**STATE OF NORTH CAROLINA**
**UTILITIES COMMISSION**
**RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

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| VILLAGE OF BALD HEAD ISLAND, Complainant, v. BALD HEAD ISLAND TRANSPORTATION, INC. and BALD HEAD ISLAND LIMITED, LLC, Respondents. | ) ) ) ) ) ) ) ) ) | **RESPONDENTS' AND SHARPVUE'S RESPONSE IN OPPOSITION TO COMPLAINANT'S MOTION FOR PRELIMINARY INJUNCTION** |

The Village of Bald Head Island ("Village")'s motion for a preliminary injunction to restrain the sale by Bald Head Island Limited, LLC ("BHIL") of its parking and barge operations "says the quiet part out loud." Despite its protests to the contrary in this docket, the Village's interests in the litigation are not principally to seek regulation in the public interest but, instead, to seek regulation that could assist its efforts as a self-styled "potential purchaser" of assets under contract for sale to SharpVue Capital, LLC.

The Commission should reject this effort by a North Carolina municipality to restrain a sale of private assets that would in no way interfere with the Commission's ability to answer the only questions before it: *whether* the parking and barge operations that have never been regulated in the past should now be subject to rate and service regulation.

The Village has taken pains in this docket to contend that its efforts to have BHIL's parking and barge operations regulations may have been accelerated by the sale to SharpVue, but that its interests operated separate and apart from the proposed transaction.

Indeed, in its *Reply to Respondents' Response, Motion to Dismiss, and Answer* the Village asserted that:

> "[T]he Village's claims are not contingent on such a sale occurring and would be equally applicable to a new owner."

*Id.* at 2. As the Village further explained, the point of the docket was regulation of the parking and barge *functions*, not their ownership:

> "[T]he conflict at the center of the Village's Complaint has already occurred: Respondents have been operating, and continue to operate, the Parking Facilities and Barge outside of the Commission's regulations. These issues exist independently from any potential sale."

*Id.* at 17.

Yet, in an eleventh-hour reversal, the Village now asks the Commission to enjoin BHIL and SharpVue "from consummating the sale of the assets at issue in this proceeding." *Motion*, at 1. The Village recites in its motion that SharpVue confirmed in a June 22 newspaper interview, and in a July 27 public meeting held on the island, that it intended to close on the purchase of the non-regulated assets in short order. *Id.*, ¶ 12.[1] Then, more than two months later, four months since the pending sale was announced, and after receiving and reviewing BHIL's Direct, and SharpVue's Rebuttal, testimonies, the Village asked Respondents and SharpVue to voluntarily confirm that they would "not consummate the sale of the parking and barge assets prior to a Commission decision in this proceeding," and that "this confirmation would be filed with the Commission to ensure its effect." (Exhibit A). Because there is no restriction on the sale of any unregulated assets other than providing the 90-day notice, Respondents and SharpVue declined to provide such

[1] In accord with the Commission's *Order Granting Partial Rate Increase and Requiring Notice* in Docket No. A-41, Sub 7, BHIL filed a Notice of Pending Sale of its parking operation, with the 90-day notice period expiring on October 12, 2022.

assurance. *Motion*, ¶ 13.

As the Commission already has found in this docket:

> **"[A] thorough review of the four corners of the Complaint does not yield any request by VBHI, either expressed or implied, that the Commission influence, restrict, or control the disposition or acquisition of any property."**

*Order on Respondents' Motion to Take Judicial Notice and Motion to Dismiss*, at 10 (emphasis added). Yet, on the eve of the hearing in this docket, the Village seeks a preliminary injunction in support of relief it did not request in its Complaint, that it has insisted in its filings was incidental to the Complaint's regulatory objectives, and the absence of which was recited by the Commission in its decision not to dismiss the action at its outset.

In denying Respondents' earlier Motion to Dismiss, the Commission determined that the Complaint did not give it any vantage into "VBHI's motivations in bringing the Complaint." *Id.* Yet, the instant request for injunctive relief to restrain the sale of the parking and barge assets is part of a continuing Village effort to derail the BHIL-SharpVue transaction. The requested regulation is simply a means to that end.

The Commission, itself, shined light on the motives underlying the docket when it forced the Village to supply emails responsive to Respondents' discovery requests that members of the Village Council had sent or received from their personal email accounts. *See Order Allowing In Part And Denying In Part Respondents' Motion To Compel* (July 27, 2022). What those emails revealed, in part, was that council members were frequently exchanging strategies and plans with supporters about ways in which the BHIL-SharpVue deal could be impacted or scuttled by regulation.

The Village has long contended that the appraisals done to support the sale of the

BHIL and Bald Head Island Transportation, Inc. ("BHIT") assets were "inaccurate" and that "a number of the asset components . . . we think are overvalued." Deposition of Scott Gardner, 17:4-16 (Exhibit B). Mr. Gardner, Mayor Pro Tem of the Village, testified that the Village lamented that BHIL "never gave the Village an opportunity, reasonable opportunity to acquire the assets" and that "we felt we deserved an opportunity to engage in deliberation that would lead to a reasonable asset purchase agreement, but we could get nowhere close to that." *Id.* 29:8-18.

Council members' emails indicate the Village has hoped that the present docket would have the effect of lowering the price at which the BHIT and BHIL assets would be sold. Some of those emails were exchanged between council members and Robert Blau, who along with Paul Carey submitted a Consumer Statement of Position on September 14, 2022 that urged the commission to regulate the ferry, parking and barge operations.

In a January 31, 2022 email to Mayor Pro Tem Gardner, Mr. Blau responds to an inquiry about whether he could be a witness for the Village in this docket and notes the Village's approach in seeking regulation was the best avenue for pursuit of suppressing the price at which the assets are ultimately sold:

> "[R]egulation or even the threat of regulation represents the best/only available means of keeping the transportation system's sales price at a reasonable level, regardless of who acquires it."

Exhibit C. Moreover, in a July 28, 2022, email to council member Gerald Maggio, Mr. Blau also reminded Maggio that "we do need to keep our eyes on the ball" that the Village objective needs to be focused on convincing the Commission that "if, and as long as the system remains commercially owned, the whole shebang will be rate-base, rate-of-return regulated." As Blau advised:

> "The important thing is to get the sales price down to a reasonable level, recognizing that regulating the barge and parking is the best and only practical way of doing that."

Exhibit D.[2]

Complainant's expert witnesses filled in the rest of the story, noting that regulation of the assets *before* they are conveyed to SharpVue could well reduce how attractive they are as acquisition targets. "[T]he valuation of an unregulated asset is set at whatever the buyer and seller believe is a fair price based upon the maximum cash flows the asset can produce," Village expert Kevin O'Donnell stated in his direct testimony. But a Commission decision to impose regulation on such an asset, O'Donnell noted, "would limit the value of the parking division - which would be a particular concern to a company seeking to sell the asset." Direct Testimony of Kevin O'Donnell, 9:19-22, 10:7-9 (Exhibit E). Village expert witness Julius Wright also testified that the Commission should decide questions of its regulatory authority "prior to the disposal of these parking assets. The same logic applies to the barge assets." Direct Testimony of Julius Wright, 48:20-49:1 (Exhibit F)

With all due respect to the Village's claim that enjoining Respondents from closing their arm's length sale/purchase of the parking and barge assets would be "logical and fair" (*Id.*), it seems more likely motivated by a "heads I win, tails you lose" ethos.[3]

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[2] On October 3, 2022, Messrs. Blau and Carey filed a second Consumer Statement of Position that commended settlement structures for the parties. That Statement criticizes the arm's length transaction between BHIL and SharpVue as containing an "inflated purchase price that SharpVue, or another buyer might agree to" and urges the Commission to "encourage[]" BHIL to "sell the System for a fair price to a new owner/operator." *Id.* at 6-7 (emphasis in original). This, of course, ignores the fundamental economic principle that fair market value is, by definition, the price that a willing buyer is willing to pay a willing seller.

[3] By way of illustration: if the Village were to receive the injunction it is now requesting, if the Commission then ruled on the merits that there was no legal basis to assert jurisdiction over the parking and barge facilities, and if the Village then appealed that adverse decision, the injunction could have the practical effect on appeal of achieving the Village's intended result of preventing the sale to a willing buyer and holding the BHIL hostage to the Village's demands for a year or more notwithstanding the Commission's decision that there

## I. The Village's Motion for a Preliminary Injunction does not Meet the Well-Settled Standards for Issuance under North Carolina Law

A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *A.E.P. Indus., Inc. v. McClure,* 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). Issuance is proper only:

> (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and
>
> (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

*Id.* at 401, 302 S.E.2d at 759–60 (citations omitted) (emphasis in original). *See e.g.*, *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (preliminary injunction "an extraordinary remedy never awarded as of right"). The Motion shows that the Village cannot meet this stringent test.

First, there is *no* way in which the requested relief preserves the *status quo* of the parties. The unregulated status of parking and barge operations is already in place – and has been for over twenty-five years. From the earliest inception of the parking and barge operations by BHIL, they have never been regulated by the Commission, and they have been freely transferable, subject only to the 90-day notice provision since the 2010 rate case. This has been, and is, the *status quo*.[4]

Indeed, as the Village has pointed out, its "claims are not contingent on such a sale

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was no jurisdiction to regulate the parking and barge operations.

[4] This fact also raises a jurisdictional issue of first impression of whether the Commission even has the authority under Chapter 62 of the General Statutes to enjoin a private sale of an unregulated asset by one party simply at the request of another party that wishes to buy the asset itself at a lower price. Acquiescing to such a request could open a Pandora's Box of complaints by disgruntled "potential purchasers" who desire to purchase unregulated assets owned by affiliates of utilities.

occurring and would be equally applicable to a new owner." *Reply to Respondents' Response, Motion to Dismiss, and Answer*, at 2. The Commission has already decided it has jurisdiction to determine if the barge or parking operations should now be subject to its regulation – regardless of whether owned by SharpVue or by BHIL In either event, the assets will be owned by a private party – just as they have been in the past.

Second, regardless of the Village's contention that it is likely to succeed on the merits, the reality of the context of this motion is the *merits of this docket have nothing to do with the requested injunctive relief*. That failure is fatal to a claim for injunctive relief under North Carolina law. It is long settled that injunctions may not issue when the restraint sought "is not germane to the subject of the action - that is, when it is not in protection of some right being litigated therein." *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143, 145 (1939).

The Commission already has concluded that, after careful inspection of the Complaint, the Village has made no claims that the Commission should "influence, restrict, or control the disposition or acquisition of any property." *Order on Respondents' Motion to Take Judicial Notice and Motion to Dismiss*, at 10. While, as explained, the Village has pursued a *sub rosa* litigation strategy to prevent the sale of the parking and barge assets, that motivation gives it no standing under *Jackson* to seek an injunction to support it, when its complaint seeks only to determine the scope of the Commission's regulatory authority.

Indeed, what the Village is entitled to, if it succeeds in its pursuit of regulation over the parking and barge assets, is to have them regulated in whatever fashion the Commission may elect. While Respondents oppose that result, there is no indication the Commission believes that it is incapable of pursuing that end nor is there any demonstration in the

Motion that the Commission would be so restricted. North Carolina law affords the Village nothing more. "Where there is a full, complete and adequate remedy at law, the equitable remedy of injunction will not lie." *Bd. of Light & Water Comm'rs v. Parkwood Sanitary Dist.,* 49 N.C.App. 421, 423, 271 S.E.2d 402, 404 (1980), *rev. denied*, 301 N.C. 721 (1981).

Third, for similar reasons, there is no prospect of irreparable harm to the Village because there is no indication that the Commission believes it is incapable of deciding the only question before it: *whether* the parking and barge assets should be *subject to* regulation. [5] The supposed irreparable harms for which the Village stalks are actually those related to its *sub rosa* agenda: losing the opportunity to: (i) suppress asset values through regulation; (ii) deter a SharpVue purchase due to the purported economic impacts of regulation; and (iii) have the suppressed-value assets fall to the Village as the long-sought "reasonable opportunity to acquire the assets" it feels it has been denied.

"North Carolina courts have held that in assessing the preliminary injunction factors, the trial judge 'should engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted. In effect, the harm alleged by the plaintiff must satisfy a standard of relative substantiality as well as irreparability.'" *Welch v. B&B Realty Investments, LLC*, 2016 WL 2842779, *4 (N.C. Super. May 13, 2016) (*quoting Williams v. Greene,* 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). That scale weighs heavily in Respondents' and SharpVue's favor where a substantial transaction would be enjoined under the Village's request, but the Village would suffer *no* harm to its interests in having

[5] Whatever "harm" the Village may allege it will suffer because of a sale of the assets to SharpVue can be addressed by the Commission by whatever terms or conditions the Commission may choose to impose, either in an order in this docket and/or in Docket No. A-41, Sub 22. *See* Rebuttal Testimony of Lee Roberts, in this docket, pages 9-12.

the Commission decide whether to extend its regulatory regime to include the parking and barge assets. *See Elec. South, Inc. v. Lewis,* 96 N.C. App. 160, 165, 385 S.E.2d 352, 355 (1989), *rev. denied* 326 N.C. 595 (1990), *(quoting Kadis v. Britt,* 224 N.C. 154, 158, 29 S.E.2d 543, 545 (1944)) ("Because grant of an injunction is an equitable matter, the trial court in its sound discretion considers the 'question of undue hardship imposed on the defendant.'")

Finally, the Village contends that "North Carolina courts regularly enjoin pending transactions of property to preserve the status quo." *Motion*, at ¶ 35. That is correct. But as the Village's own cites show, courts take that step when asset disposition or conduct would imperil the ability of a tribunal to make a decision that has binding effect. Thus, in *Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983) an injunction enjoined construction of a hazardous waste incineration facility pending review of the permit authorizing it; and in *SED Holding, LLC v. 3 Star Properties, LLC,* 246 N.C. App. 632, 784 S.E.2d 627, 639 (2016), a sale of pooled mortgages was enjoined amidst allegations of fraud in the inducement by the seller. No such condition prevails here, where conveyance of the parking and barge assets to SharpVue does not alter the ability of the Commission to undertake the analysis it has determined the Complaint permits.

## II. The Village's Position that it Need Not Post a Bond to Enjoin BHIL's Sale of the Parking and Barge Assets is Misplaced

The Village claims that North Carolina law does not permit imposition of a bond if it succeeds in enjoining the BHIL-SharpVue transaction regarding the parking and barge assets. *Motion*, ¶ 36. However, it misperceives the rationale underlying N.C. R. Civ. P. 56(c) by contending that the Village is immune from *any* bond requirements underlying

injunctive relief.

The Village relies on *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E.2d 18 (1970), *cert. denied* 277 N.C. 727 (1971), but it does not support the notion that the Village should be relieved of the responsibility to post a bond for the extraordinary injunctive relief it seeks. In *Smith*, the Court of Appeals considered the town's pursuit of a temporary restraining order to prevent defendant from violating a zoning ordinance. The court concluded that the town need not file a bond *because* "[i]n enacting and enforcing zoning regulations, a municipality acts as a governmental agency and exercises the police power of the State." (*quoting Taylor v. Bowen*, 272 N.C. 726, 727, 158 S.E.2d 837, 839 (1968)).

"[G]overnmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions. Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Estate of Williams ex rel Overton v. Pasquotank County Parks & Recreation Dep't.*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) (citations omitted).

A governmental function is an activity which is "discretionary, political, legislative, or public in nature and performed for the public good on behalf of the State rather than for itself [.]" *Britt v. City of Wilmington,* 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). A proprietary function is an activity which is "commercial or chiefly for the private advantage of the compact community[.]" *Id.*

The record shows that the Village is acting in a non-governmental capacity in at least two respects.

First, the Village is vying, as a "potential purchaser" to acquire a privately held

asset as a market participant. Compl., ¶ 43. *Cf. Williams ex rel. Overton*, 366 N.C. at 202, 732 S.E.2d at 142 ("activity is necessarily governmental in nature when it can only be provided by a governmental agency or instrumentality."). In seeking to purchase the parking and barge assets, the Village self-identifies as one of the "[v]arious potential purchasers" that it describes in its complaint that seek to buy assets that have been operated exclusively by a private entity, and which are currently under contract to a private concern. There is nothing "necessarily governmental" at play simply because a government entity wishes to purchase and operate historically private business concerns.

Second, by seeking a regulatory outcome designed to impact the price at which a private entity's assets might be conveyed, the Village acts "chiefly for the private advantage of the compact community" in seeking to reduce the price of a privately held asset by "regulation or even the threat of regulation." Where a municipality uses the cloak of a "governmental function" to accomplish plainly proprietary results, the Commission should not sanction its overt interference in the business affairs of a litigation opponent without requiring an appropriate bond. *See Koontz v. City of Winston-Salem*, 280 N.C. 513, 530, 186 S.E.2d 897, 908 (1972) (citations omitted) ("in cases of doubtful liability[,] application of [governmental immunity] should be resolved against the municipality.").

## III. Counsel for BHIL/BHIT and for SharpVue are Willing to Elaborate on these Points and Answer Commissioners' Questions at Oral Arguments on this Motion.

As noted in Complainant's Motion, the notice of pending sale of the parking facilities was properly filed as required by the Commission's Order in Docket No. A-41, Sub 7 on July 14, 2022 (Motion, ¶ 9). The ninety-day period of such notice extends to at least October 12. (Motion, ¶ 11). The evidentiary hearing in this matter is scheduled to

start on October 10. (Motion, ¶ 5). If it would be helpful to the Commission, counsel for BHIL/BHIT and for SharpVue would be willing to be heard at oral arguments on this motion immediately prior to the start of evidentiary hearing, beginning at 2:00 on October 10.

## CONCLUSION

Respondents respectfully request that the Commission deny Complainants' Motion for Preliminary Injunction. However, should the Commission determine that an injunction appropriately lies, Respondents request that a bond appropriate under North Carolina law be required in support of its issuance. Counsel is also willing to present oral arguments on this motion immediately prior to the start of the evidentiary hearing in this docket on October 10.

Respectfully submitted, this 4th day of October, 2022.

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/s/ M. Gray Styers, Jr.

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## CERTIFICATE OF SERVICE

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

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This the 4th day of October, 2022.

*/s/ Bradley M. Risinger*

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