

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, SUB 22

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

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|---------------------------------------------|--------------------------------------------------------------------------------------------------|
| In the Matter of | |
| Joint Application of Bald Head Island |) |
| Transportation, Inc., 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 |) |
| | ORDER ON SECOND, THIRD, AND FOURTH MOTIONS TO COMPEL OF THE VILLAGE OF BALD HEAD ISLAND |

BY THE PRESIDING COMMISSIONER: On July 14, 2022, Bald Head Island Transportation, Inc. (BHIT), and Bald Head Island Ferry Transportation, LLC (BHIFT, and collectively with BHIT, the Applicants), a wholly owned subsidiary of Pelican Legacy Holdings, LLC (Pelican Legacy), managed by SharpVue Capital, LLC (SharpVue), filed an application pursuant to N.C. Gen. Stat. § 62-111 (Application). Among other things, the Applicants seek approval to transfer BHIT's Common Carrier Certificate to BHIFT, so BHIFT may operate the passenger ferry transportation services to and from Bald Head Island and the tram services on the island.

On July 21, 2022, the Village of Bald Head Island (VBHI) filed a petition seeking to intervene in this docket, which was subsequently granted by the Commission.

On August 24, 2022, the Commission issued an Order Scheduling Hearing, Establishing Procedural Deadlines, and Requiring Public Notice (Scheduling Order), which among other things provided discovery guidelines.

On November 22, 2022, VBHI filed a Second Motion to Compel Responses of SharpVue Capital, LLC (Second Motion to Compel).

On November 30, 2022, SharpVue filed a confidential Amended Response to VBHI's First Motion to Compel (Amended Response).

On November 28, 2022, VBHI filed a Third Motion to Compel Responses of SharpVue Capital, LLC (Third Motion to Compel), which included matters deemed confidential.

On November 29, 2022, SharpVue filed a confidential Response to VBHI's Second Motion to Compel (Response to Second Motion).

Also on November 29, 2022, BHIT filed comments in support of SharpVue's Responses (BHIT Comments).

On November 30, 2022, SharpVue filed a confidential Response to VBHI's Third Motion to Compel (Response to Third Motion).

Also on November 30, 2022, VBHI filed a Fourth Motion to Compel Production from SharpVue (Fourth Motion to Compel).

On December 1, 2022, VBHI filed a Reply in Support of its Second and Third Motions to Compel (Reply in Support of Second and Third Motions).

On December 2, 2022, SharpVue filed a confidential Response to VBHI's Fourth Motion to Compel (Response to Fourth Motion).

On December 21, 2022, the Commission issued an Order Holding Proceeding in Abeyance, which among other things stated that the expert witness hearing was continued and would be rescheduled by further order of the Commission.

On January 20, 2023, the Commission issued an Order Rescheduling Hearing and Establishing Additional Procedures.

On January 24, 2023, BHIT, BHIFT, and Bald Head Limited LLC (BHIL, together with BHIT and BHIFT, the Amended Applicants) filed an amended application pursuant to N.C. Gen. Stat. § 62-111 (Amended Application). In addition to seeking approval to transfer BHIT's Common Carrier Certificate to BHIFT for operation of the passenger ferry transportation services to and from Bald Head Island and the tram services on the island as noted in the initial Application, the Amended Application seeks approval to transfer "the parking facilities and barge operations (to the extent the Commission has jurisdiction and authority to regulate them as may be determined on appeal)."

VBHI's Second Motion to Compel

In its Second Motion to Compel, VBHI moves the Commission to compel SharpVue to provide:

1. A full, unredacted version of SharpVue's response to the Public Staff's Data Request No. 2, which include requests of SharpVue to identify its lender and to identify the ultimate parent company of BHIFT, as well as other requests;
2. Complete responses to DRs 3-8 and 3-9 of VBHI's Third Data Requests to SharpVue; and
3. Complete, unredacted copies of the documents Bates-stamped SharpVue 1014, and SharpVue 1015-1052.

VBHI also requests an order directing further compliance with the parties' Confidentiality Agreement, filed alongside its Second Motion to Compel.

In support, VBHI states that as of September 4, 2022, the Village and SharpVue executed a Confidentiality Agreement governing the exchange of confidential information between the parties, which was defined to include proprietary, confidential, and competitive information that was exempt from public disclosure pursuant to N.C. Gen. Stat. § 132-1.2. VBHI explains that it served on SharpVue its First Data Requests seeking production of SharpVue's discovery responses to other parties in this proceeding — a type of request that is common in proceedings before the Commission, helps to promote efficiency by allowing parties to avoid duplication of discovery, and ensures that all parties are on an equal footing as regards access to discovery materials.

VBHI states that SharpVue — in serving a copy of its responses to the Public Staff's Second Data Requests that was directed to SharpVue's affiliate, BHIFT — failed to provide a full response to VBHI insofar as it did not include the documents identified in these responses as Bates-stamped SharpVue_1014 (Public Staff's DR 2-1) and SharpVue_1015-1052 (Public Staff's DRs 2-3 and 2-4). VBHI further states that SharpVue subsequently refused to provide to VBHI the redacted information and documents because it argues that the documents include SharpVue's "business trade secrets." VBHI states that no other basis for refusing to provide the responses and documents has been given or any objection lodged.

VBHI further states that in SharpVue's responses to VBHI's DRs 3-1 and 3-8, SharpVue references the documents that are Bates-stamped SharpVue_1015-1052. VBHI explains, however, that SharpVue refuses to produce these documents, claiming "business trade secrets." VBHI also states that SharpVue refuses to provide full responses to VBHI's DRs 3-8 and 3-9, again based upon the argument that they seek "confidential business trade secrets." VBHI offers that it has in good faith sought to resolve these disputes but has not been successful.

VBHI argues that SharpVue does not dispute that the requests are proper or that the documents are responsive and does not state any objection to DR 3-1; VBHI states that SharpVue's only objection to Requests 3-8 and 3-9 are that they seek trade secrets. VBHI argues that the claim that the documents are confidential is an insufficient basis for refusing production given that the parties have already agreed to a mechanism for exchanging confidential information in this proceeding. VBHI further argues that as a result SharpVue is in breach of its obligations under the Confidentiality Agreement and in violation of the Commission's Scheduling Order.

VBHI also argues that SharpVue has not cited any case allowing a party to withhold relevant documents merely because they are trade secrets and, if SharpVue is concerned about maintaining confidentiality, the appropriate remedy is for SharpVue to designate the documents as "confidential" or "highly confidential" under the parties' Confidentiality Agreement, noting that this method is a routine feature of civil litigation involving trade secrets. VBHI also notes that SharpVue has provided this information to the Public Staff,

which it argues belies any claim that the documents are so sensitive that they must be withheld.

SharpVue's Response to Second Motion

SharpVue argues that VBHI seeks to obtain privileged confidential, sensitive business trade secret information that falls into three categories:

- (1) the identity of SharpVue's lender and the specific details of the financing;
- (2) the identities of the investors in Pelican Legacy, including minority investors who do not manage or control the investment or the operations of Pelican Legacy or BHIFT; and
- (3) information about and documents of LLCs owned or controlled by the SharpVue management team of Lee Roberts and Doug Vaughn.

SharpVue states that it is SharpVue's intent for this information to be used by the Public Staff and the Commission to review and determine the pending certificate transfer application but not be provided to VBHI or other intervenors.

SharpVue argues that VBHI is a competitor of SharpVue's for the assets who is trying to undermine the sale and will try to use that information to derail SharpVue's purchase of the assets, and that this status as a competitor should tip the scales against disclosing the information to VBHI.

SharpVue also notes the statutory definition of "trade secret" pursuant to N.C. Gen. Stat. § 66-152(3) and argues that courts have consistently held that a company's business documents or processes can constitute trade secrets. SharpVue also argues that confidential information can include information that may be used against a company by a competitor.

As to the first category of information, SharpVue explains that the lender has an expectation of privacy and that because VBHI has been unable to secure financing and is (and has been) a competitive bidder for the assets it should not be allowed access to this information.

As to the second category of information, SharpVue explains that it has confidentiality obligations to its investors and has provided some related information to VBHI — e.g., the Pelican Legacy investors' city and state, percentage of ownership stake in Pelican Legacy, and the amount of their investment — and has also confirmed that

the SharpVue management team of Lee Roberts and Doug Vaughn will own and/or directly control over 50% of the investments in Pelican Legacy Holdings, LLC and will be on the Board of Managers for these entities (along with Chad Paul), and otherwise be the decision makers, along with Chad

Paul, for all things owned and controlled by Pelican Legacy Holdings, LLC including BHIFT.

SharpVue argues that the minority investors are not relevant to whether SharpVue has the resources to operate, support, and enhance the utility assets. SharpVue also states that to the extent some of the minority investors live or own property on Bald Head Island, they have concerns about harassment and retaliation. SharpVue also states that full identities have been provided to the Public Staff and argues that if providing such has opened the door to providing this information to other intervenors, including those with ulterior motives, other similarly situated parties in other dockets may not be as forthcoming to the detriment of the regulatory process.

As to the third category of information, SharpVue explains that it has informed VBHI that SharpVue management team members Lee Roberts and Doug Vaughn will own and control Pelican Legacy through affiliate entities but argues that how they structure their equity and management is proprietary and should not be shared with a competitor. SharpVue requests that the Commission find this balance is an appropriate sharing of information to allow VBHI to assess the ownership and control arrangement.

SharpVue further argues that the parties' Confidentiality Agreement — and a designation of "Confidential – Attorneys' Eyes Only" — does not provide adequate protection because the information is highly sensitive, could be unfairly prejudicial in a competing purchaser's hands, and VBHI's counsel here are the same counsel VBHI retained in its attempts to purchase the assets.

Finally, SharpVue requests that the Commission enter a protective order to (1) continue to allow SharpVue to provide confidential business trade secret information to the Public Staff pursuant to N.C.G.S. § 62-34(c) without having to provide it to the intervenors; and (2) to allow such confidential business trade secret information to be provided to the Commission and Commission Staff under seal and for in camera review only, and not disclosed to any other party.

VBHI's Third Motion to Compel

In its Third Motion to Compel, VBHI moves the Commission to compel SharpVue to provide:

4. Full, unredacted versions of SharpVue's responses to the Public Staff's Data Request Nos. 4 and 5, which include requests of SharpVue as follows:

Public Staff Data Request No. 4:

- 4-1 Please provide a personal financial statement (balance sheet) for each of the top five (5) investors (by membership interest) in Bald Head Island Ferry Transportation, LLC.

- 4-2 With respect to the leveraging of utility asset, please provide the expected debt financing terms associated with the acquisition, including, without limitation, loan term, interest rate, and other key provisions.

Public Staff Data Request No. 5:

- 5-3 Please discuss the interplay, if any, between SharpVue's contemplated "Investment Management Agreement" and [BEGIN CONFIDENTIAL] [END CONFIDENTIAL].

VBHI reiterates its arguments that SharpVue has not made any claim that the information at issue is privileged, irrelevant, or otherwise not subject to production and that the parties have negotiated a Confidentiality Agreement to facilitate the exchange of confidential information. VBHI also argues that a "trade secret" assertion does not immunize the information from discovery but rather is a threshold requirement for a designation of confidentiality in the first instance under N.C.G.S. § 62-132.1.2(1). VBHI argues that if merely claiming confidentiality was a sufficient basis for nonproduction, the purpose of discovery would be defeated and parties would never be provided access to any information other than which is already public and, again, that the parties have negotiated a mechanism to address protected information.

VBHI also states that although it has no burden to show relevance, relevance is clear from the questions. VBHI argues that Public Staff DRs 4-1, 4-2, and 5-3 relate to SharpVue's financial qualifications, ability to own and manage the ferry/tram assets, and management arrangements for managing the assets, and that given that the investment vehicle established by SharpVue for this transaction is quite small and closed in nature, the resources and capabilities of its owners is highly relevant to whether the public interest is served by SharpVue's acquisition of the assets. VBHI also states that the operation of the ferry is a capital-intensive operation which will require significant ongoing capital resources and that the management and control of the various affiliated entities identified by SharpVue in its Application is far from clear in SharpVue's disclosures to date.

SharpVue's Response to Third Motion

SharpVue incorporates by reference its response to VBHI's Second Motion to Compel and argues that the information/data requests at issue in this third motion fall into the same three main categories as the information/data requests at issue in the second motion. SharpVue reiterates that it should be allowed to be as transparent as possible to the Public Staff without being required to disclose confidential business trade secret information to VBHI, a competitor.

VBHI's Reply in Support of Second and Third Motions

VBHI argues that SharpVue is attempting to create a "shadow proceeding" where it funnels information supporting its transfer application to the Public Staff and the

Commission but not to other parties to the proceeding and under color of claim of “trade secret” protection. VBHI argues that this violates its due process rights and constitutes improper ex parte communications. VBHI argues that the requested information is central to the core issues in the proceeding relating to the identity of the buying entity, the management and control of the proposed certificated entity, and the financial ability and qualifications of the buyer.

VBHI disputes that it, as a municipal government, is a competitor of a private equity firm and that the information in question constitutes “trade secret” information. VBHI reiterates that the information is subject to production under the Confidentiality Agreement negotiated between the parties which includes the option of attorneys-eyes-only designations for added confidentiality protection.

VBHI’s Fourth Motion to Compel

In its Fourth Motion to Compel, VBHI moves the Commission to compel SharpVue to provide:

5. Full, unredacted versions of SharpVue’s responses to the Public Staff’s Data Request No. 6, which include requests of SharpVue as follows:

Public Staff Data Request No. 6:

- 6-1 Please provide a listing by name, address, and ownership interest (%) of:
 - i. Member(s),
 - ii. Manager(s),
 - iii. (if applicable) Officers, and
 - iv. (if applicable) Board Member(s)
- 6-3 Investment Management Agreement (cont.): What is the underlying purpose and benefit of the Investment Management Agreement, and the resulting added layer of complexity? Please identify any tax, liability, or other advantages that inure from operating under an Investment Management Agreement, beyond SharpVue experience previously cited by the applicant.

In support, VBHI reiterates its arguments from its Second and Third Motions to Compel.

SharpVue's Response to Fourth Motion

SharpVue incorporates by reference its response to VBHI's Second Motion to Compel and argues that the information/data requests at issue in this fourth motion fall into the same three main categories as the information/data requests at issue in the second motion. SharpVue reiterates that it should be allowed to be as transparent as possible to the Public Staff without being required to disclose confidential business trade secret information to VBHI, a competitor.

SharpVue also argues that VBHI's position ignores that by enacting N.C.G.S. § 62-34(c) the legislature determined that there needed to be a process whereby a party can share business trade secret information confidentially with the Public Staff, without being required to share it with the public and other parties to a proceeding.

BHIT Comments

In its comments in support of SharpVue's opposition to VBHI's Motions to Compel, BHIT observes that private equity financing is an increasingly important source of funding for utility and infrastructure expansion and acquisition, with public debt becoming increasingly difficult to issue. BHIT also states that it assumed that the Commission's consideration of the certificate transfer to Sharp Vue would be straightforward and that if SharpVue refuses to move forward with this acquisition because of VBHI's litigation tactics, it will have a chilling effect on the market and discourage other potential purchasers.

DISCUSSION AND CONCLUSIONS

It is well established that orders regarding discovery matters are within the discretion of the trial court and will not be upset on appeal absent a showing of abuse of that discretion." *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601, 617 S.E.2d 40, 45 (2005) (citation omitted); *see also Wachovia Bank, N.A. v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) ("[T]o demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." (Citation omitted)).

For many of the DRs at issue in VBHI's Motions to Compel, VBHI states that SharpVue did not object to the request except to raise standard general objections. The Presiding Commissioner does not find this basis alone under the facts and circumstances of this matter a reason to compel but rather examined each argument in addition to this basis for either granting or denying each motion to compel.

After careful consideration, the Presiding Commissioner allows VBHI's Second, Third, and Fourth Motions to Compel.

The Presiding Commissioner finds that based upon the information set forth in its filings SharpVue has not made a compelling or persuasive argument to withhold the requested information so long as the information is provided with a designation of Attorneys' Eyes Only. Further, SharpVue has not sufficiently demonstrated any specific harm if the information is provided with a designation of Attorneys' Eyes Only.

The Presiding Commissioner highlights that service as a public utility necessarily entails disclosure of information and participation in otherwise public processes to ensure that a utility's operations are accountable to the public. The Presiding Commissioner echoes the sentiments expressed in the Commission's Order on Public Street Lighting Issues, *Application of Duke Energy Carolinas, LLC, for Adjustment of Rates and Charges Applicable to Electric Utility Service in North Carolina*, No. E-7, Sub 1026 (N.C.U.C. June 18, 2014), wherein the Commission generally stated that "municipal parties to a general rate case who sign a confidentiality agreement . . . are entitled to receive trade secret information[,]" "making [such] information available solely to the Public Staff is not a substitute for providing the information to other parties . . . [,]" and that "a confidentiality agreement can be fashioned . . . to meet unusual circumstances . . ." *Id.* at 20.

The Presiding Commissioner recognizes that VBHI has offered to accept the materials under a "Confidential – Attorneys' Eyes Only" (AEO) designation. The Presiding Commissioner is not persuaded by SharpVue's arguments that such a designation does not sufficiently balance and protect its concerns.

Finally, the Presiding Commissioner finds that SharpVue misrelies upon N.C.G.S. § 62-34(c). Section 62-34(c) might well allow the Public Staff access to confidential information in the possession of the Commission — *without* the need for a specific docket or intervention by the Public Staff into a specific docket — but nothing in the enactment of this statute compels the conclusion that the General Assembly intended that business trade secret information must not otherwise be discoverable to other intervenors in Commission proceedings under applicable discovery rules and procedures even were that information to involve trade secrets.

IT IS, THEREFORE, ORDERED as follows:

1. That SharpVue shall provide to VBHI under a "Confidential – Attorneys' Eyes Only" designation a full, unredacted version of SharpVue's response to the Public Staff's Data Request No. 2 within three days of the date of this Order;
2. That SharpVue shall provide to VBHI under a "Confidential – Attorneys' Eyes Only" designation complete responses to DRs 3-8 and 3-9 of VBHI's Third Data Requests to SharpVue within three days of the date of this Order;
3. That SharpVue shall provide to VBHI under a "Confidential – Attorneys' Eyes Only" designation complete, unredacted copies of the documents Bates-stamped SharpVue 1014 and SharpVue 1015-1052 within three days of the date of this Order;

4. That SharpVue shall provide to VBHI under a “Confidential – Attorneys’ Eyes Only” designation full, unredacted versions of SharpVue’s responses to the Public Staff’s Data Request Nos. 4 and 5 within three days of the date of this Order;

5. That SharpVue shall provide to VBHI under a “Confidential – Attorneys’ Eyes Only” designation a full, unredacted version of SharpVue’s response to the Public Staff’s Data Request No. 6 within three days of the date of this Order; and

6. That discovery materials deemed as “Confidential – Attorneys’ Eyes Only” shall be so treated pending: (a) further Order of the Commission; or (b) the designating party agrees in writing to withdraw the confidentiality designation.

ISSUED BY ORDER OF THE COMMISSION.

This the 16th day of February, 2023.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink that reads "Tamika D. Conyers". The signature is written in a cursive, flowing style.

Tamika D. Conyers, Deputy Clerk