

**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,	)	
	)	ORDER ON RESPONDENTS'
v.	)	MOTION TO TAKE JUDICIAL
	)	NOTICE AND MOTION TO
Bald Head Island Transportation, Inc.,	)	DISMISS
and Bald Head Island Limited, LLC,	)	
	)	
Respondents.	)	

BY THE PRESIDING COMMISSIONER: On February 16, 2022, the Village of Bald Head Island (VBHI or Complainant) filed with the Commission in the above-captioned docket a Complaint and Request for Determination of Public Utility Status (Complaint) against Bald Head Island Transportation, Inc. (BHIT), and Bald Head Island Limited, LLC (BHIL, and collectively, Respondents). On February 17, 2022, the Commission issued an Order Serving Complaint and Request for Determination of Public Utility Status.

On March 30, 2022, Respondents filed with the Commission a Response, Motion to Dismiss (Motion to Dismiss), and Answer. On April 1, 2022, Respondents filed a Motion that Commission Take Judicial Notice, or, in the Alternative, For Leave to File Supplemental Exhibits to its Answer (Motion for Judicial Notice). On April 22, 2022, VBHI filed a timely Reply to Respondents' Response, Motion to Dismiss, and Answer (Reply).

**MOTION FOR JUDICIAL NOTICE**

Respondents request that the Commission take judicial notice of the Commission's Order Granting Partial Rate Increase and Requiring Notice, *In re Application of Bald Head Island Transportation, Inc., for a General Increase in its Rates and Charges Applicable to Ferry Service Between Southport, North Carolina and Bald Head Island, North Carolina*, No. A-41, Sub 7 (N.C.U.C. December 17, 2010) (2010 Rate Case Order).

More specifically, Respondents ask that the Commission take notice of the following finding of fact:

Any gain or loss on the sale or lease of parking facilities owned by BHIL shall not be assigned, credited, attributed for ratemaking purposes to BHIT.

The Commission finds and concludes that [this] provision [is] just and reasonable and should be approved in this Order.

2010 Rate Case Order at 7. Respondents also ask that the Commission take notice of pages 7 and 17 through 18 of the 2010 Rate Case Order, and Respondents attach these pages to the Motion as Exhibit D. Respondents state that these portions of the 2010 Rate Case Order support the above finding of fact. Respondents wish to rely on these excerpts from the 2010 Rate Case to establish, among other things, that the parking facilities were not considered part of the regulated utility.

Respondents also ask the Commission to take notice of a substantive exhibit filed in the 2010 Rate Case to support BHIT's witness testimony that was filed in that case. Respondents attach as Exhibit E to the Motion the list of specific assets in the BHIT rate base as shown in BHIT witness Shirley Mayfield's Exhibit 1, Schedule 2-1, which was filed in the 2010 Rate Case as Item 4 to BHIT's Petition. Respondents wish to rely on the contents of Exhibit E to their motion to show that the parking facilities were not included in the BHIT rate base in the 2010 Rate Case.

## **Discussion**

"When acting as a court of record, the Commission shall apply the rules of evidence applicable in civil actions in the superior court, insofar as practicable . . ." and may also take judicial notice of, among other things, its decisions, annual reports filed with the Commission, published reports of federal agencies, state and federal court decisions and statutes, and public information and data published by state or federal agencies and such other facts and evidence as may be judicially noticed in the General Court of Justice. See N.C. Gen. Stat. § 62-65(a) & (b). Judicial notice is the act of noticing, as true, a fact that is not subject to reasonable dispute in that it is either (1) generally known or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See N.C.G.S. § 8C-1, Rule 201. The Commentary to Rule 201 provides that "the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent."

When a Commission Order relies upon judicial notice of material facts not otherwise appearing in evidence, the Order shall state the same with particularity, and the parties are afforded the right to contest the facts of which the Commission has taken judicial notice by way of a petition filed within ten days after service of the Order. N.C.G.S. § 62-65(b). But if the parties are notified of the Commission's intent to take such judicial notice either before or during the hearing, the parties may be afforded a "reasonable opportunity" at the hearing to contest the facts the Commission proposes to notice. *Id.*

## Conclusions

It is generally appropriate for the Commission to take judicial notice of “its [prior] decisions” under Section 62-65(b). However, while Respondents have requested the Commission to take judicial notice of portions of the 2010 Rate Case Order, the Presiding Commissioner believes it is appropriate, for the sake of completeness, to take judicial notice of its 2010 Rate Case Order in the entirety. The Order speaks for itself and, by taking judicial notice of the Order, the Commission makes no determination of any contested fact or question of law in this Complaint proceeding.

Respondents also request that the Commission take notice of a substantive exhibit filed in the 2010 Rate Case. However, to the extent that Respondents wish to have Exhibit E considered in support of the Motion to Dismiss, the Presiding Commissioner grants the Respondents’ alternative motion and will treat Exhibit E as having been filed as a supplemental exhibit to Respondents’ Response, Motion to Dismiss, and Answer.

### MOTION TO DISMISS

A motion to dismiss for lack of subject matter jurisdiction challenges the Commission’s statutory or constitutional authority to adjudicate a claim and can be raised at any level of the proceeding. N.C.G.S. § 1A-1, Rule 12(h)(3); see *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964). When ruling on such a Rule 12(b)(1) motion, the Commission “need not confine its evaluation to the face of the pleadings, but may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing.” James W. Moore et al., *Moore’s Federal Practice*, § 12.30[3] (3rd ed.1997) (*Moore’s Federal Practice*); see *Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988). If the evaluation is confined to the pleadings, the Commission must “accept the plaintiff’s allegations as true, construing them most favorably to the plaintiff.” *Moore’s Federal Practice*, § 12.30[4]. Unlike a Rule 12(b)(6) motion, consideration of matters outside the pleadings “does not convert the Rule 12(b)(1) motion to one for summary judgment . . .” *Id.*

By contrast, when ruling on a motion to dismiss under Rule 12(b)(6), the Commission must determine “whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Harris v. NCNB Nat’l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). When doing so, the Commission must treat the allegations in the complaint as true, see *Hyde v. Abbott Laboratories, Inc.*, 123 N.C. App. 572, 574-75, 473 S.E.2d 680, 682 (1996), but is not required to accept as true any conclusions of law or unwarranted deductions of fact. See *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). Further, the Commission is to construe the complaint liberally and must not dismiss the complaint unless it appears to a legal certainty that the plaintiff is not entitled to relief under any state of facts which could be proved in support of the claim. *Harris*, 85 N.C. App. at 670, 355 S.E.2d at 840. Thus, a claim may properly be dismissed under Rule 12(b)(6) when one of the following three conditions is satisfied, the complaint on its face reveals: (1) that there is no legal basis for the claim; (2) the absence of facts sufficient

to make a valid claim; or (3) some fact that necessarily defeats the claim. *Oates v. JAG, Inc.*, 314 N.C. 276, 278, 333 S.E.2d 222, 224 (1985); see also *Hawkins v. Webster*, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

## Summary of the filings

### *VBHI's Complaint and Request for Determination of Public Utility Status*

VBHI cites, among other things, N.C.G.S. §§ 62-60, 62-73, and 1-253, and argues that the Commission has general supervisory power to supervise and control public utilities of the State and to declare rights and utility status.

VBHI contends that BHIL is a limited liability company registered to do business in North Carolina, owned by the George P. Mitchell Family Corporation, the developer of Bald Head Island (Island), and is the main business entity through which the family conducts its Island development activity. VBHI contends that BHIT is a wholly-owned-subsubsidiary of BHIL.

VBHI states that BHIT's ferry departing from Deep Point Marina (Marina) is the sole means of public transportation to the Island, is the only means of public access and travel to the Island for most residents/visitors, and that passengers are required to leave their vehicles at the parking lot and associated facilities (Parking Facilities) that are adjacent to the Deep Point Marina terminal (Marina), such facilities being owned and operated by BHIT's parent company, BHIL. VBHI also states that the sole public means for passengers and businesses on the Island to transport commercial materials, personnel, goods, and other supplies — including large household goods that cannot be transported via the passenger ferry — is by way of a barge, together with its associated tugboat (Barge), also owned and operated by BHIL.

The Complaint seeks a ruling upon the regulatory nature of the Parking Facilities and the Barge (collectively, Unregulated Assets) owned by BHIL, in part asking the Commission to resolve whether:

- (1) the Parking Facilities are an integral and essential part of the regulated public utility ferry services offered by BHIT (Regulated Assets) and, thus, their operation is subject to the Commission's regulatory authority; and
- (2) the Barge provides a common carrier service under Chapter 62 that also is subject to the Commission's regulatory authority.

VBHI argues that the Unregulated Assets are ancillary facilities used in connection with the Regulated Assets and are essential to, and a component of, the regulated ferry service provided by BHIT. Thus, according to VBHI, as the owner and operator of the Unregulated Assets, BHIL is also a public utility subject to the regulatory authority of the Commission. See N.C.G.S. § 62-3(23)a. VBHI also notes that "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.” N.C.G.S. § 62-3(23)c.

As to the Parking Facilities, VBHI states that Chapter 62 declares that the Commission “shall have general supervision over . . . the services rendered by all public utilities in this State,” N.C.G.S. § 62-32(a), and 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.” N.C.G.S. § 62-3(27). VBHI explains that vehicles are not permitted on the Island and that users of the Regulated Assets must pay to leave vehicles at BHIL’s Parking Facilities. As to the operation of the Parking Facilities, VBHI contends that: (1) parking charges are separate from the ferry charges/rates; (2) no other parking lots exist proximate to the area; in other words, no reasonable substitute service such as bus service (or from another lot) is available; (3) parking is essential to residents, visitors, and daily workers; and (4) parking and ferry services are integral to each other and inextricably related and in fact operate as one de facto service and are thus subject to Commission’s regulatory authority. VBHI also argues that Respondents’ joint commitment in the 2010 Rate Case demonstrates the link 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. VBHI states that, as BHIT’s parent, revenues from BHIL’s Parking Facilities can be used to offset, supplement, or otherwise impact the ferry service revenues.

As to the Barge, VBHI contends that any large household goods that are not qualified as luggage must be transported by BHIL’s Barge (and associated tugboat). VBHI argues that the Barge provides a common carrier service under Chapter 62 that is also subject to the Commission’s regulatory authority, and that 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[.]” N.C.G.S. § 62-3(6). VBHI states that common carriers operating intrastate are regulated by the Commission pursuant to statutory authority and argues that 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). VBHI also argues that whether the carrier is acting as a common carrier or as a contract carrier is a question of fact to be determined, in proceedings of this kind, by the Commission. *Id.*

As to the operation of the Barge, VBHI contends that (1) the public is permitted to reserve space on first-come/first-serve basis; (2) the Barge is the only means to transport material and equipment for municipal services, public utility equipment — such as pipes, wires, motors, waste handling vehicles, chemicals — and other utility service vehicles when on-island maintenance and repair is unavailable; (3) the Barge transports household goods of all types, as well as building and construction materials, and trade and service technicians and other personnel; (4) all reasonable options to transport large household goods requires use of the Barge; (5) Island access to services such as UPS or FedEx also

require use of the Barge; and (6) during major emergencies, such as tropical storms or hurricanes, the ferry and the Barge coordinate to evacuate persons and property.

VBHI also states that the questions it seeks to have the Commission resolve have been raised but ultimately not addressed in other Commission proceedings. VBHI states that BHIL has in the past “diffused” resolution by offering concessions such as a commitment to limit rate increases to annual inflation over a period of time. See Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (Oct. 21, 2010), at Ex. C (Settlement Agreement; attached to the Complaint as Exhibit 2). VBHI explains that as a signatory to the Settlement Agreement, BHIL agreed (1) 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; (2) that the annual parking rates reflected in the Agreement would also be extended (subject to specified modifications) through December 31, 2016; and (3) that the agreed-upon rate increase limits would apply to any successor entity that owned, operated, or leased the Parking Facilities. VBHI states that in recognition of these commitments 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. VBHI states that each of these stipulations were accepted by the Commission in the 2010 Rate Case Order.

VBHI also states that BHIL confirmed that it would adhere to codes of conduct with respect to its transactions with BHIT, with charges to the Company from affiliates priced at the lower of cost or fair market value and that charges by the Company to affiliates priced at the higher of cost or fair market value. Finally, VBHI states that the Settlement Agreement made clear that the agreed-upon stipulations were the result of compromise and would not bind any party to the settlement in a future proceeding.

The Complaint also notes the potential sale of the Unregulated and Regulated Assets. VBHI contends that the Unregulated Assets are de facto monopoly services and if they are sold off in parts or together, captive residents, visitors, and businesses are at risk of being held hostage as those owners seek to maximize profits outside of any regulatory control.

#### *Respondents’ Motion to Dismiss*

Respondents argue that VBHI is trying to insert itself into its potential private sale and that there is no statutory authority or precedent to support such an attempt. As such, the Complaint should be dismissed.

Among other things, Respondents state that (1) the Parking Facilities (first at Indigo Plantation then at Deep Point Terminal) have been in existence since at least 1991; (2) an Application for ferry services was filed, with the first rates and charges, and with temporary authority granted by the Commission, issued in 1993; (3) the Commission’s 1995 Order gave parameters of BHIT’s utility operations as: “transportation of passengers and their personal effects via water ferry operations from Southport to BHI and return”;

and (4) the first and only rate case concerning these entities was filed May 5, 2010, in Docket No. A-41, Sub 7. Respondents state that in the 2010 Rate Case the Settlement Agreement included the parties to this docket and, in that case, the rate base did not include any plant in service or other assets associated with parking or barge functions; rather, these functions were not considered part of the regulated utility. Respondents state that in order to reach an agreement on the revenue requirement, the parties agreed to impute \$523,097 of revenue from the Parking Facilities to BHIT for purposes of the rate case. The Settlement Agreement included a letter of commitment by BHIL that limited increases of parking rates through 2014.

Respondents state that finding of fact number 17 of the 2010 Rate Case Order required BHIT to file quarterly financial reports with extensive financial data, including month-end balances of plant, accumulated depreciation expense by plant category, and other relevant data. Respondents state that BHIT has filed over 50 quarterly reports since that time and that those reports include data only from the Regulated Assets — i.e., the ferry and on-island tram — and not the Parking Facilities or Barge, in a format prescribed by the Public Staff. Respondents explain that although there have been adjustments made to baggage tariff provisions, base passenger ticket prices remain in place since the rate case.

Respondents state that after the General Assembly in 2017 passed the Ferry Transportation Authority Act (N.C.G.S. § 160A-680, et seq.), VBHI, Southport, and Brunswick County created the Bald Head Island Transit Authority (BHITA or Authority) to

engag[e] to coordinate and plan for the Authority that will operate a reliable and safe ferry and barge transportation system to transport passengers and freight between Southport and the Village, to provide parking facilities for those passengers on the mainland, and to provide tram service on the island; to enhance the quality of life, mobility, and circumstances of residents of the Village, Southport, and Brunswick County; and to promote economic development and tourism throughout the Cape Fear region, while protecting and preserving the environment.

Motion to Dismiss at 5 (citing Concurrent Resolution of Village, attached as Exhibit A to the Motion).

Respondents further discuss the structure of BHITA and its attempt to purchase the Unregulated and Regulated Assets, including its submission to the North Carolina Local Government Commission (NCLGC) to secure a revenue bond to finance the purchase. Respondents further state that VBHI then withdrew its support for BHITA's attempts when VBHI's sought to purchase the assets for itself.

Respondents move to dismiss on multiple grounds, arguing that the Complaint: (1) does not assert a claim within the Commission's Complaint jurisdiction; (2) improperly seeks an advisory, declaratory ruling that raises no justiciable issue; (3) requests the Commission to assert jurisdiction over parking and barge operations beyond its statutory

authority and jurisdiction; (4) tries to re-open a twelve-year-old general rate case in which current rates were established without the inclusion of parking or barge assets in rate base; (5) raises issues prematurely that are not ripe and should be addressed only in future Commission proceedings; and (6) mistakenly characterizes the barge as a common carrier. These arguments are discussed more fully below.

### *VBHI's Reply*

VBHI argues that Respondents' arguments for dismissal lack merit. VBHI argues that the Complaint satisfies N.C.G.S. § 62-73 insofar as BHIL and BHIT are operating a critical aspect of BHIT's ferry service, and two utility services, outside of the Commission's supervision, and there are alternate grounds for relief. VBHI argues that Respondents' argument that there is no justiciable issue and the complaint is premature because the sale has not yet occurred is without merit. VBHI states that the Assets have already been operated, and continue to operate, in a manner that warrants the Commission's regulation. VBHI argues that Respondent's statutory authority argument rests not on statute or legal grounds, but on factual assertions which are not appropriate at the motion to dismiss stage.

VBHI also argues that the 2010 Rate Case proceeding supports the Commission's asserting jurisdiction over the Parking Facilities. VBHI states that the "used and useful" determination concerns identified property in the 2010 Rate Case and that the Commission was not making any declaration on the unidentified assets — i.e., the Unregulated Assets. VBHI also argues that nevertheless such a finding would not be binding on future Commission proceedings. VBHI also argues that even though the 2010 Rate Case did not make a determination of whether the Parking Facilities were integral to the ferry service, the parties treated them as such by including them in the Settlement Agreement. VBHI states that those concessions were limited to the 2010 Rate Case and do not prohibit the Commission from reaching the issue in this proceeding. VBHI further argues that the issues in the Complaint are ripe, as it is based on past and presently occurring conduct.

Finally, VBHI argues that Respondents have failed to raise a legal defense to any claim that the Barge is operating as a common carrier. Instead, VBHI states, Respondents' defense only raises a factual dispute which cannot be resolved on a motion to dismiss.

### **Discussion and Conclusions**

In support of their Motion to Dismiss, Respondents raise six arguments:

*I. Jurisdiction under N.C.G.S. § 62-73*

Section 62-73 provides, in relevant part, that:

Complaints may be made 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 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 . . . .

N.C.G.S. § 62-73 (emphasis added).

Respondents argue that the Complaint does not allege any wrongful act or omission by BHIT under N.C.G.S. § 62-73 or allege that BHIT's currently applicable ferry rates or rate structure rate is unjust or unreasonable. Respondents thus argue the Commission does not have jurisdiction to hear the Complaint.

The Presiding Commissioner concludes that the Commission has jurisdiction and authority to address whether an operator or unregulated entity is providing utility service that is subject to regulation by the Commission, even when the question is raised as the subject of a complaint against a currently unregulated entity. *See State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 326 N.C. 522, 391 S.E.2d 487 (1990); *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763 (1983).

The status of an entity as a public utility . . . is determined . . . according to whether it is, in fact, operating a business defined by the Legislature as a public utility. If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission notwithstanding the fact that it has failed to comply with [N.C.]G.S. [§] 62-110 before beginning its operation.

*State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 32, 338 S.E.2d 888, 897 (1986), *aff'd as modified*, 318 N.C. 686, 351 S.E.2d 289 (1987).

The Complaint clearly alleges that BHIL's Unregulated Assets are operating ancillary to, or as itself, a public utility without being regulated — in other words, the act or omission that VBHI pleads is either BHIL's or BHIT's failure to submit these Assets to regulation. The pleading therefore falls within the scope of N.C.G.S. § 62-73. Even assuming insufficient grounds were pled to meet Section 62-73, the Complaint also includes VBHI's request for the Commission to declare the regulatory status of the Unregulated Assets pursuant to N.C.G.S. § 1-253. *See also Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 569, 126 S.E.2d 325, 332 (1962) (“[g]reat liberality is indulged in pleadings[,]” and “substance and not form is controlling”).

Therefore, the Respondents' motion to dismiss on the ground that the Commission does not have jurisdiction is denied.

## II. *Justiciability under Declaratory Judgment Act*

Respondents argue that the Complaint alleges no justiciable issue that is appropriate for declaratory ruling. Respondents argue that any “supposed controversy” is illusory and based solely on VBHI’s disappointment in not contracting for the Assets. Respondents argue that the Complaint is motivated by VBHI’s desire to deter or slow down the private sale of the Assets. Respondents also argue that the Commission does not have the authority to influence the disposition or acquisition of the assets of a regulated utility, citing *State ex rel. Utilities Comm’n v. Gen. Tel. Co. of S.E.*, 281 N.C. 318, 337, 189 S.E.2d 705, 717-18 (1972), for the proposition that:

the property of the utility is private property and the business is private business. Except as otherwise provided, expressly or by reasonable implication, in G.S. Chapter 62, the utility is free to manage its property and business as it sees fit and the Commission may not restrict, or control, the discretion of the board of directors in the acquisition of property, or in the price paid for it.

Respondents further argue that VBHI is seeking what is prohibited: that the Commission enter an anticipatory judgment, give an advisory opinion, or provide for contingencies which may hereafter arise. See Motion to Dismiss at 15 (citing *State ex rel. Utilities Comm’n v. Cube Yadkin Generation LLC*, 865 S.E.2d 323, 329 (2021) (*Cube Yadkin*) (Jackson J., dissenting)).

The Presiding Commissioner concludes that VBHI presents a justiciable issue under the Declaratory Judgment Act, whether the Parking Facilities and the Barge are subject to the Commission’s regulatory authority. Unlike the circumstances in *Cube Yadkin*, there is nothing anticipatory or hypothetical about the question presented. The Unregulated Assets are currently owned and operated by BHIL, having been so for many years. There also has been no failure to secure leases or commit to a certain business model, and VBHI is not asking the Commission to issue a ruling on a proposed business plan. As to Respondents’ assertions regarding VBHI’s motivations in bringing the Complaint, a thorough review of the four corners of the Complaint does not yield any request by VBHI, either expressed or implied, that the Commission influence, restrict, or control the disposition or acquisition of any property.

Therefore, the Respondents’ motion to dismiss on the ground that the Complaint alleges no justiciable issue is denied.

## III. *Commission’s authority over the Unregulated Assets*

Respondents argue that there is no statutory basis for the Commission to regulate the parking or barge functions or activities. Respondents state that for 29 years the Commission has not deemed it appropriate to regulate the Unregulated Assets. Respondents also state that over the years the Commission has regulated dozens of ferries and has never inquired of, let alone asserted jurisdiction over, the parking or other

services ancillary to these ferry operations. Respondents also state that there are numerous other barges and parking facilities located throughout North Carolina that are not regulated by the Commission.

As to the Parking Facilities, Respondents state that parking is generally not a natural monopoly and there is no reason why alternative, competitive parking could not be secured for BHIT's ferry passengers. Respondents also state that the Parking Facilities are also used by persons not using the ferry but also by those owning, visiting, or servicing boats in the Marina.

The Presiding Commissioner finds that much of Respondents' argument rests on establishing facts outside of those alleged in the Complaint or disputing specific facts as alleged by VBHI. For the purpose of ruling upon a motion to dismiss for failure to state a claim, however, the allegations asserted in the Complaint are presumed to be true and factual assertions outside of the Complaint are to be disregarded. See *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 203, 652 S.E.2d 701, 707 (2007) ("matters outside the complaint are not germane to a Rule 12(b)(6) motion").

Therefore, the Respondents' motion to dismiss based upon a dispute of the facts is denied.

#### *IV. 2010 Rate Case*

Respondents argue that VBHI tries to reopen a twelve-year-old general rate case in which current rates were established without the inclusion of parking or barge assets in rate base. Respondents state that rate base included only those assets considered used and useful to the regulated ferry and tram, and the parking and barge assets were not part of the utility for which rates were set and subject to the Commission jurisdiction. Respondents argue that were the Commission inclined to revisit the issue in a future rate case, it should not change the rules now, when, among other things, there has never been a valuation or rate of return established for the Unregulated Assets in any ratemaking process, and those assets have depreciated over the past decade with their depreciation not having been part of the cost of service for the setting of any rates.

The Presiding Commissioner finds that much of Respondents' argument rests on establishing facts outside of those alleged in the Complaint or disputing specific facts as alleged by VBHI, matters which are not germane to a Rule 12(b)(6) motion. See *Weaver*, 187 N.C. App. at 203, 652 S.E.2d at 707. Moreover, a review of the four corners of the Complaint does not yield any request by VBHI 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.

To the extent that this argument may raise an affirmative defense — insofar as Respondents may be arguing that either VBHI is estopped by the Order in the 2010 Rate Case or the Unregulated Assets are already part of the rates currently charged pursuant to the 2010 Rate Case Order, and thus Respondents are presenting a filed rate doctrine-type

defense — such an argument is not pled with sufficient specificity. See, e.g., *Gunn v. Continental Casualty Co.*, 968 F.3d 802, 806 (7th Cir. 2020), *Williams v. Peabody*, 217 N.C. App. 1, 4, 719 S.E.2d 88, 92 (2011). The Presiding Commissioner thus concludes that dismissal on the basis of an affirmative defense is unwarranted, without more. See *Johnson v. N.C. Dept. of Transportation*, 107 N.C. App. 63, 66-67, 418 S.E.2d 700, 702 (1992).

Therefore, the Respondents' motion to dismiss on the ground that VBHI is attempting to reopen the 2010 Rate Case is denied.

#### V. *Ripeness*

Respondents argue that VBHI's fear that a future sale will imperil the availability of ferry service is unfounded and premature. Respondents also argue that this fear is not properly the basis for a complaint proceeding and that the Commission will have an opportunity to evaluate these concerns in any future transfer proceeding. Respondents also argue that what assets are used and useful to provide regulated utility service must be made in the context of a general rate case.

The Presiding Commissioner is not persuaded that the Complaint is premature where the Unregulated Assets are currently in operation. The Presiding Commissioner also finds that the Complaint does not rely on the alleged VBHI motivations and does not seek a ruling on the fitness of any prospective buyer of the Unregulated Assets. In contrast, most of Respondents' argument involves allegations surrounding VBHI's motivations and fear surrounding any pending sale, allegations which are to be disregarded under the proper standard of review. *Harris*, 85 N.C. App. at 670, 355 S.E.2d at 840.

Therefore, the Respondents' motion to dismiss on the ground that the Complaint is premature is denied.

#### VI. *Barge as a common carrier*

Respondents argue that VBHI mistakenly characterizes the Barge as a common carrier. They do so in large part by asserting that the Barge is not operated in the factual manner alleged by the Complaint. Respondents instead present several facts about that operation in order to contest the allegations made in the Complaint. However, such factual disputes are not a proper basis for dismissal under Rule 12(b)(6). Respondents' assertion of additional or disputed facts otherwise is disregarded at this stage of the proceeding.

Therefore, the Respondents' motion to dismiss based upon a dispute of the facts is denied.

Accordingly, after carefully considering the pleadings filed in this proceeding and the arguments of the parties, the Presiding Commissioner concludes that Respondents' motion to dismiss should be, and is hereby, denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 16th day of August, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script, appearing to read "Joann R. Snyder".

Joann R. Snyder, Deputy Clerk