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

January 17, 2003

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 Portions of the Prefiled Testimony of Stephen G. Watford Relating to Potential Contract Dispute

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,

Joe McGlothlin

Joseph A. McGlothlin

JAM/mls
Enclosure

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: January 17, 2003

/

MOTION TO STRIKE PORTIONS OF THE PREFILED TESTIMONY OF STEPHEN G. WATFORD RELATING TO POTENTIAL CONTRACT DISPUTE

Pursuant to Rule 28.106.204, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), files this motion to strike portions of the testimony of Aloha Utilities, Inc. (Aloha) witness Stephen G. Watford. Specifically, Adam Smith moves to strike page 4, line 21, through page 13, line 4 of the prefiled testimony. In the testimony, Mr. Watford proffers opinions and arguments concerning Aloha's interpretation of the developer agreement between Aloha and Adam Smith. The subject of the testimony, a potential contractual dispute between Aloha and Adam Smith (1) is a matter that, because it necessarily would involve contract interpretations, claims of breach of contract, and claims for damages, would fall within the jurisdiction of a circuit court, not the Commission; and (2) is not in the nature of a challenge to an action proposed by the Commission in PAA Order No. PSC-02-1250-SC-SU.[1] In addition, the testimony is largely in the nature of improper legal argument.

BACKGROUND

1. On September 11, 2002, the Commission issued Order No. PSC-02-1250-SC-SU in this docket. The order included several actions that the Commission undertook through

[1] Further, the potential dispute will become moot in the event the Commission resolves Adam Smith's protest in Adam Smith's favor.

Proposed Agency Action. They included: (1) the establishment of an effective date of April 16, 2002 for Aloha's increased sewer service availability tariff; (2) the imputation of CIAC in the amount of service availability charges forgone during the period May 23, 2001 through April 16, 2002, due to Aloha's failure to file a tariff as directed by Commission order and its related failure to notify affected developers and builders of the change; and (3) a proposal to allow Aloha to attempt to apply the new service availability charge to connections that occurred between May 23, 2001 and April 16, 2002.

2. On October 2, 2002, Adam Smith protested the PAA portion of Order No. PSC-02-1250-SC-SU in which the Commission purported to authorize Aloha to collect the differential in service charges from developers and builders who paid charges to Aloha during the period May 23, 2001-April 16, 2002. In its pleading, Adam Smith noted that Aloha was trying to collect from Adam Smith the differential in charges pertaining to many lots that Adam Smith had sold to others prior to the time they were connected to Aloha's system.

3. On December 18, 2002, parties and Staff participated in an informal "issue identification" meeting. Adam Smith proffered, as a proposed stipulation of law, the proposition that any responsibility for an increase in service availability charges belongs to the entity that owns the lot at the time of connection. (Adam Smith regards this as a corollary of the decision in the case of *H. Miller and Sons, Inc. v. Hawkins,*[2] in which the court determined that the amount of service availability charge applicable to a given lot is to be determined as of the date that the lot is connected.) In response, Aloha orally asserted that the developer agreement between Aloha and Adam Smith places a contractual obligation on Adam Smith to pay any and all

[2] 373 So.2d 918 (Fla. 1979)

increases in service availability charges applicable to a given lot, *whether or not* Adam Smith owns the subject property at the time the lot is connected to Aloha's system. However, the dispute over the interpretation of the developer agreement to which Aloha's contention gives rise would fall under the jurisdiction of the judiciary, not the Commission. *Neither Aloha nor any other party identified a dispute over the interpretation of the developer agreement between Adam Smith and Aloha on any of the "preliminary issue lists" that were circulated then and afterwards.*

4. On January 6, 2003, Aloha filed the prefiled direct testimony of Stephen G. Watford. From page 4, line 20 through page 13, line 4 of his testimony, Mr. Watford argues Aloha's interpretation of the developer agreement between Aloha and Adam Smith, and asks the Commission to construe the terms of a contract and/or adjudicate a future contractual dispute. For the following reasons, the testimony should be stricken.

ARGUMENT

5. The Commission's authority over water/wastewater utilities subject to its regulatory powers is limited by § 367.101, Florida Statutes, to those proceedings related to "authority, service and rates." When carrying out these regulatory responsibilities, frequently the Commission deals with certain aspects of developer agreements. The Commission approves such developer agreements (Rule 25-30.550(1), Florida Administrative Code). The Commission can also (subject to requirements of statutes and rules, including those related to the reasonableness of rates, the obligation to provide notice to affected parties prior to the effective date, and the prohibition against retroactive ratemaking) modify, prospectively, the rates contained in a developer agreement. Rule 25-30.560(2), Florida Administrative Code provides a mechanism under which a developer may complain to the Commission that the utility has failed to provide

service consistent with the agreement.[3] However, while developer agreements represent a significant *regulatory* tool related to the functions of the Commission in the areas of "authority, rates, and service," there are important limits on the Commission's jurisdiction with regard to contracts between regulated water/wastewater utilities and developers. The Commission has observed that it "does not have jurisdiction to determine the legal rights and obligations pursuant to contracts nor can it award damages *of any sort*."[4] The Commission has over time reiterated its inability to delve into contractual disputes.[5]

6. A useful analogy can be drawn to the Commission's role in the formation of contracts between electric utilities and cogenerators that are Qualifying Facilities under federal law. The Commission approves such contracts if they meet the Commission's standards and regulations governing cost recovery. However, as the Commission determined in Order No. PSC-95-0209-FOF-EQ,[6] the resolution of contractual disputes between QFs and purchasing utilities, questions of contract interpretation, and claims for damages by parties to the agreement that arise after the contract has been approved for regulatory purposes, fall under the jurisdiction of the courts, not the Commission.

7. The same is true with respect to developer agreements between regulated water/wastewater utilities and developers. When establishing the rates to be charged by the utility, the Commission has primary -- even preemptive-- jurisdiction. However, contract interpretations, the resolution of contract disputes, and the awarding of damages for the claimed

---

[3] It is clear that the rule contemplates the scope of the complaint would be the area of rates and service that are within the regulatory province of the Commission.

[4] *In re: Complaint of Naples Orangetree, Inc. against Orange Tree Utility Company in Collier County for refusal to provide service*, Docket No. 940056-WS, Order No. PSC-94-0762-FOF-WS, June 21, 1994 (emphasis added).

[5] *In re: Application for Staff-assisted rate case by CWC Communities, LP d/b/a Palm Valley,* Docket No. 010823-WS Order No. PSC-02-1111-PAA-WS, August 13, 2002.

[6] *In re: Petition for resolution of a cogeneration contract dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation*, Docket No. 940357-EQ, Order No. PSC-95-0209-FOF-EQ, February 15, 1995.

breach of the contract remain the province of courts.[7] This view is consistent with the case of *Hill Top Developers v. Holiday Pines Service Corp.*[8] In that case, the utility sued a developer in circuit court for failure to pay additional amounts that the utility claimed the developer owed for service. The additional amounts were based on charges that had not been approved by the Commission. The trial court dismissed Hill Top's counterclaim for $25,000 in additional charges it had paid, and barred it from pursuing a defense based upon the absence of Commission approval for the additional charges sought by Holiday Pines. The Second District Court of Appeals reversed the trial court and ordered Holiday Pines' complaint dismissed because the trial court lacked subject matter jurisdiction to award Holiday Pines a judgment absent Commission approval of the charge. The DCA recognized that after the PSC had exercised its statutory authority with respect to the charge "a juridically [sic] cognizable debt would exist if the charge were not satisfied."[9]

Applying the holding of *Hill Top* to the instant case, Adam Smith agrees that the Commission has jurisdiction to establish the tariffed service availability charge applicable (again, subject to the standards and limitations delineated above) to the party responsible for such charges at the time the lot is connected to Aloha's system. However, the establishment of the rate to be included in a utility's tariff must be distinguished from the interpretation of contract terms that bear on the extent of obligations to pay service availability charges. A dispute over whether the terms of the developer agreement bind Adam Smith to pay additional service

---

[7] *Cohee v. Crestridge Utilities Corp.*, 324 So.2d 155 (Fla. 2d DCA 1975). *See also In re: Application of Lake Tarpon Homes, Inc. for a staff-assisted rate case in Pinellas County*, Docket No. 890442-WU, Order No. 22160, November 7, 1989.
[8] 478 So.2d 368 (Fla. 2d DCA 1985).
[9] *Id.* at 371.

availability charge for a connection, even after it has sold the property that is the subject of the connection and the application to Aloha for connection is made by a new and different entity, involves an interpretation of the contract that would fall within the province of the courts, not the Commission.

8. During the period May 23, 2001-April 16, 2002, Aloha connected hundreds of lots as a result of a myriad of transactions between Aloha and numerous builders, developers, and homeowners. Certainly, when the Commission proposed to authorize Aloha "to try to collect"[10] the differential in charges from those many entities, the Commission did not contemplate that it would referee individual disputes between Aloha and dozens of entities regarding the details of their relationships and the extent of the liability of each under their contractual arrangements. It would be the height of irony for the proceeding initiated by the only developer who is protesting the Commission's *regulatory, ratemaking* proposed action to be converted into an adjudication of Adam Smith's individual *contractual* obligations. Indeed, so that there is no ambiguity in the event that Aloha's contention is presented to a court at some point, it is incumbent on the Commission in this case to disavow any intent to resolve any contractual disputes that may arise in the future as a result of its disposition of the regulatory matters before it.

9. On page 10, line 4–line 12 of his testimony, Mr. Watford -- a fact witness -- offers improper legal argument. Specifically, he opines on the import of *H. Miller and Sons, Inc. v. Hawkins*[11] to the proceeding. Mr. Watford is the president of Aloha. In his testimony he states his purpose is to address the *facts* surrounding the case. (Testimony of Stephen G. Watford, page 2, line 4) Mr. Watford does not state that he is an attorney; nor is his "testimony" limited to

[10] Order No. PSC-02-1250-SC-SU at 25.
[11] 373 So.2d 913 (Fla. 1979)

a layman's understanding and application of the law to the business he operates. In any event, such legal arguments belong in post-hearing briefs, not in "evidence" to be received at an evidentiary hearing. Thus, page 10, line 4 – line 12 should be stricken for this reason as well.

CONCLUSION

In summary, Mr. Watford's "testimony" on the subject of the developer agreement is improper. It is one of several improper excursions into legal opinions and arguments of legal interpretation that he is not qualified to offer, and that in any event are not properly the subject of testimony. More importantly, the assertions are in the nature of an anticipatory dispute which may be rendered moot by the decision on Adam Smith's challenge to the PAA, and which, if not rendered moot, would be the province of the judiciary, not this Commission. Thus, page 4, line 4 through page 13, line 4 of Mr. Watford's testimony should be stricken.

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.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Motion to Strike Testimony of Stephen H. Watford Relating to Potential Contract Dispute has been furnished by (*)Hand delivery, (**)Electronically, or U.S. Mail this 17th day of January 2003 to the following:

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

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

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

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

Joseph A. McGlothlin