

BEFORE THE FLORIDA 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
ORDER NO. PSC-02-1748-PCO-SU
ISSUED: December 12, 2002

ORDER ON OBJECTIONS TO ALOHA UTILITIES, INC.'S FIRST SET OF INTERROGATORIES AND FIRST REQUEST FOR PRODUCTION OF DOCUMENTS, DENYING REQUESTS FOR ORAL ARGUMENT, MOTION TO COMPEL, AND MOTION TO STRIKE, AND GRANTING IN PART AND DENYING IN PART MOTION FOR PROTECTIVE ORDER

On November 4, 2002, Adam Smith Enterprises, Inc. (Adam Smith) filed its objections to Aloha Utilities, Inc.'s (Aloha or utility) First Set of Interrogatories (Nos. 1-7) and First Request for Production of Documents (No. 1). In response thereto, on November 8, 2002, Aloha filed its Motion to Compel Answers to Interrogatories and Request for Production of Documents (Motion to Compel), and a Request for Oral Argument on its Motion to Compel. On November 20, 2002, Adam Smith filed its Response to the Motion to Compel and Motion for Protective Order. On November 27, 2002, Aloha filed an Objection to Motion for Protective Order, and on December 9, 2002, Adam Smith filed a Request for Oral Argument and Motion to Strike Aloha's Objection to Motion for Protective Order and Alternative Response. This Order resolves these motions and other filings.

OBJECTIONS

Adam Smith filed objections to Aloha's Interrogatories Nos. 2, 3, 4, and 5, and to Aloha's Document Request No. 1. As explained in Aloha's Motion to Compel, the parties have since settled their dispute with respect to Interrogatories Nos. 2 and 3, and Adam Smith has provided its responses to those Interrogatories.

DOCUMENT NUMBER DATE

13552 DEC 12 02

FPSC-COMMISSION CLERK

Interrogatory No. 4

By Interrogatory No. 4, Aloha requested as follows:

For each of the lots which Adam Smith alleges in its Petition for Formal Hearing were sold and the title transferred to other entities prior to connection to Aloha's wastewater system during the period May 23, 2001 through April 16, 2002, please provide the following information:

- a. The tax identification number, subdivision and lot number and street address, if available, of each lot.
- b. The entity to which each lot was sold and to whom title was transferred and its affiliation with Adam Smith, if any.
- c. The price at which each lot was sold and the net profit or loss realized on each lot.
- d. The date of each sale and the date at which title was transferred if not at the time of sale.
- e. The amount of service availability charges paid, if any, by Adam Smith to Aloha for each lot.

Adam Smith objects to Interrogatory No. 4(c) on the following grounds:

- a. The price at which each lot sold and the net profit or loss realized on each lot is irrelevant to any issue in this case, and further is not reasonably calculated to lead to the discovery of admissible evidence. While this consideration is dispositive, Adam Smith also objects as follows:
- b. The information sought in Interrogatory 4(c) constitutes confidential proprietary business information that Aloha does not need in order to prepare its case.
- c. The information sought in Interrogatory 4(c) is so irrelevant and so sensitive as to render the Interrogatory oppressive and harassing in nature.
- d. The request is unduly burdensome.

Adam Smith further objects to Interrogatory No. 4 on the basis that the Interrogatory requests information that Adam Smith cannot provide unless and until Adam Smith receives a new, verified list of connected lots from Aloha. Once Adam Smith sells a lot and transfers title to a builder or homeowner, it is up to the builder or homeowner to arrange with Aloha to pull a meter and connect to the system. Therefore, the information which is necessary to answer this Interrogatory accurately and completely is in the possession of Aloha, not Adam Smith.

Interrogatory No. 5

By Interrogatory No. 5, Aloha has requested as follows:

Has Adam Smith sold lots and transferred title to other entities from April 16, 2002, to date? If so, please provide the following information regarding those lots:

- a. The tax identification number, subdivision and lot number and street address, if available, of each lot.
- b. The entity to which each lot was sold and to whom title was transferred and its affiliation with Adam Smith, if any.
- c. The price at which each lot was sold and the net profit or loss realized on each lot.
- d. The date of each sale and the date at which title was transferred if not at the time of sale.
- e. Whether each lot was connected to Aloha's water and wastewater systems prior to sale, and if so, the amount of service availability charges paid to Aloha for each lot by Adam Smith.

Adam Smith objects to Interrogatory No. 5(c) on the following grounds:

- a. The price at which each lot sold and the net profit or loss realized on each lot is irrelevant to any issue in this case, and further is not reasonably calculated to lead to the discovery of admissible evidence.

- b. The information sought in Interrogatory 5(c) constitutes confidential proprietary business information.
- c. The information sought in Interrogatory 5(c) is so irrelevant and so sensitive as to render the Interrogatory oppressive and harassing in nature.
- d. The request is unduly burdensome.

Adam Smith further objects to Interrogatory No. 5 on the basis that the Interrogatory requests information that Adam Smith cannot provide unless and until Adam Smith receives a new, verified list of connected lots from Aloha. Once Adam Smith sells a lot and transfers title to a builder or homeowner, it is up to the builder or homeowner to arrange with Aloha to pull a meter and connect to the system. Therefore, the information which is necessary to answer this Interrogatory accurately and completely is in the possession of Aloha, not Adam Smith. Further, Adam Smith interprets Interrogatory No. 5 as relating to lots sold by Adam Smith within Aloha's service area. If the intent is to refer to all of Adam Smith's operations, then Adam Smith objects to Interrogatory No. 5 on the basis that it is overbroad, and seeks information that is neither relevant to any issue in the case nor reasonably calculated to lead to the discovery of admissible evidence.

Document Request No. 1

By Document Request No. 1, Aloha has requested that Adam Smith provide the work papers supporting the answers to Interrogatories Nos. 4(c), 5(c), 6(c), and 7(c).

Adam Smith objects to the Document Request on the grounds that the request seeks information which is neither relevant to any issues in the case nor reasonably calculated to lead to the discovery of admissible evidence, is confidential and proprietary business information, and is so irrelevant and sensitive as to render the request oppressive and harassing in nature. Moreover, Adam Smith objects on the basis that the term "work papers" is vague, and because the requests are unduly burdensome. They refer to hundreds of transactions, for each of which Adam Smith would have to examine numerous documents covering periods of years. Adam

Smith's files relating to developments within Aloha's service area date back to 1982 and fill several mini-storage units.

ALOHA'S REQUEST FOR ORAL ARGUMENT

Aloha requests that the Prehearing Officer permit oral argument on its Motion to Compel. As grounds therefor, Aloha argued that testimony was due to be filed on November 25, 2002, and that the discovery is needed in order for Aloha to prepare its direct testimony. Moreover, this case involves novel issues associated with the under collection of service availability charges, which issues have not previously been litigated at the Commission. Aloha believes that oral argument would assist the Commission in reaching a just and reasonable decision in this matter.

MOTION TO COMPEL

With regard to Adam Smith's objection to Interrogatories Nos. 4 and 5, Aloha argues that Adam Smith has put at issue the amount of service availability charges which it is required to pay if Aloha is allowed to backbill. Aloha is simply requesting the data which supports Adam Smith's allegations. Aloha requests the data necessary to calculate the amount of service availability fees in dispute since Adam Smith has not provided this figure. Further, Aloha argues that these requests are neither unduly burdensome nor unreasonable. Aloha's request is limited to only those lots located within its service territory sold by Adam Smith during an 11-month time period. Adam Smith, not Aloha, has the records of its own sales transactions for this time period, and the information requested in Interrogatories 4(a) through (d) can be taken directly from a standard real estate closing statement.

With respect to Interrogatories 4(c) and 5(c), Aloha argues that these requests are relevant and calculated to lead to admissible evidence. Adam Smith has indicated that backbilling for the time period of May 23, 2001 to April 16, 2002 is inappropriate since Adam Smith is unable to recover the increased service availability charges from the purchasers of lots sold during that time period. Therefore, the price at which Adam Smith sold lots after April 16, 2002, after the higher service availability fees were charged, is relevant. If Adam Smith sold lots after April 16,

2002 at the same price as those sold from May 23, 2001 until April 16, 2002, it would be reasonable to conclude that the sales price was set by the market and that Adam Smith would not have been able to "pass along" the increased service availability charges. If Adam Smith could not "pass along" these charges, notice of the increased charges would have had no practical impact. Moreover, information regarding profit or loss is relevant to the financial impact of the service availability backbilling on Adam Smith, an adverse effect which Adam Smith has raised in this proceeding.

Moreover, regarding the sensitivity and confidentiality of the requested information, Aloha argues that such matters do not act as a bar to discovery. The Commission has a very comprehensive process for handling information deemed to be confidential proprietary business information. Aloha agrees that Adam Smith's net profit or loss would fall within the definition of proprietary confidential business information. Aloha is willing to treat that information as confidential and to execute a reasonable confidentiality agreement regarding those materials.

Aloha further argues that computer software is widely used by developers to track the cost and expenditures associated with lots/subdivisions, and that this type of accounting is necessary in order to calculate long term capital gains and losses for federal income tax purposes. Thus, this type of information is kept in the normal course of business by every developer. While it will take time to complete, it does not impose an extraordinary burden on Adam Smith.

Regarding Adam Smith's objection to Aloha's Document Request No. 1, Aloha states that it is simply asking for a copy of whatever calculations were done to arrive at the net profit and loss figure for each lot in order to evaluate that calculation.

RESPONSE TO MOTION TO COMPEL AND MOTION FOR PROTECTIVE ORDER

Adam Smith argues that an order should be issued denying Aloha's Motion to Compel, and ruling that Adam Smith is not required to respond further to Interrogatories Nos. 4 and 5 and Document Request No. 1. Adam Smith states that a property owner's liability for service availability charges ceases with the ownership of the property. In Interrogatory No. 4, Aloha asks for

information related to lots that Adam Smith transferred prior to connection to Aloha's wastewater system between May 23, 2001 and April 16, 2002. After closing on their transactions with Adam Smith, the new owners arrange with Aloha for the connection to Aloha's system. Adam Smith does not know whether or when the owner of the lot purchased from Adam Smith makes those arrangements with Aloha. However, Aloha knows which lots are connected to its system and when they were connected. Therefore, Adam Smith requires a list of connect lots from Aloha before it could identify those lots which Adam Smith transferred during the time period in question.

Similarly, Adam Smith requires Aloha to provide a list of lots sold from April 16, 2002 to date for the purposes of Interrogatory No. 5, in order for Adam Smith to identify which of those lots were sold by Adam Smith during the period in question. Adam Smith has provided a list based on the information that it received from Aloha. In its answer to Interrogatories Nos. 4 and 5, Adam Smith has provided the information that is relevant and within its ability to provide. Any additional requirements would be unduly burdensome and/or beyond the scope of permissible discovery.

In subsection (c) of Interrogatories Nos. 4 and 5, Aloha asks for "the price at which each lot was sold and the net profit or loss realized on each lot." In the related Document Request No. 1, Aloha demands the workpapers supporting the answers to subparts dealing with prices, profits, and losses. In its attempt to justify these requests, Aloha mischaracterizes Adam Smith's position in the case. Aloha states that "Adam Smith has indicated that backbilling for the time period of May 23, 2001 to April 16, 2002 is inappropriate since Adam Smith is unable to recover the increased service availability charges from the purchasers of lots sold during that time period." More accurately, Adam Smith asserts that no increase in service availability charges may be collected for the period May 23, 2001 through April 16, 2002 because Aloha failed to submit a conforming tariff as required, and failed to provide notice to developers as required. The fact that Adam Smith would not be able to collect the differential in service availability charges explains the impact on Adam Smith of the illegal attempt to apply the new service availability charge retroactively on Adam Smith.

Adam Smith has no ability to recover the difference in the amounts of service availability fees following the closing of transactions with purchasers. Therefore, to quantify the economic impact of collecting additional service availability charges on Adam Smith, it is necessary only to calculate the difference between the service availability charge in effect during the period and multiply by the number of lots to which Aloha attempts to apply the differential.

Moreover, Aloha states that if Adam Smith sold lots after April 16, 2002 at the same price as those sold from May 23, 2001 until April 16, 2002, it would be reasonable to conclude that the sales price was set by the market and that Adam Smith would not have been able to "pass along" the increased service availability charges, and that if Adam Smith could not "pass along" these charges, notice of the increased charges would have had no practical impact. Adam Smith argues that this entire premise is fatally flawed. Aloha's argument improperly depends on rank speculation. More importantly, the sales prices of the lots do not include the service availability charges. Instead, the service availability charge is one of several impact fees that are identified and collected as line item closing costs on the closing statement, separate and apart from the sales price.

In addition, Adam Smith argues that Aloha's statement that developers are required to track the items sought by Aloha in order to calculate capital gains for federal income tax purposes, is wrong. In an affidavit attached to the Adam Smith's Response, Mr. David S. Ford, Secretary/Treasurer of Adam Smith, states that developers are not allowed to claim capital gains, and that Adam Smith's lots are treated as "inventory." Moreover, Mr. Ford states that Adam Smith has no business need to attempt to estimate "per lot" calculations of profits and losses on an ongoing basis and does not do so. Adam Smith asks for a protective order ruling that Adam Smith is not required to undertake this onerous and valueless exercise.

OBJECTION TO MOTION FOR PROTECTIVE ORDER

In this Objection, with respect to Adam Smith's argument that Adam Smith would be unable to recover the difference in the amounts of service availability fees following the closing of transactions

with purchasers, Aloha argues that Adam Smith could actually recover the increased service availability fees by increasing the sales price of the lots for those lots sold after April 16, 2002. Thus, the sales price of the lots sold for the periods of May 23, 2001 through April 16, 2002, and from April 16, 2002 to the present, is relevant and discoverable.

Moreover, Aloha argues that for each lot within a phase or development, the developer calculates an average total inventory cost per lot. This amount is subtracted from the sales price per lot to determine the gross profit/loss margin on average. The developer must calculate this average total inventory cost per lot in order to correctly report the ordinary income realized on the sale of each lot reported each tax year. Aloha is entitled to discover whether the gross profit margin was, or would be, affected in any way by the imposition of the higher service availability fees. In sum, Aloha is entitled to discover how, and to what extent, Adam Smith could be harmed by backbilling the higher service availability amount.

Aloha rephrases its Interrogatories Nos. 4(c) and 5(c), in order to clarify its request, as follows:

4(c) Please provide a schedule which shows by lot and by month the price at which each lot was sold and the average total inventory cost per lot for the period from May 23, 2001 to April 16, 2002.

5(c) Please provide a schedule which shows by lot and by month the price at which each lot was sold and the average total inventory cost per lot for the period from April 16, 2002 to date.

Aloha argues that the Motion for Protective Order should be denied and requests that Adam Smith be required to answer Interrogatories Nos. 4(b), 5(b), 4(d), 5(d), and 4(c) and 5(c) as restated above, and to provide the workpapers that support the answers to 4(c) and 5(c) as requested in Document Request No. 1.

ADAM SMITH'S REQUEST FOR ORAL ARGUMENT

Adam Smith requests oral argument on its Motion to Strike Aloha's Objection to Motion for Protective Order and Alternative Response (Motion to Strike). In support thereof, Adam Smith states that oral argument on the motion will aid the Commission in understanding the numerous factual and legal issues involved in the discovery dispute, and will assist the Commission in reaching a decision in this matter.

MOTION TO STRIKE AND ALTERNATIVE RESPONSE

Adam Smith argues that Aloha attempts to advance entirely new theories and rationales to support the interrogatories and the document request to which Adam Smith objected. The new arguments differ from, and actually conflict with, those that Aloha presented in earlier pleadings and that Adam Smith answered in its response to the Motion to Compel. In addition, under the guise of "clarifying" its interrogatories in light of Adam Smith's response, Aloha has attempted to use the device of an "Objection" to serve different interrogatories to which Adam Smith has had no opportunity to object. For these reasons, Adam Smith argues that the Objection should be stricken. Alternatively, in the event the objection is not stricken, the Commission should recognize the prejudice that would occur in the absence of an opportunity to respond, and consider Adam Smith's response.

With respect to Interrogatories Nos. 4(c) and 5(c), Aloha asked for the price at which each lot was sold and the net profit or loss realized on each lot. In its Response to Aloha's Motion to Compel, Adam Smith pointed out that it would have no ability, post-closing, to collect the differential from the buyer of the lot. In its Objection, Aloha argues that Adam Smith could collect the differential by applying it pro rata to future sales of different lots. This argument appears for the first time in Aloha's Objection, and it collides with its first one, which is that the market sets the price. In the Objection, Aloha refers to, then promptly ignores, that the service availability charge is one of several impact fees collected separately as pass-through items during the closing of the lot for which Adam Smith paid the charge.

Adam Smith further argues that in its response to the Motion to Compel, it demonstrated that Aloha had relied on a wildly inaccurate construct involving the calculation of capital gains for tax purposes that the federal government does not allow. In its Objection, Aloha demands the calculation of an "average total inventory cost per lot." Aloha then claims that it is entitled to discover whether the gross profit margin was, or would be, affected in any way by the imposition of the higher service availability fees. In recognition of its earlier error, Aloha "clarifies" its request by "rephrasing" Interrogatories Nos. 4(c) and 5(c). While the "rephrasing" implicitly acknowledges Aloha's earlier mistake, the effect is to launch two new interrogatories without affording Adam Smith an opportunity to object. Moreover, Aloha has failed to demonstrate the relevancy of, or the need for, the revised information request. To understand the "impact" of the higher service availability charge on gross profit or loss, Aloha has only to subtract \$206.75 from \$1,650 and multiply the result by the number of lots involved. The "rephrased" interrogatories are irrelevant and, like their predecessors, are extremely burdensome. Adam Smith attaches the affidavit of Mr. David S. Ford, who states that the "rephrased" interrogatories would require Adam Smith to expend inordinate amounts of both time and effort to prepare a response.

With respect to Interrogatories Nos. 4(b), 4(d), 5(b), and 5(d), in its Objection, Aloha states that based on Adam Smith's responses to Interrogatories Nos. 1 and 2, it is Aloha's understanding that Adam Smith takes the position that it did not pay any service availability fees to Aloha from May 23, 2001 until April 16, 2002, nor were any lots owned by Adam Smith connected to Aloha's system during that time period. According to Aloha, Interrogatories Nos. 4(b), 4(d), 5(b), and 5(d) are an attempt to discover the detail proving that Adam Smith did not actually own the lots it has identified prior to their connection to Aloha's system.

Adam Smith argues that its answer to the interrogatories is not a position, but a statement of fact, for which no detail is required. Aloha can simply refer to its own records to "prove" that Adam Smith did not pay service availability fees in the time frames described, as well as ascertain which entity applied to connect each lot to its system. In its answer, Adam Smith

identified the lot number and location of those lots to which Aloha improperly proposes to apply the higher charge that fall in the category of having already been transferred by Adam Smith to a different owner. Aloha has only to compare the lot ID against its own records to ascertain the entity who owned the lot and who requested interconnection. Moreover, because of the manner in which Adam Smith maintains its records, this information is not readily available to Adam Smith. Adam Smith would have to search the documentation for all of its transactions, not just those that relate to Aloha's service territory, to obtain information relating to these requests beyond that which it has already provided. Particularly in view of the availability of the information from Aloha's own records, the "new" interrogatories are unduly burdensome.

ANALYSIS AND RULINGS

Because I do not find it necessary to hear oral argument with respect to these discovery disputes in order to comprehend and evaluate the issues at hand, Aloha and Adam Smith's separate Requests for Oral Argument are denied.

Upon consideration of the foregoing and being fully advised on the premises, I find that Interrogatories Nos. 4(c) and 5(c), both as originally propounded and as subsequently changed within Aloha's Objection, as well as Document Request No. 1, are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. Therefore, Adam Smith's Motion for Protective Order is granted and Aloha's Motion to Compel is denied with respect to these discovery requests. In so ruling, I find it unnecessary to rule upon the propriety of Aloha's subsequent revisions to the interrogatories. Moreover, Adam Smith's Motion to Strike Aloha's Objection, including the revised discovery requests contained therein, is denied. Adam Smith's alternative response was considered in arriving at this ruling.

With respect to the other remaining discovery requests in dispute, Interrogatories Nos. 4(b), 4(d), 5(b), and 5(d), Aloha's Motion to Compel is denied and Adam Smith's Motion for Protective Order is granted in part and denied in part. Adam Smith has identified the lot number and location of the lots at issue. Aloha may compare the lot IDs against its own records to ascertain the

entity who owned the lot and who requested interconnection, and when. Adam Smith's argument that these discovery requests are overly burdensome in light of the fact that the information is available from Aloha's own records has merit. Nevertheless, once Aloha identifies the entities at issue from its own records, Aloha is free to propound additional discovery to seek the identified entities' affiliation with Adam Smith, if any. Should Aloha choose to do so, Adam Smith is encouraged to expedite its answers to the additional discovery requests to the extent possible.

Both parties are encouraged to work out any further discovery disputes among themselves.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason that Aloha Utilities, Inc.'s Request for Oral Argument is denied. It is further

ORDERED that Adam Smith Enterprises, Inc.'s Request for Oral Argument is denied. It is further


ORDERED that Aloha Utilities, Inc.'s Motion to Compel Answers to Interrogatories and Request for Production of Documents is denied. It is further

ORDERED that Adam Smith Enterprises, Inc.'s Motion for Protective Order is granted in part and denied in part, as set forth in the body of this Order. It is further

ORDERED that Adam Smith Enterprises, Inc.'s Motion to Strike Aloha's Objection to Motion for Protective Order is denied.

ORDER NO. PSC-02-1748-PCO-SU
DOCKET NO. 020413-SU
PAGE 14

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 12th day of December, 2002.


J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

RG

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for

ORDER NO. PSC-02-1748-PCO-SU

DOCKET NO. 020413-SU

PAGE 15

reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.