

**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 IN LIMINE
Bald Head Island Transportation, Inc.,)	
and Bald Head Island Limited, LLC,)	
)	
Respondents.)	

BY THE PRESIDING COMMISSIONER: On September 29, 2022, Bald Head Island Transportation, Inc. (BHIT), and Bald Head Island Limited, LLC (BHIL, and collectively, Respondents), filed with the Commission a Motion in Limine to Exclude Testimony and Evidence Regarding Rate Case Issues and Determinations Not Germane to this Docket (Motion in Limine).

On October 4, 2022, the Village of Bald Head Island (VBHI or Complainant) filed its response.

DISCUSSION AND CONCLUSIONS

“A motion in limine seeks pretrial determination of the admissibility of evidence proposed to be introduced at trial[.]” *Hamilton v. Thomasville Med. Assocs.*, 187 N.C. App 789, 792, 654 S.E.2d 708,710 (2007). In general, the Commission may exclude incompetent, irrelevant, immaterial, and unduly repetitious or cumulative evidence, with it — like any court — having “wide discretion in making [any such] advance ruling.” *Id.*

Respondents request that the Commission exclude testimony and evidence of: (1) any current or future basis or value of any assets that might be included in the rate base of the ferry and tram systems or any other operations (i.e., the parking or barge operations) the Commission may decide are subject to regulation for purposes of any future ratemaking proceeding; or (2) any calculated or proposed revenue requirements, rate design, or rates of return for the currently unregulated operations or functions at issue in this proceeding (collectively, Rate Issues).

In support, Respondents argue that the Complaint and Request for Determination of Public Utility Status (Complaint) does not request the Commission to set the rates of

the regulated ferry and tram operations of BHIT (Regulated Assets) or of either BHIL's parking or barge operations (Unregulated Assets). Respondents also state that the Commission has confirmed that "a review of the four corners of the Complaint" "does not yield any request by [the Village] that the Commission set rates for the Unregulated Assets or alter rates for the Regulated Assets" in the instant proceeding.

Respondents also state that VBHI has requested, and BHIT and BHIL have produced but reserved objections to, voluminous discovery of certain financial information, including: Income Statements for BHIT, April 2012-March 2022; Income Statements for BHIL's Parking Department, 2013-2021; Audited Financial Statements for BHIL's Parking Department, 2014-2021; Tax Asset Detail for Parking Department Improvements, 2005-2022; Cost Basis for Parking Department Assets; Income Statements for BHIL's Barge Department, 2013-2021; Audited Financial Statements for BHIL's Barge Department, 2014-2021; Gross Book Values of Ferry, Parking and Barge Assets; Due Diligence Report prepared for BHIL in Advance of Proposed Sale of the Regulated and Unregulated Assets to Bald Head Island Transportation Authority (BHITA); Bond Feasibility Study prepared for BHITA in Advance of Proposed Purchase of the Regulated and Unregulated Assets; and SharpVue Capital Valuation of Regulated and Unregulated Assets.

Respondents argue that this docket does not involve the fixing of rates, or the related statutorily required responsibilities and determinations of the same, and both that there is no relevance to the submission of such testimony and such consideration would be prejudicial to the Respondents and SharpVue. Respondents argue that "permit[ting] Complainant to take piece-meal shots at the complex and thorough-going rate processes of [N.C. Gen. Stat.] § 62-133(b) would also contravene the well-settled prohibition against 'single-issue ratemaking'" and be "alien to the Commission's historic conduct [involving rate determinations]." Respondents further argue that excluding such testimony and evidence would serve judicial efficiency and economy and "thus expedite and render efficient a subsequent trial." (Citation omitted).

Respondents highlight VBHI witness O'Donnell's rebuttal testimony as illustrating the need to limit the scope of evidence prior to hearing. Respondents state that the issues of rate base and rate of return are not properly framed or presented in this docket because they are irrelevant to the jurisdictional issue in question; if they were properly presented, Respondents would strongly dispute O'Donnell's methodology and will do so in the appropriate docket, if necessary. Respondents state that if this were a rate case proceeding, BHIT would also present extensive accounting evidence pursuant to Commission Rule RI-17 on these issues, with the Public Staff, which has an integral role in representing the using and consuming public, reviewing the same. Respondents also note VBHI witness Wright's observation that these matters "should be considered[,] if at all, "at the appropriate [and future] time[.]"

Respondents thus request that the Commission preclude testimony or evidence related to, among other things: (1) what assets may or should be newly included in the rate base of either the ferry/tram or parking or barge services; (2) the value of any assets

that may or should be newly included in the rate base of either the ferry/tram or parking or barge services; and (3) the calculated or proposed revenues, rate design, or rates of return, that should be permissible for either the ferry/tram or parking or barge services. Respondents assert that this type of testimony and evidence is irrelevant to the question of whether the Commission should regulate either the parking or barge services under any of the theories advanced by VBHI in its Complaint. Respondents state that enlarging the scope of the hearing to these rate base and rate of return issues would greatly and unnecessarily lengthen the time required for cross-examination and thus the hearing itself, where such testimony or evidence cannot pass the most basic test of relevance.

VBHI responds that evidence showing that Respondents have been using the proceeds from their highly profitable, unregulated parking facilities and barge operations to support the regulated ferry and tram services is highly relevant to the questions presented in this proceeding. VBHI states that the profitability of the parking facilities and the barge has been at issue in this case “since day one,” as “the residents, visitors and on-Island and off-Island businesses are at risk of being held hostage by one or more monopoly service providers whose primary goal would be to maximize profit outside the control of any regulated authority” VBHI cites to the testimony of its witnesses O’Donnell and Wright and argues that one of the purposes of regulation is “to ensure that the profits of a nonregulated subsidiary are not maximized at the expense of ratepayers” and that Chapter 62 permits regulation of a parent entity when the “the Commission shall find that such an affiliation has an effect on the rates or service of such public utility” — which in part can be shown by the Commission’s examining the parking facilities’ profits. VBHI also cites to certain Respondents witness testimony as evidence offering valuation of the assets and also as acknowledging the direct relevance of further inquiry into the actual profitability of the parking and barge operations, given Respondents’ assurances that revenues are being appropriately imputed and to assuage concerns about the need for the Commission to regulate the parking and barge operations.

VBHI argues that the evidence sought to be excluded by Respondents easily meets the standard for relevancy, noting that evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case. VBHI states that the evidence Respondents seek to exclude tends to support the following conclusions, that among other things:

- BHIL has historically managed, from an aggregate financial point of view, the three operations as part of a consolidated transportation business — corroborating that the parking and barge are ancillary to the ferry operations;
- the “market value” of the parking and barge operations is inextricably tied to the regulated ferry operations because the revenues of the parking and barge operations are driven by and linked to ferry ratepayers — corroborating that the parking and barge are ancillary to the ferry operations;

- ratepayers are currently at risk of paying excessive, monopoly rates for parking and use of the barge — thus endangering the public’s access to the ferry’s utility service and the barge’s common carrier service; and
- the parking operation, in particular, is a de facto monopoly service based on this evidence.

VBHI also argues that because ferry ratepayers are the same people that pay parking, and BHIL can defray ferry rate increases by simply raising parking or barge rates, the profitability of these respective enterprises is directly relevant.

After careful consideration, the Presiding Commissioner concludes that the Motion in Limine should be denied. The Presiding Commissioner accepts VBHI’s proffered bases at this time as sufficient to meet the legal standard for relevancy in response to this broad, nonspecific challenge. In so concluding, the Presiding Commissioner emphasizes that this proceeding is not a general rate case proceeding, as Respondents argue and VBHI and several of its witnesses have recognized, and only evidence relevant to the questions presented by the Complaint will be considered. It is premature and unnecessary, however, to broadly preclude certain evidence as requested by Respondents. Accordingly, the Respondents’ Motion in Limine is denied.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 7th day of October, 2022.

NORTH CAROLINA UTILITIES COMMISSION



Erica N. Green Deputy Clerk