BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.	DOCKET NO. 020413-SU ORDER NO. PSC-02-1250-SC-SU ISSUED: September 11, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER TO SHOW CAUSE FOR FAILURE TO CHARGE APPROVED SERVICE AVAILABILITY CHARGES AND FILE REVISED TARIFF SHEET AND GRANTING IN PART LIMITED PARTNERS' PETITION TO INTERVENE

AND

NOTICE OF PROPOSED AGENCY ACTION ORDER REJECTING PROPOSED SETTLEMENT AGREEMENT, REQUIRING FILING OF REPLACEMENT TARIFF SHEET TO BE STAMPED EFFECTIVE FOR CONNECTIONS MADE ON OR AFTER APRIL 16, 2002, AUTHORIZING ALOHA UTILITIES, INC. TO BACKBILL FOR APPROVED SERVICE AVAILABILITY CHARGES, AND RECOGNIZING FULL AMOUNT OF UNCOLLECTED SERVICE AVAILABILITY CHARGES AS CIAC

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the actions discussed herein rejecting the proposed settlement agreement, requiring Aloha Utilities, Inc., to file a replacement tariff sheet to be stamped effective for connections made on or after April 16, 2002, authorizing Aloha Utilities, Inc.,

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to backbill for its approved service availability charges, and recognizing the full amount of the uncollected service availability charges as CIAC, are preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

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, we approved increased rates and charges for Aloha. We 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. We 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, we 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. We 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 this Commission.

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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 we 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.

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.

Our staff originally filed a recommendation in this docket on May 15, 2002, for our 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 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, our staff agreed to file a recommendation for consideration at our 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 this Commission 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. In order to incorporate those filings into their recommendation, our staff delayed the filing of the recommendation by one agenda filing date. Moreover, on August 15, 2002, OPC filed a Notice of Intervention in

this docket. OPC's intervention was acknowledged by Order No. PSC-02-1122-PCO-SU, issued August 19, 2002.

This Order addresses Aloha's apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, the Limited Partners' Petition to Intervene, the proposed settlement agreement, the effective date of the increased service availability charges, 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 amounts that Aloha should have collected should be imputed on the utility's books as contributions-in-aid-of-construction (CIAC) as though collected. We have jurisdiction pursuant to Sections 367.091 and 367.161, Florida Statutes.

PROPOSED SETTLEMENT AGREEMENT

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 this 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. Moreover, as we later discuss, we disagree 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 this Commission. Further, by this Order, we are requiring Aloha to show cause as to why it should not be penalized in the amount of $10,000, 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, we reject the proposed settlement agreement, and we instead dispose of this matter as set forth below.

LIMITED PARTNERS' PETITION TO INTERVENE

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. We 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, our 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 this Commission establishing the effective date of the revised service availability charge tariff as being on or after July 19, 2002. That request is addressed later in this Order.

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), this 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 this 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 we determine 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 that the Limited Partners' substantial interests will be affected by our decision concerning whether the utility should be authorized to backbill and concerning the effective date of Aloha's service availability tariff. Therefore, we find that they have standing to intervene on those issues based upon the two-pronged test first announced in Agrico. With respect to the backbilling issue, we find later in this Order 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. We also rule later in this Order that the stamped approval date of the service availability tariff sheets is April 16, 2002. Should those proposed decisions become final, the petitioners will not be refunded the substantial additional amounts that they paid under protest to Aloha.

Nevertheless, we agree 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.

Because we find that the Limited Partner's substantial interests are only affected by our decision concerning backbilling and the effective date of the tariff, intervention shall be limited to those issues. This decision shall 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.

EFFECTIVE DATE OF TARIFF SHEET

Our staff stamp-approved Aloha's 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, 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, for developers/builders who connected to the system from May 23, 2001, to April 16, 2002, the previous service availability charge of $206.75 appears to apply. For those developers/builders who were connected on or after April 16, 2002, the service availability charge of $1,650 shall be effective. However, it is apparent from the copies of notices that Aloha provided to our staff that not all developers and builders who were connected to the system during that time frame received actual notice by that date.

In their Petition for Intervention discussed above, the Limited Partners correctly state that in the previous recommendation filed in this docket on May 15, 2002, our 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 this Commission establishing the effective date of the revised service availability charge tariff as being on or after July 19, 2002. As previously noted, 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.

We disagree 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. Pursuant to H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 916 (Fla. 1979), 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 shall 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, Aloha shall file a replacement tariff sheet within 10 days of the issuance date of this Order, reflecting its approved service availability charges. The tariff sheet will 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, is denied. In accordance with H. Miller & Sons, notice must be received no later than the date of connection. Aloha shall provide notice of this Order 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 shall submit the proposed notices for our staff's administrative approval within 10 days of the effective date of this Order.

BACKBILLING

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.

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.

Our staff recommended that under the circumstances of the instant case, 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. We reject our staff's recommendation in this regard. At the agenda conference, Aloha agreed to the imputation of the full amount of foregone collections if Aloha were afforded the

opportunity to backbill developers who did not pay. We hereby authorize Aloha to backbill the developers and builders in question and to exercise its ability to try to collect its approved service availability charges pursuant to Order No. PSC-01-0326-FOF-SU.

We note that service availability increases offset the need for future rate increases to the general body of ratepayers, and that increased service availability charges are a business risk to developers generally. The uncollected service availability charges in question shall be shouldered by Aloha, either alone or together with the developers who should have been billed for these charges by the time of connection. However, no portion of the uncollected service availability charges shall be borne by the existing ratepayers. We find it appropriate in this instance to exercise our discretion to allow Aloha the opportunity to try to collect from the developers the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers, so long as the existing ratepayers are not affected in any way by the utility's collection efforts. Aloha shall in no instance attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount.

IMPUTATION OF CIAC

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 previously mentioned, 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."

It is within our authority 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, this Commission generally imputes CIAC "when a utility has not collected CIAC in accordance with its tariffed rates and charges." This Commission has imputed CIAC on numerous occasions when a utility failed to charge its approved service availability charges.[2]

Our staff recommended that the entire differential of $659,547 should not be imputed because of the potential negative impact on the utility's ability to obtain future financing for plant improvements, and suggested that the imputation should be limited to $157,341, the revenue impact of a 100 basis point reduction of the utility's return on equity (ROE). We reject that recommendation. As mentioned above, at the agenda conference, Aloha agreed to the imputation of the full amount of foregone collections if Aloha were afforded the opportunity to backbill developers who did not pay. In the words of counsel for Aloha:

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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.

> The utility must have the ability to collect and to work out deals with developers to accept something less than 100% of amounts past due. But the utility's agreement to full imputation of CIAC has to be coupled with the utility's ability, by whatever means, to try to get the developers to pay.

Accordingly, we impute the entire amount to Aloha, noting that it is Aloha and Aloha alone that bears the risk that the amounts backbilled are uncollectible for whatever reason, including inability to locate developers, insolvency of developers, ir illegality. By this Order, we authorize Aloha to try to backbill developers its approved service availability charges that the utility should have collected from May 23, 2001, to April 16, 2002. The existing body of ratepayers shall bear none of the cost associated with Aloha's failure to charge its approved service availability charges. Regardless of whether Aloha is successful in collecting the full backbilled amounts from the developers in question or any portion thereof, 100% of the amount of these charges, or $659,547, shall be recognized as CIAC.

SHOW CAUSE

As previously noted, in addition to approving increased wastewater rates for Aloha, by Order No. PSC-01-0326-FOF-SU, this 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, we 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, we directed the utility to increase its service availability (plant capacity) charges. We 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, our staff noted that Aloha had not filed the service availability tariff sheet required by Order No. PSC-01-0326-FOF-SU. The 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, our 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, 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, our 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 this 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.

We 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 our staff detected Aloha's failure to file the tariff sheet sooner, they would have alerted the utility to that fact sooner. Nevertheless, Aloha is charged with the knowledge of this Commission's orders, statutes, and rules. Moreover, although the service availability tariff sheet on file with this Commission from May 23, 2001, to March 11, 2002, did not correctly reflect Aloha's authorized service availability charge, no act or order of this 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).

Aloha is hereby ordered to show cause, in writing, within 21 days, why it should not be fined $10,000 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.

By Order No. PSC-01-0326-FOF-SU, the very order that Aloha has apparently violated now, 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. We placed the utility on notice at that time 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 this Commission. We again warn Aloha that future non-compliance with Order No. PSC-97-0280-FOF-WS, or any other order or rule of this Commission, will not be tolerated.

Aloha's response to this 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 this Commission. If the utility responds timely but does not request a hearing, a recommendation will 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 shall be considered resolved.

DOCKET CLOSURE

If no timely protest is filed to the proposed agency action issues and Aloha responds to the show cause order by paying the required fine, 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 shall be closed administratively. If Aloha fails to comply with this Commission's directives, this docket shall 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 shall remain open for final disposition. In the event of a protest, the tariff shall remain in effect, held subject to refund, pending resolution of the protest.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the proposed Settlement Agreement between Aloha Utilities, Inc., and several developers, filed on August 5, 2002, is rejected. It is further

ORDERED that SRK Partnership Holdings, LLC and Benchmark Manmen Corp.'s Petition to Intervene in this docket, filed on July 24, 2002, is granted in part and denied in part, as set forth in the body of this Order, without prejudice to file a complaint regarding the other issues raised in the Petition which are unrelated to the issues addressed in this docket. It is further

ORDERED that Aloha Utilities, Inc. shall file a replacement tariff sheet within 10 days of the issuance date of this Order, reflecting its approved service availability charges. The tariff sheet will be stamped effective for connections made on or after April 16, 2002. The affirmative relief sought by SRK Partnership Holdings, LLC and Benchmark Manmen Corp., which is that the effective date of the revised service availability charge tariff should be on or after July 19, 2002, is denied. It is further

ORDERED that Aloha Utilities, Inc., shall provide notice of this Order 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 shall submit the proposed notice for our staff's administrative approval within 10 days of the effective date of this Order. It is further

ORDERED that, pursuant to Order No. PSC-01-0326-FOF-SU, Aloha Utilities, Inc. is hereby authorized to backbill the developers in question and to try to collect from those developers the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers. In no instance shall any portion of the uncollected service availability charges be borne by the existing ratepayers. Aloha Utilities, Inc., shall in no instance attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount. It is further

ORDERED that regardless of whether Aloha Utilities, Inc., is successful in collecting the full backbilled amounts from the developers in question or any portion thereof, 100% of the amount of these charges, or $659,547, shall be recognized as CIAC. It is further

ORDERED that Aloha Utilities, Inc., is hereby ordered to show cause, in writing, within 21 days, why it should not be fined $10,000 for failure to timely file a revised tariff sheet on service availability charges and charge its approved service availability charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. The utility is warned that future non-compliance of Order No. PSC-97-0280-FOF-WS, or any other order or rule of this Commission, will not be tolerated. It is further

ORDERED that Aloha Utilities, Inc.'s, response to this 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. It is further

ORDERED that any response to this Order shall be filed with the Director, Division of the Commission Clerk and Administrative Services within 21 days of the date of issuance of this Order. It is further

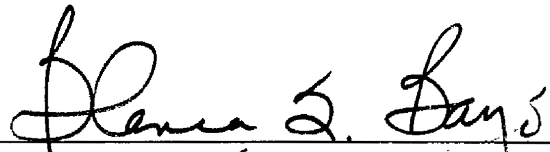
ORDERED that in the event that Aloha Utilities, Inc., fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by this Commission. If the utility responds timely but does not request a hearing, a recommendation will be presented to the Commission regarding the disposition of the show cause order. If the utility responds to the show cause by remitting the fine, the show cause matter shall be considered resolved. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that if no timely protest is filed to the proposed agency action issues and Aloha Utilities, Inc., responds to the show cause order by paying the required fine, 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 shall be closed administratively. If Aloha Utilities, Inc., fails to comply with this Commission's directives, this docket shall remain open for further action. If Aloha Utilities, Inc., 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 shall remain open for

final disposition. In the event of a protest, the tariff shall remain in effect, held subject to refund, pending resolution of the protest.

By ORDER of the Florida Public Service Commission this 11th day of September, 2002.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk and Administrative Services

(S E A L)

RG

Chairman Lila A. Jaber dissents with the following opinion:

I respectfully dissent from the majority's decision to allow Aloha Utilities, Inc. to backbill developers for the approved service availability charges which should have been collected from May 23, 2001, to April 15, 2002. I do not believe Rule 25-30.350(1), Florida Administrative Code, (backbilling rule) is applicable in this situation. I believe this rule applies to backbilling for utility errors in billing customers for monthly service and not for one time charges, such as service availability charges.

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 that is available under Section 120.57, 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 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.

The actions proposed herein rejecting the proposed settlement agreement, requiring Aloha Utilities, Inc., to file a replacement tariff sheet to be stamped effective for connections made on or after April 16, 2002, authorizing Aloha Utilities, Inc., to backbill for its approved service availability charges, and recognizing the full amount of the uncollected service availability charges as CIAC, are preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 2, 2002.

In the absence of such a petition, the aforementioned proposed actions shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Any party adversely affected by the decision to grant in part and deny in part the Petition to Intervene, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Any person whose substantial interests are affected by the show cause order may file a response within 21 days of issuance of the show cause order as set forth herein. This response must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 2, 2002.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.