

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for authority to transfer assets and Certificate Nos. 517-W and 450-S of Service Management Systems, Inc. to Aquarina Utilities, Inc., in Brevard County.

DOCKET NO. 110061-WS
ORDER NO. PSC-12-0411-PCO-WS
ISSUED: August 13, 2012

ORDER DENYING MOTION TO
COMPEL DISCOVERY

On February 28, 2011, Aquarina Utilities, Inc. (Aquarina or AUI) filed its notice of transfer of utility assets and certificates from Service Management Systems, Inc. (SMS) to Aquarina. James I. Minnes, Esquire, representing himself, filed a timely Notice of Objection on March 23, 2011, a Petition for Formal Hearing on April 26, 2011, and a Request for Production of Documents on September 12, 2011.¹ In that Request for Production of Documents, among other things, Mr. Minnes requested that Aquarina produce the document recently provided by Aquarina to the Office of Public Counsel (OPC), for which a Motion for Temporary Protective Order, dated July 13, 2011, was filed, i.e., the personal financial statements of Reginald and Lois Burge dated July 1, 2011. On September 22, 2011, Aquarina responded that it would produce all documents except that it objected to this specific request for the personal financial statements.

On October 14, 2011, Mr. Minnes filed his first Motion to Compel Aquarina to produce all documents requested. On October 18, 2011, Aquarina filed its Response in opposition to Mr. Minnes' Motion to Compel. On October 24, 2011, Mr. Minnes filed his reply to Aquarina's Response, and on October 31, 2011, Aquarina moved to strike this response. No action was taken on this first Motion to Compel.

Subsequently, the matter was set for formal hearing on September 25 and 26, 2012. An Order Establishing Procedure was issued on April 13, 2012. Pursuant to that Order, Aquarina was required to prefile testimony and exhibits on May 4, 2012, and Mr. Minnes was required to prefile his testimony and exhibits on July 20, 2012.

Aquarina timely filed its testimony and exhibits on May 4, 2012. However, Mr. Minnes filed a second Motion to Compel on June 27, 2012. This second Motion to Compel reiterated the request that Aquarina be compelled to produce the joint financial statement of Lois and Reginald Burge which was the subject of the first Motion to Compel. On July 2, 2012, Aquarina filed its Response in opposition to James Minnes' Motion to Compel Discovery (Second Motion to Compel). Also, on July 5, 2012, Aquarina moved to strike the Reply of Mr. Minnes to

¹ The Aquarina Community Services Association, Inc. (ACSA) filed its objection on March 31, 2011, and an Amended Notice of Objection and Request for Hearing on April 26, 2011. However, it withdrew its Objection and Request for Hearing on August 5, 2011.

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Aquarina's Response.² Replies to responses are not contemplated under Commission rules and the replies will not be considered here.

Second Motion to Compel

In his second Motion to Compel, Mr. Minnes requests that Aquarina be made to produce the personal financial statement of Reginald Burge. In support of this request, Mr. Minnes states that he relies upon Rule 25-30.037(2)(k), Florida Administrative Code (F.A.C.), and that Aquarina had advised Commission staff in response to staff's second deficiency letter that Reginald Burge holds 100 percent ownership of Aquarina and would provide 100 percent of the financing for Aquarina. Mr. Minnes further noted that Aquarina had specifically stated that it would provide the personal financial statements of the majority shareholders of the buyer upon request. Mr. Minnes concludes that no testimony or exhibits or meaningful discovery can be conducted absent the production of said personal financial statement. Mr. Minnes concludes that he "shall keep the personal financial statement confidential and sign a confidentiality agreement, if required."

Aquarina's Response to Second Motion to Compel

Aquarina responded that Mr. Minnes seeks to obtain the personal financial statement of Reginald and Lois Burge, even though only Mr. Burge owns stock of Aquarina. Aquarina further notes that such financial statement was provided to OPC (and Commission Staff) under confidentiality provisions. After OPC's review of such statement, Aquarina notes that OPC returned the statement concluding that:

our office does not believe staff would recommend or the Commission would vote to deny this application because of the applicant's failure to have the financial ability or utility experience to provide service, and to fulfill the commitments, obligations and representation of the Seller with regard to utility matters.

Aquarina states that it does not intend to rely upon the financial statement of Reginald and/or Lois Burge in this proceeding, and argues that its (Aquarina's) operation of this utility is "sufficient independent basis for this Commission to conclude that AUI has the financial ability to operate the systems in question." Because Aquarina is not relying on the financial statement of Reginald and Lois Burge, Aquarina argues that the financial statement has no relevance. Further, Aquarina is not mollified by Mr. Minnes' statement that he would keep the document confidential because there would appear to be no adverse consequences to Mr. Minnes if he were to breach the confidentiality agreement. Aquarina also argues that to require disclosure would violate "the Burge's right to privacy under Article I, Section 23 of the Florida Constitution."

Aquarina notes that Mr. Minnes was the driving force in creating the Aquarina Utility Association, Inc., an entity which competed with Aquarina for purchase of the utility systems, and that Mr. Minnes' actions continuing to pursue this protest is solely in furtherance of his

² The Commission did not receive Mr. Minnes' Reply until July 26, 2012.

threat to make the transfer costly. Aquarina concludes that there is no rational basis for Mr. Minnes to pursue this protest as the Commission has on three previous occasions found that Mr. Burge has the financial ability to operate a utility.

Ruling on Minnes' Motion to Compel

Rule 25-30.037(2)(j), F.A.C., requires:

A statement indicating how the transfer is in the public interest, including a summary of the buyer's experience in the water or wastewater utility operations, a showing of the buyer's financial ability to provide service, and a statement that the buyer will fulfill the commitments, obligations and representations of the seller with regard to utility matters.

Rule 25-30.037(2)(j), F.A.C., requires the applicant in a transfer application to show how the buyer has the financial ability to provide service. The applicant in this case is Aquarina Utilities, Inc. (Aquarina), and not Reginald and Lois Burge. Further, the purchase of the assets of Service Management Systems, Inc., was a cash purchase for \$550,000, and Aquarina has been operating the system since early in 2011. During that time of operation, Aquarina has expended funds in excess of \$100,000 for repairs and improvements to the utility.

Under Rule 1.280, 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 . It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

In this case, the financial standing of Aquarina, the applicant is at issue – not that of Mr. and Mrs. Burge. Cash was paid for the utility assets, and Aquarina has already invested significant funds to make improvements to the utility. It is highly unlikely that discovery of the Burges' financial statements will lead to the discovery of admissible evidence at trial.

Based on all the above, I find the discovery question at issue is not reasonably calculated to lead to the discovery of admissible evidence. Because Aquarina is not relying on the Burges' financial statement, there is no need to go any further than the financial ability of the corporation. Mr. Minnes' second Motion to Compel Aquarina's response to his discovery request is denied.

Based upon the foregoing, it is

ORDERED by Commissioner Eduardo E. Balbis, as Prehearing Officer, that Mr. Minnes' second Motion to Compel is denied as set forth in the body of this Order.

By ORDER of Commissioner Eduardo E. Balbis, as Prehearing Officer, this 13th day of August, 2012.



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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.