

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 ORDER NO. PSC-05-0231-CFO-WU ISSUED: March 1, 2005
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ORDER DENYING ALOHA UTILITIES, INC.'S REQUEST FOR ORAL ARGUMENT AND
GRANTING COMMISSION STAFF'S MOTION TO QUASH SUBPOENAS AND FOR A
PROTECTIVE ORDER

On February 15, 2005, Aloha Utilities, Inc. (Aloha or utility) filed its Notice of Taking Depositions of Commission staff members Rosanne Gervasi, Patti Daniel, Tom Walden, Marshall Willis, and Connie Kummer. On February 16, 2005, Aloha served subpoenas for each of the above-noted staff members by facsimile to staff counsel. On February 17, 2005, Commission staff filed its Motion to Quash Subpoenas and for a Protective Order. On February 24, 2005, Aloha timely filed its Request for Oral Argument and Response to Staff's Motion to Quash Subpoenas and for Protective Order.

Aloha's Request for Oral Argument

In support of its Request for Oral Argument, Aloha states that oral argument would "help clarify the issues, insure that the Prehearing Officer or the Commission Panel will be fully informed on the same, and allow the parties to further express their various concerns or comments." Aloha further states that "[i]t is in the interest of the company, the Commission, the customers and the public at large that a proceeding such as this be conducted consistent with the Florida Administrative Procedure Act and that Aloha be afforded due process of law at all times herein."

Having considered Aloha's request, I find that the utility's arguments are adequately contained within its response. Oral argument is, thus, unnecessary, and Aloha's Request for Oral Argument is hereby denied.

Staff's Motion to Quash Subpoenas and for a Protective Order

Staff states that the subpoenas directed to Marshall Willis, Rosanne Gervasi, Patti Daniel, Connie Kummer, and Tom Walden should be quashed and an order should be entered to protect these staff persons from harassment, annoyance, and oppression. Ms. Gervasi is a Commission attorney, Ms. Daniel, Mr. Willis, and Ms. Kummer are Commission supervisors, and Mr. Walden is a Commission engineer. Staff states that these staff members are not providing testimony in this proceeding, but instead have oversight duties in this docket, including: supervising the filing of testimony and other documents; consulting with staff counsel; developing staff's position on issues; developing the record; drafting discovery inquiries; preparing for the hearing; drafting staff's recommendation following the hearing; and

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participating at the agenda conference where the Commission will make its ultimate decision on the issues.

Neither the Notice of Depositions nor the subpoenas state the specific subject area that Aloha wishes to cover in the depositions. Staff states, however, that in discussions with Aloha's attorneys, staff counsel learned that Aloha intends to question the staff members on a staff recommendation that the Commission considered when it voted at its June 29, 2004, agenda conference to issue Order No. PSC-04-0712-PAA-WS (PAA Order). The PAA Order modified the 98% removal standard for hydrogen sulfide and adopted the Tampa Bay Water standard. Staff states that Aloha also intends to question these staff about their mental impressions or thoughts regarding the recommendation.

Staff asserts that the subject of this proceeding is to resolve the protest of the PAA Order issued by the Commission, not to determine staff's intent when making a recommendation to the Commission. Staff further states that "[t]he Commission's PAA Order, the customers' protest, and the Consummating Order are self explanatory." Staff contends that the prehearing officer will establish the issues in this case, the Commission will hear the evidence at the scheduled hearing, and that this matter will be determined based solely on the record from the hearing. Staff states that the mental impressions or thought processes of the staff members regarding their recommendation to the Commission on the modification of the standard for hydrogen sulfide is irrelevant to this case or to any of the issues identified in this proceeding.

Staff states that Aloha appears to be on a "fishing expedition" in an attempt to modify the protested issues clarified in Order No. PSC-04-0831-CO-WS (Consummating Order). Citing Sugarmill Woods Civic Association v. Southern States Utilities, 687 So. 2d 1346, 1350-51 (Fla. 1st DCA 1997), staff states that the prehearing officer has the discretion to weigh the competing interests of the parties and has the authority to prevent discovery which he finds is a mere fishing expedition calculated for harassment.

Staff also asserts that allowing the depositions would interfere with the deliberative governmental process of the Commission. Staff states that, although Florida law does not specifically confer or reject a deliberative process privilege, the court in Girardeau v. State, 403 So. 2d 513, 516 (Fla. 1st DCA 1981), acknowledged such a privilege. Staff states that federal case law addresses such a privilege and that, since Rule 1.280, Florida Rules of Civil Procedure, is substantially similar to Rule 26(c), Federal Rules of Civil Procedure, Florida courts should look to federal case law for guidance regarding the deliberative process privilege in Florida.

Staff states that the staff members to which the subpoena is directed are functioning as advisors to the Commission in this case. Staff likens the discovery in this instance to discovery directed toward a judge's staff. Citing 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), staff contends that a judge's staff cannot be questioned about how a draft opinion was developed for a judge.

Staff also points out that, 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; participating in the analysis of the record; making recommendations to the Commission; and addressing the Commission at the agenda conference. Staff asserts that “[i]f 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.” Staff further states that forcing non-testifying staff to submit to depositions could allow any party to “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.” Staff points out that the Florida Supreme Court, in South Florida Natural Gas v. Public Service Commission, 534 So. 2d 695, 697-698 (Fla. 1988), recognized that it would be impossible for the Commission to function without its staff testing the validity, credibility, and competence of evidence presented in administrative hearings.

Staff asserts that allowing the deposition might have a chilling effect on staff members. Staff reasons that staff members would likely hesitate to take useful preliminary positions out of fear that providing a professional opinion in their role as advisors to the Commission would subject them to adversarial questioning.

In addition to the above arguments, staff states that forcing Ms. Gervasi, a Commission staff attorney, to submit to a deposition would require Ms. Gervasi to disclose information that is protected by the work product doctrine and attorney-client privilege. Citing Shelton v. American Motors Corp, 805 F.2d 1323 (8th Cir. 1986), staff states that the practice of forcing trial counsel to testify is discouraged. Also, citing Southern Bell v. Deason, 632 So. 2d 1377 (Fla. 1994), staff states that Aloha must show that it will suffer undue hardship if Ms. Gervasi does not submit to the deposition, which staff contends the utility will be unable to show as Ms. Gervasi’s testimony would only consist of opinion work product and communications protected by the attorney-client privilege.

Aloha’s Response

In its Response to Commission staff’s Motion to Quash Subpoenas and for Protective Order, Aloha states that it supports the Commission’s PAA Order. It contends that it is the petitioners who have placed the Commission and its staff in an adversarial position. The utility states that it wishes to depose staff in an attempt to defend and support the PAA Order, which Aloha claims the staff has declined to do.

Aloha asserts that staff’s relevancy arguments are premature. It states that staff does not know what questions Aloha intends to ask at the depositions and, thus, cannot know if the information is relevant or necessary.

While Aloha agrees that staff is not a real party in interest in this proceeding, the utility states that “the Commission is a real party in interest as it is the Commission’s action which is

being challenged in this proceeding.” It states that, through the depositions, it seeks to ensure that the record in this proceeding supports the PAA Order.

The utility states that it does not challenge the Commission’s authority to use its staff. It further states, however, that Aloha “has the absolute right to know what the staff considered and to test the reliability of those facts.” Aloha contends that the depositions will not impair these staff persons from reviewing the evidence, investigating, and making recommendations to the Commission. It asserts that “[i]f staff is exempt from deposition, a party’s only recourse would be to depose the Commissioners themselves.”

Aloha states that staff’s suggestion that the utility’s attempt to take the depositions are just a means to annoy, harass, or prevent staff from taking preliminary positions contrary to Aloha shows a “fundamental misunderstanding of the issues in this case.” The utility states that “[s]taff’s position, as accepted by the Commission and reflected in the Proposed Agency Action, is the position espoused by Aloha.” It rejects staff’s comparison of itself to a judge’s staff, stating that if this is the case, staff should stop writing letters to parties, participating in depositions, propounding discovery, engaging in cross-examination, and filing motions. Aloha further states that it disagrees with staff’s assertion that “the so-called ‘deliberative process’ is more important than Aloha’s due process rights.”

Aloha contends that, while staff states that its role is to develop an adequate record, it “paradoxically reserves solely unto itself the decision whether and to what extent it will contribute to that ‘adequate record.’” It asserts that staff has offered no testimony or exhibits to support the PAA Order. The utility states that staff members who investigate the merits of the case and put together a recommendation have facts which are relevant to this proceeding, have expertise to offer expert opinions about the matters that are implicated in the PAA Order, and can “opine and explain why the Commission has a certain ‘established practice’ referenced in its Order.”

Aloha disagrees that the PAA Order speaks for itself. It asserts that the PAA Order is just “words and paper” and that it is necessary to elicit testimony in order to develop the record so that the Commission can make an informed decision. The utility states that the PAA Order “does not speak for itself in the sense that it conclusively proves the issues therein.”

As for the deposition of Commission attorney Gervasi, Aloha states that it represented to staff counsel that it would be willing to delay the deposition to determine if the information can be obtained from other witnesses. The utility states that it wants a staff witness to testify on “the Commission’s ‘established practice,’ its origins, its reasons, and its basis, and that person can at least confirm its prior existence.” It contends that it would be unlawful and improper for the Commission to comment on its “established practice” in its Final Order without allowing discovery, testimony, or cross-examination on the matter.

Aloha states that it is not seeking to learn about the staff’s deliberative process through the depositions. It states that it seeks facts which are relevant to this proceeding and which will help develop an adequate record and ensure that the “Commission has the quantity and quality of

information necessary to make a well reasoned, sound, informed decision.” The utility states that, if a particular Commission staff member qualifies as an expert witness and has an opinion relevant to the development of an adequate record, the utility wishes to discover that opinion and use it “in the ways that litigants use such information as they engage in quasi-judicial proceedings every day at the Division of Administrative Hearings.” It contends that the Commission’s procedure of holding its own hearings and requiring prefiled testimony “provides no justification or basis under the Administrative Procedure Act for skewed results, unique procedures, or situationally applied doctrines and privileges.”

Findings and Conclusion

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, Rule 1.280(c), Florida Administrative Procedure, allows for the issuance of a protective order barring or limiting discovery in order to protect a party from “annoyance, embarrassment, oppression, and undue burden or expense that justice requires” In determining whether a motion for protective order should be granted, a litigant’s right to pursue full discovery must be balanced with the deponent’s right to protection against oppressive disclosure. Sugarmill Woods Civic Association, 687 So. 2d at 1350-51; Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3rd DCA 1979).

Aloha indicates that the discovery is necessary to determine what facts staff considered when making its recommendation to the Commission and to test the reliability of those facts. Specifically, Aloha indicates it wishes to question the staff members on the “established practice” referenced in the PAA Order. Staff, on the other hand, indicates that the information Aloha wishes to elicit from these staff members is irrelevant and that forcing these non-testifying staff to be deposed would bar them from advising the Commission in this proceeding.

I am not persuaded that the discovery that Aloha wishes to engage in will lead to evidence that is relevant to the subject matter of the pending action. The PAA Order and the Consummating Order speak for the Commission. The Commission, not its staff, determines the meaning and intent its orders. Thus, the information staff considered when making its recommendation to the Commission has no bearing on this proceeding.

Aloha’s response states that, not only does it intend to depose these staff witnesses, it also implies that it intends to call these witnesses to testify at the hearing. These staff members would then be barred from advising the Commission in this proceeding, pursuant to section 120.66(1) and Rule 25-22.033(5). This would effectively remove five staff members from participating in this docket, which will impede the Commission from fulfilling its statutory duties. As staff points out, the Florida Supreme Court has recognized the important role that Commission staff plays in advising the Commission. See South Florida Natural Gas, 534 So. 2d at 697-698.


Weighing the public policy considerations of forcing non-testifying staff members to be deposed, along with the expense and burden that the depositions will create, against the lack of relevant information that might be elicited from the depositions, the balance clearly falls toward protecting these staff members in this instance. Accordingly, I hereby grant staff's Motion to Quash Subpoenas and for a Protective Order.

It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Aloha Utilities, Inc.'s Request for Oral Argument is hereby denied. It is further

ORDERED that Commission staff's Motion to Quash Subpoenas and for a Protective Order is hereby granted.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this
1st day of March, 2005



RUDOLPH "RUDY" BRADLEY
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; or (2) judicial review by the Florida Supreme Court, in

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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 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.