BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.	DOCKET NO. 100330-WS ORDER NO. PSC-11-0501-PCO-WS ISSUED: October 26, 2011

ORDER DENYING AUF'S AND STEVE GRISHAM'S JOINT MOTION TO QUASH SUBPOENA AND NOTICE OF DEPOSITION OF STEVE GRISHAM SERVED BY YES COMPANIES, LLC D/B/A ARREDONDO FARMS

Background

On July 25, 2011, Order No. PSC-11-0309-PCO-WS (Order Establishing Procedure) was issued in this docket. On October 10, 2011, YES Companies, LLC d/b/a Arredondo Farms (YES) served a subpoena and notice for deposition on Mr. Steve Grisham, a field employee of Aqua Utilities Florida, Inc. (AUF or Utility). The deposition is scheduled for October 27, 2011. On October 18, 2011, Mr. Grisham and counsel for AUF (movants) filed their Joint Motion to Quash Subpoena and Notice of Deposition (Motion) served by YES. In that Motion, AUF and Mr. Grisham requested oral argument.

YES filed a response to the Motion on October 24, 2011 (YES's Response). This Order addresses the movants' Motion and YES's response.

AUF's and Mr. Grisham's Motion

The Movants admit that Florida's rules governing discovery are broad in scope,[1] but note that pursuant to Order No. PSC-11-0246-PCO-EI, page 22,[2] this does not mean that the breadth of discovery is without limit. The movants further note that Section 350.123, Florida Statutes (F.S.), states that "the Commission may . . . compel the attendance of witnesses and the production of . . . evidence necessary for the purpose of any . . . proceeding;" and that pursuant to Section 120.569(2)(k)1., F.S., a party may request "the presiding officer having jurisdiction over the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material."

[1] See generally Section 120.569(2)(f), Florida Statutes (F.S.), and Rule 28-106.206, Florida Administrative Code (F.A.C.)

[2] Issued June 3, 2011, in Docket No. 110009-EI, In re: Nuclear Cost recovery clause.

Citing Order No. PSC-11-0246-PCO-EI, pages 24-25,[3] the movants note that the Commission has taken a practical and reasoned approach, stating:

> The balancing test that must be used under these facts and circumstances is the litigants' right to pursue full discovery with the deponent's . . . right to protection against annoyance, embarrassment, oppression, or undue burden or expense that justice requires.

The movants argue that this case was initiated under statutory procedures specifically designed to minimize rate case expense, and that to require a deposition of a non-testifying utility employee needlessly increases that rate case expense and takes that employee out of the workplace to prepare and attend the requested deposition. To satisfy the requirement that the potential deponent is necessary for the purpose of the proceeding, as required by Section 350.123, F.S., the movants argue that YES should at least show:

> that the potential deponent has personal knowledge and impressions due to direct involvement in the development of certain facts at issue in the case, and that the role the potential deponent has played in coming to know those facts at issue in the case is singular and unique.[4]

The movants further argue that Mr. Grisham is not a corporate officer but an AUF field technician, and that he has neither prefiled testimony, nor will he prefile rebuttal testimony, which is the only testimony left to be filed.

Based on the above, the movants state that YES "cannot show that Mr. Grisham has any unique information that is relevant to the facts at issue in the rate case." (Emphasis supplied by movants.) The movants argue that the deposition is desired only for supporting the allegations contained in YES's Motion for Investigation filed on September 27, 2011.[5] The movants argue that YES is not entitled to litigate its Motion for Investigation in this rate proceeding, and that it should not be allowed to circumvent the Order Establishing Procedure by litigating the customer complaints or being allowed to submit supplemental testimony. The movants state that all the prefiled direct testimony has been filed, and the facts raised in the YES Motion are not relevant to any prefiled testimony in this case.

Further, the movants note that YES has not attempted to depose any other witnesses at all, and that pursuant to Order No. PSC-11-0246-PCO-EI, and consistent with minimizing rate case expense, YES should first depose the testifying witnesses. The movants suggested that it would make any testifying witnesses available to YES, and, then, if there was still a need to depose Mr. Grisham, then that request would be addressed at that time.

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[3] Page 9 in Commission files.
[4] See Order No. PSC-11-0246-PCO-EI, page 9.
[5] The order denying that motion, Order No. PSC-11-0474-PCO-WS, was issued on October 19, 2011.

> written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise and under subdivision (c) of this rule, the frequency of use of these methods is not limited, except as provided in rule 1.200, 1.340, and 1.370.
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> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> (1) In General. 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 any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

Rule 1.310, Fla. R. Civ. P., titled "Depositions Upon Oral Examination," provides, in pertinent part:

> (a) When Depositions May Be Taken. After commencement of the action any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition within 30 days after service of the process and initial pleading upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subdivision (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 1.410. . . .
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> (b) Notice; Method of Taking; Production at Deposition.
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> (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced under the subpoena shall be attached to or included in the notice.

However, discovery without limit may not be obtained.[7] Rule 1.280(c), Fla. R. Civ. P., states:

> Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . . . If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred in relation to the motion.

Therefore, the Commission's practice is governed, statutorily, by provisions that establish broad discovery rights in accordance with the Florida Rules of Civil Procedure, and in that context provide that a deposition can be taken of any person (including even a nonparty witness or a nontestifying party witness) as a tool with which to pursue the broad scope of discovery. However, said discovery has its limits and cannot be for annoyance, embarrassment, oppression, or undue burden or expense that justice requires.[8] Thus, a balancing test must be used under certain circumstances.

The balancing test that must be used under these facts and circumstances is the litigants' right to pursue full discovery with the deponent's, a nonparty, right to protection against annoyance, embarrassment, oppression, or undue burden or expense that justice requires. Here, I find that the test favors the litigant YES. As expressed below, Mr. Grisham's personal knowledge and impressions due to his direct involvement in the development of certain facts at issue, leads towards satisfying the "necessary" requirement; thus, I find that Mr. Grisham can be deposed.

Mr. Grisham's testimony could be important on the issue of quality of service provided by AUF to the residents in YES's park. Mr. Grisham appears to be the field technician that has direct contact with those customers. Therefore, I agree with YES that Mr. Grisham's role is singular and unique, and find that his deposition is "necessary" under Section 350.123, F.S.

The Prehearing Officer in this instance possesses broad discretion in granting or refusing discovery motions. Orlowitz v. Orlowitz, 199 So. 2d 97 (Fla. 1967). Here, the facts and circumstances favor the position supported by YES. Pursuant to Rule 1.280(b)(1), Fla. R. Civ. P.:

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[7] Order No. PSC-94-1562-PCO-WS, issued December 14, 1994, in Docket No. 930945-WS, In re: Investigation into Florida Public Service Commission Jurisdiction over Southern States Utilities, Inc. in Florida, at 2.
[8] Order No. PSC-94-1562-PCO-WS, at 3; Dade County Medical Association v. Hlis, 372 So. 2d 117, 121 (Fla. 3d DCA 1979).

> 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 any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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.

Moreover, there is a more persuasive Commission case that favors denying the movants' Motion. See Order No. PSC-03-1065-PCO-EQ, issued September 24, 2003, in Docket No. 020898-EQ, In re: Petition by Cargill Fertilizer, Inc. (Cargill) for permanent approval of self-service wheeling to, from, and between points within Tampa Electric Company's (TECO) service area (the TECO Order). In the TECO Order, the Prehearing Officer denied TECO's Motion to Quash Subpoenas Duces Tecum of several of its employees after Cargill served subpoenas duces tecum for deposition on the employees. The bases for TECO's objections were that Cargill had not disclosed the subject areas that Cargill wanted to explore with the witnesses, that none of the individuals were being offered as TECO witnesses, and that the subpoenas were "unreasonable, oppressive, and calculated to harass the individuals in question." The Prehearing Officer found that the subpoenas fell within the broad standards of discovery prescribed by Rule 1.280(b), Fla. R. Civ. P, and denied TECO's motion to quash the subpoenas.[9] Similarly, in their Motion, the movants argues that the subpoena is directed only at the Motion for an Investigation, and that it is improper to litigate the investigation of the three customer complaints in this proceeding. However, while I found it was improper to proceed on these customer complaints in this proceeding, I find that Mr. Grisham may have unique information relative to the quality of service provided by AUF. Thus, similar to the Prehearing Officer's ruling in the TECO Order, I find the movants' arguments fail because the subpoena is necessary under Section 350.123, F.S., and falls within the broad standards of discovery prescribed by Rule 1.280(b), Fla. R. Civ. P. Further, I find that the subpoena meets the necessity requirements of Section 350.123, F.S.; thus, it satisfies the lawful requirement of Section 120.569(2)(k)1, F.S. Therefore, the Movants' Motion is denied.

Based on the foregoing, it is

ORDERED by Commissioner Ronald A. Brisé, as Prehearing Officer, that Aqua Utilities Florida, Inc.'s and Steve Grisham's Joint Motion to Quash Subpoena and Notice of Deposition of Steve Grisham Served by YES Companies, LLC D/B/A Arredondo Farms is denied as set forth herein.

[9] Order No. PSC-03-1065-PCO-EQ, at 5.

By ORDER of Commissioner Ronald A. Brisé, as Prehearing Officer, this 26th day of October, 2011.

RONALD A. BRISÉ
Commissioner and Prehearing Officer
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

RRJ

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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.