BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.	DOCKET NO. 010503-WU DATED: FEBRUARY 17, 2005

MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER

The Staff of the Florida Public Service Commission (Staff), by and through its undersigned attorney, pursuant to Rule 28-106.212(3), Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, hereby requests the Prehearing Officer to quash the subpoenas for depositions directed to Staff members Marshall Willis, Rosanne Gervasi, Patti Daniel, Connie Kummer, and Tom Walden, served by Aloha Utilities, Inc., on February 16, 2005, and to enter an order protecting Staff from the harassment, annoyance, and oppression resulting from the current and further Notices of Deposition of Staff in this proceeding, and in support thereof recites the following:

I. BACKGROUND

1. The Florida Public Service Commission is a legislative agency of the State of Florida with the authority, under Chapters 350 and 367, Florida Statutes, to regulate certain water and wastewater utilities.

2. The Staff of the Commission is comprised of mostly professional individuals employed to perform various duties. Among its many duties, one of the Staff's chief functions is to assist in developing an adequate record in administrative proceedings in order to ensure that the Commission has the quantity and quality of information necessary to make a well reasoned, sound, and informed decision. Staff accomplishes this, in large part, through review of filings and testimony, consultation with Staff counsel, drafting discovery inquiries, and cross-

examination of the parties' witnesses. Occasionally, a member of Staff will testify; however, such testimony is typically limited to unique or complex issues, or discrete, limited subjects.

3. 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). However, Staff may participate as a party in any 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.

4. Another of Staff's functions is to provide legal and technical advice and recommend action on matters pending before the Commission. The principal way in which Staff accomplishes this function is by making written recommendations and discussing these recommendations at agenda conferences. Pursuant to Section 120.66, Florida Statutes, and Rule 25-22.033(5), Florida Administrative Code, Staff members who testify in a given case are not allowed to participate in the preparation of recommendations or the agenda conference discussion. Testifying Staff members are removed from the advisory role.

5. On August 10, 2001, Aloha Utilities, Inc. (Aloha) filed an application and supporting information for a general rate increase for its Seven Springs Water System. The case was assigned Docket No. 010503-WU.

6. By Order No. PSC-02-0593-FOF-WS (Final Order), issued April 30, 2002, the Commission required Aloha, among other things, to make improvements to Wells Nos. 8 and 9, and then to all its wells, to implement a treatment process designed to remove at least 98 percent

of the hydrogen sulfide in its raw water. A deadline of December 31, 2003, was established for these improvements to be in place.

7 Aloha appealed the Final Order and was granted a partial stay pending the appeal. Accordingly, by operation of law, the date for making the plant improvements was extended to February 12, 2005.

8. On June 9, 2004, Aloha filed a motion to modify the requirements of the Final Order, requesting that the requirement to remove 98% of hydrogen sulfide from the raw water should be replaced with a requirement that Aloha make improvements to meet a goal of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility, and that this standard be implemented no later than February 12, 2005.

9. By Proposed Agency Action Order No. PSC-04-0712-PAA (PAA Order), issued July 20, 2004, the Commission proposed to approve Aloha's request. V. Abraham Kurien, Harry Hawcroft, and Edward Wood (the Customers) filed a timely Petition protesting several, but not all, provisions of the PAA Order. In particular, the Petition raised the following disputed issues of material fact:

a. What would be the effect of the actions proposed by order no. PSC-04-0712-PAA-TP issued July 20, 2004, on the quality of water delivered to the customers of Aloha Utilities, Inc.?

b. Should the reference to sulfide in 'finished water' in the proposed agency action order be stated as a maximum containment [sic] level for total

sulfides of 0.1 mg per liter of delivered water at the point of its entry into the domestic system at the domestic meter?

c. Should the improvements be such that sulfide present in raw water or generated during treatment and transmission be removed, not converted, to a level not to exceed 0.1 mg/L, in finished water delivered at the point of entry into the domestic system?

d. Should compliance with such requirements be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities? Should such sites be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted?

10. The Commission issued a partial Consummating Order, Order No. PSC-04-0831-CO-WS, on August 25, 2004, which consummated the portions of the PAA Order that were not protested and recognized the portions of the PAA Order contested by the Customers.

11. The Consummating Order spells out what is settled and what is at issue:

> The Petition does not protest the proposed decision to modify the rate case order to the extent that Aloha is thereby required to make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water, which is the standard used by the Tampa Bay Water Authority (TBW), a wholesale water supplier in the area. Nor does the Petition protest the proposed deadline of February 12, 2005, by which the TBW standard shall be implemented. The Petition does protest the proposed requirement of Order No. PSC-04-0712-PAA-WS that Aloha meet the TBW standard as that water leaves the treatment facilities of the utility. Moreover, the Petition protests the methodology upon which compliance with the TBW standard shall be determined.

> Accordingly, Order No. PSC-04-0712-PAA-WS can become final as to the modification of the fourth ordering paragraph of the rate case order to the extent that such modification eliminates the 98% removal requirement and requires Aloha to make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water, and requires Aloha to implement this standard by no later than February 12, 2005.

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12. The second ordering paragraph of the Consummating Order repeats that the issues that require resolution include "the methodologies for determining compliance with the revised standard and the location at which compliance is measured."

13. An administrative hearing is scheduled for March 8, 2005, to take evidence on the protested portions of the PAA Order. The prehearing conference is scheduled for February 24, 2005.

14. Consistent with the Customers' petition, the Customers and OPC have proposed the following issues for resolution:

a. Should the reference to sulfide in "finished water" in the proposed agency action order be stated as a maximum contaminant level for total sulfides of 0.1 mg per liter of deliver water at the point of its entry in to the domestic system at the domestic meter?

b. Should the improvements be such that sulfide present in raw water or generated during treatment and transmission be removed, not converted, to a level not to exceed 0.1 mg/L in finished water delivered at the point of entry into the domestic system?

c. Should compliance with such requirements be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities with such sites rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted?

15. It is Staff's understanding that Aloha disputes whether the Consummating Order contemplated a dispute concerning the subject of issues a., in that the 0.1 mg/L was a goal and not a maximum contaminant level, and b., whether the removal or conversion of sulfides was at issue.

16. The only testimony sponsored by Staff is that of John R. Sowerby, P.E., an employee of the Florida Department of Environmental Protection.

17. On February 15, 2005, Aloha filed its Notice of Taking Depositions of Rosanne Gervasi, a Commission Staff attorney, and Patti Daniel, Tom Walden, Marshall Willis, and Connie Kummer who are Staff members. Aloha seeks to depose these Staff members starting at 9:00 a.m. on Friday, February 18, 2005. On February 16, 2005, Aloha also served subpoenas for each of the above-noted Staff members by facsimile to Staff counsel.

18. Neither the Notice of Depositions or the Subpoenas provide the specific subject areas to be covered in the depositions.

19. Also, Aloha noticed John R. Sowerby for deposition, starting at 2:30 p.m., on Thursday, February 17, 2005. Because John R. Sowerby has prefiled testimony in the proceeding, Staff has no objection to Aloha's intent to depose this witness.

20. By this motion, Staff objects to Aloha's deposing Rosanne Gervasi, Patti Daniel, Tom Walden, Marshall Willis, and Connie Kummer. Ms. Gervasi is an attorney, Ms. Daniel, Mr. Willis, and Ms. Connie Kummer are supervisors, and Tom Walden is an engineer. None of these Staff members are providing testimony in this proceeding. Their oversight duties in this docket include: supervision of Staff's review of filings and testimony; consultation with Staff

counsel; development of Staff's position on issues; development of the record; drafting discovery inquiries; preparation for the formal hearing; drafting Staff's recommendation following the hearing; and participation at the agenda conference where the Commission will make its ultimate determination of the issues.

II. STANDARD OF REVIEW

21. Pursuant to Rule 28-106.206, Florida Administrative Code, Rules 1.280 through 1.400 of the Florida Rules of Civil Procedure concerning discovery are applicable to Commission proceedings. These rules are generally interpreted to favor discovery. Pursuant to Rule 1.280(b)(1), Florida Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action . . . if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." However, pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, a party may move for a protective order designed to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense that justice requires . . . ."

22. Staff submits that it is irrelevant what Staff members believe transpired in either Docket No. 020896-WS, the deletion docket, or this docket. The impressions or intentions of Staff are not relevant to the subject matter of this proceeding. Staff also submits that such information is protected under a deliberative process privilege. In addition, any attempt to depose the Staff attorney is improper because of the work product doctrine and attorney-client privilege. Although the Rules of Civil procedure are interpreted broadly to favor discovery, at times, a party's interest in full discovery may conflict with an equally compelling policy against

disclosure of particular information from a particular source. In this instance, Aloha's intention to depose Staff directly conflicts with the public policy interest of protecting the integrity of the administrative deliberative process.

III. THE INFORMATION SOUGHT IS NOT RELEVANT AND PUBLIC POLICY DICTATES THAT THE DEPOSITIONS SHOULD NOT BE ALLOWED

23. In its Notice of Depositions, Aloha states that the purpose of the depositions is for the purpose of discovery, for use at trial, or for such other purposes as are permitted under the Florida Rules of Civil Procedure. In discussions with Aloha's attorneys, Staff counsel has learned that Aloha's purpose is to question the Staff members who were involved in the filing of Staff's recommendation dated June 29, 2004, after which the Commission voted to issue the PAA Order that modifies the 98% removal standard for hydrogen sulfide and adopts the Tampa Bay Water standard. Aloha has also voiced its intention to question Staff about their mental impressions or thoughts regarding the June 29, 2004 recommendation, with respect to the modification of the requirement and adoption of the new standard.

24. The purpose of this case is not to determine Staff's intent. The purpose is to resolve the protest of the PAA Order filed by the Customers.

25. The Commission's PAA Order, the customers' protest, and the Consummating Order are self explanatory. The Prehearing Officer will establish the issues in the case. The Full Commission will hear the evidence. The final decision must be based solely upon the record adduced at hearing, and will be upheld or overturned on its own merits. Staff's mental impressions or thought processes regarding their recommendation on modification of the standard are not relevant to this case, or to any of the issues identified in this proceeding.

26. Considering the Staff members targeted for deposition, it appears that Aloha is on a "fishing expedition" in an attempt to modify the protested issues clarified in the Consummating Order. The live issues in this case, however, should be discerned from the protest filed by the customers as well as the plain language of the Consummating Order. What Staff may or may not have thought or considered at some time in the past is not at issue, nor is it relevant to, this proceeding.

27. In Manatee County v. Estech Gen. Chemicals Corp., 402 So. 2d 75 (Fla. 2d DCA 1981), which involved an inverse condemnation suit arising out of the disapproval of an application for a development of regional impact (DRI), a Manatee County Commissioner was deposed concerning the reasons behind her vote to disapprove the DRI application. She refused to answer, Estech General Chemicals Corp. (Estech) moved to compel, and the trial court granted Estech's motion. Manatee County then petitioned for common law certiorari review of the trial court's order. The Appellate Court stated that "discovery is usually permitted only on matters reasonably calculated to lead to admissible evidence" and that "[t]he right to discovery thus does not extend to matters which are not directly relevant and which cannot reasonably lead to relevant matters." (Citations omitted.) Id., at 76. Since the only issue involved the effect of governmental action on the use of Estech's land, the Court went on to state:

> The motive of the governmental entity in taking the action [denying Estech's application for a DRI], much less the motive of an individual commissioner in voting, has no relevance to this action, and, moreover, we do not see any path from the questions leading to relevant matter.

Id.

28. As in Estech, the motives or intentions of Staff are not relevant. The issues in this proceeding are defined by the Consummating Order and the Customers' Petition. Aloha is seeking the impressions, motives, or thought processes of Staff for its own agenda. Moreover, Staff did not make the decision in the PAA Order and, likewise, will not make the decision in this proceeding. Staff's role is to recommend actions that the Commission might take and provide technical and legal advice thereon. The relevance of the information sought by Aloha is even more attenuated than in Estech.

29. Even assuming that Aloha intends to question Staff regarding only what issues are placed in dispute by the protest, the Commission's decision in this case must be based upon the pleadings on file and record developed at the hearing. Any thoughts or impressions that Staff may have formed at the time of its June 2004 recommendation are not relevant to the final decision that the Commission will make in this case.

30. In situations in which the interest in full disclosure to a discovery request conflicts with a competing interest in non-disclosure, courts generally perform a balancing test. Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979). In this case, Aloha's interest in discovering the requested information must be balanced against the harm that would result from subjecting non-testifying Staff to subpoenas.

31. In Sugarmill Woods Civic Association v. Southern States Utilities, Inc., 687 So. 2d 1346, 1350-51 (Fla. 1st DCA 1997), the appellants had attempted to depose a large number of Staff members, in what the Staff argued was a fishing expedition. The prehearing officer quashed the subpoenas based on a public policy analysis that the appellants had not shown that

the depositions were needed. The First DCA disagreed with the arguments raised by the appellants that the prehearing officer had erred when she quashed the subpoenas because it was impossible to reach the conclusion that the discovery was irrelevant before the questions had been asked. The First DCA found that "[t]he prehearing officer had the discretion to weigh the competing interests of the parties." Id. at 1351. In its discussion of the prehearing officer's order, the Court concluded:

> The motion for protective order which was filed below asserted that this broad discovery request was a "fishing expedition." A trial court has authority to prevent discovery which it believes is a mere fishing expedition calculated for harassment. Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So. 2d 852, 855 (Fla. 1st DCA 1993. "It is impossible to establish rules for every possible sequence of events and types of violations that may ensue in the discovery process." Mercer v. Raine, 443 So. 2d 944, 946 (Fla. 1983). Therefore, such decisions regarding discovery are true discretionary acts, and the appellate court must defer to the superior vantage point of the trial judge who has seen the parties first-hand and is more fully informed regarding the case.

32. The prehearing officer in this case has the discretion to weigh the competing interests of the parties and determine that the depositions of the Staff members are not necessary. Staff requests that the prehearing officer consider the public policy considerations and quash the subpoenas and enter an order protecting Staff from further notices of deposition.

33. Subjecting such Staff members to subpoenas would have a chilling effect upon Staff's advisory role, which would profoundly affect the administrative deliberative process. No longer would Staff be able to consider and develop any opinion or position, however politically popular or unpopular, without the specter of being subjected to an adversarial inquisition.

34. In addition, and even more troubling in its implications, is that because Staff who testify can no longer participate in the deliberative process, by targeting specific supervisory Staff as Aloha has done here, any party could effectively hamstring management's guidance, oversight, and review of Staff's ultimate recommendation in this or any other proceeding. Aloha's attempt to depose these Staff members should be stopped because Aloha has made no showing that it would lead to relevant admissible evidence. Moreover, public policy dictates that these Staff members should not be deposed.

IV. INVASION OF THE DELIBERATIVE PROCESS

35. Even if Aloha could make some showing of relevancy, the subpoenas should still be quashed and the Staff protected from taking depositions if compliance will result in an undue invasion of the deliberative governmental process of the Commission. While Florida law does not specifically confer or reject a deliberative process privilege, at least one Florida appellate court has acknowledged such a privilege. Girardeau v. State, 403 So. 2d 513, 516 (Fla. 1st DCA 1981). Although the court rejected the claim in that case, which was in the context of a criminal investigation, it said that "[t]here is every reason to believe that all due deference will and should be extended by the judicial branch to any properly asserted claim of legislative privilege, and it is imperative that it be kept in mind that such claims of privilege are supported by substantial authority."

36. Although Florida law is relatively silent on the subject of the deliberative process privilege, federal case law expressly addresses and refines it. (See U. S. v. Morgan, 313 U. S. 409 (1941) and subsequent Morgan cases).

37. Where states have discovery rules similar to the Federal Rules of Civil Procedure, courts in those states generally look for guidance in interpreting those rules to federal court interpretations. Madison v. Travelers Ins. Co. 308 So. 2d 784 (La. 1975); American Discount Corp. v. Saratoga West, Inc., 81 Wash. 2d 34, 499 P. 2d 869 (1972), later app. on another point, 13 Wash. App. 890, 537 P. 2d 1056, rev. den., 86 Wash. 2d 1006 (1975) (holding that when a state rule and its federal counterpart are substantially the same, courts should look to decisions interpreting the federal rules for guidance).

38. Rule 1.280, Florida Rules of Civil Procedure, is substantially similar to Rule 26 (c), Federal Rules of Civil Procedure, and Florida courts should, therefore, look to federal case law for guidance regarding the deliberative process privilege in Florida.

39. The deliberative process 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). Where a court strikes the balance depends upon the circumstances of the particular case, and the trial court has broad discretion in limiting discovery to reflect the particular needs of the parties. Dowd v. Calabrese, 101 F.R.D. 427, 431 (1984). "Among the factors to be considered when the balance is struck are the relevance of the document, alternative means of proof, and the presence of allegations of governmental misconduct." Id.

40. As discussed above, the testimony that Aloha presumably wishes to elicit is neither relevant nor necessary to the proceeding or to Aloha's case. Aloha has had, and continues to have, ample opportunity to prepare and present its case without compelled Staff

testimony, through both its own direct testimony, the cross-examination of other parties' witnesses, rebuttal testimony, and through post-hearing statements and briefs. Moreover, there has been no allegation of governmental misconduct in this proceeding.

41. The purely deliberative processes of government are traditionally protected against disclosure. Ernest and Mary Hayward Weir Foundation v. U. S., 508 F. 2d 894 (2d Cir. 1974). Factual matters are discoverable from agency heads only to the extent they do not invade good faith, decision-making prerogatives, Standard Packaging Corp. v. Curwood, Inc., 365 F. Supp. 134 (N. D. Ill. 1973); and heads of government agencies are not normally subject to depositions. Kyle Engineering Co. v. Kleppe, 600 F. 2d 226 (9th Cir. 1979). See also United States Department of Energy v. Brett, 659 F. 2d 154 (Temporary Emergency Court of Appeals in 1981), where the court held that the claim of deliberative process privilege may be asserted by one other than the agency head. In Community Federal Savings and Loan v. Federal Home Loan Bank, 96 F.R.D. 619 (1983), where a savings and loan association sought the deposition of a member of the Federal Home Loan Bank Board, the court reviewed the privilege against inquiries into the thought processes of administrative decision-makers. It rearticulated the principle that the privilege would protect the decision making processes of an agency head unless some allegation of governmental misconduct could be clearly shown.

42. Staff's participation in a proceeding from the initial discovery stages through its final recommendation is an integral part of the full deliberative process through which all cases proceed and, as such, is entitled to the full decisional process privilege. Aloha's subpoenas of Staff, and notices of deposition, appear to be nothing more than an attempt to annoy, harass, or

somehow discredit Staff for taking preliminary positions that are different than those espoused by Aloha. This is an impermissible and inappropriate intrusion into the deliberative process, and will most certainly cause Staff an undue burden by undermining Staff's ability to advise the Commission in these proceedings, and would be an invasion of the deliberative process of the Commission. Further, as noted above, allowing Aloha to compel Staff testimony would most likely result in a chilling effect on the effective functioning of Staff's advisory role. Staff members would be hesitant to take any preliminary positions for fear that such a statement of their professional judgment in their advisory role, however unpopular, would subject them to an adversarial inquisition.

43. In explicating the nature of the deliberative process privilege, the court, in Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 326 (D.PC. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir.) cert. denied, 389 U. S. 952 (1967), stated:

> The judiciary, the courts declare, is not authorized to probe the mental processes of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, the matters considered, the contributing influences, or the role played by the work of others—results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision – indeed "[s]uch an examination of a judge would be destructive of judicial responsibility" – and by the same token the integrity of the administrative process must be equally respected.

44. The Staff in this case is functioning in its advisory role. It is wholly inappropriate to demand examination of the opinions of the Staff when it is in this role, whether in the beginning, the middle, or the end of a proceeding. Discovery on Staff in this instance is like discovery on a judge's staff. A member of a judge's staff cannot be questioned about how he

developed a draft opinion for a judge. In Re Certain complaints Under Investigation by an Investigating Commission on the Judicial Council of the Eleventh Circuit, 783 F. 2d 1488 (11th Cir. 1986). Any inquiries into non-testifying Staff's opinions or analysis of the issues or the evidence in this case would invade the deliberative process and impair Staff's ability to fully and candidly perform its analyses and make appropriate recommendations. Such examination would consequently impair the deliberative process of the Commission itself. See Standard Packing Corp.

45. The Court, in Community Federal Sav. and Loan Assoc. v. Federal Home Loan Bank Bd., 96 F.R.D. 619, 621 (1983), found the policy reasons for the privilege to be obvious:

> Not only must the integrity of the administrative process be protected, but public policy requires that the time and energies of public officials be conserved for the public's business to as great an extent as may be consistent with the ends of justice in particular cases. Considering the volume of litigation to which the government is a party, a failure to place reasonable limits upon private litigants' access to responsible governmental officials as sources of routine pretrial discovery would result in a severe disruption of the government's primary function.

46. Pursuant to Section 120.66(1), Florida Statutes, and Rule 25-22.033(5), Florida Administrative Code, Staff members who testify in a proceeding are subsequently prohibited from discussing the merits of the case with any Commissioner during the pendency of the case, from participating in the analysis of the record, from the compilation of the Staff recommendation in the proceeding, and from speaking at the agenda conference. If Aloha is successful in compelling Staff members to testify at hearing, those Staff will be unable to participate in the Commission's critical post-hearing deliberative process.

47. The Florida Supreme Court has recognized the important role played by Staff in the Commission's decision making process. In Occidental Chemical Company v. Mayo, 351 So. 2d 336, 342 fn. 10 (Fla. 1977), overruled on other grounds, the Court noted that the Commission is not "obliged to avoid their Staff during the evaluation and consideration stages of their deliberations. Were this so, the value of Staff expertise would be lost and the intelligent use of employees crippled." Staff is unaware of whether Aloha intends to subpoena these Staff members for their testimony at the hearing, but there is a real likelihood of that occurring. However, even if Aloha deposes these Staff members, but does not call them as a witness at the hearing, that would have a chilling effect upon Staff's ability to prepare for hearing, develop the record, and advise the Commission in this docket.

48. If parties are allowed to subpoena non-testifying Staff members, any party could eviscerate Staff's ability to execute its advisory function by excluding those Staff members from further participation in the analysis and preparation of the Staff recommendation. Such an action is contrary to common sense and reason.

49. The Staff members that are subject to the subpoenas and notice of depositions have not filed testimony in this case and are not witnesses in these proceedings. Staff believes that no appropriate grounds can be advanced to allow Aloha to depose these Staff members. Any inquiry into their mental impressions or analysis of information about the docket subject matter would be an improper invasion into the Commission's deliberative process.

50. While Staff will continue to be concerned with attempts to depose Staff members in dockets to which they are assigned, Staff is even more greatly concerned about the effect of

allowing parties to depose supervisors and an attorney. Parties with ulterior motives could effectively remove the division's management from a docket by the ploy of submitting them to deposition and cripple the Commission.

51. Staff does not mean to suggest by this Motion that it is not accountable for its actions. However, when an agency has issued an order, the order represents the decision of the agency and speaks for itself. It would be inappropriate to delve into Staff's interpretations, intentions, and thought processes concerning an order already issued.

52. Staff is particularly concerned about the chilling effect that would result if Staff members must operate with the prospect that at any time they could be subpoenaed and asked to explain their participation in a docket and their understandings of Commission interpretations and practices. Staff members would likely hesitate to take useful preliminary positions out of a fear that, in exercising their advisory role, their professional judgment would cause them to be subject to an adversarial inquisition. Inquiry into Staff's opinion or analysis, whether on a pending docket or a decision already made invades and inhibits the deliberative process.

53. The Florida Supreme Court, in South Florida Natural Gas v. Florida Public Service Commission, 534 So. 2d 695 (Fla. 1988), has recognized the role of Staff in administrative proceedings. The court stated:

> We find that the Commission is clearly authorized to utilize its staff to test the validity, credibility and competence of the evidence presented in support of an increase. Without its staff, it would be impossible for the Commission to "investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service."

Staff's ability to evaluate the evidence and investigate the issues on behalf of the Commission would be irreparably impaired if Aloha were allowed to depose these five staff members, and possibly remove them from participating in the deliberative process subsequent to the hearing.

54. Aloha's inquiry into staff management's knowledge, opinion or analysis would invade the Commission's deliberative process. The Commission has broad discretion in limiting discovery to reflect the particular needs of the parties. The Commission may consider, inter alia, the relevance of the discovery sought, alternative means of proof, and the existence of governmental misconduct. There is no indication of governmental misconduct.

55. Aloha has had, and continues to have, ample opportunity to prepare and present its case without compelled staff testimony, through its own direct testimony, the obtaining of discovery of non-staff, the cross-examination of other parties' witnesses at formal hearing, the filing of rebuttal testimony, and post-hearing statements and briefs.

56. The subpoenas must, therefore, be quashed and Staff should be protected from any further harassment, annoyance, or oppression from subpoenas or notices of deposition in this proceeding.

V. WORK PRODUCT DOCTRINE AND ATTORNEY CLIENT PRIVILEGE

57. Staff also raises the following additional arguments in support of quashing the subpoena of Ms. Gervasi's and entering a protective order on her behalf because a deposition would necessarily require that Ms. Gervasi disclose information that is protected by the work-product doctrine and the attorney-client privilege.

58. Ms. Gervasi's sole participation in this case has been as an attorney advising the Commission in Docket No. 020896-WS, and for limited purposes in Docket No. 010503-WU. While Ms. Gervasi did draft the Consummating Order, she has not filed testimony in Docket No. 010503-WU.

59. The decision in Shelton v. American Motors Corp, 805 F.2d 1323 (8th Cir. 1986), is instructive here. This case dealt with a strict liability claim against an automobile manufacturer for a product defect. The Shelton plaintiff sought to depose corporate in-house counsel for the automobile manufacturer. The plaintiff wanted corporate counsel to testify as to whether the manufacturer possessed documents showing the results of rollover tests and accidents involving similar vehicles.

60. The corporate in-house counsel for the automobile manufacturer had selected and reviewed documents during the course of preparing her defense for the case in which she was called to testify. The Court of Appeals held that in order to respond to the question of what she knew about the tests, the attorney would have to disclose her mental process of choosing certain documents from the mass of company documents. Therefore, the court ruled that the deposition of counsel would not be permitted.

61. The Shelton court held that where the deponent is opposing counsel and that counsel has engaged in the selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product.

62. Moreover, the Shelton court viewed the "increasing practice of taking opposing counsel's deposition as a negative development in the area of litigation, and one that should be employed only in limited circumstances...[T]he 'chilling effect' that such practice will have on the truthful communications from the client to the attorney is obvious." 850 F.2d at 1327.

63. Similar to this case, the Shelton court stated "in house counsel in this case had nothing to do with this law suit except to represent her client." 805 F.2d at 1330.

64. The Shelton court further opined that:

> Undoubtedly, counsel's task in preparing for trial would be much easier if he could dispense with interrogatories, document requests, and deposition of lay persons, and simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy. The practice of forcing trial counsel to testify as a witness, however, has long been discouraged, see Hickman v. Taylor, 329 U.S. 495, 513, 67 S.Ct. 385, 394 (1947)...(Jackson, J., concurring) (Discovery was hardly intended to enable a learned profession to perform its functions...on wits borrowed from the adversary.)

Id. At 1327. The court concluded that counsel's testimony would be "tantamount to requiring her to reveal her legal theories and opinions concerning that issue." Id. at 1328.

65. In Southern Bell v. Deason, 632 So. 2d 1377 (Fla. 1994), the Supreme Court of Florida reiterated the standards for applying the work product doctrine and the attorney-client privilege in Florida. The Deason case provides a definitive recitation of the legal status these privileges enjoy. Deason, however, did not address the propriety of taking deposition testimony from opposing counsel. Deason does instruct, however, that in some instances of "undue hardship," production of "fact work product" is justifiable. Nevertheless, the Court further held: "Whereas fact work product is subject to discovery upon a showing of 'need' or 'undue

hardship,' opinion work product generally remains protected from disclosure." 632 at 1384 (citing Upjohn Co. v. United States, 449 U. S. 383 (1981).

66. Similar to the rationale of Shelton, the court in Deason determined:

> ... one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.

632 So.2d, at 1384 (citing Dodson v. Persell, 390 So. 2d 704, 708 (Fla. 1980).

67. Although Aloha may contend that it will suffer "undue hardship" without Ms. Gervasi's deposition. This is nothing more than a red herring. This position is meritless not only because there is no "undue hardship," but also because Ms. Gervasi's testimony would consist only of "opinion work product" and communications protected by the attorney-client privilege. The "undue hardship" standard is a factor when trying to discover "fact" work product, but undue hardship is irrelevant when trying to discover "opinion" work product and communications protected by the attorney-client privilege.

68. To the extent that Aloha seeks information that Ms. Gervasi obtained from talking to Staff, such information is also protected by the attorney-client privilege.

69. Deason held that statements made in interviews by Southern Bell employees to Southern Bell's **counsel, were subject to the attorney-client privilege.** Moreover, even the summaries of such interviews were protected as work product. 632 So. 2d at 1384.

70. The United States Supreme Court reached the same conclusion in Upjohn Co. v. United States, 449 U. S. 383 (1981). In Upjohn, Upjohn's general counsel had conducted an internal investigation of questionable payments to foreign officials. The IRS later tried to obtain

the questionnaires, memoranda and notes of the interviews conducted by the attorney. The Supreme Court held, however, that the attorney-client privilege protected the employees' communications from disclosure.

71. Based on the foregoing authorities, counsel for Aloha has no right to discover the mental impressions of Ms. Gervasi.

72. Moreover, Staff states that Aloha has failed to demonstrate the necessity of deposing Ms. Gervasi. See West Peninsular Title Company v. Palm Beach County, 132 F.R.D. 301 (S. D. Fla. 1990) (the party seeking the deposition of opposing counsel must demonstrate the necessity of the deposition), citing Shelton and In re Arthur Treacher's Franchise Litigation, 92 F.R.D. 429 (E. D. Pa. 1981).

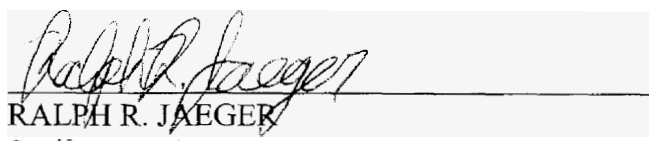
73. As emphasized by the Shelton court, deposing opposing counsel is disruptive, results in increased costs and delays, and interferes with the attorney-client relationship. Shelton at 1327. It should, therefore, only be employed in limited circumstances where it is shown that

> (1) no other means exist to obtain the information than to depose opposing counsel...(2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case.

Id. at 1327; citing Fireman's Fund Insurance Co. v. Superior Court, 140 Cal. Rpter. 677, 679; 72 Cal. App. 3d 786 (1977). Aloha has failed to sufficiently demonstrate that these circumstances exist in this case.

74. For these additional reasons, the subpoena of Ms. Gervasi should be quashed and a protective order entered protecting her from further notices of deposition in this case.

WHEREFORE, the Staff of the Florida Public Service Commission requests that the Prehearing Officer issue an order quashing Aloha's subpoenas directed to Marshall Willis, Patti Daniel, Connie Kummer, Tom Walden, and Rosanne Gervasi, and protecting Staff from the harassment, annoyance, or oppression from the notices of deposition and any further notices of deposition in this proceeding, and excusing Staff from being deposed, for the reasons set forth above.



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BEFORE THE PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.	DOCKET NO. 010503-WU DATED: FEBRUARY 17, 2005

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the MOTION TO QUASH SUBPOENAS AND FOR A PROTECTIVE ORDER on behalf of the identified Commission Staff has been furnished to F. Marshall Deterding/John L. Wharton, Rose Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Fl. 32301 by e-mail this 17th day of February, 2005, and by U.S. Mail to the following:

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Charles Beck
c/o The Florida Legislature
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Tallahassee, FL 32399-1400

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Honorable Mike Fasano
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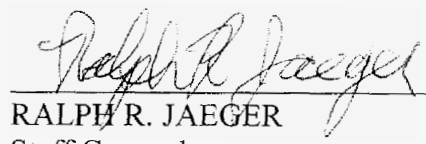

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