

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

December 9, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020413-SU

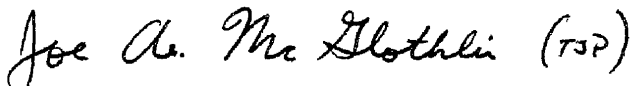
Dear Ms. Bayo:

On behalf of Adam Smith Enterprises, Inc. I am enclosing the original and 15 copies of the following:

- ▶ Adam Smith Enterprises, Inc.'s Motion to Strike Aloha Utilities, Inc.'s Objection to Motion for Protective Order and Alternative Response

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and pleading by returning the same. Thank you for your assistance in this matter.

Yours truly,


Joseph A. McGlothlin

JAM/mls
Enclosure

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A. | 3452 DEC-9 8

DOCUMENT NUMBER DATE

FPSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings
Against Aloha Utilities, Inc. in Pasco
County for failure to charge approved
Service availability charges, in violation
Of Order No. PSC-01-0326-FOF-SU and
Section 367.091, Florida Statutes

Docket No. 020413-SU

Filed: December 9, 2002

ADAM SMITH ENTERPRISES, INC.'S
MOTION TO STRIKE ALOHA UTILITIES, INC.'S
OBJECTION TO MOTION FOR PROTECTIVE ORDER
AND
ALTERNATIVE RESPONSE

Adam Smith Enterprises, Inc. ("Adam Smith") moves to strike the Objection to Motion for Protective Order ("Objection") filed by Aloha Utilities, Inc. ("Aloha") on November 27, 2002. In the alternative, in the event the Commission does not strike the Objection, Adam Smith responds to the new and different arguments that Aloha raises in the Objection. In support, Adam Smith states:

BACKGROUND

1. By Order No. PSC-02-1250-SC-SU, dated September 11, 2002, the Commission directed Aloha to submit a new tariff reflecting an increase in the service availability charge from \$206.75 per ERC to \$1,650 per ERC. Based on the dates on which Aloha provided notice of the increase to affected developers, the Commission assigned to the new tariff an effective date of April 16, 2002.

2. In the same order, through Proposed Agency Action the Commission purported to authorize Aloha to attempt to collect the differential between the \$206.75 service availability charge that was in effect during the period May 2001-April 2002 and the higher charge.

3. On October 2, 2002, Adam Smith filed its protest to this aspect of the Proposed Agency Action and its request for an evidentiary hearing. In its pleading, Adam Smith challenged the legality of this aspect of the Order on Proposed Agency Action, based upon Aloha's failure to have an approved tariff containing the higher charge in place during the period as required by Section 367.091(3), F.S. as well as Order No. PSC-01-0326-FOF-SU; Aloha's failure to provide written notice in advance to Adam Smith and other developers; and on the inapplicability of Rule 25-30.350, F.A.C. ("backbilling"), relied upon by the Commission in Order No. PSC-02-1250-SC-SU, to the circumstances. Adam Smith pointed out that the illegal application of the higher service availability charge on a retroactive basis would affect Adam Smith's substantial interests, because Adam Smith would have no ability, post-closing, to pass the higher service availability charge through to the buyer of the affected lots.

4. On October 25, 2002, Aloha served its first set of interrogatories and its first request to produce documents on Adam Smith. As required by Order No. PSC-02-1460-PCO-SU, Adam Smith filed its objections to the interrogatories and request to produce within ten days of the filing of the discovery requests. Adam Smith answered the interrogatories to which it did not object within twenty days, pursuant to a voluntary agreement between Aloha and Adam Smith.

5. On November 8, 2002, Aloha filed its Motion to Compel answers to the interrogatories and the request to produce documents to which Adam Smith had filed objections. In its Motion to Compel, Aloha provided its arguments in support of its contention that it is entitled to the information sought through the discovery request.

6. On November 20, 2002, Adam Smith filed its Response to the Motion to Compel, in which Adam Smith responded to Aloha's arguments. Based on its response, Adam Smith also

asked the Commission to enter a Protective Order ruling that it need not provide the information that is the subject of the Motion to Compel.

7. On November 27, 2002, Aloha filed its “Objection to Motion for Protective Order.”

ARGUMENT

8. The discovery process is designed to impose on the party that contests another party’s objections to discovery the burden of demonstrating, through a motion to compel, that it is entitled to the discovery that is the subject of the motion. The process provides to the objecting party an opportunity to dispute the assertions of the discovering party by responding to the motion to compel. In its “Objection,” Aloha attempts to advance entirely new theories and rationales to support the interrogatories and the requests to produce to which Adam Smith objected. The new arguments differ from, and actually conflict with, those that Aloha presented in earlier pleadings and that Adam Smith answered in its response to the Motion to Compel. In addition, under the guise of “clarifying “ its interrogatories in light of Adam Smith’s response, in effect Aloha has attempted to use the device of an “Objection” to “serve” different interrogatories to which Adam Smith has had no opportunity to object. For these reasons, the Commission should strike the Objection. Alternatively, in the event the Commission does not strike the Objection, it should recognize the prejudice that would occur in the absence of an opportunity to respond, and consider the responses contained herein.

INTERROGATORIES 4(c) and 5(c)

9. In these subparts of Interrogatories 4 and 5, Aloha asked for the price at which each lot was sold and the net profit or loss realized on each lot. In its Response to Aloha’s Motion to Compel, Adam Smith pointed out that Adam Smith would have no ability, post-

closing, to collect the differential from the buyer of the lot. In its Objection, Aloha argues that Adam Smith could collect the differential by applying it pro rata to *future* sales of *different* lots. This argument appears for the first time in Aloha's Objection.

10. Aloha's new argument collides with its first one, which is that the market sets the price. See Aloha's Motion to Compel, at page 6, paragraph 13. However, in the Objection Aloha refers to, then promptly ignores, the fact – established by pleading and supporting affidavit – that the service availability charge is one of several impact fees collected separately as pass-through items during the closing of the lot for which Adam Smith paid the charge. The transaction involving the lot for which Adam Smith pays the service availability charge is the only opportunity – and the appropriate one – to pass through the service availability charge. As for Adam Smith's "response" to the new tariff, Adam Smith's response has been to pay the higher charge to Aloha for lots for which Adam Smith applied for DEP permits following April 16, 2002. At the appropriate time, when Adam Smith sells the lots the higher charge (no more and no less) will be included with other impact fees as "pass through" items on closing statements separate and apart from the lot prices.

11. In Adam Smith's response to the Motion to Compel, Adam Smith demonstrated that Aloha had relied in its motion on a wildly inaccurate "construct" involving the calculation of capital gains for tax purposes that the federal government does not allow. In its Objection Aloha proceeds to demand the calculation of an "average total inventory cost per lot. It then claims, "Aloha is entitled to discover whether the gross profit margin was, or would be, affected in any way by the imposition of the higher service availability fees." In recognition of its earlier error, Aloha "clarifies" its request by "rephrasing" Interrogatories 4(c) and 5(c) to request a "schedule which shows by lot and by month the price at which each lot was sold and the average total

inventory cost per lot“ for the two periods in question. While the “rephrasing” implicitly acknowledges Aloha’s earlier mistake, the effect is to launch two new interrogatories – equally intrusive and equally without value – without affording Adam Smith an opportunity to object. While Aloha has tacitly admitted its error, it has failed to demonstrate the relevancy of, or the need for the revised information request. To understand the “impact” of the higher service availability charge on gross profit or loss, Aloha has only to subtract \$206.75 from \$1,650 and multiply the result by the number of lots involved.

12. For the reasons stated above, the “rephrased” interrogatories are irrelevant. Further, while the Objection implies otherwise, the “rephrased” interrogatories are, like their predecessors, extremely burdensome. See Attachment A, Affidavit of David S. Ford.

Interrogatories 4(b), 4(d), 5(b), and 5(d)

13. At page 2, Aloha states:

Based on the responses of Adam Smith to Interrogatories Nos. 1 and 2, it is Aloha’s understanding that Adam Smith takes the position that it did not pay any service availability fees to Aloha from May 23, 2001 until April 16, 2002 nor were any lots owned by Adam Smith connected to Aloha’s system during this same time period. *Interrogatories Nos. 4 (b), 5(b), 4(d), and 5(d) are an attempt to discover the detail proving that Adam Smith did not actually own the lots it has identified prior to their connection to Aloha’s system. Based on the Closing Statements provided by Adam Smith as Attachment B to its Response/Motion, this information should be readily available for each sale during this time period.”* (emphasis supplied)

14. This is a new, puzzling rationale. It should be stricken. Further, Adam Smith’s answer to the interrogatory is not a “position”; it is a statement of fact, for which no “detail” is required. More importantly, Aloha can simply refer to its own records to “prove” that Adam Smith did not pay service availability fees in the time frames described, as well as ascertain which entity applied to connect each lot to its system. In its answer, Adam Smith identified the

lot number and location of those lots to which Aloha improperly proposes to apply the higher charge that fall in the category of having already been transferred by Adam Smith to a different owner. Aloha has only to compare the lot ID against its own records to ascertain the entity who owned the lot and who requested interconnection.

15. Finally, Aloha is mistaken – again – when it opines, without foundation, that the information relating to 4(b), 5(b), 4(d), and 5(d) should be “readily available.” Because of the manner in which Adam Smith maintains its records, Adam Smith would have to search the documentation for all of its transactions, not just those that relate to Aloha’s service territory, to obtain information relating to 4(b), 5(b), 4(d), and 5(d) beyond that which it has already provided. Particularly in view of the availability of the information from Aloha’s own records, the “new” interrogatories are unduly burdensome.

WHEREFORE, Adam Smith respectfully requests the Commission to strike the Objection or, in the alternative, to consider the responses to new materials contained herein, and deny Aloha’s Motion to Compel.


Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606
jmcglothlin@mac-law.com

Attorneys for Adam Smith Enterprises, Inc.

STATE OF FLORIDA

COUNTY OF PINELLAS

AFFIDAVIT OF DAVID S. FORD


David S. Ford, after first being placed under oath, deposes and sayeth:

1. My name is David S. Ford. I hold the position of Secretary/Treasurer with Adam Smith Enterprises, Inc. ("Adam Smith").

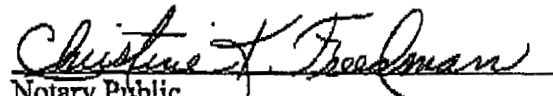
2. I previously provided an Affidavit attached as Attachment C to the Response of Adam Smith Enterprises, Inc. to Aloha Utilities, Inc.'s Motion to Compel and Adam Smith's Motion for Protective Order filed in Docket No. 020413-SU on November 20, 2002.

3. I have reviewed the Aloha Utilities, Inc.'s (Aloha) Objection to Motion for Protective Order submitted in Docket No. 020413-EU and the "rephrased" Interrogatories 4(c) and 5(c) contained therein. The "rephrased" interrogatories are extremely burdensome and would require Adam Smith to expend inordinate amounts of both time and effort to prepare a response.

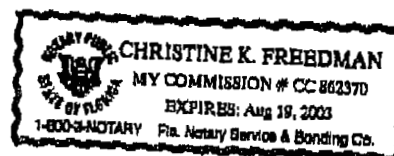
Further Affiant sayeth naught.


David S. Ford

In Witness Whereof, I have hereunto set my hand and seal in the State and County aforesaid as of this 9TH day of December 2002.


Notary Public

Commission expires: 8/19/2003



CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Motion to Strike Aloha Utilities, Inc.'s Objection to Motion for Protective Order and Alternative Response was sent via (*)Hand Delivery or U.S. Mail on this 9th day of December 2002 to the following:

(*)Rosanne Gervasi
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Stephen G. Watford
6915 Perrine Ranch Road
New Port Richey, FL 34655-3904

Stephen Burgess
Office of Public Counsel
111 W. Madison Street, #812
Tallahassee, FL 32399-1400

J. Ben Harrill
Figurski & Harrill
2435 U.S. Highway 19, Suite 350
Holiday, Florida 34691

(*)Suzanne Brownless, P.A.
1975 Buford Blvd
Tallahassee, FL 32308-4466

Diane Kiesling
Landers & Parsons, P.A.
310 West College Ave.
Tallahassee, FL 32302


Joseph A. McGlothlin