STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. A-41 SUB 22

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Joint Application of Bald Head Island Transportation, Inc., and Bald Head Island Ferry Transportation, LLC for Approval of Transfer of Common Carrier Certificate to Bald Head Island Ferry Transportation, LLC, and Permission to Pledge Assets	)	PROPOSED ALTERNATIVE FINDING OF FACT AND SUPPORTING EVIDENCE AND CONCLUSIONS FOR PROPOSED ORDER

NOW COME Applicants Bald Head Island Transportation, Inc. ("BHIT"), Bald Head Island Limited LLC ("BHIL") and Bald Head Island Ferry Transportation, LLC ("BHIFT"), and propose the following alternative Finding of Fact 37, and supporting Evidence and Conclusions for that finding of fact to be included in the Order in North Carolina Utilities Commission Docket No. A-41, Sub 22.

At the hearing in this docket, the Intervenor Village of Bald Head Island (the "Village") advocated that the Commission (1) set the rate base for the parking and barge operations, and (2) include the parking and barge assets at BHIL's net book value rather than at the lesser of SharpVue's purchase price or the fair market value of the assets. At the time BHIL and SharpVue negotiated the sale and signed the Asset Purchase Agreement (APA), the parking and barge assets were not regulated. BHIL has never been subject to ratemaking and thus the prices for its services have never included an approved recovery of depreciation or taxes or a rate of return on its investment.

Knowing that if the Commission elected to fix rates for parking and barge pursuant to N.C. Gen. Stat. § 62-133 and if it were to set a rate base on BHIL's net book value, the transaction negotiated could not be consummated, the Applicants advocated for a rate base to be set at the lesser of the purchase price or fair market value at the time the assets became subject to the Commission's regulatory authority. Since the hearing, the Applicants and Public Staff have filed a Settlement Agreement and Stipulation (the Stipulation) agreeing, among other things, that the current rates should be allowed to continue for now (subject to regulatory conditions allowing rate increases limited to the rate of inflation for six years). The Stipulation, however, provides that either party may propose alternative findings and conclusions addressing the appropriate rate base valuation for parking and barge services for the Commission's consideration. (Stipulation, pp. 7-8).

In the event the Commission determines that a rate base determination is necessary or appropriate at this time, Applicants submit the following alternative proposed finding of fact 37 and supporting evidence and conclusions, in lieu of those in the joint proposed order, for the Commission's consideration[1]:

Finding of Fact 37

37. The "reasonable original cost or the fair value" of assets associated with the Parking and Barge Operations pursuant to N.C. Gen. Stat. § 62-133(b)(1) is the cost SharpVue is paying for these newly-regulated assets, which shall be

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[1] For the convenience of the Commission, Applicants have also attached hereto a copy of the Docket No. W-354, Sub 81, Order Granting Partial Rate Increase, issued on June 15, 1990, cited in the discussion below (Attachment 1).

applied in any future rate case where the Commission elects to fix the rates for the Parking and Barge.

Evidence and Conclusions for Finding of Fact No. 30-37

The evidence supporting these findings of fact is contained in the testimony of Applicants' witnesses Paul, Mayfield, Roberts, Stewart, and Taylor, Public Staff witnesses Boswell, Rajeev, and Hinton, Village witnesses Gardner, Perry, and Wright, the Regulatory Conditions, and the record as a whole.

Applicants' witnesses Roberts, Paul, Mayfield, and Stewart all confirmed that SharpVue has reached oral agreement with Mr. Paul, Ms. Mayfield, and Captain Stewart to stay on in their current roles post-closing to ensure a seamless transition. (*See, e.g.*, Tr. Vol. 2, 45, 129; Vol. 8, 108). Their testimony also confirmed that most employees of the current operations will also be maintained. (*See, e.g.*, Tr. Vol. 2, 45).

The Regulatory Conditions detail the post-closing commitments described in the findings of fact, among others.

In the Regulatory Conditions, the Applicants commit to limit future price increases to the rate of inflation for six years, and the Commission finds this commitment to be a reasonable approach to protect consumers and to ensure the reasonableness of the parking and barge rates. (Condition 4). The Commission, in its Order in Docket No. A-41, Sub 21 allowed the current rates charged by BHIL to continue. (Sub 21 Order, p. 30). No party in this action presented any evidence or argument that the current rates are unjust or unreasonable when compared to rates in other, fully competitive contexts. In rebuttal testimony, Applicants' expert witness Taylor prepared a table showing that BHIL's charges for parking are among the lowest of benchmarked parking operations in North Carolina. (Tr. Vol. 7, 102-05). Village witness Gardner agreed that the current parking and barge rates are reasonable. (Tr. Vol. 4, 151-52). The Applicants and the Public Staff have stipulated and agreed that current rates for parking and barge services should be allowed to continue (subject to annual inflation adjustments for six years).

The Commission concludes that the existing rates are reasonable such that there is no need to "establish" new rates at this time pursuant to N.C. Gen. Stat. § 62-133. In the Stipulation reached by the Applicants and Public Staff, the parties have agreed that it is unnecessary to adjust the parking and barge rates at this time and have agreed that a six-year prohibition on rate increases above the annual rate of inflation sufficiently protects the public's interest and ensures reasonable rates. A six-year period of parking rates with increases at no more than the annual rate of inflation was also agreed upon by the parties in BHIT's last rate case in Docket No. A-41, Sub 7. While not precedent for future rate-setting, the Commission gives weight to the testimony of witnesses that the resulting level of rates has been reasonable (*e.g.*, Tr. Vol. 4, 151-52) and to the fact that no party

has taken the position that the current level of rates is unreasonable. Given that the rates are reasonable for the services provided and the Applicants' need for certainty on the issue of rates to allow the closing of the Proposed Transaction to proceed, which is in the public interest, the Commission agrees that it is appropriate to allow the current parking and barge rates to continue six years subject to the adjustments set forth in the Regulatory Conditions.

At this time, the Commission has not decided that its formal ratemaking for parking and barge pursuant to N.C. Gen. Stat. § 62-133 is necessary or appropriate even after the expiration of the six-year period set forth in the Regulatory Conditions. But it is apparent, based on the testimony that, if the Commission were to now set a rate base for parking and barge based on BHIL's net book value as the Village urges, the proposed transaction would likely not close because SharpVue would no longer be willing to pay the purchase price. (*See* Tr. Vol. 9, 113-17). Uncertainty about how a rate base for parking and barge might be set in the future may have the same effect. Thus, we conclude it is necessary and appropriate to resolve the rate base question at this stage. Doing so will establish a cost basis that can be used if and when the Commission decides the parking and barge services should be subject to ratemaking pursuant to N.C. Gen. Stat. § 62-133.

Pursuant to the reasoning of the Sub 21 Order, the parking and barge operations—viewed in isolation apart from the regulated ferry service—would not have been subject to the Commission's regulatory authority. It is only because the Commission deemed them integral to the regulated ferry and tram operations and impacted ferry and tram rates that it asserted jurisdiction over them.

Pursuant to N.C. Gen. Stat. §§ 62-130 and 62-131, any utility rate must be just and reasonable, but the Commission has discretion to determine when and how to "make, fix, establish, or allow" rates based upon the circumstances of the particular utility. As the Commission stated in the Sub 21 Order,

> 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. The Commission has also made reasonable accommodations for certain industry functions without requiring full rate or tariff review.

Order issued December 30, 2022, at p. 29 (citations omitted). When the Commission chooses to "fix" (versus "allow") rates, the Commission then engages in a full cost-based analysis. *See* N.C. Gen. Stat. § 62-133.

Prior to the Sub 21 Order, the parking and barge assets had never been previously deemed to have been part of a utility's rate base. Therefore, there is no precedent for their treatment for ratemaking purposes in these circumstances, and any decision in this docket cannot serve as precedent for any other utility transfer proceeding. Although the Commission is not setting rates for parking and barge operations on a N.C. Gen. Stat. § 62-133 cost-based basis in the present proceeding, but instead is allowing continuation of existing rates, the Commission nonetheless concludes that it is appropriate to determine a rate base or a lease rental value for the assets used by the parking or barge operations.

For the reasons set out below, the Commission finds and concludes that the value of the parking and barge assets should be set at their allocated share of the purchase price paid by SharpVue (which is less than their appraised value). Similarly, to the extent the parking and barge rates are based on lease payments as an operating expense in a future proceeding, the expense valuation should include the reasonable fair market rent of the assets at this established rate base value .[2]

The Village's expert witnesses Perry and Wright offered the opinion that the parking rates would be too high if the parking assets were included in the rate base at the purchase price, which they characterized as allowing SharpVue to recover an "acquisition premium". The Commission is not persuaded by this testimony for several reasons. First, the perspective of the Village witnesses assumes that including the purchase price in a rate base would constitute an acquisition premium, even though (i) the parking and barge assets had never been treated as regulated until December 30, 2022, and (ii) the Commission has the benefit of an appraisal to confirm their value in that same month (*See* LHR/CAP Rebuttal Exhibit 7).

Under the Commission's precedent and the unique circumstances of this case, inclusion of the portion of SharpVue's purchase price allocated to the parking and barge assets would *not* result in SharpVue recovering an "acquisition premium." In utility transfer cases, the Commission has generally ruled that rate base is the lesser of net original cost investment or the purchase price when a utility acquisition is made. There have been some exceptions where an "acquisition adjustment" (or "acquisition premium" or "debit acquisition adjustment") has been allowed in rate base to incentivize transfers where appropriate. *See, e.g.,* the Docket No. W-274, Sub 122, Order Approving Transfer, Acquisition Adjustment, and Maintaining Current Rates, issued on April 30, 1997, and the Docket No. W-1000, Sub 5, Order Approving Transfer and Denying Acquisition Adjustment, issued on January 6, 2000, *affirmed* 147 N.C. App. 182,

[2] Because any such leases have yet to be filed with the Commission, they would not only be subject to review and Commission approval under N.C. Gen. Stat. § 62-153 to protect consumers from affiliates taking undue advantage of the utility entity, but also would be subject to review for reasonableness in any future ratemaking that is conducted pursuant to N.C. Gen. Stat. § 62-133.

(2001). The Commission, however, need not reach this determination for the reasons explained in the next paragraph.

The current transfer application falls under a different Commission precedent because these parking and barge assets had never before been treated as utility property when the Application for transfer of common carrier certificate was filed. The "original cost" of those assets as utility property is the price negotiated between a willing buyer and a willing seller in an arms' length transaction for the first time they become utility property. Here, that cost is the share of the Applicants' Asset Purchase Agreement that is allocated to the parking and barge assets. (*See* Village Roberts Direct Cross Exhibit 3 showing this allocation).

A Commission decision that explains this distinction is the June 15, 1990, Order Granting Partial Rate Increase in Docket No. W-354, Sub 81 (hereinafter, the Carolina Water Service order). In the Carolina Water Service order, the Commission stated:

> As a general proposition, when a public utility buys assets *that have previously been dedicated to public service as utility property*, the acquiring utility is entitled to include in rate base the lesser of the purchase price or the net original cost of the acquired facilities in the hands of the transferor at the time of transfer. The theory behind this proposition is that the investor in utility property should only be entitled to recover his own investment. Also, *public utility ratepayers* normally should only be responsible for reimbursing an investor once for the cost of public utility property *through depreciation expense recovered through rates and through payment of a return on the unrecovered investment.*

(Docket No. W-354, Sub 81 Order issued June 15, 1990; Annual Comm. Report p. 394; emphasis added). This analysis was again quoted by the Commission with approval in a Heater Utilities case, Docket No. W-274, Sub 59, Order issued December 20, 1990.

Under this rationale, the use of the seller's original cost to establish rate base value is appropriate where the seller's "assets that have previously been dedicated to public service as utility property." This principle, however, would not apply to the BHIL parking and barge facilities because those assets had never been owned by the selling utility (BHIT) or subject to regulation as an asset of BHIL. Moreover, the parking and barge operations have never been included in rate base for any utility. Neither the utility, BHIT, nor its parent company, BHIL, has ever been allowed to recover the investment in the parking or barge facilities through utility rates because those facilities have never been in a utility rate base. (*E.g.*, Tr. Vol. 7, 93). The utility rates of BHIT have never included depreciation expense or taxes on those assets or a return on the unrecovered cost of the parking or barge facilities. (*E.g.*, Tr. Vol. 7, 93). In fact, both the Public Staff

witnesses and the Village's expert Julie Perry testified that BHIT's rates would have been *higher* if the parking assets had, in fact, been included in its rate base approved by Commission Order in Docket No. A-41, Sub 7 (2010). (Tr. Vol. 4, 202-03; Vol 6, 254-56). Therefore, customers have benefited from the fact that the parking assets were not a part of any rate base.

BHIL has generated revenues from the parking facilities but not by charging cost-based rates established by the Commission. (Tr. Vol. 7, 93). There is not the necessary regulatory linkage between BHIT's allowed utility rates and the recovery of costs for the parking and barge facilities. The credit acquisition adjustment (use of the seller's original cost) is premised on allowing a utility "to recover [only] his own investment" and in this case there has not been a prior *utility* investment in the parking facilities. To limit SharpVue's rate base valuation for parking and barge assets—where the transferor utility had never recovered through rates its investments in the parking and barge—would be inconsistent with the Commission's reasoning in Docket No. W-354, Sub 81, and would violate SharpVue's rights to fair and reasonable rates. *See* N.C. Gen. Stat. § 62-132 and 62-133.

In this context, the Commission finds informative that testimony of Applicants' witness John Taylor, who calculated the impact of including the purchase price in rate base and showed that it would have no meaningful impact on the rates—rates that no one contends are unreasonable. In fact, Mr. Taylor's calculations show that including the purchase price in rate base would support a 50 cent *reduction* in parking rates and a 3 cent difference in barge rates. (Tr. Vol. 8, 66-68; BHIT Public Staff Cross Exs. 1-2). The Village ultimately conceded that Mr. Taylor's calculations were correct. (Tr. Vol. 7, 8-9). Given that the current rates are reasonable, these calculations support the conclusion that an appropriate valuation of the assets for ratemaking purposes is the allocated purchase price.

Village witness O'Donnell, in his pre-filed testimony adopted by Village witness Julie Perry, warns of a scenario where an asset is sold back and forth between a regulated and unregulated entities for higher values, and thereby "building up" the rate base value. (Tr. Vol. 4, 180). But that scenario is inapplicable in the current, unique situation. The parking and barge assets have never been part of a utility rate case in the past (both the transferor and transferee have maintained that the parking and barge facilities do not belong in rate base), and (unless the Docket No. A-41, Sub 21 is overturned) they will be part of the utility's rate base in the future. The Sub 21 Order on December 30, 2022, was the pivotal point at which these assets were deemed part of a utility's rate base. If the utility were ever to be sold or otherwise transferred in the future, there would be no reason to value parking and barge assets at the purchase price for such potential future transaction because those assets would have been already dedicated to utility service by BHIFT. The original cost to BHIFT (SharpVue), i.e., the allocated purchase price, validated by its lender's appraisal, would determine the rate base valuation for any future owner. Therefore, the Commission's policy goal of preventing increases of rate base through bidding up the purchase price in

transfers would not be violated under these circumstances by setting the rate base at the allocated share of the purchase price being paid by SharpVue.

In summary, in this unique circumstance where the parking and barge functions have never been operated pursuant to a utility certificate and have never been deemed a regulated activity until the Commission's Order on December 30, 2022, and where the assets have been appraised by a third-party appraiser in the same month to establish their fair market value, those assets should be included in rate base at the lesser of that fair market value or the allocated purchase price being paid by SharpVue.[3]

Pursuant to its Order in Docket No. A-41, Sub 21, the Commission reiterates that it will maintain regulatory oversight over the rates and operation of Parking and Barge Operations. After the six-year period of controlled parking and barge rates as provided in the Regulatory Conditions, and assuming the Sub 21 Order is upheld, those rates may be subject to review in a future rate case, based upon its cost of service, including any reasonable rent payments which will be established prior to and as part of this Transfer.

The Settlement Agreement and Stipulation between the Applicants and Public Staff state that it is reasonable for BHIFT to acquire rights to possess and utilize the real estate and infrastructure assets used and useful in providing Parking and Barge Operations via long-term leases. The leases will be filed in this docket and subject to advance approval by the Commission pursuant to N.C.G.S. § 62-153, which will occur prior to closing of the Transfer and before any rents are paid. Such filing and approval are conditions precedent for consummation of the Transfer.

Pursuant to the applicable statutory requirements, the Commission shall require any leases associated with the Parking Operations or Barge Operations to be filed with the Commission in this docket for approval prior to closing in order to confirm the contracts meet the statutory requirements of N.C.G.S. § 62-153 that the charges and terms are fair to the utility and not an unwarranted dissipation of its funds by an affiliate. Again, any such approval of the leases does not prejudice or foreclose the right of an intervenor to object to the rent amounts in a future rate case.

[3] Of course, at the time any of future rate case, the actual amount of the rate base would be subject to depreciation and any additional capital improvement expenditures made since the date of the assets' inclusion in rate base: December 30, 2022.

The Applicants appreciates the Commission's consideration of this alternative Finding of Fact and supporting Evidence and Conclusions for inclusion in its Order in the above-captioned docket.

This the 22nd day of May, 2023.

Electronically Submitted

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Proposed Alternative Findings of Fact, filed on behalf of Bald Head Island Transportation, Inc., Bald Head Island Limited LLC and Bald Head Island Ferry Transportation, LLC, have been this day served upon each of the parties and counsel of record in this proceeding as listed on the Commission's Service List for Docket A-41 Sub 22, and have also been served on the North Carolina Public Staff and Commission Staff – Legal by e-mail / electronic transmission or by deposit of same in the U.S. Mail, first class postage properly affixed and prepaid.

This 22nd day of May, 2023.

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