

ORIGINAL

BEFORE THE 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.

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

FILED: NOVEMBER 9, 2004

RESPONSE TO MOTION FOR PROTECTIVE ORDER

The staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its Response to Aloha Utilities, Inc.'s (Aloha or utility) Motion for Protective Order filed on November 4, 2004, and states that:

1. On October 5, 2004, the staff served Aloha with the Commission's First Request for Production of Documents (PODs Nos. 1-2), requesting that the documents be produced within thirty days of service, pursuant to Rule 1.350, Florida Rules of Civil Procedure.

Document Request No. 1 states as follows:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's water customers in the seven Springs service area.

Document Request No. 2 states as follows:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's wastewater customers in the Seven Springs service area.

2. In its Motion to Compel the production of the above-referenced documents filed on October 14, 2004, staff stated that it planned 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 the entire body of Aloha's Seven Springs ratepayers. Since that time, staff has decided to

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mail the survey to only those water customers who reside within the areas for which deletion of territory has been requested in this proceeding. Therefore, staff hereby narrows its POD No. 1 to request that Aloha provide, in electronic format, a list of the names and addresses of all of its water customers who reside within the areas for which deletion of territory has been requested in this proceeding. If it is unduly burdensome for Aloha to determine the exact customer names and/or addresses of those customers who reside within the areas for which deletion of territory has been requested in this proceeding, then staff continues to request that Aloha provide, in electronic format, a list of the names and addresses of all of its Seven Springs water customers. Staff withdraws its POD No. 2 in its entirety.

3. In its Motion to Compel, staff stated that in order to reproduce the survey in time to include a compilation of the survey results in its prefiled testimony due to be filed on January 13, 2005, staff requires the production of the documents referenced in Paragraph 1 on an expedited basis. However, because of the delays involved in obtaining the requested information, staff has procured an alternative method of obtaining the requested information. Even so, staff continues to request the production of POD No. 1, as that request has been narrowed in Paragraph 2 above, so that staff may use the requested information as a cross-reference tool to verify the accuracy of the information obtained and to assure that all of the water customers in the petitioning areas receive and have an opportunity to answer the survey.

4. The information requested by POD No. 1 is discoverable. The information is not privileged, is relevant to the subject matter of the pending action, and is reasonably calculated to lead to the discovery of admissible evidence derived from customer responses to a staff survey

concerning the subject matter of the pending action. The survey is designed to determine the level of support for the deletion petitions at issue in this proceeding among all of the customers residing within the areas requested to be deleted. The level of support for the deletion petitions is relevant to whether it is in the public interest for any portion of the deletion petitions at issue in this proceeding to be granted.

5. POD No. 1 is not an overly burdensome request. Production of the document will only necessitate the amount of time required for Aloha to electronically copy the names and addresses of its Seven Springs water customers onto a diskette. The requested information consists of data which is readily available to Aloha for routine billing and other purposes.

6. In its Response to Staff's First Request for Production of Documents filed November 4, 2004, Aloha objects to POD No. 1 in part because it would require the disclosure of information which Aloha claims is confidential and proprietary and is afforded protection from disclosure under Florida law. This is not a valid reason to refuse to produce the requested information. The Commission has rules and procedures in place which allow for Aloha to produce the information under a claim of confidentiality, if it so chooses.

7. In its Motion for Protective Order, Aloha argues that staff's Motion to Compel is not authorized by the Uniform Rules of Procedure, and represents a preemptive attempt to anticipate objections not yet made so that the Prehearing Officer may, presumably, order the discovery to be had over Aloha's not-yet-made objections. Staff disagrees. In its Motion to Compel, staff requested that the Prehearing Officer promptly enter an order compelling the discovery following receipt, not before receipt, of Aloha's response and objection, if any. In any

event, Aloha has now filed both its objection and a motion for protective order so that the Prehearing Officer is fully informed of Aloha's position.

8. Aloha argues that staff has no inherent or apparent authority to engage in the discovery process because it is not a party to this proceeding. Staff disagrees. In its Statement of Agency Organization & Operations, the Commission notes that the staff may participate as a party in any proceeding. Staff's primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration. Staff is not a party in interest and has no substantial interests that may be affected by the proceeding. Rather, staff's role is to assist in developing evidence to ensure a complete record so that all relevant facts and issues are presented to the fact finder. It is within this participatory party-like role that staff has propounded the discovery at issue herein.

9. Aloha argues that staff's discovery request should be considered a nullity, or at a minimum, should not be deemed to require the production of the information here at issue because this proceeding is not lawfully constituted. According to Aloha, the only way the Commission could lawfully revoke any portion of its certificate is by following the requirements of Section 120.60(5), Florida Statutes. This is not a valid basis for seeking protection from the requirement to produce the documents requested. Unless and until the Commission dismisses the proceeding as being not lawfully constituted or for any other reason, the discovery process should proceed as contemplated by the Order Establishing Procedure issued in the case.¹

¹ Staff notes that Aloha has not sought to have the proceeding dismissed as improperly constituted. Staff also notes that this is not a revocation proceeding initiated by the Commission; it is a deletion proceeding initiated by petitions filed by Aloha's customers.

10. Aloha argues that it is unknown and unclear under the Order Establishing Procedure issued in this case whether the utility will be given an opportunity to file rebuttal or otherwise responsive testimony to staff's direct testimony and exhibits, and that for this reason, the Prehearing Officer should decline to order the production of the documents. Staff disagrees. If Aloha is unclear as to whether it may file rebuttal testimony in this case, rather than seeking protection from the requirement to answer the discovery at issue, Aloha should seek clarification from the Prehearing Officer on this point and move for an order allowing it to file rebuttal.

WHEREFORE, in consideration of the foregoing, the staff respectfully requests that the Prehearing Officer deny Aloha's Motion for Protective Order and enter an immediate order requiring Aloha to produce the document requested in Item No. 1 of the Commission's First Request for Production of Documents to Aloha, as that request has been narrowed herein, within five days of the issuance of the order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one true and correct copy of the Staff's Response to Motion for Protective Order, has been served by hand-delivery to Marshall Deterding and John Wharton, Esquires, Rose, Sundstrom and Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, FL 32301, and that a true and correct copy thereof has been furnished to the following by U. S. Mail this 9th day of November, 2004:

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CERTIFICATE OF SERVICE
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