

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Village of Bald Head Island,)	
Complainant,)	
)	
v.)	ORDER ON RESPONDENTS'
)	MOTION TO COMPEL
Bald Head Island Transportation, Inc.,)	
and Bald Head Island Limited, LLC,)	
)	
Respondents.)	

BY THE PRESIDING COMMISSIONER: On August 24, 2022, Bald Head Island Transportation, Inc. (BHIT), and Bald Head Island Limited, LLC (BHIL, and collectively, Respondents), filed with the Commission a Motion to Compel Response of Complainant to Second Data Requests (Motion to Compel).

On August 25, 2022, the Village of Bald Head Island (VBHI or Complainant) filed a Response to Respondents' Motion to Compel Response to Second Data Requests (Response).

On August 26, 2022, Respondents filed a Reply in support of its Motion to Compel (Reply).

DISCUSSION AND CONCLUSIONS

North Carolina Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .”; “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . .” N.C. Gen. Stat. § 1A-1, R. 26(b)(1) (Rule 26(b)(1)). “The discovery rules should be liberally construed in order to accomplish the important goal of ‘facilitating the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial.’” *Williams v. North Carolina Dept. of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995) (citation omitted).

Although the rule should be construed liberally neither party should be allowed to roam at will in the closets of the other. The test of relevancy under Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information “reasonably calculated to lead to the discovery of admissible evidence” [However, o]ne party’s need for information must be balanced against the likelihood of an undue burden imposed upon the other.

Willis v. Duke Power Co., 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976) (citations omitted).

Respondents seek to compel VBHI to respond to their Data Requests 2-1, 2-2, and 2-3. Respondents identify these data requests as the following:

2-1. With reference to Right of First Refusal agreement discussed in Complainant's Motion to Join Necessary Party at page 2, fn 1, please admit that the Right of First Refusal agreement has never been approved by the North Carolina Utilities Commission.

2-2. With reference to Right of First Refusal agreement discussed in Complainant's Motion to Join Necessary Party at page 2, fn 1, please admit that the Village has not sought approval by the North Carolina Public Utilities Commission of the Right of First Refusal agreement at any time since its execution on or about August 21, 1999.

2-3. With reference to Right of First Refusal agreement discussed in Complainant's Motion to Join Necessary Party at page 2, fn 1, and the Village's assertion that it “expressly reserves and does not waive its rights under the ROFR,” please admit that any rights to purchase real property that the Village asserts the ROFR affords it were not subject to an expiration date as of the agreement's August 21, 1999 creation date.

Respondents state that VBHI objects to each of the requests on the grounds that they are not reasonably calculated to lead to the discovery of admissible evidence in this proceeding, are submitted for the improper purpose of seeking evidence for anticipated future litigation between VBHI and Respondents rather than for the purpose of the pending action, and seek attorney work product and the mental impressions, conclusions, opinions or legal theories of VBHI’s attorneys or other representatives in this proceeding.

Respondents argue that these data requests properly seek admissions to facts regarding the Right of First Refusal (ROFR) claim that Complainant introduced into the docket. Respondents also state that Complainant has asked the Commission to assert regulatory authority over certain BHIL activities and that VBHI has — by raising its ROFR — asserted contractual rights in the parking and barge operations at issue in the Complaint. Respondents argue that the data requests are submitted for a proper purpose and seek factual information that is not subject to privilege.

VBHI responds that Respondents have seized on one sentence in a footnote of a procedural motion and have asked the Commission to improperly compel VBHI's legal strategy, attorney-client communications, and work product. VBHI argues that the data requests are not reasonably calculated to lead to the discovery of admissible information. VBHI argues that the requests are not relevant to the regulatory status of the parking or barge assets but rather separate, potential litigation over VBHI's ROFR to purchase the ferry system. VBHI also argues that it did not raise its ROFR as a subject of the Complaint proceeding but rather only to make clear by way of a footnote in a procedural motion that it was not waiving its ROFR.

Respondents argue in Reply that VBHI proposes a scope of discovery that is narrowly tailored to its theory of the case and that Respondents seek discovery to investigate the viability of VBHI's asserted contractual rights in support of VBHI's purpose in bringing the docket to dissuade a potential asset purchaser. Respondents argue that Complainant's desire to limit discovery only to its theory of the case is unsupported. Respondents further state that they seek admissions that bear on VBHI's asserted contractual rights and do not seek the theories of Complainant's case or mental impressions of Complainant's counsel.

After careful consideration, the Presiding Commissioner is not persuaded that Data Requests 2-1, 2-2, and 2-3 are reasonably calculated to lead to the discovery of admissible evidence relevant to the question presented in this proceeding — whether the unregulated parking and barge assets of BHIL are subject to Commission regulation — and thus concludes that the requests do not fall within the scope of Rule 26(b)(1). As a result, there is no need to examine VBHI's other reasons for objecting to the requests.

Respondents' Motion to Compel is therefore denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 6th day of September, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Erica N. Green". The signature is written in a cursive, flowing style.

Erica N. Green, Deputy Clerk