

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of ALOHA)
UTILITIES, INC. for an increase)
in water rates for its Seven)
Springs System in Pasco County,)
Florida.)

DOCKET NO. 010503-WU

**ALOHA'S RESPONSE TO STAFF'S MOTION TO QUASH SUBPOENAS
AND FOR PROTECTIVE ORDER**

Aloha Utilities, Inc. ("Aloha" or "Utility") hereby files this Response to Staff's Motion to Quash Subpoenas and for Protective Order and in support thereof would state and allege as follows:

1. Staff's Motion to Quash Subpoenas and for Protective Order is, in and of itself, an amazing document. One would think that the Motion was precipitated by some horrendous assault upon the Commission's ability to perform its statutory functions, rather than by the filing of the Notices of Deposition of agency staff, which are entirely routine and common in administrative proceedings in the State of Florida. Perhaps this is because the Motion in reality rests not upon the ostensible reasons set forth therein, but rather responds to the fact that Aloha has dared to poke at one of the Commission's sacred cows: to wit, that "non-testifying staff" of the Commission is, alone and apart from the staff of every other agency in the State of Florida, somehow immune to either discovery or deposition.¹ Staff's hastily prepared Motion defends this questionable

¹In fact, the whole concept of "non-testifying staff", whose existence is the lynchpin of the Staff's arguments, is a false distinction. In every other quasi-judicial litigation against an agency who does not use prefiled testimony, one normally has no idea whether a certain staff member from a certain agency will testify or not, until the production of a Prehearing Order just before hearing. The whole concept of

proposition while simultaneously maintaining, without a hint of irony or self-awareness, that “*one of the Staff’s chief functions is to assist in developing an adequate record in administrative proceedings in order to ensure that the Commission has the quantity and quality of information necessary to make a well reasoned, sound, and informed decision.*” Perhaps, if staff’s knee was not jerking so quickly in response to the slightest tap from Aloha, it would realize that these depositions have been proposed by Aloha in furtherance of the exact “function” which the staff claims as its own but which in this case it has totally failed to fulfill.² Staff’s express concern about an “adversarial inquisition” (§ 52) is entirely consistent with the Motion’s complete silence as to a critical fact that the Staff conveniently overlooks: Aloha **supports** the Commission’s “Proposed Agency Action” in this proceeding. It is the Petitioners who have placed the Commission and its staff in an adversarial position. Aloha noticed the depositions in an attempt to defend and support the Commission’s Proposed Agency Action Order, since the Commission’s own staff has, oddly enough, declined the opportunity to do so.

2. The argument that the information sought is not relevant not only reveals a certain lack of confidence on the part of the staff in its alternate argument (that the depositions should not be allowed in any case), but also relies upon an assumption that the staff possesses some talent for understanding what is in the mind of Aloha’s counsel.

non-testifying staff only exists because the Commission forces the parties to prefile their testimony.

2

Staff’s complete and utter failure to even attempt to defend, explain the basis of, justify, or support the Commission’s Proposed Agency Action forced Aloha to notice the depositions in an attempt “to ensure that the Commission has the quantity and quality of information necessary to make a well reasoned, sound, and informed decision.”

Any argument that the information sought is not relevant is entirely premature. The staff is completely without knowledge of the questions which will be asked at the depositions and cannot know if the information obtained from such questions will be relevant or necessary. The Motion states that the “purpose of this case is not to determine Staff’s intent.” Interestingly enough, it is the only witness for the Petitioners, Dr. Kurien, who has testified at length about his letters, staff’s emails, who among the staff did what on which date, etc. Aloha merely seeks to take the depositions of the professional staff of the Commission in order to adduce facts about what knowledge is possessed within the agency, what policies were considered, and the factual basis for its recommendation of a certain course of action to the Commission. Staff’s decision to file no staff testimony on the date prescribed for the filing of staff testimony, and to now leap into the nearest rabbit hole rather than to disclose their knowledge and expert opinions, would be baffling at any other agency and is perplexing even at the Commission.

3. Aloha certainly agrees that the “staff” is not a “real party in interest.” (¶ 3) However, the Commission is a real party in interest as it is the Commission’s action which is being challenged in this proceeding. Proceedings under the Administrative Procedure Act (such as this proceeding) are intended to formulate final agency action, not to review action taken earlier and preliminarily. *McDonald v. Dept. of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1997). To that extent, Aloha agrees that the PSC staff’s “deliberative process” is irrelevant. *McDonald*, at 583, citing *Department of Gen. Serv. v. Willis*, 344 So. 2d at 580, 591 (1st DCA 1977). *McDonald* recognizes three due

process checks to prevent arbitrary agency action: that reasons be stated for agency action taken or omitted, that reasons be supported by the record, and judicial review. Here, Aloha seeks to ensure that this record supports the Commission's Proposed Agency Action, which is the purpose for the depositions of staff. Aloha seeks to develop a record which supports the Proposed Agency Action, a "function" which staff embraces as its own but which it has not even attempted to fulfill in this case.

4. Staff's desire to be protected from "adversarial inquisition" flies in the face of the very purpose of a hearing under the Florida Administrative Procedure Act. Staff's position, that it is only subject to discovery when it chooses to be, would stifle any challenge to an agency's Proposed Agency Action by rendering the agency immune from discovery of the facts. Aloha does not question the authority of the PSC to use its staff, but Aloha has the absolute right to know what the staff considered and to test the reliability of those facts. Taking the staff's deposition does not impair its ability to evaluate evidence, investigate or make recommendations to the Commission.

5. Staff's citation of cases involving agency heads (see, e.g., ¶ 41) is more representative of staff's apparent self-image than of anything which is at issue in Aloha's request for depositions. Moreover, even agency heads are subject to deposition when they are uniquely able to provide relevant information which cannot be obtained from other sources. *Dept. of Agriculture and Consumer Services v. Broward County*, 810 So.2d 1056 (Fla. 1st DCA 2002); *Lewis v. Life Savings and Loan Ass'n.*, 342 So.2d 1031 (Fla. 1977). If staff is exempt from deposition, a party's only recourse would be to depose the Commissioners themselves.

6. The suggestion (§ 42) that Aloha's Notices of Depositions are nothing more than an attempt to annoy, harass, or somehow discredit staff for taking preliminary positions other than those espoused by Aloha is not only absurd, given Aloha's support of the Proposed Agency Action, but reveals a fundamental misunderstanding of the issues in this case.³ Staff's position, as accepted by the Commission and reflected in the Proposed Agency Action, is the position espoused by Aloha. Staff's attempt to spin a disturbing tale of the "chilling effect" (§42) Aloha's depositions would have (a "chilling effect" that apparently is not experienced by the staff of every other administrative agency in the State of Florida, who are routinely deposed in such administrative proceedings), its citation to cases which predate the Florida Administrative Procedure Act (§ 43), and the comparison of itself to "a judge's staff" (§ 44) are all attempts to divert the finder of fact's eye from the ball. If Commission staff is really like a judge's staff, then they should quit writing substantive letters to parties, they should quit participating in depositions, they should quit sending discovery to parties, they should quit engaging in cross-examination, and they should refrain from filing lengthy motions. The very suggestion that Aloha's "compelling staff members to testify at hearing" is untenable because it will supposedly render those staff "unable to participate in the Commission's critical post-hearing deliberative process" suggests that the so-called "deliberative process" is more important than Aloha's due process rights. Aloha would beg to differ.

³It is also notable that while staff argues annoyance, harrassment, etc., its actual motion retreats instead to a standard that is not supportive of the filing of a Motion for Protective Order, a preemptive suggestion that the depositions will delve into subjects which are irrelevant.

7. The staff sees its role as assisting in the development of “an adequate record”, yet paradoxically reserves solely unto itself the decision whether and to what extent it will contribute to that “adequate record.” In this case, staff’s investigation of the merits, drafting of a substantial recommendation, and presentation of the same at agenda in support of the position the Commission ultimately adopted and placed into a Proposed Agency Action Order is completely and entirely at odds with its subsequent ostrich-like refusal to offer one single word or one single exhibit in support of the Commission’s Order. Staff members who engaged in such investigation, and who put together Staff’s Recommendation, have facts which are relevant to the proceeding. Certain staff members have the expertise to offer expert opinions about the matters that are implicated by the Proposed Agency Action. Other staff members are able to opine and explain why the Commission has the certain “established practice” referenced in its Order. One can only wonder why staff would stand silent while this “established practice” is attacked by the Petitioners in this case.

8. The staff’s suggestion that the Proposed Agency Action in this case “speaks for itself” (¶ 51) is also somewhat bizarre. In fact, nothing could be further from the truth. The Proposed Agency Action is but words on a paper, neither alive nor verbose. The subject of this administrative proceeding is a challenge, brought by parties other than Aloha, to that Proposed Agency Action and it is necessary to elicit testimony from live human beings in order to “develop an adequate record” such that the Commission may render the “informed decision” about which staff ostensibly cares so passionately. The Proposed Agency Action does not speak for itself in the sense that it conclusively

proves the issues therein. Such would be the dictates of a despot, rather than an administrative agency who is subject to one of the most stringent and due process-laden Administrative Procedure Acts among the 50 states.

9. Staff has devoted a significant portion of its voluminous Motion to the request for the deposition of Ms. Gervasi. Staff conveniently omits the representation by Aloha, in a phone call with staff counsel, General Counsel, and the Executive Director of the Commission, that Aloha would be willing to delay the deposition of the attorney to see if the information could be solicited from the other witnesses. Frankly, Aloha doesn't care if the information regarding the "established practice" of the Commission which is being attacked by the Petitioners in this case comes from Ms. Gervasi, Mr. Willis, or any of the other persons noticed for depositions. Surely, someone knows something about the Commission's "established practice," its origins, its reasons, and its basis, and that person can at least confirm its prior existence. Perhaps the Commission would like to only opine about its "established practices" when it issues its Final Orders, in the form of an unpleasant surprise to the party upon whom the "established practice" lands and who was not allowed to engage in any discovery or investigation of the same prior to trial, or to elicit any testimony in explanation or defense of the same at trial. However, such is neither a lawful nor a proper way for the Commission to go about conducting its business, particularly when it is sitting in a quasi-judicial capacity.

10. Staff's false assumption, which permeates its Motion, that Aloha wishes to delve into the "deliberations" of the Commission staff causes staff's arrow to completely miss the target. Aloha does not seek to learn about the deliberative process in this case.

Rather, Aloha seeks to depose these staff witnesses for the most normal, routine, and specifically contemplated reasons for which depositions are taken in administrative proceedings in the State of Florida.⁴ If a particular Commission staff member has facts which are relevant to this proceeding, and which Aloha believes will help “develop an adequate record” so as “to ensure that the Commission has the quantity and quality of information necessary to make a well reasoned, sound, and informed decision,” then Aloha seeks to learn that information. Similarly, if a particular Commission staff member has the qualifications to testify as an expert, and that individual has an opinion which is relevant to the development of that adequate record, then Aloha seeks to discover that opinion, and then utilize that opinion in the ways that litigants use such information as they engage in quasi-judicial proceedings every day at the Division of Administrative Hearings. The fact that the Commission holds its own hearings, rather than sending those hearings to the Division of Administrative Hearings, and prefers prefiled testimony, provides no justification or basis under the Florida Administrative Procedure Act for skewed results, unique procedures, or situationally applied doctrines and privileges.

WHEREFORE, for all of the reasons set forth herein, Aloha respectfully requests that the Commission deny the Motion to Quash Subpoenas and for a Protective Order, and order that the depositions immediately be had. The delay caused by the Motion has

⁴It is curious that the staff, if it is really concerned that Aloha intends to delve into certain sacred areas or subjects, does not conduct itself in the normal fashion for a party participating in a deposition as contemplated by the applicable Florida Rules of Civil Procedure. That is, to instruct a witness not to answer as appropriate to protect a privilege.

already caused Aloha irreparable harm. An immediate adjudication of these matters is necessary in order for that harm to be minimized.

Respectfully submitted this 24th
day of February, 2005, by:



JOHN L. WHARTON
FL BAR ID NO. 563099
F. MARSHALL DETERDING
FL BAR ID NO. 515876
ROSE, SUNDBSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555
(850) 656-4029 FAX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax (*) and U.S. Mail this 24th day of February, 2005, to:-

Ralph Jaeger, Esquire*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0873

V. Abraham Kurien, M.D.
1822 Orchardgrove Avenue
New Port Richey, FL 34655

Charles Beck, Esquire*
Office of Public Counsel
111 Madison Street
Tallahassee, FL 32399-1400

Edward O. Wood
1043 Daleside Lane
New Port Richey, FL 34655-4293

Harry Hawcroft
1612 Boswell Avenue
New Port Richey, FL 34655


JOHN L. WHARTON

motion to quash subpoenas.res