

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of utility
rates of Aloha Utilities, Inc.
In Pasco County.

DOCKET NO. 960545-WS
ORDER NO. PSC-99-1990-PCO-WS
ISSUED: October 11, 1999

ORDER GRANTING OPC'S MOTION TO COMPEL AND DIRECTING UTILITY TO
RESPOND TO OPC'S FIRST SET OF INTERROGATORIES
AND REQUEST FOR PRODUCTION OF DOCUMENTS, EXCEPT AS
MODIFIED FOR DOCUMENTS WHICH THE UTILITY CLAIMS ARE PRIVILEGED

On September 21, 1999, pursuant to Rule 28-106.206, Florida Administrative Code, and Order No. PSC-99-0514-PCO-WS, Aloha Utilities, Inc. (Aloha or utility), filed its Objections to the Office of Public Counsel's First Set of Interrogatories and First Request for Production of Documents. On September 27, 1999, the Office of Public Counsel (OPC) filed Citizens' Motion to Compel Discovery Compliance (Motion to Compel). On October 4, 1999, Aloha filed its Response to OPC's Motion to Compel Discovery (Response).

In its Motion, Florida Water objects to OPC's Interrogatories Nos. 2 and 3. The utility also objects to OPC's Document Requests Nos. 4, 5, and 7. Each is discussed below.

Interrogatory No. 2

OPC's Interrogatory No. 2 states:

Please state the names and provide the business address of any and all persons who had physical access to Aloha's well sites located east of Highway 19 during the week of August 2d through 6th, or any part thereof.

Aloha objects to this interrogatory "to the extent it seeks the identity of persons unknown to Aloha," and states that it "is only able to respond to those persons who had 'physical access' . . . when such 'physical access' was within Aloha's knowledge." Clearly, Aloha can respond only as to its knowledge, and, in its instructions and Motion to Compel, OPC specifically states, "If the complete answer to an interrogatory is not known, so state and answer as fully as possible the part of the interrogatory to which an answer is known." OPC goes on to say that Aloha should answer this interrogatory insofar as its knowledge permits. If other unknown persons may have had access to the well sites, Aloha may so

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state. In its response, Aloha states that it will respond as to what was within its knowledge. Therefore, Aloha shall answer this interrogatory to the best of its knowledge and belief.

Interrogatory No. 3

OPC's Interrogatory No. 3 states:

Please state the names and provide the business addresses of any and all persons, irrespective of whether Aloha employees, who Aloha has authorized physical access to Aloha's well sites located east of Highway 19 at any time during the year immediately preceding the date of these interrogatories.

Aloha objects to OPC's Interrogatory No. 3 "as being overbroad, burdensome, seeking information which is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence."

In its Motion to Compel, OPC states that Florida law requires more than just a claim that a request is overbroad or burdensome and cites First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Association, Inc., 545 So. 2d 503 (Fla. 4th DCA 1989). In that case, the OPC quotes the Court as saying:

Lastly, we turn our attention to petitioners' objections that some of the discovery sought was 'overly broad' or 'burdensome'. Such objections, standing alone would not constitute a basis for granting certiorari relief. (Citation omitted) More importantly, such words of art have little meaning without substantive support. Is this objection raised because petitioners would be required to produce a railroad boxcar full of documents, or are they merely objecting to the production of a half-inch thick file folder? Since the trial court has to consider petitioners' other objections, it is incumbent upon petitioners to quantify for the trial court the manner in which such discovery might be overly broad or burdensome. *They must be able to show the volume of documents, or the number of man-hours required in their production, or some other quantitative factor that would make it so.* (emphasis added by OPC)

Id. at 503

As to relevance, OPC states that it "will provide in sworn testimony that it is likely that Aloha's water was altered before the Citizens' sampling" on August 4, 1999. Further, OPC states that the broad issue in this case is the unsatisfactory quality of service provided by Aloha and that this interrogatory "is designed to further the Commission's understanding of why Aloha provides unsatisfactory quality of service."

Upon review, the information requested appears to be reasonably calculated to lead to admissible evidence on the quality of service provided by Aloha. See Calderbank v. Cazares, 435 So. 2d 377 (Fla. 5th DCA 1983), and Rule 1.280(b)(1), Florida Rules of Civil Procedure. Therefore, the utility shall respond to Interrogatory No. 3.

Document Request No. 4

By Document Request No. 4, OPC requests the following:

Any time schedule, worksheet, work schedule, time cards, or the like which will show which Aloha employees were on duty during the week of August 2nd through 6th, 1999.

The utility objects, stating that this request is burdensome, overbroad, seeks information which is not relevant to any information in this proceeding and is not reasonably calculated to lead to the discovery of admissible evidence. Also, in its Response, the utility states that the time for the obtaining of proof to support Mr. Biddy's testimony would have been before the testimony was filed. This ignores the fact that the closing date for discovery is not until December 6, 1999.

It appears that OPC has limited its request to the week in which the water testing was done and, therefore, that it is not overly broad or burdensome. Further it appears to be reasonably calculated to lead to the discovery of admissible evidence. Therefore, Aloha shall respond to this request.

Document Request No. 5

By Document Request No. 5, OPC requests the following:

Any memorandum, letter, notice, or the like authored by Aloha's employees, officers, or representative, irrespective of whether generated before or after August

4th, 1999, which discussed or mentioned in any way the site visit requested by the Citizens, that request being tendered on July 2, 1999.

Aloha objects to this request to the extent that it addresses documents, such as letters written by counsel for Aloha, which are entitled to work product or privileged protection.

In its Motion to Compel, OPC states that it does not seek any privileged information, but that all documents which are not so protected should be furnished. Further, in its instructions, OPC states that if a document is to be withheld under any claim of privilege, please furnish a list identifying each document together with: the date, sender, recipients, recipients of copies, subject matter of the document, and the basis upon which such privilege is claimed. In its Response, Aloha claims that the furnishing of the information requested by OPC on the privileged letters "would be a useless act."

However, Rule 1.280(b)(5), Florida Rules of Civil Procedure, states that if a party withholds information otherwise discoverable claiming that it is privileged, the party shall make the claim expressly and shall describe the nature of the documents in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. It appears that the instructions of OPC conform with the provisions of the above-noted rule. If Aloha withholds documents on the basis of privilege, it shall comply with that rule and the instructions of OPC.

Document Request No. 7

By Document Request No. 7, OPC requests the following:

Any and all documents which relate to the testing of water withdrawn and/or produced by Aloha Utilities, whether raw or treated, generated by any source within the last five (5) years not otherwise included in the documents requested in this set of document requests, and not otherwise included in Aloha's direct prefiled testimony in this docket.

The utility objects, stating that this request is burdensome, overbroad, vague, seeks information which is irrelevant and is not reasonably calculated to lead to the discovery of admissible

evidence. In its Response, Aloha notes that it has responded to other large requests, and reiterates its assertion that the request "for 'any and all' documents "which relate to" the testing of water 'withdrawn' and/or 'produced' by Aloha, whether 'raw or treated,' and 'generated by any source' within the last five years is simply over-broad and not reasonably tailored to fit the issues in this case or reasonably calculated to lead to the discovery of admissible evidence."

OPC again states that the utility's use of the conclusory language of burdensome and overbroad "falls far short of the requirements discussed in First City, Id., and it fails to favor the Commission or the Citizens with any information as to what burden might befall Aloha in its production, or how the POD might be amended to facilitate discovery." OPC goes on to assert "that any records of the testing of Aloha's water are central to this case, and could well provide the Commission an insight into why it is that Aloha has not met Commission standards." Also, OPC notes that Aloha does not have to reproduce the documents requested, but merely offer them for inspection and copying as necessary.

Upon review, it appears that Aloha has not met its burden of demonstrating how the request is burdensome, overbroad, or vague. Moreover, it appears that the documents requested are relevant and are designed to lead to the discovery of admissible evidence. Therefore, the utility shall respond to this document request.

Having reviewed the arguments in the utility's objections and its Response, and in OPC's Motion to Compel, Aloha shall reply to the discovery requests as set forth above. Accordingly, Aloha is directed to furnish the information and documents requested, to the extent it exists, and to the extent it is not protected by attorney-client or work-product privilege.


Based on the foregoing, it is

ORDERED by Commissioner Susan F. Clark, as Prehearing Officer, that Aloha Utilities, Inc.'s Objections to Citizen's First Set of Interrogatories and First Request for Production of Documents are disposed of as set forth in the body of this Order. It is further

ORDERED that the Office Of Public Counsel's Motion to Compel is granted, as set forth in the body of this Order.

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By ORDER of Commissioner Susan F. Clark as Prehearing Officer,
this 11th day of October, 1999.



Susan F. Clark
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 reconsideration shall be filed with the Director, Division of Records and Reporting, 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.