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July 11, 2022

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

Re: In the Matter of
Village of Bald Head Island v. Bald Head Island Transportation, Inc.
and Bald Head Island Limited, LLC
NCUC Docket No. A-41, Sub 21
Response to Complainant's Motion to Join Necessary Party

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC, I herewith submit the attached Response to Complainant's Motion to Join Necessary Party.

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

Sincerely,

Brad M. Risinger

pbb

Enclosure

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota
Nevada New Jersey New York North Carolina Pennsylvania South Carolina Texas Washington

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

VILLAGE OF BALD HEAD ISLAND,)	
)	
Complainant,)	
v.)	RESPONSE TO COMPLAINANT'S
)	MOTION TO JOIN
BALD HEAD ISLAND)	NECESSARY PARTY
TRANSPORTATION, INC. and)	
BALD HEAD ISLAND LIMITED,)	
LLC,)	
)	
Respondents.)	

Respondents Bald Head Island Transportation, Inc. ("BHIT") and Bald Head Island Limited, LLC ("BHIL" and collectively, "Respondents"), by and through undersigned counsel, and pursuant to Rule 1-9 of North Carolina Utilities Commission ("Commission") Rules, hereby object to the Motion to Join Necessary Party ("Motion") filed by complainant Village of Bald Head Island ("the Village or VBHI") on July 8, 2022.

I. As a Contract Purchaser of Assets, SharpVue is not a Necessary Party to a Case that Seeks to Redefine the Commission's Regulatory Scope.

The Village certainly has walked a circuitous path to arrive at the relief requested in this motion. First, the Village endorsed and helped create a public authority to own and operate a set of transportation and logistics assets owned by BHIL – including the parking and barge operations at issue here. Then, unsatisfied

with a governance model where it shared authority board seats and control with appointees from the City of Southport, Brunswick County, the General Assembly, the Department of Transportation, and the Governor's Office¹, the Village set out to buy the assets for itself. Initiation of this docket followed, and the instant motion makes plain the Complaint's intent to "alter the legal status of the assets" in hopes of destabilizing a sale of them to any entity other than the Village. (Mot., ¶ 20). Finally, feigning concern over how the value of BHIL assets that SharpVue Capital, LLC has contracted to purchase might be affected by *this* docket, the Village asserts that SharpVue must be joined as a necessary party to its effort to regulate the BHIL-SharpVue transaction out of existence.

This motion is a solution in search of a problem.

First, the Village contends that because SharpVue's contract to purchase BHIL's parking and barge operations gives it a "property interest" under North Carolina law, it is a necessary party because the whole point of this docket is to disrupt the value and attractiveness of the assets to a private purchaser. (Mot., ¶¶ 11-12). Thus, the Village intones that SharpVue must be around to witness its efforts to "alter the legal status of the assets" and "encumber" them with "utility regulations and requirements" that would impact their value, potential to generate revenue, and "the potential resale of the assets." (*Id.*, ¶ 12)

While Respondents respectfully suggest that the Village's thinly veiled attempts to use the Commission's jurisdiction and valuable time to change the

¹ N.C.G.S. § 160A-684(b).

course of events that the Village itself set in motion by undermining the Bald Head Island Transportation Authority (“BHITA”) are misplaced, the relief requested here would simply compound an already unnecessary, and time-consuming, proceeding.

As the motion reports, SharpVue opposes the effort to add it as a necessary party to this docket. Simply put, the Village’s gambit to use this docket to disrupt the sale to a private purchaser failed. SharpVue contracted to purchase BHIL’s transportation and logistics assets on May 17, 2022 - after the filing of this docket.^[1] As a sophisticated equity capital concern advised by regulatory counsel, SharpVue understood the Commission had been asked to change course and regulate BHIL’s parking and barge activities. The possibility that the Commission might agree to regulate BHIL’s parking and barge activities has already been fully assessed and evaluated by SharpVue as the contractual purchaser. SharpVue should be free to elect whether it feels the Respondents can adequately represent whatever concerns it may have about the Village’s maneuvers in this docket.

Second, the Village makes not a single effort to explain in its motion why SharpVue’s presence as a party is in any way connected to a regulatory analysis of the nature and function of the parking and barge assets at issue. (Compl., p 2; Mot., ¶ 2). SharpVue hasn’t owned or operated the assets at issue, and therefore has no historical knowledge about allegations by the Village that parking lots are “integral” to ferry and tram service or that the barge is a “common carrier.”

^[1] In a footnote, the Village observes that it “bears noting” that it possesses a right to purchase BHIL’s parking and barge operations arising from a 1999 “Right of First Refusal Agreement.” (Mot., ¶ 4). What the Village conveniently omits is that the agreement - entered when the ferry was based at a different location in Southport - is ineffective, on its face, because neither party took the precedent steps required for it to become effective.

Yet, the Village argues in its motion that “SharpVue possess information that has direct relevance to the proceeding at hand” without any suggestion of what that information might be. (Mot., ¶ 14). In discovery, the Village has contended that bid solicitations that BHIL used with prospective purchasers or the contract that BHIL actually entered with SharpVue might shed light on statements that support its argument for regulation of parking and barge. While Respondents found those requests tangential, at best, to the issues in the docket, they have produced those documents under the parties’ Confidentiality Agreement. Moreover, with SharpVue’s permission, Respondents also have produced in discovery value materials SharpVue generated (and provided to BHIL) about the BHIL transportation and logistics assets, notwithstanding that the potential of such documents leading to relevant information in this docket is highly questionable.

With these materials already in hand, it is difficult to imagine what additional, relevant information the Village could not seek through the third-party discovery avenues that it mentions in its motion remain available to it. At least, the motion doesn’t make any suggestion what that information might be, or why SharpVue must be a party for the Village to obtain it.

Third, a request for a declaratory ruling on the scope of regulatory jurisdiction is very different from an action to resolve contractual rights or property rights. There are often “necessary parties” to the latter, but not to the former, and this motion attempts to conflate the two types of actions, which, for these purposes, are apples and oranges. The Motion cites no case in which a court or administrative tribunal has found the need to add a prospective purchaser to a declaratory ruling

action such as the one brought by the Complainant that seeks to change the regulatory status of the assets that may be -- but that have not yet been -- purchased.

Complainant's own filings in this docket expressly state that "the claims asserted in the Complaint are not dependent on any purported sale" and "even if a sale were to never happen, the issues regarding the Commission's supervision of the Parking Facilities and the Barge would persist and require resolution." (Reply to Motion to Dismiss, at 18, 27). In other words, the claims are not dependent upon SharpVue or any other prospective purchaser. Cf. *MacPherson v. City of Asheville*, 283 N.C. 299, 305, 196 S.E.2d 200, 204 (1973) ("when a complete determination of a claim *cannot* be made without the presence of other parties.") This admission by Complainant is fatal to the allegation that SharpVue is somehow now a necessary party.

II. The Village Advances a So-Called "Regulatory" Proceeding to Advance Objectives Unobtainable as a Market Participant.

The Village insists in its Motion that the "ownership, use, authority and intention" with regards to Respondents' transportation and logistics assets is "dynamic and in a significant state of flux." (Mot., ¶ 16). That lament is a bit like pushing Humpty Dumpty off the wall and decrying that the state of affairs is scrambled.

The Complainant's current motion to drag SharpVue into this docket is a clear confirmation of the Respondents' description of this proceeding. As explained in Respondent's Motion to Dismiss, this action is not about the merits, or lack thereof, of the Complainant's allegations. It is, instead, a request that the

Commission “interject itself into BHIL's potential, third-party market sale of regulated and unregulated assets in an attempt to steer the sale of those assets to the Village instead” (Respondents’ Motion to Dismiss, p.1) and to make that process as unnecessarily burdensome and onerous as possible on both the seller and prospective buyer in hopes of thwarting the sale. This Motion does not even try to be subtle or discreet in articulating how the Complainant’s efforts in this docket could, in its opinion, make the transaction less attractive to SharpVue, and thus increase the likelihood of a sale to the Village. (*See* Mot., ¶¶ 12-13 (but apparently forgetting that SharpVue agreed to a purchase price after the complaint in this docket has been filed, as noted above)).

The Village coyly suggests that its attempt to add SharpVue to this docket is reinforced by the Commission’s interest in “know[ing] who is in control of the operations of each utility.” (Mot., ¶ 16, *quoting* Order Joining Additional Party, N.C.U.C. Docket No. W-965, Sub 3, at 6 (July 11, 2017). There, in the context of a *transfer* proceeding, the Commission approved the addition of a party that exerted control over an entity to which a utility was proposed for transfer. That citation is fair as far as it goes; the Commission does have an interest in probing who will control a utility for which a certificate transfer is sought. But that’s not this docket.

Just as in Docket No. W-965, Sub 3, the Village can intervene and participate in the upcoming docket regarding the proposed transfer of the certificate of public convenience and necessity from BHIT to SharpVue. There, SharpVue will be a joint applicant in the docket and will subject itself to the jurisdiction of the Commission and to discovery by the Public Staff and intervenors. Complainant

certainly has valid interests in that proceeding to ensure that the public convenience and necessity is adequately served in the proposed transfer. But there is no basis in the Commission's rules or practice to involuntarily drag SharpVue into a docket not of its own making, about assets that it does not yet own (and that the Commission has not yet determined it even regulates).

This docket is long on motive, and short on rationale. SharpVue is an awkward and inappropriate fit as a "necessary party" because the proceeding, itself, is an exercise that asks the Commission to use its regulatory authority to engineer a transaction result the Village could not achieve as a market actor. As Respondents contend in their motion to dismiss, "[t]here is no statutory authority or precedent to support such an extraordinary intervention into a private company's control and sale of its own assets, and the Commission should dismiss the Complaint, including its request for declaratory relief." (Motion to Dismiss, pg. 2). The Village is entitled to intervene, and actively participate, in a proposed certificate transfer for BHIL's regulated assets. However, it should not be entitled to use the Commission's jurisdiction – as it overtly tries to do here – to interfere with the transaction before Respondents and SharpVue have an opportunity to introduce it for analysis of whether it serves the public interest. Therefore, for these reasons, the Respondents incorporate by reference herein their Motion to Dismiss filed on March 30, 2022 and repeat the request for relief stated therein.

WHEREFORE, Respondents respectfully request that the Commission grant the following relief:

1. Deny the Complainant's Motion to Add a Necessary Party; and
2. Dismiss this proceeding in its entirety.

Respectfully submitted, this 11th day of July, 2022.

FOX ROTHSCHILD LLP



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the attached Response to Complainant's Motion to Join Necessary Party in the above-captioned case, which was filed on this day by electronic mail to the parties of record, counsel of record or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

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*North Carolina Utilities Commission
Public Staff*

This the 11th day of July, 2022.



M. Gray Styers, Jr.