

FLORIDA PUBLIC SERVICE COMMISSION

Gerald L. Gunter Building  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

M E M O R A N D U M

February 8, 1996

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (O'SULLIVAN) *MS*  
DIVISION OF WATER AND WASTEWATER (WILLIS) *R*

RE: UTILITY: SOUTHERN STATES UTILITIES, INC. (ORANGE-OSCEOLA UTILITIES, INC.)  
DOCKET NO. 950495-WS  
COUNTY: BRADFORD, BREVARD, CHARLOTTE, CITRUS, CLAY, COLLIER, DUVAL, HIGHLANDS, LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND WASHINGTON

CASE: APPLICATION FOR RATE INCREASE FOR ORANGE-OSCEOLA UTILITIES, INC. IN OSCEOLA COUNTY, AND IN BRADFORD, BREVARD, CHARLOTTE, CITRUS, CLAY, COLLIER, DUVAL, HIGHLANDS, LAKE, LEE, MARION, MARTIN, NASSAU, ORANGE, OSCEOLA, PASCO, PUTNAM, SEMINOLE, ST. JOHNS, ST. LUCIE, VOLUSIA, AND WASHINGTON COUNTIES BY SOUTHERN STATES UTILITIES, INC.

AGENDA: FEBRUARY 20, 1996 - REGULAR AGENDA -- INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: I:\PSC\LEG\WP\950495-Q.RCM

CASE BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application with the Commission requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida

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Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. The utility also requested that the Commission approve an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

On July 26, 1995, the Commission issued Order No. PSC-95-0901-PCO-WS acknowledging the intervention of the Office of the Public Counsel (OPC). The Sugarmill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc., were granted intervenor status by Order No. PSC-95-1034-WS, issued August 21, 1995. The Commission granted intervention to the Marco Island Civic Association, Inc., by Order No. PSC-95-1143-WS, issued September 14, 1995. More recently, On January 17, 1996, the Commission granted intervention to Concerned Citizens of Lehigh Acres and Harbor Woods Civic Association, Inc. by Orders Nos. 96-PSC-0089-PCO-WS and 96-PSC-0090-WS, respectively.

On January 12, 1996, Sugarmill Woods and Marco Island served a subpoena for deposition on Charles Hill, Director of the Division of Water and Wastewater. Sugarmill Woods and Marco Island subsequently filed an amended notice of deposition for Mr. Hill for January 26, 1996. On January 17, 1996, Staff filed a motion to quash Mr. Hill's subpoena and a motion for a protective order. Counsel for Sugarmill Woods and Marco Island has indicated that while Sugarmill Woods and Marco Island will not file a written response, they oppose Staff's motion to quash.

Pursuant to Rule 25-22.038(1), Florida Administrative Code, the Prehearing Officer may "in his or her discretion, refer any matter to the panel assigned to the case for a decision." The Prehearing Officer has referred this matter to the full Commission for consideration.

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### DISCUSSION OF ISSUES

**ISSUE 1:** Should the Commission grant Staff's Motion to Quash Subpoena and Motion for Protective Order?

**RECOMMENDATION:** Yes. The deposition of Mr. Hill would not result in relevant information, will have a chilling effect upon Staff's role, and will invade the deliberative process of the Commission. (O'SULLIVAN)

**STAFF ANALYSIS:** Staff's motion requests that the subpoena directed to Mr. Hill be quashed, and that the Commission enter an order protecting Mr. Hill from further subpoenas in this proceeding. Staff states that while several Staff individuals will likely file testimony in this docket, it does not anticipate that Mr. Hill will file testimony in this docket. Instead, as Director, Mr. Hill will have supervisory review over members of technical staff in their advisory role.

Staff moved to quash the subpoena pursuant to Rule 25-22.045(3), Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, which permits a court to issue an order protecting a person from "annoyance, embarrassment, oppression, or undue burden or expense that justice requires..." Staff's motion is premised upon three grounds: relevance, the potential chilling effect upon Staff, and the deliberative process. Sugarmill Woods and Marco Island have not filed a written response, but have stated a verbal opposition to Staff's motion. While Rule 25-22.037(2)(b), Florida Administrative Code, provides for written memoranda in opposition to a motion, it does not contemplate verbal opposition after service of a written motion.

In its review of this motion, 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, issued December 14, 1994 (Docket No. 930495-WS).

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

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trial of the information sought appears calculated to lead to the discovery of admissible evidence.

However, 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). In this instance Staff recommends that the Commission should balance the interests that would be served by permitting or denying the discovery, and the effect that permitting the discovery would have upon Staff's role in this docket.

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 matters.

Neither the subpoena nor the notice of deposition sets forth the area of inquiry to be explored in Mr. Hill's deposition, making it difficult for Staff to address the subpoena more specifically. However, the notice of deposition for the two deponents originally scheduled to be deposed on the same day, Jeff Sharkey and Charles Dusseau, indicates that the area of inquiry, at least for those deponents, is the communication between SSU and its parent corporation and the Offices of the Governor and Lieutenant Governor. Because no specific area of inquiry is indicated for Mr. Hill's deposition, staff has addressed any potential aspect of inquiry, including past and present dockets, in its motion and in this recommendation.

#### Relevance

Whether Sugarmill Woods and Marco Island are seeking information regarding Mr. Hill's participation in past dockets or his participation in this docket, Staff believes that the information is neither relevant, nor calculated to lead to admissible evidence in this docket.

The Commission has addressed ratemaking and jurisdictional issues regarding SSU in several recent dockets. Dockets Nos.

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920199-WS, 930880-WS, and 930945-WS have all been appealed by various parties and remain open before the Commission. If Sugarmill Woods and Marco Island seek information from Mr. Hill regarding those dockets, Staff recommends that the subpoena be quashed because those dockets are not relevant to this proceeding. The orders emanating from those dockets speak for themselves. Moreover, those matters are on appeal and must be dealt with through the appropriate avenues 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. See Order No. PSC-95-0137-PCO-SU, issued January 27, 1995, in Docket No. 940963-SU<sup>1</sup>

Staff recommends that the subpoena should also be quashed if Sugarmill Woods and Marco Island are seeking Mr. Hill's mental impressions in this docket. The Commission's decision in this proceeding will be based upon the evidence in the record. Mr. Hill will not testify in this docket, and Staff therefore questions what relevant material may be gleaned from deposing him. 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. 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." And, if Sugarmill Woods and Marco Island's purpose in deposing Mr. Hill is to seek information about the utility's filing or other matters before the Commission, again, a public record request or depositions of witnesses who are testifying would be the appropriate route.

#### Chilling Effect

As previously stated, Staff's duty, pursuant to Rule 25-22.026(3), is to represent the public interest and ensure that all issues are brought before the Commission. However, Staff is not a real party in interest in any proceeding before the Commission.

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<sup>1</sup>In 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.

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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 based upon the record and discussing these recommendations at Agenda conferences. The Commission is not "obliged to avoid their staff during the evaluation and consideration states 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 and Marco Island have not indicated that they intend to call Mr. Hill as a witness, their subpoena 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.

The fact that Sugarmill Woods and Marco Island have only subpoenaed one member of Staff does not mitigate the chilling effect that its enforcement would have upon Staff. By taking Mr. Hill's deposition, Sugarmill Woods and Marco Island could effectively remove Mr. Hill, the Director of the Division with primary responsibility for the docket from these proceedings. In Order No. PSC-94-1562-PCO-WS, issued December 14, 1994, the Commission recognized this concern when it quashed Hillsborough County's subpoena of Mr. Hill in Docket No. 930945-WS. That order held that a deposition of Mr. Hill would significantly compromise Staff's posture of neutrality and constitute "an undue burden upon Staff's conduct of the investigation in this docket." (Order at 6).

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 as both 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 non-testifying 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 recommends that the potential harm in allowing Sugarmill Woods and

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Marco Island to depose Mr. Hill outweighs the broad scope of discovery.

#### 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. The inquisition of a non-testifying member of Staff 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 the deliberative process privilege is not an officially recognized doctrine at the state level, 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 recommends that the deposition of one of its most senior members, who is responsible for supervising all technical Staff members in this docket, would be an invasion of the Commission's deliberative process.

#### Conclusion

The subpoena of a non-testifying Staff member for deposition in a pending docket adversely impacts Staff's advisory role. The Commission has rejected such attempts to depose Staff in the past. Staff recommends that Mr. Hill's deposition be quashed because it is not calculated to lead to relevant information, has a chilling effect upon Staff's advisory role, and invades the Commission's deliberative process. See Orders Nos. PSC-94-1562-PCO-WS and PSC-94-0425-PCO-WS.

Finally, Staff notes that Sugarmill Woods and Marco Island have not filed a written response to the motion to quash which would demonstrate a factual basis for its subpoena of Mr. Hill. Such a response is not required. However, in making its determination, the Commission should balance the interests of both parties. Such a balance is difficult to make without knowledge of

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the discovery proponent's factual basis for the discovery. See Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989)