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September 29, 2022

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  
***Respondents' Motion in Limine No. 1***

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc., Bald Head Island Limited, LLC, and SharpVue Capital, LLC, in the above referenced matter and docket, I herewith submit Respondents' Motion in Limine No. 1 – Exclude Testimony and Evidence Regarding Rate Case Issues and Determinations not Germane to this Docket.

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

Sincerely,

Brad M. Risinger

pbb

A Pennsylvania Limited Liability Partnership

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Enclosure

cc: Counsel and Parties of Record  
NC Public Staff

**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.	)	<b>RESPONDENTS' MOTION IN</b>
	)	<b>LIMINE NO. 1</b>
BALD HEAD ISLAND	)	
TRANSPORTATION, INC. and	)	<b>EXCLUDE TESTIMONY AND</b>
BALD HEAD ISLAND LIMITED,	)	<b>EVIDENCE REGARDING RATE</b>
LLC,	)	<b>CASE ISSUES AND</b>
Respondents.	)	<b>DETERMINATIONS NOT</b>
	)	<b>GERMANE TO THIS DOCKET</b>

NOW COME Respondents Bald Head Island Transportation, Inc. ("BHIT"), Bald Head Island Limited, LLC ("BHIL") and SharpVue Capital, LLC (collectively, "Respondents"), by and through counsel and pursuant to Rules R1-7 and R1-24 of the Rules and Regulations of the North Carolina Utilities Commission and Rules 401 and 402 of the North Carolina Rules of Evidence, and move the North Carolina Utilities Commission ("Commission") to exclude testimony and evidence regarding (i) any current or future basis or value of any assets that might be included in the rate base of the ferry and tram systems or any other operations or functions (e.g. parking or barge) the Commission may decide to regulate for purposes of any future ratemaking proceeding; or (ii) any calculated or proposed revenue requirements, rate design, or rates of return for any currently unregulated operations or functions at issue in this proceeding that the Commission may decide to regulate (collectively, the "Rate Issues"). In support of this Motion, Respondents show the Court the following:

### FACTUAL SUMMARY

1. The Complaint and Request for Determination of Public Utility Status filed by the Village of Bald Head Island (“Complainant” or “the Village”) on February 15, 2022 requests that the Commission expand its regulatory jurisdiction to encompass the parking and barge operations of BHIL.

2. For BHIL’s parking operations in Southport, North Carolina, the Village asks the Commission to conclude that:

- a. “the Deep Point Parking Facilities constitute public utility property subject to the Commission’s authority as an integral component of the on-going utility services provided by BHIT”; or
- b. BHIL is a “public utility” subject to Commission regulation because it owns and operates parking lots that are “an essential component of providing [] utility service.”

(Compl., ¶¶ 54-55).

3. For BHIL’s barge operations, the Village asks the Commission to conclude that such service is the type of “common carrier activity under Chapter 62” that is subject to Commission regulation, and that its activity should be regulated as a “public utility.” (*Id.*, ¶ 66)

4. There is no request in the Complaint for the Commission to set the rates of the regulated ferry and tram operations of BHIT (“Regulated Assets”) following a prospective inclusion of new assets in that rate base, or in any other circumstance.

5. There is no request in the Complaint for the Commission to set the rates for either BHIL’s parking or barge operations (“Unregulated Assets”) following any

prospective decision by the Commission to exert regulation over them, either as independent “utilities” or as purportedly “integral” components of the Regulated Assets. Indeed, the Complaint itself includes in its prayer for relief that the Commission “[i]nitiate such *further* proceedings as may be required to ensure compliance with the regulatory requirements applicable to the public utility services described herein, including, without limitation . . . to file rates for approval of the Commission.” (Compl., p. 22 (emphasis added)).

6. The Commission has confirmed, upon “a review of the four corners of the Complaint,” that it “does not yield any request by [the Village] that the Commission set rates for the Unregulated Assets or alter rates for the Regulated Assets; it merely requests a ruling that the Unregulated Assets are subject to Commission regulation.” (*Order on Respondents’ Motion to Take Judicial Notice and Motion to Dismiss*, at 11).

7. As the Commission correctly observes, there is no request in the Complaint for the Commission to determine any amount of rate base for either the Regulated Assets or Unregulated Assets.

8. In the course of discovery, Respondents have responded to eight Data Requests propounded by the Village that have elicited production of a wide variety of financial information regarding the activities and assets of the Regulated Assets and the Unregulated Assets. BHIT and BHIL have produced more than 4,700 pages in discovery that contain voluminous financial information, including:

- a. Income Statements for BHIT, April 2012-March 2022;
- b. Income Statements for BHIL’s Parking Department, 2013-2021;
- c. Audited Financial Statements for BHIL’s Parking Department, 2014-



2021;

- d. Tax Asset Detail for Parking Department Improvements, 2005-2022;
- e. Cost Basis for Parking Department Assets;
- f. Income Statements for BHIL's Barge Department, 2013-2021;
- g. Audited Financial Statements for BHIL's Barge Department, 2014-2021;
- h. Gross Book Values of Ferry, Parking and Barge Assets;
- i. Due Diligence Report prepared for BHIL in Advance of Proposed Sale of the Regulated and Unregulated Assets to Bald Head Island Transportation Authority ("BHITA");
- j. Bond Feasibility Study prepared for BHITA in Advance of Proposed Purchase of the Regulated and Unregulated Assets; and
- k. SharpVue Capital Valuation of Regulated and Unregulated Assets.

While providing this information in the spirit of cooperation and in light of the broad scope of discovery allowed in Commission proceedings, Respondents have reserved their objections to object to the relevance and admissibility of this information in the record in this proceeding, given the limited scope of the requested relief sought by the Complainant.

### ARGUMENT

9. The purpose of the Motion is to seek a ruling from the Commission in advance of the hearing to exclude testimony or evidence about issues that would only be relevant *if* this were a proceeding involving the altering of rates for the Regulated Assets or the setting of rates for the Unregulated Assets, or *if* this were a proceeding to establish rate base as part of approving a transfer of utility assets and franchise.

10. “A motion *in limine* seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]” *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App. 789, 792, 654 S.E.2d 708, 710 (2007). The Court has “wide discretion in making this advance ruling.” *Id.*

11. “Where practical, the Commission applies the same rules of evidence used in civil actions in the superior court. The Commission may exclude incompetent, irrelevant, immaterial, and unduly repetitious or cumulative evidence.” *In the Matter of Biennial Determination of Avoided Cost Rates for Elec. Util. Purchases from Qualifying Facilities - 2016*, No. E-100, 2017 WL 281934, at \*1 (Jan. 18, 2017) (citing N.C.R. Evid. 402).

12. The Commission has regularly considered the issue and concluded that testimony that does not “evidence . . . any fact of consequence to the determination of the present case . . . is irrelevant and should be stricken.” *In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates & Charges Applicable to Elec. Util. Serv. in N. Carolina*, No. E-7, 2013 WL 3377105, at \*2 (July 3, 2013); *see also In the Matter of Application of NTE Carolinas II, LLC, for a Certificate of Pub. Convenience and Necessity to Construct A 500-Mw Natural Gas-Fueled Merch. Power Plant in Rockingham Cnty., N. Carolina*, No. EMP-92, 2016 WL 6581761, at \*7 (Nov. 1, 2016) (“proffered evidence [should be] specific to the application in this docket [and should] have some bearing on the issue.”).

13. Respondents acknowledge that in dockets that *do* involve the fixing of rates, the Commission has duties that include ascertaining “the reasonable original cost or the fair value . . . of the public utility’s property used and useful, or to be used and useful within a reasonable time[;]” estimation of a public utility’s “revenue under the present and

proposed rates[;]" identifying a public utility's "reasonable operating expenses, including actual investment currently consumed through reasonable actual depreciation[;]" and fixing and applying an appropriate rate of return. N.C.G.S. § 62-133(b)(1)-(5).

14. Here, though, none of those statutory responsibilities are at issue. None of the determinations required under § 62-133(b) need to, or can, be made. Thus, there is no relevance to, or need for, submission of testimony or evidence on any of the findings required in a rate case under that subsection, such as rate base valuation or allowable rate of return calculations. In addition, considering this evidence at this stage would be prejudicial to the Respondents -- particularly SharpVue, given its late addition to the proceeding and reliance on the plain language of the Complaint and the Commission's Order, cited above in paragraph 6, regarding the scope of this proceeding.

15. Indeed, for the Commission to permit Complainant to take piece-meal shots at the complex and thorough-going rate processes of § 62-133(b) would also contravene the well-settled prohibition against "single-issue ratemaking." *In the Matter of Application of Duke Energy Carolinas, LLC for Approval of Rate Rider*, Docket No. E-7, Sub 849, 2008 WL 2445559 (June 2, 2008). The statutory ratemaking process under North Carolina law involves consideration of numerous overlapping and inter-related determinations, supported by the submissions and undertakings of the parties and the Public Staff, and relies on a transparent and well-understood public process. To allow Complainant to introduce evidence or seek determination of individual elements of a rate case process in this "complaint" proceeding would be alien to the Commission's historic conduct of a process that relies on careful data analysis to forecast future conditions. As the Supreme Court has observed, "Rate making is, of necessity, a matter of estimate and prediction since



rates are set for the future.” *Utilities Commission v. City of Durham*, 282 N.C. 308, 321, 193 S.E.2d 95, 104 (1972).

16. Moreover, as a matter of judicial efficiency and economy, the Commission should act to exclude testimony and evidence related to Rate Issues that are not ripe and not before the Commission in this docket but that the Commission may be required to address, when they are ripe, in future dockets. Such a ruling would focus the hearing on those matters that are at issue, provide guidance and clarity on the scope of the questioning of witnesses, and avoid wasting the Commission’s valuable time at the hearing on issues beyond the scope of the proceeding. As one court put it, a motion in limine “enables a court to rule in advance on the admissibility of documentary or testimonial evidence and thus expedite and render efficient a subsequent trial.” *INSLAW, Inc. v. Unites States*, 35 Fed. Cl. 295, 303 (1996). *See also U.S. v. Tokash*, 282 F.3d 962, 968 (7th Cir. 2002) (“Motions in limine are well-established devices that streamline trials and settle evidentiary disputes in advance, so that trials are not interrupted mid-course for the consideration of lengthy and complex evidentiary issues.”).

17. To be sure, the Village’s many data requests have sought and elicited the production of much information that could be used to make arguments about the value of assets in rate bases for ratemaking purposes, revenue requirements, rate design, and the allowable rates of return and rates that might be permissible based on an analysis of that underlying data. But the subset of admissible information in a docket is not co-extensive with the broad scope of discovery allowable under N.C. R. Civ. P. 26. It is well settled in North Carolina that “[a] determination that particular information is relevant for discovery is not conclusive of its admissibility as relevant evidence at trial.” *Shellhorn v. Brad*

*Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106 (1978).

18. The Complainant's Rebuttal Testimony of Kevin W. O'Donnell further illustrates both the appropriateness and the need of limiting the scope of the evidence at the hearing consistent with issues in this matter. First, although Mr. O'Donnell's inaccurately states that Respondent's CFO Shirley Mayfield "does not dispute" O'Donnell's direct testimony about his "financial analysis" of the parking operations and its "logical inferences"<sup>1</sup> (Rebuttal Testimony of Kevin O'Donnell,, Sept. 28, 2022, 2:15 to 3:6 and 4:10-18), the issues of rate base and rate of return are not properly framed and presented in this docket because they are irrelevant to the jurisdictional issue in question. In a rate case proceeding (whether voluntarily initiated by BHIT or by a third-party such as the Village; see Docket No. A-41, Sub 7 Order, pg. 10; Stipulation § 18), BHIT would, of course, present extensive accounting evidence pursuant to Commission Rule R1-17 on those issues – in direct testimony and exhibits and then rebuttal testimony. Moreover, the Public Staff, which has an integral role in representing the using and consuming public on these issues (and which has an affirmative obligation to audit BHIT's finances), has presented no evidence on BHIT's rate base or rate of return in this docket. Second, Mr. O'Donnell's testimony is premised entirely on an assumption (actually, the Village's contention) that the parking facilities are, in fact, regulatory assets already in the rate base of a utility. *See Id.*; O'Donnell Rebuttal, 8:3-16. Yet, that assumption is the very contested issue that is before the Commission in this docket and has not yet been determined. For now, Mr. O'Donnell's proverbial cart is way ahead of his horse.

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<sup>1</sup> In fact, BHIL does strongly disagree with Mr. O'Donnell's methodology, calculations, and conclusions, and -- if necessary and in the appropriate docket -- will refute them.

19. Even one of the Village's own experts, Julius Wright, concedes in his rebuttal testimony, these are issues the "Commission must address after they have decided whether the parking service should be regulated." Rebuttal Testimony of Julius A. Wright, Sept. 28, 2022, 15:18-20 (Appendix 1). That is, *after* the Commission decides the *only* issue that is set forth in *this* docket. Indeed, Dr. Wright observes that "the valuation of the parking facilities presents various public policy considerations that should be considered *at the appropriate time*["]” *Id.*, 16:9-11 (emphasis added).

20. To maintain the focus of this docket on the matters placed at issue in the Complaint within the proper scope of complaint proceedings under Commission Rule 1-9, and avoid a *de facto* (and improper) rate case pursuant to N.C. Gen. Stat. § 62-133, the Commission should bar<sup>2</sup> the introduction of testimony or evidence that relate to:

- a. what assets may or should be newly included in the rate base of the ferry and tram services should the Commission decide to exert regulatory jurisdiction over BHIL's parking operations;
- b. the value of any assets that may or should be newly included in the rate base of the ferry and tram services should the Commission decide to exert regulatory jurisdiction over BHIL's parking operations;
- c. the calculated or proposed revenues, rate design, or rates of return, that should be permissible for the ferry and tram services should the Commission decide to exert regulatory jurisdiction over the BHIL's parking operations;

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<sup>2</sup> Respondents agree that the relief requested herein should equally apply to them. Respondents' direct testimony includes references to the Rate Issues that respond to the direct testimony of Complainant. Such testimony should not be permissible from any party.

- d. what assets may or should be newly included in the rate base of the barge operations should the Commission decide to regulate it as a common carrier service under Chapter 62;
- e. the value of any assets that may or should be newly included in the rate base of the barge operations should the Commission decide to regulate it as a common carrier service under Chapter 62;
- f. the calculated or proposed revenues, rate design, or rates of return, for the barge operations should the Commission decide to regulate it as a common carrier service under Chapter 62;
- g. what assets that may or should be newly included in the rate base of the parking or barge operations should the Commission decide to regulate either of them, alone or together, as a “public utility” under Chapter 62;
- h. the value of any assets that may or should be newly included in the rate base of the parking or barge operations should the Commission decide to regulate either of them, alone or together, as a “public utility” under Chapter 62; and
- i. the calculated or proposed revenues, rate design, or rates of return, for the parking or barge operations should the Commission decide to regulate either of them, alone or together, as a “public utility” under Chapter 62.

21. Financial information on the regulated utility’s rate base may be relevant and admissible in the Certificate of Public Convenience and Necessity (“CPCN”) transfer proceeding, Docket No. A-41, Sub 22. But it would be administratively inefficient and



duplicative to hear evidence on the value of the Regulated Assets in the present docket when that evidence is not relevant to the issue raised in the Complaint and may need to be heard in that pending transfer proceeding. Likewise, the same applies to evidence on the value of Unregulated Assets<sup>3</sup>, and that information would be irrelevant to the transfer proceeding if the Commission decides in this matter that the parking and barge operations are beyond the scope of the Commission's jurisdiction or need not be rate regulated. Moreover, enlarging the scope of the hearing in this docket to these rate base and rate of return issues would greatly and unnecessarily lengthen the time required for cross-examination and thus the hearing itself.

22. Testimony or evidence that relates to Rate Issues cannot pass the most basic tenet of relevance set forth in N.C. R. Evid. 401 as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The determinations set forth in § 62-133(b), or potentially in the CPCN transfer docket, are not at issue here, and no evidence underlying those determinations is of consequence to this proceeding.

### CONCLUSION

For the foregoing reasons, Respondents Bald Head Island Transportation, Inc., Bald Head Island Limited, LLC and SharpVue Capital, LLC request that the Commission exclude any testimony or evidence regarding the issues set forth in par. 20 (a)-(i).

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<sup>3</sup> Indeed, Dr. Wright, a Village expert witness, notes that "Limited and others may bring forward" such valuation arguments at a later date "when the subject of this property's valuation is ripe for consideration." Wright Rebuttal Test., 17:2-4.



Respectfully submitted, this 29<sup>th</sup> day of September, 2022.

FOX ROTHSCHILD LLP

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

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**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this date served the attached **RESPONDENTS' MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE REGARDING RATE CASE ISSUES AND DETERMINATIONS NOT GERMANE TO THIS DOCKET** in the above-captioned case, which was filed on this day, by electronic mail to the parties of record, counsel of record and the NC Public Staff, or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

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This the 29th day of September, 2022.

*/s/ Bradley M. Risinger*

Bradley M. Risinger



STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. A-41, SUB 21

VILLAGE OF BALD HEAD ISLAND,	)	
Complainant,	)	
	)	REBUTTAL TESTIMONY OF
v.	)	DR. JULIUS A. WRIGHT
	)	ON BEHALF OF
BALD HEAD ISLAND TRANSPORTATION,	)	THE VILLAGE OF BALD HEAD
INC., BALD HEAD ISLAND LIMITED, LLC,	)	ISLAND
and SHARPVUE CAPITAL, LLC.	)	
Respondents.	)	

1        *mention the allocation of the parking and barge function assets and expenses*  
2        *between ferry and non-ferry customers)."* While I agree the addition of the barge  
3        and parking services adds some complexity to the accounting and rate design  
4        elements of the overall regulated services, this Commission, its Staff, and the Public  
5        Staff have significant experience in dealing with regulated enterprises that have  
6        many different income streams, many different cost allocation issues, and many  
7        different types of tariffed services.

8        **Q.    WHAT IS YOUR ISSUE WITH RESPECT TO MS. MAYFIELD'S**  
9        **COMMENTS REGARDING THE VALUATION OF THE PARKING**  
10       **FACILITIES SHOULD THE COMMISSION DECIDE TO REGULATE**  
11       **THIS SERVICE?**

12      A.    In her direct testimony (page 12, lines 4-12), Ms. Mayfield states "*However,*  
13        *witnesses for the Village have suggested in discovery that only the net book value*  
14        *of the land (as currently carried by BHIL) should be included in the utility's rate*  
15        *base. In essence, the Village suggests that BHIT or SharpVue acquire or lease*  
16        *extremely valuable land to make the Village's newly imagined regulatory regime*  
17        *possible, but only be allowed to recover rates, and a reasonable rate of return,*  
18        *calculated off of a historical book value that dates to 1996.*" First, I would say this  
19        is an issue that this Commission must address after they have decided whether the  
20        parking service should be regulated and, as such, it remains an open question. What  
21        I would also observe is that the valuation of the parking facilities presents an  
22        interesting, possibly unique situation for the Commission.



1 Let me explain. Usually, when, a regulated utility is acquiring goods or  
2 services from an affiliate of the same holding company, as is the case with the  
3 parking facilities and the Deep Point Ferry, those goods and services are generally  
4 acquired, and if necessary placed into rate base, at (1) the original cost less  
5 depreciation or (2) the market value, whichever is less. The reason for this  
6 regulatory policy is to prevent affiliates of a holding company from selling goods  
7 or services to a regulated affiliate of the same holding company at an inflated  
8 value.

9 I would add that the valuation of the parking facilities presents various  
10 public policy considerations that should be considered at the appropriate time,  
11 including:

- 12 • The parking facility and land were acquired to service the regulated  
13 passenger ferry,
- 14 • The owners of the parking facility have agreed for years to tie the parking  
15 revenues to the passenger service revenues by imputing a portion of the  
16 parking revenues to the ferry service as a means to reduce the regulated  
17 rates of the passenger ferry,
- 18 • The same ratepayers that pay regulated ferry rates also pay the parking fees  
19 and, in this regard, have created the value (i.e., the revenue stream) which  
20 Limited is now seeking to monetize,
- 21 • The owners of the parking facility and the regulated affiliate are both under  
22 the same holding company, and