

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Interim and) DOCKET NO. 940109-WU
Permanent Rate Increase in) ORDER NO. PSC-94-0571-CFO-WU
Franklin County by ST. GEORGE) ISSUED: May 13, 1994
ISLAND UTILITY COMPANY, LTD.)
_____)

ORDER RESOLVING DISCOVERY MOTIONS

This order addresses four motions filed by the Office of Public Counsel (OPC) and one motion for a protective order filed by St. George Island Utility Company, Ltd. (St. George or utility). First, on February 11, 1994, OPC filed its Motion for Additional Interrogatories, seeking to raise the limit on interrogatories permitted by the Prehearing Officer's Order Establishing Procedure for this matter, Order No. PSC-94-0320-PCO-WU. Second, on March 18, 1994, OPC filed a Motion to Compel responses to interrogatories it had propounded to the utility that were due on March 14, 1994. On the same date of March 18, 1994, the utility filed a Motion for Protective Order. Third, on April 7, 1994, OPC filed an Emergency Petition for Reconsideration of Order Establishing Procedure, essentially addressing the same concerns as its first motion. Finally, on April 11, 1994, OPC filed its Second Motion to Compel production of Document Request No. 25.

OPC's Motions

In its Motion for Additional Interrogatories, and its Emergency Petition for Reconsideration of Order Establishing Procedure, OPC argues that this is a complicated rate proceeding that warrants more discovery than is usually required. Based on the history of this utility and the fact that there is a revocation proceeding currently held in abeyance, OPC's arguments are persuasive. Therefore, it is appropriate to grant both of OPC's motions to the extent that interrogatories, including all subparts, shall be limited to 150, requests for production of documents, including all subparts, shall be limited to 150, and requests for admissions shall be limited to 50.

Regarding OPC's Motion to Compel, OPC argues that St. George has failed to comply with its discovery requests. Although responses were due to OPC's first set of interrogatories on March 14, 1994, St. George filed its responses on March 17, 1994. Subsequently, St. George objected to OPC's second and third sets of interrogatories as exceeding the limit set by the Order Establishing Procedure and because, in its view, the requests were

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unreasonable and burdensome. St. George has also objected to OPC's second and third requests for production of documents (PODs).

As the limits on the number of interrogatories and PODs have been increased by this order, the utility's objections on this basis are now moot. Each of the other objections made by the utility will be addressed below. To the extent set forth below, OPC's motion to compel is granted in part and denied in part. OPC's Second Motion to Compel is granted as set forth below.

Interrogatories Nos. 34 and 35

Interrogatories Nos. 34 and 35 solicited various information regarding forms of compensation received by Mr. Gene Brown, manager of the utility, and Ms. Chase, an employee of the utility, from sources other than the utility for the years 1991, 1992, 1993, and 1994. In the second of two subparts, OPC requested a description of services provided by Mr. Brown and Ms. Chase in exchange for monies received. In its response to the interrogatories the utility indicates that it is not relevant or material to any issue before the Commission in this docket. In its response to the utility's objections, OPC argues that the mere assertion of irrelevance is inadequate and that information reasonably calculated to lead to the discovery of admissible evidence is discoverable. OPC also argues that the utility has not supported that the interrogatories are irrelevant. OPC asserts that information concerning other forms of compensation is necessary to determine the validity of Mr. Brown's and Ms. Chase's requested compensation for the time devoted to the utility.

In consideration of the arguments advanced by St. George and OPC, it appears that the issue of monies received from business interests other than St. George is relevant to OPC's stated purpose. Therefore, the utility shall provide such information within five days of the date of this Order.

Interrogatory No. 37

Interrogatory No. 37 solicited a list of the ownership percentages for each individual partner of each partnership with which Mr. Brown is associated. The utility objects, arguing that the information sought is irrelevant and immaterial to any issue before this Commission. OPC argues that the information is necessary to evaluate the relationship between Mr. Brown and his affiliates. Again, it appears that this information could lead to the discovery of admissible evidence. Accordingly, the utility shall provide the information to OPC within five days of the date of this Order.

Interrogatory No. 39

Interrogatory No. 39 solicited information regarding salaries, management fees, and other compensation drawn by Mr. Brown for services from the utility for years 1986, 1987, 1988, 1990, and 1991. Though the utility objects to it being relevant to this case, OPC asserts that the information is related to how the fees have changed over time. As such, it does not appear that this information is irrelevant to the instant proceeding. Therefore, the utility shall provide OPC with this information within five days of the date of this Order.

Interrogatory No. 41

Interrogatory No. 41 solicited information regarding the sale of water facilities to the utility in 1979. While the utility argues that it is irrelevant to matters before this Commission, OPC argues that this information is relevant to determine the value of assets included in rate base. As this information is relevant to the value of the utility assets, the utility shall provide the information within five days of the date of this Order.

Interrogatories Nos. 45, 46, 48

Interrogatories Nos. 45, 46, and 48 solicit information regarding the number of connections as of 1992 and 1993. The utility argues that Interrogatories Nos. 45, 46, 48 are substantially the same as Interrogatories Nos. 23, 25, and 26. OPC asserts that the questions are not substantially the same. OPC argues that while Interrogatories Nos. 23, 25, and 26 address information on the connection at the end of the years, Interrogatories 45, 46, and 48 solicit information regarding the number of customers added to the system in the years inquired. The utility's reading of Interrogatories Nos. 23, 25, and 26 as substantially the same as 45, 46, and 48, is understandable. As written, 23, 25, and 26 are substantially identical to 45, 46, and 48. If OPC intended to ask a different question, then OPC must clearly and specifically write the question. I can only rely on what is written. Therefore, it appears that the utility did not fail to comply to this discovery request. As OPC's interrogatories, as written, appear duplicative, I do not find it appropriate to compel the utility to answer the same questions a second time.

Interrogatory No. 49

Interrogatory No. 49 requests a description of the additions to plant the utility plans to make during 1994 and 1995 and their

purposes. OPC states that this information is relevant to the issue of quality of service and compliance with Department of Environmental Protection requirements. The utility argues that this information is not relevant. I find this information relevant and the utility shall provide this information within five days of the date of this Order.

Document Request No. 10

Document Request No. 10 asks for Armada Bay Company's tax returns for 1990, 1991, 1992, and 1993. The utility asserts that Armada Bay Company's tax returns are not within the possession, custody or control of the utility company. In its response to the utility's objection, OPC argues that Armada Bay Company's tax returns for 1990, 1991, 1992, and 1993 were requested for the purposes of determining its business activities in relationship to the utility. In addition, OPC explains that it seeks to solicit this information to determine if Mr. Brown is receiving compensation from Armada Bay Company above and beyond that claimed in the utility's rate filing.

Under the applicable standards of discovery, "a party need not have actual possession of documents to be deemed in control of them." In re Folding Carton Antitrust Litigation, 76 F.R.D. 420 (N.D.Ill. 1977). Since Armada Bay Company and the utility are clearly related, the utility shall provide access to the subject tax returns for OPC within five days of the date of this Order.

Document Request No. 11

Document Request No. 11 asks for ABC Management Company's tax returns for 1990, 1991, 1992, and 1993. In its objection, the utility argues that ABC Management Company is not a corporation or separate legal entity, and does not have corporate tax returns. In its response to the utility's objection, OPC explains that it seeks ABC Management Company's tax returns for the requested years for the same reason as Document Request No. 10. OPC believes that ABC Management Company is the alter ego of Armada Bay Company. OPC states that Armada Bay Company is located at the same address as the office of the utility.

Since actual possession is not a prerequisite for production, to the extent that such documents exist, the utility shall within five days of this Order provide OPC with access to the subject tax returns.

Document Requests Nos. 13 and 14

OPC's Document Requests Nos. 13 and 14 seek documents and memos addressing the 1979 Internal Revenue Service (IRS) audit and settlement with Leisure Properties, Ltd. and/or the utility and a copy of the 1979 IRS audit, respectively. In its request, OPC seeks to evaluate the original cost of the water system at the time it was sold to the utility. OPC asserts that in 1979, Leisure Properties, Ltd. (the general partner of the utility) sold the water system to the utility for \$3,000,000. After auditing Leisure Properties and the utility, the IRS disagreed with Leisure Properties' and the utility's assessment of the value of the property sold to the utility.

Since the information sought by OPC will reflect the original cost of the water system, it is relevant to this rate proceeding. Therefore, the utility shall provide OPC access to the subject audit information within five days of this Order.

Document Request No. 21

Document Request No. 21 asks for the tax returns of Leisure Properties, Ltd. In its objection to OPC's request for Leisure Properties' tax returns, the utility asserts that the tax returns are not within the possession, custody or control of the utility company and they are not relevant to this matter before the Commission. OPC argues that since Leisure Properties, Ltd. is a general partner of the utility and has engaged in numerous transactions with the utility, the requested tax returns are relevant to the value of the assets included in rate base. In addition, OPC asserts that Mr. Brown stated in Interrogatory No. 12 that he was the president of the two corporate general partners of Leisure Properties, Ltd., which acts as the general partner of the utility.

As noted above, "control" does not require actual possession. Since the requested documents will reflect the value of the assets included in rate base, they appear reasonably calculated to lead to the discovery of admissible evidence. Therefore, I find it appropriate to require the utility to provide OPC access to the subject tax returns within five days of this Order.

Document Request No. 25

Document Request No. 25 asks for a copy of all correspondence between the utility and its consultants dealing with the instant rate case. OPC asserts, that on April 7, 1994, when OPC deposed Mr. Frank Seidman, a consultant for the utility, at least one

document, of approximately 15 pages, was identified as being responsive to OPC's request No. 25. OPC also alleges that a second memo was addressed during the deposition. OPC argues that the utility has failed to timely and properly object to OPC's Document Request No. 25. In a March 21, 1994 memorandum, the utility states that there are no documents responding to Document Request No. 25.

The utility previously admitted to the existence of such a memo at Mr. Seidman's deposition, but asserted that it would not be produced because of its claim of attorney-client privilege. Subsequently, the utility claims that such document does not exist. Considering the above and the fact that the utility failed to properly and timely object to OPC's request, OPC's second motion to compel response to Document Request No. 25 is granted. The utility shall provide these documents within 5 days of this Order.

Document Request No. 61

OPC's Document Request No. 61 asked for the utility's partnership agreement. In its objection to OPC's motion, the utility states that this request is irrelevant to the matter before the Commission. In its response, OPC argues that the utility partnership agreements are essential to determine how the profits of the partnership are distributed.

Since the utility's relationship with its affiliates reflects how profits are distributed, it is relevant to the issues in this proceeding. Therefore, I find it appropriate to require the utility to provide OPC a copy of the partnership agreement within five days of this Order.

Document Requests Nos. 62 through 69

In Document Requests Nos. 62 through 69, OPC asks for tax returns of Mr. Brown's known affiliates. Though the utility argues that these documents are irrelevant to the matter before the Commission, OPC asserts that the transactions in which the utility has engaged in are relevant to the subject matter of the proceeding. Also, OPC states that most of the affiliates are located at the same address as the utility's administrative offices. In addition, Mr. Brown is typically an officer or a director of each of these companies for which information is requested.

The utility's response to OPC's motion is tenuous, at best. It appears that the information sought by OPC is relevant and appropriately within the Commission's purview. Therefore, the

utility shall respond to this document request within five days of the date of this Order.

Document Request No. 70

Document Request No. 70 asked for a copy of Mr. Brown's personal income tax returns for the years 1990, 1991, 1992, and 1993. The utility argues that the requested tax returns are irrelevant and immaterial. OPC asserts that since the utility is requesting approximately \$72,000 in compensation for Mr. Brown in this proceeding and asserts that the majority of his time is spent managing the utility, the information in the tax returns will provide information relevant to Mr. Brown's assertion regarding the time spent managing the utility.

In consideration of the foregoing, the utility shall provide copies of Mr. Brown's income tax returns for the years requested, within five days of the date of this Order.

Document Requests Nos. 71 and 72

Document Requests Nos. 71 and 72 ask for the documents used by the utility and the IRS in the 1979 IRS audit of the utility. Though the utility objects to its relevance, OPC argues that the value of the utility's plant in the IRS 1979 audit is a relevant basis to assess its current value.

Since the requested documents are relevant to the cost of this utility's system, the utility shall provide OPC with the requested documents within five days of the date of this Order.

Document Request No. 74

In Document Request No. 74, OPC requested copies of the utility's financial statements from 1979 to present. The utility objects to providing these financial statements on the grounds that they are irrelevant, however, it provided no justification for its claim. In its motion, OPC asserts that this information is important to determine the accurate value of assets included in rate base. Since this information appears relevant to the value of the assets included in rate base, the utility shall provide OPC with access to the financial statements within five days of the date of this Order.

Document Requests Nos. 76 and 77

Document Requests Nos. 76 and 77 ask for documents that substantiate the price and ownership for all land included in rate

base. The utility argues that this information is irrelevant. This argument is wholly without merit. I, therefore, require the utility to provide OPC the requested documentation that substantiates the price paid for, and proof of ownership of, land that is includable in the utility's rate base, within five days of the date of this Order.

Document Request No. 82

OPC's Document Request No. 82 asked for copies of all legal bills rendered by Mr. Brown to all of his clients for years 1992, 1993 and 1994. In OPC's response to the utility's objection, OPC asserts that Mr. Brown is requesting \$24,000 of compensation for legal services and approximately \$48,000 for management services. In addition, OPC argues that this information will assist the Commission to determine the reasonableness of Mr. Brown's compensation included in rate base.

The utility objected to the relevance of OPC's document request without any other explanation. Because those bills to the utility are relevant to the proceeding before the Commission, the utility shall provide copies of those bills within five days of the date of this Order.

Document Request No. 99

Document Request No. 99 asks for copies of invoices that were used for preparation of income tax returns and financial statements of Mr. Brown's affiliates. Aside from the utility's objection to their relevance to this proceeding, it has not provided any other explanation. In its response to the utility's objection, OPC asserts that this information is necessary to ascertain whether or not the utility and its customers are paying for tax return and financial statement preparation of Mr. Brown's affiliates.

In consideration of the above, the utility shall fully respond to OPC's Document Request within five days of the date of this Order.

Document Requests Nos. 100 and 101

OPC's Document Requests Nos. 100 and 101 ask for financial information of the utility's general partner, Leisure Properties, Ltd. OPC further states that since Leisure Properties, Ltd. originally owned the water utility assets and sold them to the utility in 1979, this information is necessary to determine if the cost of the utility assets were paid for by property owners at the time the lots were sold.

The utility objected to the relevance of these requests without any further explanation. Because the information requested reflecting the cost of utility assets is relevant to rate base, the utility shall provide OPC with the requested documents within five days of the date of this Order.

Utility's Motion for Protective Order

On March 18, 1994, St. George filed a Motion for Protective Order of the utility company's tax returns and associated work papers for the years 1987, 1988, 1989, 1990, 1991, and 1992, which were apparently provided to OPC on the same date pursuant to Document Requests Nos. 19 and 20. On March 30, 1994, OPC filed its response along with its Motion to Strike the utility's Motion for Protective Order pursuant to Section 367.156, Florida Statutes.

In its response to the utility's motion, OPC argued that the utility's chance to object or respond to OPC's request for production of documents expired on March 14, 1994, pursuant to Rule 1.350(b) Florida Rules of Civil Procedure. Also, OPC asserts that the utility's motion alleging the need to maintain confidentiality is merely a conclusory allegation as to the nature of the tax returns, without any explanation of the harm that could come to the ratepayers or to the company if the tax returns were disclosed.

Contrary to OPC's assertions, the controlling Rule here is 25-22.006(5), Florida Administrative Code, and not Rule 1.350(b) Florida Rules of Civil Procedure. It appears that the utility has provided copies of the company's income tax returns, subject to a Motion for Protective Order to maintain their confidentiality while in OPC's possession. Since the utility's tax returns are alleged to be proprietary, confidential business information, the utility's motion for an order protecting the tax returns from disclosure while in the possession of OPC is granted and OPC's motion to strike is denied.

Based on the foregoing, it is, therefore,

ORDERED by Julia L. Johnson, as Prehearing Officer, that the Office of Public Counsel's Motion to Compel is granted in part, and denied in part, as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Second Motion to Compel is granted as set forth in the body of this Order. It is further

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ORDERED that St. George Island Utility Company, Ltd.'s Motion for Protective Order of its 1987 through 1992 tax returns is granted as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Motion to Strike is denied as set forth in the body of this Order. It is further

ORDERED that St. George Island Utility Company, Ltd. is directed to respond to the pertinent portions of the Office of Public Counsel's discovery as set forth in the body of this Order. It is further

ORDERED that the Office of Public Counsel's Motion for Emergency Reconsideration of the Order Establishing Procedure is granted as set forth in the body of this Order.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 13th day of May, 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.

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.