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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS

Prehearing Conference

January 5, 1998
Jefferson City, Missouri
Volume 1

Director the Division of)
Manufactured Homes,)
Recreational Vehicles and) CASE NO. MC-97-542
Modular Units of the Public)
Service Commission,)
Complainant,)
v.)
Amega Mobile Home Sales, Inc.,)
d/b/a Quality Preowned Homes,)
Respondent.)

KEVIN F. HENNESSEY, Presiding,
REGULATORY LAW JUDGE.

REPORTED BY:
DANA J. DICK, Certified Shorthand Reporter
ASSOCIATED COURT REPORTERS, INC.

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24 FOR: Amega Mobile Homes.
25

1 P R O C E E D I N G S

2 JUDGE HENNESSEY: We're on the record this
3 morning in Case No. MC-97-542. The Director of the
4 Division of Manufactured Homes, Recreational
5 Vehicles and Modular Units of the Public Service
6 Commission, Complainant, versus, Amega Mobile Home
7 Sales, doing business as Quality Preowned Homes,
8 who is the Respondent in this case.

9 At this time I'd like counsel to make
10 their appearances on the record. Mr. Gunn, we'll
11 start with you.

12 MR. GUNN: My name is Stephen M. Gunn.
13 Business address is 301 West High Street, Jefferson
14 City, Missouri 65102. I'm appearing on behalf of
15 the Director of the Division of Manufactured
16 Housing, Recreational Vehicles and Modular Units of
17 the Public Service Commission.

18 MR. HENNESSEY: Mr. Hosford.

19 MR. HOSFORD: First initial R, Blair,
20 Hosford, Deputy General Counsel, business address
21 P.O. Box 360, Jefferson City, Missouri 65102, and
22 appearing on behalf of the Director. I'll shorten
23 that for you.

24 JUDGE HENNESSEY: Mr. Miller?

25 MR. MILLER: Danny Miller, 309 South

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1 Providence, Columbia, MO 65203, appearing on behalf
2 of the Respondent.

3 MR. HARRISON: Tom Harrison. Office is at
4 1103 East Broadway, Columbia, Missouri, here for
5 the Respondent.

6 JUDGE HENNESSEY: All right. There was a
7 short discussion of procedural matters off the
8 record this morning. I would note for the parties,
9 hearing memorandum is due January 15th, 1998, and
10 the evidentiary hearing is set for January the 22nd
11 and 23rd, 1998, to commence at 10:00 a.m.

12 There is currently a motion titled,
13 Complainant's Motion to Compel regarding some
14 13 Data Requests that were sent to Amega Mobile
15 Home Sales, and Amega filed its response to the
16 Motion to Compel asserting a Fifth Amendment
17 privilege. At this time I'd like to have oral
18 argument from the attorneys on that motion.

19 Mr. Gunn, as Complainant's counsel, would
20 you begin.

21 MR. GUNN: Thank you, your Honor. Your
22 Honor, the Data Requests that were directed to the
23 Respondent, Amega Mobile Homes, Inc., were just
24 that. They were directed to a corporation in good
25 standing in the State of Missouri.

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1 The corporation claims a Fifth Amendment
2 privilege which it does not have. It is pretty
3 much black book law that corporations do not have
4 Fifth Amendment privilege. They are privileges for
5 natural persons only. Granted that as stated in
6 the Motion to Compel, that a corporate officer may
7 claim the Fifth Amendment privilege to
8 Interrogatories in his personal capacity, but in
9 the response to Motion to Compel and in
10 Complainant's Response to the Data Requests in
11 which they claim the Fifth Amendment privilege, no
12 individual person, natural person has been
13 identified.

14 The Data Requests were directed to the
15 corporation as stated in the Motion to Compel. The
16 corporation has no Fifth Amendment privilege.
17 Usually, as stated, the U.S. Supreme Court has held
18 that where a discovery request pertains to
19 documents, the documents must be produced if they
20 are corporate records, and those are the records
21 that were requested in the Motion to Compel -- or
22 excuse me -- in the Data Request. It also
23 requested information contained in those corporate
24 records.

25 Missouri law has held that in conjunction

1 with the U.S. Supreme Court so that again, the
2 corporation may not claim the Fifth Amendment
3 privilege asserting that they are to me, not
4 produce the documents requested.

5 Additionally, as stated in Dowd, a
6 corporate officer cannot claim a Fifth Amendment
7 privilege even in personal capacity where the
8 information sought and in that case Interrogatories
9 were obtained or could be obtained from corporate
10 documents. And again, as the Data Request
11 indicated, we requested corporate documents and
12 requested information that are supposedly contained
13 in those corporate records. As such, there is no
14 Fifth Amendment privilege that can be claimed by
15 the corporation.

16 JUDGE HENNESSEY: Mr. Hosford, do you have
17 anything to add?

18 MR. HOSFORD: No. I think Steve summed it
19 up very well. I just want to point out that the
20 Data Request that we submitted were not to a named
21 individual. They were specifically -- the Data
22 Request was handed under the standard Commission
23 rules to the entity, which is the Complainant,
24 which is the corporation itself, not the
25 individual.

1 And so as Mr. Gunn has stated, the
2 assertion of the privilege by the corporation
3 doesn't exist, that the company itself runs to an
4 individual, not the corporation I just -- besides
5 what Mr. Gunn was saying.

6 JUDGE HENNESSEY: Mr. Miller?

7 MR. MILLER: Thank you. Firstly, as is
8 pretty well set out in our response to the motion,
9 the 386.470 is an unconstitutional attempt to
10 delegate the legislative party to determine who may
11 be criminally punished.

12 The cases in which -- none of the cases in
13 which the courts have held that that privilege does
14 not exist for a corporation deals with a scenario
15 wherein that legislative power has been delegated,
16 rather they deal with the only cases cited by the
17 Respondent -- deal with issues that were not --
18 ones where the power had attempted to be
19 delegated.

20 You cannot rely on 386.470 in regard to
21 giving incriminating evidence under any set of
22 circumstances. However, it becomes more poignant
23 when you look at the Data Request itself.
24 Obviously this is not a re-in which I am regularly
25 found to be in. However, in my reading of a Data

1 Request in what they say is a corporation. And
2 read any of the cases that you want to that they
3 have cited.

4 It says corporation. If there's a
5 document there, you've got to give it to us. It
6 does not say that -- I mean, how this is a request
7 for a document versus an Interrogatory is, please
8 identify all individuals at Amega who inspected the
9 Smith home prior to its acquisition by Amega.
10 Those are Interrogatories. They're not requesting
11 documents.

12 The cases that they rely on say if there's
13 a document there, you've got to give it to us.
14 They don't ask except in -- and there are a couple
15 of them in that rereading it that once you get --
16 there's a part of each Interrogatory, which is what
17 they are, that's still problematic, but if they
18 want to rework Nos. 4 and 5 to be provided a
19 copy -- for instance, No. 5, provide a copy of
20 written procedures or instructions related to the
21 instruction of a preowned manufactured home before
22 it is sold.

23 If they want to ask that, I don't think
24 it's privileged, but they haven't asked for
25 documents. They can put them in the form that

1 basically they did not ask Interrogatories. They
2 asked for something called -- they came at this
3 Data Request, and they've said, gee, you've got to
4 give us the documents. I agree with that. If they
5 want to frame it to what it is they are entitled
6 to, I'll give it to them.

7 But they are not entitled to the rest of
8 it, and that's the for-why that they haven't gotten
9 it.

10 JUDGE HENNESSEY: All right. I've read
11 through the cases that have been cited, and I have
12 some concerns about the Dowd case.

13 Mr. Gunn, I'd like you to address the
14 issue. You cited both Dowd and the Rockwell case
15 in your motion, and the Rockwell case as you've
16 cited did compel the corporate officers to turn
17 over certain documents.

18 My understanding from reading Dowd was
19 that even though the corporate officer could not
20 assert a privilege on behalf of the corporation --
21 he can only on his own behalf -- there was a
22 statement in the Dowd case where it discussed the
23 Rockwell -- the prior Rockwell case and said that
24 Rockwell turned on the fact that those documents
25 would not incriminate and could not incriminate;

1 whereas, the documents in the Dowd case had a
2 potential to incriminate.

3 In this circumstance, how do you see that
4 dichotomy between Rockwell and Dowd?

5 MR. GUNN: In this instance Dowd cited
6 Rockwell with approval that the corporate officer
7 in responding to Interrogatories or deposition
8 requests which related to the operation of the
9 company -- and, quote, which related to the
10 operation of the company based on information
11 available to prove company records.

12 The information that we've asked for in
13 the Data Request similar to Interrogatories, I
14 think Dowd speaks directly to a minute citation in
15 Rockwell of the dichotomy there. I think if there
16 is a dichotomy there, I think it is of relative
17 small importance, if important in this particular
18 case at all.

19 In this case we've asked for information
20 that should be contained in these corporate
21 records, and as such, again, the corporation has
22 not claimed the privilege on behalf of any
23 individual. There hasn't been an individual that
24 has claimed privilege as such, and the response is
25 defective.

1 JUDGE HENNESSEY: Mr. Miller?

2 MR. MILLER: Wrong. That's a
3 completely -- and not picking on my opponent, but
4 that is a fundamental misunderstanding as to Realty
5 Consultants versus Dowd as a person could have.
6 What Dowd says in discussing Rockwell is that you
7 can ask somebody, is that your corporate document?
8 You don't have a privilege on that issue.

9 And basically I'm going to read the
10 language to you. It says unlike the Defendants in
11 Rockwell, Rowland was asked to respond to questions
12 that required significantly more than
13 identification of the corporate records, which
14 falls beyond the scope of the privilege. So in the
15 idea of that somehow you do not, by asking a
16 corporation, an Interrogatory versus a document
17 request, that you do not get into the issue of the
18 privilege of self-incrimination. It's ludicrous.

19 A corporation can only act through its
20 officers, and if the officer signs down here that
21 with regard to the fact that they have answered
22 that Interrogatory, as I said, the problem is the
23 fact that they haven't asked for documents. If
24 they ask for documents, I agree with them. But
25 they haven't done it. They came in and asked for

1 Interrogatories, which are going to have to be
2 signed, which the person that signs them is going
3 to have to waive their Fifth Amendment privilege in
4 order to be able to sign that, and you can't ask
5 that.

6 If it asks for documents, I'll do it. But
7 what Dowd says, and as I said -- that I just went
8 through in discussing the Rockwell case, is you can
9 ask somebody. And for instance, it went on in that
10 line to ask if Realty were a cocaine distributor
11 that answered to Interrogatories which contained
12 potentially incriminating information could put
13 them at the risk of prosecution. Same thing.

14 If they ask, Are these your documents,
15 they're golden. If they ask for documents, they're
16 golden in terms of their legal position being
17 correct. They're entitled to that. I'll give it
18 to them. That's not what they asked for.

19 JUDGE HENNESSEY: All right. Is there
20 anything further? Do you have a response to that?

21 MR. GUNN: Again, there's been no natural
22 person identified that can claim the Fifth
23 Amendment privilege.

24 JUDGE HENNESSEY: At this time I'm going
25 to reserve ruling on the motion. I will have a

1 ruling either this afternoon or tomorrow morning.
2 I will send that out in written format to both of
3 you, and I will -- Mr. Miller, I know you are in
4 Columbia. I'll make sure you get a faxed copy of
5 that --

6 MR. MILLER: I appreciate that.

7 JUDGE HENNESSEY: -- since the hearing is
8 coming up in the fairly near future. Is there
9 anything else that we need to take up on the record
10 at this time?

11 MR. HOSFORD: Yeah. One procedural matter
12 recognizing that, I believe, in your opening
13 remarks, the hearing is presently set for
14 10:00 a.m. in the morning. And in visiting with
15 the witnesses that are -- that we have that are not
16 State employees, the individuals involved, both of
17 them have jobs, and we were discussing with them.
18 And what we would like to do is request if the
19 parties would agree that we could begin the hearing
20 at perhaps 8:30 or 9:00 on Thursday instead of
21 10:00 o'clock?

22 One of the ladies has a job that she needs
23 to be at one o'clock in the afternoon. So that
24 would inconvenience them to the minimum extent
25 possible if we could move the hearing up.

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1 MR. MILLER: Riddle me this: From what I
2 understand from your procedure, it's simply the
3 extent of the questioning with the exception of
4 cross-examination simply is, is this your
5 testimony? Would it be the same as it was if you
6 were to do that here today?

7 What I will do with you is, one, I have no
8 qualm about moving something to accommodate a
9 witness. Two, I would be happy to, if you want, in
10 order to allow you to put on whatever it is you
11 want to put on, I'll meet with you Saturday morning
12 at some point and put their testimony on at another
13 time if you run into that kind of problem and they
14 just can't be here. You know, whatever you need on
15 accommodation, let me know, and we'll do it.

16 JUDGE HENNESSEY: I have no objection to
17 beginning earlier presuming that the Commission
18 will agree to that.

19 MR. HOSFORD: If Mr. Miller is not going
20 to have much cross-examination for the two ladies,
21 or if we could resolve that and the time would be
22 short, we could leave it at ten.

23 MR. MILLER: We can talk when we're off
24 the record and make it -- I'll accommodate you.

25 JUDGE HENNESSEY: Why don't you address it

1 the off-the-record portion of the conference and
2 file some kind of a motion --

3 MR. HOSFORD: Okay. That would be fine.

4 JUDGE HENNESSEY: -- to adjust the time.
5 Off the record, please.

6 (Off the record.)

7 JUDGE HENNESSEY: All right. If there's
8 nothing further to handle on the record, then that
9 will conclude the on-the-record portion of this
10 hearing, and you may proceed with the
11 off-the-record portion. Thank you

12 WHEREUPON, the prehearing of this case was
13 adjourned.

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