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July 12, 2022

Ms. A. Shonta Dunston  
Chief Clerk  
North Carolina Utilities Commission  
430 N. Salisbury Street  
Room 5063  
Raleigh, NC 27603

Re: In the Matter of  
Village of Bald Head Island v. Bald Head Island Transportation, Inc.  
and Bald Head Island Limited, LLC  
NCUC Docket No. A-41, Sub 21  
*Motion to Compel Response of Complainant to Data Request 1-21*

Dear Ms. Dunston:

On behalf of Bald Head Island Transportation, Inc. and Bald Head Island Limited, LLC, I herewith submit the attached Motion to Compel Response of Complainant to Data Request 1-21.

Thank you in advance for your assistance with this filing. If you should have any questions concerning this submittal, please contact me.

Sincerely,

Brad M. Risinger

pbb

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota  
Nevada New Jersey New York North Carolina Pennsylvania South Carolina Texas Washington

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Enclosure

cc: All Parties and Counsel of Record  
Zeke Creech – NC Public Staff  
Lucy Edmondson – NC Public Staff  
Jessica Heironimus – NC Public Staff

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JUL 12 2022

**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,	)	MOTION TO COMPEL RESPONSE OF COMPLAINANT TO DATA REQUEST 1-21
	)	
Complainant,	)	
v.	)	
	)	
BALD HEAD ISLAND	)	
TRANSPORTATION, INC. and	)	
BALD HEAD ISLAND LIMITED,	)	
LLC,	)	
Respondents.	)	

Respondents Bald Head Island Transportation, Inc. (“BHIT”) and Bald Head Island Limited, LLC (“BHIL” and collectively, “Respondents”), by and through undersigned counsel, and pursuant to the Order Scheduling Hearing and Establishing Procedures, hereby move the North Carolina Utilities Commission (“Commission”) to compel Complainant to provide a full response to Data Request 1-21 contained in Respondents’ First Set of Data Requests.

Data Request 1-21 and the response provided by Complainant is set forth below:

- 1-1. **Produce all Documents received by any elected or appointed official of the Village, since January 1, 2021, through any email, text, social media or other electronic account personally maintained by that official that relate in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint.**

**RESPONSE:** In addition and subject to the General Objections, to the extent that Request No. 1-21 seeks documents that are duplicative with Request No. 1-20, the Village objects to Request No. 1-21 as overbroad, unduly burdensome, irrelevant, duplicative, and not reasonably calculated to lead to the discovery of admissible evidence. To the extent that Request No. 1-21 seeks information about communications that do not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited, the Village objects to Request No. 1-21 as overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, the Village objects to the extent this Request is seeking information that is protected by legislative immunity or quasi-judicial immunity. Finally, the Village is not in possession, custody, or control of email, text, social media or other electronic accounts personally maintained by any elected or appointed official of the Village.

### **ARGUMENT**

The North Carolina Rules of Civil Procedure entitle a party to obtain “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . .” N.C. Rule of Civ. P. 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, 358, 462 S.E.2d 545, 547 (N.C. Ct. App. 1995) (quoting *Telegraph Co. v. Griffin*, 39 N.C. App. 721, 726, 251 S.E.2d 885, 888 (N.C. Ct. App. 1979) (emphasis in original)). “It is not ground for

objection that the information sought will be inadmissible at the time of trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought.” N.C. Rule of Civ. P. 26(b)(1).

“When a party fails to answer interrogatories or produce documents in response to a proper request for discovery under the rules of civil procedure, the proponent of the discovery request may move for an order compelling an answer or production of documents.” *Graham v. Rogers*, 121 N.C. App. 460, 462, 466 S.E.2d 290, 292 (N.C. Ct. App. 1996) (citing N.C. R. Civ. P. 37(a)(2)). “[A]n evasive or incomplete answer is to be treated as a failure to answer. *Id.* (citing N.C. R. Civ. P. 37(a)(3)). “Whether or not the party’s motion to compel discovery should be granted or denied is within the trial court’s sound discretion and will not be reversed absent an abuse of discretion.” *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318-19 (N.C. Ct. App. 2007) (citation omitted).

**RESPONDENTS’ DATA REQUEST 1-21 IS  
REASONABLY CALCULATED TO LEAD TO  
THE DISCOVERY OF ADMISSIBLE EVIDENCE**

Respondents’ Data Request 1-21 is designed to elicit relevant information in the possession of Village officials that relates to the core subjects of this docket: (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint. This docket raises issues related to whether BHIL’s parking and barge operations should be subject to the regulatory ambit of the Commission. In part, Complainant’s arguments



depend on its contentions that the parking and barge operations are so “integral” to the operation of the “regulated assets” that they should be regulated in like fashion.

Complainant objects that the request seeks information that does “not concern the utility status of the Deep Point Parking Facilities and/or the Barge services operated by BHIT and/or Limited.” Yet, a suggested discovery scope so narrow bars Respondents from discovery of information related to discussions and information exchanges in which Village officials have been involved regarding any purported relationship – “integral” or otherwise – between the regulated assets and the unregulated assets.

Moreover, the data request is relevant to Respondents’ pursuit of discovery in support of *their* contentions in the docket that relate to efforts by the Village in connection to: the Bald Head Island Transportation Authority; the Village’s own effort to acquire the regulated and unregulated assets; the Village’s communications with elected officials, to include the Local Government Commission; and the facts and circumstances which underlie and led to the filing of the Complaint in this docket.

The Village further objects that it is “not in possession, custody, or control of email, text, social media or other electric accounts personally maintained by any elected or appointed official of the Village.” That objection pales in comparison to the robust access allowed to the public when its business is being conducted by public officials. In this request, Respondents seek to ensure that they have access to communications conducted in or through the personal communications accounts of Village elected or appointed officials when those communications involve “the transaction of public business.” Respondents contend that if any elected or appointed official of the Village engaged in such communications regarding the topics specified in this request, they were engaged in the

“transaction of public business.”

That view is supported by N.C.G.S. § 132-1, and its rule that a “public record” is one “made or received pursuant to law or ordinance in connection with the transaction of public business.” North Carolina public records scholars soundly reject the assertion that the location of a document on a personal device or computer is dispositive of whether that record reflects the conduct of “public business.” For instance, University of North Carolina Professor of Public Law and Government Frayda Bluestein has observed that:

**The content of an email – not its location – determines whether it is a public record.** If an email is made or received in connection with the transaction of public business, it is a public record regardless of whether it is created or stored on a public or private computer, mobile device, or email system. So, an email that relates to public business is a public record even if it is sent from a home computer, or made on a personal email account from any device. This is true whether the email is sent or received by an public employee, or any elected or appointed public official.

*Email as Public Record: Five Things You Should Know [Updated]*, Coates’ Canons NC Local Government Law, Feb. 20. 2017 (<https://canons.sog.unc.edu/2017/02/email-public-record-five-things-know-updated/>).

Data Request 1-21 fairly requires Complainant to conduct due diligence among its appointed and elected officials to determine if any of them have conducted communications regarding the specified topics by or through their personal communications accounts. If one or more of those individuals have, then they have communicated regarding “public business” on one or more of their devices and those communications are public records over which Complainant is deemed to have custody. It is certainly fair and reasonable for the Complainant to produce in this docket communications that are considered public records under State law. North Carolina Rule

of Civil Procedure 34 requires production of materials “in the possession, custody, or control of the party upon whom the request is served.” Where a Village public official has communicated about “public business” on a personal or private account, Complainant must be deemed to have custody or control of such communications or the very purposes of sunshine on such public communications is thwarted.

WHEREFORE, Respondents respectfully request that the Commission grant their Motion to Compel and award the following relief:

1. Grant Respondents’ Motion to Compel;
2. Require Complainant to inquire of its elected and appointed officials whether any of them have engaged in communications through any email, text, social media or other electronic account personally maintained by that official that relate in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint; and
3. Produce such responsive communications as are not privileged, and concurrently provide an appropriate log of such communications withheld on the basis of any asserted privilege.



Respectfully submitted, this 12<sup>th</sup> day of July, 2022.

FOX ROTHSCHILD LLP

A handwritten signature in blue ink that reads "M. Gray Styers, Jr.".

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*Attorneys for Bald Head Island  
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Limited, LLC*

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served the attached MOTION TO COMPEL RESPONSE OF COMPLAINANT TO DATA REQUEST 1-21 in the above-captioned case, which was filed on this day by electronic mail to the parties of record, counsel of record or by depositing a copy in the United States Postal Service in a postage-prepaid envelope, addressed as follows:

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*North Carolina Utilities Commission  
Public Staff*

This the 12<sup>th</sup> day of July, 2022.



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M. Gray Styers, Jr.