

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
 increase and increase in service) FILED: January 17, 1996
 availability charges by Southern)
 States Utilities, Inc. for)
 Orange-Osceola Utilities, Inc.)
 in Osceola County, and in)
 Bradford, Brevard, Charlotte,)
 Citrus, Clay, Collier, Duval,)
 Highlands, Lake, Lee, Marion,)
 Martin, Nassau, Orange, Osceola,)
 Pasco, Putnam, Seminole, St.)
 Johns, St. Lucie, Volusia, and)
 Washington Counties.)

MOTION TO QUASH SUBPOENA AND
MOTION FOR PROTECTIVE ORDER

The Staff of the Florida Public Service Commission (Staff), pursuant to Rule 25-22.045(3), Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, by and through its undersigned attorney, hereby requests that the Prehearing Officer quash the subpoena directed to Charles Hill and served on January 12, 1996, and subsequent notice of deposition, and to enter an order protecting Mr. Hill from further subpoenas in this proceeding, and in support thereof, states the following:

Background

This docket concerns the application for increased water and wastewater rates and charges filed by Southern States Utilities, Inc. (SSU or the utility) on June 28, 1995.

On January 12, 1996, Sugarmill Woods Civic Association, Inc. (Sugarmill Woods) and Marco Island Civic Association, Inc. (Marco Island) served a subpoena for deposition on Charles Hill, Director of the Division of Water and Wastewater for the Florida Public Service Commission. According to the subpoena, Mr. Hill's deposition is scheduled for 2:30 p.m. on January 26, 1996, at Accurate Reporting Service in Tallahassee, Florida. On the date of the filing of this motion, Staff received a notice of deposition by facsimile.

In this docket, Staff will likely file testimony on several issues. Staff does not and will not object to the deposition of Staff members who will file testimony. However, Staff does not anticipate that Mr. Hill will file testimony in this docket. Instead, as Director, Mr. Hill has considerable supervisory review

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over members of technical staff in their advisory role, as well as actively advising the Commission.

Pursuant to Rule 25-22.045(3), Florida Administrative Code, any person served with a subpoena issued by the Commission may file a motion to quash the subpoena. Furthermore, Rule 1.280(c), Florida Rules of Civil Procedure, permits a court to issue an order protecting a person from "annoyance, embarrassment, oppression, or undue burden or expense that justice requires..."

The subpoena filed by Sugarmill Woods and Marco Island does not specify the nature of the information sought or the subject of the deposition. Nevertheless, Staff asserts that no matter what the subject of the deposition, the Commission should quash the subpoena served upon Mr. Hill and issue a protective order.

Standard of Review

The Commission's decision on this issue "must balance a litigant's right to pursue full discovery with the deponent's right to protection against oppressive disclosure." Order No. PSC-94-1562-PCO-WS (Docket No. 930495-WS).

Rule 1.280, Florida Rules of Civil Procedure, permits a broad scope of discovery:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action... It is not ground for objection that the information sought will be inadmissible at the trial of the information sought appears calculated to lead to the discovery of admissible evidence.

However, as noted above, Rule 1.280(c), Florida Rules of Civil Procedure, permits a protective order in order to protect a deponent from harassment or undue burden. This requires a balancing test between the competing interests. See Dade County Medical Association v. Hlis, 372 So.2d 117, 121 (Fla 3d DCA 1979), and Argonaut Insurance Co. v. Peralta, 358 So.2d 232 (Fla 3d DCA 1978).

A trial court has broad discretion to grant or deny discovery motions, and to protect parties or individuals against possible abuse. Only an abuse of discretion will constitute a fatal error. Eyster v. Eyster, 503 So.2d 340, 343 (Fla. 1st DCA 1987), rev. den. 513 So.2d 1061 (Fla. 1987); and Orlowitz v. Orlowitz, 199 So.2d 97

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(Fla. 1967). Similarly, the Commission has broad discretion to determine discovery matters.

Staff contends that in this case the irrelevance of deposing a non-testifying Staff member, the interest in protecting Staff members from an undue burden, and the availability of relevant documents through a public record request far outweighs the interest in broad discovery.

Relevance

The subpoena does not set forth the area of inquiry to be explored in the deposition, making it difficult for Staff to address the subpoena more specifically. Nevertheless, whether Sugarmill Woods and Marco Island are seeking information regarding Mr. Hill's participation in past dockets or his participation in this docket, the information is neither relevant, nor calculated to lead to admissible evidence in this docket.

The Commission has addressed ratemaking and jurisdictional issues regarding SSU in several recent dockets. Dockets Nos. 920199-WS, 930880-WS, and 930945-WS have all been appealed by various parties and remain open before the Commission. If Sugarmill Woods and Marco Island seek information from Mr. Hill regarding those dockets, the subpoena should be quashed because those dockets are not relevant to this proceeding. Those matters are on appeal and must be dealt with through the appropriate avenues in those dockets. Moreover, the orders, documents, and other materials from those dockets may be sought by the less intrusive means of filing a public records request with the Commission. See Order No. PSC-95-0137-PCO-SU, issued January 27, 1995, in Docket No. 940963-SU¹

The subpoena should also be quashed if Sugarmill Woods and Marco Island are seeking Mr. Hill's mental impressions in this docket. The Commission's decision in this proceeding will be based upon the evidence in the record. A Staff member's opinion or impressions is not relevant to the recommendation Staff may ultimately make, nor can it be seen as reasonably calculated to lead to admissible evidence. And, if Sugarmill Woods and Marco

¹In Re: Application for transfer of territory served by Tamiami Village Utility, Inc. in Lee County to North Fort Myers Utility, Inc., cancellation of Certificate No. 332-S and amendment of Certificate No. 317-S, and for a limited proceeding to impose current rates, charges, classifications, rules, and regulations, and service availability policies.

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Island's purpose in deposing Mr. Hill is to seek information about the utility's filing or other matters before the Commission, again, a public record request is the appropriate route.

Chilling Effect Upon Staff's Advisory Role

According to Rule 25-22.026(3), Florida Administrative Code, Staff may participate as a party in a proceeding. Staff's primary duty is to "represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration." However, Staff is not a real party in interest in any proceeding before the Commission. South Florida Natural Gas Co. v. Public Service Commission, 534 So.2d 695 (Fla. 1988). One of Staff's primary functions is to provide legal and technical advice on matters pending before the Commission. Staff accomplishes this through the filing of recommendations and discussing these recommendations at Agenda conferences. The Commission is not "obliged to avoid their staff during the evaluation and consideration states of their deliberation. Were this so, the value of staff expertise would be lost and the intelligent use of employees crippled." Occidental Chemical Co. v. Mayo, 351 So.2d 336, 342 n. 10 (Fla. 1977).

However, pursuant to Section 120.66, Florida Statutes, Staff members that testify at hearing are prohibited from further participation in the proceeding. Although Sugarmill Woods and Marco Island have not indicated that they intend to call Mr. Hill as a witness, their subpoena certainly raises a concern as to his participation in this docket. If parties are permitted to subpoena non-testifying Staff witnesses, Staff's advisory role could effectively be crippled by the selection of particular Staff members for deposition.

In almost every major docket involving SSU over the last five years, parties have attempted to subpoena Staff, either for deposition or for testimony. In Docket No. 900329-WS, the Office of Public Counsel subpoenaed six members of Staff to testify at hearing. In Docket No. 930800-WS, the Office of the Attorney General subpoenaed seven members of Staff for deposition. In Docket No. 930945-WS, Hillsborough County subpoenaed Mr. Hill for deposition. None of those subpoenas were enforced against Staff members. In each case, Staff objected to the attempt to draw non-testifying Staff members into a docket and impinge upon its advisory role. These concerns are again present in this situation.

The fact that Sugarmill Woods and Marco Island have only subpoenaed one member of Staff does not mitigate the chilling effect that its enforcement would have upon Staff. By taking Mr.

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Hill's deposition, Sugarmill Woods and Marco Island would effectively remove Mr. Hill, the Director of the Division with primary responsibility for the docket from these proceedings.

In addition to the concerns over targeting and removing certain members of Staff from their role in a docket, Staff is concerned that the deposition of a non-testifying Staff member could be used as both a means of inquiring into that person's impressions and opinions on this case, and as a means of attempting to influence that person. If parties were permitted to subpoena and question Staff during the pendency of a docket, Staff would operate under the knowledge that at any time, they could be questioned by parties in that docket, which could have a chilling effect upon the performance of their duties.

For the reasons set forth above, Staff contends that the potential harm in allowing Sugarmill Woods and Marco Island to depose Mr. Hill outweighs the broad scope of discovery.

Invasion of the Deliberative Process

The questioning of a Staff member, particularly one in a supervisory role over all technical aspects of this docket, is an unnecessary invasion into the Commission's process. The inquisition of a non-testifying member of Staff in a deposition, which by the very nature of discovery is a broad inquiry, may result in the invasion of the Commission's determination on the case. Although the deliberative process privilege is not an officially recognized doctrine, some consideration should be given to protecting the deliberative process of a government agency from disclosure.

The deliberative process privilege has been recognized on the federal level. (See U.S. v. Morgan, 313 U.S. 409 (1941). The privilege is determined by balancing the public's interest in effective agency administration against its interest in accurate fact finding. United States v. Beatrice Foods Co., 52 F.R.D 14, 20 (D. Minn. 1971). The factors in this balancing test include relevance, alternate means of proof, and whether there are any allegations of government misconduct. Dowd v. Calabrese, 101 F.R.D. 427, 431 (1984). Staff contends that the deposition of one of its most senior members, who is responsible for supervising all technical Staff members in this docket, would be an invasion of the Commission's deliberative process.

WHEREFORE, the Staff of the Florida Public Service Commission requests that the Prehearing Officer issue an order quashing the subpoena of Charles Hill filed by Sugarmill Woods and Marco Island.

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Staff further requests that the Prehearing Officer issue an order protecting Mr. Hill from any further harassment, annoyance, or oppression from subpoenas in this proceeding, for the reasons set forth above.

Respectfully submitted, this
17th day of January, 1996.



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Johns, St. Lucie, Volusia, and)
Washington Counties.)
_____)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Staff's Motion to Quash Subpoena and Motion for a Protective Order has been furnished by U.S. Mail to Michael B. Twomey, Route 28, Box 1264, Tallahassee, Florida, 32310, and that a true and correct copy thereof has been furnished to the following this 17th day of January, 1996 to the individuals listed below.

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