REVISED RECOMMENDATION

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State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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COMMISSION CLERK

DATE: AUGUST 8, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI) PWM
DIVISION OF ECONOMIC REGULATION (FLETCHER, MERCHANT, WILLIS) SBS JDJ

RE: DOCKET NO. 020413-SU - INITIATION OF SHOW CAUSE PROCEEDINGS AGAINST ALOHA UTILITIES, INC. FOR FAILURE TO CHARGE APPROVED SERVICE AVAILABILITY CHARGES IN VIOLATION OF ORDER NO. PSC-01-0326-FOF-SU AND SECTION 367.091, FLORIDA STATUTES.
COUNTY: PASCO

AGENDA: 08/20/2002 - REGULAR AGENDA - PROPOSED AGENCY ACTION EXCEPT FOR ISSUES 2, 5, and 7 - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020413.RCM

CASE BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas, Aloha Gardens and Seven Springs. On February 9, 2000, Aloha filed an application for an increase in rates for its Seven Springs wastewater system. By Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, the Commission approved increased rates and charges for Aloha. The Commission also directed Aloha to increase its

wastewater service availability charges for its Seven Springs wastewater system from $206.75 per equivalent residential connection (ERC) to $1,650 per residential ERC and $12.79 per gallon for all other connections. The order required Aloha to file an appropriate revised tariff sheet reflecting the approved service availability charges within 20 days of the date of the order.[1]

Among other things, the Commission also ordered the utility to pay a $250 fine for failure to file for approval of an extension to a contract referred to as the "Mitchell agreement," in violation of Order No. PSC-97-0280-FOF-WS, issued March 12, 1997, in Dockets Nos. 950615-SU and 960545-WS. The Commission placed the utility on notice that future non-compliance will not be tolerated, and that a substantially higher fine may be assessed for future non-compliance with the statutes, rules, or orders of the Commission.

Aloha should have submitted revised tariff sheets on wastewater service availability charges and had them approved at the same time as the wastewater rate tariffs, on May 23, 2001. However, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, the utility did not submit the tariff sheets until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until almost 11 months later, on April 12, 2002.

Staff originally filed a recommendation in this docket on May 15, 2002, for the May 21, 2002 agenda conference, to address the backbilling issue and the effective date of the increased service availability charges. At the utility's request, the recommendation was deferred to the July 9, 2002 Agenda Conference. By letter dated June 25, 2002, Aloha requested that the matter be continued to the August 6, 2002, Agenda Conference, in order to allow the utility time to work with all affected persons in an attempt to reach a mutually satisfactory agreement. In the meantime, Aloha advised that it would not require developers and builders to pay

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[1]Both Aloha and the Office of Public Counsel (OPC) filed petitions for reconsideration of Order No. PSC-01-0326-FOF-SU. Those petitions were disposed of by Order No. PSC-01-0961-FOF-SU, issued April 18, 2001, by which the Commission granted Aloha's motion in part and denied OPC's motion. Order No. PSC-01-0961-FOF-SU reaffirmed the wastewater service availability charges approved by Order No. PSC-01-0326-FOF-SU.

the approved service availability charges for connections made on or before April 16, 2002, pending resolution of this docket, that it would charge its approved service availability charges for connections made after April 16, 2002, and that connections to Aloha's system would be made upon request, so long as all permitting requirements and inspections are completed. With those assurances, staff agreed to file this recommendation for consideration at the August 6, 2002 Agenda Conference.

However, on July 24, 2002, SRK Partnership Holdings, LLC and Benchmark Manmen Corp. (hereinafter referred to as Limited Partners or petitioners), filed a Petition to Intervene in this docket. On July 31, 2002, Aloha filed an Objection to Petition to Intervene (Objection). Also, by letter dated July 25, 2002, and filed July 29, 2002, a customer of Aloha, V. Abraham Kurien, M.D., expressed his objection to the PSC making any settlement with Aloha with respect to the uncollected service availability charges and to any attempt on Aloha's part to collect any portion of the uncollected amount from its present customers. Staff delayed the filing of this recommendation by one agenda filing date in order to incorporate these filings into the recommendation.

This recommendation addresses Aloha's proposed settlement agreement, its apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, whether Aloha should be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002, and whether any backbilled amounts already collected should be refunded with interest, whether any amounts that the utility should have collected should be imputed, whether the Limited Partners' Petition to Intervene should be granted, and the effective date of the increased service availability charges. The Commission has jurisdiction pursuant to Sections 367.091 and 367.161, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Aloha's proposed settlement agreement be approved?

RECOMMENDATION: No, Aloha's proposed settlement agreement should be rejected. The Commission should instead dispose of this matter as set forth in Issues 2 - 7 of this recommendation. (GERVASI, FLETCHER)

STAFF ANALYSIS: By letter dated May 30, 2002, and filed June 18, 2002, counsel for Aloha advised that it had spoken with its largest developers, Trinity Communities and Thousand Oaks Development, regarding a settlement of the show cause involving the utility's failure to charge the wastewater service availability charges set forth in Order No. PSC-01-0326-FOF-SU. By that letter, Aloha offered the following settlement terms:

1. The service availability tariff will be effective April 16, 2002, the date that developers received notice of the increased service availability charge in accord with Staff's position in its May 15th recommendation.

2. Developers and builders requesting connection to Aloha's wastewater system will not be required to pay the new service availability charges for connections made before April 16, 2002. For all connections made after April 16, 2002, the new service availability charges will be in effect.

3. Aloha will agree to pay a fine of $2,500.00, pursuant to Section 367.161, Florida Statutes, for failure to file the appropriate service availability tariff on May 23, 2001 due to an oversight on behalf of the utility.

4. No further penalties or adjustments to rate base or contributions-in-aid-of-construction (CIAC) will be assessed or made associated with this matter.

5. The major developers listed above, which comprise a majority of the homes being developed in Aloha's service territory, will be signatories to this settlement agreement.

6. The settlement agreement will become effective only upon approval of the settlement agreement, without any modifications, by the Florida Public Service Commission.

Along with a letter dated July 3, 2002, counsel for Aloha provided a draft settlement agreement incorporating the terms outlined above. Additionally, the draft settlement agreement includes a provision to the effect that if developers or builders who connected to the system prior to April 16, 2002 paid the increased service availability charges, refunds will be made with interest calculated at the 30-day commercial paper rate, within 30 days of the effective date of the Order approving the settlement, and that Aloha will comply with the reporting requirements of Rule 25-30.360, Florida Administrative Code.

On July 25, 2002, Aloha provided staff counsel with a copy of an executed Settlement Agreement dated that same day, which incorporates all of the above-described provisions. The Settlement Agreement is between Aloha and various developers, including MHC Financing Limited Partnership d/b/a Country Place Village, Grove Park Homes, Inc., Sunfield Homes (Thousand Oaks), Adam Smith Enterprises, Inc. (Trinity Communities), I.H. Suncoast Homes, and Windward Homes, and was filed in the docket on August 5, 2002.

The Settlement Agreement proposes that the settlement be contingent on approval in its entirety by the Commission. However, it is apparent that not all builders or developers received actual notice of the approved service availability charges by April 16, 2002, the date which Aloha proposes to be the effective date of the revised service availability tariff. Therefore, in Issue 6, staff recommends that no developer or builder should be billed the approved service availability charges unless notice has been provided to the developer or builder, pursuant to Rule 25-30.475(2), Florida Administrative Code. Moreover, staff disagrees that no further penalties or adjustments to rate base or CIAC should be assessed with respect to this matter in this or in any other proceeding before the Commission. In Issue 4, staff recommends that the Commission should impute $157,341 of CIAC on the utility's books as though collected. And for that reason, staff recommends in Issue 2 that the utility be required to show cause as to why it should not be penalized in the amount of $1,000, as opposed to the $2,500 amount proposed by the utility, for failure to file the appropriate service availability tariff on May

23, 2001. For the foregoing reasons, staff recommends that the proposed settlement agreement be rejected, and that the Commission should instead dispose of this matter as set forth in Issues 2 - 7 of this recommendation.

ISSUE 2: Should Aloha be ordered to show cause, in writing within 21 days, why it should not be fined for failure to charge its approved service availability charges and to timely file a revised tariff sheet reflecting those charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes?

RECOMMENDATION: Yes. Aloha should be ordered to show cause, in writing within 21 days, why it should not be fined $1,000 for the apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. The order to show cause should incorporate the conditions stated below in the staff analysis. (GERVASI, FLETCHER)

STAFF ANALYSIS: In addition to approving increased wastewater rates for Aloha, by Order No. PSC-01-0326-FOF-SU, the Commission directed Aloha to increase its wastewater service availability charges for its Seven Springs wastewater system from $206.75 per ERC to $1,650 per residential ERC and $12.79 per gallon for all other connections. Although Aloha did not request increased service availability charges along with its application for rate relief filed in Docket No. 991643-SU, the Commission directed the utility to increase its service availability charges because the purpose of the system upgrade was to enable the utility to serve future customers. Upon finding that the construction phase will increase the capacity of the plant to accommodate future growth, the Commission directed the utility to increase its service availability (plant capacity) charges. The Order required Aloha to file an appropriate revised tariff sheet reflecting its increased service availability charges within 20 days of the date of the order.

Section 367.091(3), Florida Statutes, requires that "[e]ach utility's rates, charges, and customer service policies must be contained in a tariff approved by and on file with the [C]ommission." Section 367.091(4), Florida Statutes, provides that "[a] utility may only impose and collect those rates and charges approved by the [C]ommission for the particular class of service involved. A change in any rate schedule may not be made without [C]ommission approval."

Subsequent to the issuance of Order No. PSC-01-0961-FOF-SU, the order on reconsideration of Order No. PSC-01-0326-FOF-SU (see footnote 1), Aloha timely filed its tariffs and proposed customer notice for increased wastewater rates, as required by Order No.

PSC-01-0326-FOF-WS. The wastewater rate tariffs were stamped approved effective May 23, 2001. However, the utility failed to file the required tariff and proposed customer notice for the increased wastewater service availability charges, which the utility was also required to file by that order.

In late February or early March, 2002, during a review of service availability charges for private utilities in Pasco County, staff noted that Aloha had not filed the service availability tariff sheet required by Order No. PSC-01-0326-FOF-SU. Staff contacted counsel for Aloha on or before March 7, 2002 to advise that the service availability tariff had not been filed. After contacting the utility, counsel for Aloha advised that although Aloha had inadvertently failed to file the revised tariff sheet, the utility had been correctly charging the increased service availability charges as approved by Order No. PSC-01-0326-FOF-SU.

On March 11, 2002, Aloha filed its Second Revised Sheet No. 22.7, reflecting its approved service availability charges. It appeared at that time that Aloha's failure to timely file its wastewater service availability charge tariff was merely an administrative oversight, in that the tariff should have been included with the other tariffs approved on May 23, 2001. Based on this information, staff believed that the developers were aware of the increased service availability charge and had been paying the higher charge since May 23, 2001, when the other revised rate tariff sheets became effective. Having not yet received any developer inquiries about the charge, staff administratively approved the tariff sheet with a retroactive effective date of May 23, 2001, to accord with the effective date of the tariff sheets reflecting the utility's approved wastewater rates.

Sometime later, on April 30, 2002, staff received the first developer inquiry concerning Aloha's service availability charges. On that date, staff counsel received a telephone call from I.H. Suncoast Homes, Inc. (Suncoast), a builder. Suncoast advised that it had received a letter from Aloha stating that pursuant to tariffs approved May 23, 2001, Suncoast owed an additional $1,443.25 in service availability charges. Upon investigation, staff determined that Aloha had collected an advance service availability charge in the amount of $206.75. However, Suncoast did not make the actual connection until after March 11, 2002, the date the revised service availability charge tariffs were filed. Therefore, consistent with Issue 6 of this recommendation,

depending on the effective date of the tariff and whether Suncoast received adequate notice of the increased service availability charges, Suncoast may or may not owe an additional $1,443.25 for each connection. See H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 916 (Fla. 1979) (finding that the crucial time in regard to service availability charges must be the date of connection, since the actual cost of maintaining sufficient capacity cannot be ascertained until that date).

On or about April 30, 2002, staff received a second inquiry from a developer. Counsel for Windward Homes telephoned staff to inquire about a letter which Aloha's President, Mr. Stephen C. Watford, had sent Windward Homes on April 22, 2002. In the letter, Mr. Watford states that through a mistake on the part of the utility, several developers were not assessed the approved increased service availability charges and that Windward Homes was being backbilled for connections made from May 23, 2001, forward, for additional amounts owed, in the amount of $36,081.25 for prior connections and $168,860.25 for connections not yet made.

On May 1, 2002, staff counsel contacted counsel for Aloha about the Windward Homes letter and requested a copy of the letters on backbilling that were being sent to the developers. In a follow-up telephone conversation on May 6, 2002, counsel for Aloha advised that he had been misinformed by Aloha in early March 2002, that Aloha had been correctly charging the increased service availability charges, and that Aloha's President, Mr. Watford, had been misinformed by his staff. In fact, Aloha had been charging the previously approved amount of $206.75 per ERC. Had staff known that the utility had not been charging the increased charge from the time it was approved, the tariff would not have been approved administratively.

Through discovery propounded May 8, 2002, staff requested the utility to provide information that would allow staff to determine the number of connections made and the actual charge received for connections made from May 23, 2001 forward. On May 9, 2002, at the request of staff counsel, counsel for Aloha agreed to expedite the discovery responses to the extent possible. On May 13, 2002, counsel for Aloha promptly complied with the expedited discovery request and hand-delivered a letter outlining the circumstances surrounding the mistake in billing the service availability charges approved by Order No. PSC-01-0326-FOF-SU, along with copies of letters sent to developers concerning the utility's mistake, and a

list, by month, of connections made between May 23, 2001 and April 12, 2002.

In the May 13, 2002 letter, counsel for Aloha explains that on approximately April 12, 2002, it came to Mr. Watford's attention that the utility had not been charging the proper service availability charge. Counsel also represents that the utility began noticing developers/builders on April 16, 2002. Based on our review of the utility's discovery response, it appears that Aloha substantially completed noticing on April 16, 2002.

Although Aloha should have submitted revised tariff sheets on wastewater service availability charges and had them approved at the same time as the wastewater rate tariffs, on May 23, 2001, the utility did not submit the tariff sheets until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until almost 11 months later, on April 12, 2002. Aloha's failure to timely file the revised tariff sheet on service availability charges and charge its approved service availability charge is an apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than $5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Each day that such refusal or violation continues constitutes a separate offense.

Utilities are charged with the knowledge of the Commission's orders, rules, and statutes. Additionally, "it is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as charging an unauthorized service availability charge, would meet the standard for a "willful violation." In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Staff can ascertain no mitigating circumstances which contributed to Aloha's apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. Certainly, had staff detected Aloha's failure to file the tariff sheet sooner, we would have alerted the utility to that fact sooner. Nevertheless, Aloha is charged with the knowledge of the Commission's orders, statutes, and rules. Moreover, although the service availability tariff sheet on file with the Commission from May 23, 2001 to March 11, 2002, did not correctly reflect Aloha's authorized service availability charge, no act or order of the Commission has altered the utility's service availability charge approved by Order No. PSC-01-0326-FOF-SU. Therefore, the utility should have timely charged the amount approved by that order for service availability. See U.S. Sprint Communications Co. v. Nichols, 534 So. 2d 698 (Fla. 1988) (finding that once a tariff sheet error is discovered, the Commission has the power and the duty to order compliance with its original decision). See also Order No. PSC-95-0045-FOF-WS, issued January 10, 1995, in Docket No. 941137-WS (finding that, although certain tariff sheets reflecting the utility's gross-up authority were missing from the utility's tariff, the utility had the authority to collect the gross-up charges pursuant to Commission orders, given that the missing tariff sheets were never cancelled by an order).

Staff recommends that Aloha should be ordered to show cause, in writing, within 21 days, why it should not be fined $1,000 for the apparent violations addressed herein. Aloha's failure to timely file its service availability tariff and charge its approved service availability charges has put its customers at risk of subsidizing future connections. As noted by the H. Miller & Sons court, "[t]he Commission must have the ability to alter service availability charges to defray the expenses of preserving plant capacity with changing economic factors; otherwise the whole point of having service availability charges would be lost and existing customers would subsidize future connections." Id. at 916.

Although $1,000 may not appear to be a significant fine under the circumstances, it is substantially higher than the $250 fine which the Commission ordered Aloha to pay by Order No. PSC-01-0326-FOF-SU, the very order that Aloha has apparently violated now. As stated in the case background, by that order, Aloha was ordered to pay a $250 fine for failure to file for approval an extension to a contract referred to as the "Mitchell agreement," in violation of an earlier order, Order No. PSC-97-0280-FOF-WS. The Commission

placed the utility on notice that future non-compliance will not be tolerated, and that a substantially higher fine may be assessed for future non-compliance with the statutes, rules, or orders of the Commission. Additionally, and most significantly, in Issue 3, staff recommends that Aloha should not be authorized to backbill customers for the approved service availability charges that it should have collected, and that any such backbilled amounts received should be refunded with interest, and in Issue 4, staff recommends that Aloha should be required to impute $157,341 as CIAC.

Staff recommends that the show cause order incorporate the following conditions: Aloha's response to the show cause order must contain specific allegations of fact and law. Should Aloha file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made. If a protest is also filed and a request for a formal hearing is made on other issues in this docket, the issues will be addressed in a single hearing to be scheduled in this docket. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue. In the event that Aloha fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order. If the utility responds to the show cause by remitting the fine, the show cause matter should be considered resolved.

ISSUE 3: Should Aloha be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002, and, if not, should any such backbilled amounts collected be refunded, with interest?

RECOMMENDATION: Aloha should not be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002. Aloha should be required to refund any such backbilled amounts received and any increased service availability charges collected prior to April 16, 2002, calculated with interest in accordance with Rule 25-30.360, Florida Administrative Code. The amount of interest should be based on the 30-day commercial paper rate for the appropriate time period. The refund should be made within 30 days of the effective date of the final order in this docket and the utility should be required to file refund reports consistent with Rule 25-30.360, Florida Administrative Code. With respect to persons who prepaid the erroneous charge in order to reserve capacity, but who did not connect to Aloha's system prior to April 16, 2002, Aloha should charge its approved $1,650 service availability charge provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code. (GERVASI, FLETCHER)

STAFF ANALYSIS: Aloha sent letters to developers in its service area, seeking to backbill for all connections made, and for future connections reserved from May 23, 2001 to April 12, 2002, for which it collected the erroneous $206.75 charge. Counsel for Aloha represents that the utility is now and has been since April 12, 2002, charging the appropriate connection fee to all new connections that have occurred since that date. On April 16, 2002, Aloha sent a letter to persons who had outstanding prepaid connections who would be assessed the higher rate upon attempting to connect any of their home sites to Aloha's system. On April 22, 2002, a second letter was sent to each of the developers who had outstanding "arrearages" for connections made between May 23, 2001 and April 12, 2002.

In the letters dated April 22, 2002, Aloha states that it is required by its tariff, Commission orders, and by Florida law, to assess the increased rate for this time period. The utility further states that while it mistakenly failed to charge for this increase previously, the utility is authorized both under its

Developer Agreement with Windward Homes and under Commission rules to backbill in the case of such a mistake. Aloha apologized for the mistake and offered to work with the developer on the method of repayment, but stated that the utility must receive all of the overdue monies for prior connections in order to comply with Commission requirements, and that the utility must hear from the developer shortly or it will have to consider alternative measures in order to collect the monies.

BACKBILLING

Rule 25-30.350(1), Florida Administrative Code, provides that

> [a] utility may not backbill customers for any period greater than 12 months for any undercharge in billing which is the result of the utility's mistake. The utility shall allow the customer to pay for the unbilled service over the same time period as the time period during which the underbilling occurred or some other mutually agreeable time period.

The Commission addressed this rule in Order No. PSC-96-1229-FOF-WS, issued September 30, 1996, in Docket No. 950828-WS, In re: Rainbow Springs Utilities, L.C. (Rainbow Springs). In that case, because of a utility error, Rainbow Springs failed to charge its customers a base facility charge for irrigation meters, and backbilled its customers pursuant to the rule. The Commission found that "[t]he term 'mistake' covers events such as improperly read meters, undiscovered connections, and uncollected service availability charges," and that the mistake made by Rainbow Springs constituted a "mistake" as contemplated by the rule. Id. at 27. Nevertheless, the Commission also found that it was within the Commission's discretion as to whether a utility can backbill a customer as a result of a utility mistake. Id. at 28.

The Commission cited Order No. PSC-93-1173-FOF-WU, issued August 10, 1993, in Docket No. 930168-WS, In re: Gulf Utility Company (Gulf), in finding that in certain circumstances, utility mistakes do not constitute mistakes for which the utility should be allowed to backbill. Thus, the Commission disallowed Rainbow Springs from backbilling its customers because "[t]he utility had multiple opportunities to discover its error and should have been aware of its own tariffs. The customers apparently relied upon the fact that they were not informed of the base facility charge, nor

were they assessed the charge until the mistake was discovered." Id. at 29. The Commission found that those circumstances indicated that the mistake was more than just a "billing error," and, as contemplated by the Gulf case, should not be collected from customers. The utility was therefore ordered to refund any monies collected from the customers it backbilled.

The Gulf case involved a complaint by a customer for the backbilling of certain special service availability charges. By Order No. PSC-93-1173-FOF-WU at page 4, the Commission found that "[i]t is appropriate for a utility to rectify mistakes made in the ordinary course of business whether the advantage is to the utility or the customer. Our rules provide for a utility to backbill and collect for simple errors made in billing for service." However, the Commission found that this was not a simple billing error for the following reasons:

> 1) the utility had multiple opportunities to find its error prior to the signing of the Utility Agreements; 2) the utility failed to disclose charges not available for review in its tariff; 3) the customer relied upon the charges quoted to him in making his decision to give up his own operational well and water purifier systems; 4) the customer paid substantial sums in other service availability charges and connection fees; 5) the error was not discovered until both parties had performed under the agreements; and 6) the utility had paid the Developer the pro-rata charges.

Id. The Commission held that the customer was not required to pay the backbilled charge, even though the utility stated that it acted upon Commission staff's advice when it backbilled the customer. At the time the mistake was discovered, fully executed contracts were in place, and it was only after all parties had completed performance that the utility notified the customer of its error.

As in the Commission's decisions in both Rainbow Springs and Gulf, Aloha's mistake is more than just a billing error. The circumstances surrounding Aloha's mistake present several complicating factors, such as:

1) Although Aloha should have filed a revised tariff sheet to reflect its approved service availability charge at the same time that it filed its wastewater rate tariffs which were approved

effective May 23, 2001, it did not file the service availability tariff sheet until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until April 12, 2002. Because staff discovered the tariff error, it is unknown when the utility would have discovered it on its own. The utility is charged with the knowledge of Commission orders, including the order which increased the service availability charges. The utility had ample opportunity to find its mistake prior to March 11, 2002, and prior to signing utility agreements with developers.

2) It was only because staff reasonably believed that the developers were aware of the increase in service availability charges and had been paying the increased amounts since the charges were approved that staff stamp-approved the tariff sheet filed on March 11, 2002, retroactively to May 23, 2001. In actuality, the utility did not substantially complete noticing of the approved service availability charges until April 16, 2002.

3) From May 23, 2001 to March 11, 2002 (and on to April 12, 2002, when the utility began charging the increased service availability charges), the developers relied on Aloha's erroneous representations concerning the amount of service availability charges due and the outdated tariff sheet on file resulting from Aloha's failure to timely submit the revised tariff sheet, in paying what they had reasonably believed was the correct service availability charge of $206.75 per ERC.

4) The developers reasonably relied upon the charges quoted to them. If they are backbilled, they will be unable to increase the price of homes already sold to account for the increase in the service availability charge to $1,650 per ERC. The mistake was not discovered until Aloha and the developers had performed under the agreements. It is simply unfair to allow Aloha to backbill for these charges when the developers could have otherwise protected themselves if Aloha had followed the correct procedures and timely charged its approved service availability charges.

For the foregoing reasons, staff recommends that under the circumstances of the instant case, and consistent with its prior decisions in Rainbow Springs and Gulf, the Commission should not authorize Aloha to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002. Pursuant to H.

Miller & Sons, 373 So. 2d at 916, the crucial time in regard to service availability charges is the date of connection, since the actual cost of maintaining sufficient capacity cannot be ascertained until that date (see Issue 2). Therefore, with respect to persons who prepaid the erroneous $206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, Aloha should charge its approved service availability charge of $1,650 provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code.

REFUNDS

If, through backbilling or from collection of increased service availability charges, Aloha has collected the higher service availability charges approved in Order No. PSC-01-0326-FOF-SU for connections made between May 23, 2001 and April 16, 2002, Aloha should be required to refund with interest all amounts greater than the $206.75 per ERC. Aloha should be required to refund any difference received, calculated with interest in accordance with Rule 25-30.360, Florida Administrative Code. Pursuant to Commission rule, the amount of interest should be based on the 30-day commercial paper rate for the appropriate time period. The refund should be made within 30 days of the effective date of the order and the utility should be required to file refund reports consistent with Rule 25-30.360, Florida Administrative Code.

ISSUE 4: Should Aloha be required to impute on its books as though collected any amount of the CIAC that it should have collected between May 23, 2001 and April 16, 2002?

RECOMMENDATION: Yes. Aloha should be required to impute $157,341 of CIAC on its books as though collected. (FLETCHER, GERVASI)

STAFF ANALYSIS: Had Aloha timely filed its tariff in compliance with Order No. PSC-01-0326-FOF-SU, the utility would have been collecting the increased service availability charges since May 23, 2001. The incremental difference between the prior and current charge is $1,443.75 ($1,650 - 206.75) per ERC. Staff auditors have verified that there were 407 5/8 X 3/4-inch meter connections and two 1-inch meter connections made from May 23, 2001 to April 16, 2002. According to Aloha's response to a staff data request filed July 10, 2002, the combined total reserved gallons for the two 1-inch meter connections were 6,000 gallons per day (gpd). For these two connections, the utility should have collected an additional $72,144. For the 5/8 X 3/4-inch meter connections, Aloha should have collected an additional $587,403. Thus, Aloha should have collected a total of $659,547 more in service availability charges than it actually collected for connections made between May 23, 2001 and April 16, 2002.

As mentioned in the case background, by letter dated July 25, 2002, and filed July 29, 2002, a customer of Aloha, V. Abraham Kurien, M.D., expressed his objection to "the PSC making any settlement with Aloha about this $600,000 uncollected impact fees and its attempt to collect from its present customers *any amount whatsoever* towards this omission of the Utility and the PSC." According to Dr. Kurien, the uncollected amount should be met from the 10% return on investment. And, "[i]f Aloha is allowed to collect this amount through rate increases, then the PSC will have failed the customers of Aloha just as much as the Utility has done in so many ways in the past."

Staff notes that absent backbilling all the developers who paid the incorrect service availability charges for connections made during the time in question, there appears to be no way for Aloha to recover the CIAC that has been lost during this period. However, if future rates were to be based on the rate base inflated by Aloha's failure to timely implement its higher service availability charges, this would essentially penalize Aloha's customers by significantly increasing future rates. Aloha's

customers should not be made to pay for Aloha's avoidable and costly mistakes.

It is within the Commission's discretion to impute the entire amount that Aloha should have charged for service availability during the period in question. Section 367.081(1), Florida Statutes, provides that a utility may only charge rates and charges that have been approved by the Commission. As noted by Order No. PSC-99-2444-AS-SU, issued December 14, 1999, in Docket No. 981781-SU, the Commission generally imputes CIAC "when a utility has not collected CIAC in accordance with its tariffed rates and charges." The Commission has imputed CIAC on numerous occasions when a utility failed to charge its approved service availability charges.[2]

However, staff does not believe that it is in the customers' best interests to impute the entire differential of $659,547 because of the potential negative impact on the utility's ability to obtain future financing for plant improvements. Based on the simple average balance from the utility's 2000 and 2001 annual reports, Aloha has a 20.45% equity ratio. If the entire service availability charge differential of $659,547 were imputed, it would lower the utility's total company equity ratio to 15.70%. Staff believes that the result of full imputation could detract financial lenders' willingness to approve additional loans for Aloha. Thus, in order to minimize this potential impact and to offset the amount of any future rate increase caused by the utility's mistake, staff recommends that the imputation should be limited to the revenue impact of a 100 basis point reduction of the return on equity (ROE).

To calculate this impact, staff utilized the 2001 leverage formula approved by Order No. PSC-01-2514-FOF-WS, issued December 24, 2001, in Docket No. 010006-WS.[3] That formula calculation

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[2]See, e.g., Order No. PSC-96-0790-FOF-WU, issued June 18, 1996, in Docket No. 930892-WU; Order No. PSC-95-0431-FOF-WS, issued April 16, 1995, in Docket No. 931216-WS; and Order No. PSC-93-1816-FOF-WU, issued December 22, 1993, in Docket No. 930449-WU.

[3]The 2002 leverage formula proposed by Order No. PSC-02-0898-PAA-WS, issued July 5, 2002, has been protested.

results in a ROE midpoint for Aloha of 11.34%, with a range of 10.34% to 12.34%. Based on the amounts reported in the utility's 2001 annual report, the revenue impact of reducing the ROE from the midpoint to the lower limit is $31,194. If the Commission were to impute the full amount of the uncollected CIAC, staff has calculated a revenue requirement differential of $130,760. Comparing the revenue impact of the 100 basis point reduction (of $31,194) to the full imputation (of $130,760) results in a ratio of 23.86%. Based on the above, staff believes that a CIAC imputation of $157,341 (or $659,547 multiplied by 23.86%) is equivalent to the revenue impact of a 100 basis point reduction to Aloha's ROE.

Staff notes that the imputation of $157,341 would lower Aloha's equity ratio from 20.45% to 19.24%. Staff believes that this imputation will be less likely to cause financial harm to the utility than imputing the entire uncollected amount. Further, this imputation will provide a benefit to Aloha's customers through a reduction to rate base, which would reduce the level of a possible rate increase in the future. Based on the above, staff recommends that Aloha should be required to impute $157,341 of CIAC on its books as though collected.

ISSUE 5: Should the Limited Partners' Petition to Intervene be granted?

RECOMMENDATION: Yes. However, because the Limited Partner's substantial interests are only affected by the Commission's decision on Issues 3 and 6, intervention should be limited to those issues. This decision should be without prejudice to the Limited Partners to file a complaint regarding the other issues raised in their Petition which are unrelated to the issues addressed in this docket. (GERVASI)

STAFF ANALYSIS: As noted in the case background, the Limited Partners filed a Petition to Intervene in this docket on July 24, 2002. As grounds therefor, the Limited Partners state, among other things, that they are the combined 99.5% owners of a 288-unit apartment complex project known as the Village at Wyndtree, which is located in Aloha's service territory. In December 2000, the project engineer inquired of Aloha regarding Aloha's fees and charges related to the project. By letter dated December 4, 2000, Aloha advised that the project would require service availability charges of $177,265.44. The Commission increased Aloha's service availability fees two months later, by Order No. PSC-01-0326-FOF-SU, issued February 6, 2001.

According to the Limited Partners, the project secured its funding from the United States Department of Housing and Urban Development (HUD). In October 2001, the project was billed by and paid to Aloha the sum of $177,265.44, the total amount previously specified in Aloha's December 4, 2000 letter. Construction proceeded on the project and on June 14, 2002, the project engineer formally requested that Aloha permanently connect the project to Aloha's Seven Springs water and wastewater system.

Also according to the Limited Partners, in response to that June 14, 2002, request, Aloha told the engineer of the wastewater service availability charge increase for the first time. On June 17, 2002, Aloha faxed a copy of a letter concerning the service availability charge increase to the project engineer, which was purportedly sent to the general partner on May 16, 2002. The general partner and all others connected with the project specifically deny having received any such letter prior to June 17, 2002. Aloha refused to make the connection until it received an additional approximately $500,000. Aloha was aware that tenants

had signed leases and were waiting to move into the apartments on June 17, 2002.

In an effort to mitigate damages because of the tenants with leases who were waiting to move into the units, on July 2, 2002, the limited partner paid Aloha $430,389, under protest, and requested immediate connection. On July 10, 2002, Aloha again refused to make the connection based upon a miscalculation of the additional service availability charges due, and advised that an additional balance of $273,015 was due. After further discussion with the general partner and the project engineer, Aloha reduced the projected usage for the project. Based on that reduction, Aloha recalculated the balance due to a total of $11,485. That balance was paid and Aloha finally connected the project on July 18, 2002.

The Limited Partners argue that in the previous recommendation filed in this docket on May 15, 2002, staff recommended that the effective date of the revised service availability charge tariff should be April 16, 2002, because Aloha had substantially completed noticing on that date. Yet Aloha never notified anyone connected with the project about this increase until June 17, 2002, after connection had been requested. The difference between the amounts that had been prepaid and the amount finally paid under protest is almost $500,000, which is approximately equal to the amounts due from all other developers. Aloha's failure to notify anyone connected with this project can hardly be deemed "substantially completed notice" when the amount due from this one developer is approximately equal to the amounts due from all other developers.

The Limited Partners state that they have standing to intervene based upon the two-pronged test first announced in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982). That two-pronged test requires allegations that the intervenor will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing and that his substantial injury is of a type or nature which the proceeding is designed to protect. The Limited Partners state that they have clearly alleged that they will suffer a substantial injury if Aloha is permitted to violate Chapter 367 and the rules and orders of this Commission and if the effective date of the revised tariff is established to be prior to July 19, 2002.

In addition to requesting that their Petition to Intervene be granted, the Limited Partners seek affirmative relief from the Commission establishing the effective date of the revised service availability charge tariff as being on or after July 19, 2002. That request is addressed in Issue 6 of this recommendation.

On July 31, 2002, Aloha filed an Objection to Petition to Intervene. Aloha agrees with the petitioners that their potential liability for the increased service availability charge is impacted by the effective date of the tariff. However, the Petition goes far beyond this issue and includes issues concerning notice given to the petitioners, refund of monies paid in excess of $177,265.44, the "wrongful" refusal of Aloha to allow connection to its wastewater system, the date petitioners requested service, and whether there was a valid tariff in place at the time service was requested. Thus, the damage that the petitioners suffer from the determination of an effective date for the new service availability charge is highly speculative. And speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process. Village Park Mobile Home Association, Inc. v. Department of Business Regulation, 506 So. 2d 426, 434 (Fla. 1st DCA 1987). According to Aloha, this docket is not the proper forum in which to discuss or determine the actual facts related to the Limited Partners' receipt of wastewater service from Aloha.

Aloha further argues that in AmeriSteel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997), the Commission denied AmeriSteel's petition for hearing in a JEA-Florida Power and Light Company (FPL) territorial agreement docket on the grounds that AmeriSteel had no substantial interest in the proceeding. Id. at 477. Since Florida does not allow retail customers to select electric providers, the Commission's approval of a territorial agreement which maintained the status quo vis-a-vis AmeriSteel necessarily resulted in AmeriSteel paying FPL's higher electric rates. The Court agreed with the Commission that AmeriSteel's interests were too speculative and thus failed the first prong of the Agrico test. As in AmeriSteel, the petitioner's interests in this docket are too speculative to constitute a substantial interest, and therefore, the first prong of the Agrico test has not been met.

With respect to the second prong of the Agrico test, Aloha argues that the only issue to be decided in this proceeding which the Limited Partners have argued may affect their substantial

interest is the effective date of the tariff. This docket is first and foremost an enforcement proceeding initiated as a result of Aloha's admitted failure to file a revised wastewater service availability tariff sheet in May of 2001, at the conclusion of its wastewater rate case. Since the petitioners did not connect to Aloha's system prior to notice of the tariff change, there can be no backbilling with regard to them. Penalties in the form of fines or CIAC imputations also do not substantially affect the petitioners. The purpose of an enforcement proceeding is to evaluate whether a company violated Commission rules or orders and then to impose the appropriate penalty. Determining the correct amount that the petitioners should have paid in service availability charges does not fall within that purpose. If the petitioners are denied intervention in this proceeding, they have a means of raising their issue for resolution: file a complaint.

Aloha requests that the Petition to Intervene be denied, or, in the alternative, if the Commission determines that the Petition should be granted, intervention should be limited solely to the issue of the effective date of Aloha's wastewater service availability tariff associated with Order No. PSC-01-0326-FOF-SU.

It appears to staff that the Limited Partners' substantial interests will be affected by the Commission's decision on Issues 3 and 6, and that they have standing to intervene based upon the two-pronged test first announced in Agrico. In Issue 3, staff recommends that H. Miller & Sons, 373 So. 2d at 916, dictates that persons who prepaid the erroneous $206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, should be charged Aloha's approved service availability charge of $1,650 provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code. Issue 6 concerns the stamped approval date of the service availability tariff sheets. If the Commission agrees with staff on those issues, the petitioners will not be refunded the substantial additional amounts that they paid under protest to Aloha.

Nevertheless, staff agrees with Aloha that the primary purposes of this proceeding are to evaluate whether Aloha violated Commission rules or orders and whether to impose a penalty therefor, whether builders and developers who connected to the system prior to receiving notice of the approved service availability charges should be backbilled, and whether any amounts that should have been collected for such connections should be

imputed. Determining the correct amount that the petitioners should have paid in service availability charges does not fall within these purposes, since the petitioners connected to the system one month after they received actual notice of the approved service availability charges.

For the foregoing reasons, staff recommends that because the Limited Partner's substantial interests are only affected by the Commission's decision on Issues 3 and 6, intervention should be limited to those issues. This decision should be without prejudice to the Limited Partners to file a complaint regarding the other issues raised in their Petition which are unrelated to the issues addressed in this docket.

ISSUE 6: Should Aloha be required to file a replacement tariff sheet reflecting its approved service availability charges, to be stamped effective for connections made on or after April 16, 2002?

RECOMMENDATION: Yes, Aloha should be required to file a replacement tariff sheet within 10 days of the effective date of the order arising from this recommendation, reflecting its approved service availability charges. The tariff sheet should be stamped effective for connections made on or after April 16, 2002 and the affirmative relief sought by the Limited Partners, which is that the effective date of the revised service availability charge tariff should be on or after July 19, 2002, should be denied. Further, no developer or builder should be billed the approved service availability charges unless notice has been provided to the developer or builder, pursuant to Rule 25-30.475(2), Florida Administrative Code. In accordance with H. Miller & Sons, that notice must be received prior to connection and no later than the date of connection. Aloha should also be required to provide notice of the Commission's order arising from this recommendation to all developers to whom it has sent a backbilling letter and to any persons who have either requested service or inquired about service with the utility in the past 12 months. Aloha should submit the proposed notices for staff's administrative approval within 10 days of the effective date of the order. (FLETCHER, GERVASI)

STAFF ANALYSIS: As discussed earlier, staff stamp-approved the service availability tariff sheet filed on March 11, 2002, retroactively to May 23, 2001, because Aloha had represented that the developers were aware of the increase in service availability charges and had been paying the increased amounts since that time. In actuality, from May 23, 2001, to April 12, 2002, the developers paid what they had reasonably believed was the correct service availability charge of $206.75 per ERC. Also, for charges between April 12, 2002 and April 16, 2002, the developers received no notice of the approved service availability charges. In its May 13, 2002 discovery response, Aloha states that it began charging its authorized service availability charges on April 12, 2002, and that all developers who have inquired about service availability have been advised of the correct charges since that date.

However, as previously stated, Aloha did not substantially complete its noticing to developers who were already connected to the system until on or after April 16, 2002. Rule 25-30.475(2), Florida Administrative Code, provides that service availability

charges "shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets provided customers have received notice." (Emphasis added.) Based on this provision, staff recommends that for developers/builders who connected to the system from May 23, 2001, to April 16, 2002, the previous service availability charge of $206.75 should apply. For those developers/builders who were connected on or after April 16, 2002, the service availability charge of $1,650 should be effective. However, it is apparent from the copies of notices that Aloha provided to staff that not all developers and builders who were connected to the system during that time frame received actual notice by that date. Therefore, staff further recommends that no developer or builder should be billed the approved service availability charges unless notice was provided to the developer or builder pursuant to Rule 25-30.475(2), Florida Administrative Code.

In their Petition for Intervention discussed in Issue 5, the Limited Partners correctly state that in the previous recommendation filed in this docket on May 15, 2002, staff recommended that the effective date of the revised service availability charge tariff should be April 16, 2002, because Aloha had substantially completed noticing on that date. The Limited Partners seek affirmative relief from the Commission establishing the effective date of the revised service availability charge tariff as being on or after July 19, 2002. As noted in Issue 5, the Limited Partners argue that Aloha never notified anyone connected with the HUD project about this increase until June 17, 2002, after connection had been requested. The difference between the amounts that had been prepaid and the amount finally paid under protest is almost $500,000, which is approximately equal to the amounts due from all other developers. The Limited Partners argue that Aloha's failure to notify anyone connected with this project can hardly be deemed "substantially completed notice" when the amount due from this one developer is approximately equal to the amounts due from all other developers.

Staff disagrees that the notice afforded to the Limited Partners cannot be deemed "substantially completed notice" to the developers and builders who were connected to Aloha's wastewater system between May 23, 2001 and April 16, 2002. Although the Limited Partners did not receive actual notice of Aloha's approved service availability charges until June 17, 2002, actual connection did not take place until one month later, on July 18, 2002. Unlike the other developers and builders who did not receive notice of

Aloha's approved service availability charges until after they were connected to the system, the Limited Partners received notice of Aloha's approved service availability charges before they were connected to the system. As stated in Issue 3, pursuant to H. Miller & Sons, 373 So. 2d at 916, the crucial time in regard to service availability charges is the date of connection, since the actual cost of maintaining sufficient capacity cannot be ascertained until that date. Therefore, with respect to persons who prepaid the erroneous $206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, including the Limited Partners, Aloha should charge its approved service availability charge of $1,650 provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code. In accordance with H. Miller & Sons, that notice must be received prior to connection and no later than the date of connection.

Based upon all of the foregoing, staff recommends that Aloha should be required to file a replacement tariff sheet within 10 days of the effective date of the order arising from this recommendation, reflecting its approved service availability charges. The tariff sheet should be stamped effective for connections made on or after April 16, 2002, the date that Aloha substantially completed noticing to developers and builders who were connected to the system by April 16, 2002. The affirmative relief sought by the Limited Partners, which is that the effective date of the revised service availability charge tariff should be on or after July 19, 2002, should be denied. Further, no developer or builder should be billed the approved service availability charges unless notice has been provided to the developer or builder, pursuant to Rule 25-30.475(2), Florida Administrative Code. In accordance with H. Miller & Sons, that notice must be received prior to connection and no later than the date of connection. Aloha should also be required to provide notice of the Commission's order arising from this recommendation to all developers to whom it has sent a backbilling letter and to any persons who have either requested service or inquired about service with the utility in the past 12 months. Aloha should submit the proposed notices for staff's administrative approval within 10 days of the effective date of the order.

ISSUE 7: Should this docket be closed?

RECOMMENDATION: If the Commission approves staff's recommendation on Issues 1-6, no timely protests are filed to the proposed agency action issues, and Aloha responds to the show cause order by paying the required fine, refunds any backbilled amounts received calculated with interest in accordance with Rule 25-30.360, Florida Administrative Code, within 30 days of the effective date of the order, files refund reports consistent with Rule 25-30.360, Florida Administrative Code, files a replacement tariff sheet reflecting its approved service availability charges and provides the required notices within 10 days of the effective date of the order, this docket should be closed administratively. If Aloha fails to comply with the Commission's directives, this docket should remain open for further action. If Aloha responds to the show cause order and requests a hearing, or a protest is received to a proposed agency action issue by a substantially affected person within 21 days of the issuance date of the order, this docket should remain open for final disposition. (GERVASI)

STAFF ANALYSIS: If the Commission approves staff's recommendation on Issues 1-6, no timely protests are filed to the proposed agency action issues, and Aloha responds to the show cause order by paying the required fine, refunds any backbilled amounts received calculated with interest in accordance with Rule 25-30.360, Florida Administrative Code, within 30 days of the effective date of the order, files refund reports consistent with Rule 25-30.360, Florida Administrative Code, files a replacement tariff sheet reflecting its approved service availability charges and provides the required notices within 10 days of the effective date of the order, this docket should be closed administratively. If Aloha fails to comply with the Commission's directives, this docket should remain open for further action. If Aloha responds to the show cause order and requests a hearing, or a protest is received to a proposed agency action issue by a substantially affected person within 21 days of the issuance date of the order, this docket should remain open for final disposition.