

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO.
availability charges by Southern) ISSUED:
States Utilities, Inc. for)
Orange-Osceola Utilities, Inc.)
in Osceola County, and in)
Bradford, Brevard, Charlotte,)
Citrus, Clay, Collier, Duval,)
Hernando, Highlands,)
Hillsborough, Lake, Lee, Marion,)
Martin, Nassau, Orange, Osceola,)
Pasco, Polk, Putnam, Seminole,)
St. Johns, St. Lucie, Volusia,)
and Washington Counties.)

MOTION TO QUASH SUBPOENA AND
MOTION FOR A PROTECTIVE ORDER

The Staff of the Florida Public Service Commission (Staff), pursuant to Rule 25-22.045(3), Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, by and through its undersigned attorney, hereby requests that the PreHearing Officer quash the notice of deposition directed to Bill Lowe and served on September 5, 1995, and to enter an order protecting Mr. Lowe from further notice of deposition in this proceeding, and in support thereof, states the following:

Background

On June 28, 1995, Southern States Utilities (SSU or utility) filed an application with the Commission requesting increased water and wastewater rates for 141 service areas, pursuant to Section 367.081, Florida Statutes. August 2, 1995, has been established as the official filing date for the utility's minimum filing requirements.

On July 24, 1995, SugarMill Woods Civic Association, Inc. (SugarMill Woods) filed a petition to intervene in this docket. Order No. PSC-95-1034-PCO-WS, issued August 21, 1995, granted that petition. The Spring Hill Civic Association, Inc. (Spring Hill) and the Office of Public Counsel (OPC) have also intervened in this docket. A petition for intervention filed by the Marco Island Civic Association, Inc. is pending.

DOCUMENT NUMBER-DATE

08863 SEP-8 411

FPSC-RECORDS/REPORTING

On September 5, 1995, SugarMill Woods filed a notice of deposition, stating that SugarMill Woods will take the deposition of Bill Lowe, Deputy Director of the Division of Water and Wastewater, on Tuesday, September 12, 1995, at 9 a.m., at Accurate Reporting Service in Tallahassee, Florida.

In this docket, Staff will likely file testimony on several issues. Staff does not and will not object to the deposition of Staff members who will file testimony. However, Staff does not anticipate that Mr. Lowe will provide testimony in this docket. Instead, as Deputy Director, he will have considerable supervisory review over members of technical staff in their advisory role, as well as actively advising the Commission.

Pursuant to Rule 25-22.045(3), Florida Administrative Code, any person served with a subpoena issued by the Commission may file a motion to quash the subpoena. Furthermore, Rule 1.280(c), Florida Rules of Civil Procedure, permits a court to issue an order protecting a person from "annoyance, embarrassment, oppression, or undue burden or expense that justice requires..."

SugarMill Woods' subpoena does not specify the nature of the information sought or the subject of the deposition. Nevertheless, Staff asserts that no matter the intent of SugarMill Woods, its notice of deposition and subpoena of Mr. Lowe should be quashed, and a protective order should be issued.

Standard of Review

The Commission's decision on this issue "must balance a litigant's right to pursue full discovery with the deponent's right to protection against oppressive disclosure" Order No. PSC-94-1562-PCO-WS (Docket No. 930495).

Rule 1.280, Florida Rules of Civil Procedure, permits a broad scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

However, as noted above, Rule 1.280(c), Florida Rules of Civil Procedure, permits a protective order in order to protect a deponent from harassment or undue burden. This requires a balancing test between the competing interests. See Dade County Medical Association v. Hlis, 372 So.2d 117, 121 (Fla. 3d DCA 1979), and Argonaut Insurance Co. v. Peralta 358 So.2d 232 (Fla. 3d DCA 1978).

A trial court has broad discretion to grant or deny discovery motions, and to protect parties or individuals against possible abuse. Only an abuse of discretion will constitute a fatal error. Eyster v. Eyster, 503 So.2d 340, 343 (Fla. 1st DCA 1987), rev. den. 513 So.2d 1061 (Fla. 1987); and Orlowitz v. Orlowitz 199 So.2d 97 (Fla. 1967). Similarly, the Commission has broad discretion to determine discovery questions.

Staff contends that in this case the interest in protecting Staff members from an undue burden, the irrelevance of deposing a non-testifying Staff member, and the availability of relevant documents through a public record request far outweighs the interest in broad discovery.

Relevance

Mr. Lowe's participation in past dockets and his participation in this docket is not relevant, nor is it information calculated to lead to admissible evidence in this docket.

The Commission has addressed ratemaking and jurisdictional issues regarding SSU in several recent dockets. In Docket No. 920199-WS, the Commission established final rates for the utility. In Docket No. 930880-WS, the Commission considered whether a uniform rate structure was appropriate on a going-forward basis for the utility. In Docket No. 930495-WS, the Commission determined the statewide jurisdiction of the utility's facilities. All of these dockets have been appealed and remain open before the Commission. If SugarMill Woods is seeking information from Mr. Lowe regarding those dockets, its subpoena should be quashed because those dockets are not relevant to this docket.

In fact, the Commission has determined that a Staff member's participation in a past docket is not relevant to a more current proceeding. In Docket No. 940963-SU¹, OPC subpoenaed Staff member Jerrold Chapdelaine. OPC argued that it should be allowed to depose Mr. Chapdelaine regarding his recommendation in a previous docket regarding North Ft. Myers Utility. In Order No. PSC-95-0137-PCO-SU, issued January 27, 1995, the Commission found that:

¹In Re: Application for transfer of territory served by Tamiami Village Utility, Inc., in Lee County to North Fort Myers Utility, Inc., cancellation of Certificate No. 332-S and amendment of Certificate No. 317-S; and for a limited proceeding to impose current rates, charges, classifications, rules and regulations, and service availability policies.

Mr. Chapdelaine's participation in the recommendation process and the competency of statements in staff recommendations which may have been drafted by Mr. Chapdelaine are not relevant to this proceeding.

The Commission further noted that reconsideration or appeal of the past dockets were the appropriate avenues for addressing the Commission's decision.

Similarly, in this docket, if SugarMill Woods intends to question Mr. Lowe as to his participation in the SSU dockets cited above, it should be quashed on the grounds that it is not relevant to this docket. Those matters are on appeal and must be dealt with through the appropriate means in those dockets. Moreover, the orders, documents, and other materials from those dockets may be sought by the less intrusive means of filing a public records request with the Commission.

If SugarMill Woods is not seeking information regarding Mr. Lowe's participation in those past dockets, but is instead seeking his mental impressions in this docket, the subpoena should also be quashed. The Commission's decision in this proceeding will be based upon the evidence in the record. A Staff member's opinion or impressions is not relevant to the recommendation Staff may ultimately make, nor can it be seen as reasonably calculated to lead to admissible evidence. And, if SugarMill's purpose in deposing Mr. Lowe is to seek information about the utility's filing or other matters before the Commission, again, a public record request is the appropriate route.

Chilling Effect Upon Staff's Advisory Role

According to Rule 25-22.026(3), Florida Administrative Code, Staff may participate as a party in a 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." However, 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). One of Staff's primary functions is to provide legal and technical advice on matters pending before the Commission. Staff accomplishes this through the filing of recommendations and discussing these recommendations at Agenda conferences. The Commission is not "obliged to avoid their staff during the evaluation and consideration stages of their deliberation. Were this so, the value of staff expertise would be lost and the

intelligent use of employees crippled." Occidental Chemical Co. v. Mayo, 351 So.2d 336, 342 n. 10 (Fla. 1977).

However, pursuant to Section 120.66, Florida Statutes, Staff members that testify at hearing are prohibited from further participation in the proceeding. Although SugarMill Woods has not indicated that it intends to call Mr. Lowe as a witness at a hearing, its subpoena of Mr. Lowe certainly raises a concern as to his participation in this docket. If parties are permitted to subpoena non-testifying Staff witnesses, Staff's advisory role could effectively be crippled by the selection of particular Staff members for deposition.

In almost every major docket regarding this utility over the last five years, parties have attempted to subpoena Staff, either for deposition or for testimony. In Docket No. 900329-WS, OPC subpoenaed six members of Staff to testify at hearing. In Docket No. 930880-WS, the Office of the Attorney General subpoenaed seven members of Staff for deposition. In Docket No. 930945-WS, Hillsborough County subpoenaed Charles Hill, Director of the Division of Water and Wastewater for deposition. None of those subpoenas were enforced against the Staff witnesses. In each case, Staff objected to the attempt to draw non-testifying Staff members into a docket and impinge upon its advisory role. Those concerns are again present in this situation.

The fact that SugarMill Woods has only subpoenaed one member of Staff does not mitigate the chilling effect that its enforcement would have upon Staff. By taking Mr. Lowe's deposition, SugarMill Woods would effectively remove Mr. Lowe from this docket. Moreover, Staff believes that even if the Commission grants this motion and issues a protective order for Mr. Lowe, SugarMill Woods or other parties may subpoena other members of Staff. Therefore, Staff requests that the PreHearing Officer issue a protective order to prevent parties from serving subpoenas on non-testifying members of Staff.

In addition to the concerns over targeting and removing certain members of Staff from their role in a docket, Staff is concerned that the deposition of a non-testifying Staff member could be used both as a means of inquiring into that person's impressions and opinions on this case, and as a means of attempting to influence that person. If parties were permitted to subpoena and question Staff during the pendency of a docket, Staff would operate under the knowledge that at any time, they could be questioned by parties in that docket, which could have a chilling effect upon the performance of their duties.

Staff believes that the potential harm in allowing SugarMill Woods to conduct a deposition of Mr. Lowe outweighs the broad scope of discovery.²

Invasion of the Deliberative Process

The questioning of a Staff member, particularly one in a supervisory role over all technical aspects of this docket, is an unnecessary invasion into the Commission's process. Parties should not be permitted to question a non-testifying staff member regarding his or her participation in a docket pending before the Commission. The inquisition of a Staff member in a deposition, which by the very nature of discovery is a broad inquiry, may result in the invasion of the Commission's determination on the case. Although Florida courts and the Florida Evidence Code do not expressly recognize the deliberative process privilege, some consideration should be given to protecting the deliberative process of a government agency from disclosure.

The deliberative process privilege has been recognized on the federal level. (See U.S. v. Morgan, 313 U.S. 409 (1941)). The privilege is determined by balancing the public's interest in effective agency administration against its interest in accurate fact finding. United States v. Beatrice Foods Co., 52 F.R.D. 14, 20 (D. Minn. 1971). The factors in this balancing test include relevance, alternate means of proof, and whether there are any allegations of government misconduct. Dowd v. Calabrese, 101 F.R.D. 427, 431 (1984).


Staff contends that the deposition of a senior member of Staff, who is responsible for supervising all technical Staff members in this docket, would be an invasion of the Commission's deliberative process. Moreover, one of the factors indicated in Dowd would tip the balance towards permitting discovery into the Commission's deliberative process.

² SugarMill Woods has noticed Mr. Lowe for deposition on Tuesday, September 12, 1995, at 9 a.m. at a court reporter's office in Tallahassee. The Commission's Agenda Conference is scheduled to begin at 9:30 a.m. that same day. SugarMill Woods is no doubt aware of this fact, as its counsel has filed a motion regarding the refund of rates in Docket No. 920199-WS which will be considered at that Agenda Conference on that date. As part of his supervisory duties, Mr. Lowe is required to attend the Agenda Conference. Furthermore, Staff counsel on this docket are required to attend that Agenda Conference. While SugarMill Woods is under no obligation, other than professional courtesy, to consult with a deponent and his counsel regarding the scheduling of a deposition, the scheduling of the deposition is a significant burden upon Staff and counsel.

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WHEREFORE, the Staff of the Florida Public Service Commission requests that the Prehearing Officer issue an order quashing SugarMill Woods' notice of deposition and subpoena, and protecting Bill Lowe and other non-testifying members of Staff from any further harassment, annoyance, or oppression from subpoenas in this proceeding, for the reasons set forth above.

Respectfully submitted, this
8th day of September, 1995.



Margaret O'Sullivan
Staff Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion to Quash Subpoena and Motion for a Protective Order was furnished by U. S. Mail to the following this 8th day of September, 1995:

Kenneth A. Hoffman, Esq.
William B. Willingham, Esq.
Rutledge, Ecenia, Underwood,
Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32302-0551

Brian P. Armstrong, Esq.
Matthew Feil, Esq.
Southern States Utilities, Inc.
1000 Color Place
Apopka, Florida 32703
(407) 880-0058

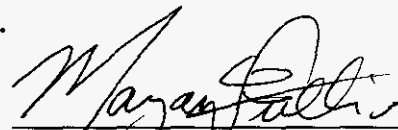
Charles J. Beck, Esq.
Office of Public Counsel
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

Michael B. Twomey, Esq.
P. O. Box 5256
Tallahassee, FL 32314-5256

Joseph Coriaci, President
Marco Island Civic Asso.
413 S. Barfield Drive
Marco Island, FL 33937

Mr. Morty Miller, President
Spring Hill Civic Asso., Inc.
P. O. Box 3092
Spring Hill, FL 34606

Mr. W. Allen Case, President
Sugarmill Woods Civic Asso., Inc.
91 Cypress Blvd., West
Homosassa, FL 34446



Margaret O'Sullivan
Staff Counsel
Florida Public Service Commission