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 OPPOSITION TO RESPONDENTS' MOTION IN LIMINE NO. 1**

Pursuant to Rule R1-7, the Village of Bald Head Island (the "Village"), responds Respondents' Motion in Limine No. 1 filed September 29, 2022, by the Respondents Bald Head Island Transportation, Inc. ("BHIT"), Bald Head Island Limited, LLC ("Limited"), and SharpVue Capital, LLC ("SharpVue").

INTRODUCTION

Discovery in this case revealed that Respondents have been using the proceeds from their highly profitable, unregulated parking facilities and barge operations to support the regulated ferry and tram. Seeking to hide that information from the Commission, ferry riders (i.e., utility ratepayers), and the public, Respondents filed this Motion in Limine asking the Commission to exclude any reference to the parking facilities or barge's profitability, under the pretense that such information is irrelevant outside of a rate case.

To the contrary: the profitability of the parking facilities and barge operations is highly relevant to this Commission's decision to exercise regulatory authority in this case. Respondents' thinly supported Motion should be denied.

FACTUAL SUMMARY

Through this action, the Village has asked the Commission to exercise its authority to regulate the ferry system's parking facilities and barge. As witnesses for both the Village and Respondents have recognized, the profitability of these systems is highly relevant to the Commission's decision.

I. The Village's Witnesses

The profitability of the parking facilities and the barge has been at issue in this case since day one: in describing the dispute in its Complaint, the Village alleged that there is a risk that, without regulation, the parking facilities and barge could be "sold in parts to maximize profit for BHIL." Complaint ¶ 48. In that case, "the residents, visitors and on-Island and off-Island businesses are at risk of being held hostage by one or more monopoly service providers whose primary goal would be to maximize profit outside the control of any regulated authority rather than to operate the assets for the benefit of the public" *Id.*

The reality of this risk has become obvious in discovery, making even more clear the need for the Commission's oversight of the parking facilities and barge. **[BEGIN CONFIDENTIAL]** [redacted]

Chart 1: 2014-2021 Comparison of Net Incomes of Ferry, Barge, and Parking[1]

[redacted]

[redacted] **[END CONFIDENTIAL]**

Mr. O'Donnell also calculated Limited's rate of return on all of its operations. He initially found that Limited receives an **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]** rate of return for the regulated ferry, unregulated parking facilities, and unregulated barge. *Id.*, Table 2. In his rebuttal testimony, Mr. O'Donnell updated that figure to include additional information Limited produced in discovery. Based on this new

data, Mr. O'Donnell found that Limited receives a **[BEGIN CONFIDENTIAL]** [redacted]

[redacted]

Table 1: Updated and Revised Consolidated Operations Rate of Return

Dec. 31, 2021

[redacted]

I[redacted] **[END CONFIDENTIAL]**

Likewise, Dr. Julius Wright, another of the Village's experts, observed that one of the purposes of regulation is "to ensure that the profits of a nonregulated subsidiary are not maximized at the expense of ratepayers." Wright Direct Testimony at 33:8-12 (quoting *Re: S. Bell Tel. & Telegraph Co.*, Docket No. P-55, Sub 834, 1984 WL 1028455 (Nov. 9, 1984), at 2). As illustrated by Mr. O'Donnell's testimony, **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**

Dr. Wright also explained that Chapter 62 permits regulation of a parent entity when the "the Commission shall find that such an affiliation has an effect on the rates or service of such public utility." *Id.* at 37:6-10. The Commission may look at several factors to determine whether the parking operation has an effect on the ferry service or rates, including the parking facilities' profits. *Id.* at 37:22-38:13. Dr. Wright found it significant that Limited had used **[BEGIN CONFIDENTIAL]** t[redacted] **[END CONFIDENTIAL]**

II. Respondents' Witnesses

Respondents' witnesses likewise have recognized the roles profitability and rates of return have on the Commission's decision to exercise authority. For example, Lee Roberts, SharpVue's managing partner, testified that SharpVue will, if it acquires the ferry assets, commit to honoring the 2010 rate case's requirement of the annual imputation of $523,725 of revenues from the parking operation to the ferry operation. *See* Roberts Pre-Filed Rebuttal Testimony at 11, lines 12-19. By offering this testimony, Mr. Roberts seeks to assuage concerns about the need for the Commission to regulate the parking and barge operations and convince the Commission that it should be satisfied with this imputation without the need for further inquiry into the actual profitability and barge operations. Further, Mr. Roberts' testimony on this topic acknowledges the direct relevance of these revenues to the question before the Commission.

Having raised the issue, SharpVue cannot now seek to prevent the introduction of evidence that tends to show that the $523,725 imputation figure is woefully inadequate based on current financial information. Such information is directly relevant to the facts put in issue by SharpVue itself, and is highly relevant to the issue whether the assets should be subject to the Commission's regulatory authority.

BHIT and Limited's witnesses, James Leonard, Shirley Mayfield, and Chad Paul offer testimony on the appropriate valuation of the assets. And the exhibits filed by Mr. Leonard with his testimony make clear that the valuation of the assets was driven solely by the revenue stream from ferry ratepayers who are forced to pay for monopoly parking. James Leonard Direct Testimony at 18, line 10 through 21 line 6 and Exhibit B; Shirley Mayfield Direct Testimony at 8, lines 1-7; Chad Paul Direct Testimony at 19, lines 8-11. Again, the issue of the revenue stream associated with parking has been put directly in issue by Respondents' own testimony.

ARGUMENT

I. Evidence about revenue and the value of the assets is highly relevant to the Commission's decision whether to regulate the parking facilities and barge.

Respondents' only argument in support of excluding revenue and valuation information is their claim that such information is not relevant to this proceeding and, therefore, should be excluded under North Carolina Rules of Evidence 401 and 402. This argument is without merit and Respondents' Motion should be denied.

The Rules of Evidence, of course, are not applied strictly in Commission proceedings. *See* G.S. § 62-65(a) ("When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable, . . ."). This standard was recognized in BHIT's 2010 rate case, when the

Commission rejected BHIT's and Limited's prior attempt to censor speech it did not like concerning the need to assert regulatory jurisdiction over the Deep Point ferry parking facilities. *See* Order Denying Motion In Limine, Docket No. A-41, Sub 7, 2010 WL 4109406, at *2 (Oct. 15, 2010) (denying motion *in limine* and allowing expert witness testimony concerning the importance of regulating the Deep Point parking operations where "there [was] no legal 'standard' or specific set of legal criteria at issue," since "the Commission is capable of avoiding undue influence in determining for itself how the laws should be interpreted").

Regardless, the evidence sought to be excluded by Respondents easily meets the evidentiary standard both as applied by the Commission and as recognized in the courts. It is well recognized that the bar for relevance under Rules 401 and 402 is low. "Evidence is relevant if it has *any* logical tendency, *however slight*, to prove a fact in issue in the case." *State v. Carpenter*, 232 N.C. App. 637, 642, 754 S.E.2d 478, 482 (2014) (emphases added) (quoting *State v. Whiteside*, 325 N.C. 389, 397, 383 S.E.2d 911, 915 (1989)). "In order to be relevant . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Miller*, 197 N.C. App. 78, 87, 676 S.E.2d 546, 552 (2009) (omission in original (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991)); *see also* Order Denying Motion in Limine, Docket No. A-41, Sub 7 (N.C.U.C. Oct. 15, 2010) (rejecting motion to exclude testimony because, *inter alia*, testimony "would be useful to the Commission").

Respondents reason that this type of financial information is typically used in rate cases and because this is not a rate case, this information is not relevant here.[1] Motion ¶¶ 9, 13-14. Respondents' logic is paper thin. Although this financial information is relevant in rate cases, it is also relevant in non-rate cases. Here, the evidence Respondents seek to exclude tends to support the following conclusions, each of which is highly relevant to the issues before Commission:

- That Limited has historically managed, from an aggregate financial point of view, the three operations as part of a consolidated transportation business to provide access to the island to the public—thus corroborating that the parking and barge are ancillary to the ferry operations;
- That the "market value" of the parking and barge operations is inextricably tied to the regulated ferry operations because the revenues of the parking and barge operations are driven by and linked to the persons who are also ferry ratepayers—thus corroborating that the parking and barge are ancillary to the ferry operations;

[1] The Village does not dispute that this case is not a rate case. The Village did not initiate a rate case because, at the time the Village filed its complaint, it did not have sufficient information to assess rate impacts. That information is held by Limited. Through the course of discovery, the Village now has access to the necessary financial information, and the testimony of its expert consultants shows that, if the aggregated transportation assets are considered as utility assets subject to the Commission's authority, revenues generated from current operations generate an overall rate of return that would suggest that initiation of a rate case would bring positive consumer benefits. In its complaint, the Village has asked the Commission to initiate appropriate proceedings to effectuate a finding that the assets are public utility assets, which would include the initiation of a rate case. Complaint, Relief Requested, ¶ 5. In this regard, the testimony in question may be "useful to the Commission," *see* Order Denying Motion in Limine, Docket No. A-41, Sub 7, at 1 (N.C.U.C. Oct. 15, 2010), as it fashions appropriate relief in this proceeding.

- Ratepayers are currently at risk of paying excessive, monopoly rates for parking and use of the barge—thus endangering the public's access to the ferry's utility service and the barge's common carrier service;
- That the parking operation, in particular, is a de facto monopoly service as evidenced by its **[BEGIN CONFIDENTIAL]** [redacted] **[END CONFIDENTIAL]**;
- That, in the absence of the assertion of regulation, Limited appears to have purposefully structured its operations so as to siphon off revenues to unregulated assets—revenues that should be attributed to the ferry ratepayers; and,
- That Sharpvue's proposed commitment to continue the $523,725 imputation from the 2010 rate case does not satisfactorily address the appropriate contribution from the parking operations to the overall operations of the transportation utility.

It is understandable that Limited would not want the Commission to be apprised of the extent of the profitability of its unregulated operations, the attendant risks for utility ratepayers and the public if they continue to be unregulated (and potentially sold to a private equity firm), and the degree to which its transportation operations have benefited from financial inter-relationships—but it would be a miscarriage of justice to allow Limited to exclude such relevant evidence from the hearing in this matter.

To this point, the Commission has *always* examined the economic effect of its decisions in making decisions on imputation of revenues from related operations. *See, e.g.*, *Re: S. Bell Tel. & Telegraph Co.*, N.C.U.C. Docket No. P-55, Sub 834, 1984 WL 1028455

(Nov. 9, 1984) ("It is, however, critical that this commission be assured that none of the directory revenues available as an offset of local rates be lost or redirected to another subsidiary of Southern Bell's parent BellSouth due to any change made by the company in the method to be used for publishing directories. There is a grave concern that approval of the contract at this time will result in a loss of revenues for North Carolina ratepayers."). Such an examination is compelled by the Commission's basic public interest obligations.

Likewise, whether regulation is appropriate requires an analysis of the functional relationship of the asset and operations as well as an understanding of its financial impact on the overall operations. Here, the Village's evidence shows that the parking and barge is part of a consolidated transportation system, including the ferry and tram. The relative financial contribution of these assets to the overall consolidated operations is highly relevant to this inquiry.

In addition to the Commission's general practice of considering financial information even in non-rate cases, this financial information is highly relevant to this specific case. A focus of the Village's advocacy has been the fact that ferry ratepayers are the same people that pay parking. *See, e.g.*, Complaint ¶ 48 ("As integral components of the ferry utility operation, Parking and Barge services must be regulated: otherwise, the public will be exposed to the risk that an unregulated monopolist will control and dictate rates, terms and conditions for indispensable services to captive ferry passengers who must have parking if they are to ride the ferry and Islanders who have no alternative to the Barge for transporting household goods to the Island."). Because Limited can defray ferry rate increases by simply raising parking or barge rates, the profitability of these respective enterprises is directly relevant to this inquiry. *See, e.g.*, *Re S. Bell Tel. & Tel. Co.*, N.C.U.C.

Docket No. P-55, Sub 794, 1982 WL 996893 (April 9, 2982) (Public Staff testifying that directory services was "integral" to the public utility operations and that separating the operations would be "inequitable" for ratepayers "since they provide the market for the Yellow Pages.").

For example, in *Re: Southern Bell Telephone and Telegraph Co.*, Docket No. P-55, Sub 834, 1984 WL 1028455 (N.C.U.C. Nov. 9, 1984), the Commission considered the regulation of Southern Bell's directory operations, which had been transferred to an unregulated affiliate company. In reaching its decision to regulate the affiliated company, the Commission carefully considered the allocation of revenue between the two companies, even though it acknowledged that rates would be set in a subsequent rate case. *Id.* ("It is necessary, therefore, that the commission's decisions and orders with regard to any contract between Southern Bell and BAPCO for publishing Southern Bell's directories provide that the appropriate amount of net directory revenues will be established in each rate case proceeding."). In other words, even though the case did not involve rate-making, the *Southern Bell* Commission recognized that it had to consider revenues in making its decision whether to regulate the affiliate company.

Respondents' citations are unavailing. Most of Respondents' citations are to general propositions of law, and say nothing about the issues in this case. *E.g.*, *Hamilton v. Thomasville Med. Assocs.,* 187 N.C. App. 789, 792, 654 S.E.2d 708,710 (2007) (simply explaining role of motions in limine). And although Respondents cite a number of cases in support of their argument that the Commission "regularly" strikes irrelevant testimony, in most of their citations, the Commission actually denied the motion to strike or exclude. *Compare* Motion ¶ 12, *with In re Biennial Determination of Avoided Cost Rates for Elec.*

Util. Purchases from Qualifying Facilities - 2016, Docket No. E-100, Sub 148, 2017 WL 281934, at *1 (N.C.U.C. Jan. 18, 2017) ("[T]he Chairman finds and concludes that the statements and supporting comments NCSEA seeks to exclude from the record are relevant and material to the above-captioned proceeding. . . . Therefore, NCSEA's motion should be, and hereby is, denied."); *In re Application of NTE Carolinas II, LLC, for a Certificate of Pub. Convenience & Necessity to Construct A 500-MW Nat. Gas-Fueled Merch. Power Plant in Rockingham Cnty.,* Docket No. EMP-92, Sub 0, 2016 WL 6581761, at *7 (Nov. 1, 2016) ("Because NC WARN's proffered evidence specific to the application in this docket may have some bearing on the issue of public convenience and necessity, the Commission will allow the evidence to be introduced and declines to grant NTE's motions.).

Moreover, Respondents do not cite any case in which the Commission granted a motion in limine. Indeed—likely due to the relaxed evidentiary standard at play before the Commission—pre-hearing motions in limine before the Commission are exceedingly rare. At most, Respondents cite a case in which the Commission reserved ruling on the motion until the hearing. *In re Application of Duke Energy Corp. & Piedmont Nat. Gas, Inc., to Engage in a Bus. Combination Transaction & Address Regul. Conditions & Code of Conduct*, Docket No. E-2, Sub 1095, 2016 WL 3569218, at *4 (June 28, 2016).

Respondents' one citation to a case in which the Commission granted a motion to strike is likewise not helpful to their cause. In *In re Application of Duke Energy Carolinas, LLC, for Adjustment of Rates & Charges Applicable to Electric Utility Service in North Carolina*, Docket No. E-7, Sub 1026, 2013 WL 3377105, at *5 (July 3, 2013), Duke Energy moved to strike specific portions of testimony. Duke Energy's motion was narrowly

tailored to certain lines of testimony. *See id.* (striking "page 4, line 14, through page 5, line 12; from page 6, line 8, through page 33, line 2; from page 34, line 10, through page 37, line 17"). Respondents' requested relief is much broader; they seek to bar the Village from submitting any evidence on *nine topics*. Motion at ¶ 20a-i. Respondents cite no authority for taking such a broad approach, and the Village is aware of none.

Respondents also contend that excluding the financial information would "streamline" the hearing. Motion ¶ 16. Neither of their case citations, which include a government contract dispute and criminal murder trial, illustrate why the issues in this case need to be streamlined—nor do Respondents offer any explanation. *See INSLAW, Inc. v. United States*, 35 Fed. Cl. 295, 303 (1996) (recognizing that a motion in limine can expedite trial, but resolving issue by ruling on defendant's motion for partial summary judgment); *United States v. Tokash*, 282 F.3d 962, 967-8 (7th Cir. 2002) (considering effect of motion in limine on criminal defendants' constitutional rights). Unlike a jury of laypeople, who might be concerned about conflicting issues, the Commission is composed of experts who are well equipped to distinguish between rate-making issues and its decision whether to exercise regulatory authority. Further, as discussed above, the parking facilities and barge's financial information is crucial to the Commission's decision to regulate and cannot be extracted from this process.

The profitability, revenues, and value of the parking facilities and barge are highly relevant to this matter, and thus exceed Rule 401's low bar. Respondents' Motion should be denied.

II. Respondents will not be prejudiced by the admission of financial information.

Although Respondents do not cite North Carolina Rule of Civil Procedure 403, which permits the exclusion of evidence on grounds of prejudice, they nonetheless make a half-hearted attempt to argue that considering financial information "at this stage would be prejudicial to the Respondents—particularly SharpVue, given its late addition to the proceeding . . . ." Motion ¶ 14. Respondents do not explain why, exactly, they would suffer any prejudice, nor do they explain why they have been prejudiced by matters which were plainly put in issue in the Village's Complaint, on issues as to which they have offered testimony, concerning information uniquely within their possession and control. To the extent Respondents claim they have not had enough time to consider the financial information, Respondents' failure to prepare is not a ground for granting a motion in limine. BHIT and Limited have had as much time to prepare as the Village, its witnesses have submitted testimony about these issues, and the Respondents are in possession and control of the underlying financial information relevant to these matters. And SharpVue has been a party to this matter since August 1. It cannot now, at this late date, raise its concerns about timing.

Respondents also contend that admitting the financial information will allow the Village to take "piece-meal shots at the complex and thorough-going rate processes of § 62-133(b) that would also contravene the well-settled prohibition against 'single-issue ratemaking,'" citing *In re Application of Duke Energy Carolinas, LLC for Approval of Rate Rider to Allow Prompt Recovery of Costs Related to Purchases of Capacity Due to Drought Conditions*, Docket No. E-7, Sub 849, 2008 WL 2445559 (June 2, 2008). *Id.* at ¶ 15. But *In re Duke* is entirely distinguishable from this case. There, Duke asked the Commission

to approve a rate rider that would allow it to recover certain costs arising out of an agreement with Columbia Energy LLC. The Commission denied the motion, noting its general disapproval of single-issue rate making "for certain purchased capacity costs that traditionally have been recovered only in general rate case proceedings." *Id.* In contrast here, no rate will be set in this case. Thus, there is no risk of "single-issue ratemaking" in this case.

Even if Respondents had identified some potential prejudice (which they unequivocally have not), there is little risk that they would actually suffer harm because this matter is before an expert agency, not a lay jury. The Commission is well equipped to put proper and appropriate weight on evidence presented. Respondents have not identified any prejudice at all, much less prejudice that rises to the level that even the Commission would be unable to withstand it.

In contrast, if the Commission were to grant Respondents' Motion, the Village would be significantly prejudiced. Although Respondents say that they would also be bound by an order excluding testimony related to profitability and testimony, enforcing such an order would not be so simple. Motion at 9 n.2. For example, Mr. Roberts seeks to assure the Commission that it is not necessary for it to assert regulatory control over parking by committing to various conditions relating to parking rate changes and service conditions. The Village is entitled to rebut SharpVue's evidence about its "voluntary" concessions regarding parking by presenting evidence relating to other alternatives open to the Commission, including the imputation of revenues that would result in much greater public benefits than proposed by SharpVue. Respondents' Motion in Limine would foreclose such arguments, thus greatly prejudicing the Village. Thus, in reality, granting

Respondents' Motion would foreclose a wider range of testimony than they anticipate, complicating the hearing and unfairly harming the Village's position.

CONCLUSION

WHEREFORE, the Village respectfully asks the Commission to deny Respondents' Motion in Limine.

This 4th day of October, 2022.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing OPPOSITION TO RESPONDENTS' MOTION LIMINE NO. 1 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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This the 4th day of October, 2022.

By: /s/ Marcus Trathen