

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, F.S.

DOCKET NO. 020413-SU  
FILED: November 27, 2002

OBJECTION TO MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 28-106.206, Florida Administrative Code, Aloha Utilities, Inc. (Aloha) files this Objection to the Motion for Protective Order filed by Adam Smith Enterprises, Inc. (Adam Smith), requests that the Commission deny Adam Smith's request for a protective order and in support thereof states as follows:

1. On November 20, 2002, Adam Smith filed Response of Adam Smith Enterprises, Inc. to Aloha Utilities, Inc.'s Motion to Compel and Adam Smith's Motion for Protective Order (Adam Smith Response/Motion).
2. Adam Smith's Response/Motion was provided to Aloha via e-mail without attachments on November 20, 2002. Adam Smith also mailed the Response/Motion with attachments on that same date.
3. On November 14, 2002, prior to filing this Response/Motion Adam Smith provided answers to Aloha's Interrogatories Nos. 1, 2, 3, 4a, 4c, 5a, 5e, 6, and 7.
4. Adam Smith objects to, and seeks a protective order for, answers to Interrogatories Nos. 4b, 4c, 4d, 5b, 5c and 5d.
5. Interrogatories 4b and 5b ask for "[t]he entity to which each lot was sold and to whom title was transferred and its affiliation with Adam Smith, if any" for lots sold to others prior to connection to Aloha's wastewater system from May 23, 2001 to date. Interrogatories 4c

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and 5c ask for “[t]he price at which each lot was sold and the net profit or loss realized on each lot” for lots sold from May 23, 2001 to date. Interrogatories 4d and 5d ask for “[t]he date of each sale and the date at which title was transferred if not at the time of sale” for lots sold from May 23 to date.

6. Based on the responses of Adam Smith 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 this same time period. Interrogatories Nos. 4b, 5b, 4d and 5d 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. Based on the Closing Statements provided by Adam Smith as Attachment B to its Response/Motion, this information should be readily available for each sale during this time period.

7. With regard to Interrogatories Nos. 4c and 5c, Adam Smith has indeed argued that for a variety of reasons “there was no conforming and approved tariff in place authorizing the higher service availability charge in question during the period May 23, 2001 - April 16, 2002”. Thus Adam Smith takes the position that imposing the higher service availability charge for this time period is illegal. [Response/Motion at 7.] However, Adam Smith also admits that the “*impact* on Adam Smith of the illegal attempt to apply the new service availability charges retroactively on Adam Smith . . . illustrates the fallacy of any rationale that purports to dismiss the significance of the legal [notice] requirements, . . .” [*Id.*, emphasis in original.] This financial impact, categorized by Adam Smith as “incontrovertible”, is that Adam Smith “would have no ability to recover the difference in the amounts of service availability fees following the closing

of transactions with purchasers". [Id.] Adam Smith states that this is true since it recovers Aloha's service availability fee through a line item on the closing statement. Aloha disagrees.

8. 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. That is, by increasing the price of lots after April 16, 2002 by a small pro rata share per lot Adam Smith would ultimately be made whole. Thus, the sales price of the lots sold for the period of May 23, 2001 through April 16, 2002 and from April 16, 2002 to date is relevant and discoverable since it demonstrates Adam Smith's reaction to the knowledge that the service availability charges increased to \$1,650 per ERC, i.e., Adam Smith's response to the higher service availability charge.

9. With regard to the second part of Interrogatories 4(c) and 5(c) and Production of Documents Request No. 1, it is true as Adam Smith states that "net profit or loss" *per se* is not calculated for each lot. However, 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. The IRS does not wait until a development is totally built out and the developer has ascertained each and every inventory expense for the development before imposing income taxes on the income generated by the sale of lots. 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.

10. In order to clarify Aloha's request, Interrogatories 4c and 5c are rephrased as follows:

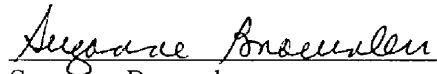
- 4.c. Please provide a schedule which shows by lot and by month the price at which each lot was sold and the average total inventory cost per lot for the period from May 23, 2001 to April 16, 2002.
- 5.c. Please provide a schedule which shows by lot and by month the price at which each lot was sold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

11. Adam Smith again argues that the information requested in Interrogatories 4c and 5c and Production of Documents Request No. 1 is confidential and proprietary business information. As stated in Aloha's Motion to Compel, Commission Rule 25-22.006, F.A.C., provides a very comprehensive process for handling information deemed to be confidential proprietary business information under §367.156(3), F.S. Further, Aloha is willing to execute a reasonable confidentiality agreement regarding these materials.

#### CONCLUSION

The information requested by Aloha in Interrogatories 4b, 5b, 4c, 5c, 4d and 5d is relevant and not unduly burdensome or oppressive. The Commission should deny Adam Smith's Motion for Protective Order and require Adam Smith to answer Interrogatories 4b, 5b, 4d, 5d and 4c and 5c as restated in paragraph 10 and provide the work papers that support the answers to 4c and 5c as requested in Production of Documents Request No. 1.

Respectfully submitted this 27th 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 27th day of November, 2002:

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