

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, Sub 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Village of Bald Head Island,)	
Complainant,)	
)	
v.)	INITIAL COMMENTS OF
)	THE PUBLIC STAFF
Bald Head Island Transportation, Inc.,)	
and Bald Head Island Limited, LLC,)	
Respondents)	

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission (Public Staff), by and through its Executive Director, Christopher J. Ayers, and pursuant to the Commission’s Order Scheduling Hearing and Establishing Procedures issued June 17, 2022, respectfully submits its initial comments.

Summary of Pertinent Dockets

Docket No. A-41, Sub 0

On April 6, 1993, Bald Head Island Transportation, Inc. (BHIT) filed an Application for Certificate of Authority for Passenger Operations to operate ferry service to Bald Head Island. On January 6, 1995, the Commission issued its Order Granting Common Carrier Authority.

Docket No. A-41, Sub 7

On May 5, 2010, BHIT filed its application and supporting testimony for its only general rate case to date.

On September 30, 2010, before the Public Staff filed testimony and the evidentiary hearing, BHIT, the Public Staff, Village of Bald Head Island (VBHI), Bald Head Association, Inc., and Bald Head Island Club (collectively, Stipulating Parties) entered into and filed an Agreement and Stipulation of Settlement, supported by the testimony of Public Staff witness James G. Hoard.

On October 5, 2010, the parties entered into and filed a Revised Agreement and Stipulation of Settlement (2010 Settlement). The 2010 Settlement provided for, among other things, the establishment of rate base of \$3,943,335, and the imputation of \$523,097 in operating revenue from the Deep Point Parking Facilities owned by Bald Head Island Limited, LLC (BHIL), the parent affiliate of BHIT, to BHIT.

The 2010 Settlement stated that imputation of the Deep Point Parking Facilities' revenues was limited to the Sub 7 rate case and established no precedent for future cases, nor was it to be cited by the Stipulating Parties in future cases as a reason for or against imputation of parking revenues or any other regulatory treatment of parking. However, it was stipulated that :(1) through December 31, 2016, BHIL or any successor entity that owns, operates, or leases the Deep Point Parking Facilities would not increase the price of the Deep Point

annual parking pass in any one year in an amount greater than the percentage change in the Consumer Price Index for All Urban Consumers (CPI-U); (2) BHIL would provide notice to the Public Staff and the Commission of any sale or lease of the Deep Point Parking Facilities or any part of those facilities not less than 90 days prior to the scheduled closing date for the sale; and (3) any gain or loss on the sale or lease of parking facilities owned by BHIL shall not be assigned, credited, or attributed for ratemaking purposes to BHIT.¹

Docket No. A-41, Sub 21

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 BHIT and BHIL (collectively, Respondents).² The Complaint in part seeks a ruling upon the regulatory nature of the Deep Point Parking Facilities and the Barge (Unregulated Assets) owned by BHIL, alleging, among other things, that they are essential to, and a component of, the regulated public utility ferry service (Regulated Assets) provided by BHIT.

¹ On July 14, 2022, and corrected on July 15, 2022, BHIL provided to the Public Staff and filed with the Commission in Docket No. A-41, Sub 7, a notice of pending sale to Pelican Logistics, LLC, a subsidiary of Pelican Legacy Holdings, LLC, and an affiliate of SharpVue Capital, LLC.

² In its Complaint, VBHI indicated, among other things, that “[a]lthough 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.”

On March 30, 2022, Respondents filed with the Commission a Response, Motion to Dismiss, and Answer. In its Response, Respondents argue, among other things, that “there is no precedent of the Commission regulating parking or other ancillary services of any ferry operations or parking or barge assets in general,” and that “[p]arking is generally not considered to be a natural monopoly: there are no significant barriers to entry, fixed costs are not extraordinarily high, and competition is commonplace.”

On July 8, 2022, VBHI filed a Motion to Join Necessary Party, requesting that the Commission order SharpVue Capital, LLC (SharpVue) to join as a necessary party to this proceeding. On August 1, 2022, the Commission issued an Order Allowing Complainant’s Motion to Join Necessary Party.³

Docket No. A-41, Sub 22

On July 14, 2022, in Docket No. A-41, Sub 22, BHIT and Bald Head Island Ferry Transportation, LLC (BHIFT), a wholly owned subsidiary of Pelican Legacy Holdings, LLC (Pelican), and managed by SharpVue (collectively with Pelican, SharpVue), filed an application pursuant to N.C. Gen. Stat. § 62-111 for approval (1) to transfer BHIT’s Common Carrier Certificate to BHIFT to operate the passenger ferry transportation services to and from Bald Head Island and the tram

³ In issuing its Order, the Commission found that “although the Sub 22 Docket is distinct and independent of this proceeding, it is BHIFT — SharpVue’s subsidiary — that conditions one of its representations to the Commission in the Sub 22 Docket upon the outcome of this proceeding.... In short, BHIFT has voiced an interest in the outcome of this proceeding. As such, the Commission is hard-pressed to conclude that SharpVue, through its subsidiary BHIFT, is not a necessary, or at least proper, party to this docket to warrant joinder.”

services on the island; and (2) for BHIFT or SharpVue to pledge assets and borrow or issue debt pursuant to N.C.G.S. §§ 62-160 and 62-161 as may be necessary to finance the transaction.

Initial Comments

Parking

The Bald Head Island ferry is one of only a few private ferries in North Carolina and is the largest private passenger-only ferry service. Passengers must park and leave their vehicles to board the ferry to Bald Head Island. As such, availability of parking is critical for most Bald Head Island ferry passengers as it would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates.

While owning and operating a parking lot is not a utility service per se, the availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers. Nonetheless, requiring that the utility provide this service does not require the Commission to approve or regulate the specific terms and conditions of the parking service or include particular assets in rate base, as long as the parking is adequate and reasonably priced. However, it does warrant Commission scrutiny to ensure that ferry customers are protected through adequate parking at reasonable rates.

This unique situation is analogous to the Commission's historical treatment of telephone yellow pages. In determining the scope of the Commission's authority,

the North Carolina Supreme Court found that *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel Co.*, 307 N.C. 541, 299 S.E.2d 763, 1983 N.C. LEXIS 1108 (*Southern Bell I*) “clearly stands for the propositions that: 1) the emphasis should be placed on the *public utility function* rather than a literal reading of the statutory definition of ‘public utility,’ and 2) the statutory definition should not be read so narrowly as to preclude Commission jurisdiction over a function which is required to provide adequate service to the subscribers.” *State ex rel. Utilities Com. v. Southern Bell Tel. & Tel. Co.*, 326 N.C. 522, 527-528, 391 S.E.2d 487, 490, 1990 N.C. LEXIS 242, 11-12, 115 P.U.R.4th 56 (*Southern Bell II*).

But the *Southern Bell II* Court, when considering a complaint regarding an incorrect yellow page listing, also found it unnecessary to determine whether publishing yellow pages was a public utility function or whether the Commission had jurisdiction over yellow page operations. Rather, the Court determined that “[p]roviding a correct telephone listing in the yellow pages as well as in the white pages of the directory is a utility function” *Southern Bell II* at 529. The Court concluded, citing N.C.G.S. § 62-42(a)(5), “that our statutes support this jurisdiction in the mandate to the telephone utilities that they provide ‘reasonably adequate service.’” *Southern Bell II* at 529.

In *Southern Bell II*, the Court further determined that “[p]roviding a telephone directory is a public utility function, and complaints arising from incorrect telephone number listings in the directory, whether in the white pages or the yellow pages, come under the jurisdiction of the Commission because providing incorrect

telephone numbers is disruptive to the public utility service which the directory is to provide.” *Southern Bell II* at 531-532.

The fact that parking revenues have been imputed in the calculation of ferry rates does not indicate that operation of the parking lot should be a regulated function. In *Southern Bell I*, the Court said, “[w]e wish to point out that the yellow pages have never been and are not now regulated by the Utilities Commission. However, the fact that a specific activity of a utility is not regulated does not mean that the expenses and revenues from that activity cannot be included in determining the rate structure of the utility.” *Southern Bell I* at 544.

Like BHIL’s Deep Point Parking Facilities, for which there is no reasonable alternative at this time, the *Southern Bell I* Court found that Southern Bell had a great advantage over its advertising competitors, and this advantage was “directly related to and a result of the Company’s public utility function.” *Southern Bell I* at 546. Thus, the Court found it appropriate to include the revenues from the yellow pages when calculating telephone rates even though the service was unregulated. Relatedly, the Court of Appeals in *Additional Franchise Tax for the Taxable Quarters Ended March 31, 1980, June 30, 1980 and September 30, 1980 v. Carolina Tel. & Tel. Co.*, 81 N.C. App. 240, 247, 344 S.E.2d 46, 51, 1986 N.C. App. LEXIS 2282, 15, determined that “[t]he inclusion for ratemaking purposes of revenues from yellow page advertisements does not require that the revenues also be included in the public utility’s franchise tax base,” thus maintaining the distinction between regulated and unregulated revenues.

While the courts have found ancillary services such as telephone yellow pages to be unregulated, it nonetheless has deemed some level of oversight short of regulation by the Commission to be appropriate. The same approach is appropriate in this case. While the parking operation is not a regulated service, the Commission should exercise its oversight to ensure BHIT provides adequate parking at a reasonable rate to provide adequate service to its customers.

Barge

As part of deregulating the trucking industry, Congress passed the Federal Aviation Administration Authorization Act of 1994 (FAAAA). The law, among other things, generally preempts state laws “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property,” excluding the transportation of household goods, though states are, for example, not restricted from enforcing certain safety and insurance requirements. Public Law 103-305, Sec. 601. Thereafter, the North Carolina General Assembly enacted North Carolina Session Law 1995-523 to, among other things, conform the provisions of Chapter 62 of the North Carolina General Statutes to the FAAAA.

On February 22, 2002, in Docket No. T-100, Sub 49, the Commission issued its Order Ruling on Household Goods Transportation. As described in its Order, the Commission exempted from regulation the transportation of household goods within North Carolina and provided for Commission issuance of certificates of exemption to movers of household goods (instead of certificates of public convenience and necessity) upon compliance with certain terms and conditions

attached to the certificate of exemption. The Order also removed retail delivery transportation of household goods from Commission jurisdiction.

Thereafter, in Docket No. T-100, Sub 61 (PODS Docket), the Commission weighed the nature of the transportation services provided against the contents being transported. In an opinion letter dated August 8, 2003, and filed October 26, 2004, the Commission Staff opined that the transportation services provided by the portable on demand storage company, PODS, Inc., do not constitute household goods transportation in North Carolina and a certificate of exemption was not required. The Commission Staff reasoned that the services provided by PODS was construed as a general transportation service instead of the more specific type of services provided by a household goods mover, such as packing, loading, and unloading.

The Public Staff filed comments in the PODS Docket concurring with the Commission Staff's reasoning and stated that the Interstate Commerce Commission (ICC) had held that "general freight carriers were not subject to household good regulation, even when transporting articles which would fall within the definition of household goods, unless they performed the specialized services typical of a household goods mover." Public Staff's Comments, page 2. The Public Staff stated that, "[t]he ICC, in other words, focused not on the cargo to be transported but rather on the services offered in addition to transportation, and FMCSA [Federal Motor Carrier Safety Administration] has continued to follow that approach." *Id.* at page 2.

On March 23, 2004, the Commission issued its Order Ruling on Request for Reconsideration, which affirmed the Commission Staff's opinion letter and was consistent with the Public Staff's Comments.

The Maximum Rate Tariff No. 1, issued by the Commission in Docket No. T-100, Sub 49, effective January 1, 2003, outlines service guidelines and the maximum rates that common carriers may bill consumers for transporting household goods during the course of a Commission regulated move, which is classified as the transportation of household goods, over a public road within North Carolina, for compensation.

The transportation services currently provided by Bald Head Island's barge operations (Barge) do not fall within the scope of the regulated services prescribed under Maximum Rate Tariff No. 1. While the Barge does indirectly transport household goods by ferrying vehicles engaged in the transportation of household goods, the barge service does not involve the specialized functions associated with a household goods mover. The transported items on the Barge are classified as general freight, subject to the FAAAA, and the presence of any household goods on the Barge would be incidental.

In Docket No. T-100, Sub 49, the Commission limited the Commission's jurisdiction over the transportation industry, effective January 1, 2003. In Docket No. T-100, Sub 61, the Commission further delineated the differences between being a common carrier of household goods and a carrier of general freight. The barge service to Bald Head Island, including its rates and service, has never been

regulated by the Commission. While barge service is undoubtedly critical for those living and traveling to and from the island, it is not related to the provision of regulated passenger ferry service. The Commission's decision in the PODS Docket suggests that the services provided by the Barge are a general transportation service and not the more specific type of service provided by a household goods mover. Thus, the Bald Head Island barge service should not be regulated by the Commission as a common carrier of household goods.

WHEREFORE, the Public Staff prays:

1. That the Commission take these initial comments into consideration;
- and
2. For such other and further relief as the Commission may deem just and proper.

Respectfully submitted this the 8th day of September 2022.

PUBLIC STAFF
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Electronically submitted
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CERTIFICATE OF SERVICE

I certify that a copy of these Initial Comments has been served on all parties of record or their attorneys, or both, by United States mail, first class or better; by hand delivery; or by means of facsimile or electronic delivery upon agreement of the receiving party.

This the 8th day of September 2022.

Electronically submitted
/s/ William E. H. Creech