

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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| In the Matter of |) | |
| Village of Bald Head Island, |) | |
| Complainant, |) | |
| |) | |
| v. |) | ORDER ALLOWING |
| |) | COMPLAINANT'S MOTION TO |
| Bald Head Island Transportation, Inc., |) | JOIN NECESSARY PARTY |
| and Bald Head Island Limited, LLC, |) | |
| |) | |
| Respondents. |) | |

BY THE COMMISSION: On February 16, 2022, the Village of Bald Head Island (VBHI or Complainant) filed with the Commission in the above-captioned docket a Complaint and Request for Determination of Public Utility Status (Complaint) against Bald Head Island Transportation, Inc. (BHIT), and Bald Head Island Limited, LLC (BHIL, and collectively, Respondents). The Complaint in part seeks a ruling upon the regulatory nature of the Deep Point Parking Facilities and the Barge (Unregulated Assets) owned by BHIL, alleging, among other things, that they are essential to, and a component of, the regulated public utility ferry service (Regulated Assets) provided by BHIT.

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 Complainant's Motion to Join Necessary Party (Response).

On July 13, 2022, VBHI filed a Reply to Respondents' Response to the Village's Motion to Join Necessary Party (Reply).

DISCUSSION AND CONCLUSIONS

North Carolina Rule of Civil Procedure 19(b) provides that "when a complete determination of [a] claim cannot be made without the presence of other parties, the court shall order such other parties summoned to appear in the action." N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 19(b). Another party must be summoned when the court cannot "determine the claim before it without prejudicing the rights of . . . [the party] not before the court." *Ludwig v. Hart*, 40 N.C. App. 188, 190, 252 S.E.2d 270, 272, *cert. denied*, 297 N.C.

454, 256 S.E.2d 807 (1979). North Carolina's Declaratory Judgment Act similarly requires that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." N.C.G.S. § 1-260.

"Necessary parties must be joined in an action. Proper parties may be joined" in the trial court's sound discretion. *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 438, 527 S.E.2d 40, 44 (2000) (citation omitted). "The term 'necessary parties' embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy." *Dunn v. Cook*, 204 N.C. App. 332, 336, 693 S.E.2d 752, 755 (2010); *see also Northwestern Bank v. Robertson*, 25 N.C. App. 424, 426, 213 S.E.2d 363, 365 (1975); *Wall v. Sneed*, 13 N.C. App. 719, 724, 187 S.E.2d 454, 457 (1972) (a party is a necessary party if "[h]is interest [is] such that no decree can be rendered which will not affect him" (citations omitted)). In contrast, a "proper party is 'a party who has an interest in the controversy or subject matter which is separable from the interest of the other parties before the court, so that it may, but will not necessarily, be affected by a decree or judgment which does complete justice between the other parties.'" *Karner*, 351 N.C. at 439, 527 S.E.2d at 44 (citation omitted). A judgment determinative of a claim arising in an action in which a necessary party has *not* been joined is null and void. *Ludwig*, 40 N.C. App. at 190, 252 S.E.2d at 272; *see also Long v. City of Charlotte*, 306 N.C. 187, 212-13, 293 S.E.2d 101, 117 (1982).

In support of its Motion to Join, VBHI states that on May 31, 2022, SharpVue announced it had entered into an agreement with BHIL to purchase, among other things, the Regulated Assets and the Unregulated Assets (collectively, the Assets) at issue in this proceeding. VBHI also states that upon information and belief, SharpVue is a private equity firm that operates real estate and private credit and equity funds on behalf of institutional investors and qualified individuals and that SharpVue's regulatory counsel was also served with the motion.

VBHI argues that SharpVue is a necessary party because, due to its contract to purchase the Assets, it is vitally interested in the subject of the controversy and a valid judgment cannot be rendered without SharpVue's being a party. VBHI also argues that if the Commission determines that the Unregulated Assets are subject to the Commission's supervision, SharpVue's property interest in those assets will be impacted and the legal status of those assets altered: the assets would be encumbered by utility regulations, requirements, and potential use restrictions, and their valuation, revenues, and potential for re-sale affected. VBHI further argues that SharpVue possesses information to which VBHI is entitled in discovery (either in this docket or, if SharpVue is not added as a party, through third-party discovery). VBHI also points to several dockets in which it alleges the Commission joined parties in similar circumstances.

VBHI also states that there are no grounds to deny its motion to join SharpVue as a necessary party. VBHI explains that it moved promptly to join SharpVue, BHIT and BHIL will not be unduly prejudiced, SharpVue is an indispensable party, and the joinder request

is not futile. VBHI also represents that both Respondents and SharpVue have communicated to VBHI that they intend to oppose the motion.

Respondents object to VBHI's Motion to Join. In its Response, Respondents argue that as a contract purchaser of the Assets, SharpVue is not a necessary party to a case that seeks to redefine the Commission's regulatory authority over some of those assets. Respondents state that VBHI has created the docket and filed its motion as part of an attempt to destabilize the sale of the Assets between BHIL and SharpVue — "the whole point of this docket is to disrupt the value and attractiveness of the assets to a private purchaser." Response at 2. According to Respondents, to grant the motion would compound an already unnecessary and time-consuming proceeding.

Respondents also state that SharpVue opposes the Motion to Join, that it contracted to purchase the Assets after the filing of this docket, in full understanding that the Commission has been asked to regulate the Unregulated Assets, and it should be free to decide whether Respondents can adequately represent its interests without joining the proceeding. Respondents argue that VBHI fails to explain why SharpVue's presence as a party is in any way connected to a regulatory analysis of Unregulated Assets, that SharpVue does not yet own or operate the Assets and, therefore, that SharpVue has no useful knowledge of the Assets' use or operation related to the questions presented. Respondents also argue that VBHI's past arguments — that "the claims asserted in the Complaint are not dependent on any purported sale" and "even if a sale were to never happen, the issues regarding the Commission's supervision of the Parking Facilities and the Barge would persist and require resolution" — belie any claim that SharpVue is a necessary party.

Respondents further argue that VBHI's reliance on Commission Orders involving transfer proceedings are misplaced, as this docket does not involve the application for a transfer of a certificate. Respondents also argue that the whole proceeding is unfounded, reiterating that "[t]here is no statutory authority or precedent to support such an extraordinary intervention into a private company's control and sale of its own assets, and the Commission should dismiss the Complaint, including its request for declaratory relief." Response at 7 (citation omitted). Respondents state that while VBHI can intervene in the proposed certificate transfer proceeding, it cannot use the Commission's jurisdiction to interfere with the transaction before Respondents and SharpVue subject it to Commission review for whether it serves the public interest. Respondents ask that the Commission deny the motion and, incorporating its motion to dismiss, reiterates its request that the Commission dismiss the proceeding at this time.

In its Reply, VBHI states that Respondents do not dispute that SharpVue has a property interest in the Assets or that the Commission's ruling on the Complaint has the potential to impact the Assets, and therefore VBHI argues that SharpVue has material interests which will be directly affected by an adjudication of the controversy. VBHI also challenges that Respondents have not offered any authority to suggest that SharpVue is not a necessary party.

After careful consideration, the Commission concludes that SharpVue is a necessary party to this docket. The Commission is persuaded that SharpVue has “a legal interest in the subject matter of [this proceeding] of such direct and immediate character that [it] will gain or lose by direct operation of the judgment.” *Northwestern Bank*, 25 N.C. App. at 426, 213 S.E.2d at 365. To this end, the Commission finds instructive North Carolina decisions involving actions against the sellers of property where the litigants have failed to join subsequent purchasers, *see, e.g., Brown v. Miller*, 63 N.C. App. 694, 698-99, 306 S.E.2d 502, 505 (1983) (dismissing the plaintiff’s complaint seeking “to have [a] deed declared null and void” because she failed to join the purchaser and equitable owner of the property, having only enjoined the sellers); *Northwestern Bank*, 25 N.C. App. at 426, 213 S.E.2d at 365 (determining that the purchaser who bid on the property at auction entered a contract for the property and thus had an interest in both the property and the transaction and was therefore a necessary party), as well as decisions involving the absence of certain property owners in actions that may restrict the future use of their property. *See, e.g., Karner*, 351 N.C. at 438-40, 527 S.E.2d at 43-44 (holding that all property owners affected by a residential use restrictive covenant were necessary parties); *Page v. Bald Head Ass’n*, 170 N.C. App. 151, 154, 611 S.E.2d 463, 465 (2005) (same as to residential use permit); *cf. Council v. Town of Boone Bd. of Adjust.*, 146 N.C. App. 103, 107, 551 S.E.2d 907, 910 (holding that a motion to intervene was improperly denied when intervenors alleged “that approval of Council’s application for a conditional use permit would [impact intervenors by] (1) result[ing] in an increase of traffic volume[;] . . . and (3) caus[ing] a reduction in the fair market value of their property”), *disc. review denied*, 354 N.C. 360, 560 S.E.2d 130 (2001). It is true that the question presented for review in this proceeding is not dependent on ownership; however, the outcome of the proceeding may impact SharpVue’s future use of some of the Assets it has contracted to purchase. As such, the Commission concludes that SharpVue is a necessary party and must be joined.

The Commission does not find persuasive Respondents’ arguments that SharpVue is not a necessary party because it had knowledge of this proceeding prior to its contracting to purchase the Assets or because its interests align with, or will be adequately protected by, Respondents’ interests and presence in the docket. *See Karner*, 351 N.C. at 439, 527 S.E.2d at 44 (rejecting the argument that “the other property owners in Elizabeth Heights were not necessary parties to the action because their interest was represented by the current parties” with whom their interests purportedly aligned). To the contrary, a scenario is easily imagined where the interests of an asset’s seller may not necessarily align with those of its buyer.

The Commission also recognizes, of course, that SharpVue does not yet hold title to, or currently own and operate, the Assets, and also that this proceeding does not concern SharpVue’s fitness to do so. The Commission nevertheless finds that the currently existing contractual obligation creates a property interest sufficient to show that SharpVue’s interests may be impacted by the outcome of this proceeding. The Commission is persuaded by the authority cited by VBHI for the proposition that a contractual right is a property interest. *See, e.g., State ex rel. Utilities Comm’n v. Buck Island, Inc.*, 162 N.C. App. 568, 580, 592 S.E.2d 244, 252 (2004); *Bailey v. State*, 348

N.C. 130, 154, 500 S.E.2d 54, 68 (1998) (“[t]he privilege of contracting is both a liberty and a property right”); see also *id.* (citing *Lynch v. United States*, 292 U.S. 571, 579, 78 L. Ed. 1434, 1440 (1934) (“valid contracts are property”)); *Oglesby v. Adams*, 268 N.C. 272, 274, 150 S.E.2d 383, 385 (1966) (contractual right of renewal under an oyster lease gave a property right that could not be taken by repeal or without just compensation). This authority further supports that SharpVue is a necessary party and must be joined.

The Commission also joins SharpVue in part as a matter of judicial and administrative efficiency. To the extent VBHI seeks declaratory relief under North Carolina’s Declaratory Judgment Act, the Act requires that “all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings.” N.C.G.S. § 1-260. By joining SharpVue in this proceeding, the Commission avoids any future attempt by SharpVue to relitigate the Commission’s jurisdiction over, and the regulatory status of, the Unregulated Assets that it has contracted to purchase. It is important to note that by requiring SharpVue’s joining as a party, the Commission is allowing but not requiring SharpVue to actively participate.

Although not necessary to the determination, the Commission notes that its conclusion is further supported by SharpVue’s stated interests in another proceeding currently pending before the Commission. On July 14, 2022, BHIT and Bald Head Island Ferry Transportation, LLC (BHIFT), filed an Application for Transfer of Common Carrier Certificate (Application) in Docket No. A-41, Sub 22 (Sub 22 Docket). There, BHIFT explains that it is a wholly owned subsidiary of Pelican Legacy Holdings, LLC (Pelican), both of which are North Carolina limited liability companies whose parent company is SharpVue. Application at 3; see also Application Exhibit B. BHIFT further explains that under the terms of the Asset Purchase Agreement (APA), SharpVue plans to acquire all of the assets of BHIT, i.e., the Regulated Assets, and a significant portion of the remaining assets of BHIL, also to include the Unregulated Assets. Application at 5. BHIFT “is simply stepping into the shoes of [and replacing] BHIT.” *Id.* In other words, the sought transfer of authority does not involve a scenario where either BHIL or its subsidiary will continue to own or operate the Assets merely under a different parent company; rather, the Application states that these entities will be dissolved entirely.

The Commission also finds that although the Sub 22 Docket is distinct and independent of this proceeding, it is BHIFT — SharpVue’s subsidiary — that conditions one of its representations to the Commission in the Sub 22 Docket upon the outcome of this proceeding, stating: “BHI Ferry Transportation agrees that for at least one (1) year following closing of the transaction there will be no change to the Ferry Operations’ rates, terms or conditions of service, as a result of the proposed transaction, unless there is a significant change in the regulatory status or rate base of its operations pursuant to any decision that the Commission may make in Docket No. A-41, Sub 21.” Application at 7. In short, BHIFT has voiced an interest in the outcome of this proceeding. As such, the Commission is hard-pressed to conclude that SharpVue, through its subsidiary BHIFT, is not a necessary, or at least proper, party to this docket to warrant joinder.

Finally, assuming *arguendo* that SharpVue is not a necessary party insofar as the sale of the Assets is merely pending and it is not yet the owner of the Assets, the Commission in its discretion deems SharpVue to be a proper party for joinder. SharpVue is therefore required to join as a party to this proceeding.

Accordingly, the Motion to Join is allowed.

IT IS, THEREFORE, ORDERED as follows:

1. That SharpVue Capital, LLC, shall be, and is hereby, joined as a party to this proceeding; and

2. That the Chief Clerk shall serve a copy of this Order on the registered agent of SharpVue Capital, LLC, by certified mail, return receipt requested.

ISSUED BY ORDER OF THE COMMISSION.

This the 1st day of August, 2022.

NORTH CAROLINA UTILITIES COMMISSION

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

Joann R. Snyder, Deputy Clerk

Chair Charlotte A. Mitchell did not participate in this decision.