

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

DOCKET NO. 020896-WS

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-04-1152-PCO-WS
ISSUED: November 19, 2004

ORDER GRANTING COMMISSION STAFF'S REVISED MOTION TO COMPEL
POD NO. 1 AND DENYING ALOHA UTILITIES, INC.'S REQUEST
FOR ORAL ARGUMENT AND MOTION FOR
PROTECTIVE ORDER

Background

On October 14, 2004, the staff of the Florida Public Service Commission (staff) filed its Motion to Compel and to Shorten Time. By its motion, staff requested that the Commission order Aloha Utilities, Inc. (Aloha or utility) to file its written objections to staff's First Request for Production of Documents to Aloha (PODs Nos. 1-2) and response to the Motion to Compel by October 19, 2004. POD No. 1 states:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's water customers in the Seven Springs service area.

POD No. 2 states:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's wastewater customers in the Seven Springs service area.

The motion also requested that the Commission promptly enter an order compelling Aloha to fully respond to staff's First Request for Production of Documents to Aloha (PODs Nos. 1-2) no later than November 3, 2004.

Order No. PSC-04-1001-PCO-WS, issued October 15, 2004, addressed staff's motion. By this Order, Aloha was required to file any written objections to staff's Motion to Compel by October 19, 2004. The Order further stated that once any such written objections were filed, a ruling on the Motion to Compel would be issued.

On October 19, 2004, Aloha filed its Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS. On October 21, 2004, Aloha filed its Response to Motion to Compel and to Shorten Time, in which Aloha questioned staff's role in this proceeding and the basis for staff's

DOCUMENT NUMBER-DATE

12433 NOV 19 04

FPSC-COMMISSION CLERK

Motion to Compel and to Shorten Time. Aloha also indicated in its response that it requested reconsideration of Order No. PSC-04-1001-PCO-WS.

The Commission voted to deny Aloha's Motion for Reconsideration at its November 2, 2004, agenda conference. The Commission ordered Aloha to file its written objections to staff's First Request for Production of Documents (PODs Nos. 1-2), if any, and its response to staff's Motion to Compel by November 4, 2004.

On November 4, 2004, Aloha filed its Response to Staff's First Request for Production of Documents, Motion for Protective Order and Response to Staff's Motion to Compel, and Request for Oral Argument. On November 9, 2004, staff filed its Response to Motion for Protective Order.

Aloha's Request for Oral Argument

As stated above, Aloha filed a Request for Oral Argument along with its Motion for Protective Order and Response to Staff's Motion to Compel. In support of its request, Aloha states that oral argument will "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 it is important that the Prehearing Officer and Commission "comprehend the effect, admissibility, propriety and advisability of the survey which staff has stated it wishes to undertake with the information staff seeks to discover from Aloha, before determining whether the requests to Aloha are proper discovery which has been properly tendered."

Aloha's arguments are adequately contained within its motion and response. Oral argument is, thus, unnecessary, and Aloha's request for oral argument is hereby denied.

Aloha's Response to Staff's First Request for Production of Documents and Motion for Protective Order and Response to Staff's Motion to Compel

In its Response to Staff's First Request for Production of Documents, Aloha states that it objects to both PODs Nos. 1 and 2. As grounds for its objections, Aloha states:

The request is not reasonably calculated to lead to the discovery of admissible evidence, seeks documents and information which are irrelevant, which would require the disclosure of information considered by customers to be private, and is tendered by an entity (the Commission staff) who does not have the power or authority to tender discovery in this proceeding, and is for that basis and otherwise improper discovery. The request seeks the disclosure of information which is confidential and proprietary and is afforded protection from disclosure under Florida law. Aloha hereby incorporates, by reference as if fully set forth herein, its Response to Staff's Motion to Compel. For the reasons set forth herein, and in said Response, Aloha objects.

In support of its Motion for Protective Order and Response to Staff's Motion to Compel, Aloha states that staff's Motion to Compel is a premature motion that is not authorized by the Uniform Rules of Procedure. Aloha further states that staff has no authority to serve discovery, as it is not a party to the proceeding. It also asserts that staff's discovery request should be considered a "nullity" because this proceeding against Aloha has not been lawfully brought under section 120.60(5), Florida Statutes.

Aloha also states that staff's purported use for the discovery information, to compile a customer survey, "will constitute inadmissible evidence, may potentially be used in a way that is unduly prejudicial to Aloha and is not an effort which will result in reliable information which is pertinent to any issue in this case." The utility further contends that use of the discovery information to compile a customer survey will place staff in an adversarial role to Aloha in violation of Cherry Communications, Inc. v. Deason, 652 So. 2d 803 (Fla. 1995).

Aloha further states that the motion to compel should be denied as POD No. 1, the names and addresses of all of Aloha's water customers in the Seven Springs service area, is not reasonably calculated to lead to the discovery of admissible evidence. Aloha states that these names and addresses would constitute inadmissible evidence and any survey compiled from this information would not be "evidence tending to prove or disprove a material fact relevant to any issue in this proceeding."

As for POD No. 2, the names and addresses of Aloha's wastewater customers in the Seven Springs service area, Aloha asserts that this information is not reasonably calculated to lead to the discovery of admissible evidence. The utility states that Aloha's wastewater service is not at issue in this proceeding.

Aloha further requests a Protective Order if staff's Motion to Compel is granted. The utility relies on the same arguments stated above as grounds for the Protective Order.

Staff's Response to Motion for Protective Order

In its Response to Motion for Protective Order, staff narrows POD No. 1 "to request that Aloha provide, in electronic format, a list of the names and addresses of all of its water customers who reside within the areas for which deletion of territory has been requested in this proceeding." Staff states that while it originally intended to mail a survey to all of Aloha's 10,000 or more customers in the Seven Springs area in an effort to determine the level of support for the petitions among the entire body of Aloha's Seven Springs ratepayers, it has since decided to mail the survey to only those water customers who reside within the area for which deletion of territory has been requested in this proceeding. Staff also states that it withdraws POD No. 2 in its entirety.

Staff contends that, contrary to Aloha's assertions, the information in POD No. 1 is discoverable. Staff states that "[t]he information is not privileged, is relevant to the subject matter of the pending action, and is reasonably calculated to lead to the discovery of admissible evidence derived from customer responses to a staff survey concerning the subject matter of the

pending action.” Staff states that “[t]he survey is designed to determine the level of support for the deletion petitions at issue in this proceeding among all the customers residing within the areas requested to be deleted” and that “[t]he level of support for the deletion petitions is relevant to whether it is in the public interest for any portion of the deletion petitions at issue in this proceeding be granted.”

In response to Aloha’s assertion that the discovery request is overly burdensome, staff states that the utility routinely uses this information to bill its customers and that Aloha would only have to electronically copy this information onto a diskette and send it to staff to fulfill the discovery request. As for Aloha’s claim that the information is confidential and proprietary and is afforded protection from disclosure under Florida law, staff states that this is not a valid reason for refusing to provide the information and that the Commission has rules and procedures in place which would allow Aloha to produce the information under a claim of confidentiality.

Staff also takes issue with Aloha’s assertion that staff’s Motion to Compel is not authorized by the Uniform Rules of Procedure. Staff states that it requested that the Prehearing Officer promptly enter an order compelling the discovery following receipt, not before receipt, of Aloha’s response and objection, if any. Staff points out that now that Aloha has filed both its objection and a motion for protective order, the Prehearing Officer is fully informed of Aloha’s position.

Staff points to the Commission’s Statement of Agency Organization & Operations, which states that staff may participate as a party in any proceeding, to refute Aloha’s argument that staff has no authority to engage in the discovery process. Staff states that its “role is to assist in developing the evidence to ensure a complete record so that all relevant facts and issues are presented to the fact finder” and that “[i]t is within this participatory party-like role that staff has propounded the discovery at issue herein.”

As for Aloha’s assertion that the discovery request is not authorized because the Commission could not lawfully revoke the utility’s certificate unless it follows the requirements of section 120.60(5), Florida Statutes, staff states that this is not a valid basis for seeking protection from the requirement to produce the requested information. Staff states that the Commission has made no finding that this proceeding should be dismissed and that the discovery process should proceed as contemplated by the Order Establishing Procedure unless and until the Commission determines otherwise.

Staff further dismisses as meritless Aloha’s argument that a protective order should be granted because it is unknown and unclear under the Order Establishing Procedure whether the utility will be given an opportunity to file rebuttal or otherwise responsive testimony to staff’s direct testimony and exhibits. Staff states that instead of seeking a protective order to prevent the discovery, Aloha should seek clarification from the Prehearing Officer on this point and move for an order allowing it to file rebuttal testimony.

Findings and Conclusion

The scope of discovery under the Florida Rules of Civil Procedure is liberal. Rule 1.280(b)(1), Florida Rules of Civil Procedure, states that:

. . . Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of the other party. . . . It is not ground 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.

While the scope of discovery is not limitless, I find that, upon review of the pleadings and consideration of the arguments, POD No. 1, as revised in staff's Response to Motion for Protective Order, appears reasonably calculated to lead to the discovery of admissible evidence. I also find that staff, in its role of assisting in the development of the evidence to ensure a complete record, is authorized to request this information from Aloha. Furthermore, if the utility has concerns about confidential or proprietary information being disclosed, the Commission has rules and procedures in place which allow for Aloha to produce the information under a claim of confidentiality.

As for Aloha's argument on the timing of staff's Motion to Compel, Aloha made this same argument in its Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS. The Commission denied Aloha's Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS at its November 2, 2004, agenda conference.

Accordingly, staff's Motion to Compel, as revised in staff's Response to Motion for Protective Order, is hereby granted, and Aloha's Motion for Protective Order is hereby denied. Aloha shall provide staff with the information requested in POD No. 1, as revised in staff's Response to Motion for Protective Order, within 5 days of issuance of this Order.

It is, therefore,

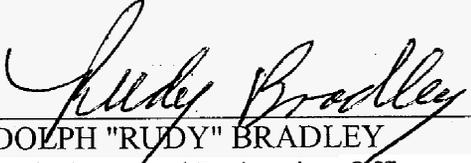
ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that Aloha Utilities, Inc.'s Request for Oral Argument is hereby denied. It is further

ORDERED that Commission staff's Motion to Compel, as revised in staff's Response to Motion for Protective Order, is hereby granted. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Protective Order is hereby denied. It is further

ORDERED that Aloha Utilities, Inc., shall provide Commission staff with the information requested in POD No. 1, as revised in Commission staff's Response to Motion for Protective Order, within 5 days of issuance of this Order.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this
19th day of November, 2004



RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

(S E A L)

SMC

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 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.