

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a rate ) DOCKET NO. 920148-WS  
increase in Pasco County by ) ORDER NO. PSC-93-0934-FOF-WS  
Jasmine Lakes Utilities ) ISSUED: 06/22/93  
Corporation. )  
\_\_\_\_\_ )

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman  
JULIA L. JOHNSON

ORDER GRANTING MOTION FOR REVIEW  
AND REQUIRING PRODUCTION OF DOCUMENTS

BY THE COMMISSION:

Background

On March 22, 1993, the Office of Public Counsel (OPC) served Jasmine Lakes Utilities Corporation (Jasmine or utility) with its Fourth Request for Production of Documents. Production of Document Request (POD) No. 34 solicited copies of the utility president's personal income tax returns for the years 1989 through 1992. Jasmine is a subchapter "S" corporation, and its president is its sole shareholder. On March 24, 1993, the utility filed an objection to POD No. 34, contending, essentially, that the information sought was neither relevant nor calculated to lead to the discovery of relevant information.

On March 31, 1993, OPC filed a Motion to Compel Discovery. On April 6, 1993, the utility filed a response to OPC's motion. On April 27, 1993, pursuant to OPC's request, the Prehearing Officer heard oral argument on OPC's motion. By Order No. PSC-93-0652-PCO-WS, issued April 28, 1993, the Prehearing Officer denied OPC's Motion to Compel. Thereafter, on May 10, 1993, OPC filed a Motion for Review of Order No. PSC-93-0652-PCO-WS, and on May 25, 1993, Jasmine filed a response to that motion. This Order evinces our disposition of OPC's Motion for Review.

DOCUMENT MADE AVAILABLE

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FLORIDA PUBLIC SERVICE COMMISSION

Motion for Review

We think it appropriate to first relate the arguments made by the parties with respect to OPC's Motion to Compel. OPC maintained that the solicited documents are necessary in order for OPC to determine the extent to which the utility president devotes his time to utility matters. OPC emphasized that the utility is requesting recovery of a \$76,500 annual salary for its president, and a critical premise to the reasonableness of the requested salary is the utility's assertion that its president spends 98% of his time performing utility duties even though he is involved in various nonutility businesses. OPC noted that in POD No. 8, it solicited the utility president's W-2 forms from all employers for 1989 through 1991 and that the utility responded with the assertion that the utility president received a W-2 from the utility only. OPC claimed that it should be allowed to test the accuracy of the response to POD No. 8.

In its response to OPC's Motion to Compel, Jasmine contended that the utility president's reported income for any period, past, present, or future, other than that income paid him by the utility itself is irrelevant to this proceeding. Moreover, Jasmine claimed, the president's tax return would not serve OPC's announced purpose of serving as some sort of record of the president's working hours, especially since the president filed a joint personal income tax return with his wife. Because the return reflects the combined incomes of the president and his wife, Jasmine argued, the president may be unfairly cross-examined to differentiate between his income and his wife's. Further, Jasmine asserted that the president had not yet filed his 1992 tax return and that he was not a utility employee until July 1990, so the 1990 tax return is not representative and the 1989 return is clearly irrelevant. Jasmine concluded that only the 1991 return is of potential relevance, but that the Commission should find that it is not relevant for the reasons stated above.

In its Motion for Review, OPC reiterates some of its arguments from its Motion to Compel, but emphasizes that the Prehearing Officer made two critical mistakes in his decision. First, the Prehearing Officer misapprehended the standard of review to be applied to the Motion to Compel. Second, the Prehearing Officer made a critical finding of fact, unsupported in the record, that had nothing to do with the relevance of the requested discovery.

With respect to the former argument, OPC asserts that the Prehearing Officer's Order indicates that the Prehearing Officer misapprehended the standard for determining whether to grant OPC's Motion to Compel. The proper standard, OPC asserts, is whether the information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence. In support of its argument, OPC cites the following language from the Prehearing Officer's Order:

The real issue of the relevance test is whether or not the requested document or information will directly answer the inquiry.

OPC asserts that nowhere in Chapter 90, Florida Statutes, is it provided that the above-quoted language is the test of relevance. Moreover, OPC asserts that the above language is contrary to the test of Rule 1.280, Florida Rules of Civil Procedure, which states,

It is not grounds for objection that the information sought will be inadmissible at trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence. (Emphasis supplied.)

OPC also argues that the Prehearing Officer made a finding of fact unsupported by the record. In his Order, the Prehearing Officer stated,

The Prehearing Officer is not persuaded that this particular discovery request is the only vehicle available to OPC to satisfy its inquiry and arrive at a determination on this issue.

This finding, OPC states, appears to be a statement relative to the work product privilege, which was not and has not been argued by either party to this dispute. Thus, OPC argues, this finding by the Prehearing Officer is erroneous in that it has nothing to do with the issue of relevance and is not supported by the record. In its conclusion, OPC asks that we reverse the Prehearing Officer's Order, grant its Motion to Compel, and require the utility to produce the subject tax returns.

In its response to OPC's Motion for Review, Jasmine reiterates the arguments it made in its response to OPC's Motion to Compel. In addition, Jasmine contends that the Prehearing Officer used the correct standard of review and has not incorporated an erroneous finding of fact into his decision. OPC's contentions are based upon a misreading of the Order, Jasmine states, and OPC has taken certain statements contained therein out of context. Jasmine agrees with the Prehearing Officer's conclusion in Order No. PSC-93-0652-PCO-WS and requests that we deny OPC's Motion for Review.

The test for determining whether reconsideration is appropriate is whether there has been an error in fact or law made or some evidence not considered when the Commission made its initial decision. For instance, as stated in Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974):

The granting of a petition for reconsideration should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.

In this case, we believe the Prehearing Officer made an error in law. We understand the Prehearing Officer's legitimate concern with the privacy of personal tax returns. However, the standard the Prehearing Officer applied appears to have been clouded by this concern. This notwithstanding, we believe the Prehearing Officer erred in finding that the president's tax returns were not relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Jasmine is an "S" corporation for tax purposes, the utility claims that its president and sole shareholder spends 98% of his time performing utility duties, and the utility owner is involved with various other business enterprises--these specific factors are critical to our decision in this matter. We agree the utility president's tax returns in conjunction with other information OPC already has received in discovery concerning the president's other business interests will permit an independent check of the premise that the utility president spends 98% of his time managing utility operations. Since the utility has requested an annual salary of \$76,000 for its president and a portion of his total salary is allocated to the utility, we think the information solicited in OPC POD No. 34 is relevant and,

therefore, the proper subject of discovery.

Finally, we note that if the utility is concerned with the privacy of the tax returns, it is free to request confidential treatment of the subject tax returns pursuant to Rule 25-22.006, Florida Administrative Code.

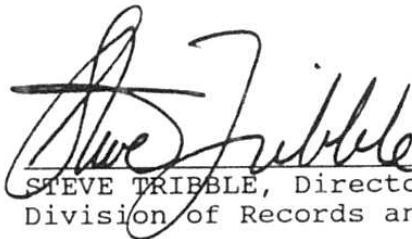
Accordingly, Order No. PSC-93-0652-PCO-WS is hereby reversed and OPC's Motion to Compel is granted.

It is, therefore,

ORDERED by the Florida Public Service Commission that the Public Counsel's Motion for Review of Order No. PSC-93-0652-PCO-WS is hereby granted and Public Counsel's Motion to Compel is, thus, derivatively granted. It is further

ORDERED that Jasmine Lakes Utilities Corporation shall produce the document requested in the Office of Public Counsel's Production of Document Request No. 34.

By ORDER of the Florida Public Service Commission, this 22nd day of June, 1993.



STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

SFS

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

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result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request 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. 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.