

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-100, SUB 1

In the Matter of)	REPLY COMMENTS OF
Study of Rates and Charges of Passenger)	THE VILLAGE OF BALD
Ferry Public Utilities)	HEAD ISLAND

The Village of Bald Head Island (the “Village”), by and through its undersigned counsel, submits these reply comments in response to the initial comments submitted in connection with the *Order Requiring Filing of Rates and Allowing Comments* (the “Order”) in the above-captioned docket,¹ which seeks comments on ratemaking treatment of passenger ferry rates and charges by the North Carolina Utilities Commission (the “Commission”).

In the following pages, the Village discusses several specific issues addressed in the comments of the only three parties to file initial comments: the Public Staff,² Bald Head Island Transportation, Inc. (“BHIT”),³ and the Village.⁴ In short, as discussed in the Village’s initial comments, traditional ratemaking is both appropriate for the Bald Head Island (“BHI”) Transportation System and critical to protect the community it serves, consistent with the regulatory scheme established in Chapter 62 of the General Statutes.

¹ Order Requiring Filing of Rates and Allowing Comments, *In re Study of Rates and Charges of Passenger Ferry Public Utilities*, Docket No. A-100, Sub 1 (Oct. 4, 2023).

² Initial Comments of the Public Staff, *In re Study of Rates and Charges of Passenger Ferry Public Utilities*, Docket No. A-100, Sub (Mar. 1, 2024) (“Public Staff Initial Comments”).

³ Bald Head Island Transportation, Inc.’s Initial Comments, *In re Study of Rates and Charges of Passenger Ferry Public Utilities*, Docket No. A-100, Sub (Mar. 1, 2024) (“BHIT Initial Comments”).

⁴ Initial Comments of the Village of Bald Head Island, *In re Study of Rates and Charges of Passenger Ferry Public Utilities*, Docket No. A-100, Sub (Mar. 1, 2024) (“Village Initial Comments”).

I. No Commenter Has Identified a Statutory Basis for Differentiating Among Ferry Services.

In its comments, the Public Staff takes note of several differences in the type of services provided by the various ferries holding existing certificates and points out that several of these differences (such as the optional, discretionary nature of tour boat services and/or the availability of transportation alternatives for other services) could justify disparate approaches to rate regulation (and perhaps other regulation).

The Village does not disagree that, as a matter of *policy*, it might be appropriate for the General Assembly to consider different forms of regulation for leisure tour boats. However, neither the Public Staff nor BHIT have cited any provision of Chapter 62 supporting the application of any such “alternative” regulation for different types of ferries. Certainly, as applied to the BHI Transportation System the facts compel rigorous regulatory oversight by this Commission.⁵ As such, the Village would respectfully urge the Commission to clarify in any order initiating further proceedings on this matter that reduced regulation of the BHI Transportation System is not under consideration.

More generally, no commenter has identified any statutory basis for differentiating among ferry services.

The Public Staff cites *State ex rel. Utils. Comm’n v. Edmisten*, 291 N.C. 424, 428, 320 S.E.2d 647, 560 (1976) for the proposition that the Commission may “consider whether there are differences in service or conditions to justify different rates.”⁶ From this, the Public Staff extrapolates that “the Commission has discretion to consider a wide range

⁵ To be clear, Village does not read the Commission’s Order as suggesting that relaxed regulation might be appropriate for the BHI Transportation System.

⁶ See Public Staff Initial Comments at 20.

of factors in determining whether proposed rates, or increases to rates, are just and reasonable” and asserts that the Commission has the authority to derive rates differently depending on the characteristics of the particular provider and service being provided.⁷

In *Edmisten*, however, the Supreme Court was not faced with the question whether the Commission could apply different rate setting regimes to different entities providing the same type of utility service—instead, it was faced with the issue whether a single utility could rearrange its tariff structure (*i.e.*, withdraw certain tariffs and combine others) to differentiate among customer classes. The Court found, of course, that the Commission had plenary authority to set rates, but that differences in *rates* for customers of the utility must be justified by substantial differences in service or conditions. This principle of law—which is certainly well-settled and not controversial—does not provide an independent source of authority for the adoption of deregulation by the Commission and the Village is not aware of any Commission decision relying on *Edmisten* for such authority.

The Public Staff cites G.S. § 62-131 for the proposition that “utility rates must be just and reasonable” and notes, appropriately and correctly, that “rates must be supported by substantial evidence in view of the whole record.”⁸ But the Public Staff does not cite G.S. § 62-133, which prescribes specifically how public utility rates are to be set nor does the Public Staff provide any rationale, supported by the language of the statute, for using some other rate setting methodology.

By contrast, where the General Assembly intends to authorize “relaxed” forms of regulation, it says so. For example, the Public Utilities Act expressly grants the

⁷ *Id.* at 21. Note that the Public Staff nowhere suggests that a lessened form of regulation should be applied to the BHI Transportation System.

⁸ *Id.* at 20.

Commission the type of authority envisioned by the Public Staff for motor vehicle carriers (a term which does *not* encompass ferries)⁹. G.S. § 62-261(8) grants the Commission with authority to issue exemption certificates where it determines that the service “is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in intrastate commerce.” G.S. § 62-261(11) vests the Commission with authority to “establish such just and reasonable classifications of groups of carriers included in the term ‘common carrier by motor vehicle’ as the special nature of the service performed by such carriers shall require.” And, exercising this authority, the Commission has in fact adopted reduced forms of regulation for certain household good motor vehicle carriers.¹⁰

Similarly, as pointed out by the Village in its initial comments, with regard to telecommunications ratemaking, G.S. § 62-134(h) allows the Commission to “permit pricing flexibility, detariffing of services, or both,” but only after the Commission first determines that the service is competitive. Similarly, Section 62-134(g) exempts bus companies and their rates, fares, or tariffs from the general provisions of Section 62-134 regarding changes in rates. There is no similar statutory authority permitting a lesser form of regulation applicable to the BHI Transportation System.

⁹ The Public Staff asserts that “[p]assenger ferries are public utilities in North Carolina, *motor carriers in general*, and common carriers in particular.” Public Staff Initial Comments at 14 (emphasis added). This is not accurate; motor carriers are statutorily limited to vehicles operating “upon the highways within the State.” See G.S. § 62-3(17), (18) and (12) (defining “Motor carrier” as “a common carrier by motor vehicle” and “motor vehicle” as “any vehicle, machine, tractor, semi-trailer, or any combination thereof, which is propelled or drawn by mechanical power and *used upon the highways within the State*” and “highway” as “road or street”) (emphasis added). Passenger ferries are, however, common carriers. The statutory definition of “common carrier” expressly includes transportation of persons for compensation by “boat.” *Id.* § 62-3(6).

¹⁰ Again, for clarity, ferries are not motor carriers with the applicable statutory definitions.

The Village is sympathetic to what it perceives to be the desire of the Public Staff’s comments—which is to preserve the lessened form of regulation for leisure tour boats which has evolved over the years through custom rather than Commission decision or application of the General Statutes. However, the Public Staff candidly concedes that it “has been unable to identify any statute or Commission rule that expressly authorizes” these existing practices and that “procedural deficiencies” with statutory requirements exist.¹¹ The Commission is charged with applying the General Statutes as they are written, and no party has articulated a statutory basis for disregarding the clear statutory directives for establishing rates for ferries.

That said, to date, the Village is not aware that rates of ferry operators other than BHIT have been the source of controversy. There is no reason to expect that such rates will become controversial in the future, even if the more formal process required by statute is applied to establishing such rates. And none of the other operators have submitted comments objecting to the application of any particular form of regulation.

II. BHIT’s Transportation System is a Monopoly Service Which Requires Regulatory Oversight.

The Village agrees with BHIT that the Commission’s ratemaking should generally extend no further than needed “to achieve the purposes for the regulation.”¹² In this context—contrary to BHIT’s incredible assertion that ferry transportation systems, *even when providing monopoly utility services*, do not require rate regulation—

¹¹ Public Staff Initial Comments at 17.

¹² See BHIT Initial Comments at 11 (citing Order Ruling on Complaint and Request for Determination of Public Utility Status, *Village of Bald Head Island v. Bald Head Island Transportation, Inc.*, Docket No. A-41, Sub 21 at 29 (Dec. 30, 2022) (the “Sub 21 Order”)).

the General Assembly has empowered the Commission to supervise utilities and such ancillary services that are necessary to the public utility function *in order “to protect the public from poor service and exorbitant charges which are normal consequences of a monopoly[.]”* *State ex rel. Utils. Comm’n v. Buck Island, Inc.*, 162 N.C. App. 568, 584, 592 S.E.2d 244, 254 (2004)¹³

As discussed in the Village’s initial comments, the BHI Transportation system is a monopoly utility that provides the only means of public access to an isolated island community. Whereas other ferries may be nothing more than “smaller motorboats carrying only a few passengers”¹⁴ on sightseeing trips, the BHIT Transportation system is a unified transportation system and one of the largest utilities in the state, with an annual ridership of over 782,000 passengers in 2023.¹⁵ As discussed below, the BHI Transportation System operates as a *de facto* monopoly with significant barriers to competition. Absent ratemaking regulation, there is substantial risk of public harm from future market power abuses.

a. Numerous Barriers to Competition Exist

BHIT contends that the lack of any viable public alternative to the BHI Transportation System does not make it a monopoly, but instead is merely a “current operational posture in which competition has not yet occurred.”¹⁶ However, the record is replete with barriers preventing entry by any potential competitor.

BHIT claims that a competitor could simply “acquire property on both the island and the mainland” and set up a competing ferry service. However, Bald Head Island

¹³ Sub 21 Order at 19 (emphasis added).

¹⁴ See Public Staff Initial Comments at 4–5.

¹⁵ Village Initial Comments, at 3; *see also* Application for Revisions to Ferry Schedules, Docket No. A-41, Sub 23 at 4 (Feb. 19, 2024).

¹⁶ BHIT Initial Comments at 15.

Limited, LLC (“BHIL”), BHIT’s parent company, controls access to the island’s only harbor, including the harbor’s marina, docks and private boat slips. Creation of a competitor ferry service would require either use of BHIT/BHIL facilities or otherwise obtaining authority to construct another ferry terminal on the island.¹⁷

Similarly, there is no evidence that property is available for construction of a marina and ferry terminal on the mainland, nor that suitable shoreline even exists in the first place.

With respect to the suggestion in BHIT’s comments that “another parking provider [could] simply buy available property across the street-providing the same service as the existing company providing that service,”¹⁸ the Commission has expressly considered and expressly rejected that spurious notion, discussing the “natural disadvantages for future competitors”:

The Commission . . . recognizes that there are a number of impediments to the likely development of such a competitive alternative in the near term—not the least of which is that BHIT and BHIL intended the Transportation Facility to be an all-encompassing, and quite convenient, “ferry base” or that BHIT, BHIL, and the Town of Southport each direct ferry customers solely to use of the Parking Facilities. The practical realities of competing with a property owner who purchased the property in Southport long ago, and the natural disadvantages for future competitors—e.g., any competitive parking would be off-site, necessitating a shuttle service to and from the terminal, and at additional expense to the owner, and would be less convenient and therefore less desirable to potential passengers—make it unlikely that any near-term competition will arise in the market.¹⁹

¹⁷ As an example, several members of the public expressed concern during the Docket No. A-41, Sub 22 proceeding about Limited’s unilateral restriction on water taxi operations. *See, e.g.*, Consumer Statement of Christa Thomas, Docket No. A-41, Sub 22 (Nov. 3, 2022) (“Bald Head Limited recently banned the use of water taxis.”).

¹⁸ BHIT Initial Comments at 15.

¹⁹ Sub 21 Order at 19.

b. Legal Barriers are Also Present

Legal barriers also restrict competition with the BHI Transportation System. G.S. § 62-110 provides that no public utility may operate “without first obtaining from the Commission a certificate that public convenience and necessity *requires*, or will require, such construction, acquisition, or operation . . .” (emphasis added). Similarly, G.S. § 62-626(a), (e)(1) requires CPCN applicants seeking to “transport[] passengers . . . in intrastate commerce” to make an affirmative showing that “[t]hat public convenience and necessity require the proposed service *in addition to existing authorized transportation service* . . .” (emphasis added). As the BHI Transportation System has sufficient capacity to service current passenger volumes, it is unlikely that a potential competitor would be able to acquire a CPCN for the same route, creating a *de facto* monopoly.

c. Rate Regulation Is Needed To Protect The Public From Future Market Power Abuse

BHIT’s comments argue that no rate regulation is necessary for any of BHIT’s operations—ferry, parking, barge, and tram—because there have been no “substantiated allegations” that BHIL has abused its monopoly power in setting parking and barge rates (which prior to the Sub 21 Order did not undergo traditional ratemaking by the Commission). Even assuming, *arguendo*, that BHIT’s rates are currently reasonable (to be clear, the Village disagrees),²⁰ there is no assurance whatsoever that its monopoly power will not be abused in the future, absent rate regulation. The need for ratemaking oversight is particularly acute here, given the impending potential sale of the BHI Transportation

²⁰ See, e.g., Docket No. A-41, Sub 22, Tr. Vol. 4, p. 190 (Perry Dir.) (calculating a return on investment of 26.5% for BHIT’s consolidated transportation system, a profit “significantly above that which would typically be permitted in a rate proceeding . . .”).

System to SharpVue Capital, LLC (“SharpVue”), a private equity company with a fiduciary obligation to its investors to prioritize return on investment over public interest.²¹

In Docket No. A-41, Sub 22, substantial concerns were raised regarding the bona fides of the purported valuation of the proposed sale of the BHI Transportation System to SharpVue and the likelihood that SharpVue would seek to recover acquisition premium through ferry, parking and/or barge rates.²² If the BHI ferry or any of its ancillary services were not subject to rate regulation—as BHIT advocates in its initial comments—SharpVue could circumvent the Commission’s longstanding general prohibition against allowing acquisition premiums in rate base,²³ and recover its purchase price by extracting the value from consumers who must pay whatever ferry, parking, barge, and tram rates SharpVue demands in order to be able to ride the ferry to access their homes or jobs. Such a result could wreak havoc on those who are dependent on the Transportation System in their daily lives.

²¹ See Order Approving Application with Conditions, *In re Joint Application of Bald Head Island Transportation, Inc., Bald Head Island Limited LLC, 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*, Docket No. A-41, Sub 22 at 12 (Aug. 22, 2023) (the “Sub 22 Order”).

²² *Id.* Tr. Vol. 4, p. 77–78 (Gardner Dir.) (describing Local Government Commission’s concerns and also noting that the purchase price exceeds the tax valuation of the assets). See also Tr. Vol. 3, p. 122:13–15 (Roberts Confidential Cross). Similarly, SharpVue never secured an independent appraisal of the assets, instead relying on appraisals Limited procured and paid for. *Id.* Tr. Vol 4 (Exhibits), at Scott Gardner Exhibit 1, SharpVue Responses to the Village’s Second Set of Data Requests, DR 2-29.

²³ See Order, Docket No. W-1000, Sub 5, at 26–27 (Jan. 6, 2000) (“The adoption of such a general rule is clearly appropriate, for the routine inclusion of acquisition adjustments in rate base would tend to create an incentive for purchasers to pay a high price to acquire utility assets, confident in the knowledge that such payments would be recouped from ratepayers.”)

The Public Staff's investigation of ferry rates and tariffs filed in this docket clearly demonstrates the risk to the public associated with applying lesser levels of ratemaking regulation. As the Public Staff explained in its initial comments:

Prior to the Commission's Initiating Order in this docket, numerous Ferries failed to maintain current schedules of rates on file with the Commission as required by state law. As noted earlier, Ferries have also ceased operations or sold their operations without seeking approval from the Commission, in violation of Chapter 62, or notifying the Public Staff.²⁴

Specifically, under the "historical practice of applying a lower level of regulation for competitive leisure service",²⁵ five out of the seven leisure ferries regulated by the Commission filed rates in this docket higher than what is listed on the ferry's most recent approved tariff.²⁶ A sixth ferry failed to file any tariffs whatsoever and, according to its website, has permanently shut down its operations without any Commission review or approval.²⁷ In contrast, BHIT concedes that the BHI Transportation System's last general rate case was "extraordinarily contentious and expensive."²⁸ This is unsurprising, given the extreme public interest in being able to access their homes, businesses, and property.

Raising rates or ceasing operations altogether without any Commission oversight or approval may not be of great public concern when ferries are little more than "motorboats" offering leisure services, but is a far different matter when the transportation system is a monopoly utility that is the lifeblood of an island community and serves over

²⁴ Public Staff Initial Comments at 18.

²⁵ *See id.*

²⁶ *See id.* at 7–12.

²⁷ *See id.* at 8–9; <https://davisferry.com/> ("Just wanted to give an update on what's been going on with us at Davis Shore Ferry Service. . . . [O]ur family has decided its time to bring our long run to an end.").

²⁸ BHIT Initial Comments at 4.

three quarters of a million ratepayers every year. BHIT's contention that "[t]here is no policy or economic justification for rate regulation of passenger ferry transportation services" simply has no basis in fact or law.²⁹

III. BHIT's Comments Are Without Legal or Factual Basis and Are Directed at Issues Far Outside the Scope of this Inquiry.

The majority of BHIT's comments are directed toward rate regulation for ancillary services provided by ferry operators or their affiliates. Such services are not within the scope of this inquiry, which is primarily aimed at "whether lesser regulation of rates and charges is appropriate for passenger ferries, particularly those offering competitive leisure service"³⁰

Moreover, the Commission's *Order Ruling on Complaint and Request for Determination of Public Utility Status* in Docket No. A-41, Sub 21 (which asserted Commission regulatory jurisdiction and authority over the BHI Transportation System's parking and barge operations as ancillary services) expressly granted temporary authority for those services to continue operation pending further Order by the Commission:

Both the Public Staff and the Association argue that it is unnecessary for the Commission to approve or review the specific terms and conditions of the Parking Operations, so long as parking remains adequately available and reasonably priced. **Again, these issues are not appropriate for determination in this docket on the available evidence in this record.**³¹

In this proceeding as in A-41, Sub 21, these issues are not appropriate for determination on the available evidence in the record. This inquiry is not a general rate case, nor is it an investigation into whether or not current rates are appropriate for the BHI Transportation

²⁹ See *id.* at 10.

³⁰ Order, at 3.

³¹ Sub 21 Order at 29 (emphasis added).

System parking or barge operations. Nor has BHIT introduced evidence to support any findings specific to its parking or barge operations. Instead, BHIT advocates for the deregulation of its ancillary services based solely on the Commission's historical ratemaking approach applied to recreational tour boats. The mere reference to a dissimilar service offering offers no support for deviating from the regulation required by the Public Utilities Act and the compelling public interest at stake here.

* * *

In light of the foregoing, the Village reiterates that lesser ratemaking regulation for the BHI Transportation System is not appropriate nor permitted by applicable law. The Commission should protect the public from the consequences of BHIT's transportation monopoly through traditional ratemaking.

This 15th day of March, 2024.

By: /s/ Christopher B. Dodd
Marcus W. Trathen
N.C. State Bar No. No. 17621
Christopher B. Dodd
N.C. State Bar No. 59294
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
mtrathen@brookspierce.com
cdodd@brookspierce.com

Attorneys for Village of Bald Head Island

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Comments of the Village of Bald Head Island* 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.

Bald Head Island Transportation, Inc.
c/o GStyers@FoxRothschild.com
EHedrick@FoxRothschild.com

Barrier Island, Inc. dba Island Ferry
Adventures
207 N. 10th Street
Morehead City, NC 28557
pbarrow1@ec.rr.com

Cape Lookout Cabins & Camps Ferry
Service dba Cape Lookout Cabins
&Camps
P. O. BOX 251
124 GRADY DAVIS LANE
DAVIS, NC 28524
calocabinscampsinc@embarqmail.com

Crystal Blue Holding Co., LLC dba
Morehead City Ferry Service
519 Front Street
BEAUFORT, NC 28516
info@crystalcoastlady.com

Davis Shore Ferry Service, LLC
148 Willis Road
PO Box 45
Davis, NC 28524
davisferry@ec.rr.com

Island Express Ferry Service, LLC
519 Front Street
Beaufort, NC 28516
Georgeislandexpressferry@gmail.com

Morris Marina, Kabin Kamps & Ferry
Service, Inc.
1000 Morris Marina Road
Atlantic, NC 28511
kmartin31@ec.rr.com

Portsmouth Island Boat Tours
PO Box 375
Ocracoke, NC 27960

*North Carolina Utilities Commission
Public Staff*
430 North Salisbury Street
5th Floor, Room 5063
Raleigh, NC 27603-5918
chris.ayers@psncuc.nc.gov
lucy.edmondson@psncuc.nc.gov
James.bernier@psncuc.nc.gov
zeke.creech@psncuc.nc.gov

This the 15th day of March, 2024.

By: /s/ Christopher B. Dodd