Fox Rothschild LLP
ATTORNEYS AT LAW

434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

M. GRAY STYERS, JR.
Direct No: 919.755.8741
Email: GStyers@Foxrothschild.com

January 27, 2023

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street, Room 5063
Raleigh, NC 27603

Re: In the Matter of Village of Bald Head Island v. Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC;
NCUC Docket No. A-41, Sub 21;
Notice of Appeal and Exceptions

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc. (BHIT), Bald Head Island Limited, LLC (BHIL), and SharpVue Capital, LLC (SharpVue), we herewith respectfully request the filing of the Notice of Appeal and Exceptions to the Commission's Order issued on December 30, 2022, in the above-referenced docket provided concurrently herewith.

Thank you in advance for your assistance with this filing. If you should have any questions concerning this submittal, please contact me.
Sincerely,

/s/ M. Gray Styers, Jr.
M. Gray Styers, Jr.

pbb

Enclosures

cc: NC Public Staff
Commission Staff, Derrick Mertz, Esq.
Counsel and Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:

Village of Bald Head Island, Complainant, v. Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC, Respondents.	)	**NOTICE OF APPEAL AND EXCEPTIONS OF BALD HEAD ISLAND TRANSPORTATION, INC., BALD HEAD ISLAND LIMITED, LLC, AND SHARPVUE CAPITAL, LLC**

NOW COME Bald Head Island Transportation, Inc. ("BHIT"), Bald Head Island Limited, LLC ("BHIL"), and SharpVue Capital, LLC ("SharpVue") (collectively, "Respondents"), pursuant to N.C. Gen. Stat. § 62-90 and Rule 18 of the North Carolina Rules of Appellate Procedure, and give Notice of Appeal to the North Carolina Court of Appeals from the *Order Ruling on Complaint and Request for Determination of Public Utility Status* ("Order") issued by the North Carolina Utilities Commission ("Commission") on December 30, 2022 in the above-captioned proceeding. Pursuant to N.C. Gen. Stat. § 62-90(a), Respondents set forth below the exceptions and grounds on which they consider the Order to be unlawful, unjust, unreasonable, and/or unwarranted, including the errors they allege were committed by the Commission in issuing the Order.

EXCEPTION NO. 1

The Order's Evidence and Conclusions for Findings of Fact 22-23, 34 and the underlying Findings of Fact 22-23, 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission has no jurisdiction other than what the General Assembly has granted in Chapter 62 of the General Statutes. *E.g.*, *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 736, 309 S.E.2d 209, 216 (1983). In disregard of the plain meaning of the General Statutes, the Order asserts an unprecedented expansion of the Commission's jurisdiction in declaring that it may regulate stand-alone business activities not included in the ambit of N.C. Gen. Stat. § 62-3(23)(a) that are not, and have never been, under the control of a regulated entity.

The detailed definition of "Public utility" in N.C. Gen. Stat. § 62-3(23)(a) does not include the functions of "parking" or "barge" (i.e., transporting motor vehicles across bodies of water). There is no reference anywhere in the statutes to parking or vehicular barge operations. The General Assembly could have included these businesses within the definition of a "Public utility" but has not. The Commission erred in creating a *de facto* common-law authority for itself over unregulated businesses, such as parking or barge operations, outside of the jurisdiction prescribed in the General Statutes. This improper assertion of authority not only exceeds the plain meaning of the statutes, but also exceeds the authority delegated to the Commission by the General Assembly.

EXCEPTION NO. 2

The Order's Evidence and Conclusions for Findings of Fact 22-23, 34 and 37, and the underlying Finding of Fact 22-23, 34, and 37 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission confirms that "the General Assembly has empowered [it] to supervise utilities in order to protect the public from poor service and exorbitant charges which are normal consequences of a monopol[y]." (Order, 19) Yet, having concluded that "the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both BHIL and BHIT," the Commission nonetheless asserts regulatory authority to remedy problems that do not exist. (Order, 28) Such is the absence of any reason to regulate historically unregulated, and reasonably conducted, businesses, that the Commission "permits the status quo – and the current rates and services of the Parking and Barge Operations – to continue." (Order, 28)

The Commission has no authority under the General Statutes to impose its regulatory jurisdiction (in its own subjective view of the "public interest") over any non-utility operations to protect the public from what the Commission fears to be the consequences of a purported monopoly -- especially one that does not harm consumers or evince indicia that it will in the future. The amorphous, unknown, and unknowable jurisdictional scope of the Commission's authority under this rationale is further illustrated by the Commission's own admission that it "is generally guided by the principle that its authority only need be imposed to achieve the purposes for the regulation" and is subject to change in the future (Order, 29). The examples cited in that paragraph do illustrate

appropriate regulatory flexibility regarding industries that squarely fall within the statutory definition of "utilities" and therefore are unquestionably under the Commission's jurisdiction, but they do not address the fundamental question in this case of whether or not those businesses are "utilities" in the first place: within the statutory definition and subject to the Commission's jurisdiction as a matter of law. The Commission cannot -- unilaterally and without legislative delegation via the General Statutes -- "impose its authority" over unregulated businesses "to achieve the purposes" of what it perceives to be a need "for the regulation." The effects of expanding subject matter jurisdiction beyond Chapter 62 can be seen in a decision to regulate, for the first time, barge and parking operations that had been well known by the Commission and unregulated for over twenty-five years. This decision is not based on new facts and circumstances occurring since prior dockets of BHIT, but rather upon application of a new legal theory that greatly increases the scope of regulation.

The Commission accordingly erred as a matter of law in concluding that the General Assembly has allowed it to regulate stand-alone business activities that provide neither poor service nor subject consumers to exorbitant charges.

EXCEPTION NO. 3

The Order's Evidence and Conclusions for Findings of Fact 22-23, 34 and the underlying Findings of Fact 22-23, 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Order erroneously asserts an unprecedented expansion of the Commission's jurisdiction on the grounds that the parking operations are "integral and necessary" to the regulated ferry operations. The

previous outer bound of this purported authority arises from two cases pertaining to telephone directory yellow pages: *Southern Bell I* (*State ex re. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 299 S.E.2d 763, 307 N.C. 541 (1983)) and *Southern Bell II* (*State ex re. Utilities Com'n v. Southern Bell Tel. & Tel. Co.*, 391 S.E.2d 487, 326 N.C. 522 (1990)). These holdings only allowed the Commission to recapture into a utility's cost of service the revenues, expenses, and net operating income generated from a tariff-required activity (publishing a telephone directory) that the utility spun off to an affiliated entity.

Here, the Commission erred in concluding it has sweeping authority that exceeds the *Southern Bell* cases in order to fully regulate an enterprise that it has never regulated in its more than twenty-five (25) years of operation, that has never been a part of a regulated utility, whose assets the Commission did not include in BHIT's utility rate base determination in the order concluding Docket No. A-41, Sub 10, and that furnishes services outside the definition of a "Public utility."

EXCEPTION NO. 4

The Order's Evidence and Conclusions for Findings of Fact 35-38 and the underlying Findings of Fact 35-38 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission correctly stated that "[w]hether or not a particular entity or its operations constitutes a public utility or a public utility service is a question of law" (Order, 14); yet, in addressing the scope of its regulatory jurisdiction, the Commission found and cited as support that "[p]ublic sentiment from Island stakeholders strongly emphasizes . . . the need for regulatory oversight over the system to include the Parking and Barge Operations." (Order, 8) Further, in concluding

that it is in the public interest to exert regulation over business activities, the Commission "emphasiz[es] the great weight of public support for regulation of these operations[.]" (Order, 27) Regulation, however, is not a popularity contest. Neither its enabling statute nor applicable case law affords the Commission authority to assert jurisdiction over the regulation of service providers who have lawfully secured their market position based upon public opinion or preference. That is a legislative policy judgment reserved for the General Assembly. To allow a necessarily legal determination to be so thoroughly tainted by reliance upon popular sentiment as polled and reported by a party not only exceeds the Commission's statutory delegation of authority, but also violates constitutional separation-of-power principles.

The legal nature of complaints, generally, and the quasi-judicial role of the Commission in resolving them, are why the Commission does not conduct public witness hearings in complaint dockets. Yet, in this case, the Commission improperly considered, and relied upon, popular opinion in making its jurisdictional determination.

Here, the Order itself concludes that the record contains no evidence that parking and barge services are anything other than reasonably available and reasonably priced. Nonetheless, the Commission credits survey results of Island homeowners that urge "Commission oversight over both the Parking and Barge Operations" (Order, 27) over its own conclusions that "there has been no substantiated allegation that BHIL is, at present, abusing its monopoly power[.]" (Order, 28) The Commission accordingly erred as a matter of law by acting in a legislative capacity to weigh public sentiment for regulation in determining whether it has appropriate jurisdiction to address their concerns.

EXCEPTION NO. 5

The Order's Evidence and Conclusions for Findings of Fact 22-23, and 35-38, and the underlying Findings of Fact 22-23, and 35-38 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission goes to extraordinary effort to conclude "that the Ferry, Parking, and Barge Operations function as interdependent components of a single transportation system[.]" (Order, 25) Indeed, the Order faults BHIT for presenting a seamless experience to customers and failing to "reference that the [parking] lots are separately maintained and are *not* part of BHIT's transportation facilities." (Order, 16) Moreover, the Commission discounts the cost and expense allocation regime followed by BHIT and BHIL – at Commission direction – so that the regulated and unregulated entities owned by BHIL pay their fair shares. In service of that, the Commission distorts the testimony of BHIL's CEO about the benefits of the Bald Head Island Transportation Authority ("Authority") owning all BHIL and BHIT assets, as instead conceding that accounting steps taken to keep these assets and operations separate are "an unnecessary façade." (Order, 25) The Commission's conclusion that complementary presentation of services provided by regulated and unregulated subsidiaries of BHIL justifies their treatment as a regulated *whole* is unsupported. The Commission ignored unrefuted evidence of the corporate structure of BHIL, the title ownership of assets, and the proper accounting of revenues and costs in audited financial statements. The Commission accordingly erred as a matter of law in substituting its judgment for the business decisions of private parties and in interpreting the scope of its jurisdiction over the activities owned, operated, maintained, and accounted for in a separate

corporate entity. Moreover, the Commission erred in finding and concluding that BHIL's regulated and unregulated affiliates could effectively be "combined" for analytical purposes despite the Commission's exacting rules that they operate separately and the undisputed evidence indicating that they do.

EXCEPTION NO. 6

The Order's Evidence and Conclusions for Findings of Fact 25-33 and 34 and the underlying Findings of Fact 25-33 and 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission concludes that the Barge Operations are ancillary to Ferry Operations by asserting that the Barge Operations are "necessary to the very existence of the Island as a destination to which the public might wish to travel," (Order, 24) and that "[w]ithout the Barge, sustenance, building, entertainment, and lodging on the Island would suffer." (Order, 25) The Commission misapprehends the economic utility of the Barge Operations to the Island's success as support for its conclusion that the service must be ancillary to Ferry Operations because fewer people might be interested in traveling to the Island if it could not sustain itself with supplies delivered by the Barge. As a matter of law, such reasoning cannot serve as the basis of Commission jurisdiction because it creates a limitless scope of regulatory authority over undefined and unrelated services. The Order neither mentions, nor rebuts, Public Staff's contrary conclusion that, "While barge service is undoubtedly critical for those living and traveling to and from the island, it is not related to the provision of regulated passenger ferry service."

EXCEPTION NO. 7

The Order's Evidence and Conclusions for Findings of Fact 25-33 and 34 and the underlying Findings of Fact 25-33 and 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission concludes that a vessel regulated as a "freight barge" by the United States Coast Guard "impacts ferry ridership" by allowing up to 12 persons to stay necessarily with vehicles that they drive on, and off, the Barge. Thus, the Commission speculates that the driver of a fuel tanker or other cargo truck transported on the Barge – who would not be going to the Island without the tanker and who needs to stay on the Barge with his vehicle – impacts ferry rider totals (that exceeded 380,000 in 2022) because (s)he doesn't buy a ticket for the passenger ferry. This finding is not supported by any record evidence; no party in this proceeding proposed this argument or presented any facts to support it. If some party had, such arguments would have easily been refuted by undisputable facts of U.S. Coast Guard maritime freight regulations and logistical operations.

EXCEPTION NO. 8

The Order's Evidence and Conclusions for Findings of Fact 25-33 and 34 and the underlying Findings of Fact 25-33 and 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission concludes that "[w]ere it not for the automobile-free nature of BHI," BHIL would not need to have separate Barge Operations and could instead operate an entirely different fleet of

vehicle ferries that transport vehicles and passengers. (Order, 26) Having speculated that in some hypothetical scenario – contraindicated by actual conditions on Bald Head Island – BHIL "would have no need for a different type of boat," the Commission asserts that "BHIL's choice to purchase, maintain, and operate two types of boats to provide this single service" should be disregarded as a sign that the Ferry Operations and Barge Operations – which are regulated separately by the U.S. Coast Guard and operated separately by different entities – are in fact distinct. (Order, 26) The Commission imagines conditions that do not exist on the Island and suggests "facts" that would suit its hypothetical. Moreover, no party in this proceeding proposed this argument or presented any facts to support it. If some party had, such arguments would have easily been refuted by undisputable facts of U.S. Coast Guard maritime freight regulations and logistical operations. In essence, the Commission substituted its subjective judgment for how freight and vehicles hypothetically "could have been" moved to and from the Island in lieu of the facts of how the Island actually operates.

The Commission accordingly erred as a matter of law in concluding Barge service is related to the provision of regulated passenger ferry service. The Commission also erred as a matter of law by interpreting federal law allowances for the presence of drivers on a "freight barge" as "passengers" who would otherwise purchase ferry tickets. The Commission's order is erroneous because of its invention of hypothetical scenarios that, if they existed, could allow BHIT to provide combined ferry and barge services *if* the Village routinely allowed internal combustion engine vehicles on the Island by residents and guests and *if* BHIL purchased an entirely new fleet of vessels to accommodate those vehicles.

Moreover, the Commission's conclusion is unsupported by competent, material, and substantial evidence because its hypothesized "facts" are not contained in the record.

EXCEPTION NO. 9

The Order's Evidence and Conclusions for Findings of Fact 22-23 and the underlying Findings of Fact 22-23 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Order concludes that because the unregulated Parking Operation is profitable, and the regulated Ferry Operations are generally not profitable, "[t]he affiliation [ ] strongly suggests to the Commission that BHIL has been subsidizing the Ferry Operations because BHIL views the Parking and Ferry Operations as connected." (Order, 21) The Commission apparently intuits BHIL's willingness to continue to operate an unprofitable utility (that its Commission-issued certificate requires) as a sign that its carefully segregated business lines are secretly, or practically, combined. Ignoring unrebutted testimony that BHIT has not filed a subsequent rate case because it was attempting to convey the ferry to the Authority, the Commission instead credits the unsupported hunch of a Village witness – who admits having *no* personal knowledge -- that no rate case has been filed because of the profitability of the Parking Operation. The Commission ignores the testimony of a witness who *does* have personal, first-hand knowledge of the regulatory history of the utility and its management decisions, as well as direct interaction with the Public Staff about its decision to delay a scheduled audit and potential rate case in deference to an anticipated transaction with the Authority which would end any Commission regulation of the utility.

The Commission proposes that it may ignore the undisputed distinct separation of, and accounting for, a company's regulated and unregulated affiliates – required by the Commission's own rules – and draws conclusions that rely upon a blurring of those very divisions. The Commission accordingly erred as a matter of law by engaging in a *de facto* veil piercing – without reference to or compliance with any of the exacting requirements under North Carolina law – that advances its findings, which lack supporting evidence of record.

EXCEPTION NO. 10

The Order's Evidence and Conclusions for Findings of Fact 22-23 and 35-38, and the underlying Finding of Fact 22-23 and 34-38 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission concludes that "the Parking and Barge Operations are currently operating as de facto monopolies" but fails to synthesize that determination with other evidence and conclusions it draws about the ways those businesses are conducted and how consumers are served by them. (Order, 27) The Order acknowledges "that there has been no substantiated allegation that BHIL is, at present, abusing its monopoly power," even quoting an Intervenor witness who said of the Parking Operation's impact on the public that, "[w]e have a good deal there. There's no question . . . [i]t's reasonable." (Order, 28) The Commission further ignores that the Village's own expert economist testified that BHIL did not obtain or maintain its market position in parking through any improper conduct, that he had no first-hand knowledge that BHIL engaged in any exclusionary or predatory conduct in support of its market position, nor did he have any evidence BHIL sought or

secured monopoly rents. (Tr. vol. 3, 70:17-21, 73:2-7, 115:1-6). The Commission's assumption that it must have the authority to regulate parking and barge operations because of the lack of current competition misconstrues basic economic principles and has no basis in the statutes or case law. Accordingly, the Commission erred as a matter of law by misinterpreting and misapplying decades of antitrust precedent to conclude it is appropriate to regulate a market actor whose customers are purportedly "captive" to reasonably priced and reasonably available services with which they are "generally satisfied" because "the risk exists" that BHIL "or a future owner" might behave differently.

EXCEPTION NO. 11

The Order's Evidence and Conclusions for Findings of Fact 22-23 and the underlying Findings of Fact 22-23 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission improperly combines (i) its finding that "there is no existing realistic alternative" to BHIL's Parking Operations with (ii) its conclusion that "[t]here is no practicable future alternative to the Parking Facilities" into justification for regulation. (Order, 6, 18) The Commission further concludes because BHIL "purchased the property in Southport long ago," and that a potential competitor would face "natural disadvantages" of geography such as off-site locales, it is "unlikely that any near-term competition will arise in the market." (Order 19) This "competition" analysis is contrary to long-standing and well-established legal principles. The law does not allow "the willful acquisition or maintenance" of a monopoly position "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Broadcom Corp. v. Qualcomm Inc.*, 501

F.3d 297, 306-07 (3d Cir. 2007); *see also Sitelink Software, LLC. v. Red Nova Labs, Inc.*, 2016 WL 3918122, at *10 (N.C. Super. Ct. June 14, 2016) (same). The Commission's allowance that its "calculus might change" on regulating the Parking Operations if competition emerged in a setting where there is neither unit demand, nor abusive pricing by the incumbent, is illustrative of the fatal flaw in this analysis. (Order, 19) Its conclusion disregards basic tenets of statutory construction and interpretation, provides no consistency of application on which the regulated community can rely, disregards any value of *stare decisis*, and violates Art. I, Section 19 of the North Carolina Constitution. The Commission accordingly erred as a matter of law in concluding that it can regulate activities that are not natural monopolies, that have been operated for decades as unregulated activities, and that did not obtain, or maintain, their market positions in an unlawful manner.

EXCEPTION NO. 12

The Order's Evidence and Conclusions for Findings of Fact 22-23, and 34 and the underlying Findings of Fact 22-23 and 34-38 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. The Commission declares that BHIL can be regulated under N.C. Gen. Stat. § 62-3(23)(c) because its role as a parent company affects the rates or services of BHIT's ferry.

There is not a single Commission finding, nor item of record evidence, that supports a conclusion that BHIL operates the Parking Operation in a manner different than any other commercial provider would. The Commission's conclusion that ferry passengers need a place to park because the Village won't allow them to operate cars on the Island does not justify BHIL's regulation by the Commission. Moreover, the Commission erred in

concluding that imputation of Parking Operation revenue in the 2010 Rate Case to establish ticket prices on which the Ferry Operation continues to lose money supports a finding that BHIL's conduct "directly affected the rates that BHIT has charged for Ferry service since 2010." (Order, 21) In fact, the evidence was unrebutted that BHIT believed it needed a ticket price in the 2010 Rate Case $5 higher to achieve an allowable rate of return, and the imputation was simply an accounting mechanism used at that time to adjust BHIT's revenue requirement in the context of the settlement.

The Commission proposes a leap in logic that would extend its jurisdictional authority well into a corporate parent's separate, unregulated businesses. Here, conditions imposed *by the Village* that dictate transportation options, an undefined and novel economic theory, and a decision to jettison prior settlement stipulations are the unpredictable justifications for deconstructing the corporate structure of a company that holds regulated and unregulated businesses. BHIL could never have anticipated that BHIT's Commission-supervised operation of a public utility could so blithely be deemed as intermeshed with its openly operated, and unregulated, affiliates. Indeed, upon information and belief, no previous Commission order or appellate case law serves as precedent for such an extension of jurisdiction to previously unregulated operations. The Commission's reliance upon *State ex rel. Utilities Comm'n v. Simpson*, 295 N.C. 519, 246 S.E.2d 753 (1978), is misplaced because that case and its progeny addressed whether a service that was indisputably a "utility" was being provided to the "public." In this case, the services provided by the barge and parking facilities are not "utilities" under the statutory definition, as Commissioner Duffley's dissent correctly observes.

The Commission accordingly erred as a matter of law in concluding that BHIL's conduct of its non-regulated activities affects the rates or services of BHIT's ferry.

EXCEPTION NO. 13

The Order's Evidence and Conclusions for Findings of Fact 24 and the underlying Finding of Fact 24 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. First, the Commission's Order disregards its determination in the 2010 Rate Case Order's (A-41, Sub 7) that the rate base of the public utility providing transportation services to Bald Head Island – the assets used and useful in providing utility services – did *not* include any parking facilities or the tugboat/barge.

Second, in contravention of the 2010 Rate Case Order's express provisions that the imputation of funds from the Parking Operations are:

(i) "limited to this case";

(ii) "establish[] no binding precedent for future cases,"

(iii) "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*," and

(iv) "contrary to BHIT's legal position",

the Commission "nevertheless" decided to use the imputation against Respondents in determining the "regulatory treatment of parking operations." (Order, 23) Although the Commission concedes the imputation is "not binding upon the parties in future proceedings," (Order, 21) it bound Respondents to it here – concluding the imputation "directly affected the rates that BHIT has charged for the Ferry service" for purposes of its

conclusions under N.C. Gen. Stat. § 62-3(23)(c) that BHIL's ownership of the Parking Operations had an effect on the rates of BHIT's utility. The Commission erred as a matter of law in so concluding. Moreover, the practical effect of this reversal of long-standing Commission practice will have the effects of interjecting uncertainty into the regulatory process, dissuading utilities from settling rate cases in the future, and impacting the ability of parties to rely upon stipulations and agreements approved by Commission order.

EXCEPTION NO. 14

The Order's Evidence and Conclusions for Findings of Fact 22-23, 34 and the underlying Findings of Fact 22-23, 34 are unjust, unreasonable, or unwarranted; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious. Specifically, the stylized "complaint" does not fall within the Commission's Complaint Jurisdiction. The Commission's statutory authority to hear complaints against public utilities is found in N.C. Gen. Stat. § 62-73:

> Complaints may be made by the Commission on its own motion or by any person having an interest . . . by petition or complaint in writing *setting forth any act or thing done or omitted to be done by any public utility*, including any rule, regulation or rate heretofore established or fixed by or for any public utility in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable.

As numerous Commission orders and appellate case have noted, an interested party "may file a complaint with the Commission alleging that a utility rate is unjust or unreasonable." *See e.g., State ex rel. Utils. Comm'n v. CIGFUR*, 503 S.E.2d 697, 700 (N.C. Ct. App. 1998). But in this case, there were no allegations that the currently applicable

ferry rates and rate structure — approved in 2010 (with Village support) – are unjust or unreasonable.

Moreover, there were no meaningful allegations of deficiencies in ferry service, or that BHIT failed to follow any Commission rules, regulations, or orders regarding conduct of its regulated activities. Indeed, the record shows no "controversy" over the current operation of the ferry and tram by BHIT or the parking or barge by BHIL. As the Commission concluded, "the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both BHIL and BHIT, as well as the agreement they struck in the last general rate case involving the Parking Operations." (Order, 28) The articulated concern of the Complainant was about the conduct of *another* owner *in the future*. (See Gardener Prefiled Testimony, p. 4, ll 19-22). In the context of a complaint proceeding, these facts are far from the "adversarial relationship" sufficient to demonstrate a justiciable controversy that the Commission should entertain. *State ex rel. Utilities Comm'n v. Cube Yadkin Generation LLC*, 865 S.E.2d 323, 326 (2021).

The parking and barge operations have been operated by BHIL for more than 25 years, in full knowledge of the Commission and all of the parties in this proceeding, and the Commission has never attempted to regulate these operations until now. Asserting the Commission's purported jurisdiction, now for the first time, and changing the rules governing these businesses so dramatically -- without statutory authorization or precedent -- is unlawful, unjust, unreasonable, and unwarranted.

CONCLUSION

For the reasons set forth above, the Commission's Order is unlawful, unjust, unreasonable, or unwarranted; in excess of statutory authority or jurisdiction of the

Commission; affected by errors of law; unsupported by competent, material, and substantial evidence in view of the entire record as submitted; and arbitrary or capricious; and should therefore be reversed.

Respectfully submitted this the 27th day of January, 2023.

FOX ROTHSCHILD LLP

/s/ M. Gray Styers, Jr
M. Gray Styers, Jr.
N.C. State Bar No. 16844
Bradley M. Risinger
N.C. State Bar No. 23629
Kip David Nelson
N.C. State Bar No. 43848

434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Telephone: (919) 755-8700
Facsimile: (919) 755-8800
Email: gstyers@foxrothschild.com
Email: brisinger@foxrothschild.com
Email: knelson@foxrothschild.com

Attorneys for Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC

NEXSEN PRUET PLLC

/s/ David P. Ferrell

David P. Ferrell
N.C. State Bar No. 23097
4141 Parkdale Avenue
Suite 200
Raleigh, NC 27612
Telephone: (919) 755-1800
Fax: (919) 890-4540
Email: dferrell@nexsenpruet.com

Attorneys for SharpVue Capital, LLC

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Notice of Appeal and Exceptions of Bald Head Island Transportation, Inc. ("BHIT"), Bald Head Island Limited, LLC ("BHIL"), and SharpVue Capital, LLC ("SharpVue") upon all parties of record by email transmission with the parties' consent.

This the 27th day of January, 2023.

/s/ Bradley M. Risinger
Bradley M. Risinger
Fox Rothschild LLP
434 Fayetteville Street, Suite 2800
Raleigh, North Carolina 27601
Telephone: (919) 755-8764
E-mail: brisinger@foxrothschild.com