MEMORANDUM

MARCH 4, 2005

TO: DIVISION OF THE COMMISSION CLERK AND ADMINISTRATIVE SERVICES

FROM: OFFICE OF THE GENERAL COUNSEL (JAEGER)

RE: DOCKET NO. 010503-WU - APPLICATION FOR INCREASE IN WATER RATES FOR SEVEN SPRINGS SYSTEM IN PASCO COUNTY BY ALOHA UTILITIES, INC.

Attached is a MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER, AND MOTION IN LIMINE TO EXCLUDE FIVE WITNESSES LISTED BY ALOHA to be issued in the above-referenced docket. (Number of pages in motion- 25)

DATE MOTION SENT ~~ELECTRONICALLY~~ TO CCA 3-4-05

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.	DOCKET NO. 010503-WU DATED: MARCH 3, 2005

MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER, AND MOTION IN LIMINE TO EXCLUDE FIVE WITNESSES LISTED BY ALOHA

The Staff of the Florida Public Service Commission (Staff), by and through its undersigned attorney, pursuant to Rule 28-106.212(3), Florida Administrative Code, hereby requests the Prehearing Officer to quash the subpoenas compelling Staff to appear to testify at the March 8, 2005 hearing directed to Staff members Marshall Willis, Rosanne Gervasi, Patti Daniel, Connie Kummer, and Tom Walden, served by Aloha Utilities, Inc., on March 1, 2005 (dated February 28, 2005, but received on March 1, 2005), and to enter an order protecting Staff from the harassment, annoyance, and oppression resulting from the current and further subpoenas in this proceeding. Further, pursuant to Rules 28-106.204 and 28-106.303, Florida Administrative Code, Staff hereby moves for an order in limine barring the testimony of these five witnesses at the hearing before the Public Service Commission ("the Commission") in this proceeding because Aloha did not identify these witnesses in its Prehearing Statement and has not prefiled testimony for those witnesses in accordance with Order No. PSC-04-0728-PCO-WS (Order Establishing Procedure). The grounds for these motions are as follows:

I. BACKGROUND

1. The Florida Public Service Commission is a legislative agency of the State of Florida with the authority, under Chapters 350 and 367, Florida Statutes, to regulate certain water and wastewater utilities.

2. The Staff of the Commission is comprised of mostly professional individuals employed to perform various duties. Among its many duties, 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. Staff accomplishes this, in large part, through review of filings and testimony, consultation with Staff counsel, drafting discovery inquiries, and cross-examination of the parties' witnesses. Occasionally, a member of Staff will testify; however, such testimony is typically limited to unique or complex issues, or discrete, limited subjects.

3. Staff is not a real party in interest in any proceeding before the Commission. South Florida Natural Gas Co. v. Public Service Commission, 534 So. 2d 695 (Fla. 1988). However, 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.

4. Another of Staff's functions is to provide legal and technical advice and recommend action on matters pending before the Commission. The principal way in which Staff accomplishes this function is by making written recommendations and discussing these recommendations at agenda conferences. Pursuant to Section 120.66, Florida Statutes, and Rule 25-22.033(5), Florida Administrative Code, Staff members who testify in a given case are not

allowed to participate in the preparation of recommendations or the agenda conference discussion. Testifying Staff members are removed from the advisory role.

5. On August 10, 2001, Aloha Utilities, Inc. (Aloha) filed an application and supporting information for a general rate increase for its Seven Springs Water System. The case was assigned Docket No. 010503-WU.

6. By Order No. PSC-02-0593-FOF-WS (Final Order), issued April 30, 2002, the Commission required Aloha, among other things, to make improvements to Wells Nos. 8 and 9, and then to all its wells, to implement a treatment process designed to remove at least 98 percent of the hydrogen sulfide in its raw water. A deadline of December 31, 2003, was established for these improvements to be in place.

7. Aloha appealed the Final Order and was granted a partial stay pending the appeal. Accordingly, by operation of law, the date for making the plant improvements was extended to February 12, 2005.

8. On June 9, 2004, Aloha filed a motion to modify the requirements of the Final Order, requesting that the requirement to remove 98% of hydrogen sulfide from the raw water be replaced with a requirement that Aloha make improvements to meet a goal of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility, and that this standard be implemented no later than February 12, 2005.

9. By Proposed Agency Action Order No. PSC-04-0712-PAA (PAA Order), issued July 20, 2004, the Commission proposed to approve Aloha's request. On August 9, 2004, V. Abraham Kurien, Harry Hawcroft, and Edward Wood (the Customers) filed a timely Petition

protesting several, but not all, provisions of the PAA Order. In particular, the Petition raised the following disputed issues of material fact:

a. What would be the effect of the actions proposed by Order No. PSC-04-0712-PAA-TP issued July 20, 2004, on the quality of water delivered to the customers of Aloha Utilities, Inc.?

b. Should the reference to sulfide in 'finished water' in the proposed agency action order be stated as a maximum containment [sic] level for total sulfides of 0.1 mg per liter of delivered water at the point of its entry into the domestic system at the domestic meter?

c. Should the improvements be such that sulfide present in raw water or generated during treatment and transmission be removed, not converted, to a level not to exceed 0.1 mg/L, in finished water delivered at the point of entry into the domestic system?

d. Should compliance with such requirements be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities? Should such sites be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted?

10. **The Commission issued a partial Consummating Order, Order No. PSC-04-0831-CO-WS, on August 25, 2004, which consummated the portions of the PAA Order that were not protested and recognized the portions of the PAA Order contested by the Customers.**

11. The Consummating Order states as follows:

> The Petition does not protest the proposed decision to modify the rate case order to the extent that Aloha is thereby required to make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water, which is the standard used by the Tampa Bay Water Authority (TBW), a wholesale water supplier in the area. Nor does the Petition protest the proposed deadline of February 12, 2005, by which the TBW standard shall be implemented. The Petition does protest the proposed requirement of Order No. PSC-04-0712-PAA-WS that Aloha meet the TBW standard as that water leaves the treatment facilities of the utility. Moreover, the Petition protests the methodology upon which compliance with the TBW standard shall be determined.
>
> Accordingly, Order No. PSC-04-0712-PAA-WS can become final as to the modification of the fourth ordering paragraph of the rate case order to the extent that such modification eliminates the 98% removal requirement and requires Aloha to make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water, and requires Aloha to implement this standard by no later than February 12, 2005.

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12. The second ordering paragraph of the Consummating Order repeats that the issues that require resolution include "the methodologies for determining compliance with the revised standard and the location at which compliance is measured."

13. An administrative hearing is scheduled for March 8, 2005, to take evidence on the protested portions of the PAA Order. The prehearing conference was held on February 24, 2005, and a Prehearing Order was issued on March 2, 2005.

14. Consistent with the Customers' petition, the Customers and the Office of Public Counsel (OPC) proposed the following issues for resolution:

a. Should the reference to sulfide in "finished water" in the proposed agency action order be stated as a maximum contaminant level for total sulfides of 0.1 mg per liter of deliver water at the point of its entry in to the domestic system at the domestic meter?

b. Should the improvements be such that sulfide present in raw water or generated during treatment and transmission be removed, not converted, to a level not to exceed 0.1 mg/L in finished water delivered at the point of entry into the domestic system?

c. Should compliance with such requirements be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities with such sites rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted?

15. Aloha disputed whether the Consummating Order contemplated a dispute concerning the subject of issue a., in that the 0.1 mg/L was a goal and not a maximum contaminant level, and issue b., whether the removal or conversion of sulfides was at issue.

16. The only testimony sponsored by Staff is that of John R. Sowerby, P.E., an employee of the Florida Department of Environmental Protection.

17. On February 15, 2005, Aloha filed its Notice of Taking Depositions of Rosanne Gervasi, a Commission Staff attorney, and Patti Daniel, Tom Walden, Marshall Willis, and Connie Kummer who are non-testifying Staff members. Further, on February 16, 2005, Aloha served subpoenas for depositions on each of the above-noted Staff members by facsimile to Staff counsel.

18. Also, Aloha noticed John R. Sowerby for deposition. Staff did not object to this deposition, and that deposition was taken as scheduled.

19. Staff objected to Aloha's deposing Rosanne Gervasi, Patti Daniel, Tom Walden, Marshall Willis, and Connie Kummer, and filed its Motion to Quash and for a Protective Order.

20. Ms. Gervasi is an attorney, Ms. Daniel, Mr. Willis, and Ms. Kummer are supervisors, and Mr. Walden is an engineer. None of these Staff members are providing testimony in this proceeding. Their oversight duties in this docket include: supervision of

Staff's review of filings and testimony; consultation with Staff counsel; development of Staff's position on issues; development of the record; drafting discovery inquiries; preparation for the formal hearing; drafting Staff's recommendation following the hearing; and participation at the agenda conference where the Commission will make its ultimate determination of the issues.

21. By Order No. PSC-05-0231-CFO-WU, issued March 1, 2005, the Prehearing Officer granted Commission Staff's Motion to Quash Subpoenas and for a Protective Order, and thus none of these staff members were deposed.

22. On that same day, Aloha served its subpoenas on the same Staff members for their appearance to testify at the hearing scheduled for March 8, 2005.

23. Staff objects to these new subpoenas and files this combined Motion to Quash Subpoenas and for a Protective Order, and Motion in Limine to Exclude the Five Witnesses Listed by Aloha.

II. MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER

24. Aloha's intention to require Staff members to testify should be denied because it: (1) directly conflicts with the public policy interest of protecting the integrity of the administrative deliberative process; (2) violates the requirements of the Order Establishing Procedure requiring the parties to list all witnesses in their Prehearing Statements which were filed on February 15, 2005, and prefile all testimony by no later than February 17, 2005; and (3) requires the testimony of attorney Gervasi which would require the disclosure of information that is protected by the work-product doctrine and the attorney-client privilege. Each of the above-noted reasons is discussed below.

A. Public Policy Dictates That The Testimony Not Be Required Because Requiring Such Testimony Would Interfere With The Deliberative Process

25. While staff notes that most of the cases cited by staff addressing interference with the deliberative process are cases involving discovery, Staff believes that testimony at hearing is even more intrusive in that it prevents that staff member from that day forward from acting as advisory staff, and that all the principles addressed in discovery would be equally applicable to testimony.

26. In situations in which the interest in full disclosure to a discovery request conflicts with a competing interest in non-disclosure, courts generally perform a balancing test. Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979). While that case dealt with discovery, Staff believes a balancing test is also appropriate to determine whether a Staff member should testify at hearing, and that Aloha's interest in compelling Staff to testify must be balanced against the harm that would result from subjecting non-testifying Staff to subpoenas.

27. In Sugarmill Woods Civic Association v. Southern States Utilities, Inc., 687 So. 2d 1346, 1350-51 (Fla. 1st DCA 1997), the appellants had attempted to depose a large number of Staff members, in what the Staff argued was a fishing expedition. The Prehearing Officer quashed the subpoenas based on a public policy analysis that the appellants had not shown that the depositions were needed. The First DCA disagreed with the arguments raised by the appellants that the Prehearing Officer had erred when she quashed the subpoenas because it was impossible to reach the conclusion that the discovery was irrelevant before the questions had been asked. The First DCA found that "[t]he prehearing officer had the discretion to weigh the

competing interests of the parties." Id. at 1351. In its discussion of the Prehearing Officer's order, the Court concluded:

> The motion for protective order which was filed below asserted that this broad discovery request was a "fishing expedition." A trial court has authority to prevent discovery which it believes is a mere fishing expedition calculated for harassment. Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852, 855 (Fla. 1st DCA 1993. "It is impossible to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process." Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983). Therefore, such decisions regarding discovery are true discretionary acts, and the appellate court must defer to the superior vantage point of the trial judge who has seen the parties first-hand and is more fully informed regarding the case.

28. Staff believes that the Prehearing Officer in this case has the discretion to weigh the competing interests of the parties and determine that the testimony of the Staff members who have not prefiled testimony should not be required.

29. Subjecting such Staff members to subpoenas to testify would have a chilling effect upon Staff's ability to prepare for hearing, develop the record, and perform its advisory role, which would profoundly affect the administrative deliberative process. No longer would Staff be able to consider, develop, or express any opinion or position, however politically popular or unpopular, without the specter of being subjected to an adversarial inquisition.

30. Moreover, pursuant to Section 120.66(1), Florida Statutes, and Rule 25-22.033(5), Florida Administrative Code, Staff members who testify in a proceeding are subsequently prohibited from discussing the merits of the case with any Commissioner during the pendency of the case, from participating in the analysis of the record, from the compilation of the Staff recommendation in the proceeding, and from speaking at the agenda conference. If Aloha is

successful in compelling Staff members to testify at hearing, those Staff will be unable to participate in the Commission's critical post-hearing deliberative process.

31. The Staff members that are subject to the subpoenas have not filed testimony in this case and are not witnesses in these proceedings. Staff is greatly concerned about the effect of allowing parties to subpoena supervisors and an attorney. Parties with ulterior motives could effectively remove the division's management from a docket by the ploy of requiring them to testify and thus cripple the Commission.

32. By targeting specific supervisory Staff and subpoenaing non-testifying Staff members, any party could hamstring management's guidance, oversight, and review of Staff's ultimate recommendation in this or any other proceeding and eviscerate Staff's ability to execute its advisory function by excluding those Staff members from further participation in the analysis and preparation of the Staff recommendation. Such an action is contrary to common sense and reason.

33. While Florida law does not specifically confer or reject a deliberative process privilege, at least one Florida appellate court has acknowledged such a privilege. Girardeau v. State, 403 So. 2d 513, 516 (Fla. 1st DCA 1981). Although the court rejected the claim in that case, which was in the context of a criminal investigation, it said that "[t]here is every reason to believe that all due deference will and should be extended by the judicial branch to any properly asserted claim of legislative privilege, and it is imperative that it be kept in mind that such claims of privilege are supported by substantial authority."

34. Although Florida law is relatively silent on the subject of the deliberative process privilege, federal case law expressly addresses and refines it. (See U. S. v. Morgan, 313 U. S. 409 (1941) and subsequent Morgan cases).

35. The deliberative process privilege is determined by balancing the public's interest in effective agency administration against its interest in accurate fact finding. U.S. v. Beatrice Foods Co., 52 F.R.D. 14, 20 (D. Minn. 1971). Where a court strikes the balance depends upon the circumstances of the particular case, and the trial court has broad discretion in limiting discovery to reflect the particular needs of the parties. Dowd v. Calabrese, 101 F.R.D. 427, 431 (1984). "Among the factors to be considered when the balance is struck are the relevance of the document, alternative means of proof, and the presence of allegations of governmental misconduct." Id.

36. In this case, the Prehearing Officer has already ruled that the subpoenas for deposition should be quashed, and now Aloha seeks to circumvent that ruling by filing subpoenas for the same five Staff members. Staff believes that the reasons for quashing the subpoenas for deposition are just as valid for quashing the subpoenas for hearing.

37. Aloha has had, and continues to have, ample opportunity to prepare and present its case without compelled Staff testimony, through both its own direct testimony, the cross-examination of other parties' witnesses, rebuttal testimony, and through post-hearing statements and briefs. Moreover, there has been no allegation of governmental misconduct in this proceeding.

38. The purely deliberative processes of government are traditionally protected against disclosure. Ernest and Mary Hayward Weir Foundation v. U. S., 508 F. 2d 894 (2d Cir.

1974). See also United States Department of Energy v. Brett, 659 F. 2d 154 (Temporary Emergency Court of Appeals in 1981), where the court held that the claim of deliberative process privilege may be asserted by one other than the agency head.

39. Staff's participation in a proceeding from the initial discovery stages through its final recommendation is an integral part of the full deliberative process through which all cases proceed and, as such, is entitled to the full decisional process privilege. Aloha's subpoenas of Staff appear to be nothing more than an attempt to annoy or harass advisory Staff with the result, whether intentional or not, that those Staff would be lost to the Commission from any future advisory role in this proceeding. This is an impermissible and inappropriate intrusion into the deliberative process of the Commission, and will most certainly cause Staff an undue burden by undermining Staff's ability to advise the Commission in these proceedings. Further, as noted above, allowing Aloha to compel Staff testimony would most likely result in a chilling effect on the effective functioning of Staff's advisory role. Staff members would be hesitant to take any useful preliminary positions for fear that such a statement of their professional judgment in their advisory role, however unpopular, would subject them to an adversarial inquisition.

40. The five Staff members that Aloha is attempting to force to testify are functioning in their advisory role. It is inappropriate to demand examination of the opinions of the Staff when it is in this role, whether in the beginning, middle, or end of a proceeding. Staff believes that requiring Staff to testify in this instance is akin to requiring a judge's staff to testify. A member of a judge's staff cannot be questioned about how he developed a draft opinion for a judge. In Re: Certain complaints Under Investigation by an Investigating Commission on the Judicial Council of the Eleventh Circuit, 783 F. 2d 1488 (11th Cir. 1986). Any inquiries into

non-testifying Staff's opinions or analysis of the issues or the evidence in this case would invade the deliberative process and impair Staff's ability to fully and candidly perform its analyses and make appropriate recommendations. Such examination would consequently impair the deliberative process of the Commission itself. See Standard Packaging Corp. v. Curwood, Inc., 365 F. Supp. 134 (N. D. Ill. 1973).

41. In Community Federal Sav. and Loan Assoc. v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (1983), the Court found the policy reasons for the privilege to be obvious:

> Not only must the integrity of the administrative process be protected, but public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pretrial discovery would result in a severe disruption of the government's primary function.

42. The Florida Supreme Court has recognized the important role played by Staff in the Commission's decision making process. In Occidental Chemical Company v. Mayo, 351 So. 2d 336, 342 fn. 10 (Fla. 1977), overruled on other grounds, the Court noted that the Commission is not "obliged to avoid their Staff during the evaluation and consideration stages of their deliberations. Were this so, the value of Staff expertise would be lost and the intelligent use of employees crippled."

43. Staff does not mean to suggest by this Motion that it is not accountable for its actions. However, Staff is particularly concerned about the chilling effect that would result if Staff members must operate with the prospect that at any time they could be subpoenaed and asked to explain their participation in a docket and their understandings of Commission

interpretations and practices. Inquiry into Staff's opinion or analysis, whether on a pending docket or a decision already made, invades and inhibits the deliberative process.

44. In South Florida Natural Gas v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1988), the Florida Supreme Court recognized the role of Staff in administrative proceedings. The court stated:

> We find that the Commission is clearly authorized to utilize its staff to test the validity, credibility and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the Commission to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service."

Staff's ability to evaluate the evidence and investigate the issues on behalf of the Commission will be irreparably impaired if these five Staff members are required to testify, and they are thus removed from participating in the deliberative process subsequent to the hearing. The Prehearing Officer recognized this danger when he issued his Order Granting Commission's Staff's Motion to Quash Subpoenas and for a Protective Order on March 1, 2005. The danger still exists.

45. Aloha's attempt to require these Staff members to testify should be stopped and the subpoenas quashed and Staff should be protected from any further harassment, annoyance, or oppression from subpoenas or notices of deposition in this proceeding, because compliance will result in an undue invasion of the deliberative governmental process of the Commission.

B. Allowing Oral Testimony From These Witnesses Violates the Requirements of the Order Establishing Procedure and Would Be Prejudicial to the Customers and OPC

46. The Commission has held that "[p]refiled testimony affords parties, the Commission Staff, and the Commission the opportunity to review and prepare for the hearing." See, Order No. PSC-95-0208-PCO-WS, issued February 15, 1995, in Docket No. 921237-WS, In

re: Application for Amendment of Certificates in Lake County by JJ's Mobile Homes, Inc.

Consistent with this concern, the Prehearing Officer in Docket No. 020896-WS, required in Order No. PSC-04-0728-PCO-WS, the Order Establishing Procedure, issued July 27, 2004, that "[e]ach party shall prefile, in writing, all testimony that it intends to sponsor. . . . Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony." Order Establishing Procedure at 2-3.

47. By Order No. PSC-04-0728-PCO-WS (Order Consolidating Dockets), issued September 22, 2004, in Dockets Nos. 010503-WU and 020896-WS, the dockets were consolidated for purposes of hearing, and the provisions of the Order Establishing Procedure issued in Docket No. 020896-WS were also made applicable to Docket No. 010503-WU.

48. From the date of the Order Consolidating Dockets, September 22, 2004, Aloha was put on notice that its prefiled direct testimony and rebuttal testimony were to be filed with the Commission by December 16, 2005, and February 3, 2005, respectively. Also, Prehearing Statements listing all known witnesses that may be called were originally due on February 10, 2005.

49. These time periods were extended pursuant to Orders Nos. PSC-04-1217-PCO-WS and PSC-05-0129-PCO-WU, issued December 9, 2004 and January 31, 2005, respectively. Under the revised schedule, Aloha was directed to prefile direct testimony on January 7, 2005, file Prehearing Statements on February 15, 2005, and rebuttal testimony on February 17, 2005.

50. Aloha timely prefiled the direct testimony of Dr. Levine and Mr. Porter, P.E., filed its Prehearing Statement, and prefiled the rebuttal testimony of Mr. Porter. However, Aloha

prefiled no other testimony, and, in its Prehearing Statement, Aloha listed no other witnesses other than Dr. Levine and Mr. Porter.

51. The intervenors filed their direct testimony on November 18, 2004, their Prehearing Statement on February 15, 2005, and their rebuttal on February 17, 2005.

52. Twelve days after it filed its prefiled rebuttal testimony and 14 days after it filed its Prehearing Statement, by subpoenas served on March 1, 2005, Aloha seeks to have five Staff members testify orally at the hearing on March 8, 2005.

53. The subpoena does not state the purpose or subject matter of the desired testimony, which prevents the Commission, Commission Staff, and Customers/OPC from adequately preparing for hearing.

54. The customers and OPC have prefiled testimony for the only witness they plan to call to testify at the hearing, as required by the Order Establishing Procedure. The customers will be at an unfair disadvantage in the hearing if they have no opportunity to review the prefiled testimony of these Staff witnesses or discover their positions, and thus will be unable to prepare adequately to rebut any allegations that these witnesses might present. Aloha should not be allowed to ignore without consequence the Prehearing Officer's clear requirement of prefiled testimony and designation of witnesses set forth in the Order Establishing Procedure.

55. In a similar situation, by Order No. PSC-02-1282-PCO-EI, issued September 19, 2002, in Docket No. 020262-EI, In re: Petition to determine need for an electrical power plant in Martin County by Florida Power & Light Company (FPL), the Prehearing Officer granted FPL's motion to exclude two witnesses that the intervenors had requested to testify live without prefiling testimony.

56. In the FPL case, the intervenors, CPV Gulfcoast, Ltd., and CPV Cana, Ltd. (CPV), in their Prehearing Statement, listed two witnesses for which they had not prefiled testimony. CPV claimed they could not prefile the testimony because the potential witnesses were not under CPV's control. CPV had advised FPL in discovery that one witness would testify as to alleged "unfairness of FPL's RFP process and related matters" while the other witness would testify as to FPL's alleged "desire to keep competitors out of the state of Florida."

57. The Prehearing Officer noted that the requirement of prefiled written testimony allows parties to review and conduct discovery related to each party's direct case to promote a more efficient and focused hearing, and that if CPV were allowed to proceed as requested to present oral testimony, the other parties would be prejudiced and be put in the position of being unable to prefile responsive rebuttal testimony.

58. The case at hand is even more egregious. Aloha did not even list these witnesses in its Prehearing Statement and has not advised the parties as to the subject matter of the desired Staff testimony. Therefore, Aloha's subpoenas for these five Staff members to testify should be quashed on the basis of its violation of the Order Establishing Procedure and the resulting prejudice to the customers and OPC that would result if this live testimony were allowed.

C. Work Product Doctrine And Attorney Client Privilege

59. Staff also raises the following additional arguments in support of quashing Ms. Gervasi's subpoena and entering a protective order on her behalf because her testimony would necessarily require the disclosure of information that is protected by the work-product doctrine and the attorney-client privilege. Again, while the cases cited deal with discovery, staff believes that the principles are applicable to this proceeding in which prefiled testimony is required.

60. Ms. Gervasi's sole participation in this case has been as an attorney advising the Commission in Docket No. 020896-WS, and for limited purposes in Docket No. 010503-WU. Ms. Gervasi did not file testimony in Docket No. 010503-WU.

61. The decision in Shelton v. American Motors Corp, 805 F.2d 1323 (8th Cir. 1986), is instructive here. This case dealt with a strict liability claim against an automobile manufacturer for a product defect. The Shelton plaintiff sought to depose corporate in-house counsel for the automobile manufacturer. The plaintiff wanted corporate counsel to testify as to whether the manufacturer possessed documents showing the results of rollover tests and accidents involving similar vehicles.

62. The corporate in-house counsel for the automobile manufacturer had selected and reviewed documents during the course of preparing her defense for the case in which she was called to testify. The Court of Appeals held that in order to respond to the question of what she knew about the tests, the attorney would have to disclose her mental process of choosing certain documents from the mass of company documents. Therefore, the court ruled that the deposition of counsel would not be permitted.

63. The Shelton court held that where the deponent is opposing counsel and that counsel has engaged in the selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product.

64. Moreover, the Shelton court viewed the "increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be

employed only in limited circumstances . . . T]he 'chilling effect' that such practice will have on the truthful communications from the client to the attorney is obvious." 850 F.2d at 1327.

65. Similar to this case, the Shelton court stated "in house counsel in this case had nothing to do with this law suit except to represent her client." 805 F.2d at 1330.

66. The Shelton court further opined that:

> Undoubtedly, counsel's task in preparing for trial would be much easier if he could dispense with interrogatories, document requests, and deposition of lay persons, and simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy. The practice of forcing trial counsel to testify as a witness, however, has long been discouraged, see Hickman v. Taylor, 329 U.S. 495, 513, 67 S.Ct. 385, 394 (1947)...(Jackson, J., concurring) (Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.)

Id. At 1327. The court concluded that counsel's testimony would be "tantamount to requiring her to reveal her legal theories and opinions concerning that issue." Id. at 1328.

67. In Southern Bell v. Deason, 632 So. 2d 1377 (Fla. 1994), the Florida Supreme Court reiterated the standards for applying the work product doctrine and the attorney-client privilege in Florida. The Deason case provides a definitive recitation of the legal status these privileges enjoy. Deason, however, did not address the propriety of taking deposition testimony from opposing counsel. Deason does instruct, however, that in some instances of "undue hardship," production of "fact work product" is justifiable. Nevertheless, the Court further held: "Whereas fact work product is subject to discovery upon a showing of 'need' or 'undue hardship,' opinion work product generally remains protected from disclosure." 632 So. 2d at 1384 (citing Upjohn Co. v. United States, 449 U. S. 383 (1981).

68. Similar to the rationale of Shelton, the court in Deason determined:

> ... one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.

632 So.2d, at 1384 (citing Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980).

69. Although Aloha may contend that it will suffer "undue hardship" without Ms. Gervasi's testimony, this is nothing more than a red herring. This position is meritless not only because there is no "undue hardship," but also because Ms. Gervasi's testimony would consist only of "opinion work product" and communications protected by the attorney-client privilege. The "undue hardship" standard is a factor when trying to discover "fact" work product, but undue hardship is irrelevant when trying to discover "opinion" work product and communications protected by the attorney-client privilege.

70. To the extent that Aloha seeks information that Ms. Gervasi obtained from talking to Staff, such information is also protected by the attorney-client privilege.

71. Deason held that statements made in interviews by Southern Bell employees to Southern Bell's counsel, were subject to the attorney-client privilege. Moreover, even the summaries of such interviews were protected as work product. 632 So. 2d at 1384.

72. The United States Supreme Court reached the same conclusion in Upjohn Co. v. United States, 449 U. S. 383 (1981). In Upjohn, Upjohn's general counsel had conducted an internal investigation of questionable payments to foreign officials. The IRS later tried to obtain the questionnaires, memoranda and notes of the interviews conducted by the attorney. The Supreme Court held, however, that the attorney-client privilege protected the employees' communications from disclosure.

73. Based on the foregoing authorities, counsel for Aloha has no right to discover the mental impressions of Ms. Gervasi.

74. Moreover, Staff states that Aloha has failed to demonstrate the necessity of deposing Ms. Gervasi. See West Peninsular Title Company v. Palm Beach County, 132 F.R.D. 301 (S. D. Fla. 1990) (the party seeking the deposition of opposing counsel must demonstrate the necessity of the deposition), citing Shelton and In re: Arthur Treacher's Franchise Litigation, 92 F.R.D. 429 (E. D. Pa. 1981), and the Prehearing Officer entered an order quashing Aloha's subpoena for deposition.

75. As emphasized by the Shelton court, deposing opposing counsel is disruptive, results in increased costs and delays, and interferes with the attorney-client relationship. Shelton at 1327. Conducting discovery by examination at the hearing would be equally disruptive, and would be prejudicial to all other parties. Therefore, whether it is through deposition or through discovery by taking live testimony at hearing, Staff believes that Shelton is applicable, and that such testimony should only be employed in limited circumstances where it is shown that

> (1) no other means exist to obtain the information than to depose opposing counsel . . . 2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. at 1327; citing Fireman's Fund Insurance Co. v. Superior Court, 140 Cal. Rpter. 677, 679; 72 Cal. App. 3d 786 (1977). Aloha has failed to sufficiently demonstrate that these circumstances exist in this case.

76. For these additional reasons, Ms. Gervasi's subpoena should be quashed and a protective order entered protecting her from further subpoenas in this case.

III. MOTION IN LIMINE TO EXCLUDE FIVE WITNESSES LISTED BY ALOHA

77. As stated above, the Order Establishing Procedure requires the testimony of the witnesses of a party to be prefiled and the witnesses to be listed in the Prehearing Statement. Aloha has done neither for the five staff members it has subpoenaed for hearing.

78. Staff believes that this case is very similar to the one in Docket No. 020262-EI, In re: Petition to determine need for an electrical power plant in Martin County by Florida Power and Light Company (FPL).

79. In that case, the intervenors, CPV Gulfcoast, Ltd., and CPV Cana, Ltd. (CPV), sought to add two witnesses in their Prehearing Statement for which they had not prefiled testimony. CPV claimed that it could not prefile testimony of those two witnesses because they were not under CPV's control. Also, CPV had advised FPL in discovery that one witness would testify as to alleged "unfairness of FPL's RFP process and related matters" while the other witness would testify as to FPL's alleged "desire to keep competitors out of the state of Florida."

80. FPL filed a motion in limine to exclude the testimony of those two witnesses, alleging that the information provided by CPV omitted all identifying information about the two witnesses and failed to provide a description of their testimony sufficient to allow the Commission, the Commission Staff, and FPL to prepare for hearing. FPL further alleged that this would put it at an unfair disadvantage and would not allow it to adequately prepare to rebut any allegations that these witnesses might present.

81. The Prehearing Officer noted that the requirement of prefiled written testimony allows parties to review and conduct discovery related to each party's direct case to promote a more efficient and focused hearing, and that if CPV were allowed to proceed as requested to

present live testimony, the other parties would be prejudiced and be put in the position of being unable to prefile responsive rebuttal testimony.

82. The Prehearing Officer further noted that "[t]he purpose of a motion in limine is to afford the trier of fact the opportunity to rule on the admissibility of evidence prior to trial or hearing, so that irrelevant and immaterial matters, or evidence whose probative value is outweighed by the danger of unfair prejudice, may be excluded. Anise DeVoe v. Western Auto Supply Company, 537 So. 2d 188 (Fla. 2d DCA 1989); 75 Am. Jur. 2d Trial Section 94." In considering FPL's motion in limine, the Prehearing Officer noted that while it went more to procedural issues than evidentiary issues of admissibility, that it should nevertheless be granted.

83. Staff believes the same reasoning is appropriate here. The customers and OPC would have no way at this late date, after the cut-off of discovery, to respond. Moreover, Staff believes that Aloha should not be allowed to benefit from its violations of the Order Establishing Procedure which required that known witnesses be listed in the Prehearing Statement and their testimony be prefiled.

84. The depositions of Staff were originally scheduled for February 18, 2005, and, even if taken as scheduled, would not have permitted the Customers and OPC to respond to the discovery in prefiled rebuttal testimony. Therefore, based on the requirements of the Order Establishing Procedure and the prejudice to the Customers and OPC of allowing such testimony, Staff requests that this Commission enter an order in limine excluding the testimony of the five Staff members listed, plus any other live witnesses presented by any party, on the grounds that Aloha has not met the Commission's clear requirement in its Order Establishing Procedure of prefiling testimony of its witnesses or of listing all witnesses in its Prehearing Statement.

WHEREFORE, the Staff of the Florida Public Service Commission requests that the Prehearing Officer or Commission issue an order quashing Aloha's subpoenas and any further subpoenas directed to Marshall Willis, Patti Daniel, Connie Kummer, Tom Walden, and Rosanne Gervasi, and protecting Staff from the harassment, annoyance, or oppression from the subpoenas requiring their appearance to testify and excusing Staff from being required to testify at the hearing in this docket, for the reasons set forth above. Also, undersigned counsel respectfully requests that this Commission enter an order in limine excluding the testimony of the five Staff members listed on the grounds that Aloha has not met the Commission's clear requirement in its Order Establishing Procedure of prefiling testimony of its witnesses or of listing all witnesses in its Prehearing Statement which was required to be filed on February 15, 2005.

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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.	DOCKET NO. 010503-WU DATED: MARCH 4, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER, AND MOTION IN LIMINE TO EXCLUDE FIVE WITNESSES LISTED BY ALOHA on behalf of the identified Commission Staff has been furnished to F. Marshall Deterding/John L. Wharton, Rose Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Fl. 32301 by e-mail this 4th day of March, 2005, and by U.S. Mail to the following:

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