

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Original Certificate of) DOCKET NO. 20190168-WS
Authorization and Initial Rates and Charges)
for Water and Wastewater Service in Duval,) FILED: October 22, 2020
Baker and Nassau Counties, Florida by)
FIRST COAST REGIONAL UTILITIES, INC.)
_____)

APPLICANT, FIRST COAST REGIONAL UTILITIES, INC.'S
MOTION TO COMPEL DISCOVERY

Applicant, FIRST COAST REGIONAL UTILITIES, INC. (hereinafter, "First Coast"), by and through its undersigned attorneys, pursuant to the Uniform Rules of Procedure, hereby moves to compel JEA to fully respond to First Coast Regional Utilities, Inc.'s Second Interrogatories to JEA (hereinafter "Second Interrogatories") and First Coast Regional Utilities, Inc.'s Second Request for Production of Documents to JEA (hereinafter "Second Request for Production"), and in support thereof states:

I. Discovery

1. On August 31, 2020, First Coast propounded its Second Interrogatories via Email. By Rule, JEA's response was due by Wednesday, September 30, 2020. Rules 1.090 and 1.340, Fla. R. Civ. P.¹

2. On August 31, 2020, First Coast propounded its Second Request for Production, via Email. By Rule, JEA's response was due by Wednesday, September 30, 2020. Rules 1.090 and 1.340, Fla. R. Civ. P.

3. On or about September 30, 2020, JEA filed JEA's Answers to First Coast Regional Utilities, Inc.'s Second Interrogatories to JEA, (hereinafter "Answers to Second Interrogatories").

¹ The Uniform Rules provide that parties in administrative proceedings may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Fla. R. Civ. P.

JEA, for Interrogatories #18-#48 answered with the following: “Objection. JEA objects to this request as exceeding the scope of permissible discovery as not reasonably calculated to lead to the discovery of admissible evidence on any issue material to this proceeding.”

4. On or about September 30, 2020, JEA filed JEA’s Responses to First Coast Regional Utilities, Inc.’s Second Request for Production of Documents to JEA (Requests 16-25) (hereinafter “Response to Second Request for Production of Documents”). JEA’s responses to Requests #21-23 stated: “Objection. JEA objects to this request as exceeding the scope of permissible discovery as not reasonably calculated to lead to the discovery of admissible evidence on any issue material to this proceeding.”

II. JEA’s Responses

5. Interrogatory 18 states: Please advise as to the amount of the franchise fee collected from JEA water customers for the years 2017, 2018, and 2019.

6. Interrogatory 19 states: Please advise as to the amount of the franchise fee collected annually from JEA wastewater customers for the years 2017, 2018, and 2019.

7. Interrogatory 20 states: Please advise as to the amount of the franchise fee collected from JEA irrigation or reuse water customers for the years 2017, 2018, and 2019.

8. Interrogatory 21 states: Please advise as to the amount of the franchise fee collected annually from JEA electric customers for the years 2017, 2018, and 2019.

9. Interrogatory 23 states: There is an item on the current JEA bill entitled “Gross Receipts Tax”. Please identify what items the gross receipts tax is applicable to, the amount thereof, the statutory basis thereof, and to whom it is paid.

10. Interrogatory 24 states: There is an item on the current JEA bill entitled “Public Service Tax”. Please identify what items the public service tax is applicable to, the amount thereof,

the statutory basis thereof and to whom it is paid.

11. Interrogatory 25 states: There is an item on the current JEA bill entitled “Florida State Sales Tax”. Please identify the percentage amount thereof.

12. Interrogatory 26 states: Relative to Interrogatory #24 above, please identify as to whether or not the stated Florida State Sales Tax is calculated upon the City of Jacksonville Franchise Fee in addition to the provision of utility services.

13. Interrogatory 27 states: Relative to the subject Interlocal Agreement Regarding Franchise Fees, please identify any study, report, or analysis prepared prior to the imposition of the franchise fee on the provision of electric utility services.

14. Interrogatory 28 states: Relative to the subject Interlocal Agreement Regarding Franchise fees, please identify any study, report, or analysis prepared prior to the imposition of the franchise fee on the provision of water utility services.

15. Interrogatory 29 states: Relative to the subject Interlocal Agreement Regarding Franchise Fees, any study [sic], please identify any report, or analysis prepared prior to the imposition of the franchise fee on the provision of sewer utility services.

16. Interrogatory 30 states: Relative to the subject Interlocal Agreement Regarding Franchise Fees, please identify any study, report, or analysis prepared prior to the imposition of the franchise fee on the provision of irrigation or reuse services.

17. Interrogatory 31 states: Relative to Interrogatory #23 above, please identify as to whether or not the stated Public Service Tax is calculated upon the City of Jacksonville Franchise Fee, in addition to the provision of utility services.

18. Interrogatory 32 states: Relative to Interrogatory #22 above, please identify as to whether or not the stated Gross Receipt Tax is calculated upon the City of Jacksonville Franchise

Fee in addition to the provision of utility services.

19. Interrogatory 33 states: Relative to Interrogatory #23 above, please identify as to whether or not the stated Public Service Tax is calculated upon the City of Jacksonville Franchise Fee in addition to the provision of utility services.

20. Interrogatory 34 states: Has the City of Jacksonville entered into a revenue sharing agreement with the State of Florida or any agencies thereof, that rely upon the Franchise Fee referenced in Interrogatory #23 above?

21. Interrogatory 35 states: Has the City of Jacksonville entered into a revenue sharing agreement with the State of Florida or any agencies thereof, that rely upon the Gross Receipts Tax referenced in Interrogatory 22 above?

22. Interrogatory 36 states: Has the City of Jacksonville entered into a revenue sharing agreement with the State of Florida or any agencies thereof, that rely upon the Public Service Tax referenced in Interrogatory #23 above?

23. Interrogatory 37 states: Has the City of Jacksonville entered into a revenue sharing agreement with the State of Florida or any agencies thereof, that rely upon the Florida State Sales Tax referenced in Interrogatory #24 above?

24. Interrogatory 38 states: Has the City of Jacksonville issued any bonds, notes, certificates of indebtedness or similar borrowing instruments wherein the Franchise Fee referenced hereinabove has been pledged as revenue source, collateral or security?

25. Interrogatory 39 states: If the answer to Interrogatory #37 is yes, please identify each such instrument, including the obligor, obligee, trustee and date of issuance.

26. Interrogatory 40 states: Has the City of Jacksonville issued any bonds, notes, certificates of indebtedness or similar borrowing instruments wherein the Gross Receipts Tax

referenced hereinabove has been pledged as revenue source, collateral or security?

27. Interrogatory 41 states: If the answer to Interrogatory #39 is yes, please identify each such instrument, including the obligor, obligee, trustee and date of issuance.

28. Interrogatory 42 states: Has the City of Jacksonville issued any bonds, notes, certificates of indebtedness or similar borrowing instruments wherein the Public Service Tax referenced hereinabove has been pledged as revenue source, collateral or security?

29. Interrogatory 43 states: If the answer to Interrogatory #41 is yes, please identify each such instrument, including the obligor, obligee, trustee and date of issuance.

30. Interrogatory 44 states: Please advise as to the percentage amount of the franchise fee being imposed on JEA customers in St. Johns County.

31. Interrogatory 45 states: Please advise as to the percentage amount of the franchise fee being imposed on JEA customers in Nassau County.

32. Interrogatory 46 states: Please advise as to the percentage amount of the public service tax being imposed on JEA customers in St. Johns County.

33. Interrogatory 47 states: Please advise as to the percentage amount of the public service tax being imposed on JEA customers in Nassau County.

34. Interrogatory 48 states: Relative to the Nocatee development project (Project) in St. Johns County, please identify when the JEA agreed to provide water, wastewater and reuse to that Project and please identify all such developer agreements, service agreements, or contracts of such nature between the developer(s) of all or any portion of such Project.

35. Request for Production (“Request”) #21 seeks: Any and all documents, exhibits, or other items of tangible evidence which outlines, discloses or explains the “public service tax” and/or the statutory basis thereof.

36. Request 22 seeks: Any and all documents, exhibits, or other items of tangible evidence that discusses or explains any revenue sharing agreement between the City of Jacksonville and the State of Florida or any agencies thereof that rely upon the franchise fees and/or gross receipts tax and/or public service tax paid to the City of Jacksonville by JEA.

37. Request 23 seeks: Any and all documents, exhibits, or other items of tangible evidence that discusses, explains or justifies use of franchise fees, public service tax, or gross receipts tax as pledges of revenue or collateral or security in any bonds, notes or certificates of indebtedness from the City of Jacksonville or JEA.

38. Request 24 seeks: Any and all documents, exhibits, or other items of tangible evidence that establishes or discusses a nexus between the franchise fees paid by JEA to the City of Jacksonville and a reasonable rental charge for the rental value for rights of way granted to JEA under any franchise agreement with the City of Jacksonville.

39. Request 25 seeks: Any and all documents, exhibits, or other items of tangible evidence that establishes or discusses the relationship between JEA and the Nocatee development in St. Johns County relative to when the JEA agreed to provide water, wastewater and reuse to that Project and please identify and produce all such developer agreements, service agreements, or contracts of such nature between the developer(s) of all or any portion of such Project.

40. With the exception of Request 25, each and every Interrogatory and Request listed above was responded to by JEA with the following boilerplate objection: "Objection. JEA objects to this request as exceeding the scope of permissible discovery as not reasonably calculated to lead to the discovery of admissible evidence on any issue material to this proceeding." No specific grounds were stated as the basis for these objections.

41. JEA's response to Request 25 merely parroted the following boilerplate objection:

“Objection. JEA objects to this request as vague, overbroad and exceeding the scope of permissible discovery as not reasonably calculated to lead to the discovery of admissible evidence on any issue material to this proceeding.” As with its other objections, JEA failed to state with specificity why this Request was vague, overbroad, and was not calculated to lead to the discovery of admissible evidence in this proceeding, or respond with any documentation responsive to this Request.

42. JEA’s objections, and refusal to answer specific interrogatories or requests for documents, were in response to discovery requests concerning JEA’s alleged exclusive franchise and related issues, JEA’s finances, and JEA’s provision of services, all of which JEA has specifically maintained are issues material to this proceeding.

43. First Coast seeks this information to determine whether the franchise itself is illegal, either in whole or in part, and thus unenforceable. That determination could adversely affect the underpinnings of JEA’s financings, and its ability to continue serving its existing customers without instituting massive rate increases, and, for that matter, attempting to serve First Coast at all.

44. JEA’s petition in this case (*ne* “Objection”) graphically demonstrates that this discovery is reasonably calculated to lead to the discovery of admissible information. JEA’s petition alleges that (a) if the application is granted, residents within the proposed service area may be precluded from obtaining water and wastewater services “of better quality at a lower cost” through JEA; (b) that JEA is ready, willing, and able to serve the water and wastewater needs of the proposed service area; and (c) that certification of the area to First Coast is not in the public interest. While responding to discovery in a litigation which it initiated may represent an inconvenience to JEA, First Coast has every right under the applicable rules of discovery to delve into the basis for, and the defenses against, these allegations. The First Coast discovery that JEA has effectively and *de facto* refused to respond to is, at a minimum, reasonably calculated to address those broad issues

as framed within the petition.

III. Efforts to Obtain Discovery Responses without Commission Intervention

45. On October 20, 2020, William E. Sundstrom, counsel for First Coast, contacted counsel for JEA, stating that JEA's responses to the Second Interrogatories #18-48, and Second Request for Production #21-25 were insufficient and misleading as they concerned JEA's "exclusive franchise" and related issues, JEA's finances, and JEA's provision of services, which are the cornerstones of JEA's objections in this proceeding, and thus material. Sundstrom requested that JEA immediately provide responses to said Second Interrogatories and Second Requests for Production.² Counsel for JEA did not agree to provide the requested discovery even though JEA maintains that its franchise, financial strength, and ability to provide service are material issues in this proceeding.

46. In spite of undersigned counsel's attempt to resolve this matter without Commission action, JEA has not provided proper answers to First Coast's outstanding discovery or stated with specificity why each outstanding request concerns issues not material to this proceeding.

47. Pursuant to Rule 1.380(2), Florida Rules of Civil Procedure, the undersigned does hereby certify that counsel has, in good faith, attempted to confer with counsel for JEA in an effort to secure the information or material without Commission action.

IV. JEA has failed to Adequately Respond to the above-referenced Second Interrogatories and Second Request for Production

48. Discovery at the pretrial stage is not fettered with the rules of admissibility that apply at trial, and utmost freedom is allowed. Jones v. Seaboard Coast Railroad Co., 297 So.2d 861, 863 (Fla. 2d DCA 1974).

² Counsel also pointed out that a few of the Interrogatories contained errors relating back to previous Interrogatories. Specifically: Interrogatory 39 should have referred back to Interrogatory 38; Interrogatory 41 should have referred back to Interrogatory 40; and Interrogatory 43 should have referred back to Interrogatory 42.

49. Boilerplate approaches are inconsistent with the rules and can result in the waiver of all objections and even sanctions. Accordingly, responses to discovery must be thoughtful, case-specific, and factually supported. *See e.g.*, Fla. R. Civ. P. 1.350(b) (“the reasons for the objection shall be stated”); the Florida Bar Guidelines for Professional Conduct, Section H.2 (all grounds for an objection must be stated with specificity); Deutsche Bank Nat’l Trust Co. v. Baker, 199 So.3d 967, n.2 (Fla. 4th DCA 2016).

50. Objections and responses to discovery requests are subject to Section 57.105, Fla. Stat., which authorizes the award of sanctions against parties who raise claims and defenses not supported by material facts. Specifically, sanctions have been awarded when a party filed a motion to dismiss, and the same party objects to discovery requests, the subject of which was directed to the issues raised in the motion to dismiss. Pronman v. Styles, 163 So.3d 535 (Fla. 4th DCA 2015). Such conduct has been found to constitute discovery abuse and improper delaying tactics. *See*, Healthcare Corp. v. Hamilton, 740 So.2d 1189, 1193 n.2 (Fla. 4th DCA 1999).

51. In the instant case, JEA’s boilerplate approach to its objections to the Second Interrogatories and the Second Request for Production listed above is inconsistent with the rules. Moreover, the subject matter of the requests was raised by JEA in its summary, which sought relief based thereon, thus constituting a formal motion to dismiss.

52. JEA has made its franchise, its financial strength and its ability to serve cornerstones of its objection to First Coast’s Application. As such, JEA has propounded these issues as material to the current proceedings. First Coast is entitled to seek information concerning these issues, whether ultimately admissible at hearing or not.

53. JEA’s objections, therefore, are inconsistent with the rules, constitute discovery abuses, and are subject to sanctions.

V. Attorneys' fees

54. Rule 1.380(4) Florida Rules of Civil Procedure, provides that if a motion to compel is granted "the court shall require the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order . . . "

VI. Conclusion

53. JEA was under an unquestionable obligation to respond fully and truthfully to the Second Interrogatories #18-48 and Second Request for Production #21-25, but for whatever reason has elected to disregard its responsibilities under applicable law and ignore both. JEA has failed to support any of its objections with material facts, instead opting for mere boilerplate objections as an improper delaying tactic. First Coast has attempted to resolve this matter without Commission intervention, but counsel for JEA has rebuffed those efforts. It is clear under applicable law that as a result of JEA's refusal to fully and truthfully respond to the Second Interrogatories and Second Request for Production, or support its objections with specificity and material facts, it has abused the discovery process and is subject to sanctions. Consequently, First Coast respectfully submits that this Commission should enter an order compelling JEA to fully respond to the Second Interrogatories #18-48 and Second Request for Production #21-25 without asserting any objections. Alternatively, should JEA maintain its position that its franchise, finances and provision of services are not material issues to this proceeding, the Commission should disregard those issues in its review of First Coast's Application.

WHEREFORE, First Coast respectfully requests the Commission enter an Order:

(a) Compelling JEA to fully respond to the Second Interrogatories #18-48 and Second Request for Production #21-25 without asserting any objections;

(b) Alternatively, declaring that JEA has waived its ability to assert any reference to its alleged “exclusive franchise”, its financial strength, or its ability to provide service in these proceedings;

(c) Awarding reasonable attorneys' fees and costs incurred in obtaining an Order on the instant Motion to Compel; and

(d) Awarding any other relief which the Commission deems appropriate.

Respectfully submitted this 22nd day of October, 2020.

/s/ Robert C. Brannan
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to the following this 22nd day of October, 2020:

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