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
Proposed Order

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, the Proposed Order is herewith provided for filing.

A copy of the Proposed Order 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.	))))))))))))	**PROPOSED ORDER OF RESPONDENTS AND SHARPVUE CAPITAL, LLC**

HEARD: October 10-12, 2022, in the Commission Hearing Room, 2115 Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

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

APPEARANCES:

For Village of Bald Head Island:

Marcus Trathen, Craig Schauer and Amanda Hawkins,
Brooks Pierce McLendon Humphrey & Leonard, LLP,
7 Wells Fargo Capitol Center, 150 Fayetteville Street,
Suite 1700, Raleigh, North Carolina 27601

Jo Anne Sanford, Sanford Law Office, PLLC,
721 North Bloodworth Street, Raleigh, North Carolina 27604

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

M. Gray Styers, Jr. and Bradley M. Risinger,
Fox Rothschild LLP, 434 Fayetteville Street, Suite 2800,
Raleigh, North Carolina 27601

For SharpVue Capital, LLC:

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

For Bald Head Island Club:

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

For Bald Head Island Association:

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

BY THE COMMISSION: On February 16, 2022, the Village of Bald Head Island (Village or Complainant), filed with the Commission a complaint and request for determination of public utility status against Bald Head Island Transportation, Inc. (BHIT or Transportation) and Bald Head Island Limited, LLC (BHIL or Limited), collectively, the Respondents.

Petitions to intervene were filed by Bald Head Island Club (BHI Club) and Bald Head Island Association (BHI Association). Those petitions to intervene were allowed by Commission orders issued on March 18th and July 22nd of 2022 respectively.

The intervention and participation of the Public Staff is recognized pursuant to North Carolina General Statute §62-15(d) and Commission Rule R1-19(e).

On March 30, 2022, Respondents filed their Response, Motion to Dismiss, and Answer.

On April 1, 2022, Respondents filed a motion asking that Commission take judicial notice, or in the alternative for leave to file supplemental exhibits to their answer.

On April 22, 2022, Complainant filed a response to Respondents' Response Motion to Dismiss and Answer.

On June 17, 2022, the Commission issued an order which, among other things, scheduled the hearing on the complaint for Monday, October 10, 2022 through Wednesday, October 12, 2022 in the Commission hearing room in Raleigh, North Carolina, and established procedures for conduct of the docket.

On July 8, 2022, the Complainant filed a motion to join a necessary party – SharpVue Capital, LLC (SharpVue).

On July 11, 2022, Respondents filed a response to Complainant's motion to join necessary party.

On July 13, 2022, Complainant filed a reply to Respondents' response to motion to join necessary party.

On August 1, 2022, the Commission issued an order allowing Complainant's motion to join SharpVue as a necessary party.

On August 9, 2022, the Village filed the direct testimony and exhibits of witnesses Scott T. Gardner, Dr. Julius A. Wright, Kevin W. O'Donnell, Brandy Monroe, David Cox, George Corvin, and Stephen Boyett, which included certain information deemed confidential.

On August 16, 2022, the Commission issued an order on Respondents' motion to take judicial notice and motion to dismiss, which, among other things, took judicial notice of the Commission's 2010 Order in Docket Number A-41, Sub 7 (2010 Rate Case Order) and denied Respondents' motion to dismiss.

On September 8, 2022, the Public Staff filed initial comments, BHI Club filed the direct testimony of David Sawyer, and BHI Association filed the direct testimony and exhibits of Alan Briggs.

Also on September 8, 2022, the Respondents filed the direct testimony and exhibits of James Leonard, Shirley A. Mayfield, and James W. Fulton, Jr., which included certain information deemed confidential.

On September 9, 2022, Respondents filed confidential exhibits to the confidential direct testimony of witness Leonard, as well as witness Leonard's public direct testimony and exhibits. Respondents also filed the direct testimony and exhibits of Charles A. Paul, III.

On September 28, 2022, BHI Association filed the reply testimony of witness Briggs, SharpVue filed the rebuttal testimony of Lee H. Roberts, and Complainant filed the rebuttal testimony and exhibits of witnesses O'Donnell, Wright, and Gardner. Also on September 28th, Complainant filed reply comments to Public Staff's comments.

On September 29, 2022, Respondents filed a motion in limine.

On September 30, 2022, Complainant filed a verified motion for preliminary injunction seeking to prohibit the sale of certain assets prior to determinations in this docket by the Commission.

On October 4, 2022, Complainant filed its opposition to Respondents' motion in limine, and Respondents and SharpVue filed a response in opposition to Complainant's motion for preliminary injunction.

On October 6, 2022, Complainant filed its reply to Respondents' and SharpVue's response to motion for preliminary injunction.

On October 7, 2022, the Commission issued an order denying Respondents' motion in limine.

On October 10, 2022, before commencing the evidentiary hearing, the Commission held a hearing on the Village's Motion for Preliminary Injunction and took the motion under advisement.

On October 11, 2022, a stipulation regarding the sale of certain assets, and notices to be provided to the Commission regarding same, was filed by Respondents and SharpVue.

On October 10-12, 2022, an evidentiary hearing was held as scheduled at which the pre-filed testimony and exhibits referenced therein were admitted into the record, the witnesses were subject to examination, and additional exhibits were identified and admitted into the record.

On October 17, 2022, the Commission issued an order holding the motion for preliminary injunction in abeyance.

On November 8, 2022, post-hearing briefs and proposed orders were filed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Ferry service to and from Bald Head Island and tram service on the Island is a regulated utility owned and operated by BHIT since 1995.

2. BHIT's parent company, BHIL, owns and operates parking services in lots adjacent to or near the Deep Point Terminal and Marina.

3. BHIL also owns and operates a tugboat and roll-on/roll-off barge transporting vehicles to and from Bank Head Island.

4. Since the death of Mr. George P. Mitchell in 2013, whose estate is now the ultimate owner of BHIL, BHIL has sought to sell all of its Bald Head Island-related assets, including but not limited to BHIT's ferry and tram operations, the parking lots, and the tugboat and barge.

5. BHIL has entered into an Asset Purchase Agreement (APA) to sell these assets to SharpVue.

6. The Village filed its Complaint in this docket requesting the Commission to assert regulatory jurisdiction over the parking services and barge operations.

7. SharpVue has made representations to the Commission that it will continue to provide adequate parking at reasonable rates. Specifically, SharpVue has made representations to the Commission regarding the preservation of an equivalent number of parking spaces as currently exists and limiting the increases in the prices to park at or near the Deep Point Terminal and Marina. Conditions such as proposed by SharpVue can be imposed by the Commission in its Order on the pending transfer of the ferry's certificate in Docket No. A-41, Sub 22.

8. Currently, no other parking lots exist in close proximity to the Deep Point Terminal at which ferry passengers can conveniently park their vehicles on the mainland prior to boarding the ferry to the island.

9. There is other property in the vicinity of the ferry terminal where alternative parking facilities could be developed.

10. Public access to the ferry terminal at Deep Point is unrestricted and available in the event that passengers wished to use a ride share service, park elsewhere, or if alternative parking facilities were developed.

11. BHIT and BHIL have conducted the businesses, operations, accounting, and recordkeeping of the regulated ferry/tram utility separately from the parking facilities and the barge operations.

12. The Commission has no jurisdiction other than what the General Assembly has granted in Chapter 62 of the General Statutes.

13. The Commission has never regulated the service or rates charged for the parking services or the barge operations.

14. The parking and barge assets were not included in the utility's financial statements in the original certificate application of BHIT in Docket No. A-41, Sub 0 nor in the rate base of BHIT in its only rate case in Docket No. 41, Sub 7.

15. The parking and barge assets have not been included in the quarterly financial reports filed by BHIT in the twelve years since the rate case.

16. The imputation of BHIL parking revenue to BHIT in the 2010 rate case provides no precedent for the issues in this proceeding, was part of a negotiated settlement, and was limited to the facts and circumstances of that docket.

17. Unlike the Yellow Pages that were published by an affiliate of Southern Bell in the 1990s and that had previously been published by Southern Bell itself, the parking facilities owned by BHIL and used by ferry passengers have never been regulated.

18. The facts of the *Southern Bell* Yellow Pages cases, and the policies underlying those appellate decisions, are different from the facts of the present case.

19. 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. BHIL has consistently provided adequate parking at reasonable rates.

20. The parking facilities of BHIL are not a "public utility," subject to the rate and service regulation of the Commission; however, as noted by the Public Staff, some level of oversight to serve customer needs – such as maintaining an adequate number of reasonably priced parking spaces for ferry passengers – is appropriate and can be ensured by conditions related to any transfer of the certificate for the regulated ferry operations.

21. BHIL also owns and operates a tugboat and barge that carries motor vehicles across the Cape Fear River, to and from Bald Head Island.

22. BHIL charges for use of the barge according to the vehicle's length (i.e. deck space occupied) and does not charge for the driver, who may stay in the cab of the vehicle during the voyage pursuant to U.S. Coast Guard regulations.

23. The Coast Guard does not consider the barge to be a "passenger ferry" and inspects and regulates the barge under a separate set of regulations than it would a "passenger ferry."

24. Although household goods may be transported to and from the island in the vehicles that are carried on the barge, the barge is simply part of an intermodal transportation system transporting the vehicles and is not itself "transporting . . . household goods . . . for compensation" as stated in the definition of "Public utility," N.C. Gen. Stat. § 62-3(23)a.4.

25. The Commission's regulatory regime for regulating household goods ("HHG") movers is based upon a Maximum Rate Tariff for point-to-point pick-ups and deliveries arranged by the retail, end-use customer. That regime is not applicable to the operations of BHIL's barge.

26. As with the parking facilities, BHIL's ownership, operations, accounting, and record-keeping maintain the barge separately from BHIT's ferry/tram operations.

27. BHIT's rate base has never included the tugboat or barge, and BHIT's reporting to the Commission has never included the tugboat or barge assets or finances.

28. The Commission has never regulated the barge operations of BHIL or any other freight barge operations in the State of North Carolina.

29. The tugboat and barge operations are not a "public utility" subject to the rate and service regulation of the Commission.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 1-7

It is undisputed that Bald Head Island (Island or BHI) is a barrier island located at the confluence of the Cape Fear River and Atlantic Ocean, approximately three miles across the Cape Fear River from the City of Southport in Brunswick County. The parties agree that the Island is a popular vacation destination for visitors, as well as for property owners, because of its beaches, attractions, and 173-acre maritime forest preserve. Further, they agree that the Village generally prohibits, by municipal ordinance, motor vehicles with internal combustion engines on the Island -- except for commercial uses, public works, and public safety purposes. Instead of using motor vehicles, residents and visitors typically ride bicycles or drive golf carts to travel on the Island.

By order of January 6, 1995, the Commission granted common carrier authority to BHIT in Docket No. A-41, Sub 0, for operation of ferry service between Southport, North Carolina, and Bald Head Island. The tram service has consistently been part of the BHIT utility operation, as recognized at least by the November 10, 1998 order in Docket No. A-41, Sub 1. The ferry operation is comprised of four passenger ferries and 23 tram units that transport passengers from the island terminal to and from their destination. (Tr. vol. 5, 96:6-12). The ferries can accommodate up to 150 passengers, and typically make a minimum of 17 daily roundtrip sailings during the low season and a minimum of 24 during the summer season. (Tr. vol. 4, 60:4-8). In 2021, BHIT reported that it transported more than 373,000 passengers on more than 8,000 round trips. (Tr. vol. 5, 100:1-4).

Since 2009, Limited has owned and operated unregulated parking services in lots adjacent to or near the Deep Point Terminal in Southport, and currently has the capacity to accommodate 2,302 cars. Those spaces are allocated among four lot locations designated as Premium, General, Contractor and Employee. (Tr. vol. 5, 100:7–101:7). Utilization of the lots varies significantly by season. For instance, data from 2021 shows that the General lot was the only lot to reach its capacity – during June and July when vacation visitors are most common. Excess demand was met through available gravel and grass parking spots, as well as through excess capacity in other lots. The Premium lot, where Islanders who spend longer periods on the island tend to park, only exceeded 60% of its capacity during June and July. (*Id.* (9:1-16). Limited's parking operation uses approximately 42 acres of the Deep Point Terminal campus. (Tr. vol. 4, 62:4-9). While Limited still controls parking lots at Indigo Plantation, site of the original mainland ferry terminal approximately 3.5 miles from the Deep Point Terminal, it reports that it has not needed to use those lots for overflow parking in the 13 years Deep Point's parking has existed. (Tr. vol. 5, 100:7-10).

The unregulated barge owned and operated by Limited is a 100-foot steel deck barge that carries vehicles of varying sizes, including supply and construction trucks, garbage and dump trucks, and vendor vehicles bringing all manner of supplies to the island. The barge is pushed by a tugboat. Limited charges for space on the barge by every 6 lane-feet of vehicles and can accommodate about 110,700 lane feet of vehicles on each crossing. (Tr. vol. 5, 106:7-11, 107:12-18). The barge operation has significant capacity to expand its services; its utilization rate was approximately 69 percent in 2021 and only once since 2015 has it reached 70 percent utilization, as it did in 2019. (Tr. vol. 5, 107:20-108:3).

BHIL was formed by George P. Mitchell to purchase Bald Head Island out of receivership in 1983. In 1993, Limited formed BHIT, a wholly owned subsidiary, to operate the ferry and tram system. (Tr. vol. 5, 95:15-16, 96:6-9). Mr. Mitchell died in July 2013, and since then Limited and BHIT have operated under the direction of his Estate. Ultimately, the Estate elected to divest the ferry/tram, parking and barge assets and a variety of other Island-related properties and all business operations. (Tr. vol. 5, 97:11-15).

Limited supported and encouraged the 2017 passage by the General Assembly of the Ferry Transportation Authority Act under which a multi-jurisdictional public authority can be created to purchase and operate a ferry system. *See* Senate Bill 391, codified at N.C. Gen. Stat. § 160A-680, *et seq*. Both the Senate and the House chambers of the General Assembly passed the legislation unanimously, and it was signed by the Governor shortly thereafter on July 18, 2017. The Village, the City of Southport, and Brunswick County each passed concurrent resolutions creating the Bald Head Island Transit Authority (BHITA or Authority). The Village and BHIL filed the Articles of Incorporation with the Secretary of State, who issued the Certificate of Incorporation of BHITA on August 23, 2017. Under its regional governance model, the Authority would have acquired all of the BHIL and BHIT assets that comprise the transportation and logistics services that operate between the Island and the mainland.

In December 2020, the Village withdrew its support for the Authority's purchase of the Limited and BHIT assets out of stated concerns about the price the Authority had agreed to pay ($47.75 million) and what the Village considered were shortcomings in the transparency of how the Authority made such decisions. (Tr. vol. 2, 48:12-22, 49:7-15). After the Village asked the North Carolina Local Government Commission (LGC) to defer consideration of the Authority's request to issue bonds, and observed that such approval might not come, it decided "it might be wise that we present a sister proposal." (Tr. vol. 2, 50:20-24). In service of that approach, the Village made a competing submission for authority to issue bonds to the LGC to purchase and operate the assets itself. It also proposed and received voter approval in November 2021 for a bond referendum to issue $54 million in General Obligation bonds. Its Mayor Pro Tem, Mr. Gardner, testified that "we determined in our investigation that we could – we could pay up to the $47 million, if it got to that point." (Tr. vol. 2, 51:3-20).

After the apparent collapse of a governmental purchase by the Authority of the BHIT and Limited assets, and public acknowledgement by Limited that it was seeking a private buyer for the BHIT and other Limited assets and all operations, the Village filed this action on February 15, 2022. (Compl., ¶ 44). The Complaint seeks a ruling upon the regulatory nature of the Parking Facilities and the Barge (collectively, Unregulated Assets) owned by BHIL, in part asking the Commission to resolve whether:

> (1) the Parking Facilities are an integral and essential part of the regulated public utility ferry services offered by BHIT (Regulated Assets) and, thus, their operation is subject to the Commission's

regulatory authority; and

> (2) the Barge provides a common carrier service under Chapter 62 that also is subject to the Commission's regulatory authority. The Village argues that the Unregulated Assets are ancillary facilities used in connection with the Regulated Assets and are essential to, and a component of, the regulated ferry service provided by BHIT. Thus, according to the Village, as the owner and operator of the Unregulated Assets, BHIL is also a public utility subject to the regulatory authority of the Commission. See N.C.G.S. § 62-3(23)a. The Village also notes that "public utility" includes "all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation . . . to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility." N.C.G.S. § 62-3(23)c.

On May 17, 2022, Limited entered an asset purchase agreement with a single, private purchaser for all of the assets – SharpVue. (Tr. vol. 5, 97:16-20). In Docket No. A-41, Sub 22 SharpVue is seeking approval for transfer of the Certificate of Common Carrier Authority under which BHIT operates the passenger ferries and on-island trams.

The record is replete with information, and acknowledgement by all parties, that the ferry/tram, parking and barge operations are important to an island without a bridge connection to the mainland. In particular, there was testimony regarding the importance of these services for "the workers who make the island function," as Mayor Pro Tem Gardner put it in his testimony. (Tr. vol. 2, 32:9-10). Gardner testified that there were multiple categories of these workers that are critical to the island, including: Village employees who manage its critical and service functions; contractors and tradesmen, "including plumbing, electrical, HVAC, housekeeping, and other building and repair services;" and those who staff the restaurants, stores, and shops, as well as the island's two clubs. (*Id.* Tr. vol. 2, 32:9-17).

Limited presented evidence regarding the parking rates charged to these employees and contractors that shows the rates charged to those categories of parkers are maintained at a low level. Contractors can purchase annual passes that enable daily parking at the Deep Point facility at an average rate of $1.92 per day. Employees also can purchase such annual passes, for which the average rate is $1.78 per day. (STG Cross Examination Ex. 2). For full-time employees, those passes 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 Bald Head Island Club, Inc., also testified that the Club purchases annual passes for full-time employees, and daily passes for part-time employees. (Tr. vol. 3, 220:3-15). The record also reflected that coupon books are available for contractor and employee parking that sets the fee for exiting the lots at $6. (STG Cross. Ex. 2).

Mayor Pro Tem Gardner testified, similar to other Village witnesses, that the Village is concerned about the exit of Limited because it was an owner that had development and investment interests on the island that spurred it to provide quality transportation and infrastructure services. (Tr. vol. 5, 183:19-22). The record is undisputed, however, that SharpVue is purchasing substantially all of BHIL's assets and operations associated with the island – including real estate holdings on the island. Consequently, Lee Roberts, SharpVue's managing partner, endorsed the view taken by Gardner and other Village witnesses that emphasized the importance of the BHIT and Limited transportation and infrastructure assets that it intends to purchase to the island's success. "[A] successful island community, the Clubs, and vacationer tourism is essential for a commercially successful transportation system," Roberts testified. "Neither BHIL/BHIT, SharpVue, nor any other owner would institute a pricing structure that would harm the island. 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).

In its testimony, SharpVue made a number of representations regarding its proposed conduct of the parking operations that it would be prepared to enshrine as conditions to a possible transfer of the ferry's certificate in Docket No. A-41, Sub 22. With regard to the availability of parking, its managing partner committed that "during all times that it owns or controls the parking business" it would provide no less than the current total of the 2,302 spaces that are currently an aggregate of the paved, lined spaces at Deep Point (1,955) and the overflow spots it provides on unpaved, gravel lots (347). (Tr. vol. 3, 241:15-19). Roberts further committed that such parking would be made available at Deep Point, by developing other "conveniently located parking lots" in the community, or by constructing parking decks or garages in lieu of surface lots. (Tr. vol. 3, 241:20-241:4). In cross-examination testimony, Roberts further stated that SharpVue believes the Deep Point lots currently used for parking represent the best use for that land, though the company may pursue development on adjacent, undeveloped land that is part of the Deep Point campus. (Tr. vol. 3, 286:24-287:17)

With regard to ensuring that parking for ferry passengers remains reasonably priced, Roberts testified that SharpVue would commit as a condition of a possible transfer in A-41, Sub 22 that "it will not increase the aggregate rates for parking ticket classes or levels in the foreseeable future more than the then-applicable Consumer Price Index for All Urban Consumers (CPI-U) as reported by the United States Bureau of Labor Statistics" for not less than four (4) years. (Tr. vol. 3, 242:14-22). SharpVue further committed that it would not seek a rate change for the ferry and tram operations for at least one (1) year following a prospective transfer of the certificate under which they operate. (Tr. vol. 3, 243:4-8). In addition, SharpVue committed that in assuming the rights and obligations of BHIT and Limited under its purchase transaction, it would commit in any transfer of assets approved in Docket No. A-41, Sub 22 that it would continue the imputation of $523,725 in parking revenues to the ferry and tram's revenue target until such time as the Commission should order otherwise in a subsequent rate case or other proceeding. (Tr. vol. 3, 243:12-244:3)

The Commission takes judicial notice that BHIT, BHIL, and subsidiaries of SharpVue have filed an application for transfer of the Certificate of Common Carrier Authority under which BHIT currently operates the passenger ferries and on-island trams. It is well within the Commission's jurisdiction to impose conditions on a purchaser in an order regarding a requested transfer of a utility's certificate pursuant to N.C. Gen. Stat.§ 62-111.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 8-10

The parties agree that Limited's parking on its Deep Point campus, adjacent to the ferry terminal, is currently the only generally available parking option for ferry passengers. As Village witness Wright testified, "at this time, there is simply no other parking available to the riders of the ferry at Deep Point." (Tr. vol. 5, 212:17-19). Limited's CEO, Mr. Paul, confirmed that "to date, there are not any other, currently existing, permanent parking facilities for passengers." (Tr. vol. 5, 105:1-3). The Commission heard testimony from witnesses that there is street parking available in Southport, but no other parking lots that ferry riders might use.

There was testimony of 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" (Tr. vol. 5, 104:16-105:3; 169:5-170:19); however, to date, no such competition has emerged. BHIT previously operated its ferry services from a mainland terminal at Indigo Plantation in Southport, located approximately 3.5 miles from Deep Point. The Deep Point terminal location, which opened in 2009, provided "a new and larger ferry facility with substantially expanded parking." (Tr. vol. 3, 20:3-7).

The record also indicates that 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 Transportation Authority, ensuring public access to and from the Deep Point Terminal and the nearest public road. (Tr. vol. 5, 127:4-128:17; CAP Redirect Exhibits 1A and 1B).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 11

It is undisputed that Limited and BHIT have conducted their businesses and financial affairs separately, in furtherance of the requirement that the activities of regulated and unregulated entities be distinct. The accounting and recordkeeping for the barge operations and the parking facilities have always been maintained separately from the regulated ferry/tram utility. (Tr. vol. 5, 35:10-36:4) Ms. Mayfield, the CFO of Limited, noted that 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, 36:16-37:4).

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." (Tr. vol. 5, 37:9-11). 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 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).

Village witness Gardner testified that "[t]he fact that Limited may have organized its affairs in a manner that suited its purposes does not, as far as I am aware, immunize those affairs from regulatory oversight." (Tr. vol. 5, 184:4-6). Of course, that is true at a conceptual level. But, separately accounting for regulated and unregulated activities under the same corporate umbrella is required, because it serves important public policy objectives to ensure that the revenues of regulated enterprises are not misdirected or misapplied to unregulated activities in ways that could alter Commission evaluation of, and rate setting for, the regulated activities.

Here, the Village raises a different vantage on the issue. Primarily through its accounting witness, Mr. O'Donnell, it 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, the regulated and non-regulated assets should be analyzed together. (Tr. vol. 1, 168:13-16, 170:13-15). The policy requirement that regulated expenses and revenues be accounted for separately from unregulated operations is meant to prevent utility ratepayers from subsidizing unregulated business activity. There is no prohibition, and indeed there is a benefit to ratepayers, if revenues from an unregulated business are used to support the regulated business. The Commission declines to accept the conclusion advanced by the Village that the past revenues of Limited's unregulated operations must be "public utility" functions under Chapter 62 simply because they offset operating losses that Limited's subsidiary utility company had with the regulated tram and ferry.

The consolidated financial analysis set out by O'Donnell postulates a theoretical scope of Commission regulation over all of Limited's and BHIT's operations *as if* the threshold regulatory question at issue in this docket had 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 collectively. (Tr. vol. 1, 171:3-8). In that sense, it is premature. As we have indicated in earlier orders in this docket, this is not a rate case that considers the many variables that allow the parties, the Public Staff, and the Commission to establish required revenue targets, rates of return, and rates. We agree with the testimony of the Village's economist, Dr. Wright, 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[.]" As Wright stated, "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). Here, O'Donnell proposes an analytical lens for considering issues that are not relevant to, or capable of appropriate discernment, in a docket posing only the threshold regulatory questions raised by the Village.[1]

However, the evidence is clear that setting the ferry/tram system up to struggle financially is not the goal or intention of BHIT, Limited, or the Commission. Indeed, the order which finalized 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 – A-41, Sub 7. Mr. O'Donnell theorized BHIT did not file a subsequent rate case because it did not want to revisit issues regarding whether Limited's parking operation should be regulated. (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 I had a theory that made perfectly good sense to me. (Tr. vol. 1, 214:2-4, 222:10-21, 223:21-224:1). This is speculation about the unstated subjective intent of another party, and as such carries little evidentiary weight. In contrast, Ms. Mayfield testified -- 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 after that audit. (Tr. 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

[1] 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 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.

Head Island Transportation Authority had traction. Mayfield testified that the Public Staff expressed that the Authority seemed poised to "be a good resolution, good opportunity for us, and they agreed, and we did not come back in for audit at that time." (Tr. 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).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 12-15

The Commission has no jurisdiction other than what the General Assembly has granted in Chapter 62 of the General Statutes. *E.g. Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 736, 309 S.E.2d 209, 216 (1983). As an initial matter, the detailed definition of "Public utility" in N.C. Gen. Stat. § 62-3(23)(a) does not include the functions of "parking" or "barge" (i.e., transporting motor vehicles across bodies of water).[2] BHIT is regulated as a utility "transporting persons or household goods by . . any other form of transportation for the public for compensation." N.C. Gen, Stat. § 62-3(23)(a)(4). There is no reference anywhere in the 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.[3] Therefore, the Complainant must look beyond the language of the statutory definitions to find a legal basis for its arguments in this docket.

It is significant that the Commission has regulated rates and services of BHIT for over 27 years and has never asserted jurisdiction over parking or barge operations conducted by BHIL at any point during that time. While this passage of time does not constitute any type of waiver or laches barring, as a legal matter, the Commission's authority to address the issues raised by the Complaint, it is persuasive factual evidence and indicative of policy considerations that those businesses are outside the regulatory scope of the Commission's jurisdiction.

BHIT filed its initial application to provide transportation service to the Island in 1993 in Docket No. A-41, Sub 0, and the Commission's Orders in that docket in 1993 and 1995 approved the provision of that service and the certificate. There were no real estate assets for parking including in the financial statement filed at that time and there have been none in any regulatory filings made since then. (Tr. vol. 5, 41:13 to 42:9).

More recently, in BHIT's only rate case, in Docket No. A-41, Sub 7 ("Rate Case Docket"), the Commission approved the rate base of used and useful assets for the

---

[2] While it may be true that there are Duke Energy facilities that include parking lots that employees or visitors can utilize, that parking is incidental to the regulatory ambit that brings those facilities within our jurisdiction, and that scenario does not give rise to the regulation of rates and service of that parking provided by Duke Energy. That analogy provides no precedent to the circumstances presented in this docket where a separate business entity owns and operates parking services available, for a separate charge, to those using a transportation utility service.

[3] 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.)

provision of the regulated utility service in its Order on December 17, 2010, which did not include any assets used for parking or for barge.[4] (KWO Cross Examination Ex. 5) As explained by witness Mayfield, who prepared the exhibits and schedules to the Application in the Rate Case Docket and had filed pre-filed testimony in that docket, the list of specific assets in the BHIT rate base were shown in Shirley Mayfield Exhibit 1, Schedule 2-1, filed in the Rate Case Docket (See KWO Cross Examination Ex. 1 and KWO Cross Examination, Ex. 2). That list of assets did not include any parking facilities in rate base and was the starting point for Public Staff witness James Hoard's calculation of the Plant in Service total in his uncontested late-filed settlement exhibit cited in the Respondents' Response.[5] (Tr. vol 5, 40:1-41:8; and KWO Cross Examination Ex.3 (Hoard Exhibit)).

In addition, in the Rate Case Docket, the Commission accepted and incorporated into its Order the following Stipulation term of the parties:

> Any gain or loss on the sale or lease of parking facilities owned by BHIL shall not be assigned, credited, attributed for ratemaking purposes to BHIT.

KWO Cross-X Exh. 5 (Finding 9.a.v., at p. 7 of Order and pages 17-18 stating the evidence in support of this finding). This term (consented to by the Village) contemplated the potential sale by BHIL of the unregulated parking assets and their exclusion from the scope of the regulated utility.

Since the rate case, Ms. Mayfield has filed, every quarter for the past twelve years (in Docket No. A-41, Sub 7A), an income statement and plant schedules listing all of the asset categories and accumulated depreciation for the rate base assets of BHIT. No parking or barge assets are included on the plant schedules in those filings, or any of the other BHIT reports filed with the Commission. (Mayfield Dir. Exh. B) These reports are publicly available on the Commission's website (Tr. vol. 4, 37), and neither the Public Staff nor any party has ever objected to the format, content, or substance of these reports.

That history does not preclude the Commission, as a matter of law, from making a contrary decision in this docket, and indeed in denying the Respondents' motion to dismiss we have determined we have the jurisdiction to *decide* whether such regulation is authorized and appropriate. But a sturdy regulatory rationale still is required to take action against the backdrop of how the General Assembly has defined a "public utility" and how the Commission has consistently viewed and treated the distinction between the regulated ferry and tram utility and the parking and barge operations.

---

[4] In fact, the barge operations were never mentioned by any party, the Public Staff, or the Commission, at any time, in any of the extensive filings in that rate case proceeding. The Commission's Order in this docket issued on August 16, 2022 took judicial notice of the Rate Case Docket Order.

[5] Mr. 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).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 16

The Village and the Respondents each submitted evidence on the significance of the imputation of $523,725 in parking revenues to the ferry and tram's revenue target that was included in the 2010 Rate Case Order. The Village's economist, Dr. Wright suggested that "[o]bviously 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). Limited's CFO, Ms. Mayfield, was directly involved in the negotiations in the 2010 rate case settlement and testified that the imputation was the result of an analysis concerning an even larger shortfall – approximately $897,000 – that existed and needed to be made up to produce sufficient revenue to support the maximum $23 ferry general ticket price that the Public Staff indicated it 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 of parking revenues calculated by the Public Staff's chief accountant, Mr. Hoard. (Tr. vol. 5, 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, which was contrary to BHIT's legal position in that case and subject to appeal if not accepted by the Commission. (Tr. vol 5, 87:7-88:6; 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 Examination Ex. 5, Finding 9)

As the Public Staff pointed out in its comments in this docket, "[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) (Public Staff 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 full regulation is not required to allow that result.

Based on the record evidence regarding the provenance of the parking revenue imputed to the ferry in the 2010 rate case, and the narrow precedential value of *Southern Bell* described by the Public Staff, the Commission concludes for the purposes of this docket to indicate that the imputation included in the 2010 Rate Case Order was and continues to be within the Commission's ambit to approve. However, the Commission will not extend *Southern Bell* beyond its premises; that case provides no basis to directly regulate Limited's parking or barge operations as "public utility" activity in the manner

requested by the Village.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 17-18

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. The issues surrounding extension of the Commission's regulatory authority to encompass the activities conducted by other, distinct entities are complex. The parties have briefed, and their witnesses have testified about, whether and how the decisions of the Commission and the North Carolina Supreme Court's in two cases involving analysis of telephone directory advertising – the now anachronistic "yellow pages" – may apply to this docket. For ease of reference, the Commission refers to *State ex re. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 299 S.E.2d 763, 307 N.C. 541 (1983) 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 factual context 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, with which it contracted to publish the directory, and 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*, our 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.

Southern Bell I and *II* presented a unique situation in which the Commission examined the consequences of a regulated utility spinning off a mandated activity (whose revenue and expenses had historically been included in ratemaking determinations) to an affiliate and then seeking to curtail the Commission's jurisdiction over it. There are two key takeaways from these holdings that have relevance here. First, that there are instances in which the Commission may consider in ratemaking the financial returns of activities that

were once regulated, even if now owned by an unregulated affiliate. Second, that the Commission has tools at its disposal to protect customers in settings where the involvement of regulated and unregulated actors does not lend itself to the assertion of general jurisdiction. 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 that had never previously been regulated simply because there is a relationship between their activities and those of a regulated utility.

The fundamental bulwark of the *Southern Bell* decisions is the transfer of a regulatory mandate from a utility to an affiliate. That provided the analytical framework for evaluating the resistance of the utility to include in its rate base revenues from that transferred mandate. Here, an equally unique but factually dissimilar narrative is at issue. The complaint posits that the Commission can and should exert general regulatory jurisdiction over the *historically unregulated parking and barge operations* of Limited, but that legal theory does not follow from the factual template of *Southern Bell I* and *II*.

For example, publishing a directory had been an activity provided by Southern Bell (the regulated utility) itself, 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. Up until and at the time of these cases, the provision of a telephone directory, listing the telephone numbers of customers that were solely assigned by the telephone company and that had to be dialed in making telephone calls, was a part of telephone service. The digits in the telephone number had no independent value or meaning except in the utilization of telephone service by the regulated utility.

Limited's parking and barge businesses, by contrast, do not share the hallmarks evident in the telephone company's directory. "Parking" is an unregulated function existing across the state at a multitude of facilities, and, in fact is an unregulated function existing across the country at ferry terminals (Tr. vol. 4, 73:6-74:12). Likewise, a barge transporting vehicles or bulk cargo is a very different business, regulated for safety by the US Coast Guard under an entirely different regime from that of passenger ferries. (Tr. vol. 4, 145:4-146:4). Parking and barge are different businesses from that of a ferry carrying passengers. Moreover, as noted above, parking and barge assets – although in existence at the time – do not appear in the docket of 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 (Tr. vol. 4, 41:8-12; and Mayfield Commission Questions Ex. 1); and they do not appear in the detailed quarterly reports of BHIT's utility activities filed with the Commission. Parking and barge operations are separate lines of business from the provision of passenger ferry service, and have always been considered and treated as such. The Village's request for regulation, thus, does not follow the *Southern Bell* precedent of selected relief, that falls short of full regulation, in settings where an unregulated entity is performing a regulated telecommunications function.

The Commission believes that the holdings in *Southern Bell I* and *II* are more appropriately supportive of the types of remedial measures that are contained in the 2010

Rate Case Order and which coincide with the Public Staff's recommendations in this docket for oversight – falling short of full regulation – that ensures the availability of reasonably priced parking that supplements BHIT's ferry service. As the Public Staff noted in its comments, "[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 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, p. 8)

The Commission finds that the Public Staff position here on oversight to achieve practical results that serve customer needs is similar to the position it took in *Southern Bell II* regarding consumer relief for those impacted by incorrect listings without asserting full regulatory jurisdiction over BAPCO's yellow pages. If the Commission ultimately elects to approve the transfer of BHIT's certificate for the ferry and tram operations to SharpVue, the inclusion of commitments regarding the availability and pricing of parking put forth in this docket by SharpVue can, and should, be included as conditions of such transfer.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT 19

The record presents many, no doubt earnest, requests from Village officials, witnesses, and citizens seeking regulation of Limited's parking and barge operations. Village witness Gardner notes "the well-known view among a majority of the island population that these assets should be regulated." (Tr. vol. 5, 184:6-8). Another Village witness notes, in his rebuttal testimony, the comments of a Village resident to a survey question on the topic with a direct sentiment: "It's a monopoly! Why shouldn't it be regulated?" (Tr. vol. 5, 190:7). That perception is a motivation of this regulatory inquiry called for by the Village's complaint. While a single parking facility serves the ferry that connects Southport to BHI, and a single barge runs between the mainland and the island, an inquiry based upon alleged monopoly power requires more than these factual inputs:

> 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 Corp. v. Qualcomm Inc., 501 F.3d 297, 306-07 (3rd Cir. 2007). *See e.g.*, *Sitelink Software, LLC. V. Red Nova Labs, Inc.*, 2016 WL 3918122, *10 (N.C. Super. June 14, 2016) (same).[6]

[6] 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*

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 is 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 (emphasis added)). 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 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.

The Village's economist, 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 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). The record shows that access to the Deep Point Terminal is unrestricted, such that ride share drivers, potential parking competitors, and the public may freely enter. (Tr. vol. 5, 105:6-8). 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

---

Laboratories, Inc., 123 N.C. App. 572, 578, 473 S.E.2d 680, 684 (1996).

"[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 not be altered. (Tr. vol. 3, 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.

Further, the evidence reflects that Limited maintained that pricing commitment well past the agreed span arising from the rate case, as rates were left unchanged for nearly a decade from the June 2009 opening of Deep Point and have lagged inflation since that 2009 agreement. (Leonard Direct Ex. K).

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.*). Moreover, 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).

The Commission finds that the record evidence and testimony supports the statement of Village expert Dr. Wright that Limited has done nothing improper to obtain or maintain its market position. As the president of the BHI Association, Alan Briggs, expressed his view 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)[7].

Moreover, the move to Deep Point in 2009 expanded the availability of parking spaces available to ferry riders, and in combination with the agreements to limit pricing increases created a consumer-benefitting outcome that has prevailed to the present. If this circumstance has created an environment in which competitors might struggle to identify a market opportunity -- given the ready availability of reasonably priced services by

[7] The Mayor Pro Tem also 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).

Limited -- it has created no injury – real or prospective – to the public. "The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Based upon the evidence presented in this docket, there appears to be no policy rationale to assert rate and service regulation over facilities and operations that are not included within the statutory definition of "public utility," have never been regulated in the past, are generally not regulated by other state utility commissions around the country, and whose market position was not obtained or maintained through any improper or anticompetitive conduct.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 20

The Public Staff's view of the balance between regulation and consumer protection is especially well founded:

> "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. However, it does warrant Commission scrutiny to ensure that ferry customers are protected through adequate parking at reasonable rates."

(PS Comments, p. 5). The Commission agrees that, in this unique setting, full regulation of Limited's parking business is unnecessary to accomplish the provision of adequate parking at reasonable rates when the record demonstrates a history of procompetitive and accommodating behavior by BHIL that SharpVue is committed to continue. We find that the ability to impose relevant conditions related to parking on any prospective certificate transfer approved in A-41, Sub 22 is sufficient to protect the public interest.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 21-23

In addition to the parking facilities, BHIL also owns and operates a tugboat, the *Captain Cooper*, and a 110' x 32' steel deck, roll-on/roll-off barge, the *Brandon Randall*, which together transport vehicles of various sizes between the mainland and the Island. (Tr. vol. 4, 143-144). The barge transports trucks that supply products for stores on the island, large highway trucks, construction vehicles, and other vehicles that have an Internal Combustion Engine (ICE) permit issued by the Village of Bald Head Island. (*Id.*)

Limited's barge does not accept passengers (Tr. vol. 4, 145:18-146:4), but pursuant to U.S. Coast Guard regulations that govern its operation, drivers (up to a maximum of 12) are allowed to stay in the cabs of their vehicles being transported. 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, 146:15-18). The charge for a vehicle is based solely on its length (i.e the deck space it occupies; $60 for each six-foot lane length. (Tr. vol. 4, 147:3-7). A driver that stays with a vehicle is not charged a fee (Tr. vol. 5, 110:1-4).

The barge and tugboat are inspected by the U.S. Coast Guard, and the record contains the current Certificates of Inspection and Documentation. The barge is inspected as a "freight barge," Under 46 CFR Subchapter I, and is considered to carry no "passengers," and federal law allows only 12 non-crew persons (the vehicle drivers) aboard. (Tr. vol 4, 146:1-4).

The Village contends that the Commission should, at a minimum, regulate the barge because it is transporting persons between Southport and BHI. The Village's economist, Dr. Wright, notes that he "would just emphasize that, from a layperson's standpoint, it is indisputable that the barge is used to carry [] persons" because drivers of transported vehicles can remain in their cabs. (Tr. vol. 5, 197:20-22). Yet, allowing the driver of a tanker carrying gasoline to remain with a truck that will be driven off the barge to its final destination on the island does not bring the barge within the letter or spirit of a statute that defines a "common carrier" as "engage[d] in the transportation of persons . . . for compensation." N.C.G.S. § 62-3(6). And, as both Mr. Paul and Mr. Fulton, confirmed, the drivers of vehicles are not charged a passenger fee but remain as incidental to safe transportation of the vehicle across the river. In other words, the charge for the space that the vehicle occupies on the barge is the same regardless of whether the driver stays with the vehicle or not. (Tr. vol. 5, 7-9). As Mr. Fulton stated, there is no charge for a "passenger," because "passengers" are not allowed on the barge. (Tr. vol 4, 186:5-18).

In contrast, the other examples of other regulated ferries cited by Village witness Wright -- even if they also transport motor vehicles -- all have Commission approved tariffs with charges for passengers and hold themselves as "passenger ferries." (Fulton Redirect Exs. 1 and 2; Tr. vol. 5, 169:1-170:1)

The Commission sees no cause to disagree with U.S. Coast Guard regulation of the *Brandon Randall* as a "freight barge" not engaged in the transport of "passengers."

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 24-25

Although some of the moving or delivery trucks that are transported on the barge may contain household goods, such as a kitchen appliances or furniture, the barge service itself is simply transporting the vehicles, for which it charges the fee. (Vol. 4. 148-149). Barge and tug personnel do not handle nor otherwise take possession of cargo contained within the vehicles that it transports. (*Id.)* The barge is neither a point of origin nor a final destination of any cargo, vehicles, or equipment it carries. Although witnesses for the Village testified at length that the only way that household goods could be delivered to the island was by the transit on the barge, there was no credible evidence that contradicted this

method of operation described by Mr. Fulton.

The Complaint poses the question of whether a freight barge that transports vehicles across a segment of 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 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 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, p. 10)

As the Public Staff explained, 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 Staff 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 Staff 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).

The Village urges a contrary view, contending that it "is a distinction without a difference," as Village witness 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 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, p. 11. This explanation and distinction apply 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 which does not provide any of the other specialized services provided by regulated moving companies.

Therefore, the Commission only regulates point-to-point pick-up, movement, and delivery of household goods ("HHG") arranged by the end-user. To support that objective, 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 carry a certificated HHG mover from Southport to BHI, but our regulations are not meant to reach an intermodal transportation link that assists an HHG mover on its regulated journey. An example afforded by one of Limited's witnesses aptly captures the nature of HHG regulation in this context:

> "[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 Village operation of its Island Package Center (IPC) also reflects the role of Limited's barge as a step in the transportation process of vehicles that, themselves, are transporting goods or other items to 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).

In neither of the descriptions of the BHIL barge operations by Village witness Cox or Village witness Boyett does BHIL take possession of the items being transported or provide point-to-point pick-up and delivery. The barge simply transports the vehicles of, or contracted by, the end user. This service does not fall under the plain meaning of the definitions of a utility as one "transporting passengers or household goods."

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT 26-29

In light of the inapplicability of this Commission's HHG mover regulation to the operations of a tugboat and roll-on/roll-off barge carrying motor vehicles like that owned and operated by BHIL, the Commission has never regulated the barge operations of BHIL or any other barge in the State of North Carolina. In fact, prior to this Complaint, no other NCUC docket had addressed issues pertaining to the BHIL tugboat and barge in the more than thirty years of its operation. This issue appears in neither the settlement stipulation nor the Commission's Order in BHIT's rate case in Docket G-40, Sub 7 (absence of any mention in Mayfield Commissioners' Exh. 1 or in KWO Cross Examination Ex. 5).

As recounted above in the recitation of evidence and conclusions pertaining to BHIL's parking facilities, Ms. Mayfield testified that BHIL's operations, accounting, and record-keeping all keep the barge completely separate from BHIT's ferry/tram operations. (Vol 5, 35 and 38-39) BHIT's rate base has never included the tug boat or barge (Vol 5, 41-42), and BHIT's reporting to the Commission has never included the tug boat or barge. (Vol 5, 36-37).

Finally, as a matter of policy, the Commission believes that Public Staff's interpretation of the regulatory regime applicable to the movement of household goods accurately reflects the consumer protection objectives of North Carolina's approach. This regulatory regime is designed to protect individuals who hire movers to make end-to-end moves between current and future residences. Extending regulatory jurisdiction over rates and services of the BHIL barge would not further this purpose, is not supported by the statutes, and would be inconsistent the Commission's past practice. Again, as with parking, the General Assembly could have extended the Commission's jurisdiction to this function but has not done so. For these reasons, we find that the tugboat and barge operations of BHIL are not a regulated public utility and not subject to the Commission's jurisdiction.

* * *

Based upon the evidence and filings, the Commission concludes that the Complainant has failed to meet its burden of proof and failed to establish that (1) the parking facilities and operations of BHIL at the Deep Point Terminal or (2) the tugboat and barge operations of BHIL are public utilities subject to the regulation of the Commission. The relief sought in the Complaint is denied and the complaint dismissed with prejudice. This decision, however, does not in any way limit or restrict what conditions the Commission may, in its discretion, impose in any order it may decide to issue in Docket No. A-41, Sub 22, or what imputation of revenue it may or may not decide is appropriate in any future rate case regarding the ferry and tram operations currently owned and operated by BHIT.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION

This the ___ day of ____, 2022.

NORTH CAROLINA UTILITIES COMMISSION

Erica N. Green, Deputy Clerk

Commissioners Charlotte A. Mitchell and Karen M. Kemerait did not participate in this decision.