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November 8, 2002

VIA HAND DELIVERY

Blanca Bayo, Director
Division of Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

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COMMISSION
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RE: Docket No. 020413-SU
Aloha Utilities, Inc. show cause proceeding

Dear Ms. Bayo:

Attached please find the original and fifteen (15) copies of Aloha Utilities, Inc.'s Motion to Compel Answers to Interrogatories and Request for Production of Documents and Request for Oral Argument to be filed in the above docket. Also attached is a copy of each pleading to be stamped and returned to our office for our files.

Thank you for your assistance in this matter. Should you have any questions or need any additional information, please contact me.

Very truly yours,

Suzanne Brownless

Suzanne Brownless
Attorney for Aloha Utilities, Inc.

Request for Oral Argument
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Motion to Compel

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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

MOTION TO COMPEL ANSWERS TO
INTERROGATORIES AND REQUEST FOR
PRODUCTION OF DOCUMENTS

Pursuant to Rules 28-106.204 and 28-106.206, Florida Administrative Code, Aloha Utilities, Inc. (Aloha), by and through its undersigned counsel, files this Motion to Compel Answers to Interrogatories and Request for Production of Documents, and in support thereof states as follows:

1. On October 25, 2002 Aloha served its First Set of Interrogatories Nos. 1-7 and First Request for Production of Documents No. 1 on Adam Smith Enterprises, Inc. (Adam Smith), an interested party in this proceeding.

2. Pursuant to the applicable rules of civil procedure, answers to these interrogatories and request for production of documents are due within 30 days of service or by Monday, November 25, 2002. [Rules 1.340 and 1.350, FRCP] Because November 25th is also the date on which the Commission scheduled Aloha's direct testimony to be due, Aloha filed a motion requesting that Adam Smith respond within 20 days of service or by Friday, November 15, 2002, or that the dates on which all testimony is due be extended by 10 days. [Aloha's Motion to Expedite filed October 25, 2002] In response to Aloha's motion to expedite, Adam Smith

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indicated that it did not object to responding within 20 days to Aloha's discovery or to granting additional time in which to file testimony. However, Adam Smith did object to only extending the testimony due dates for 10 days since that placed the due date for its direct testimony on January 2, 2003. [Adam Smith's Response at 1, filed October 31, 2002] This motion to expedite is still pending.

3. On November 4, 2002, Adam Smith filed objections to Interrogatories Nos. 2, 3, 4, and 5 and Request for Production No. 1.

4. Interrogatories Nos. 2, and 3 state as follows:

2. For the period from May 23, 2001 until April 16, 2002, please provide the total number of lots, identified by subdivision, and lot number, tax identification number or street address, owned by Adam Smith and its affiliated companies that were connected to Aloha's water and wastewater systems.

3. For the time period from April 16, 2002 to date, please provide the total number of lots, identified by subdivision and lot number, tax identification number or street address, owned by Adam Smith and its affiliated companies that were connected to Aloha's water and wastewater systems.

[Emphasis added.]

5. Adam Smith has indicated that it will answer Interrogatory Nos. 2 and 3 to the extent that "those lots were owned by Adam Smith at the time they were connected to Aloha's water and wastewater systems." Initially it appeared that Adam Smith objected to providing this same information for its affiliated companies. "Affiliated companies" are defined for the purposes of this interrogatory as companies in which:

a. One or more of the officers or shareholders of Adam Smith are also officers or shareholders; or

- b. One or more of the officers or shareholders of Adam Smith hold voting or non-voting shares; or
- c. One or more of the officers or shareholders of Adam Smith hold promissory notes or mortgages for the company; or
- d. One or more of the officers or shareholders are members of the immediate family of officers or shareholders of Adam Smith.

Aloha's First Set of Interrogatories at 2.

6. However, Adam Smith's counsel has clarified that this information will be provided for all lots owned by Adam Smith or its affiliated companies at the time of connection to Aloha's wastewater system during the period May 23, 2001 until April 16, 2002. This is the information that Aloha sought and Aloha understands that based on this clarification, Adam Smith's objection with regard to Interrogatories Nos. 2 and 3 is withdrawn.

7. With regard to Interrogatories Nos. 4 and 5, it appears that Adam Smith has both a general objection and a more specific objection. Interrogatories 4 and 5 state as follows:

- 4. For the 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.

5. 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.

8. With regard to its general objection, Adam Smith states that it needs a "new and verified list of connected lots from Aloha" before it can answer these questions. [Adam Smith Objection to Interrogatories at 4] Adam Smith admits that it has a "preliminary" list of connected lots, but it is Adam Smith's contention that this list is "replete with errors". [Adam Smith Objection to Interrogatories at 2] Apparently it is Adam Smith's contention that due to the number of lots sold during this time period, Aloha's request is unduly burdensome without this information to narrow the scope of the request.

9. Adam Smith has put the amount of service availability charges which it is required to pay, if Aloha is allowed to backbill, at issue in this proceeding. [Adam Smith Petition for Formal Hearing, ¶ 8.(b) at 3.] It is Adam Smith's contention that for lots sold whose title was transferred to other entities from May 23, 2001 until April 16, 2002 prior to connection, the new owner of the lot, not Adam Smith, is responsible for any increased service availability charges.

[Id.] Aloha is simply requesting the data which supports Adam Smith's allegations. More accurately, Aloha is requesting the data necessary to calculate the amount of service availability fees in dispute since Adam Smith has not provided this figure.

10. Further, this request is neither unduly burdensome nor unreasonable. Aloha's request is not overly broad but 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 with regard to the information requested, 4(a) through (d) can be taken directly off of a standard real estate closing statement.

11. In Interrogatory 5 Aloha is requesting the same information as requested in Interrogatory 4 for lots sold from April 16, 2002 to date. Again this request is neither unduly burdensome nor unreasonable for the reasons stated in paragraphs 9 and 10 above.

12. Adam Smith has also specifically objected to Interrogatories 4(c) and 5(c) which ask Adam Smith to provide "the price at which each lot was sold and the net profit or loss realized on each lot" on the grounds that it is: a) irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; b) confidential proprietary business information; c) so irrelevant and sensitive as to be oppressive and harassing; and d) unduly burdensome. Aloha disagrees.

13. The request is both 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. [Adam Smith Petition for Formal Hearing, ¶ 8(a)(ii) at 3] The price at which Adam Smith sold lots after April 16, 2002, and the

imposition of the higher service availability fees is, therefore, relevant. To the extent that 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. To the extent that Adam Smith could not "pass along" the increased service availability charges, notice of the increased service availability charges would have had no practical impact.

14. Information regarding profit or loss is also relevant to the financial impact of the service availability backbilling on Adam Smith - an adverse affect which Adam Smith has raised in this proceeding. Once economic impact is put at issue by Adam Smith, Aloha is entitled to discover the information necessary to quantify that impact, if any actually exists.

15. The sensitivity and confidentiality of the requested information does not act as a bar to discovery. Rule 25-22.006, Florida Administrative Code, a very comprehensive process for handling information deemed to be confidential proprietary business information, is in place to address the issue of detrimental disclosure. With regard to the answers to Interrogatories 4(c) and 5(c), Aloha believes that the sales price of each lot would be public record, and thus not properly classified as confidential proprietary business information under § 367.156(3), Florida Statutes. However, the net profit or loss would fall within the definition of proprietary confidential business information. Aloha, therefore, is willing to treat the net profit or loss data as confidential pursuant to Rule 25-22.006, Florida Administrative Code, and to execute a reasonable confidentiality agreement regarding these materials.

16. Finally, Adam Smith contends that supplying the net profit or loss on each lot would be unduly burdensome yet provides no support for this statement. Computer software is

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

17. Production Request No. 1 asks for the “work papers supporting the answers to Interrogatories Nos. 4(c), 5(c), 6(c) and 7(c)”. Adam Smith objects to this discovery on the same grounds as that stated for these respective interrogatories and on the additional grounds that the term “work papers” is vague.

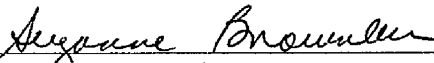
18. Aloha is simply asking for a copy of whatever calculations were done to arrive at the net profit and loss figure for each lot in order to evaluate that calculation. This is a straight forward request and its lack of specificity cannot be remedied at this time by Aloha since Adam Smith and not Aloha is developing the answer.

19. The Florida rules of discovery are remedial in nature and are to be construed liberally to accomplish their purpose: making all relevant facts available to the parties and thereby encouraging the speedy disposition of cases through settlement or fair trial. Southern Mill Creek Products Co. v. Delta Chemical Co., 203 So.2d 53 (Fla. 3d DCA 1967); Brown v. Bridges, 327 So.2d 874 (Fla. 2d DCA 1976). Further, the scope of discovery under Florida law is very broad: any information which is relevant to the subject matter of the proceeding and either admissible or reasonably calculated to lead to the discovery of admissible evidence. Rule 1.280(b)(1), FRCP. As demonstrated above, the discovery requested by Aloha is relevant to the issues raised by Adam Smith in this proceeding and is not overly broad, burdensome,

oppressive or harassing.

WHEREFORE, for the reasons stated above, Aloha Utilities, Inc. requests that this Commission require Adam Smith to answer Interrogatories Nos. 2, 3, 4, and 5 and Production of Documents Request No. 1.

Respectfully submitted this 8th day of November, 2002 by:


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been provided to the persons listed below by U.S. Mail or (*) Hand Delivery this 8th day of November, 2002:

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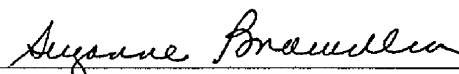
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