

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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IN RE: Petition by Customers of)
ALOHA UTILITIES, INC., for deletion of)
portion of territory in Seven Springs)
Area in Pasco County, Florida.)

Docket No. 020896-WS

COMMISSION
CLERK

IN RE: Application for increase in water)
rates for Seven Springs System in Pasco)
County by **ALOHA UTILITIES, INC.**)

Docket No. 010503-WU

**ALOHA UTILITIES, INC.'S MOTION FOR PROTECTIVE ORDER
AND RESPONSE TO STAFF'S MOTION TO COMPEL**

Aloha Utilities, Inc. ("Aloha"), by and through undersigned counsel, hereby files this Motion for Protective Order and Response to Staff's Motion to Compel, and in support thereof would state and allege as follows:

1. On November 2, 2004, at Agenda Conference, the Commission accepted Staff's Recommendation of October 21, 2004, and directed Aloha to file its written objections to certain outstanding Staff discovery, if any, and its response to the Staff's Motion to Compel by Thursday, November 4, 2005. Staff's Motion to Compel seeks an order requiring Aloha's response to the Staff's First Request for Production of Documents

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(Nos. 1 - 2) prior to the November 9, 2004 date upon which such responses would be due under the Uniform Rules of Procedure.

2. Staff's Motion to Compel, filed on October 14, 2004, is a premature motion that is not authorized by the Uniform Rules of Procedure, and represents a preemptive attempt to anticipate objections not yet made and to address them so that the Prehearing

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Officer may, presumably, order the discovery to be had over Aloha's not-yet-made objections. Rule 1.350(b) of the Florida Rules of Civil Procedure provides that "[t]he party submitting the request may move for an Order under Rule 1.380 concerning any objection, failure to respond to the request, or any part of it, or failure to permit inspection as requested". Until the filing of Aloha's objections contemporaneous with the filing of this Response, none of the rule-mandated prerequisites to the filing of a Motion to Compel had occurred. For that reason alone, the Motion should be denied.

3. Staff has no authority to serve discovery in this case pursuant to the Florida Administrative Code, the Florida Rules of Civil Procedure, or any other authority which bestows upon parties to administrative litigation the right to propound discovery. The Commission does not consider itself a party in this proceeding, Staff is not a party in this proceeding, and has no inherent or apparent authority to engage in the discovery process. Staff's discovery represents that it is served pursuant to Rule 1.350 of the Florida Rules of Civil Procedure. The service of such discovery through that particular Civil Rule by a **party** is a proper procedure because Rule 28-106.206, Florida Administrative Code, provides that **parties** may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. However, Staff is not a party to this proceeding, does not hold itself out to be a party to this proceeding, has never been a party to this proceeding, and does not intend to become a party to this proceeding. Staff cannot avail itself of the authorities and privileges of party status without any of the obligations, duties, burdens or responsibilities of that same status. There can be no doubt that Staff has access to the Prehearing Officer and does not consider its contacts with him

to be ex parte. This, in and of itself, establishes that Staff is not a party as that phrase is used or understood in Florida law or under the Florida Administrative Procedure Act. For this reason alone, Staff's Motion to Compel should be denied and Aloha's objections should be deemed well taken.¹

4. Because this proceeding is not lawfully constituted, Staff's discovery should be considered a nullity and the Prehearing Officer should decline to order its production. Staff seeks the names and addresses of Aloha's Seven Springs service area customers. Staff has indicated that it intends to use that information to create admissible evidence "derived from customer responses to a survey concerning the subject matter of the pending action". The only way the Commission could lawfully revoke any portion of Aloha's certificate is by following the requirements of Section 120.60(5), Florida Statutes. The Commission, in this case, has not done so. The Prehearing Officer should determine that any "discovery" undertaken by a non-party in an unlawfully constituted administrative proceeding be considered a nullity, or at a minimum, should not be deemed to require the production of the information here at issue.

5. It is unknown whether Aloha will be given the opportunity to even respond to the proposed survey. For this reason alone, the Prehearing Officer should decline to order the production of the documents. Staff has candidly acknowledged, in its Motion to Compel, that "Staff plans to mail a survey to all of Aloha's 10,000 or more customers in its Seven Springs area in an effort to determine the level of support for the Petitions among

¹In all actuality and for the reasons set forth above, Staff's discovery should be considered a nullity by the Prehearing Officer, obviating the need for ruling on Aloha's objections.

the entire body of Aloha's Seven Springs rate payers". Staff's Motion also acknowledges that a "compilation of the results of the survey" will be included in Staff's prefiled testimony to be filed January 13, 2005. The Order Establishing Procedure in this case provides that the "company" direct testimony and exhibits are due on December 16, 2004, that Staff's direct testimony and exhibits are due on January 13, 2005, and that "rebuttal testimony and exhibits" are due on February 3, 2005. Whether Aloha will be allowed to file rebuttal or otherwise responsive testimony to Staff's direct testimony and exhibits is unknown and unclear under the Order Establishing Procedure. This is clearly a deprivation of Aloha's due process rights.

6. Staff's Motion to Compel should be denied because the survey which Staff has indicated it wants to undertake will constitute inadmissible evidence, may potentially be used in a way that is unduly prejudicial to Aloha and is not an effort which will result in reliable information which is pertinent to any issue in the case. It is improper for Staff to assume a role of pollster in this proceeding. It is also not the place of Staff to *ex post facto* create evidence, or go fishing for facts, which support the claim of the petitions in this case. In point of fact, nothing which the survey reveals can be, will be, or should be admissible in this proceeding. It was incumbent upon the Commission to propose deletion if, and only if, it had determined that certain facts or the conduct of Aloha warrant the intended action of revocation under specific statutory authority. This proceeding is not a fishing expedition to establish such facts or conduct and staff's survey is an impermissible attempt to do exactly that. The number of persons in Aloha's service area who "support" the petitions

is entirely irrelevant.² The only facts or conduct that are relevant to this proceeding are those known to the agency, and set forth in an administrative complaint which affords reasonable notice to Aloha of the statutes, rules, facts or conduct which warrant revocation, pursuant to Section 120.60(5), Florida Statutes. The fact that the Commission has completely ignored this statutory prerequisite to any lawful revocation proceeding only accentuates the obvious: such a survey should not be undertaken, would not be admissible, and could not possibly be relevant in any case.³

The proposed survey and its likely effect, whether intended or unintended, will place Staff and the Commission itself in adversarial role to Aloha. Our adversarial system of justice places a premium on the fairness of the quasi-judicial procedure, and the decision maker must not allow one side of the dispute to have a special advantage in influencing the decision. Assumably, Staff would disagree that it constitutes a “side” in this dispute, but what ever its role or status, Staff’s intended survey is a direct and unequivocal attempt to influence the decision in this case. *Cherry Communications, Inc. v. Deason*, 652 So.2d 803 (Fla. 1995). The Commission’s discretion and its use of Staff is not absolute. *Legal Environmental Assistance Foundation, Inc. v. Clark*, 668 So.2d 982 (Fla. 1996). The

²Support for the petition could come from ignorance, animosity, confusion, sympathy or empathy for one’s neighbors known or unknown, a misguided belief about what will happen regarding utility service if deletion in some form or fashion is accomplished, etc.

³In fact, Staff’s attempt to continue to muster additional evidence to support revocation of a portion of Aloha’s certificate demonstrates, *de facto*, that the Commission did not follow the dictates of Section 120.60(5), Florida Statutes, and has not (and apparently can not) propose deletion based upon facts already known to it.

Prehearing Officer should rule that the survey should not be undertaken and that the discovery should not be had.

7. Staff's Motion to Compel should be denied because the requests are not reasonably calculated to lead to the discovery of admissible evidence. Request for Production No. 2 seeks information, in electronic format, comprising a list of the names and addresses of all of Aloha's wastewater customers in the Seven Springs service area. Aloha's wastewater service is not implicated in any way, shape, or form in this proceeding. A list of the names and addresses of all of Aloha's wastewater customers cannot possibly comprise admissible evidence or lead to the discovery of admissible evidence.

Staff's Request for Production of Documents No.1 requests, in electronic format, a list of the names and addresses of all Aloha's water customers in the Seven Springs service area. Staff has acknowledged the survey which it hopes to undertake based upon information gleaned from the response. Certainly, the names and addresses themselves would not constitute admissible evidence because that information would not be evidence tending to prove or disprove a material fact. Likewise, the survey Staff hopes to fund, undertake, compile, and admit into evidence is not evidence tending to prove or disprove a material fact relevant to any issue in this proceeding. For those reasons as argued elsewhere herein, Staff's Request for Production of Documents No. 1 is not reasonably calculated to lead to the discovery of admissible evidence.

8. Assuming arguendo that the Prehearing Officer is inclined to grant Staff's Motion to Compel, Aloha hereby moves for a Protective Order, for all the reasons set forth herein, protecting Aloha from disclosure of the information requested by Staff. The survey

which Staff intends to conduct and the predictably questionable results will prejudice Aloha, will place this Commission and its Staff in an improper posture in this case, and will create appellate issues thus prolonging any resolution of this matter. The prejudicial effect of the results of any such survey will outweigh its probative value, if any.

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests the Prehearing Officer to deny Staff's Motion to Compel. Alternatively, Aloha requests the Prehearing Officer grant Aloha's Motion for Protective Order.

Respectfully submitted this 4th
day of November, 2004, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand delivery (indicated by *) to the following on this 4th day of November, 2004:

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