

**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 RULING ON
v.)	COMPLAINT AND REQUEST
)	FOR DETERMINATION OF
Bald Head Island Transportation, Inc.,)	PUBLIC UTILITY STATUS
and Bald Head Island Limited, LLC,)	
)	
Respondents)	

HEARD: Monday, October 10, 2022, at 2:00 p.m. in Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Commissioner ToNola D. Brown-Bland, Presiding; and Commissioners Daniel G. Clodfelter, Kimberly W. Duffley, Jeffrey A. Hughes, and Floyd B. McKissick, Jr.

APPEARANCES:

For the Village of Bald Head Island:

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Jo Anne Sanford, Sanford Law Office, PLLC, Post Office Box 28085, Raleigh, North Carolina 27611

For Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC:

M. Gray Styers, Jr., and Brad Risinger, Fox Rothschild LLP, 434 Fayetteville Street, Suite 2800, Raleigh, North Carolina 27601

For SharpVue Capital, LLC:

David P. Ferrell, Nexsen Pruet PLLC, 4141 Parklake Avenue, Suite 200, Raleigh, North Carolina 27612

For the Using and Consuming Public:

Lucy E. Edmondson, Chief Counsel, Elizabeth D. Culpepper, and William E.H. Creech, Staff Attorneys, Public Staff - North Carolina Utilities Commission, 4326 Mail Service Center, Raleigh, North Carolina 27699

For Bald Head Island Club:

Daniel C. Higgins, Burns Day & Presnell, P.A., P.O. Box 10867, Raleigh, North Carolina 27605

For Bald Head Association:

Edward S. Finley, Jr., 2024 White Oak Road, Raleigh, North Carolina 27608

BY THE COMMISSION: On February 16, 2022, the Village of Bald Head Island (VBHI or Village) filed with the Commission 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 together with BHIT, Respondents). The Complaint requests that the Commission determine whether the parking lot facilities and operations located adjacent to Deep Point Marina, owned by BHIL, and the tugboat and barge operations, also owned by BHIL, are subject to the Commission's jurisdiction and regulatory authority.

On February 17, 2022, the Commission issued an Order Serving Complaint and Request for Determination of Public Utility Status.

On March 15, 2022, Bald Head Island Club (Club) filed a petition with the Commission seeking to intervene, which was allowed by the Commission on March 18, 2022.

On March 30, 2022, Respondents filed with the Commission a Response, Motion to Dismiss, and Answer (Answer). Also on March 30, 2022, Respondents filed a Motion that Commission Take Judicial Notice, or, in the Alternative, for Leave to File Supplemental Exhibits to its Answer.

On April 4, 2022, the Commission issued an Order Serving Answer and Motion to Dismiss.

On April 22, 2022, VBHI filed a Reply to Respondents' Response, Motion to Dismiss, and Answer.

On June 17, 2022, the Commission issued an Order Scheduling Hearing and Establishing Procedures.

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 (Motion to Join).

On July 11, 2022, Respondents filed a response to the Motion to Join.

On July 13, 2022, VBHI filed a reply to Respondents' response to the Motion to Join.

Also on July 13, 2022, Bald Head Association (BHA or Association) filed a petition with the Commission seeking to intervene, which was allowed by the Commission on July 20, 2022.

On August 1, 2022, the Commission issued an Order Allowing Complainant's Motion to Join Necessary Party.

The intervention and participation of the Public Staff is recognized pursuant to N.C. Gen. Stat. § 62-15(d) and Commission Rule R1-19(e).

On August 9, 2022, VBHI filed the direct testimony and exhibits of witnesses Scott T. Gardner, Dr. Julius A. Wright, Kevin W. O'Donnell, Stephen Boyett, David Cox, Brandy Munroe, and George Corvin, which included matters deemed confidential.

On August 16, 2022, the Commission issued an Order on Respondents' Motion to Take Judicial Notice and Motion to Dismiss.

On September 8, 2022, the Public Staff filed initial comments, the Club filed the direct testimony of witness David Sawyer, and the Association filed the direct testimony and exhibits of witness Alan Briggs.

Also on September 8, 2022, Respondents filed the direct testimony and exhibits of witnesses James Leonard, Shirley A. Mayfield, and James W. Fulton, Jr., which included matters deemed confidential.

On September 9, 2022, Respondents filed confidential exhibits to the confidential direct testimony of witness Leonard, as well as his public direct testimony and exhibits. Respondents also filed the direct testimony and exhibits of witness Charles A. Paul, III.

On September 28, 2022, the Association filed the rebuttal testimony of witness Briggs, SharpVue filed the rebuttal testimony of witness Lee H. Roberts, and VBHI filed the rebuttal testimony and exhibits of witnesses O'Donnell, Wright, and Gardner, which included matters deemed confidential, as well as reply comments to the Public Staff's initial comments.

Consumer statements were received in this docket and in Docket No. A-41, Sub 21CS.

On September 29, 2022, Respondents filed Respondents' Motion in Limine No. 1 (Motion in Limine).

On September 30, 2022, VBHI filed a verified Motion for Preliminary Injunction Prohibiting Sale of Assets Prior to Determination by Commission (Motion for Preliminary Injunction).

On October 4, 2022, VBHI filed the Village's Opposition to Respondents' Motion in Limine No. 1.

Also on October 4, 2022, BHIT, BHIL, and SharpVue filed a joint Response in Opposition to Complainant's Motion for Preliminary Injunction.

On October 6, 2022, VBHI filed a Reply in Support of Motion for Preliminary Injunction.

On October 7, 2022, the Commission issued an Order on Respondents' Motion in Limine.

On October 10, 2022, the parties appeared before the Commission prior to the hearing to be held in this matter and were heard on the Motion for Preliminary Injunction, after which time the motion was held in abeyance. Tr. vol. 1, 247.

The hearing was held as scheduled.

On October 11, 2022, BHIT, BHIL, and SharpVue, also on behalf of its affiliates, filed Stipulation Commitments in Lieu of Preliminary Injunction.

On October 17, 2022, the Commission issued a written Order Holding Motion for Preliminary Injunction in Abeyance.

On November 8, 2022, VBHI filed a post-hearing brief and proposed order; BHIT, BHIL, and SharpVue jointly filed a post-hearing brief and proposed order; and the Association filed a post-hearing brief.

Based on the foregoing and the entire record, the Commission makes the following

FINDINGS OF FACT

1. The Village of Bald Head Island is a municipal corporation with all the powers, duties and rights conferred by its charter and the laws of the State of North Carolina.

2. BHIT is a North Carolina public utility and is subject to the jurisdiction of the Commission pursuant to N.C.G.S. § 62-3(23)(a)(4). BHIT is engaged in the business of transporting passengers and their personal effects by ferry to and from the Deep Point Marina ferry terminal (Deep Point Terminal) on the mainland and the Bald Head Island Terminal (Island Terminal) on Bald Head Island (BHI or Island) and by tram from the Island Terminal to and from their destinations on BHI (collectively, Ferry or Ferry Operations). BHIT is a wholly owned subsidiary of BHIL.

3. BHIL is a limited liability company organized under the laws of the State of Texas and is registered to do business in North Carolina. BHIL is owned by Mitchell Island Investments, Inc., which is owned by the Estate of Cynthia and George Mitchell. George Mitchell, the original developer of the Island, died in 2013, and his Estate is seeking to divest itself of various holdings on the Island.

4. BHIL has owned various properties and businesses on BHI, in the City of Southport (Southport), and in Brunswick County, and has been engaged in development activity in those locations for several decades.

5. Among its assets, BHIL owns and operates the parking lot facilities located adjacent to Deep Point Marina (Parking Operations or Parking Facilities), the Deep Point Terminal facility, as well as the Island Terminal facility located on BHI. BHIL leases the Deep Point and Island Terminal buildings to BHIT, as well the use of its employees that are assigned to these operations and functions. Each of these assets directly serve ferry passengers.

6. BHIL also owns a tugboat and barge which are used to transport materials, goods, and supplies, primarily in vehicles, as well as contractors, vendors, and other persons together in their vehicles, to and from the Island (collectively, Barge Operations or Barge). The Barge is serviced and maintained by BHIT at the same facility, leased and operated by BHIT, as the Ferry.

7. SharpVue is a North Carolina limited liability company. On May 31, 2022, SharpVue and BHIL announced that they had entered into an asset purchase agreement (APA)¹ whereby SharpVue will acquire from BHIL and BHIT various assets, including the Parking and Barge Operations that are the subject of this proceeding, as well as the Ferry Operations that are currently subject to the Commission's jurisdiction.

8. BHI is a unique natural resource of the state due to the confluence of several attributes: its easy accessibility by way of ferry ride from the mainland; favorable climate as the southernmost of the North Carolina's barrier islands, comprised of some 12,000 acres

¹ The APA is dated May 17, 2022, and is filed in this docket as a confidential exhibit, as well as with the Commission in Docket No. A-41, Sub 22. It is signed by Lee H. Roberts (Roberts), Manager of SharpVue and Pelican Legacy Holdings, LLC, on behalf of SharpVue and its affiliates, Pelican Services, LLC, Pelican Logistics, LLC, and Pelican Real Property, LLC (collectively, Buyer); it is also signed by Charles A. Paul (Paul), President and CEO/Manager of BHIT and BHIL, respectively, on behalf of BHIT and BHIL (collectively, Sellers).

of land, of which approximately 10,000 acres are untouched and protected beach, marsh, and maritime forest preserves; relaxed island environment; historic attractions; sustainability and research programs at the Bald Head Island Conservancy; and outdoor recreational activities. One of the unique attributes of BHI is that, with rare exceptions, personal-use automobiles are not allowed (i.e., permitted to be operated by the public) on the Island.

9. The Island is open to the public, with hundreds of thousands of tickets sold for travel to and from the Island each year. Visitors to the Island include “day-trippers” (persons who come to the Island for the day to enjoy Bald Head’s amenities), vacationers, property owners, employees of the Village or various private businesses located on the Island, and contractors and tradespersons performing commercial services on the Island. Workers and contractors, who regularly purchase “employee” or “contractor” ferry tickets, comprise a significant percentage of the Ferry’s annual passengers.

10. The Island is not yet fully developed, so the demand for transportation services is expected to continue to grow over time.

11. While a few BHI residents and visitors may travel to the Island by private boat, the only means of public access to and from the Island is via the Ferry and Barge Operations. The Ferry is used to transport persons, their baggage, and small personal items to the Island. The Barge is used to transport everything else to the Island.

12. The Parking Facilities adjoin the Deep Point Terminal, located at 1301 Ferry Road, Southport, North Carolina, and consist of approximately 40 acres and 2,302 parking spaces, divided among four separate lots — the general, premium, contractor, and employee lots.

13. The Parking Facilities at Deep Point provide the only means of public parking access to the Deep Point Terminal. There is no existing alternative or reasonably substitutable parking facility or service available to the public. There is no practicable future alternative to the Parking Facilities that has thus far been identified.

14. The Parking Facilities are the only parking option for ferry passengers that is currently identified by BHIT and the Town of Southport on their respective websites. The Parking Facilities are also the only parking option identified by BHIL’s website — www.baldheadisland.com — which directs ferry passengers to use the Parking Facilities when using the ferry to get to the Island.

15. The public’s use of the Parking Facilities is derivative of the public’s use of the Ferry and vice versa.

16. A significant number of persons would choose not to travel to the Island were they not able to access or use the Parking Facilities. Ferry ridership is dependent upon, and would noticeably decline but for the operation of, the Parking Facilities.

17. The Parking Operations are necessary to the Ferry Operations.

18. The Parking and Barge Operations were not included in the financial statements filed with BHIT's original certificate application in Docket No. A-41, Sub 0. The Parking and Barge Operations also were not included in BHIT's application or the rate base in BHIT's only general rate case, Docket No. A-41, Sub 7 (2010 Rate Case).

19. The Parking and Barge Operations have not been included in the quarterly financial reports filed by BHIT in the almost twelve years since the 2010 Rate Case.

20. Pursuant to the Revised Agreement and Stipulation of Agreement, Docket No. A-41, Sub 7 (filed October 21, 2010) (Stipulation), filed by the parties in the 2010 Rate Case, and for the purpose of setting rates for ferry tickets, a significant amount of revenues are imputed to the Ferry Operations from the Parking Operations, as approved by the Commission's Order Granting Partial Rate Increase and Requiring Notice, *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 (Dec. 7, 2010) (2010 Rate Case Order).

21. The past treatment of the Parking and Barge Operations is not binding on the Commission in this proceeding.

22. The Parking Operations are subject to the Commission's jurisdiction and regulatory authority as an ancillary service or facility to the Ferry Operations. The Parking Operations are also an integral component of the ferry service and the overall transportation system operations that serve the Island.

23. The Parking Operations are also subject to the Commission's jurisdiction and regulatory authority because the operations of BHIL, BHIT's parent corporation, impact the rates or services of the regulated utility, BHIT.

24. Various determinations in the 2010 Rate Case Order are consistent with the Commission's asserting jurisdiction and regulatory authority over the Parking Facilities in the instant proceeding.

25. The Barge Operations consist of the *Brandon Randall*, a 100-foot by 32-foot steel deck barge that can carry up to 200 tons of cargo, and the *Captain Cooper*, a tugboat that pushes the barge, five days per week, on the roughly four-nautical-mile voyage to and from the Deep Point and Island Terminals. The barge is a roll-on/roll-off vessel that transports vehicles of varying sizes. Persons also travel on the Barge as passengers in the transported vehicles.

26. The Barge Operations transport to and from the Island essentially all: food and beverage sold on the Island; restaurant and Club supplies; commercial goods and materials sold and used on the Island; construction materials and equipment used in all construction and repair work on the Island; large household goods (e.g., appliances and

furniture); housekeeping, administrative, and office supplies; fuel; landscape materials; golf carts used on the Island, etc.

27. Mail and package service to and from the Island is entirely dependent upon the Barge Operations. Local carriers, such as UPS, FedEx, and DHL, do not deliver to the Island; rather, they deliver packages to a warehouse on the mainland where VBHI then organizes the packages onto pallets that are then placed on warehouse trucks. The trucks are then driven onto the barge to be transported to the Island.

28. The Barge Operations are also the only means to transport necessary municipal, public service, and emergency vehicles (e.g., police vehicles and ambulances to include their accompanying personnel) to and from the Island. During major emergencies, such as tropical storms or hurricanes, the Ferry and Barge Operations often coordinate to evacuate persons and property.

29. The Barge Operations are the “lifeblood” to construction on the Island, and the Barge schedule dictates construction, inspection, and real property closing schedules on the Island.

30. The Barge is held out to the general public and is the exclusive public means to transport the items set forth in Findings of Fact Nos. 26, 27, and 28, to and from the Island.

31. BHIL charges for use of the Barge according to the amount of deck space occupied—\$60 for each 6-foot long by one-vehicle width or lane area. BHIL does not separately charge for vehicle passengers, of which up to 12 are permitted to travel with their respective vehicles and must stay in the cab of the vehicle during the voyage. BHIL also does not charge different rates based upon what cargo or persons, if any, a vehicle carries.

32. Any vehicle transported by the Barge must also have acquired a VBHI-issued internal combustion engine (ICE) permit in order to operate on the Island.

33. The United States Coast Guard (Coast Guard) inspects the Barge as a “freight barge” under 46 CFR Chapter I, Subchapter M, and permits the Barge to carry 12 persons in addition to its crew in accordance with 46 U.S.C. § 3304. The Coast Guard does not currently inspect the Barge as a passenger ferry.

34. The Barge Operations are subject to the Commission’s jurisdiction and regulatory authority as an ancillary service to the Ferry Operations.

35. Public sentiment from Island stakeholders strongly emphasizes the importance of a unified transportation system serving the Island and the need for regulatory oversight over the system to include the Parking and Barge Operations.

36. Both the Parking and Barge Operations are currently operating as de facto monopolies.

37. The Commission's regulation and oversight of the Parking and Barge Operations is in furtherance of the public interest. The scope and degree of that regulation will be determined in future proceedings.

38. The sale or transfer of the Parking and Barge Operations without prior Commission approval is prohibited by N.C.G.S. § 62-111(a).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 1-7

The evidence supporting these findings of fact is contained in the Complaint and Answer, exhibits to the testimony of VBHI witness Wright, the testimony of Respondents witness Paul and SharpVue witness Roberts, as well as the entire record before the Commission. These findings and conclusions are jurisdictional or generally informational and are not contested by any party.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 8-11

The evidence supporting these findings of fact is contained in the Complaint and Answer, and the testimony of VBHI witnesses Gardner, Corvin, Munroe, Cox, Boyett, and Wright, BHA witness Briggs, and Respondents witness Paul. These findings and conclusions are related to the general attributes of the Island and the Ferry and Barge Operations and are generally informational and not contested by any party.

Based on the findings and the entire record, the Commission concludes that the Island is accessible only by private boat or ferry and, therefore, the Ferry Operations are integral to the Island.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 12-17

The evidence supporting these findings of fact is contained in the Complaint and Answer, and the testimony of VBHI witnesses Gardner, Corvin, Munroe, Cox, Boyett, and Wright, Respondents witnesses Paul and Leonard, Club witness Sawyer, and SharpVue witness Roberts.

The Commission finds that the importance of the Parking Operations to the Ferry Operations, and the lack of any existing practicable alternative to the Parking Facilities, are facts that are both largely uncontested by the parties and supported by the testimony of numerous witnesses and members of the public.

Both VBHI witness Wright and Respondents witness Leonard describe the approximately 40 acres of land that are dedicated to the Parking Operations, with BHIL having recently expanded the total capacity of its parking lots to 2,302 spaces due to demand. Witness Wright explains that the Parking Facilities are the only parking option

for ferry passengers that is currently identified by BHIT and the Town of Southport on their respective websites, as well as the only parking option identified by BHIL’s website — www.baldheadisland.com — which directs ferry passengers to use the Parking Facilities when using the ferry to get to the Island.

The record is replete with evidence showing that nearly every ferry passenger arrives at the terminal by personal automobile, often with considerable luggage and vacation supplies. See, e.g., tr. vol. 3, Wright Exhibit JAW-9 (Mercator Report finding that “[n]early all ferry passengers travel to and from the Deep Point Terminal (at Southport, on the North Carolina Mainland) by personal vehicle and park their vehicles in the BHI Limited parking facility.”). VBHI witness Gardner testified that he is “not aware of anybody who has used the passenger ferry to get to Bald Head without having to park a vehicle at the Deep Point parking facilities.” Tr. vol. 2, 37. Club witness Sawyer, CEO of the Bald Head Island Club, testified that “[t]he parking facilities at the Deep Point ferry landing are . . . an indispensable, integral, and essential part of BHIT’s ferry operation.” Tr. vol. 3, 206. Respondents witness Leonard confirmed that “reasonable access” to parking is “critical for ferry riders.” Tr. vol. 4, 75, 92. Finally, the Public Staff recognized in its Initial Comments that “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.” Public Staff Initial Comments at 5.

The record also demonstrates that at this time there is no other existing practicable alternative to the Parking Facilities. There is no public transportation to the Deep Point Terminal.² See Answer at 30 (¶ 22) (“It is admitted that Respondents know of no other regular bus services from another public parking lot to and from the Deep Point Terminal operating at this time.”). “No parking” signs line the road leading up to the terminal. Tr. vol. 5, 134. The Deep Point Terminal is located in a remote area, with no other parking facilities nearby at this time. Tr. vol. 1, 114. As a result, essentially all ferry passengers must use the Parking Facilities to use the ferry, see, e.g.:

- “I am not aware of anybody who has taken the ferry and has parked anywhere other than the parking facilities at the terminal From my perspective, to ride the ferry, you have to pay for a ferry ticket plus you have to pay for parking. There is no other way.” Tr. vol. 1, 129.
- “I think that 99% of ferry passengers use the parking facility. Maybe there are a few people who come to the ferry by car service from the airport.” Tr. vol. 1, 102.
- “The ferry landing at Deep Point Marina is located in a relatively isolated/remote area. There is no other access to parking in that area

² There also is no credible evidence of any other regular or dependable rideshare or public transportation that exists in Southport — such as the presence of a taxi service or Uber-type service — let alone that any such existing service could sufficiently accommodate the existing volumes of ferry passenger traffic.

and no other reliable and readily accessible way to get to the ferry other than driving to the marina.” Tr. vol. 1, 114.

The Public Staff agrees that there “is no reasonable alternative at this time” to the Parking Facilities. Public Staff Initial Comments at 7. Respondents witness Paul likewise acknowledged that “there are not any other, currently existing, permanent parking facilities for ferry passengers.” Tr. vol. 5, 119. And SharpVue witness Roberts was also unable to identify any existing practicable alternatives to the Parking Facilities. Tr. vol. 4, 21.

Respondents proposed some hypothetical alternatives to the Parking Facilities. These hypothetical alternatives include:

- An undeveloped lot across the street from Deep Point Marina, which Respondents suggest one day could become a parking lot. Tr. vol. 5, 119, 169-71. However, this lot appears to be under contract for sale to an unknown buyer, and there is no evidence that the buyer intends to develop the lot into a competing parking facility. See tr. vol. 3, 33, 137-38; see *also* tr. vol. 3, Wright Exhibit JAW-5.
- Indigo Plantation, which Respondents suggested could serve Deep Point Terminal by way of shuttle. See tr. vol. 4, 65; tr. vol. 5, 100. However, it appears that the property is currently being developed for condominiums. Tr. vol. 5, 126-27, 159-60. Even assuming it were otherwise available, the parking lot at Indigo Plantation is roughly four miles away, would add some 20 minutes to the transit calculus (almost doubling the time it takes to get to the Island), and is, until sold, currently owned by BHIL, see tr. vol. 4, 65—which also owns the Parking Facilities and is unlikely to compete with itself.
- Parking in Southport. All evidence indicates that Southport does not have any existing large public parking facilities, lacks sufficient on-street parking capacity to provide sufficient alternative parking, and even the existing on-street parking is some distance away from the terminal and does not accommodate long-term parking. See tr. vol. 1, 129, 137-38, 148, 156; tr. vol. 2, 46, 141-42; tr. vol. 3, 209. Moreover, the closest location at which one might park a vehicle is over a mile away and risks “your car be[ing] towed by the time you return.” Tr. vol. 1, 129.

The Commission finds that, at best, the alternatives proposed by Respondents are merely speculative and, in any event, none are viable or practicable alternatives—either now or in the immediately foreseeable future—to the existing Parking Facilities. See *State ex rel. Utils. Comm’n v. S. Bell Tel. & Tel. Co. (Southern Bell I)*, 307 N.C. 541, 546, 299 S.E.2d 763, 766 (1983) (agreeing that “newspapers, magazines, pamphlets and other classified directories” present “no real competition” to the Yellow Pages).

On this record, it is apparent to the Commission that use of the Parking Facilities is derivative of Ferry use and vice versa—essentially every person who parks in the BHIL-owned parking lots rides the BHIT-owned ferry; conversely, essentially every ferry passenger parks in the BHIL-owned lots. It is equally apparent to the Commission that were the Parking Operations to cease operation tomorrow (or were BHIL to prohibit public parking in its lots), the public's use of the Ferry would be significantly impaired. See *also* tr. vol. 3, 204 (“it would be nearly impossible to ride the ferry to the island if you can't park your car”). As a result, a significant number of persons would choose not to travel to the Island. See, e.g., *id.* at 209-10 (describing how Club employment is impacted by the current, already lengthy, commute). It is easy to conclude on this record that ferry ridership is dependent upon, and would noticeably decline but for the operation of, the Parking Facilities.

Based on the findings and consideration of the entire record, the Commission finds and concludes that the Parking Facilities provide the only reasonable means of public parking for ferry passengers and the only reasonable access to the Deep Point Terminal, there is no existing alternative or reasonably substitutable parking facility or service available to the public at this time, and, as a result, the Parking Facilities are necessary to the operation of the Ferry Operations.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 18-21

The evidence supporting these findings of fact is contained in the 2010 Rate Case Order and the testimony and exhibits of VBHI witness Wright and Respondents witness Mayfield.

BHIT filed its initial application to provide transportation service to the Island in 1993, in Docket No. A-41, Sub 0. The Commission issued orders in that docket in 1993 and 1995, which approved the provision of that service and the Ferry's certificate. There were no Parking or Barge assets included in the financial statements filed at that time, and there have been none in any financial reports or regulatory filings made to date. See tr. vol. 5, 41-42.

In the 2010 Rate Case, BHIT included with its application a proposed rate base of used and useful assets for the provision of BHIT's Ferry service. Tr. vol. 4, O'Donnell Cross Exhibit 5. As explained by witness Mayfield, the list of specific assets in the rate base was shown in the 2010 Rate Case in Shirley Mayfield Exhibit 1, Schedule 2-1. That list of assets did not include any Parking or Barge assets. See tr. vol. 5, 40-41. On October 21, 2010, the parties to that proceeding filed a comprehensive settlement of all issues raised by the parties to the proceeding. See Stipulation at 2 (item 2.C.i).

The Commission concluded in the 2010 Rate Case Order that the settling parties' Stipulation was just and reasonable and should be approved. See 2010 Rate Case Order at 7. Among other things, the Stipulation included the parties' agreement that “[a]ny 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.” 2010 Rate Order at 7. The

Stipulation also included the parties' agreement that: (1) certain revenues of BHIL's Parking Facilities would be imputed to BHIT, reflecting an annual revenue adjustment to BHIT of \$523,097, as further described in the testimony and shown in the exhibits of Public Staff witness James G. Hoard—significantly impacting the rates BHIT could charge and the revenue it could recover for its ferry transportation services; (2) BHIL would not increase the price of certain parking rates in any 12-month period beyond the percentage change in inflation; and (3) BHIL would include these provisions in any contract for the future sale or lease of the Parking Facilities. 2010 Rate Order at 5-7. Neither the Barge Operations, nor any of BHIL's assets or revenues relating to the same, were mentioned or at issue in the 2010 Rate Case Order or the parties' Stipulation.

Since the 2010 Rate Case, witness Mayfield has filed, every quarter for the past twelve years (in Docket No. A-41, Sub 7A), an income statement and plant schedules listing the asset categories and accumulated depreciation for the rate base assets of BHIT. No Parking or Barge assets are included on the plant schedules in those filings or in any other BHIT reports filed with the Commission. See tr. vol. 5, 36-37; Mayfield Exhibit B.

On this and other evidence, Respondents argue for the status quo—because the Parking and Barge Operations have not previously been regulated, that is some evidence they should remain that way. The Commission is not persuaded.

As early as 1998, customers and residents of Bald Head Island were calling for the Commission to regulate both the Parking and Barge Operations as necessary but unregulated monopoly services—see, e.g., Sub 1 Transcript at 9-10 (“Parking on the mainland[is] an inte[gr]al part of the overall transportation system and it should be considered as part of the tariff.”; “Barge service . . . [is the] lifeline of the property owners.”), 28 (stating that “I hope the NC Utilities Commission will consider regulating parking and barge service[,]” and “[t]he barge should be regulated,” and giving reasons in support), 48. As these services evolved to serve the Ferry, and after 2009 when BHIT completed its move to the new Transportation Facility serving the Ferry, the Village raised the issue of the Commission's regulating Parking Operations in the *next year's* rate case. It was only because the parties reached a workable solution that was satisfactory to all—to include certain rate, and other, concessions of both BHIL and BHIT as set out above—that the issue was not reached at that time.

All said, the Commission concludes that the past treatment of these assets, either by past operation or Stipulation, does not bind the Commission or compel a certain outcome in this proceeding. See *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); see also *Southern Bell I*, 307 N.C. at 544, 299 S.E.2d at 765; *Jones v. Brinson*, 238 N.C. 506, 509, 78 S.E.2d 334, 337 (1953) (parties cannot stipulate or bind as to matters of jurisdiction); *Baxley v. Nationwide Mut. Ins. Co.*, 104 N.C. App. 419, 422, 410 S.E.2d 12, 14 (1991), *aff'd*, 334 N.C. 1, 430 S.E.2d 895 (1993).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 22-23

In addition to the evidence set out and discussed above, the evidence supporting these findings of fact is contained in the testimony and exhibits of VBHI witnesses Gardner, O'Donnell, and Wright, and Club witness Sawyer, and the entire record.

The Public Utilities Act, found in Chapter 62 of the North Carolina General Statutes, provides that “[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[.]” N.C.G.S. § 62-30. The Act also provides 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).

Whether or not a particular entity or its operations constitutes a public utility or a public utility service is a question of law.³ *State ex rel. Utils. Comm’n v. New Hope Rd. Water Co.*, 248 N.C. 27, 29, 102 S.E.2d 377, 379 (1958). There is, however, no universal or formulaic test for what constitutes a public utility or public utility service. *Accord State ex rel. Utils. Comm’n v. Simpson*, 295 N.C. 519, 524, 246 S.E.2d 753, 756 (1978). Such determination depends upon the circumstances of each particular case, with no single factor controlling, and may include considerations of the: (1) nature and type of good or service sought to be regulated; (2) type of market served; (3) lack of competition in the local marketplace; (4) kind of competition that naturally inheres in that market; (5) existence of other governmental regulation; or (6) effect of non-regulation or exemption from regulation. *Id.*; see also *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. of Adjustment*, 174 N.C. App. 574, 578, 621 S.E.2d 270, 273 (2005). “[T]he emphasis in such a determination should be placed on the function of the service provided rather than a literal interpretation of the definition of a public utility” or its failure to comply with the requirements of Chapter 62. *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756; see also *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).

That said, the Commission has no jurisdiction over BHIL or its certain operations unless those operations fall within the meaning of the Public Utilities Act. *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756; *accord State ex rel. Utils. Comm’n v. N.C. Waste Awareness & Reduction Network (NC WARN)*, 255 N.C. App. 613, 615, 805 S.E.2d 712, 714 (2017), *aff’d per curiam*, 371 N.C. 109, 812 S.E.2d 804 (2018).

³ The Commission has the authority to address whether an operator or previously unregulated entity is providing utility service that is subject to regulation. 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).

After careful consideration of the entire record, the Commission concludes that Parking Facilities are subject to the Commission’s jurisdiction and regulatory authority for two related, but separate, reasons.

The Parking Operations are not only ancillary to but are integral and necessary to the Ferry Operations

There is no dispute that BHIT and its Ferry Operations and services constitute a public utility that “[t]ransport[s] persons or household goods by . . . any other form of transportation for the public for compensation” N.C.G.S. § 62-3(23)(a)(4). Pursuant to N.C.G.S. § 62-3(27), the Commission has jurisdiction and regulatory authority over “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.*” (Emphasis added). In construing the statute, the Commission must first look to and give effect to its plain language, so long as that language is clear and unambiguous and it is reasonable to do so. See *State ex rel. Utils. Comm’n v. Envir. Defense Fund*, 214 N.C. App. 364, 366, 716 S.E.2d 370, 372 (2011); *State ex rel. Utils. Comm’n v. N.C. Sustainable Energy Ass’n (NCSEA)*, 254 N.C. App. 761, 762, 803 S.E.2d 430, 432 (2017). Because the statute does not define “ancillary,” the term must be given its plain meaning.

“Ancillary” is commonly defined as “providing necessary support to the main work or activities of an organization,” see Oxford Learner’s Dictionaries, <https://www.oxfordlearnersdictionaries.com> (last checked December 30, 2022), or “(1) subordinate, subsidiary; (2) auxiliary, supplementary.” See <https://www.merriam-webster.com/dictionary/ancillary> (last checked December 30, 2022); *accord* Black’s Law Dictionary (11th ed. 2019) (“Supplementary; subordinate”). By its plain meaning, the term “ancillary” service would include any service that is “necessary” or “supplemental” to the primary service offered by a utility. *Cf. State ex rel. Utils. Comm’n v. Carolina Coach Co.*, 260 N.C. 43, 52, 132 S.E.2d 249, 255 (1963).

The Commission has already concluded above that the Parking Operations are necessary to the Ferry Operations. Indeed, by these unique circumstances, the Ferry is almost entirely dependent upon the Parking Operations, and the Parking Operations are almost entirely dependent on the Ferry Operations. To this end, the Commission notes and credits the testimony of Club witness Sawyer, who asserts that it “would practically be impossible for people to use the BHI ferry or for the ferry to operate without the parking facilities at the Deep Point ferry landing.” Tr. vol. 3, 208. And that — and the integral nature of the Parking Operations — is due in large part to the unique nature of Bald Head Island, as a largely automobile-free refuge, as well as how these adjoining services were planned from the outset to serve the other.

A simple way of looking at it would be to ask whether there would be any need for a sizable, several acre parking facility at Deep Point Terminal were the Ferry Operations instead a roll-on/roll-off car ferry to the Island. One merely has to look a short distance down Ferry Road to the NCDOT-operated Southport/Fort Fisher Ferry operations to

answer in the negative. See tr. vol. 2, 139 (“There’s not much parking there . . . [,]” only a “surface lot that is used to align cars [getting] on the . . . Ferry.”). It is also not entirely clear whether BHIT would have felt it necessary to move its operations from Indigo Plantation to Deep Point in the first instance but for the need for additional parking. To the contrary, as testified to by VBHI witness Wright and noticed and accepted by the Commission here, the records in other Commission dockets suggest that this move was, at least in part, driven by a need for additional, better equipped, and more secure parking facilities to serve ferry customers.

As early as 1998, Kenneth M. Kirkman, acting in his capacity as the COO and CLO for Bald Head Island Management Company, acknowledged the “parking concerns [of several BHIT customers]” and responded by citing the “development of a [new] mainland *ferry base*” —the Deep Point Terminal and its adjacent Parking Facilities that would open in 2009 —“which [was then] under construction [and] . . . [was] designed to help some of the problems *like parking* that [the Commission] heard about [that]day.” Transcript of Hearing, *Bald Head Island Transportation, Inc.—Proposed Change in the Operating Schedule of its Ferry Boats*, No. A-41, Sub 1, at 110-11 (N.C.U.C. September 3, 1998) (Sub 1 Transcript) (emphasis added).⁴

Witness Wright also noted documents from Docket No. A-41, Sub 6. There, BHIT filed with the Commission its Notice of the relocation of its mainland ferry terminal from the Indigo Plantation location to the then new Deep Point location. Attached to BHIT’s Notice is a copy of the January 2009 first edition of BHIT’s Deep Point Dispatch, which describes “relocating [*its*] mainland transportation facilities to Deep Point,” and in part directs customers to “turn off Ferry Road onto a well-marked entrance road around the perimeter of the main parking lots” in order to proceed to the terminal.⁵ *Notice by Bald Head Island Transportation, Inc. of Relocation of Ferry Terminal and Application for Approval of Revisions to Schedules*, No. A-41, Sub 6, Appendix 2 at 2 (filed April 30, 2009) (Sub 6 Notice). Nowhere does BHIT reference that the lots are separately maintained and are *not* part of BHIT’s transportation facilities, let alone offer for customers the availability of other public parking options. Also attached to the Sub 6 Notice is the March 2009 edition of the Deep Point Dispatch, wherein BHIT describes how after leaving the Island, passengers can easily “retrieve their car from the parking lot[s] prior to claiming their baggage,” “a simple matter of walking the short distances to the Premium [or General] Parking lot[s]”—these characteristics were touted as a benefit of the “new Transportation Facility at Deep Point.” *Id.*, Appendix 2 at 5. Again, BHIT claims the Parking Facilities as part of its Transportation Facility.

⁴ Therein, several public witnesses testified to parking concerns such as the insufficiency and insufficient availability of parking, the danger in accessing the lots, lack of adequate lighting or security, threat of towing despite having a parking pass, Bald Head Island’s operating as a monopoly regarding parking, etc. See Sub 1 Transcript at 9, 18-19, 30, 43, 53, 71.

⁵ This past treatment aligns with the facts set out above: that the Parking Facilities are the only parking option currently identified by BHIT’s website, which still directs ferry passengers to use the Parking Facilities when riding the ferry.

In this manner, the Parking Operations are no different than the tram operations, BHIT's operations on the other side of the system which are necessary to complete the transportation service on the Island. Respondents witness Paul admits that the tram service is subject to regulation, despite being a "different modality," and states that the tram service is not only ancillary to the Ferry Operations but is "fully incorporated into . . . the system[,]" having "always been designed to be that way." Tr. vol. 5, 135-36. Because of that, he continues, it is part of "the business of running the utility[,]" and integral and "important to the ferry service." *Id.* at 136. But the same can be said of the Parking Operations.

In short, the Commission finds compelling that the Deep Point Terminal facilities were built and marketed for many years to the public and the Commission as one single "ferry base," each was advertised and touted to be part of one "Transportation Facility," and each service was planned and specifically operated to serve the other's business operations and growth under a common ownership. There is no doubt that these Ferry and Parking Operations not only evolved together but were planned from the outset as necessary components of a single, holistic transportation service as early as 1998. Moreover, each operates to serve the other, and it would be practically impossible for the Ferry Operations to exist and operate as they do in their current state, or to transport the majority of Ferry passengers, without the Parking Operations.

The Commission also finds persuasive, though not directly on point, its historical treatment of telephone directory advertising. In addressing an application filed by Southern Bell for adjustment to its rates and charges for local and intrastate toll telephone service, the Commission found that the revenues, expenses, and net operating income of Southern Bell's directory advertising operation (i.e., the Yellow Pages) were properly includable in the utility's cost of service. After an appeal to the North Carolina Court of Appeals, which upheld the same, the Supreme Court rejected Southern Bell's argument that its Yellow Pages services were not essential or ancillary utility services. See *Southern Bell I*, 307 N.C. at 546, 299 S.E.2d at 766.

In doing so, the Supreme Court noted that "[t]he [Y]ellow [P]ages are a very useful and beneficial component in providing telephone service to the public[,]" they are "more than a convenience to newcomers in town who need [essential public services]," "there is presently no substantial competition posing a threat to Southern Bell's advertising market," and "unlike any competitor, Southern Bell is able to place those advertisements with or within the same book" to its great advantage over any possible competitors. *Id.* at 545-46, 299 S.E.2d at 765-66. As a result, the Supreme Court agreed with the Commission that Southern Bell's "great advantage over all competitors" and "preferred position with all its benefits and revenues is directly related to and a result of the Company's public utility function[,]" and therefore upheld the Commission's authority over those operations. *Id.* at 546, 299 S.E.2d at 766. The Parking Operations here enjoy just as great an advantage—in large part because of BHIL's relationship with BHIT—and are, like the Yellow Pages, presently existing without any substantial competition and "more than [just] a convenience" to Ferry users and are instead a necessary component of the Ferry service.

Later, after Southern Bell transferred its Yellow Pages publishing business to an unregulated subsidiary, the BellSouth Advertising and Publishing Company (BAPCO), BAPCO appeared before the Commission during a Complaint proceeding brought against BAPCO. There, among other things, BAPCO argued that because its principal business was publishing directories, including the sale of advertising therein, it was not providing utility service, was not part of the regulated utility, and therefore was not subject to the jurisdiction of the Commission. See *State ex rel. Utils. Comm'n v. Southern Bell Tel. & Tel. Co. (Southern Bell II)*, 326 N.C. 522, 523-24, 391 S.E.2d 487, 488 (1990).

This time in reversing the Court of Appeals, the Supreme Court reaffirmed the Commission's jurisdiction over the advertising services in large part because "BAPCO [was] performing this function for Southern Bell." *Id.* at 529, 391 S.E.2d at 491. The Court reasoned that "[p]roviding a telephone directory is a public utility function," and the Commission's jurisdiction over the function "continues even though the public utility transfers its duty to publish the directory to another entity." *Id.* at 531-32, 391 S.E.2d at 493. All said, the Commission concludes that the Parking Operation services are, at present, as necessary to BHIT's Ferry Operations—and its ability to provide adequate service to its customers—as the Yellow Pages services were to Southern Bell's utility functions in 1987.

The Commission further finds persuasive a review of several of the *Simpson* factors. See *Simpson*, 295 N.C. at 524, 246 S.E.2d at 756. The type of market served: the Parking Operations serve precisely the same market as do the Ferry Operations and its transportation service. The lack of competition in the local marketplace: there is no existing realistic alternative to the service provided. The kind of competition that naturally inheres in that market: while parking might ordinarily be a competitive market service, no other parking has naturally occurred in this area nor would any exist were the Ferry Operations to be located elsewhere. The existence of other governmental regulation that might protect the public: there is none. Finally, the effect of non-regulation: it allows the continued risk of a private entity holding captive those customers using the Ferry's transportation services. Each of these factors supports a finding that, at this time and as currently existing, the Parking Operations are an ancillary service to the Ferry Operations.

The Commission also notes that the General Assembly has implicitly recognized the same. In creating the Bald Head Island Ferry Transportation Authority (BHIFTA)—the stated goal of which is to provide reliable and safe public ferry transportation service to Bald Head Island's service area—pursuant to N.C.G.S. §§ 160A-180, *et seq.* (the Ferry Transportation Authority Act), the General Assembly defined "Ferry Transportation system" to include "[a] combination of real and personal property, structures, improvements, buildings, equipment, maritime vessels, vehicles, *vehicle parking*, trams, shuttle buses, docks, terminals, and other facilities necessary for the maintenance and operation of a ferry transportation service[.]" N.C.G.S. § 160A-181(5) (emphasis added), and BHIFTA's service area to include "parking . . . and other related facilities . . .," N.C.G.S. § 160A-682, and gave BHIFTA the general power to acquire or lease useful property, including "parking facilities." N.C.G.S. § 160A-685(c)(8) & (9). In other words,

the General Assembly recognizes that, at least some, parking facilities are necessary to the provision of reliable and safe Ferry Operations.

Relatedly, the Commission notes that it “is responsible for ensuring that . . . a public utility provides adequate and reliable service to North Carolina citizens at reasonable rates[.]” *State ex rel. Utils. Comm’n v. Carolina Power & Light Co.*, 359 N.C. 516, 521–22, 614 S.E.2d 281, 285 (2005), and that the General Assembly has empowered the Commission to supervise utilities and such ancillary services that are necessary to the public utility function in order “to protect the public from poor service and exorbitant charges which are normal consequences of a monopoly[.]” *State ex rel. Utils. Comm’n v. Buck Island, Inc.*, 162 N.C. App. 568, 584, 592 S.E.2d 244, 254 (2004); see also *O & M Indus. v. Smith Eng’g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006) (“[t]he Court may also consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute.”). The Commission notes that there is ample record evidence demonstrating that the Parking Facilities, as operated and existing (see Evidence and Conclusions for Findings of Fact Nos. 13 & 14, above), are a de facto monopoly.

To be sure, the Commission recognizes that parking, taken by itself, is not inherently a monopoly service and that, theoretically, a competitive alternative might later emerge to serve the public. When and if it does so, the Commission’s calculus might change. But that recognition does not alter the fact that, at present, by either planning or evolution the Ferry Operations have become interdependent upon the Parking Operations and that there are no existing practicable alternatives to that service. The Commission also recognizes that there are a number of impediments to the likely development of such a competitive alternative in the near term—not the least of which is that BHIT and BHIL intended the Transportation Facility to be an all-encompassing, and quite convenient, “ferry base” or that BHIT, BHIL, and the Town of Southport each direct ferry customers solely to use of the Parking Facilities. The practical realities of competing with a property owner who purchased the property in Southport long ago, and the natural disadvantages for future competitors—e.g., any competitive parking would be off-site, necessitating a shuttle service to and from the terminal, and at additional expense to the owner, and would be less convenient and therefore less desirable to potential passengers—make it unlikely that any near-term competition will arise in the market. Respondents witness Paul concedes that any entity that might “come in to create a secondary parking lot operation[and] shuttle” service nearby, even were that entity to “buy th[e] property . . . across the street[would be] taking a big chance on the fact that there is enough unit demand to support that, [especially given that] right now, other than a handful of times during the year, the unit demand is not there.” Tr. vol. 5, 171.

The Commission further acknowledges, but finds of limited use, the evidence presented by both Respondents and the Village of other ferry systems around the country and the parking offered in connection with those other systems. As a starting point, it is apparent that BHI presents a unique scenario, and there are multiple factual differences in the examples presented by Respondents witness Leonard and the evolution of the Parking Facilities serving BHI. Most of the examples cited by witness Leonard show more than one

parking lot or garage alternative nearby, see tr. vol. 5, 220-21, 227-33; tr. vol. 5, Wright Rebuttal Exhibit JAW-7; see *also* tr. vol. 4, 100-11; tr. vol. 4, Leonard Cross Exhibit 1; others have multiple public transportation options available to access the ferry, see tr. vol. 3, 31; some involve more than one ferry operator traveling to the same location; and still many others involve the ability for members of the public to drive their own vehicles over a bridge or *even fly* to the island in question. Here, quite obviously, due to the automobile-free nature of the Island, ferry customers are forced to leave their vehicles at the Parking Facilities on the mainland. Finally, there has been no demonstration that any of the examples relied upon by witness Leonard arise in comparable regulatory settings. As such, the Commission does not find these ferry/parking examples to be compelling.

For the foregoing reasons, the Commission concludes that the Commission has jurisdiction and regulatory authority over the Parking Operations, as currently owned and operated by the Ferry Operations parent corporation, as ancillary services within the meaning of N.C.G.S. § 62-3(27).

BHIL is the parent corporation of BHIT, and its affiliation also has an effect on the rates and service of BHIT

Pursuant to N.C.G.S. § 62-3(23)(c), the Commission also has jurisdiction over “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.” For many of the same reasons noted above, the interdependency of the Ferry and Parking Operations means that BHIL’s affiliation with BHIT has at least some effect on both the rates and service of the Ferry Operations. The Commission therefore has jurisdiction over BHIL’s Parking Operations to the extent they impact BHIT’s service and rates.

First, the Commission concludes that BHIL’s affiliation with BHIT and its control of the Parking Operations have at least some impact upon Ferry Operations and service. As described above, BHIT’s new Transportation Facility was planned from the outset to include BHIL’s Parking Operations and provide such parking to ferry passengers as was necessary to adequately serve those customers. And there is no doubt these Parking Facilities were provided—in this case by BHIL—in part to alleviate specific Ferry customer concerns. Sub 1 Transcript at 110-11. There is also little doubt that the affiliation between parent and subsidiary allows BHIT to provide more convenient access to parking for the benefit of its customers. See Sub 6 Notice, Appendix 2 at 5. As stated above, were the Parking Operations to cease operation tomorrow, the public’s use of the Ferry service would be significantly impaired. There is also at least some uncertainty whether, without the move to Deep Point Terminal to include the Parking Facilities, Bald Head Island would command the same level of tourism or ridership on the Ferry—given the inability of the former ferry terminal or the Town of Southport to accommodate some 2,000 public, long-term parking spots.

Second, it is also easy to conclude on this record that this same interdependent relationship—and potential impact to ferry ridership—has an effect on rates. Stating the

obvious, generally the easier BHIL has made it for customers to access the Ferry Operations has meant more riders on the Ferry; more riders mean more revenues. All else being equal, more riders and more revenues translates over time to lower rates for those ferry customers. See tr. vol. 3, 8, 250; tr. vol. 4, 37 (SharpVue witness Roberts explaining that it costs the same to run ferry whether empty or full and, as such, “the path to profitability is through increase in the ridership” and thus it is in the ferry utility’s interest to increase and maintain increased ridership).

The affiliation also strongly suggests to the Commission that BHIL has been subsidizing the Ferry Operations because BHIL views the Parking and Ferry Operations as connected. The Parking Operations have provided substantial positive cash flow and strong positive financial net income. In contrast, the Ferry has consistently shown annual financial losses. See, e.g., tr. vol. 1, 172. Yet BHIT has not filed a general rate case since 2010. Some witnesses opined that it has not done so because, if properly included, the overall rate of return on BHIL’s transportation-related businesses — its combined Parking and Barge Operations and BHIT’s Ferry Operations — would be nevertheless above what a public utility would be entitled to earn were the system to come under Commission review. As discussed more fully below, the Commission leaves to a future proceeding how to properly account for or quantify the effect the affiliation has on BHIT’s rates.

Finally, the Commission notes that BHIL’s affiliation has already had a direct effect upon BHIT’s rates. The parties agreed to a regulatory outcome in the last rate case where BHIL’s affiliation with the Ferry Operations not only directly — and quantifiably — affected the rates that BHIT was permitted to charge for its Ferry services but also controlled the rates that BHIL could charge for its Parking Operations (see Evidence and Conclusion for Finding of Fact No. 24, below). Respondents witness Paul agreed that the imputation of the approximately \$525,000 of revenue from the Parking Operations was in part “a product of the fact that the intervenors in the rate case had requested and were advocating that the Commission regulate the parking operations[.]” Tr. vol. 5, 160. Although not binding upon the parties in future proceedings, BHIL’s affiliation with BHIT, its intervention in the 2010 Rate Case, and this imputation directly affected the rates that BHIT has charged for Ferry service since 2010.

For the foregoing reasons, the Commission concludes that the Commission has jurisdiction and regulatory authority over the Parking Operations, as currently owned and operated by the Ferry Operations parent corporation, that have an effect on the rates or service of BHIT within the meaning of N.C.G.S. § 62-3(23)(c).

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 24

The evidence supporting this finding of fact is contained in the 2010 Rate Case Order and the testimony and exhibits of VBHI witnesses Wright and O’Donnell, and Respondents witness Mayfield.

The Commission’s 2010 Rate Case Order included several acknowledgments or determinations that are consistent with the Commission’s conclusions reached above. First,

the Order notes that the Public Staff testified “that the parking revenue adjustment of \$523,097 reflects a compromise that considers projected operating results of the parking facility over a period of years.” 2010 Rate Case Order at 17. In the present docket, witness O’Donnell reviewed the Public Staff’s workpapers, explaining that they show the \$523,097 revenue adjustment was calculated by assuming that the parking assets were subject to regulation and put in rate base. See tr. vol. 1, 185-186; tr. vol. 2, 13-15; tr. vol. 2, KWO Redirect Exhibit 1. Witness O’Donnell further explained that although BHIT’s rate base was not changed to include the parking assets, the stipulation effectively created the same result by treating the parking operations as if they were regulated. Tr. vol. 1, 186.

Second, the Commission expressly determined therein that BHIL was a “public utility” under Chapter 62 because it was the parent corporation of BHIT and BHIL’s operations would have an impact on BHIT’s rates or services. See 2010 Rate Case Order at 4, Finding of Fact No. 2 (“BHIL is subject to the jurisdiction of the Commission to the extent provided for in G.S. 62-3(23)c . . .”). This finding is at least some evidence of an existing recognition by the Commission that some of BHIL’s operations in North Carolina subject it to treatment as a public utility as BHIT’s parent corporation.

Third, the Island Terminal was included in rate base at its depreciated net book value. 2010 Rate Case Order at 13. Notably, the reclassification resulted in a reduction in BHIT’s revenue requirement. See *id.* Likewise, gain on the sale of the Indigo Plantation terminal lease was reflected as a reduction in expenses. See *id.* This was a benefit to the ferry ratepayers despite the fact that the terminal was owned by BHIL. The treatment of these assets reflects the understanding that terminal assets are necessary for the provision of ferry service and, therefore, are considered ancillary facilities.

Fourth, BHIT and BHIL also agreed — consistent with codes of conduct governing transactions between other utilities regulated by the Commission and their unregulated affiliates — that charges to BHIT from affiliates would be priced at the lower of cost or fair market value and that charges by BHIT to affiliates will be priced at the higher of cost or fair market value. See *id.* at 10. This treatment of affiliate transactions meant that if BHIL were to transfer the parking facilities to BHIT, the assets would be priced at original cost unless the fair market value of the asset was less than original cost.

Fifth, BHIT and BHIL also agreed and were ordered to provide notice to the Public Staff and the Commission of any sale or lease of the Parking Facilities not less than 90 days prior to the scheduled closing date for the sale or lease. See *id.* at 6. This requirement of notice is at least some recognition of the relationship between the Parking and Ferry Operations.

The Commission acknowledges that settlements and stipulations, such as the one entered into as part of the 2010 Rate Case, are the result of negotiation and compromise. Such stipulations are not precedential or binding upon the parties or the Commission in future proceedings. The Stipulation and Order set forth the same. See, e.g., Stipulation at 2 (item 2.C.i) (agreeing that “[t]he imputation of . . . revenues . . . establishes no binding precedent for future cases[] and shall not be binding in future cases as a reason

for or against imputation of parking revenues or any other regulatory treatment of parking operations”); 2010 Rate Case Order at 6, 7.

Nevertheless, after careful consideration, the Commission concludes that various determinations made by the Commission in the 2010 Rate Case Order, determinations that were premised in part on BHIT’s and BHIL’s own agreements and acknowledgments, are consistent with the Commission’s asserting jurisdiction and regulatory authority over the Parking Facilities in the instant proceeding.

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 25-33

The evidence supporting these findings of fact is contained in the testimony and exhibits of VBHI witnesses Munroe, Corvin, Gardner, Cox, Boyett, and Wright, Club witness Sawyer, and Respondents witnesses Fulton and Paul.

These findings and conclusions generally relate to the daily operation and attributes of the Barge. Although their importance to the issues presented, and whether the evidence meets certain statutory language, is contested by the parties, the facts themselves are not contested by any party.

Respondents witness Fulton generally describes that the Barge Operations consist of a single barge, the *Brandon Randall*, with an approximate 100-foot by 32-foot steel deck that can carry up to 200 tons, and its tugboat, the *Captain Cooper*. Tr. vol. 4, 65. He explains that the barge is a roll-on/roll-off vessel that transports vehicles of varying sizes. Several witnesses explained that the Barge is held out to the general public, and BHIL charges based upon the amount of deck space occupied by the transporting vehicle. See, e.g., *id.*; tr. vol. 3, 49. BHIL does not separately charge for vehicle passengers —of which up to 12 are permitted to travel in their vehicles —and does not charge different rates based upon what cargo or persons, if any, a vehicle carries.

The record is also replete with testimony concerning the nature and extent of the types of items transported in vehicles on the Barge, the types of vehicles and reasons for their transportation (e.g., construction, municipal services, mail delivery, etc.), and the operation of the Barge for other reasons, including coordinating with Ferry Operations during major emergencies to evacuate persons and property. There is no doubt that the Barge Operations provide necessary service to the Island —it is the only way to get most of the amenities and supplies that are needed to support essential services, tourism, development, as well as the ability to reside, on the Island.

There is also no dispute that the Coast Guard inspects the Barge as a “freight barge” under 46 CFR Chapter I, Subchapter M, and permits the Barge to carry 12 persons in addition to its crew in accordance with 46 U.S.C. § 3304. The Coast Guard does not currently inspect the Barge as a passenger ferry.

Based on the findings and consideration of the entire record, the Commission finds and concludes that the Barge Operations are necessary for the public welfare, as for the provision of most, if not all, public services, on Bald Head Island.

EVIDENCE AND CONCLUSIONS FOR FINDING OF FACT NO. 34

The evidence supporting this finding of fact is contained in the testimony and exhibits of VBHI witnesses Munroe, Corvin, Gardner, Cox, Boyett, and Wright, Club witness Sawyer, and Respondents witnesses Leonard, Paul, and Fulton, and the entire record.

The Commission incorporates the standard of law and discussion from its section setting out the Evidence and Conclusions for Findings of Fact Nos. 22-23, set out above. Again, pursuant to N.C.G.S. § 62-3(27), the Commission has jurisdiction and regulatory authority over “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.*” (Emphasis added). After careful consideration of the entire record, the Commission concludes that the Barge Operations are subject to the Commission’s jurisdiction and regulatory authority as an ancillary service to the Ferry Operations.

The Commission finds and concludes that the Barge service is not only ancillary to the Ferry Operations but necessary to the very existence of the Island as a destination to which the public might wish to travel. The Commission notes that “[a]ny service . . . which is desirable for the public welfare and highly important to the public convenience may be properly regarded as necessary.” *Carolina Coach*, 260 N.C. at 52, 132 S.E.2d at 255. The evidence supporting such a conclusion is ample.

VBHI witness Wright stated that without the Barge Operations, there would be no reason for the vast majority of passengers to ride the Ferry to visit the Island. Tr. vol. 5, 217. Witness Gardner stated that “[w]ithout access to the ferry, parking and the barge, the Island will cease to exist and function in its current form.” Tr. vol. 5, 185. Over 400 Bald Head Island property owners signed onto a statement explaining that “[f]ew would bother to park at Deep Point if the passenger ferry did not run, just as few would bother to park and get on the passenger ferry if the barge did not transport goods needed to sustain the BHI community.” The Commission not only credits and finds the above to be true but axiomatic.

Likewise, there is little doubt that BHIL has run the various components of the transportation service as one coordinated transportation system. When BHIL was first in discussions with SharpVue and other private equity buyers to sell these assets, it highlighted that “everything necessary to sustain human endeavor on Bald Head Island” and “the majority of—whether it be humans or material”—“arrive[s] by some sort of vessel crossing the river . . . ,” with BHIL being “the single service provider for [that service], inasmuch as [it has] been the single service provider for that [transportation service] since the Mitchells bought the island in 1983.” Tr. vol. 5, 146-47. The consolidation and integration of the four components of the transportation service—the Ferry, Barge, and Parking Operations, together with the island tram service—was seen as essential to the sustained viability of this system. *Id.* at 148-49.

Witness Gardner further explained that “[d]uring major events like a hurricane, . . . it is critical that all transportation assets[,]whether it be the ferry, barge or parking,” function together to “ensure the safety of the public.” Tr. vol. 2, 36. Club witness Sawyer explained that each service was an “essential and indispensable component[] of a commercially owned transportation system that serves one market: Bald Head Island.” Tr. vol. 3, 208.

The Commission also notes that both the Barge and the Ferry travel to and from the same general locations, from the Deep Point “ferry base” to the Island marina area, and that the four BHIT ferries and BHIL’s barge and tugboat are each serviced by BHIT’s Marine Maintenance department at the same facility, leased and operated by BHIT, using the same staff and shop resources, also located at Deep Point. Tr. vol. 4, 67-68; tr. vol. 5, 38, 61-62. Although BHIL performs accounting measures to allocate these repair services to either the Ferry and Barge Operations, see tr. vol. 5, 38-39, witness Paul—BHIL’s CEO and BHIT’s President—viewed these expense allocations to be mere “machinations,” *id.* at 149, essentially an unnecessary façade.

Based on a consideration of all of the evidence, the Commission finds that the Ferry, Parking, and Barge Operations function as interdependent components of a single transportation system upon which the community of Bald Head Island wholly depends. The Barge currently is the exclusive public means to transport numerous commodities, all: food and beverage, office supplies, appliances (to include refrigerators and air conditioners), construction supplies, emergency personnel, utility workers, etc. Without the Barge, sustenance, building, entertainment, and lodging on the Island would suffer. The Commission notes that a significant number of the passengers on the Ferry are employees of Island businesses or construction or service workers. Without the Barge servicing those industries these passengers’ ridership would be impacted. Without these services, the Ferry Operations would either have to provide the same or most public travel to the Island would cease.

The Commission further notes that each Barge also transports up to 12 persons to and from the Island, which represents roughly 8% of each Ferry’s capacity. In other words, there are up to 12 fewer persons who do not have to buy tickets on the Ferry (or up to 120 fewer persons a day if at full capacity for each Barge trip, e.g., during the summer months) for each Barge trip made to and from the Island. In short, this service not only impacts Ferry ridership but is an ancillary transportation service that would otherwise need to be met by the Ferry Operations.

Again, the Commission notes that the General Assembly has implicitly recognized that the Barge Operations are ancillary services to the Ferry. In the Ferry Transportation Authority Act, the General Assembly defined “Ferry Transportation service” to include “[t]ransportation of passengers or freight by any means of conveyance, including a ferry, barge, vehicle, or tram[.]” N.C.G.S. § 160A-181(4) (emphasis added), and gave BHIFTA the general power to acquire or lease property useful to the ferry service, to include the “barge service.” N.C.G.S. § 160A-685(c)(8), (9). It makes little sense that the General

Assembly would empower the Authority to purchase a privately operated barge asset if it did not also view the barge as necessary to the Ferry Operations.

And the Commission views the Ferry and the Barge Operations as simply two different types of boats by which the single transportation system chooses to operate. *Cf. State ex rel. Utils. Comm'n v. Nantahala Power & Light Co.*, 313 N.C. 614, 725, 332 S.E.2d 397, 462 (1985) (“This Court has repeatedly recognized the propriety of ‘piercing the corporate veil’ in the context of utility regulation.”), *rev'd on other grounds*, 476 U.S. 953, 90 L. Ed. 2d 943 (1986); *see also id.* at 732, 332 S.E.2d at 467 (“The Commission properly found that Nantahala and Tapoco were designed and operated as a single system . . .”); *accord State ex rel. Utils. Comm'n v. Edmisten*, 299 N.C. 432, 443, 263 S.E.2d 583, 591 (1980) (“This device does nothing more than recognize that the two corporate entities ought, for rate making accounting purposes, be treated as the one electrical power producing and distribution system which, in fact, they are.”); *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 272, 177 S.E. 2d 405, 416 (1970) (for purposes of regulation, “a parent corporation and its wholly-owned subsidiaries may be treated as one.”). Were it not for the automobile-free nature of BHI, there would be no need for a different type of boat, and the Ferry Operations would simply substitute for the Barge Operations, albeit transporting a greater number of total vehicles but a similar number of persons (including those now traveling on the Barge). All transportation to the Island would be handled by BHIT’s vehicle ferries (which would now each carry both persons and vehicles). The Barge services currently offered by BHIL differ from this hypothetical only to the extent that the majority—but certainly not all—of their passenger-driven vehicles are private construction, service, or commercial delivery vehicles (or at times even personal watercraft or golf carts out for repair, *see, e.g.*, tr. vol. 2, 123), as permitted by VBHI through its ICE permit system. The Barge Operations simply allow some persons to travel to BHI with those few vehicles that are allowed on the Island. The Barge services also are fundamentally no different than the services provided by the various state-run, roll-on/roll-off vehicle ferries, including the one located just down Ferry Road, except for the fact that the Southport/Fort Fisher Ferry is run by NCDOT and not a private entity. *See* tr. vol. 5, 134, 220, Wright Rebuttal Exhibit JAW-5. BHIL’s choice to purchase, maintain, and operate two types of boats to provide this single service does not compel an opposite conclusion.

As such, the Commission concludes that the Barge Operations, as currently owned and operated by the Ferry Operations parent corporation, are at the least an ancillary service to the Ferry Operations and are thus subject to the Commission’s jurisdiction and regulatory authority. Based on this determination, the Commission further concludes that it is unnecessary to reach the alternative grounds argued by VBHI in support of the Commission’s regulatory jurisdiction—that is, whether the Barge Operations are a common carrier service which transports persons or household goods within the meaning of N.C.G.S. §§ 62-3(6) and (23)(a)(4).

EVIDENCE AND CONCLUSIONS FOR FINDINGS OF FACT NOS. 35-38

The evidence supporting these findings of fact is contained in the testimony and exhibits of VBHI witnesses Munroe, Gardner, and Cox, Club witness Sawyer, BHA witness Briggs, and Respondents witness Leonard.

The parties presented substantial evidence that the public supports Commission oversight over both the Parking and Barge Operations. This support comes from property owners, Island business owners, and residents, alike. See, e.g., tr. vol. 1, 101, 115; tr. vol. 2, 30. The Commission also acknowledges the survey submission of, and resolution passed by, the Bald Head Association, an association that includes nearly every homeowner and property owner on the Island, which also overwhelmingly supported the same. See tr. vol. 5, 187 & BHA Exhibit 1 (survey results); tr. vol. 3, 184. Likewise, the Bald Head Island Club, a member-owned club which has over 2,000 member families and provides golf courses, tennis courts, and related recreational and social facilities on the Island, supports regulation. Tr. vol. 3, 205, 207. Finally, the Commission notes the several consumer statements filed in this docket, including an August 1, 2022 Consumer Statement of Position, signed by over 400 BHI property owners and including numerous individual statements in support of regulation. See tr. vol. 2, Gardner Exhibit STG-1.

Further, the Public Staff and Respondents also provided some evidence in support of the exercise of limited Commission oversight, at least with respect to the Parking Operations. The Public Staff recognized that “the availability of adequate and reasonably priced parking is required for this unique utility to provide service to its customers,” “it would be nearly impossible for customers to use the ferry without an adequate amount of parking offered at reasonable rates,” and thus “Commission scrutiny [is warranted] to ensure that ferry customers are protected” Public Staff Initial Comments at 5. Respondents witness Leonard also admitted it was reasonable to require for the public’s use “reasonable access to a sufficient amount of suitable parking facilities.” Tr. vol. 4, 74-75.

The Commission also credits the ample evidence demonstrating that, at present, both the Parking and Barge Operations are operating as de facto monopolies and that Island residents, visitors, and other Ferry customers are captive to the same. See, e.g., tr. vol. 1, 149-50, Wright Exhibit JAW-10 (“[T]he barge and tug system which BHIL operates between the mainland and the island is the only vehicle freight transportation system servicing that route.”); tr. vol. 3, 36-37; tr. vol. 5, 185, 217 (“the barge service is . . . a monopoly service with no other way for the public to transport large household goods or delivery vehicles to get to the Island . . .”). Indeed, it appears only by the grace and further interest of the Island’s developer, that this position was not substantially abused.

After careful consideration of the entire record and emphasizing the great weight of public support for regulation of these operations, the Commission concludes that it is in the public interest for the Commission to exercise jurisdiction and regulatory authority over the Parking and Barge Operations.

This is not to say that the status quo must immediately change. The Commission notes that there has been no substantiated allegation that BHIL is, at present, abusing its monopoly power, only that the risk exists for it—or a future owner—to do so. See, e.g., Post Hearing Brief on Behalf of Bald Head Association at 7; tr. vol. 3, 171 (Association witness Briggs testifying: “We have a good deal there. There’s no question . . . [i]t’s reasonable.”). Also, there has been some assurance from SharpVue that it intends to continue to provide these services at reasonable rates and consistent with past practices. Further, although there has been suggestion that the total transportation system may be overearning, see, e.g., tr. vol. 1, 187, no party has asked this Commission to initiate a general rate proceeding, and the great weight of the evidence shows that, at present, the parties are generally satisfied with the current rates and services of both BHIL and BHIT, as well as the agreement they struck in the last general rate case involving the Parking Operations.

The Commission also notes witness Mayfield’s discussion of other potential questions that may arise were the Commission to assert jurisdiction over these Operations—e.g., how would the Commission analyze and determine the value of certain assets, which and how would the Commission include those assets in rate base, as well as how would the Commission address cost allocation and rate design for various, different services for various, different classes of customers? See tr. vol. 5, 43-46. But no party has sought to present evidence on the panoply of matters appropriate for full review or determination in a general rate case. To this end, the Commission agrees with witness Mayfield that this docket is a premature, and improper, forum in which to address such issues.

As a result, and as requested, the Commission treats the Complaint only as a request for a declaration of utility status. The Commission does not treat the Complaint as a request to initiate a rate proceeding and does not require either BHIT or BHIL, separately or jointly, to file a general rate case at this time. See *generally State ex rel. Utils. Comm’n v. Carolinas Comm. for Indus. Power Rates*, 257 N.C. 560, 569-70, 126 S.E.2d 325, 332-33 (1962). Without more and absent any requested change, the Commission permits the status quo—and the current rates and services of the Parking and Barge Operations—to continue.

The Commission also finds that there is no other similar service or franchise existing or available in the territory served by either the Parking or Barge Operations. It thus concludes that it is in the public interest for the Parking and Barge Operations to continue to operate, consistent with their existing operation, rates, and services, and, as a result, the Parking and Barge Operations are granted temporary authority to operate in the interim pending any future proceeding. See N.C.G.S. § 62-116. For these reasons, the Commission concludes that the Parking Operations may continue to operate, consistent with any terms and conditions as approved by the 2010 Rate Case Order, and the Barge Operations may continue to operate under their existing rates, terms, and conditions, each as an ancillary service covered under BHIT’s certificate of public convenience and necessity (CPCN), and under BHIT’s current reporting obligations, pending further Order of the Commission.

Relatedly, the Commission notes that several parties, including the Public Staff and the Association, have proposed that the Commission exercise a lesser degree of oversight—a light touch, as it were—for either one or both of the utility operations at issue in this proceeding. Both the Public Staff and the Association argue that it is unnecessary for the Commission to approve or review the specific terms and conditions of the Parking Operations, so long as parking remains adequately available and reasonably priced. Again, these issues are not appropriate for determination in this docket on the available evidence in this record.

The Commission highlights that it has in the past found varying degrees of oversight to be reasonable and appropriate for certain utilities, services, or classes of utilities, for a variety of reasons and depending on circumstances—to include simple notice for some utility actions or even outright deregulation of previously regulated services based upon the development of other competition or the existence of other consumer protection measures. See, e.g., Sub 49 Order; see also *Notice of Proposed Revisions of Certain Rules in Chapter 2 & Chapter 5 of the Rules & Regulations of the N.C. Utilities Commission*, No. M-100, Sub 109 (N.C.U.C. May 20, 1986). The Commission has also made reasonable accommodations for certain industry functions without requiring full rate or tariff review. See Order Adopting Rule, *Petition of Bald Head Island Transportation, Inc., Davis Shore Ferry Service, LLC, Waterfront Ferry Service, Inc., and Morris Marina, Kabin Kamps & Ferry Service, Inc., to Establish Guidelines or Rules to Implement a Fuel Cost Surcharge*, No. A-100, Sub 0 (N.C.U.C. Jan. 29, 2009). The Commission is generally guided by the principle that its authority only need be imposed to achieve the purposes for the regulation. However, this Order leaves these, and other questions—e.g., whether a certain amount of, or in what iteration, parking must be made available to ferry passengers—for another day, when such matters are properly pending before the Commission. Because these questions were not presented by the Complaint and, as a result, there has been incomplete evidence and argument presented upon them, the Commission declines to expand the scope of this proceeding to determine the same.

Further, the Commission concludes that the requirements of N.C.G.S. § 62-111(a) and (e) do apply to both the Parking and Barge Operations. Therefore, BHIL shall not sell, assign, pledge, or transfer the Parking or Barge Operations without prior Commission approval or before the Commission has determined whether any such transfer is justified by the public convenience and necessity. See N.C.G.S. § 62-111(a); see also *State ex rel. Utils. Comm'n v. United Tank Lines, Inc.*, 34 N.C. App. 543, 549-50, 239 S.E.2d 266, 269-70 (1977), *cert. denied*, 294 N.C. 363, 242 S.E.2d 633 (1978). As a result, the Commission dismisses as moot VBHI's Motion for Preliminary Injunction, previously held in abeyance.

Finally, the Commission emphasizes that the findings and conclusions set forth in this order are unique to this proceeding and its ruling is limited to the Parking and Barge Operations as currently operated and commonly owned by the Ferry Operations parent corporation. See generally *Cape Hatteras Elec. Membership Corp. v. Stevenson*, 249 N.C. App. 11, 17, 790 S.E.2d 675, 679-80 (2016) (declaratory ruling limited to the facts

and circumstances presented); *cf. Texas v. United States*, 866 F.2d 1546, 1555 (5th Cir. 1989) (the declaratory ruling is “[r]endered in a specific factual context and resolv[es] only the question presented by [the] petitions . . .”). None of this is to say that circumstances cannot evolve that might change the utility status of part, or all, of these assets, the basis for or public interest supporting regulation, or the type or degree of oversight required of the Commission. See generally *State ex rel. Utili. Comm’n v. Coach Co.*, 261 N.C. 384, 389, 134 S.E.2d 689, 694 (1964) (“There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition.”); *Poovey v. Vista N.C. Ltd. P’ship*, 271 N.C. App. 453, 467 n.7, 843 S.E.2d 336, 345 n.7 (2020) (“The means of providing a particular utility may change over time . . .”), *disc. review denied*, 376 N.C. 671, 853 S.E.2d 157 (2021); see also Order Canceling Franchise and Requiring Customer Notice, *Application for Authority to Discontinue Water and Sewer Utility Service in White Horse Subdivision*, No. W-837, Sub 1 (N.C.U.C. January 23, 2002) (the Commission holding that a landlord/mobile home park owner that stopped charging tenants separately for water and sewer service was no longer a public utility subject to regulation by the Commission).

IT IS, THEREFORE, ORDERED as follows:

1. That the Parking Operations are subject to the Commission’s jurisdiction and regulatory authority;
2. That the Barge Operations are subject to the Commission’s jurisdiction and regulatory authority;
3. That the parties shall not be required to file a general rate case at this time;
4. That it is in the public interest for the Parking and Barge Operations to continue to operate, consistent with their existing operation, rates, and services, and therefore are, hereby, granted temporary authority to do so pending further Order by the Commission;
5. That the Parking and Barge Operations may continue to operate under BHIT’s CPCN pending further Order by the Commission; and

6. That BHIL shall not sell, assign, pledge, or transfer the Parking or Barge Operations without prior Commission approval.

ISSUED BY ORDER OF THE COMMISSION.

This the 30th day of December, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Erica N. Green".

Erica N. Green Deputy Clerk

Commissioner Kimberly W. Duffley concurs in result in part and dissents in part.

Chair Charlotte A. Mitchell and Commissioner Karen M. Kemerait did not participate in this decision.

DOCKET NO. A-41, SUB 21

Commissioner Kimberly W. Duffley, concurring in result in part and dissenting in part:

I write separately to concur in the result in part and to dissent in part. Specifically for my concurrence in result in part, I concur with Ordering Paragraph No. 6 relating to the parking operation of BHIL. To the extent that I have not concurred with the majority in this separate opinion, I dissent.

The Complainant requested that the Commission make several determinations: (1) that the Commission determine that the parking operation of BHIL provides ancillary and integral services and facilities to BHIT's ferry service and thus is subject to the Commission's jurisdiction as an integral part of the regulated ferry service, or in the alternative, that the BHIL parking operation is regulated as a public utility pursuant to N.C.G.S. § 62-3(23)c.; and (2) that the Commission determine that the barge operation of BHIL is a public utility under N.C.G.S. § 62-3(23)a.4. The majority concludes that the BHIL parking operation constitutes a public utility pursuant to N.C.G.S. § 62-3(23)c. The majority does not rule on whether the BHIL barge operation is a public utility pursuant to N.C.G.S. § 62-3(23)a.4. The majority also asserts jurisdiction over the BHIL parking operation and barge operation as ancillary services necessary to BHIT's ferry service, the regulated common carrier entity.

The definition of a public utility is within the definitions section of Chapter 62. Section 62-3(23)a. defines the six categories of utilities that constitute a public utility under Chapter 62. Specifically, N.C.G.S. § 62-3(23)a. defines a public utility as a person owning or operating equipment or facilities for the provision of the following six services to or for the public for compensation. The statute is technical but in layman's terms the six categories are: (1) electric service, (2) water and sewer service, (3) bus service, (4) common carrier service, (5) natural gas service, and (6) telephone service. Subsections 62-3(23)b. through 62-3(23)n. set forth further clarification on what constitutes a public utility and what does not constitute a public utility for purposes of Chapter 62 based upon unique circumstances. However, all of the unique circumstances are within the context of the definition of a public utility as set forth in N.C.G.S. § 62-3(23)a.

Clearly the service of parking does not fall within one of the six categories of public utility service under N.C.G.S. § 62-3(23)a. As for the barge service, the Complainant requested that the Commission find that the barge service is a common carrier pursuant to N.C.G.S. § 62-3(23)a.4. The majority did not decide whether the barge service constitutes a public utility as a common carrier under N.C.G.S. § 62-3(23)a.4, and I, too, will not address this issue at this time. However, what can be surmised is that the majority found its jurisdiction over BHIL's barge operation outside of the definition of a public utility pursuant to N.C.G.S. § 62-3(23)a.

Parking Operation

As the parent of BHIT, BHIL's parking operation may constitute a public utility under N.C.G.S. § 62-3(23)c. under certain circumstances. Section 62-3(23)c. defines the term "public utility" to include the parent corporation of a public utility doing business in this State *only* to such an extent that the Commission shall find that such affiliation has an effect on the rates or service of such public utility. I concur with the majority that pursuant to N.C.G.S. § 62-3(23)c., the parking operation of BHIL, the parent company of BHIT, is a public utility only to the extent that it has an effect on the rates and service of the regulated ferry service of BHIT. In BHIT's last general rate case in 2010, revenues from the parking operation were included in determining just and reasonable rates to be charged by the regulated public utility, the BHIT ferry service. Order Granting Partial Rate Increase and Requiring Notice, *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. Dec. 17, 2010). Thus, BHIL's parking operation has an effect on BHIT's rates. As to whether BHIL's parking operation has an effect on the service of BHIT, the Respondents acknowledge in their proposed order that some level of oversight to maintain an adequate number of parking spaces may be appropriate and offer that the Commission has the ability to impose relevant conditions related to parking on any prospective certificate transfer in Commission Docket No. A-41, Sub 22. For these reasons, I concur with the majority that at the present time it is appropriate to order that BHIL shall not sell, assign, pledge, or transfer the parking operations without prior Commission approval. I disagree with the majority in ordering the parking operation to operate under BHIT's CPCN and in purporting to grant temporary authority and approval of existing rates and services of the parking operation as if it were a public utility subject to the Commission's full authority under N.C.G.S. § 62-3(23).

Barge Operation

The majority does not appear to use N.C.G.S. § 62-3(23)c. to find jurisdiction over the barge operation. Rather, the majority states that the ferry, parking, and barge operate as interdependent components of a single transportation system. In the alternative or in addition, the majority finds that the barge operation is at the least an ancillary service to the ferry service. I do not agree with the majority that the barge operation is part and parcel of the ferry service to the extent that it needs to operate under the BHIT's CPCN until further order by the Commission. I also do not agree that the barge operation is an ancillary service to BHIT's common carrier service. Rather, the barge operation is a service for the benefit of the commercial success of Bald Head Island, such as, for example, transporting commercial goods like food and construction materials. The proper utility function of the public utility in this case, the BHIT common carrier service, as outlined in its CPCN, does not include mention of any type of barge service or transportation of commercial goods. I agree with the Public Staff that "[w]hile the 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." Public Staff Comments at 11. Therefore, I disagree with the majority's directive that BHIL shall not sell, assign,

pledge, or transfer the barge operation without prior Commission approval. I also disagree with the majority in ordering the barge operation to operate under BHIT's CPCN and in purporting to grant temporary authority and approval of existing rates and services of the barge operation as if it were a public utility subject to the Commission's full authority under N.C.G.S. § 62-3(23).

For these reasons, I respectfully concur in result in part and dissent in part.