BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency complaint by SHELBY DEVELOPMENT and GEORGE WIMPEY OF FLORIDA, INC. against JJ'S MOBILE HOMES, INC. in Lake County for denial of water and sewer services	DOCKET NO. 910008-WS ORDER NO. 24412 ISSUED: 4/22/91

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
J. TERRY DEASON
BETTY EASLEY
GERALD L. GUNTER
MICHAEL McK. WILSON

ORDER TO PROVIDE SERVICE

BY THE COMMISSION:

CASE BACKGROUND

JJ's Mobile Homes, Inc. (JJ's) is a utility that provides water and wastewater service to approximately 138 customers in Lake County. The City of Mount Dora (City) is a political subdivision of the State of Florida. Shelby Development is a Florida general partnership. George Wimpey of Florida, Inc. is a Florida corporation which, together with Shelby Development, d/b/a Monarch Homes (Monarch), is in the process of developing a planned 780-unit single family home subdivision that lies within JJ's service territory. The territory comprising the subdivision has been annexed by the City.

During the permitting process for the subdivision, Monarch apparently signed a water and wastewater service agreement with the City. Since the subdivision is within JJ's certificated service area, on September 8, 1989, JJ's filed an action in the Circuit Court of the Fifth Judicial Circuit, in and for Lake County, for a declaratory judgment that it has the exclusive right to provide water and wastewater service within its certificated territory. On April 10, 1990, the Court ruled that JJ's has the exclusive right

to provide service within its authorized service area. That case is currently under appeal in the Fifth District Court of Appeal (DCA). By order of the trial Court, both JJ's and the City are prevented from providing service to the subdivision pending the outcome of the appeal.

On April 26, 1990, the City filed an action before this Commission seeking the deletion of the territory in question from JJ's certificated territory. The City's petition was predicated, in part, upon its allegation that JJ's did not have adequate capacity to serve the subdivision. By Order No. 23500, issued as proposed agency action on September 17, 1990, we denied the City's petition, based upon our determination that JJ's did indeed have capacity to provide service to the subdivision. On October 5, 1990, the Dora Pines Estates Homeowners filed a protest to Order No. 23500. On October 8, 1990, the City also filed a protest to Order No. 23500. That case is currently pending before the Division of Administrative Hearings (DOAH), where it is being held in abeyance pending the outcome of the appeal before the Fifth DCA.

During the pendency of these cases, the City, JJ's, and Monarch apparently agreed that JJ's could provide service to Monarch on a temporary basis. The Circuit Court has not, however, lifted the stay.

EMERGENCY COMPLAINT

On January 2, 1991, Monarch filed an emergency complaint against JJ's for the latter's failure to provide even temporary service. On February 7, 1991, JJ's filed an answer to Monarch's complaint.

The essence of Monarch's complaint is that the subdivision is in JJ's certificated territory, that it has requested water and wastewater service from JJ's, that it must have such service in order to proceed further with its development, and that JJ's has thus far refused to either provide service or engage in good faith negotiations regarding the provision of service. According to Monarch, JJ's refusal to provide service is related to the latter's efforts to sell the utility systems to the City. In addition, Monarch argues that it has agreed to pay all costs related to its connection to JJ's and, if necessary, its subsequent disconnection should the Fifth DCA reverse the trial Court's decision. Monarch further argues that, in accordance with City codes, it cannot proceed with its project until it has adequate water service and that, should JJ's continue to refuse to provide service, Monarch

will suffer irreparable economic harm. Monarch, therefore, requests that the Commission order JJ's to either provide service to the development or let the City do so.

In its response, JJ's basically denies that it has refused to provide service. JJ's argues that it stands ready and willing to provide service once the Circuit Court's stay is lifted. In response to Monarch's claim that it has taken no steps to have the stay lifted, JJ's argues that it has no duty to do so. While JJ's agrees that it does have a duty to provide service within its authorized territory, it sees that duty as extending to permanent service. JJ's does not believe that the duty to provide service requires it to seek relief from the stay, disregard the stay, or to place itself or its customers at risk by providing temporary service.

JJ's further argues that it has attempted to cooperate with the City and Monarch in getting the stay lifted, but that it curtailed such efforts when Monarch exhibited what JJ's construed as "bad faith". Nevertheless, JJ's contends that it has attempted to negotiate an agreement for temporary service and that it has, in fact, provided Monarch with a proposed agreement for temporary service.

There have indeed been negotiations regarding temporary service, however, these have not resulted in any formal agreement. Apparently, the main source of contention on the proposed agreement is JJ's insistence on treating Monarch as a "permanent" customer for purposes of the agreement. In other words, the proposed temporary service agreement requires Monarch to pay the full amount of JJ's service availability charges and also provides that, should JJ's lose the Circuit Court case upon appeal, it will only reimburse Monarch for these service availability charges when and as the capacity taken up by Monarch is committed to new customers and then, only for a period of seven years. JJ's authority for this clause is Rule 25-30.540(3)(b), Florida Administrative Code, which states:

> (b) Unless the utility can sell the reserved capacity, the charges collected shall not be refunded should the applicant not proceed with the development. The agreement shall set forth the period of time within which a sale of the reserved capacity will require a refund to the applicant, which time shall not be less than four years.

If Monarch's request was for permanent service, the above-quoted rule would clearly apply to the circumstances peculiar to this case. However, since the request is only for temporary service, perhaps we would be better guided by Rule 25-30.315, Florida Administrative Code, entitled "Temporary Service". Under Rule 25-30.315, Florida Administrative Code;

> (1) Upon compliance with subsection (3) of this rule, a utility may require an applicant customer to pay all the anticipated costs of installing and removing facilities and materials for temporary service.
> (2) When temporary service is terminated, the utility shall credit the customer with the reasonable salvage value of the service facilities and materials if the customer has made advance payment pursuant to subsection (1) of this rule.
> (3) Each utility shall set out in its tariff a definition of and policy or rules regarding temporary service

Rule 25-30.315, Florida Administrative Code, does not, however, address the issue of service availability charges or their refund. Further, the situation at hand is somewhat more than the typical temporary service situation, in that Monarch is seeking temporary service for an entire phase of a subdivision. For JJ's to provide such service, it will probably have to make plant additions and/or improvements. These will, of course, require investment, and it would be unreasonable to expect JJ's or its ratepayers to bear the burden of these costs. In addition, some improvements will most likely increase operating costs for the utility on an ongoing basis. Again, it would be unreasonable to expect the utility or its ratepayers to bear the burden of these costs. Nevertheless, although additions, improvements, and increased operating costs are likely, we do not have enough information to quantify these costs.

We also note that JJ's service availability charges have not been revised since approximately 1973. They may, therefore, be inadequate to fund any plant improvements or additions that may be necessary. By Order No. 23500-A, issued September 19, 1990, in Docket No. 900341-WS, Petition by City of Mt. Dora to delete territory from JJ's Mobile Homes, Inc.'s Certificates Nos. 298-W and 248-S in Lake County, we also ordered JJ's to file a service availability case. Order No. 23500, which was issued September 17,

1990, was subsequently protested, and JJ's has not filed such an application as of this date.

Based upon the foregoing, we believe that JJ's should provide service to Monarch on at least a temporary basis. Further, we believe that Monarch should pay JJ's approved service availability charges. As for the question of the refundability of these charges, we will decline ruling on this matter unless and until the Fifth DCA overturns the lower Court's decision. At that time, the matter will clearly be at issue, and it will be easier to quantify what, if any, costs have been incurred or will be incurred on an ongoing basis. We will, therefore, leave this docket open pending the Fifth DCA's decision in that regard. If the Fifth DCA upholds the lower Court's decision, however, the issue will become moot, and this docket may be closed administratively.

It is, therefore,

ORDERED by the Florida Public Service Commission that JJ's Mobile Homes, Inc. shall provide Monarch Homes with temporary service pending the decision of the Fifth DCA, as set forth in the body of this Order. It is further

ORDERED that JJ's Mobile Homes, Inc. shall collect its approved service availability charges from Monarch Homes. The issue of whether there should be any refund, and if so, in what amount, will be addressed, if necessary, in a subsequent order. It is further

ORDERED that, if the Fifth DCA upholds the Fifth Circuit's decision, this docket may be closed administratively.

By ORDER of the Florida Public Service Commission, this 22nd day of APRIL, 1991.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

by: Kay Flynn
Chief, Bureau of Records

RJP

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 the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.