

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND,)	
Complainant,)	
)	
v.)	VERIFIED MOTION FOR
)	PRELIMINARY INJUNCTION
)	PROHIBITING SALE OF
BALD HEAD ISLAND)	ASSETS PRIOR TO
TRANSPORTATION, INC.; BALD)	DETERMINATION BY
HEAD ISLAND LIMITED, LLC; AND)	COMMISSION
SHARPVUE CAPITAL, LLC)	
Respondents.)	

Pursuant to Rule R1-5 of the Rules of the North Carolina Utilities Commission (the “Commission”), Sections 62-30, 62-32, and 62-111 of the North Carolina General Statutes, and Rule 65 of the North Carolina Rules of Civil Procedure, the Village of Bald Head Island (the “Village”), by and through counsel, hereby moves the Commission for an injunction prohibiting respondents Bald Head Island Transportation, Inc. (“BHIT”), Bald Head Island Limited, LLC (“Limited”), and SharpVue Capital, LLC (“SharpVue”) from consummating the sale of the assets at issue in this proceeding—which are alleged to be utility assets—prior to a determination by the Commission. The Village also seeks issuance of a temporary injunction affording the same relief pending the Commission’s decision on this motion. In support of this motion, the Village shows the following:

Background for Request for Injunctive Relief

1. On February 16, 2022, the Village filed its Complaint and Request for Determination of Public Utility Status (“Complaint”) seeking relief against the BHIT and Limited.

2. The Complaint seeks resolution of a dispute concerning the regulatory status of the Deep Point parking facilities and barge, each as defined in the Complaint. The parking facilities and barge are each owned by Limited—an entity affiliated with the developer of Bald Head Island and which, to date, has contended that its operation of the parking facilities and barge is not subject to the regulatory authority of the Commission.

3. The Complaint seeks relief against BHIT and Limited for their failure to adhere to the regulatory requirements set forth in Chapter 62 and the Commission’s rules applicable to the operation of the parking facilities and barge as well as declaratory relief regarding the regulatory nature of the parking and barge assets and the status of such as public utility property.

4. On May 31, 2022, SharpVue Capital, LLC (“SharpVue”) announced that it had entered into an agreement with Limited to purchase certain specified assets, including the assets comprising the ferry and tram operations owned by BHIT, the parking facilities and barge assets owned by Limited, and certain other assets unrelated to the transportation system. On August 1, 2022, SharpVue was added as a necessary party to this proceeding. *See Order Allowing Complainant’s Motion to Join Necessary Party, Docket No. A-41, Sub 21 (Aug. 1, 2022).*

5. On June 17, 2022, the Commission issued its Order Scheduling Hearing and Establishing Hearing Procedures. The hearing in this matter is scheduled to commence October 10, 2022.

6. On July 14, 2022, BHIT and Bald Head Island Ferry Transportation, LLC (an entity managed by SharpVue) filed an Application for Transfer of Common Carrier Certificate (“Application”) in Docket No. A-41, Sub 22. The Application seeks approval

to transfer the common carrier certificate held by BHIT authorizing the provision of ferry and tram transportation services to, from, and on Bald Head Island to the SharpVue-controlled entity.

7. The Application seeks approval from the Commission to transfer the common carrier certificate permitting the operation of the ferry and tram. The Application does not seek approval for the sale of the barge and parking facilities assets which are owned and operated by Limited and used and useful as integral components of the transportation services provided by Limited.

8. The Commission has set a public witness hearing on the Application for November 1, 2022, and an expert witness hearing on the Application beginning January 17, 2023. *See* Order Scheduling Hearing, Docket No. A-41, Sub 22 (Aug. 24, 2022).

9. On July 14, 2022, on the same date as the filing of the Application, BHIT filed a Notice of Pending Sale in Docket No. A-41, Sub 7, giving notice to the Commission of its intention to sell the Deep Point Parking Facilities “on a date that is not less than ninety (90) days from the date of this notice.”

10. The Notice of Pending Sale with respect to the Parking Facilities was required by the Commission in its order resolving BHIT’s most recent rate proceeding. *See* Order Granting Partial Rate Increase and Requiring Notice, Docket No. A-41, Sub 7 (Dec. 17, 2010), at Finding of Fact 9(a)(iii). The notice provision, which was agreed to by all parties to the 2010 rate case, provides the Commission (potentially acting on its own motion) and the parties an opportunity to seek redress or further investigation prior to a future sale of the parking facilities separate and apart from the ferry and tram assets—such as presented here.

11. The 90-day period under the Notice of Pending Sale expires October 12, 2022. As the hearing in the above-referenced proceeding is scheduled to commence on October 10, 2022, BHIT's Notice of Pending Sale creates the possibility that Limited could dispose of both the barge and the parking facilities before a decision is rendered by the Commission as to whether these assets are subject to the jurisdiction and authority of the Commission.

12. SharpVue has publicly stated its intent to proceed with the sale of the parking lot and the barge despite this pending proceeding. *See* Jennifer Allen, *With Sale, Bald Head Island Ferry to Remain Privately Owned*, CostalReview.org (June 22, 2022) (SharpVue stating that the assets would be “broken up” into nonregulated and regulated portions and that “closing on everything but the ferry and trams should take place in the next 60 to 90 days” (emphasis added)).¹ In a public meeting held on Bald Head Island on July 27, 2022, five months after the commencement of this proceeding, SharpVue reiterated its intention to close on the parking facilities and barge portion of the transaction notwithstanding the pendency of this proceeding. In this meeting, Lee Roberts, Managing Partner of SharpVue, stated:

One of the questions that I've been asked since this deal was announced, and I want to stress that I think most of you know, but judging from the emails I get not everybody realizes, that it hasn't closed yet and we don't have any control of what's happening right now. But we intend to close on everything besides the regulated assets - the ferry and tram - here relatively soon. We would hope in in 60 to 90 days, and that the ferry and tram assets - that needs to wait for Utilities Commission approval and we think that will be in the fourth quarter.²

¹ Available at <https://coastalreview.org/2022/06/bald-head-island-ferry-to-remain-privately-owned/>.

² Public meeting available at <https://youtu.be/CxcAInAJups?t=1256> (statement at 20:56 of video) (emphasis supplied).

Accordingly, taking SharpVue's public statements at face value, SharpVue and Limited intend to move forward on the transfer of the assets notwithstanding the pendency of this proceeding and the pending dispute as to whether the assets in question are subject to the regulatory authority of the Commission, including, without limitation, the requirement that the Commission's approval be obtained prior to disposition of the assets.

13. The Village has sought Limited's and SharpVue's commitment to refrain from closing on the transaction prior to the conclusion of this proceeding, but they have declined to provide such commitment.

14. Respondents should not be permitted to disrupt the status quo by disposing of the assets in dispute prior to the Commission's decision in this proceeding. Such action would be prejudicial to the interests of the Village and potentially other parties to this proceeding and interested stakeholders, would impede the Commission's ability to award relief in the event the complaint is granted, and would interfere with the orderly conduct of this proceeding.

Issuance of Injunctive Relief

15. It is well-established that a preliminary injunction may issue "[w]hen it appears . . . that the plaintiff is entitled to the relief demanded, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff." N.C. Gen. Stat. § 1-485.

16. In addition, "[t]he Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as

may be necessary or incident to the proper discharge of its duties.” N.C. Gen. Stat. § 62-30. Here, an injunction is necessary to preserve the status quo, so that the Commission may afford appropriate relief should it issue a ruling concluding that the assets in question are subject to its regulatory authority.

17. A preliminary injunction should be issued “if a plaintiff (1) is able to show likelihood of success on the merits of its case and (2) is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff’s rights during the course of litigation.” *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759–60 (1983). This means that a temporary restraining order and preliminary injunction should issue if there is “probable cause for supposing that the plaintiff will be able to maintain his primary [action] and there is a reasonable apprehension of irreparable loss unless [an injunction is] in force.” *Id.* at 409, 302 S.E.2d at 764.

18. “An injury is irreparable, within the law of injunctions, where it is of a peculiar nature, so that compensation in money cannot atone for it.” *Hodge v. North Carolina Dept. of Transp.*, 137 N.C. App. 247, 252, 528 S.E.2d 22, 26 (2000) (quotation omitted), *rev’d on other grounds*, 352 N.C. 664, 535 S.E.2d 32 (2000); *see A.E.P. Industries*, 308 N.C. at 406–07, 302 S.E.2d at 762 (“[O]ne factor used in determining the adequacy of a remedy at law for money damages is the difficulty and uncertainty in determining the amount of damages to be awarded for defendant’s breach.”).

Likelihood of Success of the Merits

19. The Village is likely to succeed in its claims that the Deep Point Parking Facilities are an ancillary utility service subject to the Commission’s supervision.

20. Chapter 62 declares that the Commission “shall have general supervision over . . . the services rendered by all public utilities in this State.” N.C. Gen. Stat. § 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.” N.C. Gen. Stat. § 62-3(27) (emphasis added).

21. The Deep Point Parking Facilities are an “ancillary . . . facility used in connection with such service” within the meaning of this statute. Indeed, the parking facilities are not just an ancillary facility to the ferry service, they are an integral and indispensable component of the ferry service as a whole. 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. Stated simply, without parking, there is no ferry—and without the ferry, there is no need for parking.

22. Alternatively, Limited, 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. N.C. Gen. Stat. § 62-3(23)a. 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.” N.C. Gen. Stat. § 62-3(23)c.

23. Limited is the corporate parent of BHIT, a public utility. Limited’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. In recognition of this reality, the Commission's order in BHIT's most recent rate case approved attributing \$523,097 from parking revenues to the ferry/tram operation. *See* Order Granting Partial Rate Increase and Requiring Notice, Docket No. A-41, Sub 7 (Dec. 17, 2010), at 17 and 20.

24. In addition, the Village is likely to succeed in its claims that the Barge is subject to the Commission's supervision.

25. 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. Gen. Stat. § 62-3(6); *see also id.* § 62-3(23)a.4.

26. The Barge owned and operated by Limited is a local monopoly service, the use of which is held open to the public to transport household goods, such as furniture, and persons 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 large household goods to the Island that cannot be carried or stowed on the ferry, the public must use the Barge.

27. In further support of the facts regarding the parking facilities and barge, the Village incorporates by reference Exhibit 1, which is an affidavit of Julius Wright in which he verifies his direct testimony submitted in this proceeding on August 9, 2022, and his rebuttal testimony submitted in this proceeding on September 28, 2022.

Irreparable Harm

28. In North Carolina, no public utility franchise “shall be sold, assigned, pledged or transferred, nor shall control thereof be changed through stock transfer or otherwise, or any rights thereunder leased, nor shall any merger or combination affecting any public utility be made through acquisition of control by stock purchase or otherwise, except after application to and written approval by the Commission, which approval shall be given if justified by the public convenience and necessity.” N.C. Gen. Stat. § 62-111(a).

29. If the Commission determines in this proceeding that the Deep Point Parking Facilities is an ancillary utility service and the Barge is a common carrier service, then Limited cannot sell those assets unless the Commission concludes the transaction is “justified by the public convenience and necessity.” *Id.* It would be unlawful to transfer the assets absent the Commission’s approval.

30. Limited is currently contracted to sell the Deep Point Parking Facilities and the Barge to SharpVue without first obtaining the written approval of the Commission to such transfer. Moreover, Limited purportedly intends to sell the Deep Point Parking Facilities and the Barge before the Commission will issue its ruling in this proceeding regarding the assets’ regulatory status.

31. The assets in question are unquestionably operated as essential components of the transportation services provided by Limited directly and through its subsidiaries.

[BEGIN AEO CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED] [END AEO CONFIDENTIAL]

32. Among other relief sought by the Village in its Complaint is that the Commission issue an order concluding that the barge and parking assets are subject to the Commission's regulatory authority, including the requirement that the assets not be conveyed without the Commission's prior approval. *See* Complaint, at ¶ 46 (referencing dispute as to whether the barge and parking assets can be "sold, transferred, and otherwise monetized as monopoly service assets outside the control and jurisdiction of the Commission.").

33. Upon Limited's transfers of the parking lot and barge to SharpVue, the Commission will have forever lost its ability to ensure that the transfer was justified by public convenience and necessity.

34. An injunction will prohibit an unlawful act "when the act invades civil or property rights and where there is no other adequate remedy available. Particularly is this so where a *public service* is involved." *Burke Transit Co. v. Queen City Coach Co.*, 228 N.C. 768, 772–73, 47 S.E.2d 297, 300 (1948) (internal quotation omitted) (emphasis added); *Douglas Aircraft Co. v. Loc. Union 379 of Int'l Bhd. of Elec. Workers (A. F. of L.)*, 247 N.C. 620, 626, 101 S.E.2d 800, 805 (1958) (same).

35. In addition, North Carolina courts regularly enjoin pending transactions of property to preserve the status quo. *See Blackwelder v. State Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983) (appeal from agency decision issuing preliminary injunction to stay operation of a permit and subsequent construction of facility until an agency decision could be rendered) (resolved on other grounds); *SED Holding, LLC v. 3 Star Properties, LLC*, 246 N.C. App. 632, 784 S.E.2d 627, 639 (2016) (upholding preliminary injunction to prevent sale/transfer of mortgages that Plaintiff potentially had

interest in; “Prohibiting Defendants from moving these assets for the pendency of litigation maintains the status quo . . .”).

36. No bond should be required as a result of the issuance of an injunction in this matter, and none is permissible under North Carolina law. *See* N.C. Gen. Stat. § 1A-1, Rule 65(c) (“No such security shall be required of the State of North Carolina or of any county or municipality thereof, or any officer or agency thereof acting in an official capacity . . .”); *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E.2d 18 (1970) (bond requirement relating to preliminary injunction was an impermissible attempt to waive sovereign immunity); *see also In the Matter of Piedmont Natural Gas Company v. Public Service Company of North Carolina, Inc.*, N.C.U.C. Docket No. G-5, Sub 508, 2009 WL 1702715 (June 15, 2009) (issuing preliminary injunction to prevent construction of natural gas transmission lines in territory of utility, without issuance of bond).

37. The Village has sought assurances from Limited and SharpVue that they would not consummate the transaction prior to a Commission ruling but they have refused to provide such assurances, which has necessitated the submission of this motion.

38. This proceeding was pending at the time the Respondents executed the Asset Purchase Agreement, so Respondents were well aware that the issues relating to the regulatory nature of the parking and barge assets, including the potential necessity of Commission approval for the transaction, were pending before the Commission. Thus, Respondents entered into the Agreement with full knowledge of the risk that the transfer could be delayed because of the ongoing proceeding and, ultimately, that the assets at issue could be subject to the Commission’s supervision. In fact, the Agreement itself accounts

for the uncertainty occasioned by this proceeding.³ Accordingly, Respondents cannot assert harm for a contingency which they could have avoided by providing reasonable assurances, were aware of before agreeing to the transaction, and planned for in their transaction documents.

WHEREFORE, the Village respectfully requests the Commission to:

1. Issue an order that preliminarily enjoins Respondents (including their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them) from transferring ownership or operation of the assets associated with the Deep Point Parking Facilities and the Barge, pending the Commission’s adjudication of the issues in this proceeding, or otherwise aiding and assisting in such a transfer.

2. Issue an order temporarily enjoining the conduct described above during the pendency of this motion. *See, e.g.,* Order Serving Complaint and Requiring Response, Docket No. E-7, Sub 1123 (Nov. 3, 2016).

3. Determine that the Village is not required to post bond.

4. Order such other relief as the Commission deems just and proper.

³ [BEGIN AEO CONFIDENTIAL] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [END AEO CONFIDENTIAL]

This 30th day of September, 2022.



By:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITION FOR PRELIMINARY INJUNCTION has been served this day upon all parties of record in this proceeding, or their legal counsel, by electronic mail or by delivery to the United States Post Office, first-class postage pre-paid.

This the 30th day of September, 2022.

By: /s/ Craig D. Schauer

VERIFICATION

Scott T. Gardner, first being duly sworn, deposes and says that he is the Mayor Pro Tem of the Village of Bald Head Island; that he has read the foregoing Motion for Preliminary Injunction and that the same is true of his personal knowledge, except as to any matters and thing therein stated on information and belief, and as to those, he believes them to be true; and that he is authorized to sign this verification on behalf of the Village of Bald Head Island.

This the 30 day of September, 2022.

Scott T Gardner

Sworn to and subscribed before me this 30th day of September, 2022.

September D. Oakley

Notary Public

Commission Expires: *June 21, 2025*

September D. Oakley
Notary Public
Durham County, North Carolina
My Commission Expires 6-21-2025

EXHIBIT 1
VERIFICATION OF JULIUS WRIGHT

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

Docket No. A-41, Sub 21

VILLAGE OF BALD HEAD ISLAND,)
Complainant,)
)
v.)
)
BALD HEAD ISLAND)
TRANSPORTATION, INC.; BALD)
HEAD ISLAND LIMITED, LLC; AND)
SHARPVUE CAPITAL, LLC)
Respondents.)

**AFFIDAVIT OF
DR. JULIUS A. WRIGHT**

Julius A. Wright, being first duly sworn, deposes and says:

1. My name is Julius (“Chip”) Wright. I am over the age of 18 and under no disability. I have been engaged by the Village of Bald Head Island (the “Village”) to provide expert testimony in support of the Village’s Complaint and Request for Determination of Public Utility Status filed in this docket.

2. On August 9, 2022, I filed Direct Testimony and exhibits in this docket on behalf of the Village. My testimony consisted of 49 pages and 17 exhibits.

3. On September 28, 2022, I filed Rebuttal Testimony in this docket on behalf of the Village. My testimony consisted of 29 pages and 7 exhibits.

4. In my Direct and Rebuttal Testimony, I testify to facts that are based on my personal knowledge as well as documents provided by Respondents in the course of discovery in this proceeding. I hereby verify that the factual statements contained in my Direct and Rebuttal Testimony are true and correct based on my personal knowledge and Respondents’ own documents.

FURTHERMORE AFFIANT SAYETH NOT.

Julius A. Wright
Julius A. Wright

State of Georgia,
County of BARTOW

Sworn to and subscribed before me,
this the 29 day of September, 2022.

Judith Christine Davenport
Notary Public
Printed Name: JUDITH CHRISTINE DAVENPORT
My Commission Expires: 3.3.2026



CONFIDENTIAL EXHIBIT 2
EXCERPTS FROM ASSET PURCHASE AGREEMENT

Intentionally Omitted

CONFIDENTIAL MATERIALS