BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase and increase in service 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.	DOCKET NO. 950495-WS ORDER NO. PSC-96-0411-FOF-WS ISSUED: March 22, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING STAFF'S MOTION TO QUASH SUBPOENA AND MOTION FOR A PROTECTIVE ORDER

BY THE COMMISSION:

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to service areas in 25 counties. On June 28, 1995, SSU filed an application requesting increased water and wastewater rates for 141 services areas, pursuant to Section 367.081, Florida Statutes. SSU also requested an increase in service availability charges, pursuant to Section 367.101, Florida Statutes. The utility also requested an allowance for funds used during construction (AFUDC) and an allowance for funds prudently invested.

On January 12, 1996, the Sugarmill Woods Civic Association, Inc., (Sugarmill Woods) and the Marco Island Civic Association, Inc., (Marco Island) served a subpoena for deposition on Charles Hill, Director of the Commission's Division of Water and Wastewater. Sugarmill Woods and Marco Island subsequently filed an amended notice of deposition for Mr. Hill for January 26, 1996. On January 17, 1996, Commission Staff filed a motion to quash Mr.

Hill's subpoena and a motion for a protective order. Counsel for Sugarmill Woods and Marco Island has indicated that while Sugarmill Woods and Marco Island will not file a written response, they oppose Staff's motion to quash. The Prehearing Officer referred this matter to the full Commission for consideration pursuant to Rule 25-22.038(1), Florida Administrative Code.

Staff's motion requested that the subpoena directed to Mr. Hill be quashed, and that we enter an order protecting Mr. Hill from further subpoenas in this proceeding. Staff moved to quash the subpoena pursuant to Rule 25-22.045(3), Florida Administrative Code, and Rule 1.280(c), Florida Rules of Civil Procedure, which permits a court to issue an order protecting a person from "annoyance, embarrassment, oppression, or undue burden or expense that justice requires..." Staff's motion was premised upon three grounds: relevance, the potential chilling effect upon Staff, and the deliberative process privilege. No written response to Staff's motion was filed. However, at the February 19, 1996, Agenda Conference, Sugarmill Woods and Marco Island stated that the parties need not make a showing of relevance prior to the deposition. The Office of Public Counsel also stated its objection to Staff's motion, particularly Staff's request for a protective order.

Rule 1.280(b)(, 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 if the information sought appears calculated to lead to the discovery of admissible evidence.

However, 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. Our review of this motion "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, issued December 14, 1994 (Docket No. 930495-WS). See also, 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). This Commission has broad discretion to determine discovery matters. 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 (Fla. 1967).

After considering the positions of Staff and the parties expressed at our Agenda Conference, and balancing the interests in this instance, we find it appropriate to deny Staff's motion to quash Mr. Hill's subpoena and motion for a protective order. Any objections to relevancy, undue burden, or invasion of the deliberative process which have been raised by Staff in its motion may be raised during the course of the deposition itself, and ruled upon pursuant to Rules 1.310(c) and (d), Florida Rules of Civil Procedure.

Based on the foregoing, it is, therefore,

ORDERED by the Florida Public Service Commission that Commission Staff's motion to quash the subpoena of Charles Hill and motion for a protective order is hereby denied.

By ORDER of the Florida Public Service Commission, this 22nd day of March, 1996.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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DISSENTS

Chairman Clark dissents from the holding of this Order. This dissent is based upon the view that the Commission misunderstands the purpose and scope of appropriate discovery.

The scope of discovery is broad but not unlimited. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action... (Emphasis added)

The key is the discovery must be relevant to the pending action, and not be privileged. In addition, Rule 1.280(c) allows discovery to be further limited in scope or method to protect a party or person from "annoyance, embarrassment, oppression or undue burden or expense." Finally, when discovery relates to public employees, consideration of the deliberative process privilege and preservation of public resources comes into play. The rules relating to discovery balance the need of parties to have access to relevant information and the appropriate protection to prevent abuse of the rights of discovery.

The effect of the majority's decision is to recognize no limitation upon discovery. When discovery is unlimited, a litigant would only need to file an action in court to be able to take the deposition of any individual. The logical result of the majority's decision is that a litigant may file a subpoena at any time without having to demonstrate that the subpoena is intended to promote a legitimate judicial or administrative purpose.

In this case, upon issuance of the subpoena, Staff filed a motion to quash listing three grounds: the relevance of the information sought, the potential chilling effect upon Staff, and the potential invasion of the deliberative process. At the Agenda Conference, counsel for Sugarmill Woods and Marco Island took the position that a party need not disclose the areas on which it seeks to depose the witness. This allows no opportunity to determine if the discovery sought was legitimate, and if it was legitimate, if other concerns, such as an undue burden or invasion of the deliberative process, would prevent the deposition from going forward.

Without a demonstration that the information sought is within the scope of discovery, the subpoena should have been quashed. In fact, in an earlier attempt in this matter to subpoena a member of Staff, Bill Lowe, the Prehearing Officer granted Staff's motion to quash because neither the notice of deposition nor the subpoena described the area of inquiry. Order No. PSC-95-1134-PCO-WS, issued September 11, 1995, found that this failure to demonstrate the subject of the deposition made it impossible to determine the relevance. This standard should have been applied in this instance as well.

Apparently, the majority believes that the deponent must, even if he has no relevant information, go to the time and expense of appearing at a deposition and then simply object on the grounds of relevance. This procedure is at odds with the Rules of Civil Procedure, and would seem to obviate the need to ever review whether a proposed deposition will lead to relevant evidence. According to Rule 1.310, Florida Rules of Civil Procedure, while a deponent may object to a question, the question must be answered and the objection preserved for future ruling. The only exception is when a claim of privilege is made. There is no way to protect the deponent from the harm contemplated by Rule 1.280(c) because he is already there. Once a deposition is initiated, a deponent must answer any non-privileged question, no matter how irrelevant. For example, a deponent in a utility-related matter could be subject to questions relating to his or her physical health, interpersonal relationships, financial status or any number of irrelevant, personally invasive questions.

A party who wishes to depose an individual must demonstrate relevance in the first instance. We have not had the opportunity to balance the interests in rendering a decision on this motion. Without an initial showing of relevance, it is impossible to determine the relevancy prior to the deposition being taken. See Santiago v. Fenton, 891 F.2d 373 (1st Cir. 1989), where the court held that the absence of sufficient facts to demonstrate relevance, when weighed against the burden of the request, justified the issuance of a protective order. The majority's decision finds that the deponent must attend, and raise any objection at the time that the question is posed, yet still answer the question.

The majority's decision leads to the conclusion that at any time in a proceeding before the Commission, any number of Staff members may be deposed. This will effectively stymie the work process of the Commission. Moreover, the deposition of Staff has a chilling effect upon the free exchange of information among staff members so they may appropriately convey and discuss matters pending before the Commission. The knowledge that Staff may be questioned at any point regarding matters in a pending docket may cause members of Staff to be hesitant to discuss or pursue particular matters. Parties who have access to Staff in this manner may also seek to influence or sway Staff's ultimate recommendation by deposing Staff and questioning their rationales and positions.

The effectiveness and duties of public employees should also be considered. The unlimited access to Staff contemplated by the majority decision will impede the accomplishment of the work which this agency is charged with fulfilling. In addition to the undue

burden and chilling effect upon Staff's advisory role, the deposing of Staff detracts from its ability to carry out its responsibilities with respect to this case and regulation in general. "[P]ublic policy requires that the time and energies of public officials be conserved for the public's business." Community Federal v. Federal Home Bank, 96 F.R.D. 619, 621 (1983). The court in that matter weighed the volume of litigation and noted that reasonable limits must be placed upon access to governmental officials to avoid the disruption of governmental functions. It should also be noted that there are other means for a litigant to obtain information as to an agency's actions, such as a public records request.

Our Staff acts as our alter ego in order to inquire into a matter, obtain facts, and report back to us, all within our deliberative process. The Florida Supreme Court, in South Florida Natural Gas v. Public Service Commission, 534 So.2d 695, 698 (Fla. 1988), recognized the role of our Staff and the impossibility of investigating and making determinations without Staff's participation. This Commission recognized the harm that such a subpoena can have upon that role in Order No. PSC-94-1562-PCO-WS (Docket No. 930945-WS), where the Prehearing Officer granted Staff's motion to quash a subpoena of Mr. Hill. That order found that Staff's ability to assist the Commission in developing evidence and ensuring a complete record would be significantly compromised."

The subpoena directed to Mr. Hill in this matter has an equally chilling effect upon Staff's fulfillment of its role. Staff interacts with Commissioners throughout the course of a proceeding. There must be a free exchange of ideas between Commissioners and Staff in order for both to carry out their responsibilities. The unlimited discovery of Staff without a showing of relevance impinges upon these functions.

This dissent should not be construed to hold that it is never appropriate to subpoena a member of Staff for deposition. It is entirely appropriate for a Staff member who will be testifying in a case to be deposed in connection with that case. But each subpoena must be evaluated based on the given circumstances. At a minimum, the discovery sought must be shown to be relevant and must represent legitimate discovery.

Commissioner Garcia dissents from the holding of this Order and joins with Chairman Clark in her dissent.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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.

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 25-22.038(2), 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.