

Docket No. A-41, Sub 21

**VILLAGE OF BALD HEAD ISLAND'S
AND BALD HEAD ISLAND CLUB'S
JOINT POST-HEARING BRIEF**

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Bald Head Island*

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INTRODUCTION

* * *

“Without access to the ferry, parking and the barge, the Island will cease to exist and function in its current form”¹

“[I]t would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates. . . . [T]he availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers.”²

* * *

The stakes here are materially different from those presented in the typical proceeding before the Commission. Here, the decision the Commission makes concerning the regulatory status of assets which are integral components of the common carrier service to Bald Head Island will shape the future availability of those services to the public as the Island transitions away from a developer-controlled transportation system. These issues go to the heart of this agency’s purpose in the first place—to protect the public and advance the delivery of utility services on reasonable terms and conditions. In this light, this proceeding is not so much about parking and barge service per se—it is about ensuring the survival of the Island as a place that is open and accessible to the public on reasonable terms and conditions.

It is not hyperbole to say that Bald Head Island is one of the state’s natural treasures. As a vacation destination, it is open to, and widely accessible by, the general public. Its environment of pristine beaches, native and protected maritime forest, historic attractions, and relaxed, vehicle-free island atmosphere is enjoyed by hundreds of thousands of North

¹ Tr. Vol. 5, p. 185 (Gardner Rebuttal).

² Initial Comments of the Public Staff, Docket No. A-41, Sub 21, at 5 (Sept. 8, 2022).

Carolinians every year. Indeed, the Island's popularity as a vacation destination fuels the local economy, not just on the Island but also in the surrounding counties.

Part of the Island's charm is what brings it within the jurisdiction of the Commission: as a bridgeless island, with use of gas-powered vehicles generally prohibited, the public is dependent on common carrier transportation services to access the Island. In contrast to any other island community in the nation that anyone—despite exhaustive efforts by Respondents' expert witness—has discovered, Bald Head's public access is exclusively controlled by a private entity, using docks, road ways and assets (i.e., parking, trams, terminals, barge service, and related maintenance and operational assets) under the entity's exclusive ownership and control. There is no other currently available ferry, roadway, barge, parking lot, dock space, harbor (either on the mainland or the Island), airport, bridge or other means of general public access to the Island. Nor has any competent evidence been presented that any such alternatives are reasonably foreseeable or practicable. Thus, Bald Head's residents, property owners, visitors, vacationers, and workers all rely on a passenger ferry to access the Island, the parking facility to provide access to the ferry terminal, and the barge to transport all of the essentials (supplies, furnishings, food, building materials, etc.) that are needed to fuel and sustain life on the Island.

The analysis presented by the Village's regulatory accounting witness paints this picture. The ferry utility operation has historically operated at a financial loss while the parking and barge operations have been generating substantial income and free cash flow.³ The un rebutted evidence supports a conclusion that, from a financial perspective, Bald

³ Tr. Vol. 1, p. 170 (O'Donnell Dir.).

Head Island Limited, LLC (“Limited”) has been operating the consolidated transportation system reflecting the *de facto* reality that it is a unified operation—content to lose incremental (but minimal) money on the regulated ferry service so long as it is free to offset that by earning an extraordinary return on what Limited regards as “unregulated” operations. To this point, the analysis shows that ratepayers would benefit, significantly from treating the transportation system, for regulatory purposes, as a consolidated operation.

The original developer of the Island, George Mitchell,⁴ is deceased, and his Estate is seeking to resolve its financial entanglements with the Island, including by disposing of the transportation system.⁵ And the reality is that the disposition of the transportation system would have already been accomplished long ago, to a public entity, the Transportation Authority, but for Limited’s inability to substantiate its proposed sale price to the satisfaction of North Carolina’s Local Government Commission.⁶

These developments, and the impending proposed transition from a developer-controlled transportation system to one owned by a non-developer private entity, are the impetus for this proceeding and the need now to resolve long lingering questions. The record is replete with the overwhelming public support by the Island’s stakeholders for the Commission’s regulatory oversight of all portions of the transportation system, including

⁴ See, e.g., “George Mitchell, Father of Fracking,” The New York Times Magazine, December 21, 2013 (available at <https://archive.nytimes.com/www.nytimes.com/news/the-lives-they-lived/2013/12/21/george-mitchell/>).

⁵ See, e.g., Tr. Vol. 5, p. 121 (Paul Dir. at 20) (“Ever since the death of Mr. Mitchell in August 2013, it has been common knowledge the day was coming when BHIL and BHIT would have to be wound down . . .”).

⁶ See, e.g., Tr. Vol. 2, pp. 108-115 and STG Redirect Ex. 2 (Auditor Wood letter to State Treasurer Folwell dated Nov. 15, 2021) and STG Redirect Ex. 3 (Auditor Wood letter to State Treasurer Folwell dated Jan. 12, 2021).

parking and the barge. This support reflects reasonable concerns that the assets held privately could be used in manner disruptive to the Island's long-term interests—including by, for example, seeking to extract abusive, monopoly rents from captive ratepayers, repurposing pieces of the system for non-utility uses, or disposing of the assets in piece parts to third parties who do not share an interest in the development or viability of the Island. These sort of concerns, if actualized, will be difficult, if not impossible, to remedy. The Commission is the state regulatory body imbued with authority to protect the public interest in these matters.

PROCEDURAL HISTORY AND FACTS

I. Bald Head Island's Uniqueness

Bald Head Island ("BHI" or the "Island") is a unique natural resource of the state due to the confluence of several attributes. It has a favorable and highly desirable climate as the southernmost location in the state; it has pristine beaches and a protected state-designed maritime forest; it features a relaxed and automobile-free island environment; it has historic attractions such as the "Old Baldy" lighthouse; it is home to sustainability and research programs at the Bald Head Island Conservancy (e.g., the Sea Turtle Protection Program, where the Island has been a national leader in protecting endangered loggerhead turtles); and it offers numerous outdoor recreational activities such as bird watching, biking, swimming, boating, canoeing, paddle boarding, and hiking.

Given these attributes, the Island is a highly sought-after and accessible destination for vacationers, day trippers, and those who seek to make the Island a home.⁷ The Island

⁷ Tr. Vol. 2, p. 31 (Gardner Dir.). *See also* Tr. Vol. 1, p. 112 (Corvin Dir.); Tr. Vol. 1, p. 100 (Munroe Dir.).

is not a private, “gated” community that only caters to millionaires, with restricted access only to property owners and renters; rather, it is a community that is open to all and enjoyed by a wide spectrum of the public.⁸ Indeed, the Island’s economy is fueled by tourism, which in turn benefits the mainland communities, such as Southport, Wilmington, and elsewhere in Brunswick and New Hanover Counties.⁹ In fact, almost 40% of the Island’s annual traffic is from employees, contractor employees, and tradesmen¹⁰ who depend on the Island’s tourism industry for their livelihood but live in one of the surrounding mainland communities.¹¹

Because Bald Head is a bridgeless island with no airport, the only means of public access to Bald Head is by ferry.¹² Bald Head is also unique in that gas-powered vehicles are strictly regulated and generally not allowed for private use.¹³ Thus, for nearly everyone who comes to the Island, on-Island transportation options are limited to trams (when arriving or departing), golf carts, bicycles, and pedestrian traffic.¹⁴

II. The Ferry and Parking Facilities

Because vehicles are not generally permitted on the Island, everyone who visits must park their vehicle on the mainland before boarding the passenger ferry. The developer of the Island established the existing ferry, parking, and barge operations to accommodate

⁸ See, e.g., Tr. Vol. 1, p. 100 (Munroe Dir.); Tr. Vol. 1, pp. 113-114 (Corvin Dir.); Tr. Vol. 2, pp. 32, 38-39 (Gardner Dir.); and Tr. Vol. 5, p. 95 (Paul Dir.).

⁹ Tr. Vol. 2, pp. 34-36 (Gardner Dir.); *see also* Tr. Vol. 1, p.112-113 (Corvin Dir.) (describing the benefit the Island’s economy and tax base provide to Title I schools in Brunswick County).

¹⁰ Employee and contractor tickets accounted for over 150,000 of the approximately 389,000 tickets in 2021. Tr. Vol. 3, pp. 17-18 (Wright Dir.); *see also* Tr. Vol. 3, p. 272 (Roberts Cross).

¹¹ Tr. Vol. 2, pp. 32, 35-36 (Gardner Dir.).

¹² Tr. Vol. 2, p. 28 (Gardner Dir.).

¹³ Tr. Vol. 5, p. 95 (Paul Dir.); *see also* Tr. Vol. 2, p. 28 (Gardner Dir.).

¹⁴ *Id.* at 3.

the needs of the public. Bald Head Island Transportation, Inc. (“BHIT”) operates four passenger ferries, transporting passengers between Southport and the Island.¹⁵ The ferry transports nearly 400,000 passengers each year—many of whom are workers who rely on the ferry for transportation to their jobs.¹⁶

Limited, BHIT’s parent company, owns the ferry terminal in Southport, known as the Deep Point ferry terminal. Limited also owns the parking facilities, as well as a barge that transports goods to and from the Island.¹⁷ On the Island, BHIT-owned trams take passengers and their luggage to and from their accommodations. There are no other companies offering parking, ferry transportation, or tram services; as its CEO, Mr. Paul testified, Limited is the “single source provider” for transportation to the Island.¹⁸

Limited’s parking facility is immediately adjacent to the Deep Point ferry terminal and offers four general categories of parking: Premium, General, Contractor, and Employee.¹⁹ There are currently 1,955 paved parking spots and additional gravel spots that bring the total to 2,302 spaces.²⁰

¹⁵ Tr. Vol. 5, p. 96 (Paul Dir.).

¹⁶ Tr. Vol. 3, pp. 17-18 (Wright Dir.); *see also* Tr. Vol. 3, p. 272 (Roberts Cross).

¹⁷ *Id.*

¹⁸ Tr. Vol. 5, p. 147 (Paul Cross). *See also* Tr. Vol. 1, p. 149 (Boyett Dir.); Tr. Vol. 1, p. 131 (Cox Dir.). Although a small number of people may reach the Island by water taxi or private boat, all parties agree that this is not a true substitute. *See* Roberts Cross. For example, these services are significantly more expensive than taking the ferry. Tr. Vol. 3, p. 217 (Sawyer Cross) (“It’s about \$150 per run ...”); Tr. Vol. 1, p. 112 (Corvin Dir.) (noting that as Islanders have become concerned about the future of the ferry, the price of boat slips has “skyrocketed,” and boat slips have been listed up to \$1.1 million). Further, water taxis do not have their own parking or tram services. Tr. Vol. 3, p. 218 (Sawyer Cross) (describing problems with water taxi users dropping off their luggage at the ferry and taking the water taxi across). Finally, Limited has taken measures to ensure that water taxis do not compete against the ferry for “non-emergency” transportation, putting the future viability of the service in “doubt.” Tr. Vol. 3, p. 209 (Sawyer Dir.) and p. 216-219 (Sawyer Cross) (discussing Limited’s “notice” that competitive water taxi service would not be permitted, but permitting service on an “emergency” basis).

¹⁹ Tr. Vol. 3, p. 22 (Wright Dir.).

²⁰ *See generally* Tr. Vol. 5, pp. 100-101 (Paul Dir.).

III. The Barge

Because the ferry cannot accommodate large items, passengers seeking to bring anything beyond luggage and hand-carried supplies to the Island must arrange to have their belongings transported by Limited's barge. As with the ferry, there is no alternative to the barge for passengers looking to bring goods, including household goods and construction materials, to the Island.²¹ For example, residents use the barge to transport household furnishings.²²

The barge also transports people. The barge is primarily a "drive-on, drive-off" service, meaning that vehicles are driven-on and driven-off the barge and occupied by their drivers during the voyage.²³ These drivers are not employees of Limited, rather they are homeowners transporting goods back and forth, tradespersons driving their service vehicles, contractors driving their work vehicles, "big-box store" retailers delivering goods to the Island, and the like. Purchasing a ticket for the barge grants the purchaser transportation for a vehicle, its driver, and its cargo.

IV. The Commission's Regulation of the Ferry System

The Commission already regulates BHIT's ferry and tram system, and no party disputes the Commission's authority to do so. The parking facilities at the Deep Point ferry terminal and the barge operation are not currently regulated, however.

²¹ Small items subject to tariffed size and weight limitations (e.g., coolers; beach chairs), can travel on the passenger ferry as luggage. Theoretically, an individual could hire a private boat to bring items over if they could fit in the boat's cargo space. The vast majority of household goods and construction materials are brought over via the barge, however.

²² Tr. Vol. 4, pp. 152-153 (Fulton Dir.); Tr. Vol. 1, p.115 (Corvin Dir.).

²³ Tr. Vol. 4, p. 146 (Fulton Dir.) ("Owners-operators load their vehicles and equipment directly onto the barge *and typically remain with the vehicle during the transit* to and/or from the island where they offload their vehicle from the barge to continue to their destination." (emphasis added); *id.* (Limited "generally permits one person . . . to stay inside each transported vehicle.")).

This proceeding is not the first time questions have been raised by members of the public over whether the parking facilities and barge should be regulated. Concerns were raised regarding whether the parking and barge should be regulated by members of the Island community as far back as 1998 in a proceeding addressing the ferry's operating schedule.²⁴ Similar concerns arose in public comments during the 2010 Rate Case.²⁵ And testimony advocating regulation of the ancillary parking facilities and operations was filed on behalf of the Village, the Bald Head Island Club, and the Bald Head Association in the 2010 Rate Case.²⁶

Despite these questions, Limited has never sought guidance from the Commission on the regulatory status of its operations.²⁷ Historically, Limited has deflected and diffused the need for Commission resolution of these issues by its willingness to offer concessions

²⁴ See, e.g., Gardner Direct Exhibit STG-2.1 at Public Hearing Transcript, Docket A-41, Sub 1 (filed Sept. 22, 1998), 9 (testimony of Marvin Cox), at 18 (testimony of James Wilson), 71 (testimony of King Triplett); Hearing Exhibits, Docket A-41, Sub 1 (filed Oct. 1, 1998), at 4 (letter of Marvin Cox), 9 (letter of Wendie Walker) (Tr. Vol. 2 – Exhibits).

²⁵ See, e.g., Gardner Direct Exhibit STG-2.2 at Public Hearing Transcript, Docket A-41, Sub 7 (filed Sept. 1, 2010), at 13–15 (testimony of Suzanne Dorsey), 21–22 (testimony of Brenda Quanstrom), 29 (testimony of Richard Mesaris), 42 (testimony of Sylvia Poole), 49–50 (testimony of Jane Johnson), 64 (testimony of Pat Garrett), 73–74 (testimony of Clark Pennell), 99 (testimony of Ricki Grantmyre), 104–06 (testimony of Bob Liesegang), 114–15 (testimony of Joe Elrod), 130–31 (testimony of Larry Lammert), 138–39 (testimony of Patricia Barnard), 159 (testimony of David Adcock); Hearing Exhibits, Docket A-41, Sub 7 (filed Sept. 14, 2010), at 11 (letter of Wendie Walker), 15 (letter of Donna Finley), 20–23 (letter of Robert and Gail Liesegang), 35 (letter of the Bald Head Island Conservatory), 81 (letter of Joe Elrod), 83–84 (letter of Brewster and Patricia Barnard), 86 (letter of Sandra Hall) (Tr. Vol. 2 – Exhibits).

²⁶ BHI Club Wright Cross Examination Exhibit 1. The parties to the 2010 Rate Case reached an agreement on settlement, which was filed with and approved by the Commission, and which explicitly left the issue of regulation of Limited's parking operations unresolved: “The imputation of the revenues of the Deep Point parking facilities . . . 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.” Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010).

²⁷ Respondents' Responses to Complainant's Second Data Requests, Request No. DR 2-3 (Exhibit 2 hereto).

to address public concerns—all of which was consistent with its commercial development objectives relating to the Island. For example, in 2009 Limited entered into a commitment to limit rate increases to inflation for certain parking rates (*i.e.*, those assessed on an annual basis) at the Deep Point ferry landing parking facilities between 2009 and 2014.²⁸ And in the 2010 Rate Case, Limited entered into a stipulation, approved by the Commission, to expand and extend its 2009 commitment by committing not to increase rates beyond inflation for all classes of parking rates at the Deep Point facility for a defined period of years.²⁹ In this same stipulation, Limited and BHIT agreed to the annual imputation of \$523,097 of revenues from its Deep Point parking operations to BHIT's utility operations to defray the revenue requirement that otherwise would be collected from regulated ratepayers³⁰ and avoid resolution of other issues then pending before the Commission (*i.e.*, the request for regulation of the parking operation).

V. Limited's Intention to Dispose of the Transportation System Assets

Although there have always been concerns about the lack of oversight over the parking facilities and barge, Limited's failed attempt to sell the transportation system to the Bald Head Island Transportation Authority,³¹ coupled with its public statements that it

²⁸ See Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), at Ex. C (attached as Exhibit 2 to Complaint). This concession was extended in the 2010 Rate Case.

²⁹ See Order Granting Partial Rate Increase, Docket No. A-41, Sub 7 (Dec. 17, 2010), at 5-7.

³⁰ *Id.* at 5-6, 17, and Schedule I. See also Testimony of James G. Hoard on behalf of the Public Staff, Docket No. A-41, Sub 7 (Sept. 30, 2010), at 3-4; Late-Filed Exhibits of James G. Hoard, Docket No. A-41, Sub 7 (Oct. 21, 2010).

³¹ See, *e.g.*, Auditor Wood letter to State Treasurer Folwell dated Nov. 15, 2021 ("To date, the Commission has not received the evidence, required by statute, that supports the value of the assets, and provides adequate support for Commission member consideration verifying that the amount proposed is adequate and not excessive. The two valuations/appraisals of the assets of the Bald Head Island Transportation System that have been submitted used assumptions that have raised a number of questions, have used estimates of asset values supplied by the seller, and has

would seek to sell the transportation assets to a private buyer, in piece parts if necessary,³² brought these issues to a head. Because of Limited's interest in successfully developing the Island (i.e., selling property on and attracting investment to the Island), it had an incentive to make the transportation system convenient and accessible, including by keeping parking and barge prices reasonable.

In contrast, a new private buyer—such as emerged more than three months after the filing of the Complaint in this proceeding—has no such incentives. In fact, the proposed buyer, SharpVue Capital, LLC, a private equity firm, has no obligations to the visitors, residents, and employees of Bald Head Island.³³ Rather, SharpVue owes a fiduciary duty to its investors to maximize profits.³⁴ Regulation is thus critical at this juncture to protect those who have vested interests in Bald Head Island, including its citizens, visitors, and those who make their living there. The exercise of regulatory authority by the Commission is the only realistic, dependable proxy for the competition that does not exist.

Proving the validity of these latent concerns, the evidence shows that SharpVue is aware of, and intends to capitalize on, the profitability of the Deep Point ferry terminal parking operation and barge service.³⁵ **[BEGIN AEO CONFIDENTIAL]** [REDACTED]

garnered so many other questions that have gone unanswered, even after multiple requests.”) (Gardner Testimony, STG Redirect Ex. 2) (Tr. Vol. 2 – Exhibits).

³² See Complaint, at ¶¶ 43-44 and notes 12-14 (citing news articles quoting Limited's representatives).

³³ To be clear, the Village had no knowledge of SharpVue as a potential purchaser until a press release was issued announcing the execution of the Asset Purchase Agreement on May 31, 2022.

³⁴ Tr. Vol. 4, pp. 29-30 (Roberts Redirect).

³⁵ See Tr. Vol. 3, pp. 303-304 (Roberts Cross) (acknowledging duty to maximize return on assets for investors).

[REDACTED]³⁶ [REDACTED]

[REDACTED]

[REDACTED]³⁷ [REDACTED]

[REDACTED]³⁸ S [REDACTED]

[REDACTED]

[REDACTED]³⁹ [END AEO CONFIDENTIAL]

Although SharpVue has made various tentative “commitments” about its treatment of the parking facilities, [BEGIN AEO CONFIDENTIAL] [REDACTED]
[REDACTED] [END AEO CONFIDENTIAL] If SharpVue sells to a third party, its commitments will not be binding on subsequent owners.⁴⁰ Even if SharpVue holds onto the property, its proffered commitments are limited in time and conditional.⁴¹ Absent Commission regulation, there is no practical means of holding SharpVue, or its successors, to its promises.

ARGUMENT

Because the parking facilities and operation are integral to the provision of ferry services, they are subject to the Commission’s oversight as either an ancillary service to the regulated ferry service or because Limited is the parent company of a regulated utility.

³⁶ This plan was developed with Mr. Paul and Ms. Mayfield. *See* Tr. Vol. 3, p. 262 (Roberts Confidential Cross); Tr. Vol. 3 (Exhibits), at Roberts Cross Ex. 1 at 16.

³⁷ Tr. Vol. 3 (Exhibits), at Roberts Cross Ex. 1 at 16; *see also* Tr. Vol. 3, p. 264 (Roberts Confidential Cross).

³⁸ Tr. Vol. 3 (Exhibits), at Roberts Cross Ex. 1 at 16; *see also* Tr. Vol. 3, pp. 264-268 (Roberts Confidential Cross).

³⁹ Tr. Vol. 3, pp. 267 (Roberts Confidential Cross).

⁴⁰ Tr. Vol. 3, pp. 241-42 (Roberts Dir.); Tr. Vol. 3, pp. 307-08 (Roberts Cross).

⁴¹ Tr. Vol. 3, pp. 242-43 (Roberts Dir.).

And the barge is subject to regulation as a common carrier public utility. Each argument is discussed in turn.

I. THE PARKING FACILITIES ARE SUBJECT TO THE COMMISSION'S JURISDICTION, EITHER AS AN ANCILLARY SERVICE OR BECAUSE LIMITED IS BHIT'S PARENT COMPANY.

A. The Commission has authority over the Deep Point parking operations as an ancillary service or facility to the regulated ferry operation.

The plain meaning of the language in Chapter 62, when coupled with the Commission's general obligation to supervise utility services, empowers the Commission to regulate ancillary services—which are incidental services that are necessary to the operation of a primary utility service. The record before the Commission establishes that the parking facilities are necessary to the ferry's operation and, as further justification for regulation, ferry passengers have no alternative to using the parking facilities at the Deep Point ferry terminal.

1. *Chapter 62 authorizes the Commission to regulate ancillary utility services.*

Chapter 62 grants the Commission “general supervision over . . . the services rendered by all public utilities in this State.” G.S. § 62-32(a). “Service” is defined 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). Looking at 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 regulate incidental services and facilities that are necessary to the provision of utility service—such as parking service—as ancillary services or facilities.

“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).

As a threshold matter, 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, p. 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)); *State v. Muncie*, 91 Ohio St.3d 440, 449, 746 N.E.2d 1092 (2001) (“An ancillary proceeding is one that is attendant upon or aids another proceeding.” (internal quotation marks 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.

In addition to the plain language of Section 62-3(27), the intent behind the statutory language is to ensure that the Commission’s authority extends to all necessary components of a 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* 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 ex rel. Utils. Comm’n v. So. Bell Tel. and Tele. Co.*, 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’s inherent authority over property that is used and useful in the provision of utility services, including ancillary services or facilities, manifests itself in a variety of ways. *See infra* Sec. I.A.5. (additional examples).

The Southern Bell directory publishing proceedings are analogous to the present circumstances and constitute the controlling authority here.⁴² There, the Commission addressed the appropriate treatment of revenues from Southern Bell's directory publishing business as well as the utility's plan to transfer its lucrative yellow pages publishing business to an unregulated subsidiary (i.e., BAPCO). The Commission disagreed with the utility's argument that it had no jurisdiction over the publishing operation, asserted jurisdiction, and allocated publishing revenues to the utility operations—a decision which was affirmed by the North Carolina Supreme Court.⁴³ Exercising this authority, the Commission ultimately approved the transfer subject to a series of ratepayer protection measures and subsequently attributed revenues from the directory publishing operation to the utility operation for the benefit of ratepayers. For example, in its 1984 rate order, the Commission disapproved the revenue allowance proposed by the utility, expressing its concerns with potential gamesmanship to the detriment of ratepayers:

The relationship between Southern Bell and BAPCO requires close scrutiny of any contract or similar arrangement between these companies to be sure that the profits of a nonregulated subsidiary are not maximized at the expense of the ratepayers.

...

⁴² Limited is likely to argue that the Commission lacks authority over parking because the word "parking" does not appear with the definition of "public utility" set out in G.S. § 62-3(23), relying on the decision in *State ex rel. Utils. Comm'n v. Gen. Tel. Co. of S.E.*, 281 N.C. 318, 189 S.E.2d 705 (1972). However, that case involved the Commission's review of a contract with an affiliate (which is not in issue here), where the affiliate was not a parent entity (unlike the case here) nor did it involve the provision of a utility or ancillary service (unlike the case here). Moreover, if parking is "ancillary" it is also a "utility service" under the plain language of G.S. § 62-3(27).

⁴³ *State ex rel Utils. Comm'n v. So. Bell Tel. and Tele. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983) (rejecting Southern Bell's "vigorous" argument that directory advertising is not "an essential part of the public utility function" and affirming Commission's decision to consider the investment and net operating income resulting from Yellow Pages advertising for purposes of determining revenue requirements in the utility rate proceeding).

Approval of the contractual arrangement between BAPCO and Southern Bell . . . could serve to set a precedent of allowing Southern Bell, for rate-making purposes, to spin-off profitable pieces of its telecommunications services to separate subsidiaries, thereby circumventing a determination or review of the proper ratemaking treatment of these services by this commission. This means that the commission could lose control, not only of directory revenues, but also of revenues from other areas and sources in the future.⁴⁴

In this proceeding, of course, BHIT is not seeking to “spin off” portions of its regulated assets because those assets are already held by its parent entity. But the legal principles at play are identical. Here, the parking operation’s income is solely derived from its integral relationship with the utility (the ferry), and the evidence in this proceeding shows that profits of the unregulated subsidiary are being maximized at the expense of ratepayers since ratepayers would be significantly better off if the entire enterprise was regulated as such.

The Commission’s responsibility to ensure adequate service is heightened when there is no alternative to the service, for in such situations the utility provider can—and presumably will, absent other considerations of a natural self-interest (such as development goals)—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 (e.g., the ferry), but also any incidental services or facilities that are necessary to render adequate primary services (e.g.,

⁴⁴ *Re So. Bell Tel. and Tele. Co.*, P-55, Sub 834, 1984 WL 1028455 (Nov. 9, 1984), at 8-9.

the parking facilities and operation at the ferry terminal). As explained in the following sections, there is agreement on many of the fundamental facts relevant to the ferry's parking facilities—and these fundamental facts establish that the parking facilities are necessary to the operation of the ferry.

2. All parties agree the parking facilities are necessary to the ferry service.

The parking facilities provide necessary, indeed essential, support to the ferry and, therefore, the parking facilities are an “ancillary” service or facility subject to the Commission's supervision.

The ferry's parking facilities—to use the words of Respondents' own expert—are “critical” to the ferry service.⁴⁵ The parking facilities are critical because nearly every ferry passenger arrives at the ferry terminal by car, oftentimes with extensive luggage and vacation supplies.⁴⁶ Because vehicles are not allowed on the Island, passengers must have a place to leave their car before boarding the ferry.

Multiple witnesses offered clear and compelling testimony on the critical importance of access to the Deep Point ferry terminal parking on reasonable terms and conditions.⁴⁷ In fact, all parties agree that parking is necessary to the ferry service. Respondents' expert witness Mr. Leonard testified that “reasonable access” to parking is

⁴⁵ Tr. Vol. 4, p. 75 (Leonard Dir. at 24), and p. 92 (Leonard Cross).

⁴⁶ See Tr. Vol. 3 (Exhibits), Wright Direct Testimony Exhibit JAW-9 (Mercator Report finding that “Nearly 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.”); Tr. Vol. 2, p. 37 (Gardner Dir.) (“I am 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.”).

⁴⁷ See Exhibit 1 hereto quoting from, and citing to, this testimony in addition to public comments.

“critical for ferry riders.”⁴⁸ The Public Staff recognized 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.”⁴⁹ Mr. Sawyer, CEO of the Bald Head Island Club (the largest customer of the BHI transportation system), testified that “[t]he parking facilities at the Deep Point ferry landing are [] an indispensable, integral, and essential part of BHIT’s ferry operation.”⁵⁰

3. *All parties agree there is no existing alternative to the Deep Point parking facilities.*

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.⁵¹ “No parking” signs line the road leading up to the terminal.⁵² The Deep Point terminal is located in a remote area, with no other parking facilities nearby.⁵³ All ferry passengers, as a matter of course, exclusively use the parking facilities at the terminal.⁵⁴

⁴⁸ Tr. Vol. 4, p. 75 (Leonard Dir.), and p. 92 (Leonard Cross).

⁴⁹ Public Staff Initial Comments, at 5.

⁵⁰ Tr. Vol. 3, p. 206 (Sawyer Direct).

⁵¹ See Response, Motion to Dismiss, and Answer of Limited 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.”).

⁵² Tr. Vol. 5, p. 134 (Paul Cross).

⁵³ Tr. Vol. 1, p. 114 (Corvin Dir. 7).

⁵⁴ See, e.g., Tr. Vol. 1, p. 129 (Cox Dir.) (“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, p. 102 (Munroe Dir.) (“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, p. 114 (Corvin Dir.) (“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. 2, p. 37 (Gardner Dir.) (“I am not aware of anybody who has used the passenger ferry to get to Bald

There is no dispute that there is no existing alternative to the Deep Point parking facilities. The Public Staff agrees that there “is no reasonable alternative at this time” to the parking offered by Limited at the ferry terminal.⁵⁵ Limited’s CEO likewise acknowledges that “there are not any other, currently existing, permanent parking facilities for ferry passengers.”⁵⁶ Similarly, SharpVue’s witness, Mr. Roberts, was unable to identify any existing alternatives to the parking facilities. At best, Mr. Roberts suggested that employees or contractors coming to the Island could “take Uber” or “have your teenage son” take you to the ferry.⁵⁷ Suffice it to say, there is no evidence that Uber is available in the Southport area on the scale needed to bring thousands of passengers per week to the Island;⁵⁸ and every member of the public does not have a “teenage son” willing and able to drive them to the Deep Point ferry terminal. The general public cannot depend on Uber and teenagers to be reliable alternatives to the ferry’s parking facilities and these responses are presumably not intended to be serious suggestions of alternatives.

At most, Respondents offered speculation about potential future alternatives to the existing parking facilities. But each of these purported alternatives was shown to be a nonviable replacement for the 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

Head without having to park a vehicle at the Deep Point parking facilities. If you need to get to Bald Head, you need to park in those parking facilities.”).

⁵⁵ Public Staff Initial Comments, at 7.

⁵⁶ Tr. Vol. 5, p. 119 (Paul Dir. Summary, at 2).

⁵⁷ Tr. Vol. 4, p. 21 (Roberts Cross) (“You can park in Southport and have a friend drop you off. You can take Uber. If you’re a contractor and you live in Southport, why wouldn’t you get your teenage son to take you to the airport – take you to the parking the way I do to get you to the airport?”).

⁵⁸ Tr. Vol. 3, p. 31 (Wright Dir.) (pointing to limited availability of ride sharing services due to Southport’s small size).

parking lot.⁵⁹ There are several problems with this “alternative”:⁶⁰ that lot is currently under contract for sale with an unknown buyer, and there is no evidence that the mystery buyer is interested in developing the land for parking. Nor is there evidence that this could economically be considered given the \$3.25 million sales price, the existing condition of the property (dense tree coverage), and the unknown nature of any environmental remediation or other conditions that would potentially interfere with the development of the property.

- Indigo Plantation. The discussion of Indigo Plantation at the hearing showed that that it is not a viable long-term alternative to the existing Deep Point parking.⁶¹ First, Limited is pursuing independent development of the property as a planned unit development and, as Mr. Paul testified, plans are already underway to develop the parking lots into condominiums⁶²—thus, it will not be available for parking in the future. Even if it were, Indigo Plantation is nearly four miles away from the Deep Point terminal, which means ferry passengers would have to drive to Deep Point, drop off their luggage, drive back to Indigo Plantation, and then secure a ride from Indigo Plantation to Deep Point.⁶³ The Indigo Planation lots have also never been utilized for overflow parking and, therefore, there is no infrastructure or arrangements in place for security, ticketing, or transiting passengers to and from Deep Point.⁶⁴

⁵⁹ Tr. Vol. 5, p. 119 (Paul Dir.).

⁶⁰ See Tr. Vol. 3, pp. 33 and Exhibit JAW-5 (Wright Dir.) (MLS listing, sales price, and image of property) & Vol. 3, pp. 137-138 (Wright Redirect) (testifying concerning his personal observations of the property and the likelihood of encountering wetlands or other environmental conditions necessitating remediation).

⁶¹ To be clear, Limited offered no evidence that Indigo was a long term parking option. At most, Mr. Paul testified that Indigo could presently be used for parking overflow although it never has been used for that. Tr. Vol. 5, p. 100 (Paul Dir.). See also Tr. Vol. 4, p. 65 (Leonard Dir. 14) (noting pending re-development of the property).

⁶² Tr. Vol. 5, pp. 126-127 (Paul Cross) (acknowledging that Limited is continuing to pursue the development of the property and that “the plan would be, in 10 years, that [the former parking facilities] are condominiums”). More to the point, even if ferry riders could park at the Indigo Plantation lots—which they presently cannot—no one contends that Indigo Planation is a long-term option for parking to serve the Deep Point ferry terminal. The property is currently owned by Limited and is not an asset being conveyed in the SharpVue transaction. Tr. Vol. 5, p. 127 (Paul Cross); Tr. Vol. 4, pp. 10, 35 (Roberts Cross and Commission’s Questions) (“we will not be acquiring that parcel”).

⁶³ See Tr. Vol. 2, p. 126 (Gardner Commission’s Questions).

⁶⁴ Tr. Vol. 3, p. 93 (Wright Cross) (describing his personal observation of current condition of Indigo parking areas which would “require a lot of work” to be useable).

- Parking in Southport. Testimony showed that the Town of Southport lacks sufficient public parking capacity to provide alternative parking.⁶⁵ 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.⁶⁶ 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.”⁶⁷

Not only are there no alternatives to the parking facilities at the ferry terminal, the owner of the ferry and parking facilities has the legal right to exclude a parking competitor from accessing the terminal. Limited owns the access roads to the terminal as well as the parking facilities,⁶⁸ and leases use of the roads to BHIT.⁶⁹ Although Respondents represented to the Commission that easements “ensur[ed]” the public “free access” to the terminal,⁷⁰ the actual easement does no such thing. The “Declaration of Easements” referred to by Respondents’ and SharpVue’s witnesses⁷¹ *expressly does not* grant any public right-of-way.⁷² To the contrary, the Declaration is quite specific that it only grants easement rights to the “Owners” (sec. 13) for use of the Owners’ “tenants, licensees, [and]

⁶⁵ Tr. Vol. 1, p. 129 (Cox Dir.); Tr. Vol. 1, p. 137-138 (Cox Commission’s Questions); Tr. Vol. 1, p. 148 (Boyett Dir.); Tr. Vol. 1, p. 156 (Boyett Commission’s Questions); Tr. Vol. 2, pp. 46, 141-142 (Gardner Cross); Tr. Vol. 3, p. 209 (Sawyer Dir.).

⁶⁶ Tr. Vol. 1, p. 137-138 (Cox Commission’s Questions).

⁶⁷ Tr. Vol. 1, p. 129 (Cox Dir.).

⁶⁸ Tr. Vol. 4, p. 28 (Roberts Cross) (“[t]hey are private roads”); Tr. Vol. 5, p. 127 (Paul Cross (“[t]hey are privately owned roads”); Tr. Vol. 3, pp. 139-140 (Wright Redirect)).

⁶⁹ Tr. Vol. 5, p. 129 (Paul Cross).

⁷⁰ “There are easements granted for free access to the terminal.” Tr. Vol 4, p. 93 (Leonard Cross). There are easements that “ensur[e] access to the ferry terminal.” Tr. Vol. 5, p. 165 (Paul Cross).

⁷¹ See Tr. Vol. 4, p. 29 (Roberts Cross) (“there are easements in place governing those roads”); Tr. Vol. 5, p. 76 (Mayfield Commission’s Questions) (“I would have to agree with the testimony I’ve heard that says you have the access easements”); Tr. Vol. 5, p. 131 (Paul Cross).

⁷² 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”).

invitees.” Thus, so long as the ferry and parking facilities are controlled by a unified owner—such as Limited—that owner has unfettered discretion to exclude anybody *it chooses* from using the access roads to the terminal. Contrary to the suggestion of Respondents and SharpVue, Limited—and any subsequent owner of the transportation assets—has the right to exclude a parking competitor from shuttling people to and from the terminal.

4. *That the parking facilities are a monopoly also weighs in favor of regulation.*

The monopoly nature of the ancillary parking operation at the Deep Point ferry terminal further supports the Commission’s exercise of regulatory authority.

A monopoly is “an entity which has the exclusive possession or control of the supply of or trade in a commodity or service.”⁷³ The existence of a monopoly runs the risk that the owner may extract monopoly rates from the public. *See Buck Island*, 162 N.C. App. at 584, 592 S.E.2d at 254. Here, the ferry is a regulated monopoly and the Commission regulates its rates. But the associated parking facilities, which are indispensable to the operation of the ferry, are also a monopoly yet unregulated. Thus, there is a risk that the owner of the ferry system could circumvent the Commission’s regulation of the ferry by raising parking rates. In other words, the owner could profit off of the residents and employees who must reach the Island via the parking facilities and ferry by simply inflating the price of parking.

As even SharpVue agrees, [BEGIN AEO CONFIDENTIAL] [REDACTED]

[REDACTED]⁷⁴ [REDACTED]

⁷³ Tr. Vol. 3, p. 30 (Wright Dir.). *See generally id.*, pp. 30-37.

⁷⁴ [BEGIN AEO CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷⁵ [REDACTED]

[REDACTED]⁷⁶ [REDACTED]

[REDACTED]

[REDACTED]⁷⁷

[END AEO CONFIDENTIAL] Thus, users of the ferry system are vulnerable to being taken advantage of by a new owner seeking to profit off of its captive customer base.

The monopoly nature of the parking facilities—coupled with the lack of other means to access the Island—distinguishes the Bald Head Island ferry from other ferries around the country. Indeed, Respondents’ witness Mr. Leonard—despite an apparently exhaustive search—was unable to identify any parking and ferry operation with all the characteristics of Bald Head’s. Unlike the ferries identified by Mr. Leonard, there are no parking lots and garages near Deep Point.⁷⁸ Also unlike Mr. Leonard’s examples, there is no public transportation to the Deep Point ferry terminal: no bus or train or other public transportation runs to the Deep Point ferry terminal.⁷⁹ Likewise, unlike many of the ferries

[REDACTED] **[END AEO CONFIDENTIAL]**

⁷⁵ Tr. Vol. 3, pp. 269-270 (Roberts Cross).

⁷⁶ Tr. Vol. 3, p. 272 (Robert Cross).

⁷⁷ Tr. Vol. 3, p. 274 (Roberts Cross).

⁷⁸ Mr. Leonard’s examples had 2.6 parking options on average within walking distance from the terminal. Tr. Vol. 5, p. 231 (Wright Rebuttal). *See generally* Tr. Vol. 5, pp. 227-233 and Tr. Vol. 5 (Exhibits), Wright Rebuttal Exhibit JAW-7. *See also* Tr. Vol. 4, pp. 100-111 (Leonard Cross) and Village Leonard Cross Exhibit 1.

⁷⁹ *See* Tr. Vol. 3, p. 31 (Wright Dir.). *See also* Response, Motion to Dismiss, and Answer of Limited 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.”).

Mr. Leonard identified,⁸⁰ 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 the Island.

Further, Limited controls all roads to and from the Deep Point terminal. Thus, as discussed above, even if competitive parking were to become available (notwithstanding the obvious practical challenges⁸¹), Limited could still limit access to the ferry by putting up a gate and charging non-parkers for access to the ferry terminal. Because the ferry's parking is a *de facto* monopoly, its users are at risk. Consistent with the General Assembly's intent that the Commission protect the public from potential abuses of monopoly power, *see, e.g., Buck Island*, 162 N.C. App. at 584, 592 S.E.2d at 254, the Commission should regulate the parking facilities.

5. The regulation of ancillary services is commonplace and includes the regulation of parking facilities in similar contexts.

Regulating the parking facilities for the ferry service is not as novel as Respondents would suggest.⁸² The Commission has repeatedly regulated services—such as the BHI ferry's tram service, billing and collection services, bus station terminals, and the Yellow Pages—that are ancillary to the primary utility service offered to the public. The Commission's regulation of the ferry's parking facility would be no different than the

⁸⁰ At least a third of Mr. Leonard's examples allow passengers to bring their vehicles on the ferry. Tr. Vol. 5, p. 321 (Wright Rebuttal).

⁸¹ Any competitive parking would be off-site, necessitating a shuttle service to and from the terminal. The shuttle service will add considerable 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.

⁸² *See* Response, Motion to Dismiss, and Answer of Limited and BHIT, Docket No. A-41, Sub 21 (March 30, 2022), at 2 ("There is no statutory authority or precedent to support such an extraordinary intervention into a private company's control and sale of its own assets . . .").

regulation of other ancillary services. Indeed, parking facilities have been regulated as ancillary services in similar contexts.

a. Regulation of BHIT Tram Service

To address the “elephant in the room,” the Commission already—without controversy—asserts jurisdiction over services that are ancillary to the BHI ferry operation; namely, the tram service.⁸³ There is no express statutory directive for the Commission to regulate tram service (indeed, Chapter 62 makes no mention of trams), and the service is not regulated as a motor vehicle carrier of household goods. Yet, the Commission unquestionably has asserted jurisdiction over the tram service, including for ratemaking purposes.⁸⁴ Indeed, no party disputes that the tram service on Bald Head Island is subject to the Commission’s regulation.

Just as the tram is necessary for passengers to leave and return to the ferry terminal on BHI, the parking facilities are necessary to reach the ferry terminal at Deep Point. As discussed above, because of the remote location of the mainland terminal, the lack of alternative parking locations, and the fact that passengers must leave their vehicles at the terminal, the parking facilities are critical to the ferry’s operation. As with the tram, although a few passengers may be able to avoid the parking facilities by having someone else drop them off, the general public uses the parking facilities. Thus, like the tram, the parking facilities should be regulated as an essential and ancillary to the consolidated transportation system.

⁸³ Bald Head’s trams are small trucks that transport ferry passengers and their luggage from the ferry to their accommodations on the Island. Because there are no vehicles on the Island, the trams are necessary to the ferry’s function because they help passengers get to and from their final destination.

⁸⁴ Tr. Vol. 5, pp. 134-136 (Paul Cross) (Mr. Paul asserting that trams are regulated as integral to the ferry service).

b. Billing and Collection Services

A paradigmatic example of another regulated ancillary service is billing and collection. Every utility offers such services, and the Commission exercises regulatory jurisdiction over such services as ancillary components of utility operation.⁸⁵ Indeed, if a utility sought, for example, to charge a fee for rendering a paper bill, that fee would fall within the Commission's regulatory authority. Similarly, if a utility sought to sell its billing and collection operation, the transfer would require the Commission's approval.⁸⁶ The Commission exercises this authority notwithstanding that Chapter 62 does not define "billing and collection" as a public utility service.

c. Bus Terminal Facilities

As an extension of its authority to compel reasonable and adequate utility service, the Commission has exercised, in the past, authority over bus terminals operated by common carriers, finding that that "[a]dequate bus station facilities commensurate with the requirements of the traveling public must be provided by all motor carriers of passengers subject to the jurisdiction of this Commission"⁸⁷

⁸⁵ See, e.g., N.C.U.C. Rule R-12 (Customer deposits for utility service; disconnection of service).

⁸⁶ See, e.g., *In the Matter of Application for Declaratory Ruling (Windstream)*, Docket No. P-118, Sub 192, 2014 WL 5319717, at *6 (Oct. 13, 2014)

⁸⁷ See, e.g., *Board of Directors Representing Carolina Coach, et al.*, B-275, Sub 38, Vol. 59 N.C.U.C. Orders and Decisions at 134-139 (May 5, 1969) (in considering request for dissolution of agreement respecting operation of bus terminal facilities, Commission finds that existing facilities are inadequate and that "all of the carriers operating into said station have the burden and responsibility of securing, building, maintaining, and operating a suitable bus station facility"). See also G.S. § 62-42(a) (setting forth Commission powers to compel adequate service, including "additions, extensions, repairs or improvements," erection of new structures; and "any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity").

d. Yellow Pages

The Commission has asserted regulatory authority over yellow pages directory services, which were ancillary to the use of the telephone service provided by public utilities.⁸⁸ Although, with the Commission's approval, Southern Bell transferred its directory operations to BAPCO, an unregulated affiliate, the Commission still asserted authority over those operations. For example, the Commission allocated revenues from BAPCO to Southern Bell for ratemaking purposes, recognizing the "integral relationship of the directory to telephone service" and the need to ensure that the "profits of a nonregulated subsidiary are not maximized at the expense of ratepayers"⁸⁹—the exact concern at work here.

The Commission likewise scrutinized the revenues of General Telephone Company's directory affiliate and allocated revenues to the utility for ratemaking purposes because the "directory operations are an integral part of the local telephone operations of GTC and the company's ratepayers are entitled to receive the benefit of those operations."⁹⁰

e. Regulation of parking facilities.

It is not unusual for a regulatory commission to exercise regulatory authority over utility property such as parking facilities when the property is used to provide a utility

⁸⁸ Tr. Vol. 3, pp. 42-45 (Wright Dir.). Dr. Wright also testified to the Commission's regulation of telephone handsets prior to telephone deregulation. Tr. Vol. 3, p. 42 (Wright Dir.). The handsets were not themselves a utility, but they were deemed necessary for customers to be able to use the telephone utility and therefore were an ancillary service subject to the Commission's regulation.

⁸⁹ *Re: So. Bell Tel. & Tele.*, Docket No. P-55, Sub 834, 1984 WL 1028455 at *8-10 (Nov. 9, 1984). *See also State ex rel. Utils. Comm'n v. So. Bell Tel. and Tele. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983) (rejecting argument that "mere transmission of messages across telephone lines is adequate telephone service").

⁹⁰ Order Granting Partial Increase in Rates and Requiring Service Improvements, Docket P-19, Sub 207 (Sept. 16, 1986), at 11.

service. In fact, this Commission has done so, expressly permitting Duke Power to include “all common plant” in its rate base, including “[s]witching stations, waste treatment facilities, shops, laboratories, roads and *parking lots*.”⁹¹ To this point, evidence presented in this case shows at least one regulated ferry in North Carolina includes parking lot expenses in its calculation of utility expenses, suggesting that parking assets are included in its rate base.⁹²

Similarly, in the 2010 Rate Case, the Commission’s order included several restrictions on the Deep Point parking facilities. For example, the order imputed \$523,097 in parking revenues in establishing revised ferry rates.⁹³ The basis for this imputation was a stipulation of the parties, but the evidence shows that the amount of the imputation was determined by the Public Staff’s calculation performed as if the parking operation was subject to regulation and put in rate base.⁹⁴ Additionally, in the 2010 Rate Case, the Commission approved a stipulation constraining permitted rate increases for the Deep Point parking facilities—again demonstrating a willingness and ability to regulate parking.

Outside of North Carolina, state agencies and regulatory bodies have regulated parking, including for ferry services. For example, Massachusetts’s Steamship Authority sets parking rates for ferries traveling to Martha’s Vineyard and Nantucket.⁹⁵ Similarly,

⁹¹ *State ex rel. Utils. Comm’n v. Eddleman*, 320 N.C. 344, 362, 358 S.E.2d 339, 352 (1987) (emphasis added).

⁹² See Tr. Vol. 5 (Exhibits), Wright Rebuttal Exhibit JAW-4, at 5 (showing “parking lot lights” in utilities expense calculation).

⁹³ Tr. Vol. 3, p. 39 (Wright Dir.).

⁹⁴ Tr. Vol. 1, pp. 185-186 (O’Donnell Rebuttal) (citing Public Staff workpapers from 2010 Rate Case); Tr. Vol. 2, pp. 13-15 (O’Donnell Redirect) (explaining the Public Staff workpapers); see also Tr. Vol. 2 (Exhibits), KWO Redirect Exhibit 1 (Public Staff’s 2010 workpapers).

⁹⁵ See Tr. Vol. 5, p. 231 (at item 3) (Wright Rebuttal) and Rebuttal Exhibit JAW-7.0. See also October 2022 Board Meeting - Proposed 2023 Rate Adjustments, at 121-34 (Oct. 13, 2022), https://www-steamship-assets.s3.amazonaws.com/files/2022_1018_board_meeting_public_packet.pdf (discussing setting parking rates for 2023 season).

in the context of transportation by trains, the California Public Utilities Commission dismissed out of hand the argument that a parking facility adjacent to a railroad station was not a necessity and thus not subject to regulation. *City of Mountain View v. S. Pac. Co.*, 70 P.U.R.3d 304, 1967 WL 164047, at *7 (Cal. P.U.C. June 20, 1967). There, the railroad argued that the California utilities commission did not have jurisdiction over its decision to close parking facilities at train stations. The California commission rejected the argument, explaining: “We do not believe in the year 1967 it can seriously be argued that customer parking facilities adjacent to a railroad station are not ‘incidental to the safety, comfort, or convenience of the person being transported’ . . . [and] cannot be reasonably necessary to accommodate passengers.” Just as it was (and is) necessary for the train riders to be able to drive to the train station, here, it is necessary for ferry riders to use the Deep Point ferry terminal parking facilities in order to ride the ferry.

Similarly, it is often the case that government entities exercise regulatory control over parking facilities. For example, the RDU Authority is a governmental body established by the General Assembly that maintains jurisdiction over and establishes through a yearly budgeting process (subject to Chapter 159 of the General Statutes) parking rates for all on-site airport parking.⁹⁶ This is, of course, a common arrangement with large “coliseum”-type parking facilities that are operated by and through legislatively-authorized governmental authorities.⁹⁷ These governmental entities are *de facto* regulatory bodies that are authorized to, among other things, establish and control parking and parking rates.

⁹⁶ See Tr. Vol. 5, pp. 137-144 (Paul Cross) and Village Paul Cross Exhibit 1. Similarly, the City of Charlotte owns Charlotte-Douglas International Airport. See <https://www.cltairport.com/careers/>.

⁹⁷ See, e.g., Facility Authority Act, S.L. 1995-458 (establishing Centennial Authority to construct what is now known as PNC Arena); see also G.S. § 160A-480.2(5) (defining “regional

Indeed, as to the BHI ferry operations itself, the General Assembly enacted the Ferry Transportation Authority Act, S.L. 2017-120, which established the legal authority for creation of the Bald Head Island Transportation Authority. This legislative enactment—specifically focused on Bald Head Island, at Limited’s request⁹⁸—repeatedly references “parking” as within the Authority’s authorized powers, defining “ferry transportation system” to include parking and making clear that the Authority could set parking rates.⁹⁹ The General Assembly could not be more clear—in legislation specifically directed to the BHI transportation system—that it viewed parking as an indispensable component of the ferry operation, and gave the Authority the ability to govern and establish parking rates.

B. In the alternative, the Commission should regulate Limited as BHIT’s parent.

The Commission is empowered with “general supervision over . . . the services rendered by all public utilities in this State.” 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.” G.S. § 62-3(23)c. The Commission has repeatedly, especially in the context of mergers and

authority” to include associated parking facilities); G.S. § 160A-480.4(16) (giving authority power to set rates for use of the “regional facility”).

⁹⁸ Tr. Vol. 5, p. 121 (Paul Summary).

⁹⁹ See generally Article 29 of Chapter 160A of the General Statutes; see also G.S. § 160A-681(5) (definition of “ferry transportation system”); *id.* § 160A-685((c)(27) (ratemaking authority).

acquisitions, relied on this authority to ensure the appropriate regulation of public utilities.¹⁰⁰

Limited is BHIT's parent company.¹⁰¹ Because Limited's operation of the parking facilities affects the rates and service of the ferry, Limited is subject to Commission regulation for this separate and additional reason. Indeed, the Commission has already made this determination in the context of the 2010 Rate Case, finding that "BHIL is subject to the jurisdiction of the Commission to the extent provided for in G.S. 62-3(23)c."¹⁰² This finding provided the basis for the imposition of revenue imputation, rate increase limits, and other restrictions applicable to the parking operation in the 2010 Rate Case.

Limited's control over the Deep Point parking affects both the rates and the service offered by BHIT. As described above, the parking facilities are critical to the service ferry

¹⁰⁰ See, e.g., *State ex rel. Utils. Comm'n v. Nantahala Power and Light Co.*, 313 N.C. 614, 656, 332 S.E.2d 397, 423 (1985) ("the evidence fully supports the Commission's determination that Alcoa is a North Carolina public utility under N.C.G.S. § 62-3(23)c, by virtue of the effect Alcoa's 'affiliation' with Nantahala has had upon Nantahala's rates. The historical and current operating conditions tying Tapoco and Nantahala together clearly show that Nantahala is part of a single utility enterprise, created by Alcoa as part of a plan to secure for itself, through the separate corporate entities of its public utility subsidiaries, the large quantities of low-cost power it requires for its aluminum smelting and fabricating operations."), *rev'd on other grounds*, 476 U.S. 953 (1986); *In Re Frontier Energy, LLC*, No. G-40, Sub 67, 2007 WL 3129809 (Sept. 13, 2007) (approving Regulatory Condition that "[Frontier Utilities of North Carolina, Inc.] and Frontier Energy shall be considered to be a consolidated entity to the extent that FUNC's affiliation with Frontier Energy has an effect on Frontier Energy's rates or service so as to cause FUNC to be a public utility under G.S. 62-3(23)c.; reports to be filed on a consolidated basis); *In Re Duke Energy Fossil-Hydro, LLC*, Docket No. E-7, Sub 694, 2002 WL 257795 (Feb. 5, 2002) (Commission disapproving reorganization of Duke Power entities) (Public Staff witness panel noting that G.S. 62-3(23)c and G.S. 62-51 give the Commission authority over affiliates of public utilities and recommending that the Commission exercise its authority "to the fullest extent necessary to monitor the effect of the [Duke Energy Generation Services, LLC] Agreements on Duke Power's retail electric rates and service and to take whatever action is necessary to protect the interest of North Carolina retail ratepayers."); *In Re Duke Energy Corp.*, Docket No. E-7, Sub 795, 2006 WL 1559336 (Mar. 24, 2006) (Commission retaining the authority to treat "new Duke Energy" as a public utility by virtue of G.S. 62-3(23)(c)).

¹⁰¹ Tr. Vol. 5, p. 96 (Paul Dir.).

¹⁰² 2010 Rate Case Order, at 4 (Finding of Fact and Conclusions no. 2).

riders receive. If Limited disposed of, or moved, the parking facilities, it would fundamentally disrupt the ferry service. As Mr. 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.¹⁰³ Further, ferry ridership and parking are intertwined; without parking facilities, ferry ridership would likely drop.¹⁰⁴

Limited's control over the parking operation 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 its revenues with profits from the parking and barge operations. Although the ferry consistently shows annual financial losses,

[BEGIN AEO CONFIDENTIAL] [REDACTED]

[REDACTED]¹⁰⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰³ Tr. Vol. 2, p. 126 (Gardner Rebuttal Cross).

¹⁰⁴ Tr. Vol. 3 (Exhibits), Wright Dir. at Exhibit JAW-9 (Mercator report finding that "the parking operation is tied to the ferry operation, with demand for parking very closely related to overall ferry traffic").

¹⁰⁵ Tr. Vol. 1, pp. 168-169 (O'Donnell Dir.).

¹⁰⁶ [END AEO CONFIDENTIAL]

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

[END AEO CONFIDENTIAL] Likewise, in the 2010 Rate Case proceeding, BHIT told the Commission that its ferry service has operated at a loss since 1999.¹⁰⁷

As further evidence of the parking facilities' [BEGIN AEO CONFIDENTIAL] [END AEO CONFIDENTIALITY] overall rate of return on the ferry system, parking facilities, and barge.¹⁰⁸ This rate of return is significantly above what any public utility would be permitted to earn in a rate proceeding.

[BEGIN AEO CONFIDENTIAL]

¹⁰⁶ Tr. Vol. 1, pp. 169-170 (O'Donnell Dir.).

¹⁰⁷ Tr. Vol. 1, p. 172 (O'Donnell Dir.) (citing Application, Docket No. A-41, Sub 7, at ¶ 6).

¹⁰⁸ Tr. Vol. 1, p. 179 (O'Donnell Dir.).

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

Finally, as further evidence of the practical connection between the parking operation and the ferry service, in the 2010 Rate Case, the Commission approved the annual imputation of \$523,097 in parking revenues when it established the current ferry rates. Thus, Limited's provision of parking facilities not only had an effect on the ferry rates and service, the parking and ferry are inextricably linked.

In sum, for this additional, separate reason, the parking facilities and operations are subject to Commission's regulation.

C. There is widespread consensus that the Commission must ensure adequate parking, which requires the Commission to exercise authority over that service.

Given an Island community with only approximately 300 full-time residents and 1,250 total residences, the record in this proceeding reflects a tidal wave of public support for Commission regulation to ensure that Island residents, visitors, and workers have access to adequate ferry parking on reasonable terms and conditions. Exhibit 1 to this brief quotes from, and cites to, the extensive testimony, letters and surveys put forward in this proceeding by BHI residents and property owners. Illustrating the depth of concern among Island stakeholders, in an August 2022 survey, over 70% of responding Island property owners supported Commission regulation of ferry parking, based largely on the lack of

alternative parking providers and resulting monopoly pricing.¹⁰⁹ These concerns echoed a previously-filed Consumer Statement of Position signed by over 400 BHI property owners.¹¹⁰

Other parties in this proceeding acknowledge the need for Commission oversight. In its Initial Comments, the Public Staff recognized that parking is intrinsically linked to 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."¹¹¹ That is because "it would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates."¹¹² 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."¹¹³ The Public Staff does not explicate the nature or regulatory basis for or implications of this "scrutiny"—and, in fact,

¹⁰⁹ See, e.g., Tr. Vol. 5, p. 188 (Gardner Redirect) (quoting BHA survey respondent) ("My concern is a private owner will increase costs for profitability purposes, and since property owners/visitors have no alternative to the private owner they will be forced to pay the higher costs. The NCUC can protect property owner/visitors from the monopoly power of the private owner to keep costs fair and reasonable.").

¹¹⁰ See, e.g., Consumer Statement of Position at 13 ("We urge the commission to regulate the BHI Ferry, Barge Parking and tram operations as they are vital to all BHI owners & workers"); *id.* ("As full time residents we are especially concerned with unregulated parking. If those rates increase to untenable amounts, it will cause us to rethink our long term plans for living and owning a home on BHI."); *id.* ("I support the need to regulate parking at Deep Point. I am fearful of the monopolistic nature of the entire ferry system (from parking to trams). We simply have no other choice for these critical services."); *id.* at 14 ("Unregulated prices on parking, barge and ferry will drive out many long-standing property owners."); *id.* at 15 ("Life on BHI depends on the ferry, barge and parking services, not just for residents but for the many employees who must travel to the island every day. This is not a tourist luxury, it is essential to the life of the island and to the communities near to it.").

¹¹¹ Public Staff Initial Comments, at 5.

¹¹² *Id.*

¹¹³ *Id.*

the Public Staff goes on to state that it envisions oversight “short of regulation.”¹¹⁴ However, no scrutiny (or effective protection of the using public) is possible (or at least effective, and one presumes the Public Staff is recommending efficacious scrutiny) without the assertion of regulatory authority by the Commission over parking, consistent with the Village’s request in this proceeding.

Similarly, Respondents’ witness Mr. Leonard testified that the “economic success of the parking operation can be linked to the existence and usage of a ferry system” and that it was “critical” that ferry riders be provided “reasonable access to a sufficient amount of suitable parking facilities.”¹¹⁵ Mr. Leonard further acknowledged public concerns over the “availability of parking and the ability to expand parking capacity as and when needed.”¹¹⁶ Again, while Mr. Leonard is not an expert on utilities regulation,¹¹⁷ he was offered by Respondents as their expert witness on parking as it relates to ferry operations, and his own testimony acknowledges (1) the link between BHIT’s ferry operation and parking as an essential service, and (2) the need for regulatory oversight of this essential component of the regulated service.

In the end, while there is disagreement concerning the degree and manner of regulation that should be exercised by the Commission, there is widespread recognition—

¹¹⁴ *Id.* The Public Staff apparently bases its view based on a misreading of the applicable authority. The Village explained in its Reply (at 3-5) how the Public Staff’s interpretation (i) relies on *dicta* from *State ex rel. Utils. Com’n v. So. Bell Tel. & Tele. Co.*, 307 N.C. 541, 544 (1983), (ii) conflicts with the Public Staff’s own interpretation of that exact language, and (iii) conflicts with the Commission’s interpretation of that exact language. The Village incorporates herein by reference its Complainant’s Reply to Initial Comments of Public Staff filed in this proceeding on September 28, 2022.

¹¹⁵ Tr. Vol. 4, pp. 74-75 (Leonard Dir.).

¹¹⁶ *Id.* at 75.

¹¹⁷ Tr. Vol. 4, pp. 88-89 (Leonard Cross).

together with extensive and powerful support from the local community—of the need for Commission oversight of Limited’s parking operation.

D. Impact of a finding of regulatory authority.

A finding that property is integral to, or used and useful in connection with, a utility operation has several, established regulatory consequences.

- Approval for disposition of utility property. It has long established that “if the assets to be transferred are a substantial or integral part of the system or facilities used to provide public utility service, Commission approval of the transfer of ownership or control would be required because of the impact of the transfer on public utility rates and service.”¹¹⁸
- Approval for disposition of “excess property.” Even where property is not “used and useful” but has been acquired with ratepayer funds, the Commission has asserted regulatory authority. For example, the Commission required Duke Energy Progress to seek prior approval before disposing of excess land acquired, but not used, in connection with the construction and operation of the Harris Nuclear Plant. To facilitate this review the Commission established various review criteria to ensure, among other things, that fair value is being received for this assets, that ratepayers will benefit from the sale, and that ratepayers are not incurring any costs or future liabilities from the sale.¹¹⁹ This review requirement has remained in place since 1988, with disposition notices filed as recently as November 3, 2022.¹²⁰

¹¹⁸ *In the Matter of Application for Declaratory Ruling (Windstream)*, Docket No. P-118, Sub 192, 2014 WL 5319717, at *6 (Oct. 13, 2014) (citing G.S. § 62-111). *See also* Docket No. P-55, Sub 839 (Southern Bell for approval of the transfer of directory assets to BAPCO, notwithstanding the contentions of Southern Bell that the Commission lacked jurisdictional authority over the directory assets); Docket No. E-22, Sub 418 (application of Dominion North Carolina Power for authority to transfer control of its North Carolina electric transmission system to PJM Interconnection, LLC, a regional transmission organization); and Docket No. E-2, Sub 778 (petition of CP&L for approval to transfer certificates to construct certain generating facilities to subsidiaries of an unregulated affiliate, Progress Energy Ventures, Inc.).

¹¹⁹ *See, e.g., In the matter of Application of Carolina Power & Light Company for Authority to Adjust and Increase Its Rates and Charges*, Order Granting Partial Rate Increase in Rates and Charges, Docket No. E-2, Sub 537, at 145 (Aug. 5, 1988); *id.*, Order on Public Staff Motion, at 2 (Aug. 13, 1992) (“CP&L will not convey and/or encumber [Harris Plant] land without prior Commission approval and that any benefits resulting from such conveyance or encumbrance will be passed on to CP&L’s ratepayers.”).

¹²⁰ *See* Duke Energy Progress, LLC’s Information / Compliance Report for Conveyance of Harris Plant Lands, Docket Nos. E-2, Sub 333A and E-2, Sub 537A (Nov. 3, 2022).

- Complaint authority. The Commission retains the authority to hear and resolve complaint regarding ancillary services and facilities—which authority has been affirmed by the North Carolina Supreme Court.¹²¹
- Imputation of revenues. The Commission retains the authority to impute revenues from ancillary services and facilities—which authority has been affirmed by the North Carolina Supreme Court.¹²²
- Allocation of gain on sale. Consistent with the Commission’s treatment of “excess property” at the Harris Nuclear Plant, in the 2010 Rate Case, the Commission utilized its authority to ensure the gain on the transfer of the Indigo Plantation terminal to non-utility property was reflected as a reduction in expenses in the ratepayer’s favor, despite the fact that the terminal was owned by Limited, not BHIT.¹²³ This treatment reflects the recognition that the terminal property was considered to be a utility-related asset (ancillary), even though owned by the parent, entity.

Similar transfer restrictions, complaint authority, imputation of revenues, gain-on-sale regulations apply here with respect to Limited’s parking operation. Stated another way, irrespective of whether the Commission ultimately sets parking rates in a future rate case, the impact of the exercise of jurisdiction over the parking assets and operations will have multiple other beneficial impacts for ratepayers and the preservation of utility assets.

II. THE BARGE IS A COMMON CARRIER OF HOUSEHOLD GOODS AND PERSONS FOR COMPENSATION.

The General Assembly has expressly included within the scope of the Commission’s regulatory authority common carriers engaged in the intrastate transportation of household goods and persons by boat. Under 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*

¹²¹ *State ex re. Utils. Comm’n v. So. Bell Tel. and Tele. Co.*, 391 S.E.2d 487, 391 S.E.2d 487 (1990).

¹²² *State ex rel Utils. Comm’n v. So. Bell Tel. and Tele. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983).

¹²³ *See 2010 Rate Case Order*, p. 13.

compensation, including transportation by bus, truck, boat or other conveyance”

This authority is reiterated in the statutory definition of “public utility,” which includes:

‘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”

G.S. § 62-3(23)(a)(4) (emphases added).

Because Limited’s barge service (1) holds itself out to the general public (2) to transport persons or household goods for compensation (3) by boat or other means, it is a common carrier subject to the Commission’s public utility regulation.

As a preliminary matter, it should be understood that the Commission’s statutory authority over non-vehicular-based common carriers has never been limited by federal regulation in the same way that it has with respect to motor vehicle carriers. The Federal Aviation Administration Authorization Act of 1994 (“FAAAA”),¹²⁴ includes a provision preempting state and local regulation of trucking.¹²⁵ 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) expressly “does not apply to the intrastate transportation of household goods.” *Id.* § 14501(c)(2)(B). Notably, intrastate water transportation is not within the scope of federal jurisdiction. *See id.* §

¹²⁴ Pub. L. No. 103-305, 108 Stat. 1569

¹²⁵ *See* § 601(c), Tit. VI, 108 Stat. 1606. This enactment was a reaction to an interpretation of the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. § 41713(b) by the Ninth Circuit which resulted in dissimilar treatment of overnight delivery services (e.g., FedEx).

13521 (granting exclusive federal jurisdiction only for *interstate* water transportation (§ 13521(a)(1)), and *foreign* water transportation (§ 13521(a)(3)).

Accordingly, the General Assembly's grant of authority to the Commission to regulate common carrier service by "boat" or "other conveyance" remains fully intact and does not suffer from any preemption concerns applicable in the motor vehicle context.

A. The barge service is held open to the public.

The barge service is clearly held out to the general public. In his Direct Testimony, Dr. Wright explained that Limited advertises its barge service to the general public without any restrictions on who may use it, relying on and citing to Limited's public statements on its website.¹²⁶ In its responses to discovery requests, Limited admitted that there are no restrictions on usage of the barge so long as the passenger has an Internal Combustion Engine ("ICE") permit that is required to use a vehicle on the Island.¹²⁷ Further, Limited also conceded that it was not aware of a single instance in which it refused service to a member of the public who had paid the appropriate fare and had an ICE permit.¹²⁸

Neither Limited nor SharpVue presented any evidence challenging the assertion that the barge service is held open to the public nor did they cross examine Dr. Wright on this issue. To the contrary, in their discovery responses, Respondents' repeatedly stated

¹²⁶ See Tr. Vol. 3, p. 51 (Wright Dir.).

¹²⁷ Tr. Vol. 3 (Exhibits) (Limited Responses to Village DR 1-23 as set forth in Wright Direct Testimony at Exhibit JAW-10). Vehicles with internal combustion engines are not allowed on the island unless the Village has issued an ICE permit authorizing their use. *Id.* Tr. Vol. 3, at 51 (Wright Dir.).

¹²⁸ Tr. Vol. 3 (Exhibits) (Limited Responses to Village DR 1-24 as set forth in Wright Direct Testimony at Exhibit JAW-10).

that “BHIL’s barge and tug operation *holds itself out to the public* as a vehicle freight transportation business.”¹²⁹

The courts have made clear that “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).

The leading case on whether utility service is provided “to or for the public” is *State ex rel. Utils. Comm’n v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978) (*Simpson*). In *Simpson*, a physician owning a telephone answering service began operating a two-way radio communication service offered exclusively to members of the Cleveland County Medical Society, a small group of 55 to 60 persons. The Commission concluded that the two-way radio communication service was being provided to the public. On appeal, the Supreme Court affirmed the Commission’s order and wrote:

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.

Simpson, at 522, 246 S.E.2d at 755 (quoting *State ex rel. Utils. Comm’n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 268, 148 S.E.2d 100, 109 (1966)). Further, the Court explained:

[W]hether any given enterprise is a public utility within the meaning of a regulatory scheme does not depend on some abstract, formulistic definition of “public” to be thereafter universally applied. What is “public” in any given case depends rather on the regulatory circumstances of that case. Some of these circumstances are (1) nature of the industry sought to be

¹²⁹ *Id.* (Limited Responses to Village DR 1-19); *id.* (Limited Responses to Village DR 1-20); *id.* (Limited Responses to Village DR 1-21).

regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry. The meaning of “public” must in the final analysis be such as will, in the context of the regulatory circumstances, ... accomplish “the legislature's purpose and comport with its public policy.

295 N.C. 519, 524, 246 S.E.2d 753, 756-757 (1978) (citation omitted). *See also Mackie*, 79 N.C. App. 19, 388 S.E.2d 888 (1986) (person providing water and sewer service to some but not all residents of a subdivision was nonetheless a public utility); *State ex rel. Utils. Comm’n v. NC WARN*, 255 N.C. App. 613, 805 S.E.2d 712, at 715-16 (advocacy organization’s power purchase agreement with single church under which electricity was furnished by a solar array owned by the organization rendered the organization a public utility), *aff’d per curiam* 371 N.C. 109, 812 S.E.2d 804 (2018).

Here, *Simpson*, *Mackie*, and *NC WARN* all support the determination that Limited’s barge service is furnishing utility service to or for the public. Limited is offering service to all persons who have ICE permits from the Village without further distinction or qualification. The ICE permit requirement is a requirement established by the Village, not by Limited. In other words, because the barge is a “roll-on, roll-off” vehicular barge,¹³⁰ all vehicles that are permitted to be transported to the Island are allowed on the barge. Considering the context of the particular service here (a service barge), transporting essential goods, supplies and vehicles to Bald Head Island, where the service is being provided on a monopoly basis, there is ample justification for concluding that the service is provided to the public—particularly given the strong public interest ensuring the

¹³⁰ Tr. Vol. 4, p. 65 (Leonard Dir.); Tr. Vol. 4, p. 144 (Fulton Dir.); Tr. Vol. 4, pp. 189-190 (Fulton responses to Commissioners questions); Tr. Vol 5, p. 7 (Fulton Redirect); Tr. Vol. 5, p. 107 (Paul Dir.).

availability under reasonable terms and conditions of essential transportation services provided on a monopoly basis.

B. The barge service is provided for “compensation.”

There is no dispute that the barge service is a fee-based service. Dr. Wright testified that pricing for use of the barge is based on the amount of deck space utilized.¹³¹ Limited’s testimony is consistent therewith.¹³²

That the fee is calculated based on deck space, rather than per passenger or per volume of household goods, is of no import here. The only statutory requirement is that the service be provided for “compensation,” and the Commission has repeatedly emphasized the flexible nature of this analysis.

For example, in a proceeding involving a combined heat and power facility, the Commission determined that the applicant, 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). The Commission reasoned:

[W]ere the Commission to rule otherwise it would open a Pandora’s box of scenarios in which an electric generator could provide electrical services “free of charge” to a third party and build in compensation to recover its costs via other arrangements, thus, avoiding the statutory definition of a public utility in G. S. 62-3(23)a.1.

¹³¹ Tr. Vol. 3, p. 55 (Wright Dir.).

¹³² Tr. Vol. 4, p. 147 (Fulton Dir.).

WEP Order, at 4. *See also 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) (finding that flat rental fee, which entitled tenant to the leased premises plus electric, water, and sewer service, constituted “providing utility service ‘for compensation’”); *Buck Island*, 162 N.C. App at 577, 592 S.E.2d at 250 (noting that statute does not require sale of utility service, only furnishing for compensation; finding that evidence of tap fees received was sufficient to satisfy compensation element). All that is required by the common carrier definition is that the service be provided for “compensation,” and that requirement is clearly met here.

Other vehicular ferries offer similar pricing structures.¹³³ In response to the Commission’s questions, Mr. Leonard testified to his personal knowledge for ferries charging by “size of vehicle, weight, or type of cargo.”¹³⁴ Here, Limited charges a fee based on the amount of barge deck space utilized by a customer.¹³⁵ Clearly, the barge service offers transportation services in exchange for compensation, as contemplated in G.S. § 62-3(6) (common carrier) and G.S. § 62-3(23) (public utility).

¹³³ *See, e.g.,* Village Leonard on Commission’s Questions Exhibit 1 (showing vehicle rates, priced by weight and size, inclusive of the driver) (Tr. Vol. 4, p. 133).

¹³⁴ Tr. Vol. 4, pp. 123-124 (Leonard on Commission’s Questions). *See also* Tr. Vol. 3, pp. 123-124 (Wright Dir. on Commission’s questions).

¹³⁵ Tr. Vol. 3, p. 55 (Wright Dir.).

C. The barge is a “boat” within the meaning of G.S. § 62-3(6) and “other form of transportation” within the meaning of G.S. § 62-3(23)(a)(4).

The barge is a “boat” within the meaning of G.S. § 62-3(6).¹³⁶ Limited’s barge witness, Mr. Fulton, agreed that the barge was a boat for purposes of G.S. § 62-3. Asked on cross-examination about the statutory definition:

Q. And a barge is a boat, is it not?

A. Yes. It’s a vessel.

Q. I’m sorry I interrupted you.

A. I said a vessel, a boat, yes.¹³⁷

See also 46 CFR § 90.10-3 (defining “barge” for purposes of Title 46 to mean “any non self-propelled vessel”).

Mr. Fulton further agreed that a barge was an “other form of transportation” within the meaning of G.S. § 62-3(23)(a)(4).

Q. Wouldn’t you agree that a barge is another form of transportation?

A. Yes.¹³⁸

There is no dispute on this point.

D. The barge service transports household goods and persons.

The only question disputed by Limited is whether the barge transports household goods and persons for compensation. Because the barge transports both household goods and persons for compensation, the barge is a common carrier public utility.

¹³⁶ *See* Tr. Vol. 4, p. 143 (Fulton Dir.) (explaining that the barge service “consists of the Brandon Randall, a 100 foot x 32 foot steel deck barge . . . and the Captain Cooper, a tug boat that pushes the barge.”).

¹³⁷ Tr. Vol. 4, pp. 163-164 (referring to Village Fulton Cross Exhibit 1).

¹³⁸ Tr. Vol. 4, p. 163 (referring to Village Fulton Cross Exhibit 1).

1. The barge transports household goods.

Although Chapter 62 does not define “household goods,” the Commission’s Rule R2-37—applicable to motor vehicle carriers—defines the term as “personal effects and property used or to be used in a dwelling, when a part of the equipment or supply of such dwelling, and similar property if the transportation of such effects or property is arranged and paid for by the householder or another party.” N.C.U.C. Rule R2-37. The federal definition in the transportation statutes is to similar effect. *See* 49 U.S.C. § 13102(10). Of particular note, these definitions encompass the transportation of household items by third party vendors where arranged by the householder—as is often the case with respect to the barge.¹³⁹

Village witness Munroe testified how she relies on the barge to bring supplies for her property maintenance and cleaning business—as well as for her own personal use:

I rely on the barge to bring supplies over for my business. I have also used the barge to bring household goods over for my personal use. A few years ago I rented a U-Haul and brought over a bathroom vanity and light fixtures for my house. I called the barge to reserve a spot. I rode over on the barge with the U-Haul. Everyone on the Island knows that the only way to get furniture or other large household goods over the Island is by using the barge.¹⁴⁰

Village witness Corvin also testified to his personal use of the barge to transport household goods:

I have used the barge to transport furniture I was bringing to the island in 2016. I rented a 26 foot truck to bring over furniture for my house. I called up the barge to reserve a spot. I rode over on the barge with my truck. The workers on the barge were well aware that I was transporting furniture. I have also arranged for other large items to be delivered to our home over the years by use of the barge service. It is well known on the island that this

¹³⁹ *See, e.g.*, Tr. Vol. 2, pp. 121-122 (Gardner on Commission’s Questions); Tr. Vol. 1, pp. 150-151 (Boyett Dir.); Tr. Vol. 1, p. 131 (Cox Dir.).

¹⁴⁰ Tr. Vol. 1, p. 102 (Munroe Dir.).

is the only way to get furniture and other large household items transported to the island.¹⁴¹

Village witness Gardner testified as to his use of the barge to deliver appliances, furniture, and construction material for small projects to his home on the Island.¹⁴² For larger projects, his contractors have used the barge to transport larger loads of household furniture, appliances, and construction material. And recently he had two HVAC units replaced, each of which was delivered on the barge. Finally, Mr. Gardner testified to his personal use of the barge to transport a small boat and trailer back to the mainland for maintenance and repair.¹⁴³

Village witness Cox testified as to the household goods he has seen transported on the barge, in his oversight role as to the Village's Island Package Center ("IPC"):

Short of carrying an item onto the passenger ferry, the only way to get a household good to the island is by barge. This is especially true for large household items. . . . I think I have seen everything you could imagine as a household item come through IPC [via the barge]: chairs, lamps, mattresses, book shelves, TVs, kitchen tables, refrigerators, grills—you name it. For those on the island, the barge carries everything plus the kitchen sink. And I mean that literally: I have even seen a kitchen sink arrive at the IPC after having come over on the barge.¹⁴⁴

Village witness Boyett testified as to the role played by the barge in constructing and furnishing houses on the island: "The materials that come across the barge include everything needed to build and furnish a house. Lumber, nails, tiles, grout—you name it, it comes across on the barge. It also includes the delivery of appliances and furniture. The

¹⁴¹ Tr. Vol. 1, p. 115 (Corvin Dir.).

¹⁴² Tr. Vol. 2 p. 38 (Gardner Dir.).

¹⁴³ *Id.* See also Tr. Vol. 2, p. 123 (Gardner Commission's Questions) (describing his use of golf cart to transport small boat and trailer to and from mainland via the barge).

¹⁴⁴ Tr. Vol. 1, p. 131 (Cox Dir.).

barge regularly transports furniture to the island.”¹⁴⁵ Mr. Boyett also testified that “[a]fter a major hurricane or other storm, it is common for damaged furniture, appliances, and other household items to have to be collected and transported off-island via the barge before they become a safety hazard.”¹⁴⁶

Mr. Sawyer, CEO of the BHI Club, testified how the barge service is the exclusive means for transporting all of the supplies and equipment required for operation of the Club, including food and beverage supplies—in addition to transporting furniture, appliances, and other household goods for Club members owning homes on the Island.¹⁴⁷

Even Respondents agree that “vehicles that are transported on the barge may contain household goods.”¹⁴⁸ Indeed, Limited publicly advertises the barge as the exclusive means to transport furniture—unquestionably a household good—to the Island.¹⁴⁹ [BEGIN CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]¹⁵⁰ [BEGIN AEO
CONFIDENTIAL] [REDACTED]

[REDACTED]

¹⁴⁵ Tr. Vol. 1, p. 150 (Boyett Dir.).

¹⁴⁶ Tr. Vol. 1, p. 151 (Boyett Dir.).

¹⁴⁷ Tr. Vol. 3, p. 206 (Sawyer Dir.) and pp. 214-215 (Sawyer Summary).

¹⁴⁸ Tr. Vol. 4, p. 148 (Fulton Dir.); Tr. Vol. 3 (Exhibits) (Limited Responses to Village DR 1-20 as set forth in Wright Direct Testimony at Exhibit JAW-10) (“[I]ndividuals or businesses who wish to transport furniture, materials, equipment or supplies to the island can do so as cargo in a vehicle that qualifies to rent space on the barge.”).

¹⁴⁹ Tr. Vol. 3, p. 52 (Wright Dir.) (citing <https://baldheadislandferry.com/faq>).

¹⁵⁰ Tr. Vol. 3, p. 53 (Wright Dir.); *see also* Tr. Vol. 3 (Exhibits) (Wright Dir. at Exhibit JAW-12).

[REDACTED]¹⁵¹ [END AEO
CONFIDENTIAL] [END CONFIDENTIAL]

In short, the evidence adduced at the hearing shows that (i) Limited publicly advertises to the public the barge as the exclusive means to transport households goods such as furniture to the Island; (ii) Limited knows and admits that its barge brings household goods to the Island; (iii) Limited’s own barge inventory records show extensive transportation of household goods; (iv) it is common knowledge among property owners that the barge is the “boat or other form of transportation” for transporting household goods from the mainland to their property; and (v) the barge is the only public means for transporting such goods to and from the Island. The barge is used to transport household goods.

a. The common carrier statute does not require that carriers take “custody” of goods.

Unable to dispute that the barge transports household goods, Respondents attempt to evade regulation on a manufactured technicality: Respondents contend that Limited does not transport household goods because it does not take custody of the goods. But the word “custody” never appears in Chapter 62, much less G.S. § 62-3(6) and G.S. § 62-3(23)(a)(4)—nor does Limited offer any definition of the term.¹⁵² The statute *only* requires that the carrier engage in the “transportation of persons or household goods,” regardless of whether it takes “custody” of those goods or not. *See* G.S. § 62-3(6) & § 62-3(23)(a)(4).

¹⁵¹ Tr. Vol. 3, p. 54 (Wright Dir.).

¹⁵² The concept of “custody” typically has meaning in the liability context—which has no relevance here. *E.g.*, 46 U.S.C. § 30704 (addressing carrier liability); *Clott v. Greyhound Lines, Inc.*, 278 N.C. 378, 180 S.E.2d 102 (1971). It has no identified applicability in the North Carolina regulatory context.

Even if such a requirement were read into the statute, vehicles and passengers on the barge *are* in the custody of barge crewmembers. Custody is typically defined as “immediate charge and control (as over a ward or a suspect) exercised by a person or an authority.”¹⁵³ Passengers cannot physically leave the barge mid-journey, and must follow the safety and operational directions of barge crewmembers. Household items loaded onto vehicles cannot be disturbed mid-journey. While underway, the barge and tug personnel are responsible for the safety of the vessel, personnel, and cargo.¹⁵⁴ They are loaded onto the vessel under the supervision and control of the operator. By any practical understanding, as confirmed by federal regulation, all of the items loaded onto the barge for transportation to or from the Island are under the control and custody of the barge operator during the journey.

Further, any “deck loaded” cargo or vehicle transported on the barge without its driver must necessarily be in the “custody” or “possession” of barge crewmembers during transit to and from the island, since the vehicle or cargo owner is not onboard the barge. For example, a building contractor might have a cargo pallet or truck loaded onto the barge in Southport, and a colleague already on the island might take delivery of the pallet or truck.¹⁵⁵ While the barge and tug crew might not handle items contained within the truck or pallet, the crew would nonetheless have sole custody and possession of them during the barge’s voyage.

¹⁵³ *Custody*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/custody> (last visited Nov. 2, 2022).

¹⁵⁴ *See, e.g.*, 46 U.S.C. § 10101 (defining “master” as “the individual having command of a vessel.”); *id.* § 140.210 (“[T]he safety of the towing vessel is the responsibility of the master and includes . . . [s]upervision of all persons onboard in carrying out their assigned duties.”).

¹⁵⁵ *See* Tr. Vol. 4, pp. 181-182 (Commissioners questions of witness Fulton) (acknowledging that “from time to time people put things on the barge that are not contained in vehicles for transport across the island”).

To illustrate the absurdities that would result from Respondents' narrow reading of the Commission's scope of authority, Respondents' argument would mean that the Commission has no authority over moving companies that move household goods packed by a homeowner. For example, Box and Dolly, LLC, a certificated North Carolina moving company,¹⁵⁶ offers both self-pack and professional packing options.¹⁵⁷ Under Respondents' interpretation of the common carrier statute, when a homeowner packs their own boxes, Box and Dolly would merely take "custody" of the cardboard boxes—not the items itself—which, Respondents would argue, divests the Commission of its regulatory authority.

Obviously, it is frequently the case that a homeowner utilizing moving services will self-pack as many boxes as they are able—leaving larger items that cannot be boxed for the professional movers. Undoubtedly, the Commission has the power to regulate moving companies assisting with self-packed moves, even if the moving company does not inventory, "handle," or "take possession" of individual items within boxes. Again, the statute authorizing regulation of common carriers transporting household goods is silent as regards any specific level of custody and control that must be exerted by a mover of household goods. Respondents' attempts to engraft such a requirement where none exists is contrary to current practice and understanding, not supported by the language of the statute, and unworkable.

¹⁵⁶ See Docket No. T-4718 (operating under Certificate C-2897). See also Tr. Vol. 4 (Exhibits) (Fulton Exhibit 6, p. 2).

¹⁵⁷ See *Wrapping & Packing Services*, Box & Dolly LLC, <https://www.boxanddolly.com/>.

- b. Respondents' claim that the barge has status as a "freight barge" which exempts it from regulation by the Commission is without support.*

Respondents also claim that the barge's Coast Guard classification as a "freight barge" exempts it from Commission regulation. This claim is misplaced.

As an initial matter, Limited cannot decide whether the barge transports "freight" or "vehicles." Witness Fulton testified that the barge is a "freight barge" because of its inspection status with the Coast Guard,¹⁵⁸ but, in an attempt to explain away the barge's obvious transportation of household goods and persons, Mr. Fulton repeatedly contends that the barge does not carry freight, just vehicles that carry freight.¹⁵⁹

Limited cannot have it both ways. If the barge is merely a transporter of vehicles, then the barge is appropriately classified, for Coast Guard inspection purposes, as a ferry and passenger vessel. Under federal law, a ferry is a vessel that is (1) used on a regular schedule, (2) to provide transportation between places that are not more than 300 miles apart, and (3) to transport only (i) passengers or (ii) vehicles, or railroad cars, that are being used, or have been used, in transporting passengers or goods.¹⁶⁰ And "passengers" are defined as anyone onboard the vessel "except for the vessel's owner, the master, crewmembers, or the charterer of a charter vessel."¹⁶¹ Under 26 C.F.R. Table 2.01-7(a), non-self-propelled vessels greater than 100 gross tons that "[c]arry at least 1 passenger and are ferries" are passenger vessels.

¹⁵⁸ Tr. Vol. 4, p. 170 (Fulton Cross).

¹⁵⁹ See Tr. Vol. 4, pp. 148-149 (Fulton Dir.). Mr. Fulton testifies repeatedly and, presumably, purposefully that the barge merely transports vehicles, as opposed to freight; see, e.g., at Direct Testimony at (pages:lines) 3:1-2; 5:14-15; 6:5-7; 7:18-19; 8:17-19; and 10:14-16.

¹⁶⁰ 46 U.S.C. § 2101(10); 46 CFR § 70.10-1.

¹⁶¹ See also 46 CFR Subchapter I (Cargo and Miscellaneous Vessels) § 90.10-29 (identical definition); Subchapter H (Passenger Vessels) § 70.10-1 (identical definition).

Here, the barge is a non-self-propelled vessel greater than 100 tons.¹⁶² It travels four nautical miles between Southport and the Island, on a regular schedule five days per week.¹⁶³ Passengers are onboard—Limited allows vehicle drivers (persons other than the barge’s crew) to travel to the Island aboard the barge.¹⁶⁴ Accordingly, if the barge “simply gets a loaded vehicle across the river,” then the barge is federally classified as a ferry and as a passenger vessel, not as a freight barge.

Even if the barge carries more than simply vehicles and passengers, it still should not be classified as a “freight barge” under federal law, but rather as an “uninspected vessel.” Mr. Fulton testified that the barge “is inspected as a ‘freight barge,’ under 46 CFR Subchapter I.”¹⁶⁵ But 46 C.F.R. Table 2.01-7(a) provides that Subchapter I is applicable only to “seagoing barges.” And, as Mr. Fulton admitted, the barge is not seagoing; it remains wholly within the Cape Fear River.¹⁶⁶ Accordingly, the barge would fall within the scope of 46 C.F.R. Subchapter C as an “uninspected vessel”¹⁶⁷—making federal safety regulations even less pertinent to the barge’s function.

On the other hand, if the barge is transporting “freight” instead of vehicles, Limited’s suggestion that the transport of “freight” somehow renders it outside the scope of the Commission’s regulatory authority is not supportable.

¹⁶² Tr. Vol. 4, p. 175 (Fulton Cross).

¹⁶³ Tr. Vol. 4, p. 143 (Fulton Dir.); Tr. Vol. 4, p. 156 (Fulton Summary, at 1).

¹⁶⁴ See Tr. Vol. 4, p. 146 (Fulton Dir.) (Limited “generally permits one person . . . to stay inside each transported vehicle.”).

¹⁶⁵ Tr. Vol. 4, p. 146 (Fulton Dir.).

¹⁶⁶ Tr. Vol. 4, p. 173 (Fulton Cross).

¹⁶⁷ See 46 C.F.R. Table 2.01-7(a).

Limited witness Fulton defined freight as anything the barge might be hauling: “freight and/or cargo is a common term for vessels hauling what we are hauling.”¹⁶⁸ Similarly, Limited’s witness Leonard defined freight as: “Freight is goods. Goods transported. Goods being transported, not necessarily in bulk.”¹⁶⁹ And federal law broadly defines “[c]arrying freight for hire” as “[t]he carriage of any goods, wares, or merchandise or any other freight for a valuable consideration” 46 C.F.R. § 90.10-5. Obviously, this broad definition encompasses and includes household goods.

Chapter 62 does not define “freight,” but 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. *See id.* (“No common carriers of household goods by motor vehicle shall deliver or relinquish possession at destination of any **freight** transported by it”) (emphasis added). There are numerous other references to freight and freight regulation in Chapter 62.¹⁷⁰ There is simply no support for the proposition that incantation of the word “freight” transmutes a service otherwise within the Commission’s authority into one that is exempt from regulation.

¹⁶⁸ Tr. Vol. 4, p. 171 (Fulton Cross).

¹⁶⁹ Tr. Vol. 4, p. 90 (Leonard Cross). However, Mr. Leonard did concede that “a person is not freight,” and a person driving a vehicle is not freight; “[i]t’s a person.” *Id.*, at 90-91. *See infra* at Section II.D.2.

¹⁷⁰ *See, e.g.*, G.S. § 62-201 (“All common carriers doing business in this State shall settle their **freight** charges according to the rate stipulated in the bill of lading”); § 62-202 (“**All common carriers** shall handle with care all baggage and **freight** placed with them for transportation”), § 62-203(g) (“This section shall not deprive any consignee or consignor of any other rights or remedies existing against common carriers in regard to freight charges or claims for loss or damage to freight”); § 62-210 (“All common carriers subject to the provisions of this Chapter shall afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and for the forwarding and delivering of passengers and **freight**”); § 62-271 (“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”).

To the extent that Limited is seeking to create some inference of preemptive effect of federal inspection regulations,¹⁷¹ nothing in 49 U.S.C. or 46 U.S.C. preempts Commission regulatory authority over the barge as a common carrier of household goods. Title 46 governs minimum safety, inspection, and operational requirements—not state certification requirements, pricing regulations, or consumer protection.¹⁷² Thus, although 46 C.F.R. does expressly preempt “State or local regulation within the same fields,” that field is minimum safety requirements—not status as a common carrier.

As discussed previously, 49 U.S.C. grants federal jurisdiction over *interstate* water carriers (§ 13521(a)(1)), and *foreign* water carriers (§ 13521(a)(3)), but not over intrastate water carriers. And Mr. Fulton conceded 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].”¹⁷³ Coast Guard safety regulations do not preempt the Commission’s regulatory authority under Chapter 62. In fact, on cross-examination, Respondents’ barge witness, Mr. Fulton, conceded that the regulatory status of the barge was controlled by state, not federal, law. Further, Limited’s CEO, Mr. Paul, conceded that the federal barge regulations do not preempt the Commission’s authority with regards to regulation of the barge as a utility.¹⁷⁴

¹⁷¹ See Tr. Vol. 5, pp. 155-156 (Paul Cross) (“we don’t need a CPCN for that vessel, because it is . . . classified as a tug and freight barge by the U.S. Coast Guard.”); Tr. Vol. 4, pp. 145-146 (Fulton Dir.) & p. 170 (Fulton Cross) (discussing federal regulations under Title 46 of the Code of Federal Regulations).

¹⁷² See generally 46 C.F.R. (set[ting] forth uniform minimum requirements” (§§ 70.01, 90.01) for, *inter alia*, general marine engineering requirements (§ 70.20), lifesaving appliance and arrangements (§70.28), inspection and certification requirements (Parts 71, 91), fire protection equipment (Parts 76, 95) and operations (Parts 78, 97)).

¹⁷³ Tr. Vol. 4, pp. 171-172 (Fulton Cross).

¹⁷⁴ Tr. Vol. 4, p. 172 (Fulton Cross); Tr. Vol. 5, p. 157 (Paul Cross) (“No, they do not preempt the Commission’s authority.”).

The lack of federal preemption over water common carriers is evidenced by multiple instances of state regulation. For example, passenger ferries are subject to safety and inspection requirements as passenger vessels under 46 C.F.R. Subchapter H. Yet passenger ferries are regulated by this Commission as common carriers of persons.¹⁷⁵ Likewise, while cargo and miscellaneous vessels are governed by 46 C.F.R. Subchapter I, these federal regulations have not prevented Hawaii from regulating an inter-island freight barge as a common carrier under the Hawaii Water Carrier Act of 1974.¹⁷⁶ Similarly, other states such as Washington and California issue certificates for freight and barge services.¹⁷⁷

Respondents' argument reduces to the proposition that because the barge is not used "exclusively" to transport household goods it is not subject to regulation as a common carrier. This proposition is not sustainable: it has no support in the statutory language or public policy. Under such an interpretation, the BHI ferry would not be subject to regulation if the ferry was also used for carriage of non-passenger "freight." Or a motor vehicle common carrier of household goods would not be subject to regulation if the same truck was also used to carry non-household items. This sort of interpretation has been expressly rejected by the General Assembly in the motor vehicle context where the law is clear that the list of exemptions from common carrier regulation do not excuse an entity

¹⁷⁵ See Tr. Vol. 5, p. 12-14 (Wright Rebuttal).

¹⁷⁶ Haw. Rev. Stat. § 271G ("recogniz[ing] and declar[ing] that the transportation of persons and of property, for commercial purposes, by water within the State or between points within the State, constitutes a business affected with the public interest" and seeing the need for "fair and impartial regulation of such transportation"). See also Tr. Vol. 4, p. 91 (Leonard Cross) (Mr. Leonard acknowledging that Hawaii regulates barge service).

¹⁷⁷ See *In re Application B-316 of Jack L. Harmon & Jack W. Rood d/b/a Arrow Launch Service*, Order S.B.C. No. 473, 1990 WL 10702649 (Wash. U.T.C. Sept. 10, 1990) (applicant intending to operate three boats and two barges for "freight service"); *Re Antone Sylvester Tug Service, Inc.*, Decision 99-10-067, 1999 WL 33588618 (Cal. P.U.C. Oct.. 21, 1999); *In the matter of Application of Catalina Freight Lines, Inc.*, 2007 WL 143008 (Cal. P.U.C. Jan. 11, 2007) (authorizing transportation of freight).

from regulation where the entity is also “engaged at the time in the transportation of other passengers or other property by motor vehicle for compensation.” G.S. § 62-260(a). This type of crabbed interpretation of the Commission’s authority has also been rejected by the courts. *See, e.g., State ex rel. Utils. Comm’n v. McKinnon*, 254 N.C. 1, 7, 118 S.E.2d 134, 139 (1961) (concluding that statutory exclusion from bus regulation for “motor vehicles used solely for the transportation of passengers to or from religious services” applied only when the vehicle was being used for such purpose and did not require the carrier to “sequester such bus from its fleet of buses and not use it for any other form of transportation or transportation purpose”; observing that a contrary interpretation “is such an unrealistic and impractical requirement from an economic standpoint, it cannot be in conformity with legislative intent.”); *see also id.* at 14-16, 118 S.E.2d at 144-145 (cases therein).

c. Respondents’ attempts to limit the Commission’s authority to regulation of motor vehicle transportation of household goods contradicts the plain language of Chapter 62 and the General Assembly’s intent.

Respondents likewise attempt to divert the Commission’s attention by pointing to the regulation of household goods movers.¹⁷⁸ In Respondents’ view, because the barge does not move household goods (“HHG”) from “door-to-door,” as with motor vehicle HHG carriers, it cannot be regulated. This argument is a red herring. The Commission’s power to regulate common carriers extends beyond the regulation of traditional vehicular household goods moving companies.

¹⁷⁸ *See, e.g., Tr. Vol. 4*, pp. 150-151 (Fulton Dir.) (“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.”); *id.* at pp. 151-152 (Fulton Dir.) (discussing “other aspects of the Commission’s regulations of HHG movers that are inapplicable to the circumstances of the BHIL barge.”).

As stated, the General Assembly has also expressly authorized this Commission to regulate the intrastate transportation of household goods and persons by other means of transport, specifically including transportation by “boat.”¹⁷⁹ Nothing in Chapter 62 suggests that the General Assembly sought to limit the regulation of household goods to a particular 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.

It is a canon of statutory interpretation that “[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.’”¹⁸⁰ Thus, because Chapter 62 makes clear that household good movers of all modalities are subject to this Commission’s authority, the barge’s transportation of household goods by boat renders it subject to this Commission’s regulatory authority. Limited’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.¹⁸¹ Thus, the Commission should give effect to all

¹⁷⁹ See G.S. § 62-3(6) (“‘Common carrier’ means any person . . . 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); G.S. § 62-3(23)(a)(4) (“‘Public utility’ means a person . . . 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).

¹⁸⁰ *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)).

¹⁸¹ See Tr. Vol. 4, p. 150 (Fulton Dir.).

the words in the statute and reject Respondents' limited reading of the relevant statutory provisions.

The Commission's decision in the PODS Docket does not foreclose regulation of Limited's common carrier barge operations.¹⁸² There, the Commission considered whether PODS, Inc., a storage service utilizing large containers that are loaded and unloaded by customers, was subject to regulation. *Order Ruling on Request for Reconsideration*, Docket No. T-100, Sub 61, at 1 (Mar. 23, 2004) ("PODS Order"). The circumstances here are completely different. First, there the transportation element in the PODS Order was "incidental" to the service: i.e., customers were, in essence, purchasing storage services, not transportation services.¹⁸³ 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.¹⁸⁴ Third, the Public Staff's recommendation and the Commission's finding in the PODS 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.¹⁸⁵

¹⁸² See Public Staff Initial Comments, at 11. The Village incorporates by reference its Reply to Initial Comments of Public Staff filed in this proceeding on September 28, 2002. This Reply addresses more fully the PODS decision.

¹⁸³ PODS Order, at 6, 12.

¹⁸⁴ Here, by analogy, although a customer-affiliated driver drives the vehicle on the barge, that is being done under the supervision and responsibility of the barge operator

¹⁸⁵ See, e.g., 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

Indeed the application of this “home-to-home” approach, as urged by Respondents,¹⁸⁶ 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. The PODS decision has no bearing here.

2. The Barge is a Common Carrier for the Additional Reason that it Transports Persons for Compensation.

Even if the barge did not transport household goods—which it does—the barge would still be a common carrier under G.S. § 62-3(6) because it transports people for compensation. Mr. Fulton testified that Limited “generally permits one person . . . to stay inside each transported vehicle.”¹⁸⁷ Thus, by paying the barge fee, the driver is allowed to remain in his vehicle and ride the barge to the island. In fact, some drivers are *required* to accompany certain vehicles on the barge: Per the barge’s Certificate of Inspection, “[e]ach vehicle carrying dangerous cargo must have a minimum of one (1) person for vehicle operation, safe handling, and stowage of cargo.”¹⁸⁸

For a significant percentage of the vehicles transported on the barge, the drivers are not merely incidental to the delivery of goods. For example, homeowners needing AC repair may contract with a tradesperson who gets their service truck to the Island on the barge; plumbers will drive their service vehicles when making house calls; and the same

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.”).

¹⁸⁶ See Tr. Vol. 4, pp. 152-153 (Fulton Dir.) (“[W]e believe that [transporting vehicles carrying household goods] does not transform BHIL into the kind of end-to-end shipper of household goods that the Commission seeks to regulate.”).

¹⁸⁷ See Tr. Vol. 4, p. 146 (Fulton Dir.).

¹⁸⁸ Tr. Vol. 4 (Exhibits) (Fulton Dir., Exh. 3 at 2) (Coast Guard Certificate of Inspection for USS Brandon Randall).

thing for electricians. The list of these needs is endless—appliance repair, glass repair, home decorator services, painters; most if not all of these tradespersons will bring their vehicles to the Island on the barge as their sole means of providing services to homeowners and businesses on the Island.¹⁸⁹ A picture of the barge included with Mr. Fulton’s testimony clearly shows examples of trade vehicles. Additionally, Village Fulton Cross Exhibit 2 shows additional examples, including a glass company vehicle, what appears to be a contractor vehicle, and a U-Haul van.

Fulton Cross Exhibit 2



¹⁸⁹ See Tr. Vol. 4, p. 144 (Fulton Dir.) (picture of barge with tradesperson vehicles); Tr. Vol. 4, p. 166 (Fulton cross) (Fulton acknowledging trades vehicles); Village Fulton Cross Exhibit 2 (picture of barge showing tradesperson vehicles).

Mr. Fulton admitted that the picture was “representative of the types of vehicles you see on the barge,”¹⁹⁰ and any service technician providing services on the Island that needs the resources in their vehicle will come to the Island via the barge with their vehicle.

Again, it must be emphasized: the barge is the only way these tradespersons have access to the Island to perform services that are necessary to support a population on the Island. The barge is unquestionably used to transport these persons, together with their service vehicles, to the Island; there is simply no other conclusion to be reached.

In this manner, the barge is thus no different than other vehicle ferries regulated by this Commission as common carriers. And, as explained above, as a “roll-on, roll-off” barge, the barge is appropriately classified under federal safety regulations as a ferry and passenger vessel. On cross-examination, Mr. Fulton acknowledged the Commission’s regulation of vehicle ferries.¹⁹¹ For example, Cape Lookout Cabins & Camps, Inc. operates a vehicle and passenger ferry service to South Core Banks from Davis, North Carolina.¹⁹² This vehicle and passenger ferry service has been operating since 2009 under common carrier authority granted by the Commission.¹⁹³ Just like Limited’s barge service, which allows drivers to drive their vehicle onto the barge and ride over with their vehicle, Cape Lookout Cabins & Camps carries vehicles with passengers riding inside. *See id* at 5 (discussing Cape Lookout Cabins & Camps’ 48-foot ferry that transports “up to 6 vehicles and 26 passengers”).¹⁹⁴

¹⁹⁰ Tr. Vol. 4, p. 167 (Fulton Cross).

¹⁹¹ Tr. Vol. 4, pp. 168-169 (Fulton Cross).

¹⁹² Tr. Vol. 5 (Exhibits) (Wright Rebuttal, at Rebuttal Exh. JAW-1, p. 3).

¹⁹³ Tr. Vol. 5 (Exhibits) (Wright Rebuttal, at Rebuttal Exh. JAW-1, p. 3) (Affidavit of Kenneth Mack Best, filed on April 10, 2011 in Docket No. A-66, Sub 2).

¹⁹⁴ *See also* 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-

Relying on the fact that the barge is inspected by the Coast Guard as a “freight barge” rather than as a “passenger vessel,” Limited claims that the barge does not carry passengers.¹⁹⁵ In fact, Limited goes so far as to argue that it is not “allowed” to carry passengers under federal law.¹⁹⁶ This is a flat misstatement of applicable law. Even if, for purposes of discussion, Limited is correct (notwithstanding the previous discussion) that the barge does not fall within the federal Coast Guard classification for inspection as a “passenger vessel,” that does not mean that it does not carry passengers. To the contrary, federal law is clear: under 46 U.S.C. § 2101(29), 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.¹⁹⁷ Vehicle drivers are clearly not the vessel’s owner, master, or crewmembers. Nor is the barge chartered for its voyages to the Island. Therefore, drivers inside their vehicles on the barge are passengers under federal law. On cross-examination, Mr. Fulton conceded the application of this definition to the drivers of vehicles on the

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).

¹⁹⁵ See Tr. Vol. 4, p. 146 (Fulton Dir. at 5).

¹⁹⁶ Tr. Vol. 1, pp. 92-32 (argument of counsel). The barge’s Certificate of Inspection states that it may carry “0 Passengers,” and “12 Persons in addition to crew.” (Fulton Dir. Exhibit 3). But this is a meaningless distinction. 46 U.S.C. and 46 C.F.R use the terms *passengers*, *persons in addition to crew*, and *individuals in addition to crew* interchangeably. Compare 46 U.S.C. § 3304(a) (“A documented vessel transporting cargo that transports not more than 12 *individuals in addition to the crew* . . . is not subject to inspection as a passenger vessel or a small passenger vessel”) (emphasis added), with *id.* § 3304 (historical and revision notes) (“This section permits the bulk of vessels subject to the International Convention for Safety of Life at Sea to carry up to 12 *passengers* . . . without being categorized as passenger vessels.”) (emphasis added). See also 46 C.F.R. § 2.01-40 (“*Passengers or persons in addition to crew* on cargo or tank vessels. . . . Under the authority of 46 U.S.C. 3304, a documented vessel transporting cargo may be allowed by its certificate of inspection to carry not more than 12 *individuals in addition to the crew* The application for permission to carry *persons in addition to the crew* may be included in the [application for inspection].”) (emphasis added).

¹⁹⁷ See also 46 CFR Subchapter I (Cargo and Miscellaneous Vessels) § 90.10-29 (identical definition); Subchapter H (Passenger Vessels) § 70.10-1 (identical definition).

barge.¹⁹⁸ Additionally, on cross-examination, Respondents' expert maritime witness, Mr. Leonard, agreed that persons could not be appropriately categorized as "freight," including drivers of vehicles loaded onto vessels.¹⁹⁹

Further, all that G.S. § 62-3(6) requires is that a common carrier engages in the "transportation of *persons*." (emphasis added). Regardless whether drivers are "passengers," "persons other than crew," or any other classification, the people on the barge are still undoubtedly "persons," as conceded by Mr. Fulton.²⁰⁰ Neither G.S. § 62-3(6) nor G.S. § 62-3(23)(a)(4) requires the transportation of "passengers" as a condition to assertion of the Commission's authority—and Respondents have not identified any justification for imposing an extra-textual condition to restrict the Commission's authority.²⁰¹

Respondents likewise protest that they charge barge fees based on deck space, and do not separately charge passengers.²⁰² Whether Limited charges a separate fee for passengers traveling with vehicles is irrelevant—it does not change the fact that a person riding the barge must pay to do so. For example, although a passenger is not required to purchase a *separate* ticket, they certainly cannot ride the barge for free—they must pay to reserve and use deck space on the barge for their vehicle.

Respondents' treatment of passengers on the barge is analogous to the long-standing treatment of livestock caretakers riding for "free" on railroads. The United States Supreme Court has repeatedly held that caretakers of livestock on freight trains are

¹⁹⁸ Tr. Vol. 4, pp. 176-178 (Fulton Cross).

¹⁹⁹ Tr. Vol. 4, p. 91 (Leonard Cross).

²⁰⁰ Tr. Vol. 4, p. 170 (Fulton Cross) ("We have zero passengers. They are persons.").

²⁰¹ G.S. 62-262(a), by contrast, does reference "passengers, but that statute is clearly directed to motor carriers, as evidenced by the title to Article 12 ("Motor Carriers").

²⁰² Tr. Vol. 4, p. 147 (Fulton Dir.).

passengers for hire, even where railroads issued them “free passes” to accompany their cargo. *See, e.g., New York Cent. R.R. Co. v. Lockwood*, 84 U.S. 357, 358 (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.”). For example, in *Norfolk S. R.R. Co. v. Chatman*, 244 U.S. 276 (1917), Chatman signed a railroad’s “customary ‘uniform livestock contract’” (pursuant to published tariffs), and was given a “coupon” describing his livestock and its final destination. *Id.* at 278. “Without other pass or ticket than this ‘coupon,’ and without other payment than the published tariff on the carload of stock, the Pennsylvania Railroad Company carried [Chatman], with his carload of horses, on a freight train to Norfolk, Virginia” The Court rejected the Railroad’s argument that the man was not a passenger for hire, stating that “such transportation has been declared by a long line of decisions not to be ‘free’ in the popular sense, but to be transportation for hire, with all of the legal incidents of paid transportation” *Id.* at 280.

Just like livestock caretakers, drivers accompany their vehicles and cargo on the barge. Accordingly, under long-standing United States Supreme Court precedent, these drivers riding the barge are passengers for hire, regardless of whether they pay for a separate ticket.

Furthermore, it is not unusual for vehicle ferries to include the cost of passengers in vehicle fares. For example, the Fort Fisher ferry operated by the North Carolina Department of Transportation (“NCDOT”) charges customers per vehicle, regardless of how many passengers are inside the vehicle.²⁰³ Although Limited’s barge service does not

²⁰³ *See* Ticket Prices, NCDOT, <https://www.ncdot.gov/travel-maps/ferry-tickets-services/Pages/ticket-prices.aspx> (last updated December 1, 2020) (charging \$1 per “Pedestrian” and \$7 per “Vehicle and/or Combination Less Than 20 Feet”).

allow pedestrians to ride the barge, the pricing methodology is otherwise the same—fees are based solely on vehicle length, and vehicle occupants are not charged separately or required to pay a separate additional fee.

Likewise, ferry services often do not charge separate fees for children to ride the ferry, yet there is no contention that such children are not being transported in exchange for compensation, as described in G.S. § 62-3(6). Instead, the cost of transporting children is included in the price of an adult ticket.²⁰⁴

To allow Limited's argument to prevail would create a loophole: any vehicle ferry could escape regulation by simply not charging for drivers separately from vehicles. A ferry cannot circumvent the Commission's regulation through its ticketing scheme. Because the barge transports persons (in addition to household goods), it is a common carrier under G.S. § 62-3(6).

E. Public policy supports the assertion of jurisdiction over the barge service.

There is no public policy basis for the Commission to purposefully adopt a limited reading of its statutory authority under the circumstances here. To the contrary, the public policy considerations cry out for regulation of Limited's barge service.

First, the barge is critically important to Island residents. In the words of the Public Staff, the "barge service is undoubtedly critical for those living and traveling to and from the island."²⁰⁵ As Village witness Boyett explained:

²⁰⁴ See Bald Head Island Ferry Tickets, Bald Head Island Transportation, <https://baldheadislandferry.com/tickets.aspx> (allowing children under two to ride the regulated ferry for free); Tr. Vol. 5 (Exhibits) (Wright Rebuttal Exhibit JAW-2, p. 7) (website of Davis Shore Ferry Service, stating that children under four years old ride the ferry for free); *Id.* (Wright Rebuttal Exhibit JAW-4, p. 7) (website of Morris Marina Ferry Service, allowing children to ride for free if they are accompanied by a paying adult).

²⁰⁵ Initial Comments of the Public Staff, at 11.

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.

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.²⁰⁶ Without the access to the barge, the Island would be crippled—it would be impossible to build, repair, or furnish homes, maintain businesses, or undertake almost any other endeavor—recreational or commercial—on the Island.

Second, the barge service is a *de facto* monopoly.²⁰⁷ There is no practical alternative to the barge for transporting large household goods, construction materials, or service vehicles to and from the Island.²⁰⁸ 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 to use a personal boat, if one had access to a personal boat and the boat was capable of carrying the item.²⁰⁹ The fact that there is no alternative to the barge is borne out in construction delays when the barge does not run: “if there is a cancelled barge run, the cancellation can delay a construction schedule for days or weeks as they wait for the next opportunities for the needed building supplies to arrive.”²¹⁰ The barge service, therefore, currently operates as a monopoly service.

²⁰⁶ Tr. Vol. 1, p. 149 (Boyett Dir.).

²⁰⁷ T. Vol. 5, p. 185 (Gardner Rebuttal); Tr. Vol. 5, p. 217 (Wright Rebuttal); Tr. Vol. 5 (Exhibits) (Limited 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.”).

²⁰⁸ Tr. Vol. 5, p. 217 (Wright Rebuttal).

²⁰⁹ Tr. Vol. 1, p. 149 (Boyett Dir.).

²¹⁰ Tr. Vol. 1, p. 150 (Boyett Dir.).

Additionally, Respondents have presented no evidence to suggest that there is a reasonable means to establish a competitive alternative. Any competitor to the barge service would first need, at a minimum, access to a port open to navigable waters that has the legal ability to access the marina port on the Island. Limited owns and controls the dock facilities on both sides of the river. There is no known replacement harbor space not controlled by Limited on either the mainland or on the Island.

Furthermore, for decades, BHI residents have repeatedly emphasized the need for the Commission to regulate the barge. For example:

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.**²¹¹

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.²¹²

I support the regulation of parking and barge operations. They are monopolies and they are critical to the island.²¹³

Lastly, the barge service is integral to the regulated ferry service. Without the barge service, and the critical role it plays in making life possible on Bald Head, there would be no reason for the vast majority of passengers to ride the ferry to visit the Island—there

²¹¹ See Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 -Exhibits) (Letter of Marvin B. Cox, dated August 4, 1998).

²¹² See Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 - Exhibits) (Letter of Wendie H. Walker, dated August 11, 1998).

²¹³ See Gardner Dir. Exhibit STG-2.1 (Tr. Vol. 2 - Exhibits) (August 1, 2002 Letter to the Commission, Comments from Signers).

would be no homes in which to reside, no stores or restaurants in which to shop or dine, and extremely limited recreational opportunities.²¹⁴

Accordingly, for all these reasons, public policy supports the assertion of regulatory authority as to Limited's barge operation under the facts and circumstances presented here.

CONCLUSION AND REQUEST FOR RELIEF

As detailed above, the parking facilities are subject to the Commission's oversight, as an ancillary service or facility to the regulated ferry operation (or as integral to the utility service) and, independently, because of Limited's relationship as BHIT's parent. Likewise, because the barge is a common carrier, it is also subject to Commission regulation.

At this stage, the Commission need only declare that the parking facilities and barge are subject to the Commission's regulatory authority and that the utility property related to those operations cannot be sold or otherwise alienated without prior Commission approval. Decisions regarding the economic effects of this regulatory status can be reserved for later proceeding based on an evidentiary record appropriate to a determination of those questions.

A determination of regulatory status of these assets and operations is, however, necessary, and it is important that the Commission decide the issue now given the impending disposition of the assets. Thousands of people depend on reliable access to the ferry to access Bald Head Island as well as access to the barge services. With the pending sale to SharpVue, access to the Island is at risk. The Commission's decision now, in this case, is critical to protect Islanders, Island visitors, and its workers.

²¹⁴ Tr. Vol. 5, p. 217 (Wright Rebuttal).

Based on the foregoing, the Village and BHI Club respectfully request that the Commission issue an order providing the following relief.

1. Either amending BHIT's certificate of common carrier authority to include the parking facilities as a regulated, ancillary service to the already regulated transportation of passengers and their personal effects, via water in ferry operations, from Southport to Bald Head Island and return, or issuing a special certificate to Limited consistent therewith.

2. Directing Limited to seek certification for its barge operations, to show cause as to why it should not be subject to penalties for its prior unlawful operations.

3. Requiring BHIT and Limited to obtain the approval of the Commission before selling, pledging, leasing or otherwise alienating the Deep Point parking facilities and the barge assets and properties.

4. Holding that, in the event of any approved sale or disposition of the Deep Point 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 rate case.

5. Reserving determination of the appropriate rate treatment of the parking facilities and the barge for the next general rate case, permitting BHIT and Limited to continue to charge existing rates for the parking facilities and the barge, and directing Limited and BHIT not to increase existing rates for parking and barge services without prior Commission approval.

6. Such other and further relief as the Commission deems appropriate.

This 8th day of November, 2022.



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing JOINT POST-HEARING BRIEF has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

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This the 8th day of November, 2022.

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Exhibit 1

References to Record Testimony on Critical Importance of Parking Service

References to Record Testimony on Critical Importance of Parking Service

Public Staff

- “[I]t would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates.”¹
- “[T]he availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers.”²

Village Witnesses

Scott Gardner

- “[T]he public’s access to the parking facilities and the barge is critical to the island’s economy and the wellbeing of all of those on the island.”³
- “The island’s economy is fueled by tourism, and each tourist must park a vehicle in the parking facilities before boarding the passenger ferry. If the parking rates were to become cost prohibitive to tourists, the island’s economy would be harmed significantly.”⁴
- “The vast majority of workers on the island live on the mainland. These workers ride the contractors ferry in the morning to reach their weekday jobs, so that they can bring home their earnings to provide for their families on the mainland. If the island is no longer able to support jobs for these workers, the personal incomes flowing from the island would cease to support communities in Southport, Wilmington, and elsewhere in Brunswick and New Hanover Counties.”⁵
- “During 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.”⁶
- “Without access to the ferry, parking and the barge, the Island will cease to exist and function in its current form”⁷

¹ Initial Comments of the Public Staff, Docket No. A-41, Sub 21, at 5 (Sept. 8, 2022).

² Initial Comments of the Public Staff, Docket No. A-41, Sub 21, at 5 (Sept. 8, 2022).

³ Tr. Vol. 2, p. 34 (Gardner Dir.).

⁴ Tr. Vol. 2, p. 34 (Gardner Dir.).

⁵ Tr. Vol. 2, p. 36 (Gardner Dir.).

⁶ Tr. Vol. 2, p. 36 (Gardner Dir.).

⁷ Tr. Vol. 5, p. 185 (Gardner Rebuttal).

Brandy Munroe

- “I use the parking facilities myself and have an annual pass. My employees also park at the parking facilities daily. The cost of parking and using the ferry is a major expense for my business. . . . Our whole lifestyle as well as our business depends on the ferry system.”⁸

George Corvin

- “If homeowners, employees, and vacationers cannot rely upon reasonable access to parking at Deep Point, it doesn’t matter how well the regulated assets (ferries and trams) are run, because people will not be able to access them (or will come to believe that their access to these services in the future is at risk). This is particularly problematic given that there are no viable alternatives to these assets.”⁹
- “Simply stated, the vast majority of individuals who vacation, live, or work on Bald Head Island are unable to access the island by any means other than use of the ferry system. Without reasonable access to on-site parking at Deep Point, it would become extremely difficult, if not impossible, for these same individuals to access the ferry.”¹⁰

David Cox

- “Although I have worked on the island for over two decades, I have never lived on the island. Therefore, I have had to drive to the ferry terminal [and use the parking facility] every workday for the past twenty plus years.”¹¹

Dr. Julius Wright

- “The parking operation is not merely an additional optional service supporting the utility service—rather it is an integral, necessary and irreplaceable ancillary component of the ferry service leaving me to conclude that the parking facilities easily meet the statutory requirement of being an “ancillary service or facility used in connection with such service.”¹²
- Public parking is necessary for the public’s access to the ferry service, in the same manner that the terminal is necessary for the loading and unloading of passengers unto the ferry itself, and substitutable parking is not available from any other source.”¹³

⁸ Tr. Vol. 1, p. 100-101 (Munroe Dir.).

⁹ Tr. Vol. 1, p. 111 (Corvin Dir.).

¹⁰ Tr. Vol. 1, p. 113 (Corvin Dir.).

¹¹ Tr. Vol. 1, pp. 127-128 (Cox Dir.).

¹² Tr. Vol. 3, p. 24 (Wright Dir.).

¹³ Tr. Vol. 3, p. 24 (Wright Dir.).

- “[I]f the parking lot ceased operations tomorrow, the ferry would be crippled as passengers would have almost no means to access to the ferry.”¹⁴
- “I have no idea how the Commission can [ensure] that parking is adequate and reasonably priced, short of regulation of the parking facilities as is being requested.”¹⁵
- “[T]he provision of parking is an essential service upon which the passenger ferry is dependent—absent parking, the passenger ferry will shut down (at least until other parking services are offered).”¹⁶

Bald Head Island Club

David Sawyer

- “The parking operation at the Deep Point ferry landing is indispensable to the use of BHIT’s ferry service operations – it would be nearly impossible to ride the ferry the island if you can’t park your car.”¹⁷
- “The ferry does not transport automobiles, so ferry passengers must leave their automobiles at the Deep Point ferry landing, in parking lots owned and operated by Limited. The parking facilities at the Deep Point ferry landing are thus an indispensable, integral, and essential part of BHIT’s ferry operation.”¹⁸
- “The island needs dependable service at reasonable prices, and the prospect of being held hostage through pricing set by an unregulated monopolist that is the only source for these indispensable services, would not bode well for the Club, homeowners, or other island interests. It is not difficult to imagine that at some point monopoly price increases for these essential services could adversely impact Club member and tourist spending which, in turn, would force the BHI Club to increase prices and could result in reducing our workforce.”¹⁹
- “[T]he 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. The ferry system, parking, and barge operations are a commercially owned local monopoly relied upon by the public that, in the Club’s view, should be regulated as such.”²⁰
- “The parking operations at the Deep Point ferry landing, where anyone planning to use the ferry must park their vehicle, is an inseparable and indispensable part of the ferry operation. It would practically be impossible for people to use the BHI ferry or for the ferry to operate without the parking facilities at the Deep Point ferry

¹⁴ Tr. Vol. 3, pp. 24-25 (Wright Dir.).

¹⁵ Tr. Vol. 5, p. 234 (Wright Rebuttal).

¹⁶ Tr. Vol. 5, p. 235 (Wright Rebuttal).

¹⁷ Tr. Vol. 3, p. 204 (Sawyer Dir.).

¹⁸ Tr. Vol. 3, p. 206 (Sawyer Dir.).

¹⁹ Tr. Vol. 3, p. 206 (Sawyer Dir.).

²⁰ Tr. Vol. 3, p. 208 (Sawyer Dir.).

landing. The Club believes that the Deep Point parking facilities are integral to BHIT's provision of ferry service to the public."²¹

- "[V]ery few if any of our employees would likely take a job at the BHI Club if they could not park at the Deep Point ferry landing and catch the ferry to the island or catch the ferry from the island back to Deep Point and get in their car to drive home."²²
- "Were BHI employees asked to park somewhere other than the Deep Point ferry landing, assuming an alternative parking lot was available, which it currently isn't, and take public transportation, which is non-existent in Southport, from a remote parking lot to the Deep Point ferry terminal and back, would add considerably to an already long commute."²³
- "[T]he harsh reality [is] that BHI Club employees, like nearly all people who travel to Bald Head Island, are captive customers of BHIT's passenger ferry and Limited's parking operations at the ferry landing. Nearly all who ride the regulated ferry to BHI have no choice but to park in the unregulated parking facilities at the Deep Point ferry landing."²⁴

Consumer Statement of Position (signed by over 400 island property owners)

- "Few 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. The system also is a commercially-owned monopoly which BHI property owners, visitors, workers and service providers have no choice but to use; it should be regulated as such."²⁵
- "We do not believe that breaking up BHI's transportation system is in the Island's best interest, particularly if the regulated passenger ferry were left to operate on its own, and different owners of the currently unregulated parking and barge monopolies were free to set rates at whatever level they believe the market will bear."²⁶

²¹ Tr. Vol. 3, p. 208 (Sawyer Dir.).

²² Tr. Vol. 3, p. 209 (Sawyer Dir.).

²³ Tr. Vol. 3, p. 209 (Sawyer Dir.).

²⁴ Tr. Vol. 3, p. 210 (Sawyer Dir.).

²⁵ *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 1 (signed by over 400 Bald Head Island property owners).

²⁶ *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 1 (signed by over 400 Bald Head Island property owners).

- Individual Comments from Signers
 - “We urge the commission to regulate the BHI Ferry, Barge Parking and tram operations as they are vital to all BHI owners & workers.”²⁷
 - “It's essential for Bald Head's future to have the parking & barge under the same owner and regulated like the ferry tickets.”²⁸
 - “As full time residents we are especially concerned with unregulated parking. If those rates increase to untenable amounts, it will cause us to rethink our long term plans for living and owning a home on BHi.”²⁹
 - “I support the need to regulate parking at Deep Point. I am fearful of the monopolistic nature of the entire ferry system (from parking to trams). We simply have no other choice for these critical services.”³⁰
 - “The entire transportation system, not just the boats and trams, needs to have regulatory oversight, regardless of the final owner!”³¹
 - “I support the regulation of parking and barge operations. They are monopolies and they are critical to the island.”³²
 - “This system is crucial to the viability of the island. Workers, residents (many retired), and visitors have no other option to get on and off BHI. A monopoly could set rates so high that it will cripple the island. Especially eliminating services that will refuse to come over due to cost.”³³
 - “We have been property owners since 1997. The entire transportation system including the parking and barge operation needs to be regulated so as not to create a monopolistic system in which all dependent on the system will have no say and all will be subject to the whim and caprice of the new owners.”³⁴

²⁷ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

²⁸ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

²⁹ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

³⁰ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

³¹ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

³² Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 13.

³³ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 14.

³⁴ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 14.

- “It is imperative that the Deep Point Parking network and the working Bald Head Barge fall under the jurisdiction of the state commission.”³⁵
- “Unregulated prices on parking ,barge and ferry will drive out many long-standing property owners.”³⁶
- “It is so important to the future of the island that the NCUC regulate the parking and barge operations as they now regulate the passenger ferry.”³⁷
- “Life on BHI depends on the ferry, barge and parking services, not just for residents but for the many employees who must travel to the island every day. This is not a tourist luxury, it is essential to the life of the island and to the communities near to it.”³⁸
- “As owner of a house on Bald Head, we know how critical the ferry service is to the viability of the island. As such, the entire ferry operation--including not only the direct ferry operations, but also the tram service, the marinas, the facilities at Deep Point, and the parking, must all be regulated as a monopoly that ensures reasonable prices for ferry users and a return on investment that allows proper maintenance and capital improvements.”³⁹
- “It is critical to regulate all components of the BHI ferry system, including the barge operation and parking facility.”⁴⁰
- “We depend on the barge & parking. They are an integral part of the ferry service.”⁴¹
- “Life on BH and the livelihoods of many Brunswick County residents are dependent upon a reliable and fairly priced ferry system.”⁴²

³⁵ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 14.

³⁶ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 14.

³⁷ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 14.

³⁸ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15.

³⁹ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15.

⁴⁰ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15.

⁴¹ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15.

⁴² Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 15-16.

- “The Ferry system is critical to the continued success of BHI. We are asking for the NCUC’s support for this request.”⁴³
- “I support NCUC regulation of the BHI ferry/tram/barge/parking system because it is vital to the economic survival of the island and to the interests of all those who live, work, and visit Bald Head Island.”⁴⁴
- “The parking and barge should be managed together with the passenger ferry, to ensure fair pricing and a minimum level of quality service.”⁴⁵
- “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.”⁴⁶

Consumer Position Statement of Robert Blau and Paul Carey

- “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.”⁴⁷

BH Association Survey

- “BHA members—meaning the island’s property owners—indicated by a strong majority that they support the Commission’s involvement in overseeing the parking and barge business operations. **Of over 500 respondents, 71.5% said that the Commission should regulate parking and the barge (and another 13% said they didn’t have an opinion or didn’t have enough information at this time).** By Bald Head Island standards—where oftentimes issues can be divided by a handful of votes—this is an overwhelming endorsement of regulation.”⁴⁸

⁴³ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 16.

⁴⁴ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 16.

⁴⁵ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 16.

⁴⁶ Comment from Signer, *Consumer Statement of Position*, filed on August 1, 2022 in Docket Nos. A-41, Sub 21 and Sub 22, at 16.

⁴⁷ Tr. Vol. 5 (Exhibits), Gardner Rebuttal Exhibit STG-2 (Consumer Position Statement of Robert Blau and Paul Carey), at 12.

⁴⁸ Tr. Vol. 5, p. 187 (Gardner Rebuttal). *See also* Tr. Vol. 3, p. 156 (Briggs Dir.); Tr. Vol. 3, p. 165 (Briggs Dir. Summary)

- Quotes from BHA Survey Respondents:
 - “My concern is a private owner will increase costs for profitability purposes, and since property owners/visitors have no alternative to the private owner they will be forced to pay the higher costs. The NCUC can protect property owner/visitors from the monopoly power of the private owner to keep costs fair and reasonable.”⁴⁹
 - “We have no guarantees on how long the SharpVue will own the system before selling it to another group. We could get rate increases every time it changes ownership. The cost is high now for the home owners.”⁵⁰
 - “If the owners of the BHI transportation system do not have a vested interest in the viability of the island that the system serves there is no incentive to run the system in a manner that is fair to BOTH the owners of the system AND the island that it serves. What if the new owner wants to sell off the more lucrative portion of the system? Then what will be left will have to fend for itself; will it do so in a manner that remains fair to the homeowners, businesses and many workers whose current livelihood is based on working on the island.”⁵¹
 - “It’s a monopoly! Why shouldn’t it be regulated?”⁵²
 - “The entire BHI transportation system is a commercially-owned monopoly and should be regulated as such. BHI property owners would be protected against monopoly price abuse and a new commercial owner could get on with making much needed improvements to the quality of BHI transportation services.”⁵³
 - “The parking and barge are monopolies no real alternative for BHI owners. Rates should be regulated and limited to costs plus a reasonable return on investment.”⁵⁴

* * *

⁴⁹ Tr. Vol. 5, p. 188 (Gardner Rebuttal) (quoting BHA survey respondent).

⁵⁰ Tr. Vol. 5, p. 188 (Gardner Rebuttal) (quoting BHA survey respondent).

⁵¹ Tr. Vol. 5, p. 188-189 (Gardner Rebuttal) (quoting BHA survey respondent).

⁵² Tr. Vol. 5, p. 190 (Gardner Rebuttal) (quoting BHA survey respondent).

⁵³ Tr. Vol. 5, p. 190 (Gardner Rebuttal) (quoting BHA survey respondent).

⁵⁴ Tr. Vol. 5, p. 190 (Gardner Rebuttal) (quoting BHA survey respondent).

Exhibit 2

Respondents' Responses to Complainant's Second Data Requests

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND,)	
Complainant,)	
)	
v.)	RESPONSES TO
)	COMPLAINANT’S
BALD HEAD ISLAND)	SECOND DATA
TRANSPORTATION, INC. and BALD)	REQUESTS
HEAD ISLAND LIMITED, LLC,)	
Respondents.)	

Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL”) (collectively, “Respondents”), by and through legal counsel, hereby respond to Complainant’s Second Data Requests as follows:

General Statement

In responding to these general data requests, Respondents have made reasonable efforts to research documents and data regarding the subject matter of the proceeding. These responses are based upon information presently available to Respondents and their attorneys, and specifically known to the individuals who are preparing these responses. It is possible that future discovery and independent investigation may supply additional facts or information, add meaning to known facts, and may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in, and variations from the responses set forth herein.

These responses are made without prejudice to Respondents’ rights to provide additional evidence at the time of any proceeding before the Commission. Respondents reserve the right to supplement or correct these responses. Respondents also reserve the

right to object to future discovery on the same or related matters and do not waive any objection by providing the information in these responses. Finally, Respondents reserve the right to object to the admissibility of any of these responses, in whole or in part, at any further proceeding of this matter, on any grounds, including but not limited to timeliness, materiality, relevance, and privilege.

Objections

1. Respondents object to the Data Requests to the extent they are vague, ambiguous, and/or incapable of reasonable ascertainment.
2. Respondents object to the Data Requests to the extent they seek information, documents and/or things protected from disclosure by the attorney-client privilege, the work-product doctrine, consulting expert privilege, and/or the common-interest privilege. Inadvertent disclosure of any such information, documents and/or things shall not operate as a waiver of any applicable privilege or immunity.
3. Respondents object to the Data Requests to the extent they seek discovery of documents available by means that are less burdensome, less expensive, or more appropriate.

DATA REQUESTS

General Requests

1. **Provide a corporate organizational chart and related information showing the ownership structure of BHIT, Limited, and their affiliates, including the percentage of ownership held for each entity and the officers of each entity.**

RESPONSE: Without waiving any of their objections, Respondents state that Figure A, below, reflects the corporate structure of BHIT, Limited and their affiliates:

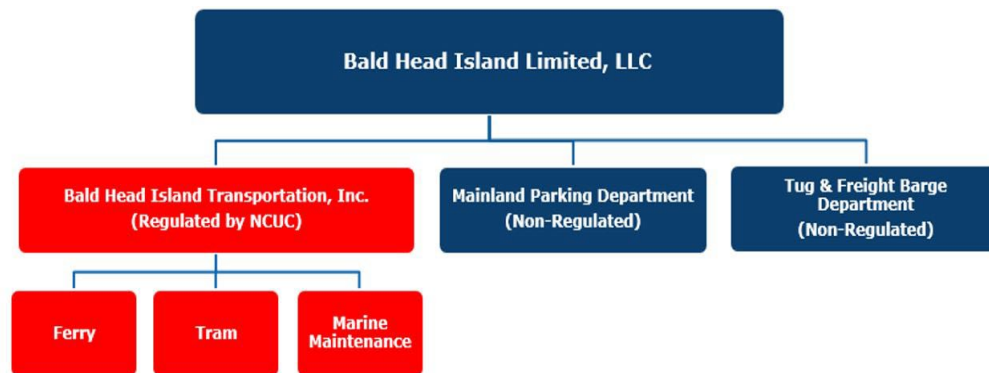


Figure A

Respondents further state that BHIL is wholly owned by Mitchell Island Investments, Inc. and that BHIL wholly owns BHIT. In addition, BHIL has additional departments, functions and entities that function under its umbrella which focus on construction, sales, marketing, and operations.

2. **Provide all documents relating BHIT's or BHIL's original application to the North Carolina Utilities Commission for authority to operate as a common carrier utility, including without limitation all documents supplied to the Public Staff and/or Commission staff in support of the application or in response to investigate inquiries, including data requests.**

RESPONSE: Without waiving any of their objections, Respondents state that the public filings with the Utilities Commission maintained on its website at the

following link are the best record of the nearly 30-year-old docket referenced in this request:

<https://starw1.ncuc.gov/NCUC/page/docket-docs/PSC/DocketDetails.aspx?DocketId=288f5689-4ea7-4c5a-b219-e96cce477b6c>

If Respondents are able to identify any further responsive, nonprivileged materials, they will promptly make a supplemental production.

3. **Has BHIT or Limited, either directly or through its agents or affiliates, ever sought guidance, either formal or informal, from the Public Staff – North Carolina Utilities Commission or the North Carolina Utilities Commission, or any of their respective personnel, agents or officials, concerning the regulatory status of the Barge and the Parking Facilities, each as defined in the Complaint? If “yes,” provider copies of all documents pertaining to such inquiries.**

RESPONSE: Without waiving any of their objections, Respondents state that neither have sought such guidance from the Public Staff or from the Commission, or any of their respective personnel, agents, or officials.

4. **Reference the following statement at page 4 of Response, Motion to Dismiss, and Answer: “George Mitchell died on July 26, 2013, and his heirs have been liquidating the assets owned by the Mitchell family’s business interests in order to provide additional funds to The Cynthia & George Mitchell Foundation. The Mitchell Foundation (cgmf.org).”**
 - a. **Is it Respondent’s contention that all proceeds from sale of liquidation of assets related to Bald Head Island are being donated to the referenced family foundation? If “no,” provide a description of the use of the proceeds from the sale.**
 - b. **Is it Respondent’s contention that the proceeds received from the potential sale of assets to SharpVue Capital will all be donated to the referenced family foundation? If “no,” provide a description of the use of the proceeds from the sale.**
 - c. **Assuming that the SharpVue transaction occurs as presently envisioned by the applicable purchase and sale agreement, please describe the assets associated with Bald Head Island that will remain**

owned by the Mitchell family and/or the businesses owned by the Mitchell family.

RESPONSE: Respondents object to this request as not reasonably calculated to lead to the discovery of admissible evidence in this docket. The proceeding as framed by Complainant's Complaint asks for the Commission's focus on "the regulatory nature of the parking and barge assets" and whether the barge operations should be regulated as a "common carrier." Respondents further object that the disposition of the proceeds from a sale of these non-regulated assets is not related in any fashion to whether the Commission should expand its jurisdiction to regulate their operations under the auspices of the asset purchaser. Without waiving any of their objections, Respondents state that neither entity is empowered to make any decisions regarding the disposition of sale proceeds, is unable to speak to the plans of George Mitchell's heirs or the executor of his estate with regard to same, and is thus providing no information in response to sub-parts (a) and (b).

In response to sub-part (c), and without waiving any of their objections, Respondents state that those assets are:

[REDACTED]

Respondents' response to sub-part (c) of this request is designated as CONFIDENTIAL under the parties' Confidentiality Agreement.

- 5. Reference the following statement at page 7 of the Response, Motion to Dismiss, and Answer: "Therefore, BHIL has no choice but to look for another buyer and has announced its intentions to do so consistent with the disposition of assets in the Estate of Cynthia and George Mitchell." Is it BHIL's contention that the Estate of Cynthia and George Mitchell requires the sale of the Transportation assets, including the Barge and Parking Facilities? If so, provide support for this contention and describe any restrictions or limitations imposed by the Estate concerning such sale.**

RESPONSE: Without waiving any of their objections, Respondents state that representatives of the Estate of Cynthia and George Mitchell directed and authorized the sale of the transportation and logistics assets of BHIL and BHIT to Bald Head Island Transportation Authority ("BHITA"). When that transaction became unfeasible, for reasons including the interference of Complainant and its competing attempts to seek bond authority from the North Carolina Local Government Commission, the Estate's representatives directed and authorized the sale of those assets to a private purchaser or purchaser(s) that would continue the decades-long stewardship of those assets by the Mitchell family.

- 6. Reference the following statement at page 18 of the Response, Motion to Dismiss, and Answer: "Likewise, there are numerous other barges and parking facilities located throughout the State of North Carolina – many**

of which are the only, or most convenient, means by which person access specific locations.” Please identify the “numerous other barges and parking facilities” referenced in this statement.

RESPONSE: Without waiving any of their objections, Respondents state that parking facilities adjacent to airports and train stations are analogous examples. Other examples include parking near or next to stadiums, arenas, theaters, fairgrounds, amusement parks, and other athletic/entertainment destination venues. Barge services in North Carolina include those provided by RiverBulk, with a bulkhead terminal in North Carolina.

7. Provide all information and data concerning use of Parking Facilities by persons other than those seeking to access the ferry.

RESPONSE: Without waiving any of its objections, Respondents state that the Deep Point parking facility is open for public use and that they do not keep any statistics regarding the purposes for which drivers park vehicles there. However, Respondents can further state that patrons of the Island Times Cafe can and do use the Deep Point parking facility, as well as those using and visiting the marina. Further, special arrangements can be made for more frequent, non-ferry uses. An example of that is parking accommodations that were made for workers and those associated with dredging operations at Military Ocean Terminal Sunny Point who were then shuttled to the facility grounds.

8. Reference the following statement at page 19 of the Response, Motion to Dismiss, and Answer: “There are numerous other ferries around the country, especially in urban areas, departing from and returning to terminals that are part of marina, retail, and/or mixed-use developments with shared parking facilities serving all of those uses. Upon information and belief, none of those parking facilities are considered to be regulated utilities.”

- a. Identify the ferries referenced in this statement.
- b. Provide, in full, the basis for Respondent's information and belief that none of these parking facilities are considered to be regulated utilities.

RESPONSE: Without waiving any of their objections, Respondents state as follows:

(a) Such ferries include, but are not limited to, certain departure/return locations for ferries to and from Hyannis, Nantucket, and Martha's Vineyard, Massachusetts operated by the Steamship Authority; ferries to and from Mackinac Island, Michigan; ferries to and from and between the San Juan Islands, Washington; the NYC Ferries along and between the boroughs of New York City; the ferries to Daufuskie Island, Georgia from Hilton Head Island, South Carolina and Savannah, Georgia.

(b) Upon information and belief, the responses are based upon a review of the public utilities commission websites in the states in which those ferries operate; telephone calls with personnel employed by those public utilities commissions; and information gleaned from counsel's attendance at twenty-plus years of NARUC meetings.

9. **Admit that there is no requirement in the purchase agreement with SharpVue that SharpVue continue to own and operate the Parking Facilities for the benefit of the ferry.**

RESPONSE: Without waiving any of their objections, Respondents admit that the content of the Asset Purchase Agreement speaks for itself, and further state that they have previously provided the Agreement to Complainant in discovery bearing the Bates No. BHIL/IT 000837 - BHIL/IT 000908. Complainant is able to examine

the Agreement in full, and test its characterizations of its contents against its actual text.

- 10. For 2015 to 2021, provide a breakdown of the ferry tickets sold annually (e.g., round-trip tickets, adult/children, no-frills tickets, etc.).**

RESPONSE: Without waiving any of their objections, Respondents state that information responsive to this request is contained in a concurrently produced document bearing Bates No. BHIL/IT 000971.

- 11. Provide any analysis or documentation regarding potential rate calculations for the Parking Facilities (i.e., price for parking) if the parking lot was to be regulated by the Commission.**

RESPONSE: Without waiving any of their objections, Respondents state that they have not conducted an analysis or prepared documents that calculate parking rates that would exist or apply if BHIL's parking operations became regulated by the Commission.

- 12. Provide copies of any insurance policies of Limited and BHIT that relate to the Parking Facilities, the Barge or the ferry.**

RESPONSE: Without waiving any of their objections, Respondents state that they are gathering the most recent policies that applied during the 2021-2022 coverage period and will produce them.

This 14th day of July, 2022.



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Limited, LLC*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **RESPONSES TO COMPLAINANT'S SECOND DATA REQUESTS** has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail and by delivery to the United States Post Office, first-class postage pre-paid.

This the 14th day of July, 2022.

By: /s/ Bradley M. Risinger