

**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, c/o Village)	
Manager, 106 Lighthouse Wynd, Bald)	
Head Island, North Carolina 28461)	
Complainant)	ORDER SERVING COMPLAINT AND
)	REQUEST FOR DETERMINATION OF
v.)	PUBLIC UTILITY STATUS
)	
Bald Head Island Transportation, Inc., and)	
Bald Head Island Limited, LLC,)	
Respondent)	

BY THE COMMISSION: Notice is hereby given of the filing with this Commission on February 16, 2022, of a complaint by Village of Bald Head Island (Complainant) against Bald Head Island Transportation, Inc., and Bald Head Island Limited, LLC (Respondents). In accordance with the Commission's Rules of Practice and Procedure, service of the complaint is hereby made on Respondents by copy thereof attached to this Order Serving Complaint, to Bald Head Island Transportation, Inc., by electronic mail (e-mail), delivery confirmation requested, and to Bald Head Island Limited, LLC, by United States certified mail, return receipt requested. Respondents are hereby directed to either satisfy the demands of Complainant or to file an answer with the Commission on or before February 28, 2022. The answer should comply with Rule R1-9 of the Commission's Rules of Practice and Procedure.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 17th day of February, 2022.

NORTH CAROLINA UTILITIES COMMISSION



Joann R. Snyder, Deputy Clerk



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Feb 16 2022

February 16, 2022

Via Electronic Filing

Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, NC 27699-4300

Re: *Docket No. A-41, Sub 21*
Village of Bald Head Island Complaint and Request for
Determination of Public Utility Status

Dear Ms. Dunston:

Transmitted on behalf of the Village of Bald Head Island for filing in the above-referenced docket is a Complaint and Request for Determination of Public Utility Status against Bald Head Island Transportation, Inc., and Bald Head Island Limited, LLC.

Should any questions arise in connection with this matter, please do not hesitate to contact this office.

Very truly yours,

Marcus W. Trathen
Direct Dial: (919) 573-6207
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Enclosure

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND,)	
)	
Complainant,)	
)	
v.)	COMPLAINT AND
)	REQUEST FOR
)	DETERMINATION OF
BALD HEAD ISLAND)	PUBLIC UTILITY STATUS
TRANSPORTATION, INC. and BALD)	
HEAD ISLAND LIMITED, LLC,)	
)	
Respondents.)	

Petitioner Village of Bald Head Island (“VBHI”), pursuant to N.C. Gen. Stat. §§ 62-30, 62-31, 62-45, 62-60, 62-73, 62-136, and 1-253 and North Carolina Utilities Commission (“Commission”) Rules R1-5 and R1-9, files this Complaint and Request for Determination of Public Utility Status (“Complaint”) seeking relief against respondents Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL”).

In support of this Complaint, VBHI shows the Commission the following.

SUMMARY

The sole means of public transportation to Bald Head Island is BHIT’s ferry that departs from Deep Point Marina. Because the ferry does not transport motor vehicles, ferry passengers are required to leave their vehicles at the parking lot adjacent to Deep Point Marina, which is owned and operated by BHIT’s parent company, BHIL. Similarly, the exclusive public means for passengers and businesses to transport household goods that do

not qualify as luggage for purposes of transport on the ferry is by a barge, which is also owned and operated by BHIT's parent company, BHIL.

A dispute has arisen between and among the parties concerning the regulatory nature of the parking and barge assets which are essential to, and a component of, the regulated public utility ferry service provided by BHIT. This dispute takes on particular importance now because BHIL has publicly stated both its intention to seek third party, private buyers of the transportation assets and its willingness to sell the assets comprising the transportation system in parts. Given those present efforts to dispose of these critical assets, it is important that the Commission resolve questions concerning the regulated nature of services being provided to the public with the parking and barge assets to ensure that the public interest in utility service is protected.

This Complaint seeks, at a minimum, the Commission's threshold determination that: (1) the parking lots at the Deep Point Marina terminal owned and operated by BHIL are an integral and essential part of the ferry services offered by BHIT and, thus, the parking operation is subject to the Commission's regulatory authority; and (2) the barge owned and operated by BHIL provides a common carrier service under Chapter 62 that also is subject to the Commission's regulatory authority.

PARTIES AND JURISDICTION

1. VBHI is a municipal corporation with all the powers, duties and rights conferred by its charter and the laws of the State of North Carolina. VBHI is governed under a council-manager form of government, with a Mayor and a four-member Council. The address for the Petitioner is Village of Bald Head Island, c/o Village Manager, 106 Lighthouse Wynd, Bald Head Island, North Carolina 28461.

2. VBHI's legal representatives in this proceeding, to whom all notices, pleadings, and other documents should be directed, are:

Marcus W. Trathen
Craig D. Schauer
Brooks, Pierce, McLendon,
Humphrey & Leonard, LLP
Suite 1700, Wells Fargo Capitol Center
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P.O. Box 1800 (27602)
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VBHI consents to electronic service in this proceeding.

3. BHIT is a North Carolina corporation with a principal office at 6 Marina Wynd, Bald Head Island, North Carolina, 28461-5073. BHIT operates as a public utility under the laws of the State of North Carolina and is subject to the jurisdiction of the Commission pursuant to G.S. § 62-3(23)a.4. *See* Order Granting Common Carrier Authority, Docket No. A-41, Sub 0 (Jan. 6, 1995). Under color of this authorization, BHIT is engaged in the business of transporting passengers and their personal effects by ferry between the Deep Point terminal on the mainland and Bald Head Island.

4. BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. BHIL's principal office is 6 Marina Wynd, Bald Head Island, North Carolina, 28461-5073.

5. BHIL is owned by the George P. Mitchell Family Corporation, the developer of the Island, and, on information and belief, is the main business entity through which the family conducts its Bald Head Island development activity. As such, BHIL has extensive business operations and property holdings on the Island and, of relevance here,

owns and operates parking lot facilities serving the Deep Point Marina terminal, as well as a barge (together with its associated tugboat, “Barge”) used to ferry commercial materials, goods, supplies and personnel, including large household goods that cannot be transported via the passenger ferry, to and from the Island.

6. On information and belief, BHIT is a wholly-owned subsidiary of BHIL.

7. G.S. § 62-73 empowers this Commission to hear complaints against public utilities brought “by any person having an interest, either direct or as a representative of any persons having a direct interest in the subject matter of such complaint.”

8. Among other powers, the Commission is invested with general power and authority to supervise and control the public utilities of the State, including all powers and duties necessary or incident to the discharge of this responsibility. G.S. § 62-30.

9. The North Carolina Declaratory Judgment Act, G.S. § 1-253, empowers courts of record, including the Commission, to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. Such declarations shall have the force and effect of a final judgment or decree. Pursuant to G.S. § 62-60, the Commission may exercise this power under the Declaratory Judgment Act with respect to all subjects over which the Commission has jurisdiction.

10. VBHI, as the Island’s municipal government and a regular user of the ferry, parking and Barge for its employees and operations, has a direct and substantial interest in ensuring the ongoing and continued availability of transportation service to the Island for the benefit of its residents, property owners, businesses and visitors on reasonable terms and conditions.

11. The Commission has jurisdiction over the subject matter and action now presented, and venue in the Commission is proper.

FACTS

Bald Head Island

12. Bald Head Island (the “Island”) is the southernmost of North Carolina’s barrier islands and is located at the confluence of the Cape Fear River and Atlantic Ocean, approximately three miles across the Cape Fear River from the city of Southport in Brunswick County. It is renowned for its natural beauty, including its picturesque beaches and 173-acre Maritime Forest Preserve, and it is a popular vacation destination for visitors as well as for property owners. A unique feature of Bald Head is that motor vehicles are generally prohibited on the Island, except for commercial uses, public works, and public safety purposes. Instead of motor vehicles, residents and visitors typically ride bicycles or drive golf carts to travel on the Island.

13. The Island has over 1,000 private residences, with approximately 295 full-time residents. In addition to the full-time residents, there are many more who consider the Island their primary residence with a home elsewhere, and many who have their primary residence elsewhere, but make regular trips to their home on Bald Head. There are also visitors who rent property on the Island, as well as “day trippers” who work on the Island or who wish to visit attractions such as the historic lighthouse (“Old Baldy”), the Conservancy, or the Maritime Forest. In combination, these activities account for extensive travel to and from the Island, particularly during spring and summer months, and the daily population of the Island (including full-time residents, part-time residents, vacation renters, daily tourists, and employees and contractors) can exceed 7,000 persons during peak periods.

14. VBHI is governed by an elected Village Council which exists, in part, to help property owners maintain the Island's unique qualities and to ensure that the Island is an accessible and enjoyable place to live, visit and work. Among other benefits, VBHI supplies water, sewer, waste management, road repair, storm water management, beach stabilization, public safety services (including fire, police, EMS, and emergency management) and public works services to its residents and visitors.

Transportation to the Island by Ferry or Barge

15. As a barrier island, Bald Head is accessible only by boat; there is no bridge or road to the Island.¹ While a few residents and visitors own their own boats which they can utilize for transportation to and from the Island, the only means of general public access to the Island is via an approximately twenty-minute ferry ride using ferries operated by BHIT between the terminal located at the Deep Point Marina in Southport and the Bald Head Island Marina terminal located on the Island.

16. Ferries generally depart on the hour from the Deep Point terminal on the mainland and on the half-hour from the Island terminal facility. Additional ferry runs are added on certain days during peak season.

17. The Deep Point ferry terminal is a relatively new facility, having been constructed and placed into operation as of 2009. Prior to that time, BHIT's ferry operations on the mainland were conducted from Indigo Plantation, a smaller facility located on the Intracoastal Waterway west of Southport, North Carolina. One of the

¹ While the Island is accessible by four-wheel drive vehicle along the beach strand from Fort Fisher to the north, only government officials are allowed to drive the beach route. See generally VBHI Code of Ordinances, at Article II (Operation of Vehicles) (available at https://codelibrary.amlegal.com/codes/baldheadisland/latest/baldheadisland_nc/0-0-0-2426).

primary factors for moving the ferry operations from Indigo Planation and constructing the Deep Point Marina and terminal was the need for a larger terminal and more parking space to accommodate travelers and their vehicles.

18. Because VBHI is, for all practical purposes, an automobile-free Island, property owners, visitors and workers must leave their automobiles at parking facilities adjacent to the Deep Point terminal (the “Deep Point Parking Facilities”) in order to utilize the ferry.

19. The Deep Point Parking Facilities are owned and operated by BHIL.

20. Those using the Deep Point Parking Facilities currently pay for parking separately from the ferry, and prices are based on a daily rate (currently \$12/day) or an annual pass rate (currently varying from \$650/year for employees to \$1,350/year for premium parking).²

21. The Deep Point Parking Facilities are the only parking facilities available for passengers riding the ferry, and all of the available parking is owned and operated by BHIL. Exhibit 1, attached hereto, are satellite images of the Deep Point Parking Facilities. As is evident from the images, no other public parking facilities are proximate to the ferry terminal.

22. There is no reasonable substitute parking service—such as a bus service from another public parking lot—available to the public. A significant proportion of travelers to the Island are non-residents who temporarily rent Island homes for summer vacations. As the Commission is aware from the proceeding initiated by BHIT concerning the increasing amount of baggage sought to be brought onto the ferry, visitors to the Island

² See <https://baldheadislandferry.com/parking> (last visited Jan. 26, 2022).

often bring a large number of personal items for their vacation visits, which requires them to transport themselves and their baggage to the Deep Point terminal using their own motor vehicles.³ For these ferry travelers, there is no practical alternative to on-site parking.

23. Similarly, the parking is a necessity for workers on the Island. According to BHIT, in 2019 there were 159,000 ferry rides by workers and contractors which constitute 44% of the ridership. The ferry is the only means to transport Village personnel who provide essential municipal services. These include public safety officials (police, fire, EMTs), water plant operators, waste water plant operators, solid waste handlers, and other utility service providers. All of these people need parking and most all are residents of Brunswick and New Hanover Counties.⁴

24. Parking for ferry passengers' vehicles at the Deep Point Parking Facilities is an integral part of the ferry service offered to the public by BHIT. Without the ability to park vehicles at the terminal parking lot, the public would not be able to utilize the ferry services. For a third-party owner, the possibility exists to extract monopoly rates for an essential service that is indispensable to use of the ferry service—a regulated monopoly—and that should not be outside the authority of the Commission. The ability to operate the

³ See Application for Amendment to Tariff Language Regarding Baggage, Docket No. A-41, Sub 20 (Dec. 22, 2021) (seeking tariff change to limit the number of checked items per passenger and to equate the fee for both oversized baggage and excess baggage). The Application notes that with the existing six bag allowance, BHIT transported 1.2 million pounds of luggage during the July 4th holiday in 2021 and that “part of the increased baggage volume is due to visitors staying longer on the island and perhaps bringing with them bulk purchases from warehouse-type stores, rather than purchasing needed supplies from on-island merchants.” The Application also notes that annual ridership has grown from 263,000 passenger trips in 2012 to over 360,000 passenger trips in 2021.

⁴ BHITA Credit Presentation, December 2020, at 24 (*available at* <https://villagebhi.org/wp-content/uploads/2021/01/BHITA-Credit-Presentation.pdf>).

ferry in service to the public, which is the essence of its regulated status under Chapter 62, is dependent on the ability the public to park at the ferry terminal under reasonable terms and conditions. The ferry and the parking are inextricably related and in fact exist in tandem as one de facto regulated service.

25. In addition to its ownership of the Deep Point Parking Facilities, BHIL also owns and operates the Barge.⁵ On information and belief, BHIL operates its Barge service as a common carrier service according to its published terms available on its website. The public is permitted to reserve space on the Barge at published prices on a first-come, first-served basis. The barge is the only means to transport materials and equipment necessary to provide essential municipal and other public utility materials and equipment such as pipes, wires, motors, waste handling vehicles, chemicals, etc., as well as the only means to transport public safety and other utility services vehicles when on-Island maintenance and repair is unavailable.

26. Household goods of all types (furniture, furnishings, food, beverages, hardware, clothing, etc.) are conveyed to the Island by the Barge, either for homeowners furnishing their homes or for resale by businesses on the Island. Additionally, building materials that are used in the construction of new homes and repair of existing homes are constantly being delivered to the Island by the Barge. Tradespersons and service technicians utilize the Barge to provide services to homeowners and businesses on the Island.

27. If a person wishes to transport any large household goods to or from the Island, there are several options, each of which includes use of the Barge. A person can

⁵ See <https://bhibarge.com/> (last visited Jan. 26, 2022).

engage the services of the seller to transport the large household goods using the Barge. Alternatively, persons can transport large household goods on the Barge themselves by reserving space and loading a vehicle carrying the goods onto the Barge to transport the goods to or from the Island.⁶

28. Additionally, on information and belief, smaller household goods purchased online and delivered by express delivery services such as UPS or FedEx are transported for delivery by the Barge.

29. Islanders' access to service vendors and their ability to purchase household goods on the Island is reliant on the Barge, which can transport as many as 60 vehicles in a day.⁷

30. In major emergencies, including tropical storms and hurricanes, the ferry and Barge are used to evacuate persons and property from the Island and coordinated activities including ferry and barge operations are critical to emergency event management.

Prior Commission Involvement

31. Although the Parking and Barge operations have been operated, to date, as unregulated business activities conducted by the utility's parent entity, the regulatory status of the Parking and Barge operations has been a long-standing source of concern which has, to VBHI's knowledge, never been directly addressed by the Commission.

32. For many years, residents and businesses on the Island have been troubled by the reality that the Parking Facilities and the Barge—despite being equally integral to

⁶ For example, residents needing to transport furniture and other large items to their homes on the Island could choose to load their large household goods into a U-Haul vehicle and then transport the vehicle to the Island by reserving space on the Barge.

⁷ BHITA Credit Presentation, December 2020, at 28 (*available at* <https://villagebhi.org/wp-content/uploads/2021/01/BHITA-Credit-Presentation.pdf>).

the transportation of persons and household goods to the Island as the ferry—have not been subject to the same regulatory oversight as the ferry service.

33. These concerns have been addressed and conveyed to the Commission at various times by members of the public.⁸ *See, e.g.*, Letter of Marvin B. Cox, Jr. dated Aug. 4, 1998, filed with Official Exhibits to Sept. 3, 1998 Public Hearing in Docket No. A-41, Sub 1 (filed Aug. 6, 1998) (full time resident of the Island noting his concern that parking should be regulated as an integral part of the ferry transportation and that barge service should be regulated as “the only means by which a property owner can transport household goods and other larger items” to the Island). These concerns were reiterated and amplified in BHIT’s most recent rate case, where numerous residents and business representatives testified concerning the need for regulation.⁹

34. Consistent with its own historic interest in promoting its real estate development operations on the Island, BHIL has previously diffused the need for Commission resolution of these issues by its willingness to offer concessions to address public concerns.

⁸ The public first raised the problem of BHIL’s control of the parking lot and the Barge with the Commission in the 1998 docket regarding the ferry’s operating schedule. *See, e.g.*, 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).

⁹ The public lodged its concerns in that proceeding through an outpouring of requests that the Commission regulate BHIL’s operation of the parking lot and the Barge. *See, e.g.*, 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).

35. For example, in 2009 BHIL entered into a commitment to limit rate increases to annual inflation for annual parking rates at the Deep Point Parking Facilities between 2009 and 2014. *See* Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), at Ex. C (the “April 4, 2009 Letter Agreement”) (attached hereto as Exhibit 2).

36. Subsequently, in the context of BHIT’s 2010 general rate case, BHIL was party to a stipulation that expanded and extended the commitment to constrain parking rate increases and imputed parking revenues to BHIT’s regulated ferry service so as to mitigate passenger ferry rate increases.

37. BHIT’s 2010 general rate case commenced on May 5, 2010, when BHIT filed an application requesting approval of an increase in rates, fares and charges for ferry transportation services, and certain changes to the rate design underlying existing rates for BHIT. *See* Docket A-41, Sub 7 (the “2010 Rate Case”). In that proceeding, intervenors Bald Head Association, Bald Head Island Club, and VBHI filed joint testimony presenting evidence and argument supporting the assertion of regulatory authority by the Commission over the Deep Point Parking Facilities. *See* Direct Testimony of Julius A. Wright, Ph.D., Docket No. A-41, Sub 7 (Sept. 30, 2010) (“Wright Testimony”). Dr. Wright testified to his opinion that BHIL’s Parking Facilities at Deep Point Marina terminal constituted a monopoly service, given that there were no reasonable substitutes or alternatives for ferry passengers, which was subject to the Commission’s regulatory authority. *See* Wright Testimony, at 5-17.

38. In its order disposing of the proceeding, however, the Commission did not reach the issue of the regulatory status of the Parking Facilities; instead, the Commission

accepted a stipulation of all parties—including that of BHIL—providing, among other things, that \$523,097 of revenues from the Deep Point Parking Facilities would be imputed to BHIT for purposes of the rate case and that parking rate increases would be constrained for a period of six years. *See* Order Granting Partial Rate Increase, Docket No. A-41, Sub 7 (Dec. 17, 2010), at 5-7.

39. Specifically, as a signatory to the Revised Agreement and Stipulation of Settlement, BHIL agreed to limit rate increases for terminal parking applicable to daily rates to the rates then in effect (\$10 seasonal; \$8 non-seasonal) plus the annual inflation rate in any 12-month period for a period of six years, ending December 31, 2016. BHIL further agreed that the existing agreement regarding annual parking reflected in the April 4, 2009 Letter Agreement with VBHI would also be extended (subject to specified modifications) through December 31, 2016. BHIL also agreed that the agreed-upon rate increase limits would apply to any successor entity that owned, operated, or leased the Deep Point Parking Facilities. Finally, in recognition of the various commitments concerning parking made by BHIL, the remaining parties agreed that any gain or loss on the sale or lease of Parking Facilities owned by BHIL would not be “assigned, credited or attributed for ratemaking purposes” to BHIT. All of these stipulations were accepted by the Commission in its order.¹⁰

40. In addition to its commitments regarding parking, BHIL also joined the stipulation resolving the 2010 Rate Case to confirm that it would adhere to codes of conduct with respect to its transactions with BHIT. Specifically, BHIL agreed:

¹⁰ The stipulation and agreement made clear that the agreed-upon stipulations were the result of compromise and would not bind a party in a future proceeding.

The Company and BHIL also agree that consistent with codes of conduct governing transactions between other utilities regulated by the Commission and their unregulated affiliates, charges to the Company from affiliates will be priced at the lower of cost or fair market value and that charges by the Company to affiliates will be priced at the higher of cost or fair market value.¹¹

41. Together, these various commitments illustrate the linkage that has always existed between the parking and ferry operations and that the public utility ferry service is dependent on the availability of parking on reasonable terms and conditions.

42. The Barge service similarly should be subject to the regulatory authority of the Commission and reasonable terms and conditions of service.

Potential Sale of Transportation Assets

43. BHIL has expressed its intention to divest itself of the ferry and related transportation assets, including the Deep Point Marina terminal, ferries, Barge, on-island tram and mainland Parking Facilities. Various potential purchasers of the assets have emerged, including VBHI itself, the Bald Head Island Transportation Authority (“BHITA”), and unnamed private third parties.¹² Both VBHI and BHITA have pending bond issuance applications before the North Carolina Local Government Commission (“LGC”). BHITA’s revenue bond application has been pending since December 2020. VBHI’s general obligation bond application has been pending since July

¹¹ Revised Agreement and Stipulation of Settlement, Docket No. A-41, Sub 7 (Oct. 21, 2021), at para. 8.

¹² Johanna F. Still, *At An Impasse, Bald Head Island Transportation Authority Seeks Guidance*, WilmingtonBiz.com (Nov. 29, 2021) (available as of Jan. 25, 2022 at http://www.wilmingtonbiz.com/maritime/2021/11/29/at_an_impasse_bald_head_island_transportation_authority_seeks_guidance/22590) (“Bald Head Island Limited has informed authority members it is actively pursuing a sale on the private market, with the possibility of divvying up the assets to maximize its returns. Discussions among six entities are ongoing, according to the letter.”).

2021. Neither application has been placed on an LGC agenda to date due to various publicly stated concerns, including those of State Auditor Beth Wood regarding the valuation of the assets.¹³

44. BHIL has publicly stated that it intends to move forward with a private sale of the transportation assets and that it is actively soliciting bids from private entities (as many as six such entities; *see id.* n. 10), and that it is willing to sell the assets in “piece parts” at a “higher total valuation.”¹⁴ Specifically, according to BHIL’s designated representative, “[t]he competitive sale process has already begun” and BHIL is “in due diligence with certain parties.”

45. Accordingly, by BHIL’s own public statements, in the absence of action by the Commission, assets that are critical, indispensable components of BHIT’s transportation utility operations may be sold to third parties outside of the Commission’s authority and control based upon the “potential that each system sold individually would summon a higher total valuation.” *Id.*

Dispute Between the Parties

46. A dispute has arisen between and among VBHI, BHIT and BHIL regarding the potential sale and the Commission’s regulation of the utility assets, including the Parking Facilities and Barge operations. A present and real controversy exists over the nature of the Parking Facilities and Barge assets, whether they are subject to the jurisdiction

¹³ Travis Fain, *State faces internal squabbling, competing bid in Bald Head Island ferry sale*, WRAL.com (Dec. 2, 2021) (available as of Jan. 26, 2022 at <https://www.wral.com/state-faces-internal-squabbling-competing-bid-in-sale-of-bald-head-island-ferry/20014019/>).

¹⁴ Johanna F. Still, *Mitchell family begins Bald Head ferry sale process on open market, authority still preferred buyer*, PortCityDaily.com (Sept. 28, 2021) (available as of Jan. 23, 2022 at <https://portcitydaily.com/local-news/2021/09/28/mitchell-family-begins-bald-head-ferry-sale-process-on-open-market-authority-still-preferred-buyer/>).

of the Commission, and, accordingly, whether they are integral components of the ferry utility operation or whether they can be sold, transferred, and otherwise monetized as monopoly service assets outside the control and jurisdiction of the Commission.

47. The gravity of this situation for residents of and visitors to the Island cannot be overstated. There is no practical or feasible means of accessing the Deep Point ferry terminal other than utilizing the Parking Facilities owned and operated by BHIL. Likewise, there is no practical or feasible means of transporting large household goods to the Island other than the Barge owned and operated by BHIL. These are de facto monopoly services currently operated by BHIL, both of which are indispensable to the regulated utility operations.

48. If the Parking Facilities and Barge are sold in parts to maximize profit for BHIL, then residents, visitors and on-Island and off-Island businesses are at risk of being held hostage by one or more monopoly service providers whose primary goal would be to maximize profit outside the control of any regulated authority rather than to operate the assets for the benefit of the public. As integral components of the ferry utility operation, Parking and Barge services must be regulated: otherwise, the public will be exposed to the risk that an unregulated monopolist will control and dictate rates, terms and conditions for indispensable services to captive ferry passengers who must have parking if they are to ride the ferry and Islanders who have no alternative to the Barge for transporting household goods to the Island.

49. For these reasons, it is necessary for the Commission to exercise its authority over the disputed assets and corresponding provision of services consistent with the public interest.

FIRST CLAIM:
THE DEEP POINT PARKING FACILITIES ARE PUBLIC UTILITY
PROPERTY SUBJECT TO THE COMMISSION'S AUTHORITY

50. The allegations of each of the preceding paragraphs are hereby realleged and incorporated by reference.

51. The ferry operation, unquestionably a public utility, is inextricably linked to access to parking at the mainland terminal. Access to and use of the ferry requires access to parking at the Deep Point Parking Facilities on reasonable terms and conditions. Given the unique circumstances presented by Bald Head Island, including that vehicles are not permitted on the Island, on-site parking is a critical aspect of the public utility service.

52. The facts and circumstances supporting VBHI's recommendation in the 2010 Rate Case that the Commission assert jurisdiction over the Deep Point Parking Facilities have not changed: access to parking is essential for the ferry's passengers and there are no reasonable parking substitutes or alternatives for ferry passengers. *See* Wright Testimony, at 8. Since the 2010 Rate Case, daily parking rates have increased 50% over the prior nonseasonal daily rate.¹⁵ BHIL has significantly expanded the parking areas at Deep Point in recent years, as necessary to accommodate increased ridership.

53. Chapter 62 declares that the Commission "shall have general supervision over . . . the services rendered by all public utilities in this State." G.S. § 62-32(a). Chapter 62 defines "service" to mean "any service furnished by a public utility, including any commodity furnished as a part of such service and *any ancillary service or facility* used in connection with such service." G.S. § 62-3(27) (emphasis added). The Deep Point

¹⁵ The 2010 rate was \$8 for daily nonseasonal parking. *See* Wright Testimony, at Exh. JAW-2 (citing BHIT response to Public Staff Second Data Request, responses 10 and 11). The current rate is \$12/day. *See* <https://baldheadislandferry.com/parking>.

Parking Facilities are an “ancillary . . . facility used in connection with such service” within the meaning of this statute. Indeed, the parking lots are not just an ancillary facility to the ferry service, they are an integral and indispensable component of the ferry service as a whole.

54. The Commission should conclude and declare that 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.

55. Alternatively, the Commission should conclude and declare that BHIL, to the extent of its ownership and operation of the Deep Point Parking Facilities, is a public utility subject to the regulatory authority of the Commission as an owner and operator of facilities used to provide, and an essential component of providing, utility service. G.S. § 62-3(23)a.

56. 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. More generally, the Commission is empowered with “general supervision over . . . the services rendered by all public utilities in this State.” G.S. § 62-32(a).

57. Here, BHIL is the corporate parent of BHIT, a public utility. BHIL’s ownership and operation of the Deep Point Parking Facilities has a direct effect on the rates and services of BHIT’s ferry operation since passengers have no choice but to leave vehicles at the Parking Facilities and, accordingly, revenues derived in connection with the parking operation can be used to offset, supplement or otherwise impact the revenues

derived from the ferry service. *See, e.g.*, Wright Testimony at 12-16 (demonstrating revenue impact of parking revenues). More fundamentally, the ferry operation— unquestionably a public utility—has little practical utility if the public is unable to access it or can only access it at unregulated, monopolistic rates, terms and conditions.

58. In this case, BHIL’s ownership and operation of the Deep Point Parking Facilities is an integral part of its subsidiary’s utility service. Since there are no feasible parking alternatives for BHIT’s ferry passengers, such passengers are forced to pay the parking rates set by BHIT’s parent company (or subsequent owner) if they want to access BHIT’s ferry service. This has an intrinsic “effect on the . . . service of such public utility”; the accessibility of the BHIT’s utility service is fundamentally subject to the monopoly power its parent has on parking spaces at the ferry terminal. BHIL’s, or a successor owner’s, ability to freely raise parking rates for ferry passengers without constraint or regulatory oversight is a clear and present threat to the ability of ferry passengers to receive regulated utility service from BHIT.

59. To the extent the Commission finds that the Parking Facilities are an integral component of BHIT’s utility operations, the Commission should conclude and declare that BHIL is a public utility under Chapter 62 because BHIL’s ownership of the Deep Point Parking Facilities is an integral component of BHIT’s ferry services that necessarily affects those ferry rates and services.

SECOND CLAIM:
THE BARGE SERVICES CONSTITUTE A COMMON CARRIER
ACTIVITY SUBJECT TO THE COMMISSION’S AUTHORITY

60. The allegations of each of the preceding paragraphs are hereby realleged and incorporated by reference.

61. Chapter 62 defines a “common carrier” as “any person . . . which holds itself out to the general public to engage in the transportation of persons or household goods for compensation, including transportation by . . . boat[.]” G.S. § 62-3(6).

62. Chapter 62 further defines as a “public utility” “persons . . . owning or operating in this State equipment or facilities for . . . [t]ransporting 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.

63. Common carriers operating intrastate are regulated by the Commission pursuant to statutory authority. A common carrier, as distinct from a contract carrier, holds itself out as willing to transport goods for all who might apply or that it would carry for anyone without first voluntarily entering into a specific contract for such carriage. *State ex rel. Utils. Comm'n v. Gulf-Atl. Towing Corp.*, 251 N.C. 105, 109, 110 S.E.2d 886, 889 (1959).

64. Whether the carrier is acting as a common carrier or as a contract carrier is a question of fact. The fact is to be determined, in proceedings of this kind, by the Commission. *Id.*

65. The Barge owned and operated by BHIL is a local monopoly service the use of which is held open to the public to transport household goods and persons (among other things) to and from the Island for compensation. Moreover, the Barge is the exclusive means of transporting such household goods to the Island. If the public wishes to transport any household goods to the Island that cannot be carried or stowed on the ferry, the public must use the Barge.

66. The Commission should conclude and declare that the Barge service owned by BHIL is a common carrier activity under Chapter 62, that the common carrier service is subject to the Commission's jurisdiction, and that, to the extent that BHIL's ownership and operation of the Barge subjects it to treatment as a "public utility" under North Carolina law, BHIL is subject to regulation as a public utility.

RELIEF REQUESTED

WHEREFORE, Petitioner respectfully requests that the Commission grant the following relief:

1. Treat this matter as a formal Complaint against BHIT and BHIL pursuant to N.C. Gen. Stat. § 62-73 and Rule R1-9 of the Commission's Rules of Practice and Procedure, as a request for investigation and determination of public utility status, and as a request for a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253.
2. Should the Commission believe it would be helpful to the adjudication of this Complaint, conduct a site visit and/or local hearing such that Commissioners and Staff can apprise themselves of the unique facts and circumstances relating to the matters in issue.
3. Enter an order determining that:
 - a. The Deep Point Parking Facilities are an essential component of BHIT's public utility ferry service and subject to a regulation as a component of BHIT's utility service offering;
 - b. Alternatively, that BHIL's ownership and operation of the Deep Point Parking Facilities subjects BHIL to treatment as a public utility;

- c. The provision of Barge services by BHIL to the Island is subject to the regulatory authority of the Commission as a common carrier service; and
 - d. BHIL's ownership and operation of the Barge service subjects it to treatment as a public utility.
4. Enter an order providing that the existing rates for the Deep Point Parking Facilities and the Barge shall remain in place subject to further orders of, or proceedings before, the Commission.
 5. Initiate 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, the obligations to obtain a Certificate of Public Convenience of Necessity and to file rates for approval of the Commission.
 6. Grant such other and further relief as this Commission may find just and reasonable.

Respectfully submitted, this 16th day of February, 2022.

BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.



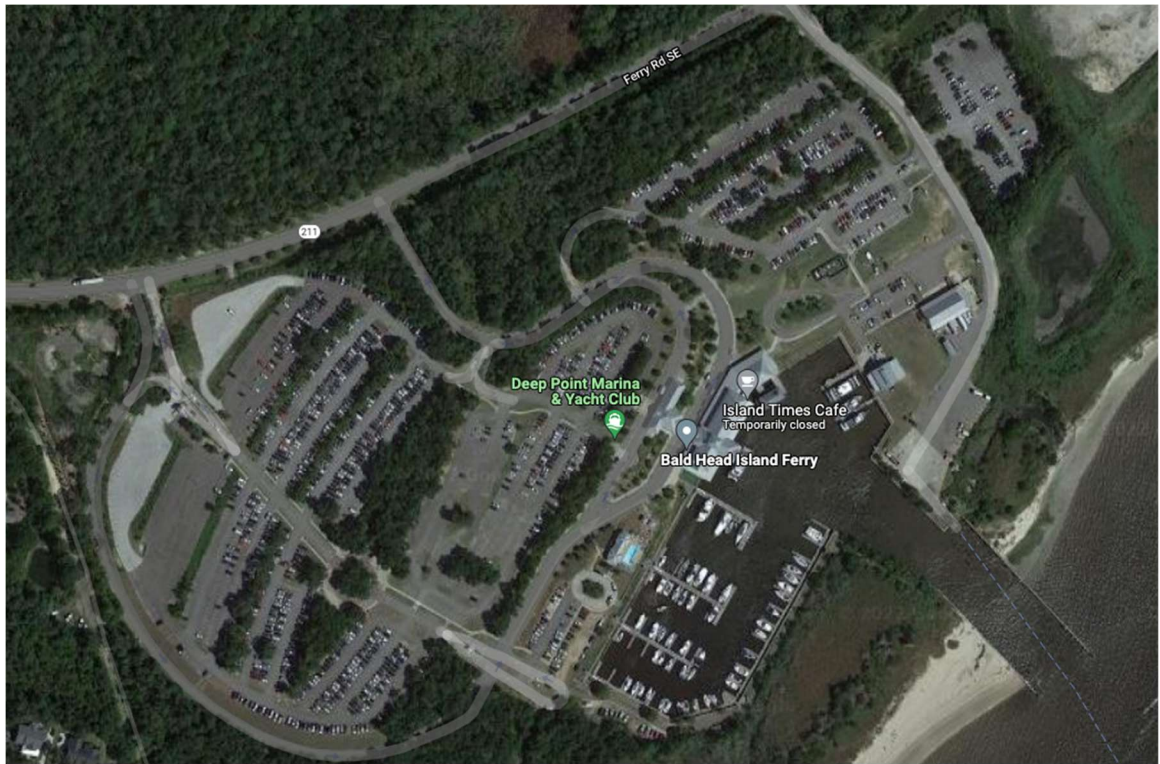
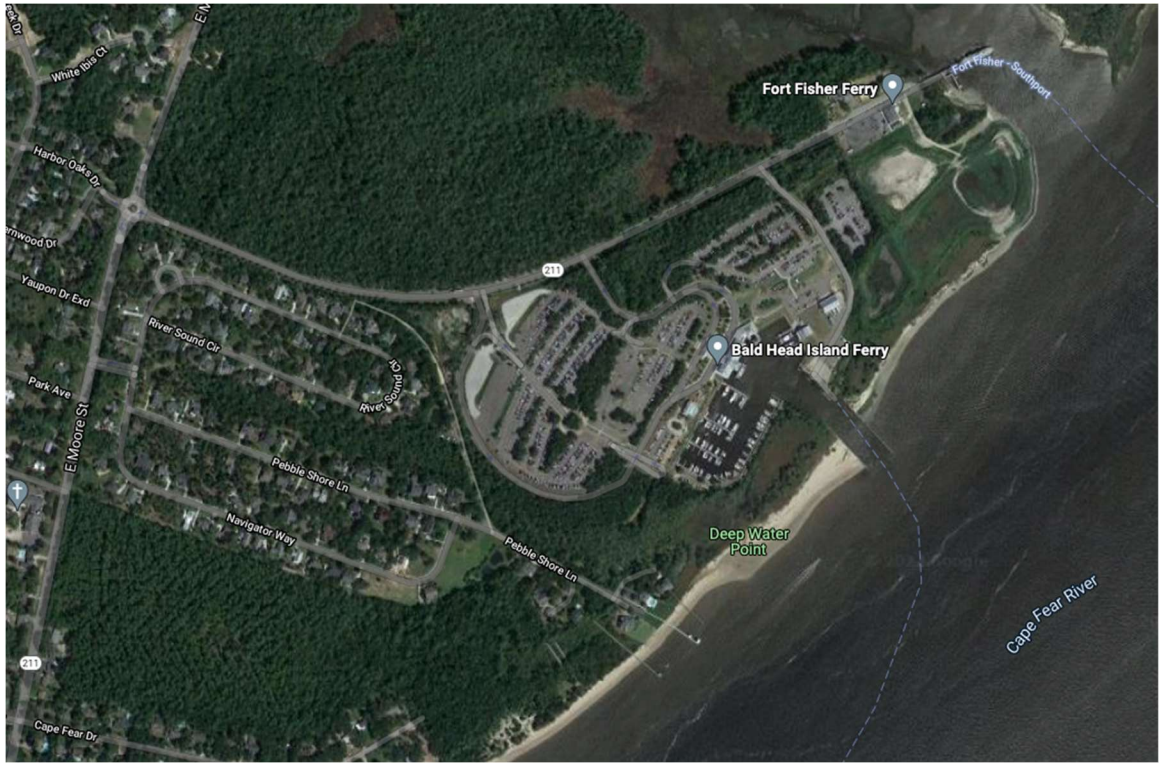
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EXHIBIT 1

**DEEP POINT FERRY TERMINAL & PARKING LOT
SATELLITE IMAGES**



Source: Google Maps

EXHIBIT 2

**LETTER AGREEMENT DATED APRIL 4, 2009,
CONCERNING PARKING RATES**