STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND, Complainant, v. BALD HEAD ISLAND TRANSPORTATION, INC., BALD HEAD ISLAND LIMITED, LLC, and SHARPVUE CAPITAL, LLC, Respondents.	**THE VILLAGE'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Rule R1-7, the Village of Bald Head Island (the "Village"), by and through its undersigned counsel, hereby files this reply to Respondents' Response to the Village's Motion for Preliminary Injunction filed in this proceeding on October 4, 2022.

INTRODUCTION

In this proceeding, the Village asks the Commission to determine whether the parking facilities and the barge should be regulated under Chapter 62. Should the parking facilities and barge be regulated as utility assets, then Limited would not be able to transfer the assets absent the Commission's approval under Section 62-111(a). Despite this pending question, Limited intends to move with haste to consummate the sale of these assets to SharpVue before the Commission issues its controlling answer. In doing so, Limited evades the regulatory oversight to which Limited should be subject. The Village's motion simply seeks to maintain the status quo pending the Commission's ruling in this proceeding.

Respondents spend little time confronting the merits of the Village's motion and instead, focus their attack on the Village's purported motives. Their attack is a distraction

from the problem at hand: Respondents' attempt to outflank the Commission's regulation of the assets. Their attack is also based on an inaccurate presentation of the Village's witnesses and case. For the reasons set out in the motion, and as further discussed below, a preliminary injunction should issue.

BACKGROUND

As a quick reset, the unrebutted facts relevant to the Village's motion are:

- Concerns regarding the regulatory status of the combined transportation assets have been publicly discussed for years. Compl. ¶¶ 31-33.

- Issues regarding the regulatory status of the parking facilities were directly raised in BHIT's most recent rate case, in which Limited avoided a Commission determination on the question by agreeing, among other things, that parking rates would not be increased over inflation for a specified period and that a portion of parking revenues would be attributed to the utility operations for ratemaking purposes. Compl. ¶¶ 36-41.

- Given Limited's public statements that it was seeking to sell the assets to a private entity (Compl. ¶ 44), the Village instituted the instant proceeding to clear up the long-pending issues regarding the regulatory status of the combined transportation assets. This proceeding was initiated prior to the execution of the SharpVue Asset Purchase Agreement and before the Village became aware of SharpVue's interest in the assets. *See* Motion at ¶ 38.

- Limited and SharpVue were well-aware of the pending proceeding, and the long standing nature of the concerns at issue, when they entered into the APA. Indeed, they purposefully structured the deal to account for regulatory risks associated with the proceeding. *See* Motion at ¶ 38.

- On July 14, 2022, Limited gave 90-day notice to the Commission that it would sell the assets to SharpVue. Based on the notice, Limited could consummate the transaction as soon as October 12, 2022.

- The Village repeatedly asked Limited for reassurance that it would not consummate the transaction of the parking facilities and barge until after the Commission had issues a ruling in this proceeding. Limited refused to provide such reassurance. *See* Motion at ¶¶ 13, 37; Exhibit 1 (letter dated July 8, 2022).

With this backdrop, the Village felt compelled to seek a preliminary injunction to maintain the status quo pending the Commission's ruling on whether the parking facilities and the barge are subject to the Commission's oversight. If the Village is correct that the parking facilities and the barge are public utility property subject to the regulatory oversight of the Commission, then these assets cannot be divested without the Commission's prior authorization. N.C. Gen. Stat. § 62-111(a). The Village believes it would be fundamentally unfair for Limited to evade the Commission's oversight by racing to close the transaction before the Commission can make a determination.

ARGUMENT

Both prongs of the preliminary injunction test are satisfied here. First, the Village has shown a likelihood of success on the merits—and Respondents do not argue otherwise in their filing. Second, the Village has shown that it will suffer irreparable harm if the injunction does not issue. Therefore, the Commission should grant the Village's motion and enjoin the consummation of the sale of the parking and barge facilities while this proceeding is pending.[1] Respondents' ancillary arguments about the Commission's jurisdiction and the rules surrounding the posting of a bond are likewise baseless.

I. The Village has shown a likelihood of success on the merits of its case.

Although Respondents acknowledge that a party seeking a preliminary injunction must show (1) a likelihood of success on the merits; and (2) irreparable harm, Respondents do not respond to or otherwise rebut the Village's demonstration that the Village is likely

[1] To the Village's understanding, there are other portions of the transaction which would be unaffected by such a ruling. Additionally, as the Commission is aware, Respondents are unable to consummate on the sale of the ferry and tram assets until the Commission has issued an order in Docket No. A-41, Sub 22.

to succeed on the merits. *Compare* Opp. at 6 (stating, but not addressing, first prong of preliminary injunction test), *with* Motion ¶¶ 19-27 (arguing that the Village has shown a likelihood of success on the merits).[2] Respondents, therefore, concede that the Village is likely to succeed on the merits and have waived any argument to the contrary. *See Glover Constr. Co., Inc. v. Sequoia Servs., LLC*, No. 18 CVS 1900, 2020 WL 3393065, at *8 (N.C. Super. June 18, 2020) (treating motion as uncontested and granting summary judgment where defendants failed to respond to plaintiff's argument in their response brief).

The Village thus has shown that there is "probable cause for supposing that the plaintiff will be able to maintain his primary [action]" in satisfaction of the first prong of the preliminary injunction test. *A.E.P. Industries, Inc. v. McClure,* 308 N.C. 393, 409, 302 S.E.2d 754, 764 (1983). The only dispute placed in issue by Respondents is over whether the Village has shown that it is likely to sustain irreparable loss unless the injunction issues.

II. Respondents' transfer of the parking facilities and barge will cause irreparable harm by denying the Commission and the public the opportunity to assess the transfer and by breaking up the common ownership of the utility property.

This case is about whether the parking facilities and barge are subject to the Commission's regulatory authority. If the Village is correct, the parking facilities and barge are subject to Section 61-111(a), which prohibits transfers of regulated assets absent Commission approval of the transfer as being "justified by the public convenience and necessity." N.C. Gen. Stat. § 62-111(a). In other words, if Respondents proceed with the sale before the Commission issues its decision, there is a risk that Limited will improperly

[2] *See also* Complainant's Reply to Initial Comments of Public Staff, Docket No. A-41, Sub 21 (Sept. 28, 2022) (responding to Public Staff's initial comments and discussing legal support of the Village's positions).

transfer regulated and essential utility assets (the parking facilities and the barge) without affording the public and the Commission the opportunity to ensure that the transfer satisfies public interest standards, including Section 61-111(a). Thus, contrary to Respondents' position, not only is the sale germane to this action, the sale and the Commission's authority to regulate these assets are inextricably intertwined.[3] *See* Opp. at 7.

Moreover, to this date, the combined transportation assets—ferry, tram, parking and barge—have all been operated under the ownership and control of a single corporate entity affiliated with the developer. If the parking and barge assets are sold separately from the ferry and tram assets this corporate linkage will be broken and there can be no assurances that the status quo could be restored. There is substantial evidence in this case that the combined assets have historically operated jointly, that they have been held out to the public as such, and that each are integrally necessary and essential to the ability of the public to access Bald Head Island.[4] If the Commission permits the assets to be sold in

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[3] Respondents' citation to *Jackson v. Jernigan*, 216 N.C. 401, 5 S.E.2d 143 (1939), to argue that an injunction must be "germane" to litigation in error. There, the plaintiff opened a new case seeking an injunction to reclaim land that had been separately adjudicated as belonging to the defendant. Because the defendant's right to the land had been adjudicated in a separate matter, the court concluded that the plaintiff could not use a request for injunction to try to undo the prior matter. The court explained that the (no longer in effect) statute did not authorize using an injunction in this way because an injunction must protect "some right being litigated therein"; otherwise it was not "germane" to the pending litigation. *Id.*, 5 S.E.2d at 145.

Here, unlike in *Jackson*, the Village has brought its motion for an injunction in the same docket as its initial request for relief. Therefore, its request is "germane" to this litigation within the meaning of *Jackson*.

[4] *See, e.g.,* Mot., Ex. 1 (Affidavit of Dr. Julius A. Wright verifying prefiled testimony); Wright Direct Testimony at 4:20-5:4, 14:13-22 (parking is essential to ferry operation), pp 15-27 (discussing evidence supporting view that parking is essential an integral component of ferry operation, currently operated as a monopoly, with no existing practicable alternative) (discussing evidence that Limited and BHIT have consistently held out to the public that parking is integrally connected to the overall ferry system's services); at pp 41-43 (discussing evidence that Limited describing the barge as ancillary to the ferry service and a component of transportation service); at 46:12-47-6 (discussing how barge is a component of the overall transportation service and an

"piecemeal" fashion to a private equity firm—with no public interest obligations or responsibilities—there can be no assurances that the assets will continue to be used by and useful to the public as they have since their inception.[5] And without the barge, the ferry is of no consequence since there will be no way to transport essential goods, materials, supplies, and services to the Island. Without parking, the ferry will be essentially useless since the public, Island employees, and contractors will have nowhere to park.

The harm here is both real and irreparable, and it is puzzling why Respondents would force this decision on the Commission. Respondents have offered no explanation whatsoever as to why they must be permitted to sell these historically linked and critical utility assets in a piecemeal fashion. The Village is right to be concerned that, if the assets are sold prior to a determination by the Commission, a subsequent finding that the assets are subject to the Commission's authority will be ineffectual.

First, Section 62-111(a) prohibits the transfer of a utility franchise absent the Commission's approval of the transfer as being "justified by the public convenience and necessity." If Limited transfers the assets to SharpVue now, it would rob the Commission of the opportunity to determine whether the transfer to SharpVue is statutorily justified. And it is far from clear that the Commission, should it determine later that the assets are regulated, would have the power to force SharpVue to divest the assets back to Limited. The bell, once rung, could not be un-rung.

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essential service to the Island); at 47:9-48:7 (discussing linkage of the parking, barge and ferry assets and risks to public of "de-linkage"); and Wright Rebuttal Testimony at 4:16-20 (barge is integral component of overall transportation services).

[5] *See* Wright Rebuttal Testimony at 27:18-22

Second, a buyer, like SharpVue, will likely argue that the Commission has no authority over it and that the Commission cannot engage in retroactive regulation of the property.

Third, if the sale to SharpVue is consummated, it is entirely possible that the property could be sold again completely outside of the Commission's authority and jurisdiction.[6]

These immediate, irreversible threats plainly constitute an "irreparable harm." As even Respondents acknowledge, a preliminary injunction is appropriate "when asset disposition or conduct would imperil the ability of a tribunal to make a decision that has binding effect." Opp. at 9. Without an injunction, regulated and essential utility assets will transfer without the Commission's oversight, in contravention of the expectation that essential utility property will not be conveyed without Commission approval and to the detriment of ratepayers like the Village's constituents. If the Commission later determines that the transfer was not justified under Section 61-111(a) or otherwise, the Commission will not be able to reverse the sale, and its decision would thus be too late.

Respondents attempt to divert the Commission's attention by arguing that the assets will remain unregulated regardless of whether the sale goes forward. Opp. at 6. But Respondents miss the point—although the Commission does not currently regulate these assets, it is an open question as to whether these assets should be regulated and, therefore, subject to a transfer proceeding under Section 62-111(a). A preliminary injunction would therefore maintain the status quo as it has been since the Village initiated this litigation—

[6] If the sale is allowed to move forward, nothing will prevent SharpVue—a private equity firm with no duties or obligations to ratepayers—from selling the parking facilities and the barge the next day.

the assets would not currently be regulated *and would remain under Limited's ownership* pending the Commission's ruling.

The Village is not saying that Limited cannot eventually sell the assets to SharpVue. But Respondents cannot evade the Commission's authority by rushing to close the sale before the Commission can issue a ruling.

III. The Commission has jurisdiction over this matter.

In a footnote and without citation, Respondents contend that the requested injunction "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." Opp. at 6 n.4.

Respondents have forfeited any such argument by failing to cite any legal authority or make any legal argument on this point. And in any event, N.C. Gen. Stat. § 62-30 authorizes the Commission "to exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation"—which would certainly include delaying the unauthorized transfer of regulated assets.

Respondents warn that granting an injunction here would "open a Pandora's Box of complaints by disgruntled 'potential purchasers' who desire to purchase unregulated assets owned by affiliates of utilities." Opp. at 6 n.4. This proposition is preposterous. All parties acknowledge that Bald Head Island presents a unique set of facts based on its geography (no road access) and its development and control by a privately-held entity now seeking to exit. Moreover, Respondents overlook that any such "disgruntled purchaser" would have to first satisfy the two-pronged preliminary injunction test, which requires

applicants to show a likelihood of success on the merits—which provides a further safeguard against unfounded complaints.

Respondents want to have their cake and eat it too: they want the Commission to not exercise jurisdiction before the sale of assets closes, assuring the Commission that it will later be able to regulate the assets after the sale. *See* Opp. at 8-9 (arguing that "the Village would suffer *no* harm" if a pre-hearing sale were to occur because the assets could still be regulated). But once the sale closes, Respondents will surely be back before the Commission arguing that the Commission cannot retroactively regulate assets that have been sold. Indeed in Dr. Wright's deposition, counsel for BHIT and Limited suggested that retroactive regulation of the ferry assets would be a regulatory taking of SharpVue's assets. *See* Exhibit 2 at 89:14-90:5; *see also id.* at 90:7-15.

Respondents' jurisdictional argument is without merit and should be disregarded.

IV. North Carolina law does not permit the imposition of a bond.

Respondents contend that, because the Village is a potential purchaser of the ferry system and is "seeking a regulatory outcome designed to impact the price at which a private entity's assets might be conveyed," the Village is acting in a proprietary capacity, rather than a governmental capacity, and thus must pay a bond. Opp. at 10-11. Respondents have cited no case—and there is none—in which a court refused to recognize an authorized and appropriate governmental function based on unsupported innuendo and suspicion that the action was motivated by a proprietary desire.

There can be no doubt that the Village is acting in a governmental capacity in this matter. North Carolina courts have instructed that "the threshold inquiry in determining whether a function is proprietary or governmental is whether, and to what degree, the legislature has addressed the issue." *Estate of Williams ex rel Overton v. Pasquotank Cty.*

Parks & Recreation Dep't., 366 N.C. 195, 200, 732 S.E.2d 137, 141-42 (2012). If an action "has been designated as governmental or proprietary in nature by the legislature," that is the end of the inquiry. *Id.* at 202, 732 S.E.2d at 142. If an action has not been designated as governmental or proprietary in nature, courts consider whether "the undertaking is one in which only a governmental agency could engage"; if so, the action is governmental, not proprietary. *Id.* at 202, 732 S.E.2d at 142.

The General Assembly has made clear that "the rates, services and operations of public utilities" are matters of "public interest," N.C. Gen. Stat. § 62-2(a), and regulatory authority over the same has been delegated to this Commission. *See* N.C. Gen. Stat. § 62-2(b) ("To these ends, therefore, authority shall be vested in the North Carolina Utilities Commission to regulate public utilities generally, their rates, services and operations . . . .").

The Village, on behalf of its constituents, is ensuring that the utility services here—the ferry, barge, and parking facilities—are being managed and regulated for the benefit of its constituents and the public at large. Because the Village does not control the ferry utilities, it must appeal to the Commission to pursue this argument on its constituents' behalf. A local government, of course, has the inherent governmental authority to "sue" on behalf of its citizens, G.S. § 160A-11, and under its Charter the Village "shall have and may exercise all of the powers, duties, rights, privileges, and immunities conferred upon the Village of Bald Head Island specifically by this Charter or upon municipal corporations by general law . . . as defined in G.S. 160A-1." *See Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 11, 418 S.E.2d 648, 655 (1992) (explaining that county acts in its governmental capacity when it initiates as lawsuit in pursuit of fulfilling its duties). And,

of course, the Village is permitted under Chapter 62 to seek redress before the Commission. Thus, bringing this action seeking a determination regarding the regulation of the parking facilities and barge is plainly a governmental function.

Because the Village is acting in its governmental capacity, it cannot be required to post a bond. *See* N.C. Gen. Stat. § 1A-1, Rule 65(c). Regardless, even without this legal impediment, Respondents have not demonstrated any harm from issuance of the injunction that would support a bond requirement.

V. Respondents misrepresent the Village's motives to distract the Commission from the merits of the motion.

Respondents accuse the Village of changing its position. That is not true. The Village has, from the start, argued that any owner of the assets (including a new purchaser) would be subject to the Commission's regulation—but the Village has never taken the position that Limited can sell the assets *before the Commission's decision on whether the assets are regulated*. *See* Reply to Respondents' Response, Motion to Dismiss, and Answer, at 2 ("While the potential sale of Respondents' assets creates urgency to resolve the claims—due to valid concerns that a new owner will extract monopoly rents from the assets or deploy them for non-utility uses—the Village's claims are not contingent on such a sale occurring and would be equally applicable to a new owner.").

Respondents also accuse the Village of "*sub rosa* litigation" to reduce the sales price. However, unable to find any statements from the Village councilors that fit this false narrative, Respondents instead point to an email from Robert Blau, claiming that it shows "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." Opp. at 4. Respondents' tactic is misleading on two counts. First, Mr. Blau is a Village resident who is concerned about the

sale of the ferry system. He is not a member of the Village Council, and he does not speak for the Village. It is disingenuous for Respondents to claim that *Mr. Blau's* email shows that *the Village* wanted to depress prices. Second, Respondent intentionally took Mr. Blau's statements out of context. Mr. Blau did not say he wanted to depress the price of the assets through regulation *to facilitate the Village's purchase*. *Compare* Opp. at 4, *with* Opp. Exs. C, D. Mr. Blau merely expressed his sincere concern that if SharpVue overpays for the system, then SharpVue will *reduce services* to recoup its excessive investment. *See* Opp. Ex. D. Mr. Blau was not advocating for any particular purchaser—in fact, he said that one should not "worry too much about who will end up buying the system." *Id.*

Respondents also misrepresent the testimony of the Village's experts. Mr. O'Donnell opined on the value of the assets as part of his opinion that BHIT could have avoided a rate case proceeding to avoid the question of whether the parking facilities should be regulated—thus preserving their unregulated value for a potential sale. *See* O'Donnell Direct Testimony, at 10:5-9. (Indeed, Limited is now attempting to consummate such a sale post haste, before the Commission can declare its intentions with respect to these assets.) Dr. Wright, on the other hand, opined that the Commission should determine the regulatory status of the assets before a sale in fairness to the potential purchaser. *See* Opp. Ex. F at pg. 48, lines 15-17 ("It would be unfair to a purchaser to proceed with said purchase without the purchaser knowing whether they are buying a competitive or regulated company.").

In the end, Respondents offer a narrative of the Village's motives that is not only misleading but also irrelevant. The Village's intentions have no bearing on the existence

of a likelihood of success and irreparable harm. Respondents' focus on the Village's motives is a red herring.

CONCLUSION

The Village respectfully requests that the Commission grant its Motion for Preliminary Injunction Prohibiting Sale of Assets Prior to Determination by Commission, including a temporary injunction pending a decision on the motion.

This 6th day of October, 2022.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

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Attorney for Village

This the 6th day of October, 2022.

By: /s/ Marcus Trathen

Exhibit 1

Letter from Village Counsel to BHIT/Limited Counsel Dated July 8, 2022

PUBLIC VERSION

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July 8, 2012

BY E-MAIL

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Re: Docket No. A-41, Sub 21

Dear Gray:

I am writing in reference to the above-referenced proceeding.

On May 31, 2022, Limited and SharpVue Capital, LLC ("SharpVue") announced that they had entered into an agreement pursuant to which SharpVue would purchase various assets from your client, Bald Head Island Limited, LLC ("Limited"), and its affiliates comprising the existing transportation system, including the parking facilities and barge which are in issue in Docket No. A-41, Sub 21.

In a news article dated June 22, 2022, SharpVue is quoted as stating that the assets in the transaction would be "broken up" into nonregulated and regulated portions and that "*closing on everything but the ferry and trams should take place in the next 60 to 90 days*" (emphasis added). *See* Jennifer Allen, *With Sale, Bald Head Island Ferry to Remain Privately Owned*, CostalReview.org (June 22, 2022).[1] Under this time frame, closing on the parking facilities and barge could occur prior to the issuance of an order in Docket No. A-41, Sub 21.

As your client is aware, in its Order Granting Partial Rate Increase and Requiring Notice issued December 17, 2010, in Docket No. A-41, Sub 7, the Commission required Limited to provide notice (referred to herein as the "Closing Notice") to the Public Staff and the Commission of any sale or lease of the Deep Point parking facilities or any part of those facilities not less than **ninety (90) days prior to the scheduled closing date** for the sale or lease. *See* Order Granting Partial Rate Increase and Requiring Notice, *Application of Bald Head Island Transportation, Inc. for a General Increase in its Rates and Charges Applicable to Ferry Service Between Southport, North Carolina and Bald Head Island, North Carolina,* Docket No. A-41, Sub 7 (Dec. 17, 2010), at 6. By letter dated January 13, 2022, the Village reminded Limited of this obligation and

[1] Available at https://coastalreview.org/2022/06/bald-head-island-ferry-to-remain-privately-owned/.

requested, as a party to the rate case proceeding, that the Village be provided a copy of any such notice provided to the Public Staff and the Commission. *See* Letter of Peter Quinn, Mayor, Village of Bald Head Island, to Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC dated Jan. 13, 2022, Docket No. A-41 (Company File).

As of this date, the Village has not received any Closing Notice and is not aware of any such notice being provided to the Public Staff or Commission.

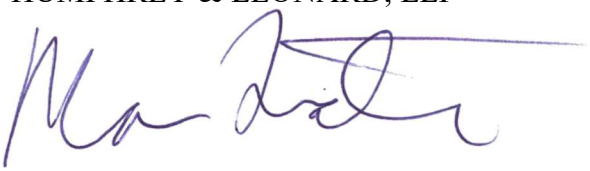
By this letter, the Village respectfully requests that Limited confirm by written response that (1) it intends to comply with the Closing Notice requirement of the Commission's December 17, 2010, order in Docket No. A-41, Sub 7, (2) no such Closing Notice has been provided to date, and (3) it will copy the Village (and its counsel) with any such notice.

Further, as I hope your client will appreciate, any closing on the parking facilities and barge assets prior to determination by the Commission in Docket No. A-41, Sub 21 may complicate the availability of meaningful relief, including the requirement that your client seek prior approval of the Commission of any such transfer. We would welcome any comfort that your client is able and willing to provide—notwithstanding the statements attributed to the purchaser reported in the news article cited above—that closing on the assets will not occur prior to resolution of the pending docket. I would welcome any thoughts you might have on this topic prior to engaging the Commission.

With best regards,

Sincerely,

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP



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cc: Brad Risinger
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Craig Schauer

Exhibit 2

Excerpt from Deposition of
Dr. Julius A. Wright
Intentionally Omitted
CONFIDENTIAL MATERIALS