

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-03-0130-PCO-SU
ISSUED: January 24, 2003

ORDER GRANTING MOTION TO STRIKE UNTIMELY-FILED OBJECTIONS TO DISCOVERY AND DENYING MOTION REGARDING ROLE OF PRIOR COUNSEL IN RESPONDING TO DISCOVERY AND MOTION FOR PROTECTIVE ORDER

On December 5, 2002, Aloha Utilities, Inc. (Aloha or utility) filed its Objections to Adam Smith Enterprises, Inc.'s (Adam Smith) Discovery propounded on November 14, 2002, along with a Motion regarding the role of prior counsel in responding to the discovery, should Aloha be required to respond over its objections. On December 12, 2002, Adam Smith filed its Response to the Motion, and on December 20, 2002, Adam Smith filed a Motion to Strike Aloha's Objections to Discovery and Alternate Motion to Compel Discovery (Motion to Strike). Finally, on December 27, 2002, Aloha filed a Motion for Protective Order. This Order disposes of these filings.

It is noted that on December 27, 2002, Adam Smith filed Objections to Aloha's Notice of Deposition Duces Tecum, and on December 30, 2002, Adam Smith filed Amended Objections to the Notice of Deposition Duces Tecum. The deposition was taken on December 30, 2002, and the parties worked out their dispute among themselves. Therefore, no ruling is necessary with respect to those Objections.

Motion to Strike Objections to Discovery

Aloha filed objections to Adam Smith's First Request for Admissions Nos. 1-3, 5, and 6, First Set of Interrogatories Nos. 1-3, and First Request for Production of Documents Nos. 1, 2, 4, 7, and 8. As noted in Adam Smith's Motion to Strike, by Order No. PSC-02-1460-PCO-SU, issued October 23, 2002, (Order Establishing Procedure), parties were directed to make objections to discovery

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requests within ten days of service of the discovery request, and were advised that this procedure is intended to reduce delay in resolving discovery disputes. Aloha's objections were untimely filed twenty days after service, with no accompanying request to late-file or explanation for the late filing. For this reason, Adam Smith's Motion to Strike the untimely objections is granted and its Alternative Motion to Compel Discovery need not be ruled upon. Nevertheless, it is noted that the discovery requests at issue concern Aloha's failure to file a revised service availability tariff on May 23, 2001, and are directly related to the issues in this case. Therefore, the fact that Aloha's objections were untimely filed is of no consequence. Aloha shall answer all of the requests that were the subjects of the objections within ten days of the issuance date of this Order.

Motion Regarding Role of Prior Counsel

In its Motion regarding the role of prior counsel in responding to the discovery, Aloha states that the assistance of its prior counsel is required in order for Aloha to answer the discovery requests at issue. According to Aloha, only prior counsel is able to answer Admissions Requests Nos. 3, 5, and 6, and Interrogatories Nos. 2 and 3. Moreover, prior counsel would have relevant documents and information in addition to those in Aloha's possession which relate to Document Requests Nos. 1, 2, 4, 7 and 8. However, Aloha's prior counsel was unable to represent Aloha in this matter due to the fact that another member of his law firm represents Adam Smith and Adam Smith objected to his representation of Aloha on the basis of a conflict of interest.

Aloha argues that if the Commission determines that the facts surrounding Aloha's failure to file a revised service availability tariff on May 23, 2001, are relevant to this proceeding, which Aloha does not concede, it is necessary for prior counsel to be allowed to participate both in answering Adam Smith's discovery and at hearing on this point. According to Aloha, to allow the discussion without the input of prior counsel is unfair and inherently biased. The Commission should hear both sides of the story concerning Aloha's late filing or no side at all. Aloha requests that this Commission either order Adam Smith to allow Aloha's prior counsel to answer the above-identified discovery requests and to provide testimony at hearing regarding this

information, or strike these discovery requests and prohibit Adam Smith from offering testimony or other evidence at hearing regarding Aloha's failure to file the service availability tariff on May 23, 2001.

Adam Smith responds that Aloha essentially requests that the previous counsel, who is disqualified from representing Aloha in this case by reason of a conflict of interest, must be the sole source of critical information in discovery, or Adam Smith must be precluded from presenting the same information from any source. According to Adam Smith, the admissions and information requested by Adam Smith are virtually common knowledge that can be provided by others within Aloha. For example, Admission Request No. 3 states:

PSC Staff notified counsel for Aloha on or before March 7, 2002 that the tariff for the increased service availability charge that the Commission directed Aloha to file in Order No. PSC-01-0326-FOF-SU had not yet been filed.

Adam Smith argues that Aloha's previous counsel would have communicated the notification by staff to officers or employees of Aloha, and that in fact, Aloha's later efforts to address the fact of the omitted tariff are evidence that knowledge of the omission was not limited to previous counsel. Anyone who has that knowledge is qualified to prepare a response to the Request for Admissions.

With respect to the document requests, Adam Smith argues that those requests are not limited to documents that may be in the possession, custody or control of Aloha's previous counsel. Any documents in the possession and control of Aloha which fall within the scope of the document requests are responsive, whether or not they were authored by previous counsel, and whether or not previous counsel may also have copies of the documents. Moreover, the act of providing files of documents to Aloha for inclusion in Aloha's review for purposes of responding to the document request does not require actions taken in a "representative" capacity.

According to Adam Smith, Aloha's contention that Aloha's previous counsel is the exclusive source of information responsive to the discovery requests such that either he should provide the

information or Adam Smith should be denied the information is baseless. Further, the premise of the Motion is in error. Adam Smith objected to the conflict of interest that would have occurred had the law firm to which Aloha's prior counsel belongs represented Aloha in this matter. It appears that the real purpose of Aloha's Motion is to limit the source of factual information to an individual who would be constrained by the attorney-client privilege, unless waived by Aloha, as to the answers he would be able to provide. In short, Aloha wants to leverage the relationship into a means of resisting disclosure of facts relevant to the issues in the case. Moreover, with respect to the possibility that Aloha may wish to sponsor previous counsel as a fact witness, Adam Smith will object unless Aloha waives the attorney-client privilege. The previous counsel's participation in this case, if any, as a source of facts, cannot be colored or limited by his association as counsel to Aloha.

Adam Smith argues that it is clear that Aloha hopes to establish its prior counsel, whose participation would be complicated by both a conflict of interest and a relationship of privileged communications with respect to Aloha, as the exclusive source of discovery information and testimony on facts that are now a matter of common knowledge, are recited in Order No. PSC-02-1250-SC-SU, and can be answered by persons other than previous counsel. Alternatively, Aloha seeks to prevent Adam Smith from offering testimony or other evidence on the subjects gained from sources other than Aloha's previous counsel. According to Adam Smith, the motion is a form of stonewalling which depends on a distorted view of the ramifications of previous counsel's conflict of interest, is unfounded, frivolous, and absurd on its face, and should be summarily rejected.

Upon consideration of all of the foregoing, Aloha's Motion is denied. I am persuaded by Adam Smith's argument that certain officers or employees of Aloha would have knowledge of the information sought by Adam Smith, and that the information is thus available to Aloha by sources other than its prior counsel. Aloha shall answer the discovery requests at issue within ten days of the issuance date of this Order.

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Motion for Protective Order

By this Motion, Aloha seeks protection from providing answers to the discovery requests at issue, which discovery requests are the subject of its untimely-filed objections. The Motion is denied. Aloha shall file its answers to all discovery requests at issue within ten days of the issuance date of this Order. To the extent the answers call for any privileged information, Aloha shall identify which materials are being withheld, state with particularity the privilege which is being asserted, and explain how the materials fall within that privilege.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason as Prehearing Officer, that


Adam Smith Enterprises, Inc.'s Motion to Strike Aloha Utilities, Inc.'s Objections to Discovery is granted. It is further

ORDERED that Aloha Utilities, Inc.'s Motion regarding the role of its prior counsel is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Protective Order is denied. Aloha Utilities, Inc. shall file its answers to all discovery requests at issue within ten days of the issuance date of this Order. To the extent the answers call for any privileged information, Aloha shall identify which materials are being withheld, state with particularity the privilege which is being asserted, and explain how the materials fall within that privilege.

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By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 24th day of January, 2003.



J. TERRY DEASON
Commissioner and Prehearing Officer

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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

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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.