

October 3, 2022

Via Electronic Filing

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

Re:

Docket A-41, Sub 21, Village of Bald Head Island v. Bald Head Island Transportation, and Bald Head Island Limited, LLC

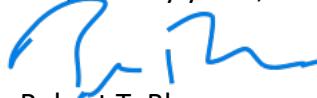
and;

Docket A-41, Sub 22, In the Matter of Joint Application of Bald Head Island Transportation, Inc., and Bald Head Island Ferry Transportation, LLC, for Approval of Transfer of Common Carrier Certificate to Bald Head Island Ferry Transportation, LLC, and Permission to Pledge Assets

Dear Ms. Dunston:

Transmitted herein is a **Consumer Statement of Position** in both of the aforementioned proceedings. Should you have any questions, please do not hesitate to contact us.

Respectfully yours,



Robert T. Blau
5 Starrush Trail
Bald Head Island, NC 28461



J. Paul Carey
611 Currituck Way
Bald Head Island, NC 28461

Enclosure

cc: Chris Ayers, Director, NC Public Staff
Krishna Rajeev, Director, Transportation Services, NC Public Staff
Zeke Creech- NC Public Staff
Lucy Edmondson - NC Public Staff
Jessica Heironimus -NC Public Staff

October 3, 2022

Consumer Statement of Position

Re: Docket A-41 Sub 21 and Docket A-41 Sub 22

On September 14, 2022, we filed a *Consumer Statement of Position (Statement)* in the aforementioned proceedings. Among other things, the *Statement* demonstrated that the Bald Head Island transportation system (System) and each of its three components – the BHI passenger ferry, parking facility at the Deep Point ferry terminal, and the barge – operate as a commercially-owned local monopoly. Only the passenger ferry is currently regulated. The System should be regulated in its entirety.

The need for regulation is amply reflected in operating profit (EBITDA) margins for the System's three components.

EBITDA Margins (Earnings Before Interest, Taxes, and Depreciation/Amortization as a % of Revenues)

Component	Year								
	2016	2017	2018	2019	2020	2025	2030	2035	2040
Ferry	-3.1%	5.6%	10.3%	12.1%	11.8%	15.0%	12.4%	12.6%	12.3%
Parking	70.1%	71.7%	82.3%	83.0%	83.1%	84.0%	84.8%	85.5%	86.1%
Barge	<u>71.8%</u>	<u>71.3%</u>	<u>74.8%</u>	<u>76.5%</u>	<u>76.9%</u>	<u>78.9%</u>	<u>80.5%</u>	<u>82.0%</u>	<u>83.2%</u>
Consolidated	25.6%	31.4%	43.2%	45.0%	45.2%	47.6%	48.0%	49.3%	50.3%

Source: Mercator International *Bald Head Island Sellers Due Diligence*, January 2018, Tables 13-16, pp. 66-71.

The September 14 Statement demonstrates further that excessive operating profit that the System's owner, Bald Head Island Limited (BHIL), currently earns on its unregulated parking and barge operations are responsible for an inflated \$56M sales price that SharpVue Capital (SharpVue), a small private equity investor, is proposing to pay for the System. Going forward, of course, captive System users would have no choice but to pay for all of this through inflated rates for unregulated parking and barge services.

Moreover, precisely because the unregulated Deep Point parking and barge monopolies are excessively profitable, a private equity investor like SharpVue would likely sell off the regulated passenger ferry in an effort to avoid having to impute revenues from its unregulated parking and barge operations to the regulated passenger ferry -- as was done in 2010 as part of a settlement agreement that resolved the last rate case for the BHI passenger ferry.

Breaking the System up for these reasons would only add insult to injury as far as System users are concerned. Ferry rates would go up since the ferry, which currently operates at a loss, would have to stand on its own financially. Similarly, if the threat of imputing unregulated parking or barge revenue to the regulated passenger ferry were removed, the owner(s) of the then completely unregulated parking and barge monopolies would be free to charge whatever they believe the captive market for those services would bear.

Lastly, the September 14 *Statement* outlined terms of a possible settlement agreement between the parties to Dockets A-41 Sub 21 and A-41 Sub 22 that would: a) protect the System's captive users from monopoly pricing abuse going forward, b) mitigate incentives to break up the System in an effort to avoid imputing unregulated parking revenues to the regulated ferry's annual revenue requirement, while c) minimizing the amount of time and resources that the Utilities Commission would need to commit to overseeing the System's operation.

Q. Why are you filing a second *Consumer Statement of Position* at this time?

A. We felt it prudent to modify the outline for a possible settlement agreement in light of two recommendations contained in the Public Staff's initial comments in Docket A-41 Sub 21, the Village of Bald Head Island's petition to regulate the BHI transportation System in its entirety.

First, the Public Staff concluded that while parking at the Deep Point ferry terminal is not a regulated service *per se*, it is nonetheless essential, or necessary to the provision of regulated passenger ferry service to BHI. As such, the Public Staff recommends that the Commission exercise oversight of the Deep Point parking operation in order to ensure that ferry passengers are afforded adequate parking service at reasonable rates.

Second, the Public Staff's initial comments note that the U.S. Congress enacted legislation in 1994 that preempted state regulation of motorized transportation services with the exception of those involved in the transportation of household goods. Since the BHI barge transports vehicles, which may or may not contain household goods, the Public Staff contends that the Commission may not have the legal authority to regulate BHI barge service -- notwithstanding the fact that the barge is a commercially-owned monopoly that currently operates with extremely high EBITDA margins (e.g., 77% of revenues).

Q. Do you agree with the Public Staff's initial comments?

A. No, for reasons explained in our Sept. 14 Statement, the BHI transportation System operates as an integrated, commercially-owned monopoly and should be regulated as such. We are not attorneys, but we find it hard to believe that the U.S. Congress intended to preempt the Commission from regulating a purely intrastate, commercially-owned monopoly like the BHI barge, particularly when that monopoly is engaged in excessive profiteering at the expense of its captive customers. The System, including the barge, is a unique local monopoly, the operation of which has absolutely nothing to do with Congress' intent in adopting the *Federal Aviation Administration Authorization Act of 1994*.

We understand the Public's Staff's reasoning in analogizing service vehicles that are transported on the BHI barge to PODS containers that are commonly used to transport household goods when people are moving from one home to another. PODS are not regulated by the Commission because they constitute a general transportation service which the Congress did preempt the states from regulating in 1994. In the case of PODS and virtually all other motorized transportation services in the U.S. and in North Carolina, however, consumers have competitive alternatives (e.g., Pack Rat containers vs. PODS) to choose from. In the case of the

BHI barge, there are no competitors. In our view, the total absence of competition, and what to do about it, is the real issue here.

Q. If the Commission were inclined to adopt the Public Staff's recommendations and not to regulate the System in its entirety, would that preclude parties from working out a mutually beneficial settlement agreement?

A. No, not at all. In fact, if the Commission (mistakenly) concluded it has no authority over the BHI barge, working out an agreement that only deals with the integrated ferry/parking operation might be simpler and, therefore, easier to structure.

Q. If a settlement agreement were limited to the unregulated Deep Point parking operation and the regulated passenger ferry, what might it look like?

A. A straight forward and permanent settlement agreement could be structured around the Public Staff's finding that while parking at the Deep Point ferry terminal is not a regulated service *per se*, it is nonetheless essential to the provision of regulated ferry service simply because parking is a function that is required to provide users access to the passenger ferry. As such, the Public Staff recommends that the Commission exercise oversight of the Deep Point parking operation in order to ensure that ferry passengers are afforded adequate parking service at reasonable rates.

Q. If the Commission were disposed to exercise oversight of the Deep Point parking operation, how might that be reflected in a settlement agreement?

A. If the Commission exercised oversight of the Deep Point parking operation, as it should at an absolute minimum, it would obviously need to establish a framework for doing so. That framework also would need to include the Public Staff's two recommended standards that the Commission follow in providing oversight; namely that BHI ferry passengers are afforded adequate parking at reasonable rates. Third, the framework would have to specify the type of market and financial data that the Commission would use to determine whether parking services at the Deep Point ferry terminal are adequate and reasonably priced. Providing that data, of course, would be the responsibility of the owner/operator of the Deep Point parking facility. Data submissions could be done annually based on a standardized format that a settlement agreement could put in place.

Q. What would a framework for providing Commission oversight of the unregulated Deep Point parking facility entail?

A. Again, the framework could be structured around the Public Staff's conclusion that parking service at Deep Point is essential to and, in effect, is an extension of regulated passenger ferry service. Thus, the framework for overseeing the Deep Point parking service should mirror the framework that the Commission currently uses to regulate the passenger ferry. This would not only simplify, or streamline the oversight process for ensuring that Deep Point parking service

remains **adequate** and **reasonably** priced. It also would give a prospective owner/operator of the parking operation and the passenger ferry a much better understanding of how much cashflow both operations would likely generate going forward and, thus, how high of a purchase price captive users of ferry and parking services might reasonably be required to pay for (thru higher user fees) if the ferry or parking monopoly were transferred from one owner (e.g., BHIL) to another (e.g., SharpVue).

Q. Why is a framework for providing oversight of an unregulated service necessary?

A. Absent a permanent framework for providing oversight, the Commission would have no basis for judging whether Deep Point parking service remains adequate and reasonably priced. Every time, an owner/operator proposed to raise passenger ferry or parking rates, the Commission would be put in the position of having to adjudicate the merits of doing so. Without a clear set of standards (i.e., a framework) and the requisite data for making those judgements, the oversight process would likely become unnecessarily litigious, time consuming, and costly for everyone involved, including the Commission.

The 2010 settlement agreement that resolved the last rate case for BHI passenger ferry service is illustrative. That agreement involved the imputation of \$523,097 in annual Deep Point parking revenues to the regulated ferry's annual revenue requirement. The System's owner, BHIL, agreed to do so in exchange for gaining Commission approval of a rate increase for ferry service, and to defer Commission consideration of whether the entire System should be regulated. The 2010 agreement terminated in 2016, and here we are.

Q. What might the specific terms of a mutually beneficial framework for providing Commission oversight of the Deep Point parking operation entail.

A. One possible and practical framework would include only three stipulations of a settlement agreement that the parties of interest could work out and present to the Commission:

1. Current user rates for passenger ferry and parking services would be presumed to be reasonable until BHIL, or a subsequent commercial operator (e.g., SharpVue), elected to file a general rate case for the regulated passenger ferry, or to increase parking rates. Any proposed rate increase for parking service would require a 90-day notice to the Commission, an opportunity for public comment, and subsequent Commission consent.
2. In any future rate case for regulated passenger ferry service, a showing that ferry rates are just and reasonable would be contingent on the owner/operator calculating a revenue requirement for the regulated ferry and the unregulated parking operations combined, based on the same rate-making methodology that would be applied in a general rate case for the regulated passenger ferry.
3. BHIL, or a subsequent owner, would be permitted to set rates for its passenger ferry and parking services subject only to the condition that those rates satisfy the overall annual revenue requirement (i.e., operating expenses, annualized depreciation expenses, and a

fair rate-of-return on its rate base) for the regulated ferry and unregulated parking operation combined.

Q. Why would a settlement agreement structured along these lines benefit all parties of interest.

A. An oversight framework structured along these lines would benefit the System's captive users, but also its owner/operator. The presumption that current rates are reasonable until a new rate case for regulated ferry passenger service, or a 90-day notice for a parking rate increase, is filed with the Commission, would protect users of the ferry and Deep Point parking facilities from being required to pay for an inflated purchase price that SharpVue, or another buyer might agree to -- on expectations that the Deep Point parking and barge monopolies would remain completely unregulated and excessively profitable.

At the same time, as EBITDA margins depicted in the table above clearly indicate, current rates for ferry, parking and barge service are no doubt well above what they would be if the entire System were subject to rate base, rate-of-return regulation – as the passenger ferry is today. Thus, if current rates remained in place, the System would continue to generate supra normal profits which, of course, accrue to the owner/operator. While those profits may not be as great or excessive as they would if the owner/operator of the Deep Point parking operations were allowed to set rates free of any Commission oversight, the System's profitability would still be very attractive relative to returns on investment opportunities that carry a comparable amount of risk.

Similarly, since oversight of unregulated parking service would be based on an estimated revenue requirement for ferry and parking services combined, the framework should mitigate incentives to break the System up in an effort to avoid imputing unregulated parking revenues to the regulated ferry's annual revenue requirement. The option of imputing or transferring unregulated parking revenues to the regulated passenger ferry would still exist. In fact, as long as the ferry and parking operations continued to operate under a common owner, that owner would be free to determine how rates for various classes of ferry and parking service would be set to recover the combined revenue requirement for both operations.

If ownership of the passenger ferry and Deep Point parking operation were separated, both would still be obligated to comply with the Commission's oversight framework for ensuring that parking services remain adequate and reasonably priced per the Public Staff's recommendations. Steps that different owners might need to take in order to satisfy that requirement would be left up to the owners and presumably be worked out in a purchase agreement. Any purchase agreement would be subject to Commission review and approval pursuant to its oversight of the Deep Point parking operation.

Lastly, the Commission would benefit if the parties of interest were able to agree on an oversight framework and how it should be (routinely) administered going forward. Indeed, with encouragement from the Commission, **the parties could agree to present an annual report to the Commission stipulating that that they believe that parking and ferry services remain**

adequate and reasonably priced based on the oversight framework outlined above. In that event, the System, in effect, would police itself and the Commission's involvement would essentially be limited to reviewing the report and certifying its findings as reasonable.

While no individual party would get everything they might want out of a settlement agreement structured along these lines, everyone would almost certainly get what they need.

Q. If the Commission chose not to regulate either the Deep Point parking facility or the BHI barge, but decided to exercise oversight of both unregulated operations, would the framework you described above work?

A. Yes, in that instance, the parties of interest would simply calculate a revenue requirement for the entire System along with associated rate schedules for ferry, parking and barge services, and present it annually to the Commission for its review and consent. Since there would be no need to allocate the System's common costs between regulated and unregulated services, the oversight process would be less contentious.

Q. Are there any other points about the proposed settlement agreement that the Commission should consider?

A. Just one. It is in everyone's interest that Bald Head Island Limited sell the System for a fair price to a new owner/operator. At this juncture, getting the parties of interest to think through what they may need to give, in order to get what they need from a transfer of ownership, may require some encouragement from the Commission.

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