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March 1, 2024

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

Re: In the Matter of
Study of Rates and Charges of Passenger Ferry Public Utilities
NCUC Docket A-100 Sub 1
Bald Head Island Transportation, Inc.'s Initial Comments

Dear Ms. Dunston:

Attached hereto for filing in the above referenced docket are Bald Head Island Transportation, Inc.'s ("BHIT") Initial Comments.

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

Thanking you in advance for your assistance in this matter.

Sincerely,

/s/ M. Gray Styers, Jr.

M. Gray Styers, Jr.

pbb

Enclosure

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Ms. Shonta A. Dunston
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Copy to: Christopher Ayers – NC Public Staff
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Parties and Counsel of Record

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Mar 01 2024

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-100, SUB 1

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Study of Rates and Charges of Passenger Ferry Public Utilities)))))	BALD HEAD ISLAND TRANSPORTATION, INC.'S INITIAL COMMENTS
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BALD HEAD ISLAND TRANSPORTATION, INC. ("BHIT"), by and through its undersigned counsel, provides these Initial Comments as requested in the Order Requiring Filing of Rates and Allowing Comments ("the Order") issued by the Commission on October 4, 2023, in the above-referenced docket regarding the scope and nature of the Commission's regulation of passenger ferries in North Carolina. Specifically, the Order states:

Without intending to limit the scope of parties' comments, the Commission specifically requests that the parties address whether the Commission's current ratemaking treatment of passenger ferry rates and charges complies with state law; whether lesser regulation of rates and charges is appropriate for passenger ferries, particularly those offering competitive leisure service; factors to be considered in determining whether proposed rates and charges are just and reasonable; and whether changes should be made to the Commission's rules or procedures.

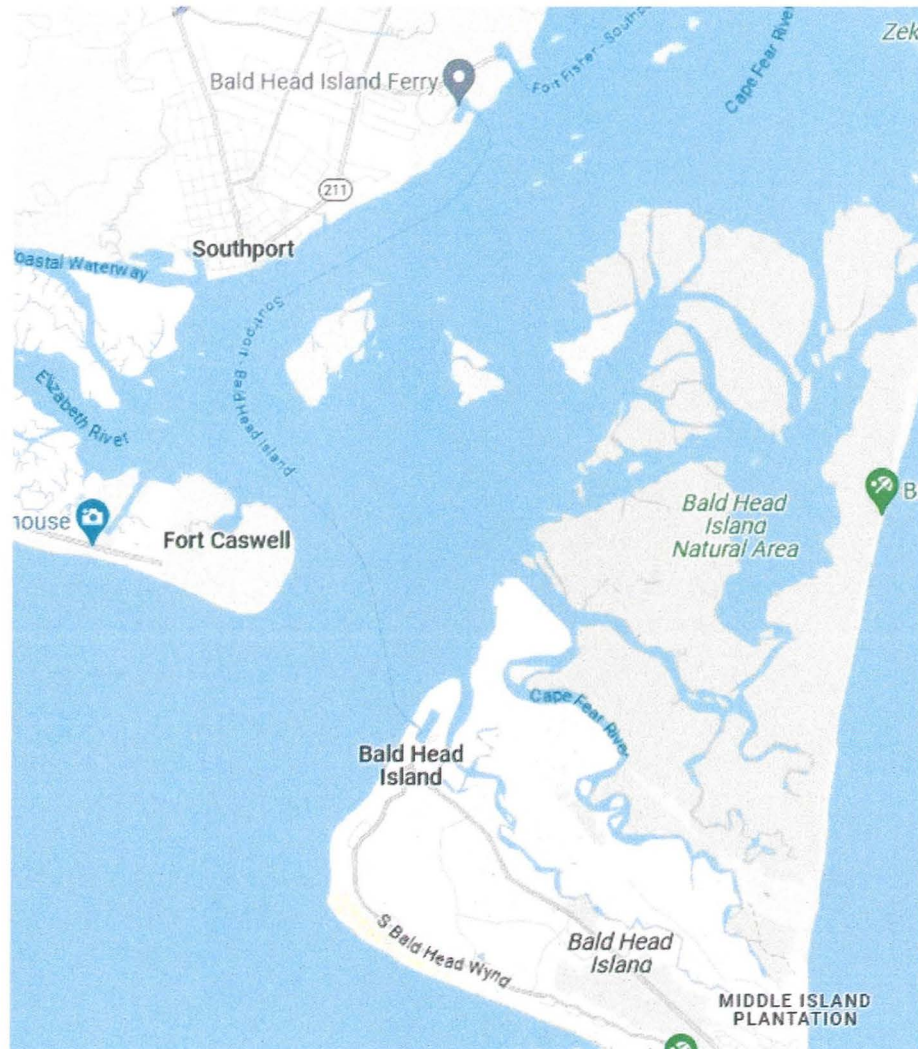
BHIT files these comments in response to that Order.

I. BACKGROUND AND CONTEXT

BHIT believes that providing some factual background about its ferry operations will help provide context for its comments:

A. Location and route

BHIT's passenger and contractor ferries transport passengers daily between the Deep Point Terminal located in Southport, NC and the Bald Head Island Terminal located at Bald Head Island, NC. This route is shown on the following map:



Rates, service regulations and schedules for the ferry operations are approved by the Commission and were timely filed in this docket as requested by the Order. General fare (Class I) and Bulk 40 (Class II) tickets include tram service to and from the passenger's ultimate destination on the island if tram seating capacity is available.

B. Initial BHIT Certificate and Scope of Utility Services

George Mitchell purchased the undeveloped portions of Bald Head Island (the “Island”) – which, at that time was most of the island - in the 1980s and started creating the corporate structure for the development of, and services to, the Island. Bald Head Island Limited, LLC (“BHIL”) was the corporate entity established for financing, construction, and parent ownership of most of the infrastructure and operations on the Island.¹ A subsidiary of BHIL – BHIT – was created to operate the ferry and on-island tram to transport passengers to and from the island from Southport..

Once regular ferry service was established, BHIT filed an Application for Authority to Operate Ferry Service in Docket A-41, Sub 0. The Commission granted temporary authority by order dated April 27, 1993, requiring BHIT to file with the Public Staff “a schedule of rates and charges” at that time. BHIT then filed its first tariffs and rate schedule, “NCUC No. 1”, which was effective July 1, 1993. The Commission issued its order on January 6, 1995 setting forth the parameters of BHIT’s utility operations:

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

Order Granting Common Carrier Authority, Docket No. A-41, Sub 0, Jan. 6, 1995.

Since 1995, the base ticket prices remained unchanged until BHIT filed its first (and only) general rate case on May 5, 2010 in Docket No. A-41, Sub 7.

¹ BHIL has provided unregulated parking facilities, first at the Indigo Plantation ferry terminal and then at its current Deep Point Terminal, since at least 1991 (“Parking Facilities”). Records and available information indicate that unregulated barge service has been provided to and from the Island since 1983 (together with the associated tugboat, “Barge”).

C. 2010 Rate Case

On May 5, 2010, BHIT filed for a general rate case to adjust its rates previously approved in 1995, pursuant to N.C. Gen. Stat. §§ 62-133 and -144 Commission Rule R1-17. This rate case included calculations of the cost of service during the test year, an accounting of used and useful rate base, a determination of a reasonable rate of return on that rate base, and a revenue requirement -- consistent with the requirements of Commission Rule R1-17 and pursuant to the procedural recommendations of the Public Staff at that time. The Village of Bald Head Island, the Bald Head Island Club, and the Bald Head Association intervened in the 2010 rate case. The proceeding was extraordinarily contentious and expensive, but ultimately all parties entered into a Revised Agreement and Stipulation of Settlement on October 21, 2010 ("Settlement Agreement") prior to the start of the evidentiary hearing. Revised Agreement and Stipulation of Settlement, Docket No. A-41, Sub 7, Oct. 21, 2010. The Settlement Agreement was supported by Late-Filed Exhibits by Public Staff witness James G. Hoard, establishing the rate base of \$3,943,335, a calculation approved by the Commission. See Order Granting Partial Rate Increase and Requiring Notice, Findings of Fact and Conclusions 7 and Schedule II, Docket No. A-41, Sub 7, Dec. 17, 2010 ("Rate Case Order"). This approved rate base did not include any Plant in service or other assets other than those associated with the ferries and tram functions.

Finding of Fact 17 of the Rate Case Order required BHIT to file quarterly financial reports with extensive financial data, including month-end balances of plant, accumulated depreciation expense by plant category, and other relevant data. BHIT has filed over 50

quarterly reports since that time. Those reports include only data from the regulated operations – ferry and on-island tram – in a format prescribed by the Public Staff.

Although there have been two adjustments to the baggage tariff provisions and several revisions to the ferry schedules – all of which have been approved by the Commission -- the base passenger ticket prices established in Docket No. A-41, Sub 7 remain in place. There has been no subsequent rate case.

D. Commission Order in Docket No. A-41, Sub 21

On December 30, 2022, a majority of four Commissioners issued an Order in Docket No. A-41, Sub 21 finding that the Parking Facilities and Barge owned and operated by BHIL “are subject to the Commission’s jurisdiction and regulatory authority” (Ordering ¶¶ 1 and 2). But, at the same time, the Commission held “[t]hat it is in the public interest for the Parking and Barge Operations to continue to operate, consistent with their existing operation, rates, and services,” just as they had been as unregulated operations for now over thirty years. (Ordering ¶ 4). More specifically, that Order explained:

This is not to say that the status quo must immediately change. The Commission notes that there has been no substantiated allegation that BHIL is, at present, abusing its monopoly power, only that the risk exists for it — or a future owner — to do so. *See, e.g.*, Post Hearing Brief on Behalf of Bald Head Association at 7; tr. Vol. 3, 171 (Association witness Briggs testifying: “We have a good deal there. There’s no question . . . [i]t’s reasonable.”). Also, there has been some assurance from SharpVue that it intends to continue to provide these services at reasonable rates and consistent with past practices. Further, although there has been suggestion that the total transportation system may be overearning, *see, e.g.*, tr. Vol. 1, 187, no party has asked this Commission to initiate a general rate proceeding, and the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both BHIL and BHIT, as well as the agreement they struck in the last general rate case involving the Parking Operations.

The Commission also notes witness Mayfield's discussion of other potential questions that may arise were the Commission to assert jurisdiction over these Operations — e.g., how would the Commission analyze and determine the value of certain assets, which and how would the Commission include those assets in rate base, as well as how would the Commission address cost allocation and rate design for various, different services for various, different classes of customers? *See tr. Vol. 5, 43-46.* But no party has sought to present evidence on the panoply of matters appropriate for full review or determination in a general rate case. To this end, the Commission agrees with witness Mayfield that this docket is a premature, and improper, forum in which to address such issues.

As a result, and as requested, the Commission treats the Complaint only as a request for a declaration of utility status. The Commission does not treat the Complaint as a request to initiate a rate proceeding and does not require either BHIT or BHIL, separately or jointly, to file a general rate case at this time. *See generally State ex rel. Utils. Comm'n v. Carolinas Comm. For Indus. Power Rates*, 257 N.C. 560, 569-70, 126 S.E.2d 325, 332-33 (1962). Without more and absent any requested change, the Commission permits the status quo — and the current rates and services of the Parking and Barge Operations — to continue.

The Commission also finds that there is no other similar service or franchise existing or available in the territory served by either the Parking or Barge Operations. It thus concludes that it is in the public interest for the Parking and Barge Operations to continue to operate, consistent with their existing operation, rates, and services, and, as a result, the Parking and Barge Operations are granted temporary authority to operate in the interim pending any future proceeding. *See N.C.G.S. § 62-116.* For these reasons, the Commission concludes that the Parking Operations may continue to operate, consistent with any terms and conditions as approved by the 2010 Rate Case Order, and the Barge Operations may continue to operate under their existing rates, terms, and conditions, each as an ancillary service covered under BHIT's certificate of public convenience and necessity (CPCN), and under BHIT's current reporting obligations, pending further Order of the Commission.

Relatedly, the Commission notes that several parties, including the Public Staff and the Association, have proposed that the Commission exercise a lesser degree of oversight — a light touch, as it were — for either one or both of the utility operations at issue in this proceeding. Both the Public Staff and the Association argue that it is unnecessary for the Commission to approve or review the specific terms and conditions of the Parking Operations, so long as parking remains adequately available and reasonably priced. Again, these issues are not appropriate for determination in this docket on the available evidence in this record.

The Commission highlights that it has in the past found varying degrees of oversight to be reasonable and appropriate for certain utilities, services, or classes

of utilities, for a variety of reasons and depending on circumstances — to include simple notice for some utility actions or even outright deregulation of previously regulated services based upon the development of other competition or the existence of other consumer protection measures. *See, e.g.*, Sub 49 Order; see also Notice of Proposed Revisions of Certain Rules in Chapter 2 & Chapter 5 of the Rules & Regulations of the N.C. Utilities Commission, No. M-100, Sub 109 (N.C.U.C. May 20, 1986). The Commission has also made reasonable accommodations for certain industry functions without requiring full rate or tariff review. *See* Order Adopting Rule, Petition of Bald Head Island Transportation, Inc., Davis Shore Ferry Service, LLC, Waterfront Ferry Service, Inc., and Morris Marina, Kabin Kamps & Ferry Service, Inc., to Establish Guidelines or Rules to Implement a Fuel Cost Surcharge, No. A-100, Sub 0 (N.C.U.C. Jan. 29, 2009). The Commission is generally guided by the principle that its authority only need be imposed to achieve the purposes for the regulation. However, this Order leaves these, and other questions — *e.g.*, whether a certain amount of, or in what iteration, parking must be made available to ferry passengers — for another day, when such matters are properly pending before the Commission. Because these questions were not presented by the Complaint and, as a result, there has been incomplete evidence and argument presented upon them, the Commission declines to expand the scope of this proceeding to determine the same.

Finally, the Order opined:

None of this is to say that circumstances cannot evolve that might change the utility status of part, or all, of these assets, the basis for or public interest supporting regulation, or the type or degree of oversight required of the Commission.

Order Ruling on Complaint and Request for Determination of Public Utility Status, Docket No. A-41, Sub 21, issued December 30, 2020, pp. 28-30. This Order has been appealed to the North Carolina Court of Appeals. Briefs have been filed and oral arguments were presented to the appellate court on November 29, 2023.

Given the considerable uncertainty created by the above-quoted language from the Order in A-41, Sub 21, BHIT appreciates the Commission initiating this docket and hopes that it may result in some clarity as to the Commission's regulatory oversight of passenger ferries and their ancillary services.

II. DISCUSSION OF LAW

A. The Commission's practice, in general, has been to exercise only limited regulatory oversight of passenger transportation.

As an initial matter, BHIT agrees with the Commission's characterization of ferries as being common carriers under the state statutes as currently written. BHIT has a certificate of public convenience and necessity, issued in Docket No. A-40, Sub 0, to transport passengers and their personal effects. Prior to the Commission's Order in Docket A-41, Sub 21, that certificate has been deemed to apply to only ferry and tram passenger transportation services.

The definition of a "Public Utility" includes "a person . . . [t]ransporting persons or household goods by . . . any other form of transportation for the public for compensation . . ." N.C.G.S. § 62-2(23)a.4. This definition specifically exempts "motor carriers exempted in 62-260, carriers by rail, and carrier by air." As a legal matter, that means very few transportation providers are regulated by the Commission at all. According to the Commission website, six brokers and two bus companies are regulated by the Commission to some degree. See <https://www.ncuc.gov/Industries/buscomp.aspx>. The Commission's website also notes these companies "are required to file their tariff of rates and charges with the Commission." See <https://www.ncuc.gov/Industries/transportation/transportation.html>. But, upon information and belief, those rates and charges are not set by the Commission in a ratemaking proceeding pursuant to N.C.G.S. § 62-130 *et seq.*² Rather, they are simply

² A person engaging in the intrastate transportation of household goods ("HHG"), as defined in Commission Rule R2-37 is required to obtain a Certificate (C-#) from the Commission. As part of the regulatory process, HHG movers are required, *inter alia*, to abide by the provisions of the Maximum Rate Tariff (MRT) issued by the Commission. See <https://www.ncuc.gov/Industries/transportation/transportation.html>.

established by the service provider and filed with the Commission. As a practical matter, the pricing and services for “the transportation for the public for compensation” in North Carolina are determined by competitive and market forces, and not by rate regulation with one notable exception: the Bald Head Island ferry.

B. There is no statutory basis for differentiating between the regulation of passenger ferries or for the exceptional treatment of the Bald Head Island ferry.

As described above, BHIT has tried to diligently comply with the panoply of statutory and regulatory requirements set forth in Chapter 62 of the General Statutes and the Commission’s Rules and Regulations, including ratemaking. In its only rate case, BHIT submitted cost of service calculations, asset allocations, rate base accounting, and rate of return analysis so that its rates for the regulated ferry and tram service were established pursuant to N.C.G.S. § 62-130 *et seq.* It has filed affiliated agreements for acceptance by the Commission pursuant to N.C.G.S. § 62-153. It has filed quarterly reports of its financial performance. It has sought approval for every ferry schedule adjustment and baggage policy amendment. Upon information and belief, no other passenger transportation service of any type in North Carolina undergoes this level of regulatory scrutiny. The statutes and regulations that have been applied to the Bald Head Island ferry and tram are not applied to any other ferry operation in the state.

The North Carolina General Statutes provide no legal basis for this exceptional treatment of the Bald Head Island ferry and tram. In fact, Constitutional principles of equal protection found in the Fourteenth Amendment of the United States Constitution and

Article I, Section 19 of the North Carolina Constitution should be applied to treat companies that provide the same type of utility service, as defined by the same statute, in the same (or “equal”) way.³

C. There is no policy or economic justification for rate regulation of passenger ferry transportation services or of ancillary services provided by ferry operators or their affiliates.

1. The Commission has never asserted jurisdiction over ancillary services provided by other ferry operators in North Carolina.

As noted above, upon information and belief, unlike BHIT, the rates and tariffs of the other private ferry operations in North Carolina have not been set in a rate case pursuant to N.C.G.S. §62-130 *et seq.*, but instead have simply been set and filed with the Commission. The regulatory treatment of “ancillary services” provided for ferry passengers by different ferry operators is even more disparate. Without conducting field visits to each of the other ferries operating under certificates issued by the Commission and relying upon a review of their websites, it appears that other ferry operators provide non-transportation services to their passengers. For example, Cape Lookout Cabins and Camps provides, based upon their website, vehicle storage, Kubota rentals, cabin rentals, and camping sites, and operates a large retail store providing “what you need.” <https://cape-lookout-cabins-camps-ferry-davis-nc.com/> Upon information and belief, it is the only business at or near the location of its mainland departure point that provides those goods and services to its passengers. BHIT does not suggest that the Commission assert rate

³ While the non-discrimination provisions of Art. I, Sec. 19 apply to individuals, commentators have consistent noted that the equal protection clause extends to corporations as well. *E.g. Orth, J., The North Carolina State Constitution with History and Commentary*, p. 59.

regulation of those other ancillary services provided by Cape Lookout Cabins and Camps (or its affiliates), only that it apply the law equally to the “ancillary services” provided by all certificated ferry operations.

2. The Commission has recognized that its ratemaking should extend no further than needed.

Within the portion of the Commission’s Order in Docket No. A-41, Sub 21 quoted above is this key sentence:

The Commission is generally guided by the principle that its authority only need be imposed to achieve the purposes for the regulation.

Order, at p. 29 (emphasis added). BHIT would respectfully suggest that the purposes of regulation are reliable and safe service at just and reasonable rates. BHIL has been operating parking facilities and a barge for almost thirty years without their rates or service being regulated by the Commission. What has been the result of the absence of rate regulation?

3. The provision of “ancillary services” by affiliates of passenger ferry utilities have not resulted in monopolistic pricing or unreasonable rates.

It is telling —if not compelling—that the Commission noted “there has been no substantiated allegation that BHIL is, at present, abusing its monopoly power.” Sub 21 Order, page 28. To the contrary, the Commission observed that, “the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both BHIL and BHIT.” *Id.* BHIL also contends that, over the past thirty years, those using the parking facilities and barge services have been satisfied with past rates and services and there have *never* been substantiated allegations that BHIL has *ever* abused

whatever monopoly power it has in setting rates for parking and barge. BHIT is proud of the fact that it has not been the subject of complaints at the Commission by its customers.

This reality was confirmed by the uncontested, sworn testimony of John Taylor, a utility economics and pricing expert, in Docket No. A-41, Sub 22. His benchmarking analysis of North Carolina parking rates as compared to the \$12 daily maximum rates to park at the Deep Point Terminal. His testimony and analysis are attached to these Comments as Appendix A. If Mr. Taylor's conclusion is correct (and it has never been contested)—that there is no indication that the Deep Point parking rates are priced above the market rate—and if the Commission's own statement is accepted—that “its authority only need be imposed to achieve the purposes for the regulation” (Sub 21 Order, p. 29)—then there is no need to assert ratemaking authority over ancillary services such as parking and barge.⁴

4. Other ferry services around the country—and the parking used by their customers—are not subject to rate regulation by other state utility commissions.

While acknowledging that the scope of jurisdiction of a state utilities commission is a function of state law, and therefore can vary from state to state, it is instructive to note the undersigned counsel are unaware of any state utilities commission setting rates for ferry services (or for services such as parking or vehicular barge rate) anywhere in the United States. This was also the finding of Jim Leonard, one of the country's foremost experts on commercial maritime operations and whose resume is attached as Appendix 2. In Docket

⁴ It should be noted that the Commission did not have the benefit of Mr. Taylor's benchmarking analysis before it in Docket No. A-41, Sub 21.

No. A-41, Sub 21, Mr. Leonard testified specifically about parking used by ferry passenger customers and provided by both ferry operators and third-parties at various locations:

[P]assenger ferries exist in a variety of settings. For example, the ferries serving Catalina Island in California, Fire Island in New York, and some of the Rhode Island-based ferries that serve Block Island operate with no parking at all that is controlled or offered by the ferry operator. Parking facilities are provided by third-party parking operations. In some markets, the ferry operator does operate the parking facilities, often with differentiated levels of price and service (valet / on dock / near dock / offsite, shuttle served). We see this, for example, in the Mackinac Island market in Michigan. In some markets, notably from Cape Cod to Nantucket and Martha's Vineyard, the ferry operator offers parking alongside third-party lots, each serving the same passenger base.

* * *

What I take away from my canvassing of ferry operations around the country is that parking can be provided to ferry riders in a number of ways. **We also note that we found no evidence that parking rates were being regulated in any of these ferry markets, whether or not ferry operators were subject to regulation of passenger fares or not.**

(Docket No. A-41, Sub 2; Vol. 4, pp. 73-74 (emphasis added)). A summary table of his research is contained in Exhibit J to his testimony, a copy of which is attached hereto as Appendix 3. Given that parking and other services used by passenger ferry riders are not regulated, and such services are generally provided at or near ferry terminals, why is there no evidence of monopolistic power or anticompetitive conduct contrary to the public interest?

5. Fundamental economic principles explain why rate regulation of these types of services is not necessary.

A benchmarking analysis such as performed by Mr. Taylor or a canvassing of other jurisdictions as performed by Mr. Leonard is particularly relevant to the Commission's effort in this docket because they demonstrate that competitive and market forces are sufficient to ensure just and reasonable pricing for ferry transportation and their ancillary

services. It is true that there is currently only one public passenger ferry operating on a published, regular schedule between Southport and the island⁵ and only one parking facility located at the mainland terminal, but those facts are not sufficient to establish monopoly power, as a matter of law. Nor does it justify rate regulation of those services. An inquiry based upon alleged monopoly power requires more than a single provider:

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) (emphasis added); see e.g., *Sitelink Software, LLC. V. Red Nova Labs, Inc.*, 2016 WL 3918122, *10 (N.C. Super. June 14, 2016) (same).⁶ In other words, the fact the George Mitchell and his management team had the business savvy and skill to acquire property on both the island and the mainland side of the Cape Fear River; procured the necessary local, state, and federal permits to develop that land; expended considerable capital to construct beautiful and well-functioning terminals and parking lots; financed and purchased four large

⁵ It is also undisputed, and several witnesses testified in Docket Nos. A-41, Sub 21 and Sub 22, that (1) there are private marina slips available both at the Bald Head Island marina and at several large marinas in the Southport area (including one next to the Deep Point ferry terminal) to and from which private vessels can travel, and (2) there is a private taxi service that can provide transit for passengers to and from the island. (*See also, infra* at page 16.)

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

passenger vessels and trams (as well as a tugboat and barge); hired skilled captains, mates, and other employees to run the system; ran the operations efficiently; and priced the services so low that other potential competitors have chosen not to enter the market does NOT constitute monopoly power or justify rate regulation of those services, as a matter of economic principles, in the absence of explicit statutory authorization requiring the Commission to do so.

Moreover, there is nothing in BHIT's CPCN, in any Commission Order, or in any statute that awards exclusive service rights or territory to BHIT or, upon information and belief, any other ferry operator (or other passenger transportation system). In that respect, it is unlike regulated electric, natural gas, and water/wastewater utilities in North Carolina, and more like telecommunications and other transportation (e.g. bus) services. There is no legal impediment to a competing ferry operator—much less another parking provider who can simply buy available property across the street—providing the same service as the existing company providing that service.⁷

Testifying in Docket No. A-41, Sub 21 for the Village, Dr. Chip Wright stated that while BHIL'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.

⁷ Upon information and belief, Davis Shore Ferry Service and Cape Lookout Cabins and Camps have operated a similar ferry service, on a similar route, from terminals on the mainland located a few hundred yards apart.

Dr. Wright further testified in Docket No. A-41, Sub 21 that he did not believe that BHIL had obtained or maintains its market position in the parking sphere through any improper conduct. He further testified that he had no knowledge that BHIL had engaged in any exclusionary or predatory conduct in support of its market position. (Tr. vol. 3, 73:2-7, 8-13). Nor did he offer any evidence that BHIL has sought or secured monopoly rents. (Id. Vol. 3, 70:17-21, 115:1-6). This testimony, by the Village's own witness, established that the second prong of the requirements for monopoly power is not satisfied.

As a practical matter, as with most (if not all) ferry transportation terminals, it is undisputed 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, witnesses testified in both Docket Nos. A-41, Sub 21 and Sub 22 regarding the activities of water taxi services that operate between Southport and the island. Mr. Sawyer, the president of the BHI Club, another intervenor in Docket No. A-41, Sub 21, testified at that hearing 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 dock at the Deep Point marina. (Tr. vol. 3, 216:7-18, 217:19-22). This is not the conduct of a party with monopoly power acting contrary to the public interest.

The practical reality is that owners and operators of ferries have market incentives to encourage the utilization of their services (regardless of whether they own or are selling property at the ferry destination). They want customers to choose to visit destinations

served by the ferry (e.g. Bald Head Island), rather than an alternative nearby destination (e.g. Oak Island or St. James Plantation). They want to provide convenient, affordable parking or other goods and services that facilitate their customers' travels (such as those provided by Cape Lookout Cabins and Camps). And they want to enable the destination island to grow and succeed, creating more demand for the ferry service. As explained by Lee Roberts in Docket No. A-41, Sub 22, as Managing Partner of SharpVue Capital, the (now) approved purchaser of the Bald Head Island ferry, tram, parking and barge:

It is in SharpVue's interest [as a potential purchaser and owner] for passengers and customers to receive excellent service and want to return to the island in the future, for the commercial businesses and residential rental properties on the island to succeed, and for the island as a whole to prosper. As tourism grows, ridership on the ferry increases, barge usage increases, and parking facilities are utilized, and the per-unit allocation of the fixed costs decreases. Our economic incentives are aligned with those of the other island stakeholders.

(A-40, Sub 22, Tr. vol. 3 p. 17: 12-18).

From a broader perspective, Jim Leonard has observed this reality with ferry operations across the country. As he succinctly stated in Docket No. A-41, Sub 21:

“[T]he absence of regulation in ferry-associated parking is indicative of conditions in which market solutions are working and regulatory intervention has not been required.

(A-40, Sub 21, Tr. vol. 4, p. 83; emphasis added).

D. The Public Staff, on behalf of the using and consuming public, has acknowledged that a lesser degree of regulation of ancillary services is appropriate.

While the Public Staff offered no testimony in the A-40, Sub 21 docket, it did file comments for the Commission's consideration. As indicated by the Commission's order in the docket, the Public Staff endorsed the idea that the Commission exercise a lesser

degree of oversight over the ancillary parking and barge operations. In its comments, the Public Staff noted that while parking was a necessary component of the utility's service,

[n]onetheless, 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

(Initial Comments of the Public Staff, Docket No. A-41, Sub 21, Sep. 8, 2022, (hereinafter "Public Staff Comments") p. 5). Citing the North Carolina Supreme Court's historical recognition of yellow pages as an ancillary utility function subject to limited Commission jurisdiction in *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 391 S.E.2d 487 (1990), the Public Staff concluded that the parking services offered by BHIL at the ferry terminal were analogous:

While 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).

Addressing the barge operations, the Public Staff first noted that federal law largely preempts state laws related to price, route, or service of motor carriers with respect to transportation of property. (Public Staff Comments, p. 8). It further addressed Commission precedent relating to transport of goods and concluded that "[t]he transportation services currently provided by Bald Head Island's barge operations (Barge) do not fall within the scope of regulated services prescribed" but are instead subject to federal regulation as general freight. (Public Staff Comments, p. 10). Accordingly, it concluded that the barge

services are “not related to the provision of the regulated passenger ferry service” and “should not be regulated by the Commission as a common carrier of household goods.” (Public Staff Comments, p. 11).

BHIT agrees in concept with the Public Staff that “some level of oversight short of regulation by the Commission” is appropriate. Jim Leonard in Docket No. A-41, Sub 21 observed that what is “critical for ferry riders is that there is reasonable access to a sufficient amount of suitable parking facilities.” (A-40, Sub 22, Tr. vol 4, p. 75). BHIT also agrees with this observation and would have no objection to being subject to the Commission’s complaint jurisdiction (like the BellSouth Yellow Pages). While the details will be critical, the Commission can adequately protect the public interest in adequate ferry service without rate regulation (as currently the practice with the other ferries in North Carolina), and certainly without rate regulation of parking, barge, or other ancillary services.

Respectfully submitted this 1st day of March, 2024.

FOX ROTHSCHILD LLP

/s/ M. Gray Styers, Jr.

M. Gray Styers, Jr.

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Counsel for

Bald Head Island Transportation, Inc.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Initial Comments of Bald Head Island Transportation, Inc. on parties and counsel of record as listed in the Commission's Service List and NC Public Staff by electronic mail and / or by depositing a copy of same in the U. S. Mail, with appropriate First Class postage affixed.

This 1st day of March, 2024.

/s/ M. Gray Styers, Jr.

M. Gray Styers, Jr.

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APPENDIX 1

Testimony of John Taylor is Docket No. A-41, Sub 22

Q. Have you performed a benchmarking analysis of North Carolina parking rates to determine if the Bald Head Island parking is reasonably priced?

A. Yes. Table 3 below contains a summary of various parking operations in North Carolina and their prices.

Table 3 - North Carolina Maximum Daily Parking Rates

Parking Facility	Daily Max Rate
Wilmington International- Economy Daily Lot	\$9
Town of Carolina Beach- November & December	\$10
Charlotte Douglas International- Long-term Lot	\$10
Piedmont Triad International- Economy	\$10
Raleigh-Durham International- Economy	\$11
Deep Point Terminal Parking	\$12
Piedmont Triad International- Central Garage	\$12
City of Wilmington- Decks	\$12
Charlotte Douglas International- Daily Deck	\$12
Piedmont Triad International- Central Garage	\$12
Wilmington International- Daily Lot	\$12
City of Wilmington- River Place Deck	\$13
Downtown Raleigh State Gov't Complex- Parking Decks	\$14
Raleigh-Durham International- Express	\$14
Downtown Raleigh State Gov't Complex- Performing Arts Deck & Convention Center	\$15
Town of Holden Beach	\$15
City of Wilmington- Convention Center	\$15
Piedmont Triad International- Premium	\$15
Wilmington International- Premium Daily Lot	\$15
Charlotte Douglas International- Express Deck	\$16
Raleigh-Durham International- Central	\$17
City of Wilmington- On Street	\$19
Downtown Raleigh State Government Complex- Visitor	\$20
Town of Oak Island	\$20

Parking Facility	Daily Max Rate
Charlotte Douglas International- Hourly	\$24
Wilmington International- Hourly Lot	\$24
Town of Carolina Beach- March to October	\$25
Town of Wrightsville Beach	\$25
Raleigh-Durham International- Premier	\$26
Downtown Raleigh State Government Complex- Metered	\$30
Count= 30	
Average= \$16.13	
Median= \$15.00	
Mode= \$12.00	

Not considering discounted annual pass rates⁸, the standard daily parking rate at the Deep Point Terminal is \$12 per day and its daily parking price ranks as the 6th lowest of those benchmarked. As shown in table above, the Deep Point parking price is below the average North Carolina daily parking rate of \$16.13. In fact, the parking prices at the Deep Point Terminal rank in the 23.3 percentile, placing them in the lowest quartile of the benchmarked North Carolina parking rates. The benchmark analysis also indicated that the median of the daily parking rates in North Carolina is \$15, and the mode is \$12. The mode represents the price in the benchmark analysis that is repeated the most times, meaning that a daily parking rate of \$12, as is the case at Deep Point, is quite common. Based on all this information, I conclude there is no indication that the Deep Point parking rates are priced above the market rate.

⁸ Of course, this is a significant exclusion from the analysis because the uncontroverted evidence of record in A-41, Sub 21, is that owners and residents who tend to park for longer periods can buy an annual pass under which their fee in the Premium Lot is \$3.70 per day. The annual pass rate is even lower for a pass in the General Lot, at \$3.29 per day. Annual pass rates are lower still for contractors (\$1.92 per day) and Island employees (\$1.78 per day). NCUC Docket No. A-41, Sub 21, STG Cross Examination Ex. 2.

I/A

EXHIBIT A TO J. LEONARD'S
DIRECT TESTIMONY
NCUC A-41 SUB 21

James Leonard, Founding Partner, Mercator International LLC

EDUCATION

BS Mechanical Engineering, University of California at Berkeley, 1983

MS Management, The Sloan School, Massachusetts Institute of Technology, 1991

MS Department of Mechanical Engineering, Massachusetts Institute of Technology, 1991

EXPERIENCE SUMMARY

Mr. Leonard is an experienced executive and consultant with over 40 years in the transportation and infrastructure field, with well-developed expertise in shipping economics and port strategy and the financial and operational analysis of a wide variety of transportation activities. His experience includes the design and evaluation of passenger and freight transportation networks and marine terminals, development of operational and financial models for transportation infrastructure projects, evaluation and forecasting of cargo markets, development of productivity and profitability improvement strategies for carriers and terminal operators, and the design and construction of cargo ships.

INDUSTRY EMPLOYMENT HISTORY

Mercator International LLC, Founding Partner, 2009-Present, Seattle, WA

Provides strategic planning and advisory services, including financial and operational analysis, market forecasting, and competitive analysis, to clients involved in operating, financing, or purchasing international freight transportation services, as well as to companies and government agencies developing, financing, and/or operating transportation and logistics infrastructure.

Macquarie Capital Funds Inc., Vice President and Port Sector Specialist, 2006-2008, Seattle, WA

Directed a team of maritime professionals responsible for identifying, evaluating, executing, and managing investment transactions in the global port sector for twenty separate infrastructure investment funds. Participated in the valuation of, and business plan construction for, thirty prospective acquisitions of major marine terminal companies, and in the completion and management of seven transactions involving twelve marine terminals in North America, Asia, and Europe, including two greenfield projects.

Mercator Transport Group, LLC., Founding Partner, 2000-2005, Seattle, WA

Consulted in the areas of operations planning, market research, financial analysis, and business strategy for stakeholders in the international transportation industry. Clients included port authorities, ocean carriers, port terminal operators, financial institutions, cargo shippers and government agencies.

Sea-Land Service 1991-1999

Director of Network Planning Designed the Sea-Land transportation network to deliver optimal service at minimum cost. Managed financial and operational evaluations for decisions related to the operation and investment in ships and terminals.

I/A

EXHIBIT A TO J. LEONARD'S
DIRECT TESTIMONY
NCUC A-41 SUB 21**Director of Development – Brazil/Latin America**

Managed local activities as a senior manager in-country. Responsible for daily operations, planning, problem resolution and partner relations. Identified and developed infrastructure investment projects in Brazil. Directed financial analysis and planning for operations throughout Latin America and the Caribbean.

Manager of Operations Planning

Applied process modeling and simulation to improve service and lower costs at Sea-Land container terminals.

American President Lines, Manager of Naval Architecture, 1985-1989

Managed and performed engineering design, planning, and supervision activities, including for a \$250 million capital project building the world's first post-Panamax container vessels.

Petrochem Marine Consultants, Naval Architect and Marine Engineer, 1981-1985

Provided engineering services to ship owners and operators.

REPRESENTATIVE PROJECTS

Network Planning and Transshipment Forecasting (Panama Canal Authority) - Evaluated carrier networks and costs to forecast how service patterns would evolve as a result of the expanded Panama Canal, which fed into a forecast of regional transshipment volumes and the demand for additional terminal capacity in Panama.

Strategic Market/Facility Planning (Port of Long Beach) - Conducted a detailed study of liner shipping service patterns and economics for the Asia–North America trade to project the future frequencies and average vessel sizes of deployments calling at the ports of Los Angeles and Long Beach. Applied the outputs of this work to assist the client in reassessing its strategic plans for marine terminal development to reflect the operational impacts of very large container ships in Transpacific services. Similar projects were subsequently undertaken for other port authorities, as well as port infrastructure investors and marine terminal operators.

Cargo Volume and Vessel Call Forecast (State of Victoria, Australia) - In connection with the State of Victoria's initiative to grant a long-term concession for the management of the Port of Melbourne, Mercator developed long-term cargo forecasts as well as a long-term forecast of the number and size of container ships that would call at the Port of Melbourne. The Mercator forecasts were made available to bidders to assist them in understanding future traffic volumes through the port and the effect of infrastructure limitations on the number and size of ships calling.

Feasibility Study of a Port/Rail Landbridge System (Government Client) - Evaluated the commercial, operational, and financial feasibility of combined port and rail investments to create a freight landbridge system between the Mediterranean Sea and the Red Sea. Evaluated cargo flows, estimated the market that could be addressed by the new system, and developed cost, revenue, profitability, and investment return projections for the project.

Development of an Intra-Island Ferry System for the Hawaiian Islands – Market research, commercial and operational planning for the Hawaii Superferry system to support the development and financing of the new transportation system by private investors.

I/A

EXHIBIT A TO J. LEONARD'S
DIRECT TESTIMONY
NCUC A-41 SUB 21

Busan Port Commercial Due Diligence (Macquarie Shinhan Infrastructure Company) - Analysis of greenfield South Korean container terminal on behalf of a leading fund management company seeking to invest in the project. Developed long-term forecasts of the new terminal's import/export volumes, transshipment traffic, and likely customer base.

Vendor's Due Diligence Analysis – Bald Head Island Ferry/Tram, Bald Head Island Freight Barge and Deep Point Marina parking - Commercial and operational analysis of the Bald Head Island passenger ferry and related on-island tram system. Evaluated condition of assets and expected replacement costs. Analyzed the parking operation at the Deep Point marina, as well as the freight barge system that serves the Bald Head Island. Developed a long-range forecasts for demand of ferry and tram services, parking and barge transportation and valuation estimates for the businesses as going-concerns.

Feasibility Consultant – Bald Had Island Transportation Authority (BHITA) – Forecasted demand for the various Bald Head Island operations that were to be acquired by the BHITA, and developed cash flow forecast model to evaluate the feasibility of bond repayment by the BHITA.

Forecast of Ship Sizes that Would Call the Port of New York and New Jersey and Assessment of Benefits of Raising or Replacing the Bayonne Bridge (Port Authority of New York and New Jersey) - Analyzed the world container fleet and the services deployed in the Asia-US East Coast trade lane. Assessed future ship designs and deployment patterns and prepared a forecast of the number and size of ships that would call the Port of New York and New Jersey with and without a change to the Bayonne Bridge. Based on this assessment of ship sizes and the associated shipping economics, assessed the benefits to ocean shipping (from the perspective of ocean carriers and users of shipping services) of eliminating the constraint to ship sizes imposed by the Bayonne Bridge.

Strategic and Competitive Review of US West Coast Container Terminals (Confidential Client) - Assessed the demand for container port facilities and the relative competitiveness of terminals in each of the three main port regions of the US West Coast, assisting a terminal operator / investor to develop its long-term strategy for the region.

Expert Witness in Shipping and Port Sector Disputes - Testimony and written reports in respect to multiple US and international disputes relating to international shipping and the development and operation of cargo and passenger facilities at seaports. Expert testimony provided in proceedings before the International Center for the Settlement of Investment Disputes (ICSID), the World Bank, ICC International Court of Arbitration; The US Federal Maritime Commission, United States District Court for Southern District of Florida, and The Impact Assessment Agency of Canada (IAAC).

Registered Professional Engineer, State of California, 1986

EXHIBIT J TO DIRECT TESTIMONY
OF J. LEONARD
NCUC A-41, SUB 21

**Summary of Parking and Regulatory Status of Ferry Systems
Similar to the Bald Head Island Ferry¹**

Operator	State			Parking Provided By		Regulated Parking?
	/Prov.	Origin	Destination	Ferry Op.	3rd Pty.	
Freedom Cruise Line	MA	Harwich	Nantucket	XX		No
Steamship Authority	MA	Hyannis	Nantucket	XX		No
Hy-Line	MA	Hyannis	Nantucket	XX	XX	No
Seastreak	MA	New Bedford	Nantucket		XX	No
Rhode Island Fast Ferry	RI-MA	Quonset Pt	Martha's Vineyard	XX		No
Steamship Authority	MA	Woods Hole	Martha's Vineyard	XX		No
Island Commuter Corp	MA	Falmouth	Martha's Vineyard	XX		No
Seastreak	MA	New Bedford	Martha's Vineyard		XX	No
Hy-Line	MA	Hyannis	Martha's Vineyard	XX	XX	No
Cuttyhunk Ferry Co.	MA	New Bedford	Cuttyhunk Is.	XX	XX	No
Bay State	MA	Boston	Provincetown		XX	No
Viking Fleet	NY-RI	Montauk, NY	Block Island	XX		No
Interstate Navig. Co.	RI	Narragansett	Block Island		XX	No
Block Island Express	CT-RI	New London	Block Island		XX	No
Interstate Navig. Co.	RI	Newport	Block Island		XX	No
Rhode Island Fast Ferry	RI	Quonset Pt	Block Island	XX		No
A&R Marine	RI	Bristol RI	Prudence Island		XX	No
Sayville Ferry	NY	Sayville	Fire Island	XX	XX	No
Fire Island Ferries	NY	Bay Shore	Fire Island	XX	XX	No
Davis Park Ferry	NY	Patchogue	Fire Island		XX	No
Daufuskie Island ferry	SC	Hilton Head	Daufuskie Island	XX	XX	No
Washington Is. Ferry	WI	Northpoint	Washington Is.	XX	XX	No

¹ In this list, I have included ferry operations serving island communities (like Bald Head Island) or communities with limited over-the-road access (like Key West) and have excluded ferry operations that simply act as short-cuts for highway routes (such as the Lake Champlain Ferries, or the Lake Express that runs across Lake Michigan between Wisconsin and Michigan). I have focused primarily on private systems because they are more relevant with respect to the regulatory issues. To augment my own knowledge of ferry systems around the country, I reviewed the membership list of the Passenger Vessel Association to ensure that I was being as complete as possible. Entries in the table are based on data available on ferry system websites, augmented by my prior knowledge and by my interviews of ferry operators and state transportation agency and utilities regulation officials.

APPENDIX 3

A-100 SUB 1

EXHIBIT J TO DIRECT TESTIMONY
OF J. LEONARD
NCUC A-41, SUB 21

Madeline Island Ferry	WI	Bayfield	Madeline Island	XX	XX	No
Star Line	MI	Mackinaw	Mackinac Island	XX		No
Shepler's	MI	Mackinaw	Mackinac Island	XX		No
Star Line	MI	Ignace	Mackinac Island	XX		No
Shepler's	MI	Ignace	Mackinac Island	XX		No
Beaver Island Ferry	MI	Charlevoix MI	Beaver Island	XX		No
Miller Boat Co	OH	Catawba	Put-in-Bay	XX		No
Jet Express	OH	Port Clinton	Put-in-Bay	XX		No
Key West Express	FL	Ft. Myers	Key West	XX		No
Catalina Express	CA	Long Beach	Catalina Island		XX	No
Catalina Express	CA	San Pedro	Catalina Island		XX	No
Catalina Express	CA	Dana Point	Catalina Island		XX	No
Catalina Flyer	CA	Newport Beach	Catalina Island		XX	No
WA State Ferry	WA	Anacortes	San Juan Islands		XX	No
WA State Ferry	WA	Bainbridge Is.	Seattle		XX	No
Black Ball Line	WA-BC	Pt. Angeles	Victoria BC		XX	No
Victoria Clipper	WA-BC	Seattle	Victoria BC		XX	No
BC Ferries	BC	Tsawwassen	Gulf & Van. Isls.		XX	No
BC Ferries	BC	Horseshoe Bay	Gulf & Van. Isls.		XX	No

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