

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ'S MOBILE HOMES, INC.)	DOCKET NO. 921237-WS
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In Re: Investigation Into Provision of Water and Wastewater Service by JJ'S MOBILE HOMES, INC. to its Certificated Territory in Lake County.)	DOCKET NO. 940264-WS ORDER NO. PSC-94-1202-PCO-WS ISSUED: September 30, 1994

ORDER REQUIRING PRODUCTION OF DOCUMENTS

This Order addresses two requests for production of documents filed by the Office of Public Counsel (OPC) and a first request for production of documents filed by JJ's Mobile Homes, Inc. (JJ's utility). This Order also addresses and resolves the utility's objections to OPC's two requests for production of documents, OPC's two motions for orders compelling the utility to produce the documents requested, the utility's responses to OPC's two motions for orders compelling the utility to produce the documents requested, and OPC's objections to the utility's first request for production of documents.

OPC's First Request for Production of Documents

On July 13, 1994, OPC served the utility with a request for production of documents. Production of Document Request (POD) No. 1 solicited the personal income tax returns of Mr. Jordan W. Hypes, President and primary shareholder of the utility, for the years 1990 through 1993. POD Nos. 3 and 4 solicited copies of certain bills included in the utility's 1992 and 1993 annual report balances for the law firm of Rose, Sundstrom & Bentley and for Hartman & Associates.

On July 28, 1994, the utility filed an objection to POD Nos. 1, 3 and 4. With regard to POD No. 1, the utility argues that the personal income tax returns of Mr. Hypes are irrelevant and immaterial to any issue in this action, have no bearing on the utility's financial ability to fund improvements when needed, and are highly private. The utility contends it will introduce certain financial statements of Mr. Hypes which will provide the support for its position that Mr. Hypes has the ability to provide the funding when needed. The utility requests oral argument on this

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issue. With regard to POD Nos. 3 and 4, the utility contends that these requests seek irrelevant, immaterial information, as well as information which is within the scope of the attorney-client privilege.

On August 9, 1994, OPC filed a motion for order compelling discovery in response to the utility's objection. With regard to POD No. 1, OPC argues that because Mr. Hypes is representing to this Commission that he personally has the ability to provide funding when needed, and because his personal tax returns may contain information about his income, debt, assets, depreciation expenses, etc., his tax returns are indeed relevant and material to this proceeding. With regard to POD Nos. 3 and 4, OPC points out that Mr. Hypes was noticed for deposition pursuant to a subpoena duces tecum on November 16, 1993. The utility objected to, among other things, the nature of the documents subpoenaed, which included "[r]ecords of all legal expenses paid by JJ's from 1989 forward." Order No. PSC-93-1672-PCO-WS, issued November 17, 1993, held that "the objections due to relevance, privilege, work product, vagueness, or availability [were] not well-founded." The utility subsequently provided all of its billings for legal fees for 1989 forward. Thus, the records sought in POD Nos. 3 and 4 are encompassed within documents which the utility has already produced. OPC now seeks to identify within those documents those bills that directly relate to certain amounts delineated in the utility's annual reports, and further, to identify those amounts that another entity reimbursed to the utility.

On August 22, 1994, the utility filed a response to OPC's motion for order compelling discovery. With regard to POD No. 1, the utility argues that OPC's request for copies of Mr. Hypes's tax returns is not reasonably calculated to lead to the discovery of admissible evidence. The utility asserts that a tax return cannot be used to assess financial position or financial ability to fund a utility's capital needs. With regard to POD Nos. 3 and 4, the utility states that these documents have been produced, or will be produced, except those which contain privileged information. The bills of Rose, Sundstrom & Bentley are very detailed as to the nature of work performed on a given day, and may reveal sensitive information about trial tactics, strategies, etc.

Rules 1.280 and 1.350 of the Florida Rules of Civil Procedure allow the discovery of any document relevant to the subject matter of a pending action. See Bystrom v. Whitman, 488 So. 2d 520, 523 (Fla. 1986). Personal tax returns are discoverable in Florida. Id.; see also Old Holdings, Ltd. v. Taplin, Howard, Shaw & Miller, P.A., 584 So. 2d 1128, 1129 (Fla. 4th DCA 1991); Citibank, N.A. v. Plapinger, 461 So. 2d 1027, 1028 (Fla. 3rd DCA 1985) (finding that

the trial court's view that federal income tax returns and various other financial statements "were not discoverable because 'privileged' finds absolutely no support in the law"). This Commission has also ruled that federal income tax returns are discoverable when relevant or reasonably calculated to lead to the discovery of admissible evidence. See Orders Nos. PSC-94-0571-CFO-WU, issued May 13, 1994, in Docket No. 940109-WU, In Re: Petition for Interim and Permanent Rate Increase in Franklin County by St. George Island Utility Co. Ltd, and PSC-93-0934-FOF-WS, issued June 22, 1993, in Docket No. 920148-WS, In Re: Application for a Rate Increase in Pasco County by Jasmine Lakes Utilities Corporation. The tax returns solicited in POD No. 1 are relevant to support or discredit Mr. Hypes' ability to personally fund the utility as needed. Moreover, the utility is free to seek confidential treatment for these documents pursuant to Rule 25-22.006, Florida Administrative Code. Accordingly, the utility is hereby ordered to produce a response to POD No. 1 within seven days of the effective date of this Order. As the pleadings contain sufficient argument to render a complete evaluation of the merits of this issue without oral argument, the utility's request for oral argument on this issue is hereby denied.

POD Nos. 3 and 4 are relevant and reasonably calculated to lead to the discovery of admissible evidence, in accordance with Rule 1.280, Florida Rules of Civil Procedure. The utility's attorney-client privilege argument lacks merit to the extent that these billing statements are encompassed within documents already in OPC's possession. The utility waived any privilege that may have attached to these documents when it disclosed them to OPC. Any billing statements that the utility has not yet provided to OPC pursuant to POD Nos. 3 and 4 which do not reveal privileged information are discoverable. Accordingly, the utility is ordered to produce such billings within seven days of the effective date of this Order. The utility is further ordered to specifically delineate and explain to OPC any claims of privilege to billing statements requested and not yet produced. The utility shall make a good-faith effort to modify these billing statements so that OPC may obtain the information it seeks without the privileged information being divulged.

The Utility's First Request for Production of Documents

On July 13, 1994, the utility served its first request for production of documents upon OPC. The utility's POD No. 1 was a request for all documents OPC intends to introduce as an exhibit and/or upon which its witnesses "intend to refer, rely, or review prior to or during the course of the hearing on this matter." The utility's POD No. 2 solicited "all documents which analyze,

discuss, reference, contain, comprise, or are otherwise relevant to" an issue in this cause concerning whether prior orders of this Commission properly granted certain territory to the utility or its predecessor in interest.

On July 25, 1994, OPC filed an objection to the utility's first request for production of documents. With regard to the utility's POD No. 1, OPC argues that because its three witnesses are not employed by or under contract to the OPC, OPC has no idea what they might refer to, rely upon or review prior to or during the hearing. OPC cites to Smith v. Florida Power and Light Co., 632 So. 2d 696 (Fla. 3rd DCA 1994), for the proposition that the selection of documents to be used during cross-examination of witnesses is undiscoverable work product. To the extent that the requested documents intended for use on cross-examination comprise a grouping that would reveal counsel's mental impressions, they are nondiscoverable. *Id.* at 698. However, with regards to POD No. 2, OPC shall produce all of the requested documents that it knows of which relate to the specific issue and do not contain legal theories, strategies, analyses, or conclusions or do not otherwise fall within the definition of attorney work product. All documents are to be produced within seven days of the effective date of this Order. Any such documents which are public records, have already been filed or obtained through discovery in this docket, or are orders of this Commission, need not be produced. However, within seven days of the effective date of this Order, OPC shall provide the utility with a list identifying each of these documents for each POD. As to POD No. 1, the utility's request for all documents relevant to this docket is excessively broad and is denied.

OPC's Second Request for Production of Documents

On August 9, 1994, OPC served the utility with its second request for production of documents. In this request, OPC solicited the financial statements of Mr. Hypes referred to in the utility's objection to OPC's initial request for production of documents, along with "all documentation, including, but not limited to, invoices, forecasts, workpapers, etc., which support the financial statements."

On August 16, 1994, the utility filed an objection to OPC's second request for production of documents. The utility objects to the time frames for response requested by OPC. The utility also objects to OPC's request for all supporting documentation associated with the requested financial statements of Mr. Hypes. The utility argues that OPC requests documents which are irrelevant, overbroad, immaterial, and redundant.

On August 24, 1994, OPC filed a second motion for order compelling the utility to respond to its second request for production of documents. OPC contends that it has the right, as well as the duty, on behalf of the Citizens, to question the validity of any financial statements which the utility alleges is evidence of Mr. Hypes's financial ability to provide necessary funding for the utility system. OPC further avers that any documents that support the figures on the financial statements may tend to prove the veracity of the financial statements or may reasonably lead to the discovery of admissible evidence.

On September 6, 1994, the utility filed a response to OPC's second motion for order compelling discovery. The utility again states that it will provide the personal financial statements of Mr. Hypes with its rebuttal testimony, which is due on September 14, 1994. However, the utility argues that OPC's request for all documentation which supports the financial statements is so overbroad as to be physically impossible to respond to, particularly under the timeframe requested by OPC. Compliance with this request would entail production of every invoice for items such as personal purchases of clothing, canceled checks, receipts for household furniture, and so forth. The utility argues that OPC has no right to question the validity of the financial statements by imposing an impossible burden upon the utility at the last possible moment.

Because OPC requested the utility to respond by August 19, 1994, and that date has come and gone, this issue is moot. OPC's request for production of the financial statements of Mr. Hypes is proper. However, OPC's request for production of supporting documentation for the financial statements is also proper to the extent that it could reasonably lead to information which might show the accuracy of the accounting treatment of the financial statements. As previously mentioned in this Order, the utility is free to seek confidential treatment for its documents pursuant to Rule 25-22.006, Florida Administrative Code. Accordingly, the utility is hereby ordered to produce the requested financial statements of Mr. Hypes, including, to the extent possible, such documentation which directly supports those statements, within seven days of the effective date of this Order.

Based upon the foregoing, it is

ORDERED that JJ's Mobile Homes Inc.'s objection to OPC's Original Request for Production of Documents filed July 28, 1994, is hereby denied as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's first Motion for Order Compelling Discovery filed August 9, 1994, is hereby granted to the extent set forth in the body of this Order. It is further


ORDERED that the Office of Public Counsel's objection to JJ's Mobile Homes, Inc.'s first request for production of documents, filed July 25, 1994, is hereby denied in part and granted in part as set forth in the body of this Order. It is further

ORDERED that JJ's Mobile Homes, Inc.'s objection to Office of Public Counsel's second request for production of documents, to the extent it is not moot, is hereby denied as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Second Motion for Order Compelling Discovery filed August 24, 1994, is hereby granted to the extent set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel and JJ's Mobile Homes, Inc. are hereby directed to respond to the discovery as set forth in this Order within seven days of the effective date of this Order.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 30th day of September, 1994.



JULIA L. JOHNSON, Commissioner and
Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

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Any party adversely affected by this Order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.