BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation into Florida Public Service Commission Jurisdiction over SOUTHERN STATES UTILITIES, INC. in Florida.	DOCKET NO. 930945-WS ORDER NO. PSC-94-1562-PCO-WS ISSUED: December 14, 1994

ORDER QUASHING NOTICE OF DEPOSITION AND SUBPOENA FOR DEPOSITION AND GRANTING A PROTECTIVE ORDER

BACKGROUND

On June 6, 1994, the Florida Public Service Commission issued Order No. PSC-94-0686-DS-WS, in which it denied the petition of Southern States Utilities, Inc. (SSU or the Utility) for a declaratory statement delineating Commission jurisdiction over the Utility's water and wastewater operations in the nonjurisdictional counties of Polk and Hillsborough under Section 367.171 (7), Florida Statutes. In that order, the Commission, on its own motion, initiated an investigation, in the same docket, to determine the functional relatedness of SSU's facilities and land throughout Florida. A formal administrative hearing is set for January, 23, 24, and 25, 1995.

On November 9, 1994, the Staff of the Florida Public Service Commission (Staff), filed a Motion to Quash Notice of Deposition and Subpoena for Deposition and for a Protective Order. Staff's Motion was filed in response to Hillsborough County's Notice of Deposition directed to Charles Hill, Director, Division of Water and Wastewater, Florida Public Service Commission, and served on November 2, 1994, and Subpoena for Deposition directed to Mr. Hill and served on November 3, 1994. On November 21, 1994, Hillsborough County filed its Response to Motion to Quash Notice of Deposition and Subpoena for Deposition and for Protective Order. On the same day, Hernando County filed the Response of Hernando County to Staff's Motion to Quash Notice of Deposition and Subpoena for Deposition and for a Protective Order.

APPLICABLE STANDARD

A ruling on a motion to quash a subpoena for deposition or a motion for a protective order must be made in accordance with the

Florida Rules of Civil Procedure, which have been adopted by the Commission. The scope of discovery under the Rules is broad. Rule 1.280(b)(1), Fla.R.Civ.P., provides:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, discovery without limit may not be obtained. Rule 1.280(c), Fla.R.Civ.P., states:

> Upon motion by a party or by the person from whom the discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires . . . .

It is apparent that the Florida Rules of Civil Procedure contemplate that the court, or the Prehearing Officer in this instance, will be required to rule on the appropriateness of discovery requests by parties when disputes arise. It is also apparent that the Commission has broad discretion in resolving discovery disputes. Case law indicates that the Commission must use a balancing test in certain circumstances. In Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979), the court said:

> Many, probably most, discovery questions may be decided by a proper balancing of the competing interests to be served by granting discovery or by denying it. See, e.g., Argonaut Ins. Co. v. Peralta, supra; American Health Plan v. Kostner, 367 So.2d 276 (Fla. 3d DCA 1979); Travelers Indemnity Co. v. Salido, 354 So.2d 963 (Fla. 3d DCA 1978); Begel v. Hirsch, 350 So.2d 514 (Fla. 4th DCA 1977), cert. denied, 361 So.2d 830 (Fla. 1978); Reeg v. Fetzer, 78 F.R.D. 34 (W.D.Okl. 1976); Payne v. Howard, 85 F.R.D. 465 (D.D.C. 1977). In this case, the interest of the public, of the DCMA, and of those the association represents in the non-production of the records in question, far outweighs the almost chimerical grounds for their discovery asserted by the respondents.

Also, in Eyster v. Eyster, 503 So. 2d 340, 343 (Fla. 1st DCA 1987), rev. den. 513 So. 2d 1061 (Fla. 1987), the court stated:

> [T]he trial court possesses broad discretion in granting or refusing discovery motions and also in protecting the parties against possible abuse of discovery procedures, and only an abuse of this discretion will constitute fatal error. Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla. 1967).

Thus, the Prehearing Officer's ruling must balance a litigant's right to pursue full discovery with the deponent's right to protection against oppressive disclosure.

STAFF'S MOTION TO QUASH

Generally, in support of its Motion to Quash, Staff states that Mr. Hill, as Director, Division of Water and Wastewater, exercises a senior management duty for the effective, efficient and lawful conduct of the investigation ordered by the Commission in this docket and that he bears a principal oversight responsibility for the preparation of the staff recommendation in this docket following the January 23, 1995 formal hearing, as well as for supervision of Staff's participation in the agenda conference. Staff alleges that taking the deposition of Mr. Hill will, as a consequence, cause Staff an undue burden by undermining Staff's ability to advise the Commission in these proceedings, and would be an inhibiting invasion of the deliberative process of the Commission. Further, Staff alleges that, in taking the deposition of Mr. Hill, Hillsborough County seeks discovery that is irrelevant to this proceeding.

Specifically, Staff first contends that the County seeks to obtain discovery that is irrelevant and beyond the permissible scope of discovery, asserting that any factual data concerning the subject matter of this docket, which the County may wish to discover from Mr. Hill, should rather be sought from the Utility or from the Commission through a public records request, pursuant to the Public Records Law, Chapter 119, Florida Statutes. Staff further asserts that, if the County seeks analysis of the genesis of Section 367.171, Florida Statutes, the appropriate source of information is the legislative history, not Mr. Hill's mental impressions, thought processes or analysis of information about the docket subject matter. Moreover, Staff contends that, since discovery is permitted only on matters reasonably calculated to lead to admissible evidence, and since the motives of a government official in taking official action are not admissible evidence in this docket nor would discovery of them be reasonably calculated to lead to admissible evidence, there are no appropriate grounds upon which the County may be permitted to take the deposition of Mr. Hill.

Second, Staff contends that the County's taking of Mr. Hill's deposition will cause the Commission and Staff an undue burden and irreparable injury by removing Mr. Hill thereafter from meaningful participation in this docket. Although Staff acknowledges that Rule 25-22.0021, Florida Administrative Code, bars only staff members who testify at the hearing from participating at the agenda conference, it alleges that the County, having taken Mr. Hill's deposition, almost certainly will call Mr. Hill as a witness at the hearing or, if circumstances require, seek to introduce his deposition into evidence at the hearing. Staff alleges that the outcome, were the County permitted to take Mr. Hill's deposition, would be to give license to those who would target specific supervisory staff members and effectively constrict management's guidance, oversight, and review of Staff's ultimate recommendation in any particular proceeding.

Finally, Staff argues that the purely deliberative processes of government are traditionally protected against disclosure. Staff alleges that the County's inquiry into staff management's knowledge, opinions or analysis in the instant docket would invade the Commission's deliberative process. Further, Staff observes that Rule 25-22.026 (3), Florida Administrative Code, designates as a primary Staff duty that Staff, in representing the public interest, bring before the Commission for its consideration all relevant facts and issues, and that Rule 25-22.026 (4) (a), Florida Administrative Code, states staff's role to be to assist in developing evidence to ensure a complete record. Noting that the Commission is authorized to use its staff to test the validity, credibility, and competence of the evidence in the record, Staff asserts that its required posture of neutrality would be significantly compromised were the County permitted to take Mr. Hill's deposition. Staff urges that the Prehearing Officer order that Hillsborough County's Notice of Deposition and Subpoena for Deposition be quashed and a Protective Order issued protecting Mr. Hill from harassment, annoyance, or oppression.

COUNTIES' RESPONSES

Generally, Hillsborough County, in urging the Prehearing Officer to permit it to obtain full discovery and to depose Mr. Hill, contends that taking Mr. Hill's deposition is reasonably calculated to lead to admissible evidence and that Staff's motion for a protective order is anticipatory and must, therefore, be denied. The County relies on its right to full discovery pursuant to Rule 1.280 (b) (1), Fla.R.Civ.P., in the preparation of its case, and observes that Mr. Hill, in view of the Commission staff's role, pursuant to Rule 25-22.026 (4) (a), Florida Administrative Code, to assist in developing evidence to ensure a complete record

so that all relevant facts and issues are presented to the fact finder, may have information appropriately to be discovered that the County could obtain in no other way.

Specifically, Hillsborough County first states that it seeks to discover the purpose, object, reason, necessity, and effect of Section 367.171 (7), Florida Statutes. The County cites City of Gainesville v. Scotty's Inc., 489 So. 2d 1196 (Fla. 1st DCA 1993) for the proposition that such matters are proper for discovery. It disavows any purpose to inquire into the motive and intent of Mr. Hill in any official activity, which it acknowledges to be improper inquiry.

Second, the County asserts that Staff, in seeking a comprehensive and anticipatory protective order, has failed to pursue less restrictive, alternative means, as provided for in Rule 1.280 (4) (c), Fla.R.Civ.P. The County, noting that discovery is only rarely denied completely, proffers that a protective order stating that discovery may be had only on specified terms and conditions, or by a method of discovery other than that selected by the party seeking discovery, or that certain matters not be inquired into, or that the scope of discovery be limited to certain matters, should be rather considered. The County further asserts that the Prehearing Officer cannot possibly divine that questions will be asked of Mr. Hill that would warrant an anticipatory protective order.

Hillsborough County next asserts that Staff, as the movant for a protective order, has failed to meet its burden under Rule 1.280 (4) (c), Fla.R.Civ.P., to show good cause that Mr. Hill should be protected from annoyance, embarrassment, oppression or undue burden or expense as justice requires. The County alleges that Staff has not demonstrated that an undue burden upon Staff in the conduct of the investigation in this docket would flow from the deposition of Mr. Hill. The County observes that Section 120.66 (1), Florida Statutes, precludes only an advisory staff member engaged in advocacy in connection with the matter under investigation, or a factually related matter, from communication with the Commissioners relative to the merits of the matter. Accordingly, the County asserts, this provision cannot be applied to Mr. Hill, who does not plan to testify at the hearing.

Finally, the County asserts that it has a protected interest in obtaining full discovery, including the discovery of Mr. Hill. It alleges that Staff has failed to show that its interests in shielding Mr. Hill from deposition defeat the County's interest. The County states that no privilege attends Mr. Hill's deposition,

as does, for example, the production of the records of a medical association ethics committee.

As stated earlier, Hernando County filed a Response to Staff's Motion to Quash, wherein Hernando County urges that Staff's Motion be rejected and Hillsborough County be afforded full discovery rights through the deposition of Mr. Hill. The legal arguments of Hernando County are congruent with those of Hillsborough County and have been considered.

CONCLUSION

In taking the deposition of Mr. Hill, Hillsborough County seeks to discover the purpose, object, reason, necessity, and effect of Section 367.171 (7), Florida Statutes. Staff is correct that such discovery is beyond the scope of permissible discovery. Notwithstanding the extent, if any at all, to which Mr. Hill may have participated in his official capacity in the enactment of that statute, or the manner in which he may have so participated, Mr. Hill does not stand competent to respond to Hillsborough County's inquiry into the statute's purpose, object, reason, necessity, and effect. The County may appropriately seek discovery of factual matters concerning the enactment of the statute through inspection of the legislative history, through a public records request of this Commission, and through requests of the Utility. Mr. Hill's testimony would be no more than duplicative and cumulative.

Hillsborough County, furthermore, argues that a comprehensive and anticipatory protective order is inappropriate and that less restrictive means should be pursued. However, the County has stated an intention to discover from Mr. Hill only information that it may not be permitted to discover. Therefore, a comprehensive and anticipatory protective order is appropriate.

While the Prehearing Officer accords full respect to the County's statutory right to full discovery in the interest of adequately preparing its case in this docket, and to the public policy underlying it, that right, when balanced in this instance with Staff's interest in the integrity of its deliberative process, must be foreshortened. The public policy underlying Staff's concern with the integrity of the deliberative process is more compelling. As Staff has argued, its statutory posture of neutrality, in which it is directed to assist in developing evidence to ensure that a complete record is before the Commission in its deliberations, would be significantly compromised were the County permitted to take Mr. Hill's deposition. The County's deposition of Mr. Hill would constitute an undue burden upon Staff's conduct of the investigation in this docket.

Therefore, Staff's Motion to Quash Notice of Deposition and Subpoena for Deposition and for a Protective Order is granted.

It is, therefore,

ORDERED by Commissioner Julia L. Johnson, as Prehearing Officer, that Staff's Motion to Quash Notice of Deposition and Subpoena for Deposition, directed to Charles Hill, Director, Water and Wastewater Division, Florida Public Service Commission, is granted. It is further

ORDERED that Staff's Motion for a Protective Order for the protection of Charles Hill, Director, Water and Wastewater Division, Florida Public Service Commission from annoyance, embarrassment, oppression, or undue burden by means of a further Notice of Deposition or a further Subpoena for Deposition, is granted.

By ORDER of Commissioner Julia L. Johnson, as Prehearing Officer, this 14th day of December, 1994.

JULIA L. JOHNSON, PREHEARING OFFICER
Florida Public Service Commission

(S E A L)

CJP

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.