

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. E-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Village of Bald Head Island,)	
Complainant,)	VILLAGE OF BALD HEAD ISLAND
)	AND BALD HEAD ISLAND CLUB
v.)	JOINT PROPOSED ORDER
)	DETERMINING REGULATORY
Bald Head Island Transportation, Inc.,)	STATUS OF UTILITY PROPERTY
Bald Head Island Limited, LLC,)	AND DIRECTING COMPLIANCE
Respondents,)	
and)	
SharpVue Capital, LLC,)	
Necessary Party.)	

HEARD: Monday, October 10, 2022, at 2:00 p.m., in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioners ToNola D. Brown-Bland (Presiding Commissioner), Daniel G. Clodfelter, Kimberly W. Duffley, Jeffrey A. Hughes, and Floyd B. McKissick, Jr.

APPEARANCES:

For Village of Bald Head Island:

Marcus W. Trathen, Craig D. Schauer, and Amanda Hawkins,
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, Suite 1700,
Wells Fargo Capitol Center, 150 Fayetteville Street, Raleigh, NC
27601

Jo Anne Sanford, Sanford Law Office, PLLC, Post Office Box 28085,
Raleigh, North Carolina 27611-8085

For Bald Head Island Transportation Inc. and Bald Head Island Limited,
LLC:

M. Gray Styers, Jr., and Brad Risinger, Fox Rothschild LLP, 434 Fayetteville Street, Suite 2800, Raleigh, North Carolina 27601-2943

For SharpVue Capital, LLC:

David P. Ferrell, Nexsen Pruet PLLC, 4141 Parklake Avenue, Suite 200, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Lucy E. Edmondson, Esq., Chief Counsel, Elizabeth D. Culpepper, William E.H. Creech, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699-4300

For Bald Head Island Club:

Daniel C. Higgins, Burns Day & Presnell, P.A., P.O. Box 10867, Raleigh, North Carolina 27605

For Bald Head Association:

Edward S. Finley Jr., 2024 White Oak Road, Raleigh, North Carolina 27608

BY THE COMMISSION: On February 16, 2022, the Village of Bald Head Island (Village) filed with the Commission a Complaint and Request for Determination of Public Utility Status (Complaint). The Village requested that the Commission issue an order determining that (1) the parking facilities at the Deep Point Marina terminal owned and operated by Bald Head Island Limited, LLC (BHIL) are an integral and essential part of the utility ferry services offered by Bald Head Island Transportation, Inc. (BHIT) and that the parking operation is subject to the Commission's regulatory authority, and (2) the barge service owned and operated by BHIL provides a common carrier and public utility service that also is subject to the Commission's regulatory authority.

On March 15, 2022, the Bald Head Island Club (Club) filed a Petition to Intervene in the proceeding. On March 18, 2022, the Commission issued an order granting the Club's petition.

On March 30, 2022, Respondents filed a Response, Motion to Dismiss, and Answer. On April 1, 2022, Respondents filed a motion that Commission take judicial notice, or in the alternative for leave to file supplemental exhibits to its answer.

On April 22, 2022, the Village filed a reply to Respondents' Response, Motion to Dismiss, and Answer.

On June 17, 2022, the Commission issued an order which, among other things, scheduled hearing on the Complaint for October 10, 2022, at 2:00 p.m., established a deadline for intervention, and established procedures for filing testimony and/or comments. In its order, the Commission further recognized the Public Staff's right to intervene in the proceeding pursuant to N.C. Gen. Stat. 62-15(d) and Commission Rule R1-19(e) and invited the Public Staff's participation by filing testimony and/or comments.

On July 8, 2022, the Village filed a motion to join SharpVue Capital, LLC (SharpVue) as a necessary party to the proceeding. In its motion, the Village explained that, on May 31, 2022, SharpVue announced that it had entered into an agreement with BHIT to purchase certain assets, including the ferry assets currently subject to the Commission's jurisdiction as well as the parking and barge assets in dispute in this proceeding. The Village contended that SharpVue's contractual interest in the assets in dispute in this proceeding made it a necessary party.

On July 11, 2022, Respondents filed a response to the Village's motion to join necessary party.

On July 13, 2022, the Village filed a reply to Respondents' response to motion to join necessary party.

On July 13, 2022, the Bald Head Association (Association) filed a Motion to Intervene in the proceeding. On that same date, the Association also filed a letter amending its motion. On July 20, 2022, the Commission issued an order, treating the motion as a petition, and granting the Association's petition.

On August 1, 2022, the Commission issued an Order Allowing Complainant's Motion to Join Necessary Party in which it joined SharpVue as a necessary party to the proceeding and required service of the order on SharpVue's registered agent.

Also on August 1, 2022, Bald Head Island residents Robert T. Blau and J. Paul Carey submitted a letter (filed in Docket No. A-41, Sub 21CS) on behalf of over 400 Bald Head Island property owners supporting the assertion of regulatory authority over the parking and barge assets and addressing several related matters and concerns.

On August 9, 2022, the Village filed the testimony and exhibits of Scott T. Gardner, Dr. Julius A. Wright, Kevin W. O'Donnell, Brandy Munroe, David Cox, George Corvin, and Stephen Boyett, which included matters deemed confidential.

On August 16, 2022, the Commission issued an Order on Respondents' Motion to Take Judicial Notice and Motion to Dismiss, which, among other things, took judicial notice of Commission's Order Granting Partial Rate Increase and Requiring Notice, Docket Number A-41, Sub 7 (Dec. 17, 201) (2010 Rate Case Order) and denied Respondents' motion to dismiss.

On September 8, 2022, the Public Staff filed initial comments, the Club filed the direct testimony of David Sawyer, and the Association filed the direct testimony and exhibits of Alan Briggs.

Also on September 8, 2022, the Respondents filed the direct testimony and exhibits of James Leonard, Shirley A. Mayfield, and James W. Fulton, Jr., which included matters deemed confidential. On September 9, 2022, Respondents filed confidential exhibits to the confidential direct testimony of witness Leonard, as well as witness Leonard's public direct testimony and exhibits. On September 9, 2022, Respondents also filed the direct testimony and exhibits of Charles A. Paul.

On September 14, 2022, Island residents Blau and Carey filed a joint consumer statement of position.

On September 28, 2022, the Association filed reply testimony of witness Briggs, SharpVue filed rebuttal testimony of witness Lee H. Roberts, and the Village filed rebuttal testimony and exhibits of witnesses O'Donnell, Wright, and Gardner. Also on September 28th, the Village filed reply comments to Public Staff's initial comments.

On September 29, 2022, Respondents filed a motion in limine seeking to exclude from the hearing in this matter certain evidence specified in paragraph 20 of the motion generally relating to the calculation of rate base, rate design, asset valuation, or rates of return for the ferry/tram, parking and barge operations.

On September 30, 2022, the Village filed a Verified Motion for Preliminary Injunction Prohibiting Sale of Assets Prior to Determination by Commission. In this motion, the Village sought issuance temporary and preliminary orders enjoining BHIL and SharpVue from consummating the sale of the parking and barge assets prior to the issuance of a decision by the Commission's adjudication of the issues in this proceeding.

On October 3, 2022, Island residents Blau and Carey filed a revised joint consumer statement of position.

On October 4, 2022, the Village filed an opposition to Respondents' motion in limine. Also on October 4, 2022, Respondents and SharpVue filed a joint response in opposition to the Village's motion for preliminary injunction.

On October 6, 2022, the Village filed a reply to Respondents' and SharpVue's response to motion for preliminary injunction.

On October 7, 2022, the Commission issued an order denying Respondents' motion in limine.

The Village's motion for preliminary injunction was heard on October 10, 2022, prior to the hearing in this matter.

At the hearing, Respondents released from prior claims of confidentiality various matters, including (1) historic financial performance information of BHIL, BHIT, and its parking and barge divisions, (2) information regarding the parking facilities, including parking information, number of parking spaces, and maps of the parking area.

The hearing was held as scheduled.

On October 11, 2022, Respondents and SharpVue filed "Stipulation Commitments" setting forth a list of specific commitments made by Respondents and SharpVue, including commitments (1) not to consummate any buy or sell of the parking and barge assets on or before November 18, 2022; (2) to provide the Commission at least 10-days notice prior to any such purchase or sale, (3) to provide the Commission at least 10-days notice prior to the execution of any waiver, modification or amendment of the asset purchase agreement ("APA") between the parties relating to the parking and barge assets, and (4) to file a copy of any tolling agreement executed by the parties tolling or extending any date under the APA, including without limitation, the "Outside Date."

On October 17, 2022, the Commission issued an Order Holding Motion for Preliminary Injunction in Abeyance. In that order, the Commission referenced the sworn commitments made by witnesses Roberts and Paul on behalf of SharpVue and BHIL as well as the "Stipulation Commitments" filed on October 11, 2022. Based on these representations and commitments, the Commission found good cause to hold the Motion for Preliminary Injunction in Abeyance.

On November 8, 2022, the parties filed post-hearing briefs and proposed orders.

Based upon consideration of the pleadings, testimony, and exhibits received into evidence at the hearings, and the record as a whole, the Commission makes the following:

FINDINGS OF FACT

The Parties

1. The Village of Bald Head Island is a municipal corporation with all the powers, duties and rights conferred by its charter and the laws of the State of North Carolina. The Village brings this action in its governmental capacity as a regular user of the ferry, parking and barge in connection with the pursuit of its governmental operations and on behalf of the residents, property owners, businesses, and visitors who rely on the continued availability of the transportation services to the Island on reasonable terms and conditions.

2. BHIT is a North Carolina public utility and is subject to the jurisdiction of the Commission pursuant to N.C.G.S. § 62-3(23)a.4. See Order Granting Common Carrier Authority, Docket No. A-41, Sub 0 (Jan. 6, 1995). Under color of its certificate, BHIT is engaged in the business of transporting passengers and their personal effects by ferry between the Deep Point terminal on the mainland and Bald Head Island and by tram from the Bald Head Island terminal to and from their destinations on the island.

3. BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. BHIL is owned by Mitchell Island Investments, Inc., which is owned by the Estate of Cynthia and George Mitchell. George Mitchell, the original developer of the Island, died in 2013, and his Estate is seeking to divest itself of various holdings on the Island, including the transportation system assets.

4. BHIL has owned various properties and businesses on Bald Head Island, in the City of Southport, and in Brunswick County and has been engaged in development activity in those locations for over thirty (35) years.

5. Among other assets, BHIL owns and operates parking lot facilities at the Deep Point Marina terminal for the use of ferry passengers (the “parking facilities”). BHIL also owns a tugboat and barge (collectively, the “barge”) used to transport commercial and household materials, goods, and supplies, as well as contractors, vendors, and other personnel together with their commercial vehicles, to and from the Island.

6. SharpVue is a North Carolina based private equity firm. On May 31, 2022, SharpVue and BHIL announced that they had entered into an asset purchase agreement whereby SharpVue will acquire from BHIL various assets, including the parking and barge assets at issue in this proceeding as well as the ferry and tram assets that are presently subject to the Commission's jurisdiction.

The Island and Transportation System

7. Bald Head Island (“BHI” or the “Island”) is a unique natural resource of the state due to the confluence of several attributes: its relative accessibility by 20-minute ferry ride from the mainland, favorable climate as the southernmost location in the state, pristine beaches, protected maritime forest and native wildlife, relaxed and automobile free island environment, historic attractions, sustainability and research programs at the Bald Head Island Conservancy, and outdoor recreational activities.

8. The Island is open to the public, and hundreds of thousands of persons travel to the Island each year.

9. The Island is not yet fully developed, so the demand for transportation services is expected to grow over time.

10. Visitors to the Island include “day-trippers” who come to the Island for a day to enjoy Bald Head’s amenities, families on vacation, property owners, persons who are employed by the Village or private businesses located on the Island, and contractors and tradespersons performing services on the Island.

11. Workers and contractors, who purchase “employee” or “contractor” ferry tickets, comprise nearly percent of the ferry’s annual passengers.

12. The only means of public access to the Island is via the ferry and the barge. The ferry is used to transport persons, their baggage, and small personal items to the Island. The barge is used to transport everything else to the Island—including household items too large to bring by hand on the ferry, food, retail merchandise, construction materials and supplies, tradesmen vehicles, and equipment.

13. Overwhelming public sentiment from Island stakeholders strongly emphasizes the importance of a unified transportation system serving the Island and the need for regulatory oversight of all portions of the system, including parking and the barge.

Availability of Declaratory Relief

14. This Complaint is properly before the Commission.

15. The Commission has the authority to make a declaratory ruling in this matter pursuant to N.C.G.S. § 62-60 and the Declaratory Judgment Act, and that the purpose of the Act is served by the Commission’s doing so.

16. Alternatively, the Commission has the authority under N.C.G.S. § 62-73 to adjudicate complaints regarding any act or thing done or omitted to be done by any public utility and finds that the Village's complaint against BHIT and BHIL is properly before the Commission.

Findings Relevant to Parking

17. The Deep Point parking facilities are necessary to the operation of the ferry utility service.

18. The parking facilities at Deep Point provide the only means of public parking access to the Deep Point ferry terminal. There is no presently existing alternative or substitutable parking facility or service available to the public. There is no practicable future alternative to the existing parking facilities at Deep Point that has been identified.

19. The parking facilities are owned and operated by BHIL. Access roads are owned and controlled by BHIL.

20. BHIT, the owner of the ferry utility, does not possess a leasehold or other binding legal right or interest to use the parking facilities.

21. The parking service is a highly profitable component of the overall transportation system service to serving the Island.

22. A designated amount of revenues are presently attributed from parking operations to the ferry operations and have been for the past twelve years under the Commission's 2010 Rate Case Order.

23. Various determinations by the Commission in the 2010 Rate Case are consistent with a finding asserting jurisdiction over the parking facilities in the present proceeding.

- a. BHIL was determined to be a "public utility" as the parent entity of BHIT whose operations have an impact on utility rates or services.
- b. The parking revenues were attributed to the ferry operation. The calculation of the attributed revenues was based on an analysis of the parking being subject to regulation, including valuation of the property at the original cost for rate base purposes.
- c. The Island terminal lease between BHIL and BHIT was reclassified to a rate base item at its original cost, which reflects that the terminal was ancillary to the ferry service.

- d. The gain on the sale of the Indigo Plantation terminal lease was reflected in the prior ferry rate case as a reduction in expenses in the ratepayer's favor, despite the fact that the terminal was owned by BHIL and not BHIT, reflecting a view that the terminal property was considered to be a utility-related asset.
- e. BHIT and BHIL also agreed that, consistent with codes of conduct governing transactions between other utilities regulated by the Commission and their unregulated affiliates, charges to the Company from affiliates will be priced at the lower of cost or fair market value and that charges by the Company to affiliates will be priced at the higher of cost or fair market value.
- f. BHIT and BHIL agreed to provide 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 90 days prior to the scheduled closing date for the sale or lease.

24. The findings of the Commission in the 2010 Rate Case Order are not binding in this proceeding, as noted by the order itself. However, while those findings are not binding on the Commission, the findings can be considered as relevant evidence in this proceeding.

25. The Deep Point parking facilities are an ancillary service or facility to the ferry utility. Alternatively, the parking facilities can be viewed as an integral component of the ferry service and the overall transportation system operations.

26. As a parent entity whose operations impact the rates or services of the regulated utility, BHIL is subject to the jurisdiction of the Commission as a public utility.

27. The Commission's regulation of the parking facilities is in furtherance of the public interest.

Findings Relevant to Barge

28. BHIL holds out the barge service to the general public within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

29. The barge is used to transport household goods to the Island within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

30. The barge is used to transport persons to the Island within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

31. The barge service is available in exchange for compensation within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

32. The barge service is a common carrier service under N.C.G.S. § 62-3(6).

33. The barge service is a public utility service under N.C.G.S. § 62-3(23)(a)(4).

34. The Commission's regulation of the barge service is in furtherance of the public interest. Specifically, the Commission finds that (1) the barge is an essential service, (2) the barge is a *de facto* monopoly, (3) there are no practical alternatives available, and (4) the public has repeatedly called for regulatory oversight since at least 1998.

35. Alternatively, the barge service is "ancillary" to the ferry utility service.

36. The barge service is an integral component of the overall transportation system operation serving the Island.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 1

The evidence supporting these findings and conclusions is contained in the testimony of Village witness Gardner and the record before the Commission.

The parties do not dispute that the Village is a municipal corporation. *Compare* Compl. ¶ 1, with Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (Mar. 30, 2022), at 25 ¶ 1. And as Village witness Gardner, a member of the Village's council, testified, the Village initiated this action given "the island's dependency on the transportation system," and on behalf of its citizens, residents, property owners, visitors, and businesses. Tr. Vol. 2, 29-30.

The Village is acting in a governmental capacity by bringing this action. In determining whether a municipality is acting in its governmental or proprietary role, 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.

A local government has the inherent governmental authority to initiate lawsuits on behalf of its citizens, N.C.G.S. § 160A-11; *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 a lawsuit in pursuit of fulfilling its duties). And this action concerns “the rates, services and operations of public utilities,” which are matters of “public interest.” N.C. Gen. Stat. § 62-2(a).

Based on consideration of the foregoing, the Commission concludes that because this “undertaking is one in which only a governmental agency could engage,” the Village has acted in a governmental capacity by bringing this action on behalf of its residents, property owners, businesses, and visitors seeking a determination regarding the regulation of the parking facilities and barge.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 2-6

The evidence supporting these findings and conclusions is contained in the testimony of BHIT/BHIL witness Paul, and SharpVue Witness Roberts, exhibits to the testimony of Village witness Wright, as well as the record before the Commission.

The parties do not dispute that BHIT is a North Carolina public utility subject to the Commission’s jurisdiction. See Order Granting Common Carrier Authority, Docket No. A-41, Sub 0 (Jan. 6, 1995); Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (Mar. 30, 2022), at 4-5. As BHIT/BHIL witness Paul testified, “BHIT owns four passenger ferries that transport passengers between [the Deepo Point terminal located in] Southport and Bald Head Island. BHIT also owns 23 tram units that transport passengers on the Island to and from the Island Terminal and their final destination.” Tr. Vol. 5, 96.

The parties also do not dispute that BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. Compare Compl. ¶ 4, with Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (Mar. 30, 2022), at 26 ¶ 4. As BHIT/BHIL witness Paul testified, after George Mitchell, the original developer of the land, died in 2013, his Estate has controlled BHIL’s parent company. Tr. Vol. 5, 95-97; see also Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (Mar. 30, 2022), at 4, 26 ¶¶ 5.

During Mr. Mitchell’s ownership, “BHIL has owned various properties and businesses on Bald Head Island, in the City of Southport, and in Brunswick County and has been engaged in development activity in those locations for over thirty (35) years.” Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (Mar. 30, 2022), at ¶ 5. As BHIT/BHIL witness Paul testified, BHIL owns the ferry terminals in Southport and on the Island, as well as the parking facilities at the ferry terminal in Southport (also known as the “Deep Point Terminal.”) Tr. Vol. 5, 96, 100.

Mr. Paul further testified that BHIL also operates a barge and tugboat, which are used to transport vehicles, as well as contractors, vendors and other personnel to and from the Island. *Id.* at 106, 108, 110. The barge's logs make clear that commercial and household materials goods, and supplies, such as furniture, construction materials, appliances, and food, are transported on the barge. See Exhibit JAW-12.

As Mr. Paul testified, the Mitchell Estate now seeks to divest itself of the transportation system assets. Tr. Vol. 5, 97, 113.

The parties do not dispute that SharpVue is a private equity firm. Tr. Vol. 3, 2 (testimony of Lee Roberts that SharpVue is an "investment management firm" founded in Raleigh, North Carolina). As BHIT/BHIL witness Paul testified, on May 17, 2022, BHIL and BHIL entered into an Asset Purchase Agreement with SharpVue to sell the transportation system, including the parking and barge system. Tr. Vol. 5, 97-98; see also Exhibit 12 to Direct Testimony of C. Paul (May 31, 2022 press release announcing signing of asset purchase agreement).

Based on consideration of the foregoing, the Commission concludes that BHIT is a North Carolina public utility subject to the Commission's jurisdiction; BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina; and SharpVue is a North Carolina-based private equity firm. The Commission further concludes that BHIT owns the ferry and tram facilities, and that BHIL owns the parking facilities and barge. The Commission further concludes that BHIT and BHIL have entered into an agreement with SharpVue to transfer the transportation system to SharpVue.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 7-13

The evidence supporting these findings and conclusions is contained in Village witnesses Gardner, Corvin, Munroe, Cox, Boyett, and Wright, BHA witness Briggs, BHIT/BHIL witness Paul

Numerous witnesses testified about the Island's unique environment and location. Tr. Vol. 1, 112 (testimony of Village witness Corvin that Island is a "very unique place, not only to North Carolina, but to the country. What Bald Head provides is important from a conservation, nature, and educational standpoint."); *id.* at 99-100 (testimony of Village witness Munroe describing Island's "2000 acres of marches, 7 miles of undevelopable beaches, and 200 acres of Virgin Maritime forest" which attract "visitors from around the world"); *id.* at 127 (testimony of Village witness Cox describing visitors who come to the Island "for a day to tour Old Baldy Lighthouse or the [environmental] Conservancy"); *id.* at 145 (testimony of Village witness Boyett that "I believe most day trippers visit the island to experience its reputation for being a unique car-free sanctuary and preserve. Many day trippers also come for shopping and dining, as well as to visit the Bald Head

Conservancy . . . and Old Baldy Lighthouse.”). As Village witness Gardner testified, the Island “is the most unique of the barrier islands of North Carolina in that you can only get there by ferry, can only travel around the island by golf cart or bicycle, has the oldest lighthouse in North Carolina, and has a state-owned Maritime Forest making up a sizeable portion of the land.” Tr. Vol. 2, 31.

The Island is open to the public, and hundreds of thousands of people travel to the Island each year. *Id.* at 28. Because of these unique features, the Island “is a highly sought after destination for vacationers, for those who wish to explore the island for a day (‘day trippers’), and for those who seek to make the island a home.” *Id.* at 31. In addition, persons employed by the Village or private businesses located on the Island, contractors, and tradespeople performing services on the Island travel to the Island daily; purchasers of “contractor” and “employee” ferry tickets comprise nearly 40% of the Island’s annual passengers. Tr. Vol. 3, 17-18 (direct testimony of Village witness Wright); see *also* Exhibit JAW-11. As the Island continues to develop, the number of transportation users is expected to grow. Tr. Vol. 5, 196 (rebuttal testimony of Village witness Gardner).

As Village witness Gardner testified, because Bald Head is a bridgeless island, the only means of access to the Island is via the ferry. Tr. Vol. 2, 28; see *also* Tr. Vol. 1, 113 (testimony of Village witness Corvin that “[t]he ferry is the only means by which the public can reach Bald Head Island”); *id.* at 100 (testimony of Village witness Munroe that “almost all members of the public reach Bald Head Island by using its ferry system”); *id.* at 126 (testimony of Village witness Cox that “[t]he ferry is the only way the public can reach the island”); *id.* at 145 (testimony of Village witness Boyett that “[t]he only way to reach the island is by boat. For the public, that means taking the passenger ferry operated by Bald Head Island Transportation, Inc.”).

Passengers use the ferry to transport their belongings, such as luggage and small personal items. See Tr. Vol. 3, 31-32 (testimony of Village witness Wright describing passenger reliance on ferry to transport luggage). Larger items, such as furniture, must be transported via the barge. *Id.* at 52 (testimony of Village witness Wright describing BHIL’s website, which advertises the barge as the only means for transporting furniture). The barge is also the exclusive means by which food and supplies for restaurants, clubs, stores, as well as construction materials, appliances, furnishing, fuel, and landscape materials are transported to the Island. *Id.* at 54; see *also* Exhibit JAW-12 (barge logs).

The public overwhelmingly supports regulation of a unified transportation system to serve the Island. This support has come from property owners, Island business owners, and residents. *E.g.*, Tr. Vol. 1, 101 (testimony of Village witness Munroe, a local business owner, expressing concerns about lack of regulation over ferry system); *id.* at 115 (testimony of Village witness Corvin, an Island property owner, that the ferry system should be regulated); Tr. Vol. 2, 30 (testimony of

Village witness Gardner describing Village citizens' concerns over lack of regulation).

As evidence of the overwhelming public support in favor of regulation, the Bald Head Association, an association that includes nearly every homeowner and property owner on the Island, conducted a survey of its members. Of over 500 respondents, 71.5% said that the Commission should regulate parking and the barge. Another 13% said they didn't have an opinion or did not have enough information. See Tr. Vol 5, 187 (rebuttal testimony of Village witness Gardner summarizing results of the survey); see *also* BHA Exhibit 1 (survey results). Given its members' overwhelming support, the BHA passed a resolution to support regulation of the ferry system. Tr. Vol. 3, 184 (testimony of BHA witness Briggs).

Likewise, the Bald Head Island Club, a member-owned club which has over 2,000 member families across its clubs and provides golf courses, tennis courts, and related recreational and social facilities to its members, supports regulation. Tr. Vol. 3, 205 (testimony of Bald Head Island Club witness Sawyer describing club functions); *id.* at 207 (describing Club's support of regulation).

These concerns of property owners were also express in a Consumer Statement of Position filed with the Commission. See Tr. Vol. 2 (Exhibits), STG-1 (Consumer Statement of Position (Aug. 1, 2022)). This Consumer Statement of Position was signed by over 400 BHI property owners, and included numerous statements by the signatories regarding their concerns of the regulation of the parking and barge assets. *Id.*

Based on consideration of the foregoing, the Commission concludes that the Island is accessible only by ferry and, therefore, the ferry system is integral to the Island. The Commission further concludes that the Island is open to the public and hundreds of thousands of people use the ferry system each year, including Island residents and property owners, as well as employees, contractors, workers, vacationers, and day trippers. The Commission further concludes that overwhelming public sentiment favors regulation of a unified transportation system.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 14-16

The evidence supporting these findings and conclusions is contained in record before the Commission.

As previously decided by this Commission, this Complaint is properly before the Commission. See Order on Respondents' Motion to Take Judicial Notice and Motion to Dismiss

First, the Commission has the authority to make a declaratory ruling in this matter pursuant to N.C.G.S. § 62-60 and the Declaratory Judgment Act. Section

62-60 provides that “the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.” N.C.G.S. § 62-60. Section 1-253 empowers courts of general jurisdiction “to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” *Id.* § 1-253.

Here, the Village invoked the Commission’s declaratory powers as a basis for jurisdiction over the Complaint. See Cmplt. ¶ 9. The Village asked the Commission to (1) “declare that the Deep Point Parking Facilities constitute public utility property subject to the Commission’s authority,” (2) “declare that BHIL, to the extent of its ownership and operation of the Deep Point Parking Facilities, is a public utility subject to the regulatory authority of the Commission as an owner and operator of facilities used to provide, and an essential component of providing, utility service,” (3) “declare that BHIL is a public utility under Chapter 62 because BHIL’s ownership of the Deep Point Parking Facilities”, and (4) “declare that the Barge service owned by BHIL is a common carrier activity under Chapter 62[.]” *Id.* ¶¶ 54, 55, 59, 66.

VBHI presents a justiciable issue under the Declaratory Judgment Act, whether the parking facilities and the barge are subject to the Commission’s regulatory authority. There is nothing anticipatory or hypothetical about the question presented. The parking facilities and the barge are currently owned and operated by BHIL, having been so for many years. Therefore, the Commission has jurisdiction over the Complaint based on the Village’s request for a declaratory ruling. See, e.g., Order Issuing Declaratory Ruling, *In re Pub. Util. Status of Am. Homes 4 Rent*, Docket No. M-100, Sub 144 (Oct. 18, 2016) (seeking declaration of regulatory status applicable to provision of water-sewer service).

Second, the Commission has the authority under Section 62-73 to adjudicate complaints regarding any act or thing done or omitted to be done by any public utility. Section 62-73 provides that “[c]omplaints may be made . . . by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility[.]” N.C.G.S. § 62-73. “If the complaint alleges violations of public utility rates, tariffs, or practices, the Commission has jurisdiction.” Order on Jurisdiction and Dismissal of Complaint, *In re City of Greensboro v. Duke Energy Carolinas, LLC*, Docket No. E-7, Sub 1038, at 13 (Mar. 5, 2014).

The Complaint asserts acts or omissions by BHIT that contravene Chapter 62. The Complaint alleges that BHIT is, in essence, operating an integral part of its ferry service outside of the Commission’s supervision. In addition, the Complaint asserts acts or omissions by BHIL that contravene the requirements of Chapter 62. Stated simply, the Village’s Complaint asserts that BHIT and BHIL are public utilities under Chapter 62 that are offering service without complying with the applicable regulatory requirements. As explained below, the record supports the allegations in the Complaint.

The Commission has jurisdiction and authority to address whether an operator or unregulated entity is providing utility service that is subject to regulation by the Commission, even when the question is raised as the subject of a complaint against a currently unregulated entity. See *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 326 N.C. 522, 391 S.E.2d 487 (1990); *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983).

The status of an entity as a public utility . . . is determined . . . according to whether it is, in fact, operating a business defined by the Legislature as a public utility. If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission notwithstanding the fact that it has failed to comply with [N.C.]G.S. [§] 62-110 before beginning its operation.

State ex rel. Utils. Comm'n v. Mackie, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (1986), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987). The Complaint clearly alleges that BHIL's parking and barge assets are operating ancillary to, or as itself, a public utility without being regulated — in other words, the act or omission that VBHI pleads is either BHIL's or BHIT's failure to submit these assets to regulation. The pleading therefore falls within the scope of N.C.G.S. § 62-73.

Based on consideration of the foregoing, the Commission concludes that the Commission has the authority to make a declaratory ruling in this matter pursuant to N.C.G.S. § 62-60 and the Declaratory Judgment Act, and that the purpose of the Act is served by the Commission's doing so. Alternatively, the Commission has the authority under N.C.G.S. § 62-73 to adjudicate complaints regarding any act or thing done or omitted to be done by any public utility and finds that the Village's complaint against BHIT and BHIL is properly before the Commission.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 17

The evidence supporting this finding and conclusion is contained in the testimony and exhibits of Village Witnesses Gardner and Wright, Respondents Witness Leonard, and Club Witness Sawyer, as well as the Public Staff's Comments.

The Commission finds that the importance of the parking facilities to the ferry operation is largely uncontested by the parties and supported by fulsome evidence from numerous witnesses and members of the public.

The evidence shows that the parking facilities are critical because nearly every ferry passenger arrives at the ferry terminal by car, oftentimes with extensive luggage and vacation supplies. See Tr. Vol. 3 (Exhibits), Exhibit JAW-9 (Mercator Report finding that "[n]early all ferry passengers travel to and from the Deep Point

Terminal (at Southport, on the North Carolina Mainland) by personal vehicle and park their vehicles in the BHI Limited parking facility.”). Village Witness Gardner testified that he was “not aware of anybody who has used the passenger ferry to get to Bald Head without having to park a vehicle at the Deep Point parking facilities.” Tr. Vol. 2, 37. Club Witness Sawyer, who is CEO of the Bald Head Island Club, testified that “[t]he parking facilities at the Deep Point ferry landing are [] an indispensable, integral, and essential part of BHIT’s ferry operation.” Tr. Vol. 3, 206.

BHIL, BHIT, and SharpVue provided evidence corroborating the indispensable nature of the parking facilities. Respondents’ witness Leonard testified that “reasonable access” to parking is “critical for ferry riders.” Tr. Vol. 4, 75, 92. The Public Staff recognized in its Initial Comments that “availability of parking is critical for most Bald Head Island ferry passengers as it would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates.” Public Staff Initial Comments, at 5.

Based on consideration of the foregoing, as well as the weight of the entirety of the evidence, the Commission concludes that the Deep Point parking facilities are necessary to the operation of the ferry utility service.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 18

The evidence supporting these findings and conclusions is contained in the testimony and exhibits of Village Witnesses Gardner, Cox, Boyette, Corvin, Munroe, and Wright, Respondents’ witness Leonard, and SharpVue witness Roberts.

The Commission finds that the lack of any existing alternative to the Deep Point parking facilities for the public at large is largely uncontested by the parties and supported by fulsome evidence from numerous witnesses and members of the public.

Ferry passengers overwhelmingly travel to the Deep Point ferry terminal by car and park at the terminal because they do not have any other option. There is no public transportation to the terminal. See Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (March 30, 2022), at 30 (¶ 22) (“It is admitted that Respondents know of no other regular bus services from another public parking lot to and from the Deep Point Terminal operating at this time.”). “No parking” signs line the road leading up to the terminal. Tr. Vol. 5, 134. The Deep Point terminal is located in a remote area, with no other parking facilities nearby. Tr. Vol. 1, 114.

All ferry passengers, as a matter of course, exclusively use the parking facilities at the terminal. Village Witness Cox testified, “I am not aware of anybody who has taken the ferry and has parked anywhere other than the parking facilities

at the terminal. . . . From my perspective, to ride the ferry, you have to pay for a ferry ticket plus you have to pay for parking. There is no other way.” Tr. Vol. 1, 129. Village Witness Munroe testified, “I think that 99% of ferry passengers use the parking facility. Maybe there are a few people who come to the ferry by car service from the airport.” Tr. Vol. 1, 102. Village Witness Corvin testified, “The ferry landing at Deep Point Marina is located in a relatively isolated/remote area. There is no other access to parking in that area and no other reliable and readily accessible way to get to the ferry other than driving to the marina.” Tr. Vol. 1, 114.

Based on the record before the Commission, there was no substantive dispute that there is no existing alternative to the parking facilities for public access to the Deep Point ferry terminal. The Public Staff, in its Initial Comments, agrees that there “is no reasonable alternative at this time” to the parking offered by BHIL at the ferry terminal. Public Staff Initial Comments, at 7. Respondents’ witness Paul likewise acknowledged that “there are not any other, currently existing, permanent parking facilities for ferry passengers.” Tr. Vol. 5, 119. Similarly, SharpVue’s Witness Roberts was unable to identify any existing alternatives to the parking facilities. Tr. Vol. 4, 21.

The Commission agrees with the evidence in the record indicating that parking, by itself, is not inherently a monopoly service and that, theoretically, it is possible that a competitive alternative might emerge in the future to serve the Deep Point ferry. However, the Commission further agrees with evidence suggesting that, under the circumstances presently existing, there are a number of practical impediments to the development of such an alternative which create doubt and uncertainty regarding this possibility. For example, any competitive parking would be off-site, necessitating a shuttle service to and from the terminal. The shuttle service would entail significant additional expense to the business, especially considering the seasonal nature of the traffic coupled with the steady demand for services throughout the day, with hourly ferry runs, even when boats are not full. Such an alternative would, by necessity, also be less convenient, and therefore less desirable to, passengers.

Further, although Respondents identified hypothetical alternatives to the parking facilities, the Commission finds that these purported alternatives, at the present, do not rise above the level of speculation and are cannot, for purposes of this decision, be assumed to be viable alternatives for the existing parking facilities.

- Undeveloped lot across street from Deep Point. Respondents suggested an undeveloped lot across the street from the terminal could one day become a parking lot. Tr. Vol. 5, 119. This lot, however, is currently under contract for sale with an unknown buyer and there is no evidence that the buyer is willing or able to develop the lot into a competing parking facility. See Tr. Vol. 3, 33, 137-38; see Tr. Vol. 3 (Exhibits), Exhibit JAW-5 Vol. 3.

- Indigo Plantation. Respondents' suggested that Indigo Plantation could be a parking alternative to Deep Point. See Tr. Vol. 5, 100; Tr. Vol. 4, 65. This is not an alternative because BHIL is developing the property into condominiums. Tr. Vol. 5, 126-27. Even if it were, Indigo Plantation is nearly four miles away from the terminal. See Tr. Vol. 2, 126. It is not clear to the Commission that such remote parking could serve as an adequate substitute for the existing parking facilities.
- Parking in Southport. Testimony showed that the Town of Southport lacked sufficient public parking capacity to provide alternative parking. Southport does not have any large public parking facilities. Tr. Vol. 1, 129, 137-38, 148, 156; Tr. Vol. 2, 46, 141-142 ; Tr. Vol. 3, p. 209. Although there are on-street parking spaces available in front of stores in downtown Southport, these parking spaces are more than a mile from the terminal, are not intended to be long-term parking, and exist in limited supply. Tr. Vol. 1, 137-38. Finally, testimony showed that the nearest parking lot to the ferry terminal was at a Circle K convenience store location that was over a mile from the terminal and posed the risk of "your car be[ing] towed by the time you return." Tr. Vol. 1, 129.

The Commission also takes note of evidence presented that the Deep Point parking facilities currently, as currently operated, bear the characteristics of a *de facto* monopoly. See, e.g., Tr. Vol. 3, 0-37. **[BEGIN AEO CONFIDENTIAL]**



[END AEO CONFIDENTIAL] which reflects the reality that property owners on the Island are, by and large, captive to the existing parking facilities provided by BHIL. As a general proposition, the Commission takes notice that the General Assembly empowered the Commission to supervise utilities 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) (citation omitted).

The Commission further acknowledges the evidence presented by both Respondents and the Village of other ferries around the country and parking offered in connection with those ferries. The Commission finds limited utility in this evidence. As a starting point, it is apparent that there are multiple factual differences in the examples presented by Respondents' witness Leonard and the BHI facts. Unlike most of the examples cited by Mr. Leonard, there are no alternative parking lots or garages near Deep Point. See Tr. Vol. 5, 231; Tr. Vol. 5, 227-33; Tr. Vol. 5 (Exhibits), Wright Rebuttal Exhibit JAW-7; see also Tr. Vol. 4, 100-11; Tr. Vol 4 (Exhibits), Village Leonard Cross Exhibit 1. Also unlike other identified ferries, there is no public transportation to the Deep Point ferry terminal:

i.e., there is no bus or train or other public transportation runs to the Deep Point ferry terminal. See Tr. Vol. 3, 31; see also Response, Motion to Dismiss, and Answer of BHIL and BHIT, Docket No. A-41, Sub 21 (March 30, 2022), at 30 (¶ 22) (“It is admitted that Respondents know of no other regular bus services from another public parking lot to and from the Deep Point Terminal operating at this time.”). Likewise, unlike many of the examples cited by Mr. Leonard, ferry riders cannot bring their cars to the Island—they are thus forced to leave them at the parking facilities—nor is there an airport on or road-access to the Island.

Additionally, there has been no demonstration that any of the examples cited by Mr. Leonard arise in regulatory settings comparable to that presented here. Given this, the Commission can only conclude, based on careful review of all the evidence presented, that Respondents have not demonstrated the existence of any directly comparable ferry system, with the factual and regulatory characteristics presented here.

Based on consideration of the foregoing, the Commission concludes that the parking facilities at Deep Point provide the only means of public parking access to the Deep Point ferry terminal. There is no presently existing alternative or substitutable parking facility or service available to the public.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 19-20

The evidence supporting these findings and conclusions is contained in testimony and exhibits of Village witness Wright, Respondents’ witness Paul, and SharpVue witness Roberts.

The ownership and operation of the parking facilities is not in dispute: the Deep Point parking operation is owned and operated by BHIL. Further, undisputed evidence shows that the access roads to the Deep Point terminal are private and owned by BHIL. Tr. Vol. 4, 28; Tr. Vol. 5, 127; see also Tr. Vol. 3, 139-40. Finally, the Commission notes the uncontradicted evidence showing that BHIT holds no leasehold or other interest with respect to the parking facilities. Tr. Vol. 3, 20; see generally Docket No. A-41, Sub 4.

However, the Commission notes that, notwithstanding the agreement as to ownership, there is a dispute as to whether the public has been affirmatively granted the unfettered right to use the access roads to the Deep Point ferry terminal, irrespective of the wishes of the owner of those roads. Respondents’ witnesses testified at the hearing that the public has been granted access rights by virtue of a “Declaration of Easements” encumbering the Deep Point property. Tr. Vol. 4, 93; Tr. Vol. 5, 165; see Tr. Vol. 5 (Exhibits), CAP Redirect Ex. 1-A. In its Post-Hearing Brief, the Village disputes this testimony, asserting that the Declaration of Easements does not grant any public right of access.

Having reviewed the evidence presented by the parties and evaluated the parties' arguments, the Commission is unable to conclude that the Declaration of Easements relied on by Respondents establishes the unfettered right in the public to access the terminal facilities. To the contrary, the Commission notes that the express language of the Declaration clearly states that no rights are granted to the public generally. See Tr. Vol. 5 (Exhibits) at CAP Redir. Ex. 1-A ¶ 11 ("Nothing in this Declaration shall be deemed to be a gift or dedication of any portion of or interest in the Tracts to the general public or for the general public or for any public purpose whatsoever . . ."); *id.* ¶ 16(d) ("[T]his Declaration is not intended, and shall not be construed (i) as a dedication to the public of any interests in the Tracts, (ii) to give any member of the public, or any person other than as provided herein, any right whatsoever . . ."). As an easement is a property interest, it is apparent that no such public easement is conveyed by the instrument relied on by Respondents.

The Commission acknowledges that the Declaration includes language establishing access rights for "the Owners and their respective tenants, licensees, invitees, successor and assigns" (sec. 2), but the Declaration is quite specific that it only grants easement rights to the "Owners" (sec. 13) for use of the Owners' "tenants, licensees, [and] invitees." Reading this limitation in *pari materia* with the clear language cited previously making clear that no rights are being granted to the public generally, the conclusion is unavoidable that the "owner" continues to have discretion to control those who are permitted to access the property. As a result, so long as the ferry and parking facilities are controlled by a unified owner—such as BHIL—the Declaration changes nothing with regards to access rights. To the extent that the property is divided and sold, the access language merely ensures that the succeeding *owner* has the ability to access the other parcels and retains authority to control access rights to the premises.

Based on consideration of the foregoing, the Commission concludes that the parking facilities are owned and operated by BHIL, the access roads to the Deep Point ferry terminal are owned and controlled by BHIL, and BHIT does not hold any enforceable legal interest to use the parking facilities. Further, based on this findings, the Commission concludes that the right of the public to access the terminal facilities in the future is, at best, uncertain and that the evidence relied on by Respondents does not clearly establish general access rights in favor of the public.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 21

The evidence supporting these findings and conclusions is contained in the testimony and exhibits of Village witness O'Donnell and Respondents' witness Mayfield.

Witness O'Donnell offered testimony showing that profits from the unregulated parking and barge operations are used to offset losses from regulated

ferry operations. Tr. Vol. 1, 168-69. Specifically, although the ferry consistently shows significant annual financial losses, the parking facilities consistently show very strong positive financial net income and the barge shows positive income as well. Tr. Vol. 1, 168-69.

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Respondents did not provide any evidence that disputed witness O'Donnell's calculations of the incomes and EBITDA of the three operations. To the contrary, evidence shows that Respondents acknowledge that the parking facilities are very profitable and that the ferry operation is not profitable. **[BEGIN AEO CONFIDENTIAL]**

[END AEO

CONFIDENTIAL] Likewise, in the 2010 Rate Case proceeding, BHIT represented to the Commission that its ferry service had operated at a loss since 1999. Tr. Vol. 1, 172.

Witness O'Donnell further testified that Limited is earning an estimated **[BEGIN AEO CONFIDENTIAL]** **[END AEO CONFIDENTIAL]** overall rate of return on the ferry system, parking facilities, and barge. Tr. Vol. 1, 187. Witness O'Donnell opined that this rate of return is significantly above what Limited would be permitted to earn if all of its operations were regulated. Tr. Vol. 1, 187. Limited witness Mayfield disagreed with Witness O'Donnell's assumption that, for purposes of calculating a rate of return, the parking assets would be valued at original cost as opposed to fair market value. Tr. Vol. 5, 43-45. However, witness Mayfield did not otherwise take issue with the accuracy of witness O'Donnell's calculations. See *id.* Witness O'Donnell offered testimony in support of his assumption that the parking assets should be valued at original cost, Tr. Vol. 1, 181-82, however, the Commission need not address this question in this proceeding.

Based on consideration of the foregoing, the Commission concludes that the parking and barge services are highly profitable components of the overall transportation service to the Island.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 22

The evidence supporting this finding and conclusion is contained in the testimony and exhibits of Village witness O'Donnell and Respondents witness Mayfield.

In the 2010 Rate Case Order, the Commission determined that the participating parties' stipulation was just and reasonable and should be approved. See *Order Granting Partial Rate Increase and Requiring Notice*, Docket No. A-41, Sub 7 (Dec. 17, 2010) (2010 Rate Case Order), p. 7. Among the provisions of the approved stipulation was the parties' agreement that revenue would be attributed from the parking facilities to the ferry operations. See Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), p. 2 (item 2.C.i). As explained in the 2010 Rate Case Order, the Public Staff testified "that the parking revenue adjustment of \$523,097 reflects a compromise that considers projected operating results of the parking facility over a period of years." See *2010 Rate Case Order*, p. 17.

Witness O'Donnell testified that he had reviewed the Public Staff's workpapers, which shows that the \$523,097 revenue adjustment was calculated by assuming that the parking assets were subject to regulation and put in rate base. See Tr. Vol. 1, 185-186; Tr. Vol. 2, 13-15; see also Tr. Vol. 2 (Exhibits), KWO Redirect Exhibit 1 (Public Staff's 2010 workpapers). Witness O'Donnell testified that, although BHIT's rate base was not changed to include the parking assets, the stipulation effectively created the same result by treating the parking operations as if they were regulated. Tr. Vol. 1, 186. No party provided evidence to contradict witness O'Donnell's testimony on this point nor was witness cross-examined on this testimony.

The Commission acknowledges that, as part of the settlement, the parties agreed that "[t]he imputation of the revenues of the Deep Point parking facilities, as described in the testimony and shown in the exhibits of Public Staff witness James G. Hoard, is limited to this case and establishes no binding precedent for future cases, and shall not be binding in future cases as a reason for or against imputation of parking revenues or any other regulatory treatment of parking operations[.]" See Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), at p. 2 (item 2.C.i). While the stipulation and the imputation of revenue was not binding on the parties or the Commission, the act of imputing parking revenue to the ferry operations can be offered as—as is viewed by the Commission as—as persuasive evidence of the dependency of the ferry operations on the parking facilities.

Pursuant to the 2010 Rate Case Order, the revenue adjustment of \$523,097 to the regulated revenue requirement has been in place for the last 12 years.

Based on consideration of the foregoing, the Commission concludes that revenues are presently attributed from parking operations to the ferry operations and have been for the past twelve years under the Commission's 2010 Rate Case Order.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 23-24

The evidence supporting these findings and conclusions is contained in the 2010 Rate Case Order and the testimony and exhibits of Village witness Wright.

The Commission's 2010 Rate Case Order included several determinations relevant to the relationship between the parking facilities and the ferry service.

In the 2010 Rate Case Order, the Commission expressly determined that BHIL was a "public utility" under Chapter 62 because it was the parent entity of BHIT and BHIL's operations would have an impact on ferry's rates or services. See *2010 Rate Case Order*, p. 4 ("BHIL is subject to the jurisdiction of the Commission to the extent provided for in G.S. 62-3(23)c. ..."). This conclusion demonstrates an existing recognition the BHIL's operations in North Carolina subject it to treatment as a public utility as the parent of BHIT. The Commission is unaware of any factors present in this proceeding which undermine or contract the Commission's prior conclusion on this point.

In the 2010 Rate Case Order, the Commission determined that the participating parties' stipulation was just and reasonable and should be approved. See *2010 Rate Case Order*, p. 7; Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), at p. 2 (item 2.C.i). The stipulation, which was approved by the Commission, provides evidence of the relationship between the parking facilities and the barge.

First, the parking revenues were attributed to the ferry operation. As discussed above, the calculation of the attributed revenues was based on an analysis of the parking being subject to regulation, including valuation of the property at the original cost for rate base purposes. Although the imputation of revenue was not binding on the parties, the imputation of parking revenue to the ferry operations is evidence of the dependency of the ferry operations on the parking facilities.

Second, the terminal located on the Island was included in rate base at its depreciated net book value. See *2010 Rate Case Order*, p. 13. This terminal was subject to a lease agreement between BHIL, the owner, and BHIT. The reclassification of the terminal assets as rate base reflected the understanding that the terminal assets were necessary for the provision of the ferry service and, therefore, ancillary facilities. Notably, the reclassification resulted in a reduction in the ferry's revenue requirement. See *id.*

Third, gain on the sale of the Indigo Plantation terminal lease was reflected as a reduction in expenses. See *id.* This was a benefit to the ferry ratepayers, despite the fact that the terminal was owned by BHIL. Similar to the treatment of the Island terminal lease, the treatment of the Indigo Plantation terminal lease reflects the terminal property being necessary for the operation of the ferry service.

The Commission finds that the prior rate treatment of the Island and Indigo Plantation terminal facilities is analogous to the parking facilities' relationship to the ferry service: just as the terminals are necessary for a passenger to use the ferry service, the parking lot is necessary for a passenger to use the ferry service. Thus, the treatment of the two terminal assets is consistent with and supportive of a finding that the parking facilities should likewise be treated as ancillary services or facilities.

Fourth, as part of the 2010 Rate Case, BHIT and BHIL also agreed that, consistent with codes of conduct governing transactions between other utilities regulated by the Commission and their unregulated affiliates, charges to the Company from affiliates will be priced at the lower of cost or fair market value and that charges by the Company to affiliates will be priced at the higher of cost or fair market value. See *id.*, at 10. This treatment of affiliate transactions meant that, if BHIL were to transfer the parking facilities to BHIT, the assets would be priced at original cost unless the fair market value of the asset was less than original cost.

Fifth, BHIT and BHIL also agreed, and were ordered to, provide 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 90 days prior to the scheduled closing date for the sale or lease. See *id.*, at 6. This requirement of notice is a recognition of the important relationship between the parking facilities and the ferry.

The Commission acknowledges that settlements and stipulations, such as the one entered into as part of the 2010 Rate Case, are the result of negotiation and compromise. Village witness Wright testified that, while such stipulations were not precedential, they were "nonetheless a persuasive indication that all the parties to the stipulation, and the Commission, understood the integral connection between the parking and the ferry." Tr. Vol. 3, 40-41. In particular, witness Wright posed the rhetorical question, "why would a stipulation that the Commission and Public Staff be notified of any sale or lease of the parking facilities if the parking facilities were not a vital and necessary service of the ferry service?" *Id.*, 41. The Commission agrees with witness Wright's testimony about the persuasive value of the determinations and stipulations in the 2010 Rate Case.

Based on consideration of the foregoing, the Commission concludes that the determinations and stipulations in the 2010 Rate Case, though not binding on the parties or the Commission, are persuasive evidence of the dependency of the

ferry service on the parking facilities and consistent with a determination in this proceeding that the parking facilities are ancillary services or facilities.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 25

The evidence supporting these findings and conclusions is contained in the entirety of the record presented to the Commission, including the specific testimony and exhibits of Village witness Wright.

The Village asks that the Commission assert jurisdiction over the parking facilities on the grounds that they are an ancillary service or facility to BHIT's ferry service. The facts relating to this request are somewhat novel as they pertain to ferry services that are not subject to extensive regulation by the Commission nor are there extensive ferry operations in the state. Nonetheless, the Commission is regularly asked for guidance concerning the regulatory status of various assets and operations and, in appropriate circumstances, the Commission believes it advantageous and in the public interest to provide such guidance. Moreover, the issues raised here may, and are likely to, arise in a variety of factual circumstances but create similar concerns from the standpoint of the Commission's responsibilities and authority under Chapter 62.

Here, the evidence shows that Island is currently transitioning from a developer-owned transportation system to one that will be owned by a non-developer entity. In this regard, the Commission notes that an application is currently pending in Docket No. A-41, Sub 22, for approval of the transfer of the common carrier certificate permitting operation of the ferry and tram to SharpVue. Nothing in this order should be taken as suggestive of the outcome of the pending transfer proceeding, but the Commission is cognizant of the stated need, desire and intent of BHIL to divest its ownership and operation of the transportation system serving the Island. Given this development, it is appropriate for the Commission to provide guidance concerning the regulatory status of the transportation assets. Such guidance will assist the parties and stakeholders in the transition, in whatever form that might take, and will resolve questions which have been latent in the existing operations but, heretofore, have not required resolution.

Chapter 62 empowers the Commission to supervise utility services, which includes the supervision of a utility's ancillary services. Specifically, Chapter 62 grants the Commission "general supervision over . . . the services rendered by all public utilities in this State." N.C.G.S. § 62-32(a). Chapter 62 defines "service" to mean "any service furnished by a public utility, including any commodity furnished as a part of such service and *any ancillary service or facility* used in connection with such service." *Id.* § 62-3(27) (emphasis added). Examining the plain meaning of the relevant statutory text and the General Assembly's intent in creating the Commission, it is evident that the General Assembly intended the Commission to have regulatory authority over services and facilities that are necessary to the provision of utility service—such as the Deep Point terminal parking service here.

“The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). “The legislative purpose of a statute is first ascertained by examining the statute’s plain language.” *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). “When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning.” *Id.* (quotation marks and citation omitted). In addition to the plain meaning of the text, “[t]he Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute.” *O & M Indus. v. Smith Eng’g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006).

There is no dispute that the ferry operation is a regulated utility. The only question is whether the parking facilities at the Deep Point ferry terminal—which all parties agree provide necessary support to the ferry—are subject to this Commission’s oversight as a “service or facility” ancillary to the ferry service. Because the statutes do not define “ancillary,” the term “must be interpreted to have [its] plain and common meaning.” *In re Vill. of Bald Head Island*, Docket No. A-41, Sub 21, 2022 WL 3041164, at *4 (July 27, 2022); *Correll*, 332 N.C. at 144, 418 S.E.2d at 235 (“The legislative purpose of a statute is first ascertained by examining the statute’s plain language.”). “Ancillary” is commonly defined as “providing necessary support to the primary activities or operation of an organization, institution, industry, or system.” *Ancillary*, Oxford Languages for Google; see also Wright Dir. at 14 (Tr. Vol. 3, 14); *Ancillary*, Black’s Law Dictionary (11th ed. 2019) (“Supplementary; subordinate”); see also *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 775 (Tex. 2011) (“[A]ncillary means ‘supplementary[.]’” (citation omitted)). By its plain meaning, the term “ancillary” service would include any service that is “necessary” or “supplemental” to the primary service offered by a utility.

Further, such jurisdiction over related aspects of the utility service is essential to the exercise of the Commission’s authority in service of the public interest as it would defeat the purpose of regulation in the first place if the Commission did not have regulatory aspect over all necessary components of the utility service. The Commission “is responsible for ensuring that, in exchange for having a monopoly in its franchise area, a public utility provides adequate and reliable service to North Carolina citizens at reasonable rates.” *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 521–22, 614 S.E.2d 281, 285 (2005) (citation omitted). The Commission’s responsibility to ensure “adequate . . . service” explicitly extends to ancillary services that are needed to ensure the public’s access to and use of the primary utility service. See N.C.G.S. § 62-3(27). North Carolina courts have long-recognized the commonsense notion that the Commission’s authority extends well beyond the bare infrastructure providing the regulated service. See *State of North Carolina ex rel. Utils. Comm’n v. Southern*

Bell Telephone and Telegraph Company, 307 N.C. 541, 299 S.E.2d 763 (1983) (rejecting argument that “mere transmission of messages across telephone lines is adequate telephone service”).

The Commission notes that its responsibility to ensure adequate service is heightened when there is no alternative to the service, for in such situations the utility provider can take advantage of its monopoly status. Indeed, the General Assembly empowered the Commission to supervise utilities 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) (citation omitted).

Thus, the General Assembly intended for the Commission’s supervision of utility services to encompass not only a utility’s primary services, but also any incidental services or facilities that are necessary to render adequate primary services. As explained already, the Commission finds that the Deep Point parking facilities are necessary to the operation of the ferry utility service and provide the only means of public parking access to the ferry service. As such, we find that the parking facilities are an ancillary component of the ferry service.

The conclusion here is consistent with prior decisions of the Commission in a variety of settings. Perhaps most relevant, the Commission currently regulates the tram operation serving the Island without controversy. The tram operation is certificated as a component of BHIT’s common carrier service, despite the fact that there is no expressly stated jurisdiction in Chapter 62 over tram services nor is has any evidence been presented in this case showing any other examples of Commission regulation of tram service. In this regard, the Commission asserts jurisdiction over the tram service as a necessary and integral component of the ferry service, since ferry passengers arriving at the Island terminal need a means of transportation to and from their destination on the Island. Similarly, as discussed above, the Commission has exercised regulatory authority over the Indigo Island ferry terminal and the BHI ferry terminal for ratemaking purposes, despite the ownership of these facilities by BHIL. Again, the assertion of regulatory authority over these facilities reflects the Commission’s understanding and determination that these assets are integral to the ferry operation and exist for the benefit of utility ratepayers.

Similar conclusions can arise with other services and assets, such as billing and collection services, bus terminal facilities, lift station facilities, water and sewer backbone facilities, etc. In this regard, there is nothing novel about the Commission’s conclusion as regards the parking facility. Rather, the only unusual aspect of this determination relates to the asset itself—the un rebutted evidence in his proceeding shows that BHIL has turned property which exists for the benefit of

ratepayers into a profit center which is driving its consolidated transportation operations.

We find additional support for our conclusion in *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co. (Southern Bell I)*, 307 N.C. 541, 544, 299 S.E.2d 763, 765 (1983). In *Southern Bell I*, Southern Bell insisted that the Yellow Pages' advertising services were "not an essential part of the public utility function of providing telecommunications service" and, therefore, were inappropriate to consider in ratemaking. The Supreme Court of North Carolina chastised Southern Bell for relying on a "far too narrow" definition of the public utility function. *Id.* The Court affirmed the Commission's ruling because the advertising services were "an integral part of the public utility's function of providing adequate telephone service." *Id.* at 547, 299 S.E.2d at 766. Then, after Southern Bell had transferred the Yellow Pages to BellSouth Advertising and Publishing Company ("BAPCO"), BAPCO insisted its advertising services were immune from the Commission's supervision because it was not a public utility. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co. (Southern Bell II)*, 326 N.C. 522, 527, 391 S.E.2d 487, 490 (1990). The Supreme Court, relying on *Southern Bell I*, affirmed the Commission's jurisdiction over the advertising services "since BAPCO is performing this function for Southern Bell." *Id.* at 529, 391 S.E.2d at 491. The Court reasoned that "[p]roviding a telephone directory is a public utility function," and the Commission's jurisdiction over the function "continues even though the public utility transfers its duty to publish the directory to another entity." *Id.* at 531–32, 391 S.E.2d at 493. The Commission finds that, similar to Southern Bell and the Yellow Pages, the parking facilities are an integral part of BHIT's public utility function of providing adequate ferry service. Because the parking facilities are integral to BHIT's ferry service, the facilities are subject to the Commission's regulation.

Based on consideration of the foregoing, the Commission concludes that the Deep Point parking facilities are an ancillary service or facility to the ferry utility. Alternatively, the parking facilities can be viewed as an integral component of the ferry service and the overall transportation system operations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 26

The evidence supporting this finding and conclusion is contained in the testimony and exhibits of Village witnesses Gardner, O'Donnell, and Wright.

The Commission is empowered with "general supervision over . . . the services rendered by all public utilities in this State." N.C.G.S. § 62-32(a). The term "public utility" includes "all persons affiliated through stock ownership with a public utility doing business in this State as parent corporation . . . to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility." *Id.* § 62-3(23)c.

BHIL is BHIT's parent company. Tr. Vol. 5, 96. As part of the 2010 Rate Case, the Commission made the finding that "BHIL is subject to the jurisdiction of the Commission to the extent provided for in G.S. 62-3(23)c". *2010 Rate Case Order*, at 4 (Finding of Fact and Conclusions no. 2). Based on the record in this proceeding, the Commission again makes the finding that BHIL is a public utility under N.C.G.S. § 62-3(23)c to the extent BHIL owns and operates the ferry's parking operations.

For a parent company to be a public utility under N.C.G.S. § 62-3(23)c, the Commission must find that parent company's ownership has an effect on the rates and service of the subsidiary public utility. BHIL's control over the parking affects both the rates and the service offered by BHIT.

First, BHIL's control over the parking facilities affects the ferry service. As described above, the parking facilities are necessary to the service ferry riders receive. If BHIL disposed of, or moved, the parking facilities, it would fundamentally disrupt the ferry service. As Village witness Gardner testified, if parking were moved to a remote location, ferry passengers would have to add up to an hour to their arrival in order to be able to drop off their luggage, travel to park their car, park their car, take a shuttle back to the ferry terminal, and board the ferry. Tr. Vol. 2, 126. Further, the evidence shows that ferry ridership and parking are intertwined; without parking facilities, ferry ridership would likely drop. Tr. Vol. 3 (Exhibits), Wright Dir. at Exh. JAW-9 (consultant report finding that "the parking operation is tied to the ferry operation, with demand for parking very closely related to overall ferry traffic").

Second, BHIL's control over parking also affects ferry rates. Parking revenues and funds from the barge are used to supplement ferry revenues. Thus, BHIT has been able to avoid a rate case by supplementing revenues flowing to the parent entity with profits from the parking and barge operations. Although the ferry consistently shows annual financial losses, **[BEGIN CONFIDENTIAL]**

[REDACTED]

[REDACTED]

CONFIDENTIAL]

[END

Respondents have confirmed that the parking facilities are profitable, but the ferry is not. [BEGIN AEO CONFIDENTIAL]

[REDACTED]

[END AEO CONFIDENTIAL]

Likewise, in the 2010 Rate Case proceeding, BHIT told the Commission that its ferry service has operated at a loss since 1999. Tr. Vol. 1, 172 (citing Application, Docket No. A-41, Sub 7, at ¶ 6).

As further evidence of the parking facilities' [BEGIN AEO CONFIDENTIAL]
[REDACTED] [END AEO
CONFIDENTIALITY] overall rate of return on the ferry system, parking facilities, and barge. Tr. Vol. 1, 179. This rate of return is significantly above what any public utility would be permitted to earn in a rate proceeding.

[BEGIN AEO CONFIDENTIAL] [REDACTED]
[REDACTED] [END AEO
CONFIDENTIAL] Because the parking and barge operations subsidize the ferry, BHIL's affiliation with BHIT "has an effect on the rates and service" of the ferry such that BHIL is subject to the Commission's oversight under N.C.G.S. § 62-3(23)c.

Based on consideration of the foregoing, the Commission concludes that, as a separate and independent basis for the Commission's jurisdiction over the parking facilities, BHIL is a public utility under N.C.G.S. § 62-3(23)c to the extent BHIL owns and operates the ferry's parking operations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 27

The evidence supporting this finding and conclusion is contained in the testimony and exhibits of Village witness Gardner, Club witness Sawyer, BHA witness Briggs, and Respondents witness Leonard, as well as Consumer Statements and the Comments of the Public Staff.

The parties presented substantial evidence of the public's concerns about the ownership and operations of the ferry's parking facilities.

Village witness Gardner testified extensively of the importance of continued access to the parking facilities for the Island and the surrounding communities. Village witness Corvin testified to the interrelationship of the ferry, tram, parking, and barge and how "[i]nterruption of user access to any of those assets inevitably

endangers access (and the productive benefit of access) to others.” Tr. Vol. 1, pp. 110-111. Witness Corvin further testified that it was “critical” that parking be regulated and expressed his surprise to learn that it was not currently regulated. *Id.*

The Bald Head Association offered testimony in the proceeding. The Bald Head Association is a non-profit corporation that represents property owners on the island. Tr. Vol. 3, 150. Its membership includes 1891 property owners on Bald Head Island, which is nearly the entire ownership population on the island. Tr. Vol. 3, 150. The President of the Bald Head Association testified that it survey its members, asking the following question: “Do you want the North Carolina Utilities Commission (NCUC) to regulate the fares for the parking lot and the barge?” Tr. Vol. 3, 154. Survey recipients had the option of responding, “Yes,” “No,” “I don’t have an opinion at this time,” or “I don’t have enough information at this time to form an opinion.” *Id.* The survey showed that 71.5% of the respondents favored regulation of the parking lot and barge. Tr. Vol. 3 (Exhibits), Briggs Exhibit 4.

The President of the Bald Head Association testified that the Association had passed a resolution that reflected the Association’s position that it believed parking and barge services must be provided to the public at reasonable rates and that the owner of the parking and barge assets should not be able to sell the assets without Commission approval. Tr. Vol. 3, 191-92.

Club witness Sawyer testified that “the parking facilities at the Deep Point ferry landing, barge and passenger ferry are essential and indispensable components of a commercially owned transportation system that serves one market: Bald Head Island.” Tr. Vol. 3, 208. Witness Sawyer also testified to the Club’s support for the Commission’s assertion of regulatory authority over parking. *Id.* at 207.

These concerns of property owners were also expressed in a Consumer Statement of Position filed with the Commission. See Tr. Vol. 2 (Exhibits), Gardner Dir. Exh. STG-1 (Consumer Statement of Position (Aug. 1, 2022)). This Consumer Statement of Position was signed by over 400 BHI property owners, and included numerous statements by the signatories regarding their concerns of the regulation of the parking and barge assets. *Id.*

The Commission also gives credence to the views of the Public Staff, which represents the using and consuming public. In its Comments, the Public Staff recognized that parking necessary for the ferry’s utility function, concluding that “the availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers.” Public Staff Initial Comments, at 5. That is because “it would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates.” *Id.* As a result, the Public Staff concludes that it “does warrant Commission scrutiny to ensure that ferry customers are protected through adequate parking at reasonable rates.” *Id.*

Although the Public Staff states that believed oversight “short of regulation,” *id.*, was appropriate here, the Public Staff did not elaborate on how the Commission might be able to scrutinize the parking operations to ensure adequate and reasonably priced parking in a manner that did not constitute “regulation.” Nevertheless, the Public Staff’s comments made clear that the public has an interest in “the availability of adequate and reasonably priced parking” for the ferry service. *Id.*

Respondents witness Leonard also testified that it was “critical” that ferry passengers have “reasonable access to a sufficient amount of suitable parking facilities.” Tr. Vol. 4, 74-75. Witness Leonard further acknowledged public concerns over the “availability of parking and the ability to expand parking capacity as and when need.” *Id.*, 75.

Based on consideration of the foregoing, and in accordance with the broader record regarding the parking facilities, the Commission concludes that it is in the public interest for the Commission to exercise jurisdiction over the ferry’s parking operations.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 28

The evidence supporting these findings and conclusions is contained in the testimony and exhibits of Village witness Wright, and BHIL’s response to discovery requests, as set forth in the direct testimony of Witness Wright.

In his direct testimony, Village witness Wright testified that BHIL advertises its barge service to the general public. Tr. Vol. 3, 51. Neither BHIL nor SharpVue presented any evidence challenging the assertion that the barge service is held open to the public nor did they cross examine Witness Wright on this issue.

In its response to discovery requests, BHIL stated that there are no restrictions on the use of the barge, so long as a customer has (1) an internal combustion engine (“ICE”) permit issued by the Village, and (2) has made a statement regarding hazardous material contained in the vehicle. Tr. Vol. 3 (Exhibits) (BHIL Responses to Village DR 1-23, Wright Dir. Exh. JAW-10). BHIL also stated that it was not aware of any instance in which it turned away a member of the public who had paid the appropriate fare and had an ICE permit. *Id.*

Under North Carolina law:

One offers service to the “public” when he holds himself out as willing to serve all who apply up to the capacity of his facilities. It is immaterial, in this connection, that [the owner-operator’s] service is limited to a specified area and his facilities are limited in capacity. For example, the operator of a single vehicle within a single community may be a common carrier

State ex rel. Utils. Comm'n v. Simpson, 295 N.C. 519, 522 246 S.E.2d 753, 755 (1978) (quoting *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966)). And “although a service may be offered only to a definable class, rather than to the public at large, it still may be considered an offering of service to the ‘public’ within the meaning of the regulatory statutes.” *State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 26, 338 S.E.2d 888, 893-894 (1986), *aff'd and modified on other grounds* 318 N.C. 686, 351 S.E.2d 289 (1987). Accordingly, the Commission is not persuaded that limiting the barge service to a definable class (customers with ICE permits) forecloses the barge service from being held out to the public.

Furthermore, in its response to other discovery requests, BHIL stated that “BHIL’s barge and tug operation *holds itself out to the public* as a vehicle freight transportation business.” Tr. Vol. 3 (Exhibits) (BHIL Responses to Village DR 1-19, DR 1-20, and DR 1-21, Wright Dir. Exh.t JAW-10) (emphasis added).

Based on consideration of the foregoing, the Commission concludes that the barge service is held out to the general public within the meaning of N.C.G.S. § 62-3(6) and -3(23)(a)(4).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 29

The evidence supporting these findings and conclusions is contained in the testimony of Village witnesses Munroe, Corvin, Gardner, Cox, Boyett, and Wright, and Respondents witnesses Fulton and Paul.

Village witness Munroe testified that she relies on the barge to transport household goods for her property maintenance and cleaning business, as well as for her own personal use. Tr. Vol. 1, 102.

Village witness Corvin testified to his personal use of the barge to transport household goods, including transporting furniture for his house in a truck on the barge. Tr. Vol. 1, 115.

Village witness Gardner testified to his use of the barge to deliver appliance, furniture, and construction material for small projects to his home on the Island. Tr. Vol. 2, 38.

Village witness Cox testified that in his oversight role of the Village’s Island Package Center (“IPC”), he has seen numerous household goods transported on the barge. Tr. Vol. 1, 131.

Village witness Boyett testified that the barge transports all materials needed to build and furnish a house, including lumber, nails, tiles, grout, appliances and furniture. Tr. Vol. 1, 150 (Boyett Dir.). Witness Boyett also testified

that after hurricanes or other storms, the barge transports damaged furniture, appliances, and other household items off-island. Tr. Vol. 1, 151.

Village witness Wright testified that BHIL's website publically advertises the barge as the exclusive means to transport household goods such as furniture to the island. Tr. Vol. 3, 52.

Respondents witness Fulton testified that "vehicles that are transported on the barge may contain household goods. Tr. Vol. 4, 148.

This evidence is uncontradicted and does not appear to be in dispute between the parties. Neither BHIL nor SharpVue presented any evidence challenging the assertion that the barge transports household goods.

BHIL argues that the barge should not be understood to transport household goods within the meaning of N.C.G.S. § 62-3(6) & § 62-3(23)(a)(4), since it does not take custody of the household goods contained inside vehicles transported on the barge. BHIL witness Paul testified that "The only connection between BHIL's barge operation and the vehicles it transports is that BHIL rents space on the barge's deck on the basis of every 6 lane-feet occupied by a vehicle. . . . There are no variable charges based on what cargo, if any, that a particular vehicle carries. The BHIL barge operation does not take custody or possession of any cargo carried in a vehicle, nor does it take an inventory of such cargo." Tr. Vol. 5, 107.

The Commission is not persuaded that a lack of custody, variable charges, or inventory bears on whether a carrier transports household goods under North Carolina law. North Carolina law only requires that a carrier engage in the "transportation of persons or household goods." N.C.G.S. § 62-3(6) & § 62-3(23)(a)(4).

Additionally, the Commission notes that it regulates moving companies that transport household goods packed by the homeowner as common carriers. See, e.g., Docket No. T-4718 (operating under Certificate C-2897). This is analogous to the way a barge customer might pack a vehicle for transport on the barge.

Furthermore, Witness Fulton testified that in addition to vehicles, the barge transports cargo not contained in vehicles, unaccompanied by the cargo's owner. Tr. Vol. 4, 181-182. The Commission finds that unaccompanied cargo on the barge is necessarily in the custody of barge crewmembers.

In sum, the Commission is not persuaded by BHIL's argument that the barge does not transport household goods within the statutory meaning since it does not take custody of individual items inside vehicles carrying household goods.

Based on consideration of the foregoing, the Commission concludes that the barge transports household goods within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 30

The evidence supporting this finding and conclusion is contained in the testimony of Respondents witness Fulton and the exhibits of Village witness Wright.

The fact the barge transports persons is not in dispute. Respondents witness Fulton testified that BHIL “generally permits one person . . . to stay inside each transported vehicle” on the barge. Tr. Vol. 4, 146.

BHIL argues that the barge’s classification as a “freight barge” precludes it from carrying passengers. Witness Fulton testified that the barge is inspected by the Coast Guard as a “freight barge.” Tr. Vol. 4, 146. Witness Fulton opined that as a result of its status as a “freight barge,” the barge carries “zero passengers. They are persons.” Tr. Vol. 4, 170. The Commission is not persuaded by this argument.

First, North Carolina law only requires that a common carrier engages in the “transportation of *persons*.” N.C.G.S. § 62-3(6) (emphasis added). On cross-examination, Witness Fulton testified that classification as a “freight barge” under 46 C.F.R. is merely for purposes of “federal safety regulations administered by the Coast Guard . . . involving periodic safety inspection[s].” The Commission concludes that whether or not a person is a “passenger” under federal safety regulations, they are still a “person” within the meaning of N.C.G.S. §62-3(6).

Second, under federal law, a passenger is any “individual carried on the vessel,” except for the vessel’s owner, the master, crewmembers, or the charterer of a charter vessel. 46 U.S.C. § 2101(29). On cross-examination, Witness Fulton testified that vehicle drivers on the barge meet the federal definition of “passenger.” Tr. Vol. 4, 176-178.

Third, the Village also introduced evidence that Commission regulates other North Carolina vehicle ferries as common carriers. Tr. Vol. 5 (Exhibits) (Wright Rebuttal Exhibit JAW-2) (Order Granting Common Carrier Authority to Davis Shore vehicle ferry, dated March 14, 2008 in Docket No. A-65, Sub 0); *Id.* (Wright Rebuttal Exhibit JAW-4, p. 6) (Docket No. A-26, Sub 0 and Sub 4; granting common carrier status to Morris Marina vehicle ferry). On cross-examination, witness Fulton acknowledged the Commission’s regulation of vehicle ferries. Tr. Vol. 4, 168-169.

Based on consideration of the foregoing, the Commission concludes that that the barge carries persons within the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 31

The evidence supporting this finding and conclusion is contained in the testimony and exhibits of Village witness Wright and Respondents witnesses Fulton and Leonard.

The fact the barge provides service in exchange for compensation is not in dispute. Village witness Wright testified that pricing for use of the barge is set by amount of deck space utilized. Tr. Vol. 3, 55. Respondents witness Fulton described the same fee structure. Tr. Vol. 4, 147.

Respondents witness Fulton testified that the barge does not charge a separate fee for vehicle drivers to accompany their cargo on the barge. Therefore, BHIL argues, the barge does not transport persons for compensation. The Commission does not find this argument persuasive.

First, both Village and Respondents witnesses testified that other regulated vehicle ferries use a fee structure similar to the barge. Respondents witness Leonard testified to his personal knowledge for other regulated vehicle ferries charging by “size of vehicle, weight, or type of cargo.” Tr. Vol. 4, 123-124. Witness Wright testified to the same underlying facts. Tr. Vol. 3, 55.

Second, under U.S. Supreme Court precedent, persons accompanying cargo are considered passengers for hire, even when they do not pay a separate fee apart from the cargo transportation fee. *See, e.g., New York Cent. R.R. Co. v. Lockwood*, 84 U.S. 357, 358, 21 L. Ed. 627 (1873) (holding that a caretaker of livestock who was given a free pass by a railroad “for the purpose of taking care of his stock on the train, is a passenger for hire.”). This longstanding precedent is consistent with the commonsense finding here that drivers of barge vehicles are “passengers” (and certainly “persons”) regardless whether they are separately charged by the operator.

Additionally, the Commission has repeatedly emphasized the flexible nature of the “compensation” inquiry under the *Simpson* test. For example, the Commission concluded that W.E. Partners, LLC (WEP), satisfied the “compensation” element of the determination of public utility status despite the fact that WEP proposed to provide the electricity generated by its facility free of charge to a third party with whom it had existing and future financial arrangements. *See In re Application of W.E. Partners, LLC for Registration of a Renewable Facility*, Order on Request for Declaratory Ruling and Notice of Intent to Revoke Registration of New Renewable Energy Facilities, Docket No. SP-729, Sub 1 (Sept. 17, 2012). In Cube Yadkin, the Commission found the compensation

element was met with respect to a proposed landlord-tenant arrangement where utility service was not separately metered but rather bundled into the lease rate. *In the Matter of Petition for Declaratory Ruling by Cube Yadkin Generation, LLC*, Order Issuing Declaratory Ruling, Docket No. M-100, Sub 152 (Sept. 4, 2019), at 22, *vacated on other grounds*, 279 N.C. App. 217, 865 S.E.2d 323 (2021). In *Buck Island*, the Commission found that evidence that a developer had received tap fees was sufficient to satisfy the compensation element, specifically noting that the statute did not require sale of utility service, only furnishing for compensation. *Buck Island*, 162 N.C. App at 577, 592 S.E.2d at 250.

Based on consideration of the foregoing, the Commission concludes that the barge service is provided only for a fee. This fee is compensation with the statutory meaning of N.C.G.S. §§ 62-3(6) and -3(23)(a)(4).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 32-36

The evidence supporting these findings and conclusions is contained in the entire record in this proceeding, including Findings of Fact Nos. 28 to 31.

As a preliminary matter, the Commission notes that its statutory authority over non-vehicular-based common carriers is not preempted by federal regulation in the same way that it is limited with respect to motor vehicle carriers. The Federal Aviation Administration Authorization Act of 1994 (FAAAA), Pub. L. No. 103-305, 108 Stat. 1569, includes a provision preempting state and local regulation of trucking. See § 601(c), Tit. VI, 108 Stat. 1606. That provision, now codified at 49 U.S.C. § 14501(c), generally bars state and local governments from “enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). However, Section 14501(c) “does not apply to the intrastate transportation of household goods.” *Id.* § 14501(c)(2)(B). Nor is intrastate water transportation within the scope of federal jurisdiction. See *id.* § 13521 (granting exclusive federal jurisdiction only for *interstate* water transportation (§ 13521(a)(1), and *foreign* water transportation (§ 13521(a)(3)). Accordingly, the Commission concludes that, in contrast with the transportation of household goods by motor vehicle, there are no federal preemption concerns with respect to the exercise of regulatory authority of the intrastate transportation of household goods or persons by water carrier.

Additionally, the Commission finds that the barge is a “boat” within the meaning of N.C.G.S. § 62-3(6) and “other form of transportation” within the meaning of N.C.G.S. § 62-3(23)(a)(4). This fact does not appear to be in dispute. Respondents witness Fulton testified that the barge was a boat for purposes of N.C.G.S. § 62-3. Tr. Vol. 4, 163-164. Witness Fulton further testified that a barge was an “other form of transportation” within the meaning of N.C.G.S. § 62-3(23)(a)(4). Tr. Vol. 4, 163.

a. The Commission Finds that the Barge Service meets the statutory definition of a Common Carrier Service.

Under N.C.G.S. § 62-3(6):

‘Common carrier’ means any person, other than a carrier by rail, which holds itself out to the general public to engage in transportation of persons or household goods for compensation, including transportation by bus, truck, boat or other conveyance”

As previously discussed in Findings of Fact Nos. 28 to 31, the Commission finds that BHIL: holds out the barge service to the general public (Finding of Fact No. 28); to engage in transportation of persons (Finding of Fact No. 30) and household goods (Finding of Fact No. 29); for compensation (Finding of Fact No. 31); and by boat (see above).

Accordingly, the Commission concludes that BHIL’s barge service meets the statutory definition of a common carrier of household goods and persons under N.C.G.S. § 62-3(6).

b. The Commission Finds that the Barge Service meets the statutory definition of a Public Utility

‘Public utility’ means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: . . . Transporting persons or household goods by motor vehicles or any other form of transportation for the public for compensation”

N.C.G.S. § 62-3(23)(a)(4) (emphases added). As previously discussed in Findings of Fact Nos. 28 to 31, the Commission finds that BHIL by its barge service: is transporting persons (Finding of Fact No. 30) and household goods (Finding of Fact No. 29); by any other form of transportation (see above); for the public (Finding of Fact No. 28); for compensation (Finding of Fact No. 31).

Accordingly, the Commission concludes that BHIL’s barge service meets the statutory definition of a public utility under N.C.G.S. § 62-3(23)(a)(4).

BHIL offers several arguments in support of its contention that the barge service does not fall within the scope of the Commission’s regulatory authority over common carriers and public utilities.

First, BHIL offers testimony that the barge is a “freight barge,” implying that such designation would render the service outside the scope of the Commission’s regulatory authority. As to this point, the Commission notes that Respondents have offered inconsistent explanations of the nature of the barge service: on some occasions it refers to the service as a “freight barge” and on other occasions it refers to the barge as a “vehicle transportation” service. See, e.g., Tr. Vol. 4, pp. 148-149. See also Fulton Dir. at (pages:lines) 3:1-2; 5:14-15; 6:5-7; 7:18-19; 8:17-19; and 10:14-16. If the barge is a vehicle transportation service then it is not a freight barge since, in this context, vehicles would not be appropriately categorized as freight.

The Commission does not think it necessary to resolve the “freight vs. vehicles” conundrum here. As discussed above in connection with the Commission’s conclusion that the barge carries passengers for hire, the Commission does not find Respondents’ “freight” argument to be persuasive as diminishing the Commission’s authority. See Finding of Fact No. 30. While “freight” is not defined in Chapter 62, N.C.G.S. § 62-271 describes household goods transported by motor vehicle common carriers as freight, and expressly provides for Commission regulatory authority over such freight:

No common carriers of household goods by motor vehicle shall deliver or relinquish possession at destination of any *freight* transported by it in intrastate commerce until all tariff rates and charges thereon have been paid, except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges

To this point, the common definition of “freight” would include household goods. The Commission finds no support for BHIL’s contention that a “freight barge” is, by definition, outside the scope of the Commission’s regulatory authority under Chapter 62. To the contrary, the statutory question is whether the barge transports household goods. As to this question, the evidence is unequivocal: it does.

Second, BHIL argues that the Commission’s authority to regulate common carriers of household goods is limited to “home-to-home” transportation services as is the case with motor carriers of household goods. Respondents witness Fulton testified that:

BHIL does not view the leasing of space on its barge deck for vehicles carrying items and supplies to the Island as being engaged in the business of HHG moves for consumers between their homes. Nor has the Commission regulated the barge as an HHG mover or otherwise as falling under NCUC regulatory jurisdiction.

Tr. Vol. 4, 150-151. The Village did not dispute the fact that the barge does not provide home-to-home transportation services in the manner of household good

motor carriers regulated by the Commission, but argues that this is of no significance given that boats are not capable of rendering “home-to-home” services.

The Commission agrees with BHIL that its barge service is not subject to the specialized regulation for land-based motor carriers of household goods. However, the Commission agrees with the Village that the Commission’s authority to regulate common carriers extends beyond the regulation of motor vehicle carriers of household goods. The General Assembly has expressly authorized the Commission to regulate the intrastate transportation of household goods and persons by other means of transport, specifically including transportation by “boat.” This grant of authority is repeated in Chapter 62, including:

- N.C.G.S. § 62-3(6) (“‘Common carrier’ means any person, other than a carrier by rail, which holds itself out to the general public to engage in *transportation of persons or household goods* for compensation, including transportation by bus, truck, *boat* or other conveyance”) (emphases added); and
- G.S. § 62-3(23)(a)(4) (“‘Public utility’ means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: . . . *Transporting persons or household goods* by motor vehicles or *any other form of transportation* for the public for compensation”) (emphases added).

Nothing in Chapter 62 suggests that the General Assembly sought to limit the regulation of household goods to a particular transportation modality (i.e., motor vehicles), nor does Chapter 62 suggest that the Commission’s authority arises only when the carrier transports household goods from one home to another.

When conducting statutory interpretation, “[c]ourts will presume that the ‘legislature intended each portion of a statute to be given full effect and did not intend any provision to be mere surplusage.’” *In re Application for Approval of DSM & Energy Efficiency Cost Recovery Rider*, Docket No. E-2, Sub 931, 2009 WL 1171156, at *22 (March 20, 2009) (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 652 (1991)). The Commission finds that BHIL’s interpretation that only traditional land-based moving companies may be regulated as transporters of household goods—would effectively delete the words “boat” and “any other form of transportation” from Chapter 62, overriding the General Assembly’s grant of authority. See Tr. Vol. 4, 150 (Fulton Dir.). The Commission concludes that in order to give effect to all the words in the statute, its regulatory authority is not limited to land-based moving companies.

The Commission further finds that its decision in the PODS Docket does not foreclose regulation of BHIL's common carrier barge operations. There, the Commission found that PODS, Inc., a storage service utilizing large containers that are loaded and unloaded by customers, was not subject to regulation. *Order Ruling on Request for Reconsideration*, Docket No. T-100, Sub 61, at 1 (Mar. 23, 2004) ("PODS Order").

The Commission notes that there are several important distinctions between BHIL's barge service and the services PODS provides. First, in PODS, the transportation element was "incidental" to the service: i.e., customers were, in essence, purchasing storage services not transportation services. PODS Order, at 6, 12. Second, the customer (not the company) was responsible for packing and unpacking the POD storage device, unlike a HHG moving service where the company loads and unloads the truck. Here, in contrast, although a customer-affiliated driver drives the vehicles on the barge, that is being done under the supervision and responsibility of the barge operator. Third, the Commission's finding in that proceeding was heavily influenced by the limited nature of the Commission's authority over motor vehicle HHG transportation services given federal preemption in this area—a concern that (as discussed above) does not exist with respect to transportation by boat. In other words, the PODS decision was a product of the Commission's construction of its limited authority over a specialized type of regulation applicable only to motor carriers that transport HHG from home-to-home. See, e.g., N.C.G.S. §§ 62-3(17) (defining "motor carrier" as a common carrier by motor vehicle) & -3(18) (defining "motor vehicle" as self-powered vehicle using State's highways); N.C.U.C. Rule R2 (applicable to "motor carriers" and prescribing regulations applicable to household goods carriers); September 2022 Revised Maximum Rate Tariff No. 1, NCUC HHG No. 1, filed on September 8, 2022 in Docket No. T-100, Sub 49A, at 68 (defining "carrier" as "Motor carrier of household goods."). As discussed previously, the application of the "home-to-home" approach asserted by BHIL to the common carriage by boat scenario would nullify the common carrier statute because a boat could never be used to provide home-to-home transportation services.

In sum, while the Commission agrees with BHIL that its barge service is not subject to the specialized regulation for land-based motor carriers of household goods, the Commission concludes that its power to regulate common carriers extends beyond the regulation of motor vehicle carriers of household goods. Accordingly, the Commission finds that it has statutory authority to regulate the barge as a common carrier of household goods, regardless of whether it performs the traditional functions of a moving company.

c. Regulation of the Barge Service is in the Public Interest

The Commission takes notice of the strong public interest supporting the assertion of regulatory authority over the barge service.

First, the Commission finds that the barge service provides an essential service. The evidence on this point is pervasive in the record and undisputed. In their Initial Comments, the Public Staff the stated that “barge service is undoubtedly critical for those living and traveling to and from the island.” Initial Comments of the Public Staff, at 11. Village witness Gardner testified to the transportation system, including the barge, being the “lifeblood” to the Island and “critical to the island’s economy and well-being of all those on the island.” Tr. Vol. 2, 28, 34. Village witness Boyett testified that the barge is a necessary for the island’s construction industry:

The barge is the lifeblood to construction on the island. First, with an island that is only accessible by boat, all material must come over on a boat. The vast majority of all construction materials and household items come over on the barge.

Tr. Vol. 1, 149. Witness Boyett elaborated that everything needed to build houses or buildings must be transported on the barge, including everything from lumber, tiles, and nails, to large appliances and furniture. Tr. Vol. 1, 149.

Second, the Commission further finds persuasive evidence demonstrating that the barge service is a de facto monopoly. Village witnesses Gardner and Wright testified that the barge service is a de facto monopoly. T. Vol. 5, 185; Tr. Vol. 5, 217. Witness Wright explained that there is no practical alternative to the barge in order to transport large household goods, construction materials, or vehicles to the island. Tr. Vol. 5, 217. Witness Boyett testified that other than the barge, the only way to bring items to the Island that are too big to hand-carry on the passenger ferry would be by personal boat. Tr. Vol. 1, 149. Witness Boyett also testified that construction delays result from barge cancellations, demonstrating the lack of an available alternative to the barge. Tr. Vol. 1, 150. BHIL did not rebut these statements. See BHIL Responses to Village DR 1-18 as set forth in Wright Direct Testimony at Exhibit JAW-10) (“[T]he barge and tug system which BHIL operates between the mainland and the island is the only vehicle freight transportation system servicing that route.”).

Third, Commission notes the absence of competent evidence in the record demonstrating there is a reasonable means to establish a competitive alternative to BHIL’s barge service.

Fourth, the Commission takes note of the Village’s evidence showing that island residents have repeatedly discussed the need for Commission regulation of the barge since at least 1998. Village witness Gardner presented the following exhibits:

The barge service which is the only means by which a property owner can transport household goods and other large items required for the use and enjoyment of their property is owned and operated

by Bald Head Island Management and is operated at their sole unregulated discretion. . . . This service needs to be regulated so as to protect the interest of the property owner. Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 -Exhibits) (Letter of Marvin B. Cox, dated August 4, 1998)

The barge should be regulated. The charge of transporting items to the island far exceeds the cost. . . . In addition, I was present when a staff member representing [the barge's owner] made a statement in a public meeting that the [barge's owner] could make it difficult for a particular builder by making sure the barge was not available for the builder's use. Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 - Exhibits) (Letter of Wendie H. Walker, dated August 11, 1998).

I support the regulation of parking and barge operations. They are monopolies and they are critical to the island. Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 - Exhibits) (August 1, 2002 Letter to the Commission, Comments from Signers)

In sum, the essential facts found by the Commission are that (1) the barge is an essential service, (2) it is a *de facto* monopoly, (3) there are no practical alternatives available, and (4) the public has repeatedly called for regulatory oversight since at least 1998.

The Commission is not insensitive to the concerns of subjecting a private company to its regulatory authority, particularly when the service has been operating without Commission oversight for an extend period of time. However, the Commission also notes that BHIL never sought the guidance from the Commission or the Public Staff on these questions. Regardless, the Commission is persuaded that public policy strongly supports the assertion of authority under the facts here.

d. The barge service is integral to the regulated ferry service.

Village witnesses repeatedly testified to the integrated nature of the barge service and the regulated ferry service.

Witness Wright testified that without the barge service, there would be no reason for the vast majority of passengers to ride the ferry to visit the island he barge service is integral to the regulated ferry service. Tr. Vol. 5, 217.

Witness Gardner testified that “[w]ithout access to the ferry, parking and the barge, the Island will cease to exist and function in its current form.” Tr. Vol. 5, 185. Witness Gardner also testified that “[d]uring major events like a hurricane, . . . it is critical that all transportation assets – whether it be the ferry, barge or parking – be

available to coordinate an appropriate response to ensure the safety of the public.” Tr. Vol. 2, 36.

Bald Head Island Club witness Sawyer testified that “the parking facilities at the Deep Point ferry landing, barge and passenger ferry are essential and indispensable components of a commercially owned transportation system that serves one market: Bald Head Island.” Tr. Vol. 3, 208.

In the *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 1, over 400 Bald Head Island property owners signed a statement that “[f]ew would bother to park at Deep Point if the passenger ferry did not run, just as few would bother to park and get on the passenger ferry if the barge did not transport goods needed to sustain the BHI community”. Additionally, individual signers commented that “We depend on the barge & parking. They are an integral part of the ferry service.” Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15. And “I urge the Utilities Commission’s regulation of the BHI ferry, barge and parking. These operations are all interconnected and they should be regulated as the monopoly that they are.” Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 16.

In their Consumer Position Statement, Robert Blau and Paul Carey stated that “The BHI passenger ferry, parking facility at the Deep Point ferry terminal and the barge operation are interdependent components of a single transportation System on which the community of Bald Head Island totally depends and cannot survive without.” Tr. Vol. 5 (Exhibits), Gardner Rebuttal Exhibit STG-2 (Consumer Position Statement of Robert Blau and Paul Carey), at 12.

Based on the substantial and uncontroverted evidentiary record, the Commission concludes the barge service is integral to the regulated ferry service.

REMEDIES

Having found that the parking facilities and barge are subject to the regulatory authority of the Commission, the Commission must decide on the appropriate relief to be granted in this proceeding.

In light of the Commission’s conclusion that the Deep Point parking facilities are an ancillary and integral service to BHIT’s ferry utility service, the Commission finds that it is appropriate to issue a special certificate to BHIL for operation of these facilities as an integral and ancillary component of BHIT’s ferry utility service. This remedy is justified in light of the Commission’s general power to supervise and control the public utilities of the State and in consideration of Section 62-110, which requires a certificate that public convenience and necessity to operate or control any public utility plant or system. In further support of this conclusion, the

Commission notes that it currently exercises jurisdiction over the ferry tram service through the certificate process, albeit via a certificate issued to BHIT in that case given that BHIT is the owner and operator of the tram service.

The barge is a common carrier under Sections 62-3(6) and public utility under 62-3(23)(a)(4). As such, BHIL is required to have a certificate of convenience and necessity to own and operate the barge. See N.C.G.S. § 62-110(a). BHIL will be directed to seek a certificate for its barge operations. The Commission notes that rates for utility service are subject to the Commission's review and approval. See N.C.G.S. §§ 62-32, -130(a). Without approving presently existing rates as just and reasonable, the Commission notes that no evidence was presented in this proceeding that existing rates are improper or excessive. Accordingly, the Commission will permit existing barge rates to remain in effect pending further order of the Commission. BHIL must seek the approval of the Commission for any increases to existing rates.

Because the parking facilities and the barge operations are utility operations that must be owned and operated pursuant to a certificate of convenience and necessity, N.C.G.S. § 62-110(a), BHIL is prohibited from transferring the assets associated with the parking facilities and the barge without prior Commission approval that the transfer is justified by the public convenience and necessity. See N.C.G.S. § 62-111(a). BHIL is therefore required to obtain the approval of the Commission before selling, pledging, leasing or otherwise alienating the Deep Point parking facilities or barge properties.

In the event to any approved sale or disposition of the Deep Point parking facilities or barge properties, any gain on the sale or disposition of the properties shall be assigned, credited or attributed for ratemaking purposes in the next succeeding rate case.

Because this is not a rate case pursuant to N.C.G.S. § 62-133, the Commission is not making any rate determinations as part of the proceeding. The appropriate rate treatment of the parking facilities and the barge shall be reserved for future rate cases. BHIT and BHIL are permitted to charge existing parking and barge rates, and they are directed not to increase existing rates for parking and barge without prior Commission approval.

IT IS, THEREFORE, ORDERED as follows:

1. BHIL is hereby issued a special certificate for the ownership and operation of the Deep Point ferry parking facilities as an integral and ancillary component of BHIT's ferry utility service.
2. BHIL is directed to seek certification for its barge operations.

3. The determination of the appropriate rate treatment of the parking facilities and the barge is reserved for future rate cases. BHIT and BHIL are permitted to charge existing parking and barge rates, and they are directed not to increase existing rates for parking and barge without prior Commission approval.
4. BHIT and BHIL are required to obtain the approval of the Commission before selling, pledging, leasing or otherwise alienating the Deep Point parking facilities and the barge assets or properties.
5. In the event of any approved sale or disposition of the Deep Point ferry terminal parking facilities or barge properties or assets, any gain on the sale or disposition of the properties shall be assigned, credited or attributed for ratemaking purposes in the next succeeding ferry rate case.

This ____ day of _____, 2022.

NORTH CAROLINA UTILITIES COMMISSION

Certificate of Service

I hereby certify that a copy of the foregoing *Proposed Order of the Village of Bald Head Island and Bald Head Island Club* has been served this day upon counsel for all parties of record in this proceeding by electronic mail.

This the 8th day of November, 2022.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, LLP

/s/ Craig Schauer