUET PLLC

/s/ David P. Ferrell

David P. Ferrell
N.C. State Bar No. 23097
4141 Parkdale Avenue
Suite 200
Raleigh, NC 27612
Telephone: (919) 755-1800
Fax: (919) 890-4540
Email: dferrell@nexsenpruet.com

Attorneys for SharpVue Capital, LLC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the attached **RESPONDENTS' AND SHARPVUE'S POST-HEARING BRIEF** in the above-captioned case, which was filed on this day, by electronic mail to the parties of record, counsel of record and the NC Public Staff, or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

Marcus W. Trathen Craig D. Schauer Brooks, Pierce, McLendon, Humphrey & Leonard, LLP P. O. Box 1800 Raleigh, North Carolina 27602 Email: mtrathen@brookspierce.com Email: cschauer@brookspierce.com Jo Anne Sanford SANFORD LAW OFFICE, PLLC Post Office Box 28085 Raleigh, North Carolina 27611-8085 Email: sanford@sandfordlawoffice.com *Attorneys for Village of Bald Head Island*	Chris Ayers Lucy Edmondson Zeke Creech North Carolina Utilities Commission Dobbs Building 430 North Salisbury Street 5th Floor, Room 5063 Raleigh, NC 27603-5918 Email: chris.ayers@psncuc.nc.gov Email: lucy.edmonson@psncuc.nc.gov Email: zeke.creech@psncuc.nc.gov *NC Utilities Commission Public Staff*
Daniel C. Higgins Burns Day & Presnell, P.A. P.O. Box 10867 Raleigh, NC 27605 Email: dhiggins@bdppa.com *Attorneys for Bald Head Island Club*	Edward S. Finley, Jr. 2024 White Oak Road Raleigh, NC 27608 Email: edfinley98@aol.com *Counsel for Bald Head Island Association*

This the 8th day of November, 2022.

/s/ Bradley M. Risinger

Bradley M. Risinger