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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 24-127

Filed 19 November 2024

North Carolina Utilities Commission, No. A-41, SUB 22

In the Matter of Joint Application of Bald Head Island Transportation, Inc., Bald Head Island Limited, LLC; and Bald Head Island Ferry Transportation, LLC, for Approval of Transfer of Common Carrier Certificate to Bald Head Island Ferry Transportation, LLC, and Permission to Pledge Assets.

Appeal by intervenor from order entered 22 August 2023 by the North Carolina Utilities Commission. Heard in the Court of Appeals 14 August 2024.

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PER CURIAM.

This appeal concerns the approval with conditions by the North Carolina Utilities Commission allowing *the transfer of ownership* of the operations related to the provision of transportation services between Southport to Bald Head Island.

I. Background

Intervenor Village of Bald Head is a municipality coterminous with Bald Head Island, an island accessible by boat but not by car.

Applicant Bald Head Island Transportation, LLC, developed and for decades has owned and operated the ferry service (the “Ferry Operation”) providing passenger transportation between Southport to the Island. An affiliated entity, Applicant Bald Head Island Limited, LLC, developed and for decades has owned and operated a parking lot in Southport adjacent to the ferry port (the “Parking Operations”) and a freight barge business (the “Barge Operation”) providing transportation of various goods from Southport to the Island.

The Applicants sought to sell the Ferry, Parking, and Barge Operations. Though the Village desired to purchase the Operations, the Applicants contracted to sell the Operations to an unrelated third-party, Bald Head Island Transportation, Inc., an affiliate of an entity known as SharpVue Capital, LLC (both referred to as “SharpVue”).

In July 2022, SharpVue filed an application with the Commission seeking approval to purchase the Ferry Operation. There is no dispute among the parties that the Ferry Operation is a utility, subject to regulation by the Commission.

In December 2022, in a separate proceeding, the Commission determined that the Barge Operation and the Parking Operation were also subject to regulation by

the Commission, concluding that they provide services ancillary and essential to the regulated Ferry Operation. That determination was reviewed by our Court in a separate appeal. *See State ex rel. v. Bald Head*, \_\_ N.C. App. \_\_ (Oct. 15, 2024) (“*Bald Head I*”). In that appeal, our Court held the Commission “may regulate the sale of [the] Parking Operations because [the relationship between the Ferry Operation and the Parking Operation] has an effect on the rates and service of the regulated [Ferry Operation].” However, over a dissent, our Court held that the Commission lacked authority to regulate the Barge Operation. *Id.* (Additional factual background may be found in that opinion.)

In any event, in August 2023 in this present matter — prior to our opinion in the *other* appeal — the Commission approved the transfer and pledge of assets of all three Operations to SharpVue. The Village timely appealed to our Court.

## II. Standard of Review

The Village challenges the Commission’s order approving the sale of the Operations to SharpVue.

“In an appeal taken from an order entered by the Commission, any . . . order made by the Commission under the provisions of Chapter 62 shall be *prima facie* just and reasonable.” *State ex rel. Utils. Comm’n v. Stein*, 375 N.C. 870, 899 (2020) (internal quotations omitted). According to the Act, our Court on appeal must

decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission

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action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

N.C.G.S. § 62-94(b). A Commission's decision is "arbitrary and capricious when, among other things, [it] indicate[s] a lack of fair and careful consideration or fail[s] to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Thornburg*, 314 N.C. 509, 515 (1985). "In deciding whether to affirm, reverse, invalidate or remand the Commission's decision for further proceedings, we are required to review the whole record, or such portions thereof as may be cited by any party and take due account of the rule of prejudicial error." *State ex rel. Utils. Comm'n. v. Va. Elec. and Power Co.*, 381 N.C. 499, 514 (2022) (internal quotations omitted).

While it is our responsibility to determine whether the Commission's decision was supported by "competent, material, and substantial evidence," *State ex rel. Utils. Comm'n v. Cooper*, 367 N.C. 444, 448 (2014), it is the Commission's responsibility to

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determine the weight and credibility of the evidence provided, *Stein*, 375 N.C. at 900. We must accept the Commission's challenged findings of facts if supported by competent, substantial evidence. *State ex rel. Utils. Comm'n v. Morgan*, 277 N.C. 255, 266–67 (1970). However, “the Commission's conclusions of law . . . are reviewed *de novo*.” *Stein*, 375 N.C. at 900.

III. Analysis

We are bound by our Court's decision in the other appeal that the Barge Operation is not subject to Commission regulation. We, therefore, dismiss any argument by the Village in this present appeal that the Commission inappropriately approved the sale of the Barge Operation. We note that in the other appeal our Court recognized that the Commission *could* have jurisdiction over the Barge Operation *either* based on a determination that the Barge Operation was sufficiently ancillary to the regulated Ferry Operation *or*, alternatively, based on a determination that the Barge Operation — to the extent that it transported “household goods” or passengers — is itself a utility in its own right. See N.C.G.S. § 62-3 (stating a public utility includes operations which transport “passengers” or “household goods” for compensation). We further note our Court determined that the *only* issue properly before the Commission and before us in that appeal was whether the Barge Operation was ancillary to the Ferry Operation, leaving unanswered whether the Commission could otherwise regulate the Barge Operation as a transporter of passengers or household goods:

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[T]he Village's request was insufficient to confer the Commission's jurisdiction to determine its unreached contention that [the Applicant] operates its Barge Operations as a per se utility transporting persons or household goods for compensation, as the Village's alleged use of the Barge Operations is limited to transporting municipal materials and equipment.

*Bald Head I* at \*2. In any event, in this appeal the Village has not made any argument that the Barge Operation was itself a utility subject to regulation based on an allegation that the Barge Operation is used, at least in part, as a transporter of passengers or household goods. Rather, the Village in its brief merely states that the Barge Operation is subject to the Commission's jurisdiction based on its connection to the regulated Ferry Operation, an argument our Court rejected in the other appeal.

We now address the Village's arguments as they pertain to the approval of the transfer of the Parking Operation. For the reasoning below, we affirm the order of the Commission approving the transfer.

A. Legal Standard for Transfer

The Village argues that the Commission applied the wrong legal standard in approving the transfer, contending that the Commission analyzed the transfer request under N.C.G.S. § 62-111(e) rather than under N.C.G.S. § 62-111(a).

Subsection (e) requires the parties seeking approval to show the transfer will not adversely affect the service to the public, will not unlawfully affect the service to the public by other public utilities, the person acquiring control of the utility is fit and willing to perform such a service to the public, and that service will not stop in the

transition period. N.C.G.S. § 62-111(e). Subsection (a) states that a utility may not change ownership or control without approval, “which shall be given if justified by public convenience and necessity.” N.C.G.S. § 62-111(a).

Regardless of which one is applicable in this case, the Commission analyzed and approved the requested transfer under both subsections, determining in its order:

Applying the motor carrier standard, as has generally been applied in transfer proceedings involving passenger ferries, the Commission finds credible the ample evidence that the transfer is in the public interest.

. . .

Even under the Commission’s three-prong test applied to other utility mergers, the Commission concludes that the transfer is also justified under this test and is in the public convenience and necessity.

In other words, any error by the Commission in analyzing the transfer under subsection (e) was harmless, as the Commission properly analyzed the transfer under subsection (a).

B. Approval of Application

The Village argues that the Commission erroneously “accorded only minimal consideration to competent evidence” of multiple risks of the proposed transfer that have bearing on whether the transfer is justified by public convenience and necessity. *See State ex rel. Utils. Comm’n v. Edmisten*, 299 N.C. 432, 437 (1980). The Village, otherwise, does not challenge the Commission’s findings as to the benefits of the transfer. We have carefully reviewed the Commission’s order and conclude that the

Commission made ample findings supported by the evidence, taking all testimony and evidence into consideration when concluding that both standards are met in this case, and that the findings support the Commission's conclusions of law. *See Coble*, 300 N.C. at 714; *State ex rel. Utils. Comm'n v. Thrifty Call*, 154 N.C. App. 58, 65 (2002) ("The presumption is that the Commission gave proper consideration to all competent evidence and reached a just and reasonable conclusion.").

For instance, the Village contends that "[t]he Commission never addressed the substantial evidence demonstrating that SharpVue had no intention of holding the assets long term." However, the Commission did address this concern in its detailed findings, noting SharpVue's fiduciary obligation to its investors prevented it from committing that it would hold the assets long term. It is the Commission who is charged to assign weight of evidence, which it did. *Stein*, 375 N.C. at 900. We further note that the Village has not directly challenged any of the Commission's findings.

In sum, the Commission directly addressed the potential risks identified by the Village and stated that "although [Intervenor] identified several risks it believes are associated with the transaction, *the Commission concludes that ratepayers are reasonably protected from these risks and that they are outweighed by the benefits of the Transfer.*" (Emphasis added). The Commission noted that the matter was not about rates and that the current rates being charged remain reasonable and that there was no request at this time to change those rates.

C. Pledging Regulated Assets to Support Unregulated Businesses



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The Village separately argues that the Commission erred by permitting SharpVue to pledge regulated assets (the Operations subject to Commission regulation) to support SharpVue's unregulated lines of business. Section 62-160 governs the pledging of public utilities and states:

No public utility shall pledge its faith, credit, moneys or property for the benefit of any holder of its preferred or common stocks or bonds, nor for any other business interest with which it may be affiliated through agents or holding companies or otherwise by the authority of the action of its stockholders, directors, or contract or other agents, the compliance or result of which would in any manner deplete, reduce, conceal, abstract or dissipate the earnings or assets thereof, decrease or increase its liabilities or assets, *without first making application to the Commission and by order obtain its permission so to do.*

(Emphasis added). Here, the Commission in its order stated that assets may be pledged "to secure debt financing within the limitations, and pursuant to the requirements, of the Regulatory Conditions." In any event, there is nothing in the record showing that the Applicants ever requested, or the Commission granted, any such authority.

D. Arbitrary and Capricious

The Village argues the Commission's order approving the transfer was arbitrary and capricious. We have carefully reviewed the order and the arguments of the parties and conclude that the Commission has not acted arbitrarily and capriciously in approving the transfer.

AFFIRMED.

IN RE: BALD HEAD ISLAND TRANSP., INC.

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Panel consisting of Chief Judge DILLON and Judges COLLINS and FLOOD.

Report per Rule 30(e).