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Public Service Commission

February 9, 1998

Division of Administrative Hearings
Clerk of the Court
1230 Apalachee Parkway
Tallahassee, Florida 32399

Re: Case No. 97-4990 - Mother's Kitchen Ltd. vs. Florida Public Utilities Company (FPSC Docket No. 970365-GU)

Dear Clerk:

Enclosed are the original and one copy of the Florida Public Service Commission's Objection to Florida Public Utilities Company's Notice of Taking Depositions and Amended Notice of Taking Depositions and Motion for Protective Order in the above case. Please date stamp the additional copy and return in the enclosed postage-paid envelope. Thank you.

Sincerely,

Wm. Cochran Keating, IV
Staff Counsel

- ACK _____
- AFA _____
- APP _____
- CAF _____ WCK:js
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- LIN _____
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FPSC-RECORDS/REPORTING

DOCUMENT NUMBER-DATE

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOTHER'S KITCHEN LTD.,)
)
 Petitioner,)
)
vs.)
)
)
FLORIDA PUBLIC UTILITIES)
COMPANY,)
)
 Respondent,)
)
and)
)
PUBLIC SERVICE COMMISSION,)
)
 Intervenor.)
_____)

Case No. 97-4990

THE FLORIDA PUBLIC SERVICE COMMISSION'S OBJECTION
TO FLORIDA PUBLIC UTILITIES COMPANY'S NOTICE OF TAKING
DEPOSITIONS AND AMENDED NOTICE OF TAKING DEPOSITIONS
AND MOTION FOR PROTECTIVE ORDER

The Florida Public Service Commission (Commission), pursuant to Rule 60Q-2.019, Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, by and through its undersigned attorney, hereby objects to Florida Public Utilities Company's Notice of Taking Depositions and Amended Notice of Taking Depositions of Wayne Makin, Dick Durbin, and John Plescow. The Commission requests that the Administrative Law Judge issue a protective order relieving Mssrs. Makin, Durbin, and Plescow from the undue burden of appearing for the noticed depositions. As grounds therefor, the Commission states:

1. On September 17, 1996, Mr. Anthony Brooks II, on behalf of Mother's Kitchen Ltd. (Mother's Kitchen) filed a complaint with the Commission's Division of Consumer Affairs against Florida Public Utilities Company (FPUC) concerning gas service to Mother's Kitchen Restaurant. By Proposed Agency Action Order No. PSC-97-1133-FOF-GU, issued September 29, 1997, the Commission found that FPUC acted in compliance with all applicable statutes and Commission rules concerning the complaint. On September 29, 1997, Mother's Kitchen timely filed a protest of the Commission's proposed agency action. The Commission referred this matter to the Division of Administrative Hearings (DOAH) to conduct a formal proceeding. The Commission was granted intervenor status in this proceeding on January 23, 1998.

2. On February 2, 1998, the Commission received service by hand delivery of FPUC's Notice of Taking Depositions of Commission staff members Wayne Makin, Dick Durbin, and John Plescow. On February 4, 1998, the Commission received service by facsimile of FPUC's Amended Notice of Taking Depositions of the same Commission staff members.

3. Pursuant to Rule 60Q-2.019, Florida Administrative Code, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. Rule 1.280(a), Fla.R.Civ.P., provides that parties may obtain discovery regarding any relevant matter, as long as the

information sought appears to be "reasonably calculated to lead to the discovery of admissible evidence." However, Rule 1.280(c), Fla.R.Civ.P., allows persons from whom discovery is sought to move for a protective order to protect them "from annoyance, embarrassment, oppression, or undue burden or expense"

4. The Commission objects to the depositions of Mssrs. Makin, Durbin, and Plescow, as noticed by FPUC, on the grounds (1) that these depositions will cause an undue burden on the Commission's staff by impinging upon its role as an advisor to the Commission, (2) that the Commission staff has no personal knowledge of, and is therefore not competent to testify concerning, the facts of this case, and (3) that Commission testimony concerning its analysis of this case would undermine the requirements of Chapter 120, Florida Statutes.

**FPUC'S DEPOSITIONS WILL RESULT IN UNDUCE BURDEN
ON THE COMMISSION'S STAFF**

5. Pursuant to Rule 25-22.026(4), Florida Administrative Code, in cases assigned to DOAH, the Commission staff's role is to represent the public interest and be neither in favor of or against either party. The Commission's staff is not a party in interest and has no substantial interests that may be affected by the proceeding. Rule 25-22.026(4), Florida Administrative Code; South Florida Natural Gas Co. v. Public Service Commission, 534 So.2d 695 (Fla. 1988).

6. One of the staff's primary functions is to provide legal and technical advice on matters pending before the Commission. The Commission uses its staff to "test the validity, credibility, and competence of the evidence presented." South Florida Natural Gas, at 698. Although this case will not be heard by the Commission, the Commission must issue the final order, and its staff must assist it in that responsibility.

7. Section 120.66(1), Florida Statutes, permits only advisory Commission staff members who do not testify on behalf of the Commission in a formal proceeding to communicate with Commissioners. Further, Rule 25-22.033(5), Florida Administrative Code, prohibits Commission staff members who testify in a case from discussing the merits of that case with any Commissioner during the pendency of that case. This prohibition extends to preparing the staff's post-hearing recommendation and participating at the agenda conference where the Commission considers its staff's post-hearing recommendation.

8. If FPUC is permitted to depose Messrs. Makin, Durbin, and Plescow, and those depositions are offered at hearing, those staff members would no longer be able to perform their advisory role in this proceeding because they would be excluded from further participation in analysis of the case and preparation of a post-hearing recommendation to the Commission. Such a result places an undue burden on the Commission's resources and its ability to

efficiently and effectively dispose of this case.

COMMISSION STAFF MEMBERS HAVE NO PERSONAL KNOWLEDGE
OF THE FACTS UNDERLYING THIS CASE

9. Mssrs. Makin, Durbin, and Plescow were assigned to Commission Docket No. 970365-GU concerning the complaint filed by Mother's Kitchen. These staff members investigated the complaint and advised the Commission in the proposed agency action proceeding underlying this formal proceeding. These staff members considered the parties' written correspondence, statements from informal conferences, and supporting documentation in their review of the complaint. Such a review was necessary, of course, because these staff members have no personal knowledge of the facts underlying the complaint. Therefore, any information elicited from Mssrs. Makin, Durbin and Plescow concerning the facts underlying this case, although arguably relevant to the issues at hand, would be limited to speculation and hearsay evidence.

COMMISSION STAFF MEMBERS' TESTIMONY CONCERNING ITS ANALYSIS
OF THIS CASE WOULD UNDERMINE CHAPTER 120, F.S., REQUIREMENTS

10. Mother's Kitchen's protest of the Commission's proposed agency action order established a de novo proceeding. Section 120.57(1)(i), Florida Statutes; Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 786-87 (Fla. 1st DCA 1981). The protest thus rendered the Commission's proposed agency action order and the underlying proceeding a nullity.

Consistent with the requirements of Chapter 120, Florida Statutes, the Commission must now limit its final order on the complaint to the record established in this formal proceeding. If FPUC is permitted to depose Messrs. Makin, Durbin, and Plescow concerning the facts or their analysis of this case and those depositions are offered at hearing, FPUC would effectively be permitted to undermine the de novo proceeding requirements of Chapter 120, Florida Statutes.

11. If FPUC is permitted to question Messrs. Makin, Durbin, and Plescow to elicit their opinions on the interpretation of Commission rules as they apply to this case, as FPUC may intend, the result is not different. The Commission staff is not a real party in interest in this proceeding; its role in this proceeding is to review the complete record before making its proposed recommended order to the administrative law judge and its recommendation to the Commission. If the Commission staff's preliminary opinions - necessarily based on their knowledge and analysis in the underlying proposed agency action proceeding - are permitted to be injected into this proceeding, the de novo hearing requirements of Chapter 120 would be undermined.

12. Further, Messrs. Makin, Durbin, and Plescow cannot testify as to how the Commission would interpret or apply any particular Commission rule to the facts of this case. The Commission's staff often makes recommendations to the Commission concerning the

application of its rules to particular facts. The Commission may adopt a staff recommendation as its own decision and memorialize that decision in an order. The Commission's final orders are the only evidence of the Commission's interpretation and application of its rules and are available to anyone as public records.

CONCLUSION

13. Decision makers have broad discretion in resolving discovery disputes and protecting against possible abuse of discovery procedures. See Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla. 1967). In deciding whether a protective order is appropriate in a particular case, courts must balance the competing interests that would be served by granting discovery or denying it. Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533, 535 (Fla. 1987).

14. In Order No. PSC-97-425-PCO-WS, issued April 11, 1994, the Commission stated:

[W]hen the interest in full disclosure to a discovery request conflicts with a competing interest in non-disclosure, the decision-maker must balance the competing interests. When the public policy considerations of allowing non-testifying staff members' depositions to go forward are weighed against the lack of relevance of any information that might be elicited thereby, ... the balance clearly falls toward protecting the integrity of the governmental process.

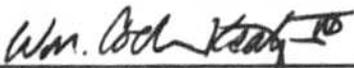
The Commission's decision was upheld in Sugarmill Woods Civic

Ass'n. Inc. v. Southern States Utilities, 687 So. 2d 1346 (Fla. 1st DCA 1997).

15. Considering (1) the undue burden that would result from these depositions, (2) the Commission staff's lack of personal knowledge concerning the facts of this case, (3) the requirements of Chapter 120, Florida Statutes, and (4) the availability of any Commission rule interpretation through the Commission's previous final orders, a balancing of the interests in this case should fall in favor of granting the Commission's motion.

WHEREFORE, the Florida Public Service Commission requests that the Administrative Law Judge issue a protective order relieving Wayne Makin, Dick Durbin, and John Plescow from the undue burden of appearing for deposition pursuant to Florida Public Utility Company's Notice of Taking Depositions and Amended Notice of Taking Depositions.

Respectfully submitted this 9th day of February, 1998.



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CERTIFICATE OF SERVICE

I hereby certify that one true and correct copy of the Florida Public Service Commission's Objection to Florida Public Utilities Company's Notice of Taking Depositions and Amended Notice of Taking Depositions and Motion for Protective Order has been furnished by Hand Delivery (*) or U.S. Mail this 9th day of February, 1998, to the following:

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Gatlin Schiefelbein & Cowdery
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 Robert V. Elias For

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