

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

DOCKET NO. 020896-WS

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

DOCKET NO. 010503-WU

ORDER NO. PSC-04-0712-PAA-WS

ISSUED: July 20, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS DELETION PETITIONS, GRANTING MOTION TO STRIKE SUPPLEMENTAL RESPONSE, AND SETTING DELETION PETITIONS DIRECTLY FOR HEARING

AND

NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING MOTION TO MODIFY ORDER NO. PSC-02-0593-FOF-WU

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein granting Aloha Utilities, Inc.'s Motion to Modify Order No. PSC-02-0593-FOF-WU is 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 water and wastewater utility providing service to approximately 14,000 customers in Pasco County, including approximately 11,000 customers in the Seven Springs area. The Seven Springs area, which includes Riverside Villas, has a continuing problem with odor and black water caused by the presence of hydrogen sulfide.

This Order involves both (a) the implementation of potential solutions to the odor and black water problem in light of an independent audit financed by the Office of Public Counsel

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(OPC), and (b) the handling of two petitions for deletion of territory and other relief (deletion petitions) filed by customers in Seven Springs. The parties to the deletion docket, Docket No. 020896-WS, include Aloha, OPC, and Aloha customers Dr. Kurien, Mr. Wood, Mr. Hawcroft, and Dr. Gaul.¹

Black Water Problem and the Rate Case Order

This Commission addressed the black water problem in Order No. PSC-02-0593-FOF-WU (rate case order) issued April 30, 2002, in Docket No. 010503-WU, Aloha's most recent rate case docket. The rate case order contained an extensive discussion of the black water issue and ordered Aloha to take specific steps to address the problem:

- Hydrogen sulfide naturally occurs in much of the source water for Florida's utilities. The black water problem is not unique to the customers of Aloha and does occur in other areas of Florida.
- Hydrogen sulfide in Aloha's source water is converted to sulfates by chlorination.
- Copper sulfide (black water) occurs when elemental sulfur or sulfate in the water is converted biochemically in the customer's home from harmless sulfate and elemental sulfur back into hydrogen sulfide.
- Aloha's water contains very small quantities of sulfate as it is delivered to the customer – at most one-tenth of the national limit.
- Aloha meets the drinking water standards set forth by the Department of Environmental Protection (DEP) for water quality, and the black water is created beyond the meter. Therefore the quality of Aloha's product is satisfactory.
- The method that Aloha has chosen to comply with DEP's water quality rules – the conversion of sulfides to sulfates through chlorination – has not proven to be an adequate remedy. Aloha should take a more proactive approach to dealing with the black water problem.
- For those customers experiencing black water, the only absolute fix appears to be to replace existing copper pipe with chlorinated polyvinyl chloride (CPVC) piping.

¹Dr. Kurien caused the first deletion petition to be filed. We granted intervention to the other parties by Order Nos. PSC-02-1274-PCO-WS (OPC), PSC-02-1504-PCO-WS (Mr. Wood), PSC-04-0308-PCO-WS (Mr. Hawcroft) and PSC-04-0309-PCO-WS (Dr. Gaul).

- Another possible solution to address the black water problem is the removal of almost all hydrogen sulfide.
- Aloha is required by December 31, 2003 to implement a treatment process for all its wells that is designed to remove at least 98% of the hydrogen sulfide in the raw water. The improvements must start with Wells No. 8 and 9, which have the highest hydrogen sulfide concentration in the raw water.
- Aloha is required to submit an action plan by July 30, 2002 showing how it intends to comply with this requirement (action plan).

Aloha appealed the rate case order and, on August 5, 2002, this Commission granted a partial stay pending appeal.² The requirement to complete the improvements for removal of 98% of the hydrogen sulfide within 20 months was stayed. The First District Court of Appeal affirmed the rate case order. The Court subsequently denied Aloha's request for reconsideration on June 12, 2003. The new date to implement the 98%-reduction solution thus became February 12, 2005.³ The Court's mandate issued on June 30, 2003.

The Deletion Petitions

On July 18, 2002 – after the rate case order was appealed, before the partial stay was granted, and almost a year before the Court's mandate issued – Dr. Kurien filed a petition signed by 1,491 residents from 1,314 households located in Seven Springs. That petition asked that:

- The required action plan be approved (i) only after an independent audit of Aloha's processing plant and methodology, (ii) only if the action plan contains the minimum requirements imposed by neighboring utilities for raw water processing, and (iii) only if a Citizens' Advisory Committee is created to monitor the effectiveness of the plan.
- The implementation date for treatment improvements be accelerated from December 31, 2003 to April 30, 2003.

² Order No. PSC-02-1056-PCO-WU.

³ On July 29, 2003, Aloha requested a 100-day extension to the new February 12, 2005 deadline. We denied that request as premature by Order No. PSC-03-1157-PCO-WU, issued October 20, 2003.

- If significant resolution of the problems does not occur by June 30, 2003, the Commission “sequester the Seven Springs Area from Aloha Utilities and make it part of the service area of Pasco County water utility system.”

We held action on this petition (first deletion petition) in abeyance from December 9, 2002 to March 8, 2004.⁴ On December 11, 2003, while the docket was in abeyance, a separate petition was filed by 218 customers in the Riverside Villas portion of Seven Springs (second deletion petition). The second deletion petition asked the Commission to alleviate the water quality problem by “allowing us another choice of a water provider.”

Aloha filed timely motions to dismiss both deletion petitions. OPC and Dr. Kurien filed timely responses to the motion to dismiss the first petition. Dr. Kurien later filed a supplemental response to the motion to dismiss that Aloha has moved to strike.

On June 9, 2004, Aloha filed a motion to modify the requirements of the rate case order in the rate case docket, requesting that the requirement to remove 98% of hydrogen sulfide from the raw water should be replaced with a requirement that Aloha make improvements to meet a goal of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility, and that this standard be implemented no later than February 12, 2005.

The Independent Audit

While the deletion docket was in abeyance, OPC volunteered to conduct and finance the independent audit of Aloha’s processing plant and methodology that had been requested by the first deletion petition. This audit was conducted by Dr. Audrey Levine of the University of South Florida. Dr. Levine’s findings and conclusions are contained in a two-phased audit report. Phase I of the report was issued in August 2003 and Phase II was issued in February 2004. Phase II of the report identifies several potential treatment options, each of which may be effective in resolving the odor problem and the formation of copper sulfide in homes that do not already exhibit a black water problem. The report indicates that there is no guarantee that the use of either packed tower aeration or alternative disinfection can completely alleviate the black water problem.

The Customer Service Hearings

In our March 8, 2004 order removing the deletion docket from abeyance, we scheduled customer service hearings to obtain the customers’ views on Dr. Levine’s audit report and the

⁴ Order No. PSC-02-1722-PCO-WS (issued December 9, 2002) held the case in abeyance pending conclusion of the appeal. Order No. PSC-03-0325-FOF-WS (issued March 6, 2003) denied requests by Dr. Kurien and Mr. Wood for reconsideration of the abeyance order. Order No. PSC-04-0254-PCO-WS (issued March 8, 2004) removed the docket from abeyance.

implications of its findings. Two customer service hearings were held in New Port Richey on April 8, 2004. Approximately 200 customers attended each session, and numerous customers testified at both sessions. The customers generally did not address the specifics of the audit report and the proposed treatment options. Instead, virtually all of the customers stated that they wished to be deleted from Aloha's service area in order to obtain service from Pasco County. Subsequent to the service hearings, approximately 365 customers have submitted comments stating that they wish to be deleted from Aloha's service territory and allowed to obtain service from Pasco County, including 88 customers who reside in Riverside Village Estates, Unit 4.

Staff's Investigation

The order removing the deletion docket from abeyance directed our staff to fully analyze the findings of the audit report and the information gathered at the customer service hearing and to thereafter file a recommendation concerning the disposition of the deletion petitions and the pending motions to dismiss those petitions. Pursuant to this direction, our staff has reviewed the audit report in detail, obtained additional information through data requests to Aloha, met with representatives of Pasco County, met with representatives of the Southwest Florida Water Management District (SWFWMD), met with representatives of DEP, and participated in two meetings with the parties. The following is a summary of the key results of that investigation.

A. Potential Treatment Technologies

Dr. Levine's report identified several potential options to modify the existing treatment system:

1. Packed tower aeration. Removal of hydrogen sulfide can be accomplished using packed tower aeration. Packed tower aeration is a physical/chemical treatment system in which a chemical is added to the water to reduce the pH (carbon dioxide or a mineral acid) and the hydrogen sulfide is transferred from the water to air. This process needs to be coupled with a gas scrubber to control the release of odorous compounds into the air. In addition, due to the potential for the packing material to become clogged from biological growth, there is a need for frequent maintenance and/or filtration.

2. Alternative oxidants. Alternative oxidants can be used to improve the consistency of hydrogen sulfide conversion reactions. The most likely candidate oxidants are hydrogen peroxide (H₂O₂) or ozone. The presence of iron in the source water can serve as a catalyst for this process. Supplemental control of pH may be necessary to ensure that the hydrogen sulfide is converted to sulfate. Another advantage of using alternative oxidants is that the chlorine demand of the water will be reduced allowing for more effective use of chloramination. In addition, the supplemental oxygen in the treated water will improve the taste of the water and help reduce the growth of anaerobic microorganisms in the distribution system.

3. Membrane technologies. Membrane technologies can be coupled with chemical oxidation to remove particulate forms of sulfur and improve water quality. The use of membrane processes requires a reliable energy source and a means for treatment/disposal of the rejected water.

It should be noted that while H₂O₂ has been used for the treatment of drinking water, it has not been used for the purpose of reducing hydrogen sulfides in drinking water. The science suggests that it will be effective for that purpose; but the science has not been proven in a full-scale utility application.

B. Utility Analysis of Treatment Alternatives

Aloha's estimated capital and O&M costs for the various treatment options identified in Dr. Levine's report are listed below, along with an estimate of the associated rate impact. All of the costs are conceptual in nature and are subject to change as design and permitting occurs.

Treatment Option	Conceptual Capital Cost	Conceptual O&M Cost	Estimated Rate Impact
Packed Tower Aeration	\$14,500,000	\$3,100,000	261.95%
H ₂ O ₂ Oxidation – Rental	\$3,500,000	\$390,000	43.85%
H ₂ O ₂ Oxidation – Purchase	\$4,000,000	\$340,000	44.40%
Ozone Oxidation	\$6,900,000	\$520,000	72.99%
H ₂ O ₂ Oxidation/Membrane – Rental	\$11,800,000	\$580,000	108.09%
H ₂ O ₂ Oxidation/Membrane – Purchase	\$12,300,000	\$530,000	108.64%

NOTE: The reason for the small difference in the cost between leasing or purchasing equipment is due to the small amount of equipment that could be leased. The leased equipment would be two chemical feed pumps and two storage tanks at each treatment plant site. The company would have to perform its own site work (including slabs and containment structures for tanks), and install its own on-site piping, instrumentation, switches and controls, and electrical modifications at each treatment plant.

On March 29, 2004, Aloha filed its response to a staff data request, in which Aloha describes the advantages and disadvantages and associated costs of each of the treatment methods identified by Dr. Levine.

C. Other Factors

Aloha is currently withdrawing more raw water than is allowed under its consumptive use permits from the SWFWMD. In an effort to settle this matter, Aloha is in negotiations with

Pasco County for a contract to purchase up to 1.5 million gallons per day (MGD) of treated water from the County.

Pasco County obtains water from its own wells and treatment facilities, as well as from purchases from the Tampa Bay Water Authority (Authority). Effective January 1, 2005, the Authority will change its disinfection treatment from the addition of chlorine to the addition of chloramines. Because these two disinfection processes are incompatible, Pasco County will also begin using chloramines effective January 1, 2005. In order to be in a position to purchase treated water from the County, Aloha must likewise change from chlorine to chloramines.

The forthcoming change to chloramines has two consequences:

- Given limited space at Aloha's well sites for additional treatment facilities, if H₂O₂ oxidation is chosen to address the removal of hydrogen sulfide, it is more efficient and cost-effective to design and construct the facilities for use of chloramines and H₂O₂ at the same time. In order to meet a January 1, 2005 in-service date, design and engineering needs to start immediately.
- Without the simultaneous installation of a treatment process, the problem of black water creation may worsen.

Oral argument was granted on Aloha's Motion to Dismiss the deletion petitions. Parties and interested persons were permitted to participate in the discussion on all issues addressed herein. This Commission has jurisdiction pursuant to Sections 367.011, 367.045, 367.111, 367.121, and 367.161, Florida Statutes.

MOTION TO STRIKE

On September 5, 2002, Aloha filed a timely motion to dismiss the first deletion petition. On September 17, 2002, OPC and Dr. Kurien filed timely responses to that motion. Subsequently, on November 4, 2002, Dr. Kurien filed a supplemental response to the motion to dismiss.

Aloha moved to strike Dr. Kurien's supplemental response on two grounds: first, Rule 28-106.204(1), Florida Administrative Code, requires any response to a motion to be filed within seven days of the service of the motion; second, there is no provision in that rule for the filing of supplemental or second responses.⁵

⁵ Aloha further requested that the Commission admonish Dr. Kurien that he represents only himself and that he should refrain from alleging otherwise or engaging in the unauthorized practice of law. By letter dated November 14, 2002, the Commission's then General Counsel advised Dr. Kurien of Rule 28-106.10, Florida Administrative Code (the "qualified

We agree with Aloha that Dr. Kurien's supplemental response is untimely and is not permitted under the applicable rules. We therefore grant Aloha's motion to strike.

MOTIONS TO DISMISS DELETION PETITIONS

As previously noted, Aloha timely filed a motion to dismiss the first deletion petition and a supplemental motion to dismiss the second deletion petition. OPC and Dr. Kurien timely filed responses to the motion to dismiss. No party filed a response to the supplemental motion to dismiss.

Our analysis first identifies the three items of relief requested by the deletion petitions. Next, it discusses the appropriate standard of review for the motions to dismiss. We then address the motions to dismiss in the context of each of the three items of relief, taking into account the current posture of the case, which has changed significantly since the petitions and motions to dismiss were filed.

A. The Deletion Petitions

The two deletion petitions allege generally that the potable water provided by Aloha continues to experience problems with black water and rotten egg odor and that Aloha has failed to take adequate steps to address these problems in a timely manner.

The two deletion petitions ask for three items of relief:

- (1) Timing of and Conditions for Implementation of Treatment Improvements. (First Petition) The Commission should approve the action plan that the rate case order originally required Aloha to submit by July 30, 2002 and to implement by December 31, 2003:
 - only after an independent audit of Aloha's processing plant and methodology;
 - only if the action plan contains the minimum requirements imposed by neighboring utilities for raw water processing; and
 - only if a Citizens' Advisory Committee is created to monitor the effectiveness of the plan.

representative" rule) and that he is in no way barred from continuing to actively represent himself in the docket. Since that time, Dr. Kurien has clarified that he represents only himself in this proceeding.

- Further, the first petition asks that the implementation date for the improvements be accelerated from December 31, 2003 to April 30, 2003.⁶
- (2) Deletion of Territory. (Both Petitions) If significant resolution of the problems does not occur in a timely manner – originally identified in the first petition as June 30, 2003 – the Commission should amend Aloha’s certificate to delete the entire Seven Springs territory (first petition) and the Riverside Villas area (second petition).
- (3) Transfer of Territory to Pasco County Water System. (First Petition) Upon deletion from Aloha’s service territory, the Commission should make the Seven Springs area part of the service area of the Pasco County water utility system.

B. Standard of Review

The purpose of a motion to dismiss is to raise a question of law regarding the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioners. Id. Moreover, a petition must be dismissed for lack of jurisdiction if the tribunal does not have jurisdiction over the subject matter of the petition. Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 299 (Fla. 2002).

C. Ruling on Motions to Dismiss

Because the deletion petitions were submitted by customers of the utility in the form of citizen petitions, we interpret those petitions liberally in ruling on the motions to dismiss. Both petitions fundamentally allege that Aloha is not providing its customers with water of the quality to which they are entitled from a monopoly provider of service and request that we take specific actions to remedy that situation. Each of these requests will be discussed in turn.

1. Timing of and Conditions for Implementation of Treatment Improvements

Aloha’s Position. Aloha argues that the portion of the first petition asking for the imposition of conditions on approval of an action plan and for a change in the date for implementation of an improved treatment process amounts to an untimely motion for reconsideration of the rate case order.

⁶ The original December 31, 2003 implementation date has become February 12, 2005 as a result of the stay granted by this Commission pending the appeal of the rate case order.

OPC's Response. OPC responds that the customers' requests for relief are distinct from any issue resolved in the rate case docket. OPC points out that the rate case order is a valid pronouncement requiring the establishment of a Citizens' Advisory Committee and that the petition simply seeks an acceleration of the requirement for Aloha to implement an improved treatment process.

Dr. Kurien's Response. Dr. Kurien's response does not specifically address the motion to dismiss this portion of the petition.

Analysis and Ruling. We reject Aloha's contention that the petitions should be dismissed as amounting to an untimely request for reconsideration of the rate case order. Chapter 367 clearly gives this Commission subject matter jurisdiction over Aloha's quality of service. This includes the authority under Section 367.121(1)(a) to prescribe standards of quality and measurements, and under Section 367.121(1)(d) to require facility improvements necessary to provide the prescribed quality of service:

367.121 Powers of commission.

(1) In the exercise of its jurisdiction, the commission shall have power:

(a) To prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements ... to be observed by each utility, except to the extent such authority is expressly given to another state agency. ...

(d) To require repairs, improvements, additions, and extensions to any facility, or to require the construction of a new facility, if reasonably necessary to provide adequate and proper service to any person entitled to service or if reasonably necessary to provide any prescribed quality of service... .

Moreover, by affirming the rate case order that directed creation of a Citizens' Advisory Committee, the court upheld this Commission's jurisdiction to give such a body a role in assisting Aloha in making critical decisions that impact the level of service provided to the community.

Aloha's argument that the first petition amounts to an untimely motion for reconsideration of the rate case order raises matters outside the four corners of the petition, and therefore is not a proper basis for dismissal. For that reason, we hereby deny the Motion to Dismiss the portion of the first deletion petition that requests establishment of a timetable and conditions for implementation of improvements to the water treatment process. This decision does not preclude Aloha from raising this argument as an issue in the deletion docket. We note,

however, that the posture of the case has changed significantly since the first deletion petition was filed:

- The rate case order was affirmed on appeal and the Court's mandate issued on June 30, 2003. The Court's ruling upheld the requirement for Aloha to implement treatment improvements, but the timing of that ruling made it impossible for the Commission to accelerate the implementation date to April 30, 2003, as requested by the petition.
- The deadline for implementation of improvements has been delayed from December 31, 2003 to February 12, 2005, as the result of the stay that was granted pending appeal.
- The independent audit requested by the petition has been conducted by Dr. Audrey Levine in conjunction with OPC without the necessity for a Commission order.
- A Citizens' Advisory Committee has been formed pursuant to the rate case order.
- Aloha is seeking relief from the 98% hydrogen sulfide removal standard required by the rate case order, and the parties appear to agree that it would be too costly to attempt to achieve this standard.

In light of these developments, the petition's request for an independent audit is now moot and the request for an April 30, 2003 implementation date is impossible to grant. Moreover, Aloha's argument that the request for modifications to the water treatment requirements and timetable should be treated as an untimely motion for reconsideration of the rate case order is less persuasive, since Aloha itself is now seeking a change in those requirements.

2. Deletion of Territory

Aloha's Position. Aloha argues that this Commission does not have the jurisdiction to sequester the Seven Springs area from Aloha and make it a part of the County's water service area. The Legislature has never conferred upon the Commission a general authority to regulate public utilities. The Commission has "only those powers granted by statute expressly or by necessary implication." Deltona Corp. v. Mayo, 342 So. 2d 510 (Fla. 1977). Any reasonable doubt as to the lawful existence of a particular power must be resolved against the exercise thereof. Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973).

Aloha argues that it is statutorily required to provide service to the area described in its certificate of authorization within a reasonable time. Section 367.111(1), Florida Statutes, provides that:

[i]f the Commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

According to Aloha, this is a far cry from deleting territory of a utility consistently found to be in compliance with all environmental standards promulgated by the DEP, on the basis of a failure to implement a water treatment standard imposed by the PSC, and transferring such territory to the County, a nonjurisdictional service provider. Aloha argues that this Commission lacks such jurisdiction.

Finally, Aloha argues that the customers do not have standing to seek to delete a portion of Aloha's service area to be made part of the County's service area. The Florida Supreme Court has held that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968).

OPC's Response. OPC argues that Aloha's reliance on Storey v. Mayo to oppose the customers' deletion request is misplaced. In Storey, a group of customers challenged the Commission's approval of a territorial agreement between Florida Power Corp. and the City of Homestead. The Court found that the Commission had the authority to approve the agreement, and that by so doing, the Commission, in effect, informed the electric company that it would not have to serve the particular area because under the circumstances, it would not be reasonable to require it to do so. 217 So. 2d at 307-308. On the other hand, in the instant case, the customers are asking this Commission to exercise its authority over a service territory in a particular fashion. Contrary to Aloha's misinterpretation, the Storey ruling actually supports the Commission's authority to grant the Petition, should the Commission deem it proper.

Dr. Kurien's Response. Dr. Kurien points out that the petitioners have not rushed to seek deletion of Aloha's territory. Rather, they have recognized Aloha's responsibility in this matter and have demonstrated "the patience of Job" in their search for solutions. The customers have recognized in the petition the need to give Aloha time to remedy the problems through an independent scientific audit of the adequacy of its processing methods and physical plant. However, Aloha's continued denial of its responsibility to deal with the "black water" and associated problems leaves the customers with no choice but to seek other solutions.

Dr. Kurien argues that Chapter 367, Florida Statutes, gives the Commission exclusive jurisdiction over each utility with respect to its authority, service and rates. That includes granting a certificate and setting a utility's service territory. If the Commission were not empowered to also amend or rescind such grants of authority, the Commission would become merely the agent of a government serving the interests of the monopoly instead of its citizens, by delivering them to the monopoly as captive customers. Aloha itself points out in its Motion to Dismiss that Section 367.111(1), Florida Statutes, authorizes the Commission to "amend the certificate of authorization to delete an area not served or not properly served by the utility or it may rescind the certificate of authorization." In the rate case order, this Commission already concluded that the Seven Springs area has not been properly served by Aloha.

Analysis and Ruling. We reject Aloha's contention that the petitions should be dismissed on the grounds that we lack jurisdiction to order a deletion of territory and that the petitioners lack standing to seek such a deletion.

This Commission has subject matter jurisdiction to grant, deny, amend, revoke, suspend or rescind certificates of authorization. See Sections 367.045(5), 367.045(6), 367.111(1) and 367.161(2), Florida Statutes. We recognize that there may be limitations on this Commission's exercise of the power to delete service territory depending on the circumstances of a particular case. Those potential limitations, however, do not detract from our subject matter jurisdiction to consider a complaint seeking such relief. This is particularly true since the Commission is charged under Section 367.011(3) to construe its powers under Chapter 367 liberally in order to protect the public health, safety and welfare.

This is nevertheless a case of first impression regarding whether this Commission can or should delete territory based on concerns about finished water quality when that water appears to meet all of DEP's standards for drinking water quality. Thus, we find that a Commission decision not to dismiss based on this ground should not preclude Aloha from raising an issue in the case regarding the extent of the Commission's territory deletion authority.

We also reject Aloha's contention that the petitioners lack standing under Storey v. Mayo. That case held that an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. The petitioners have not alleged that they are requesting to be deleted from Aloha's service territory merely because they deem it advantageous to themselves. Rather, they allege that the service provided by Aloha is inadequate and provide a statutory basis for deletion.

For these reasons, we deny Aloha's motion to dismiss based on this Commission's asserted lack of jurisdiction to order territorial deletion and petitioners' asserted lack of standing to request such relief.

3. Transfer of Territory to Pasco County Water System

Parties' Arguments. Most of the parties' arguments regarding the Commission's jurisdiction over territorial deletion and the petitioners' standing to seek such relief are also applicable to the request to transfer the Seven Springs service area to the Pasco County water system.

Analysis and Ruling. We hereby dismiss the portion of the first petition that asks this Commission to transfer the Seven Springs service area to the Pasco County water utility system. This Commission does not have subject matter jurisdiction over the Pasco County water utility system. That system is exempt from Commission regulation as a governmental authority pursuant to Section 367.022(2), Florida Statutes. Therefore, we do not have the authority to make any portion of Aloha's service territory a part of the County's water system.

D. Summary

The motion to dismiss the first deletion petition is granted in part and denied in part. We dismiss for lack of jurisdiction the portion of the first petition that requests that the Seven Springs service territory be made a part of the service area of the Pasco County water utility system. The remainder of the motion to dismiss the first deletion petition, and the entirety of the supplemental motion to dismiss the second petition, which address the timing and conditions for implementation of treatment improvements and the deletion of territory, are denied.

MOTION TO MODIFY RATE CASE ORDER

Modification of Rate Case Order

In the fourth ordering paragraph of Order No. PSC-02-0593-FOF-WU (the rate case order), this Commission ordered Aloha to, by no later than December 31, 2003, "make improvements to wells 8 and 9, and then to all of its wells, to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in the finished water." In the fifth ordering paragraph of the order, we required Aloha to submit a plan within 90 days showing how it intends to comply with that requirement.

In its motion to modify the rate case order, Aloha states that it submitted the requisite report on October 18, 2002, and noted therein that achieving the 98% removal standard was at best very expensive, and at worst, impossible. Attached to the motion as Exhibit A is a letter dated July 23, 2003, from OPC to the Commission, stating that the Citizens agree that the 98% removal standard should be replaced with other standards. The letter notes that the Tampa Bay Water Authority (TBW) uses a maximum total level of 0.1 mg/L standard, and that additional standards may also be appropriate, depending on the final audit report findings.

Aloha states that it continues to work with Dr. Levine, who was originally hired by the Citizens to review possible additional treatment alternatives, and intends to move forward with

the recommendation of Dr. Levine to implement one of the appropriate treatment options. The utility believes that the Commission should modify the rate case order to eliminate the 98% removal requirement as unreasonable and/or inappropriate, and that the standard provided by TBW should be adopted in its place, including the testing requirements to maintain such compliance. Finally, Aloha states that all such modified requirements should be effective by the revised deadline imposed by Order No. PSC-03-1157-PCO-WU, such that the language of the fourth ordering paragraph of the rate case order be revised to read as follows:

Ordered that Aloha Utilities, Inc. shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment facilities of the utility. Compliance with such requirement shall be determined based upon samples taken at least annually from a point of connection just after all treatment systems and before entry of such water into the transmission and distribution system of the utility. Aloha should implement this standard no later than February 12, 2005.

On June 16, 2004, OPC filed a letter written by Dr. Kurien dated June 13, 2004 on behalf of the Citizens' Advisory Committee, which OPC adopts by reference as its response to Aloha's motion. The letter states that any modification to the rate case order should be qualified to include the following language:

1. The reference to sulfide in "finished water" should be stated as a maximum contaminant level for total sulfides of 0.1 mg per liter of delivered water at the point of its entry into the domestic system at the domestic meter;
2. The improvements should be such that sulfide present in raw water or generated during treatment and transmission will be removed, not converted, to a level not to exceed 0.1 mg/L in finished water delivered at the point of entry into the domestic system; and
3. Compliance with such requirements shall be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities. Such sites shall be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted.

It appears that the 98% removal standard required by the rate case order is not attainable for all of Aloha's wells, due to low concentration of hydrogen sulfide in some of the wells. For example, concentrations ranged between 0.61 mg/L to 2.43 mg/L in November, 2003. Removing 98% of 0.61 mg/L (.5978 mg/L) is thus not feasible. TBW is a wholesale water supplier in the area and has voluntarily imposed a standard for hydrogen sulfide not to exceed 0.1 mg/L for its finished water. We find it appropriate for Aloha to apply this standard because it appears to be reasonable and attainable, and will diminish the occurrences of black water.

We note that TBW has already begun using this standard, and Aloha will be blending its water with TBW water when water is purchased through Pasco County. Regarding water blending, it is significant to note that beginning in January, 2005, TBW will be using chloramines for disinfection. Pasco County will also convert to the use of chloramines at that same time. In order for Aloha's water to be compatible then with purchased water, Aloha will have to convert from chlorination to the use of chloramines. We have been informed by both the utility's engineering consultant and Dr. Levine that treatment for hydrogen sulfide is necessary in conjunction with converting to chloramines so that the black water problem is not exacerbated. This process will allow Aloha to produce water that is compatible with purchased water, which will further enhance the water quality provided to Aloha's customers.

We decline to include in the order modification qualifiers nos. 1 and 2, as outlined by Dr. Kurien in response to Aloha's motion to modify the rate case order. While we understand the concerns raised by Dr. Kurien in qualifier no. 1 regarding maintaining the 0.1 mg/L goal throughout the distribution system, this does not match the standard set by TBW, which involves compliance testing at the point of connection with its bulk customers. We have concerns regarding Aloha's purchase of water from Pasco County's treatment plants which is blended with the water provided by TBW, and the resulting impact on sulfide of those two waters being introduced into Aloha's system. Pasco County has not agreed to the same compliance standard. Therefore, the blended water may adversely impact Aloha's water at the point of delivery. In addition, we have concerns about the feasibility of collecting water samples at the domestic meters instead of at the treatment facilities.

Qualifier no. 2, the requirement that the improvements must result in removal, as opposed to conversion, of sulfides not to exceed the 0.1 mg/L standard, would have the effect of eliminating any treatment process which oxidizes, rather than removes, hydrogen sulfide. As discussed further below, we decline to prescribe the treatment methodology that Aloha should use in order to comply with the requisite treatment standard. This is a business decision that should be made by Aloha's engineering experts. Therefore, we decline to include qualifier no. 2 in modifying the rate case order.

We find that qualifier no. 3, regarding monthly samples taken at domestic meters, merits further review. Therefore, Aloha shall file comments within 60 days from the date of this Commission's vote on this item, by August 30, 2004, regarding the feasibility of collecting and testing monthly samples at domestic meters as proposed by Dr. Kurien.

For the foregoing reasons, Aloha's motion to modify the rate case order is granted. In so ruling, we recognize that the Florida Supreme Court has found that:

orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the

public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.⁷

Nevertheless, the Court continued by stating that:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.⁸

With the passage of time, the parties and this Commission have come to realize that the 98% standard is unattainable on a system-wide basis. Therefore, we find that the public interest warrants modification of the standard to a more realistic standard which has been adopted by TBW, and that this action fits squarely within the reasoning of the Peoples Gas Court.

Other Options

1. Direct Aloha to implement a specific treatment. Rather than specifying a standard for the amount of hydrogen sulfide allowed in the finished water, this Commission could order the utility to implement a new, specific treatment process to reduce the hydrogen sulfide concentrations in the finished water. This could be any one of the treatment methods included in Dr. Levine's report, including aeration, oxidants, and membrane technology. According to Aloha, H₂O₂ oxidation is the least cost alternative recommended by Dr. Levine in her study. Aeration, which is the method used by Pasco County coupled with storage, is not a feasible alternative for Aloha due to the compact size of the well sites.

Aloha's consultant has stated that H₂O₂ could be implemented simultaneously with the chloramine process by January, 2005. However, representatives of the Citizens' Advisory

⁷ Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966).

⁸ Id.

Committee have expressed reservations over using H₂O₂ due to the lack of statistical performance data for hydrogen sulfide removal in drinking water. While H₂O₂ has been used for the treatment of drinking water, it has not been used for the purpose of reducing hydrogen sulfides in drinking water. Scientific review suggests that it will be effective for that purpose, but results have not been proven in a full scale utility application.

Commission practice has been not to micromanage the business decisions of regulated companies, but to instead focus on the end-product goal. In keeping with this established practice, we decline to prescribe the specific treatment process to be used in this case. Prudency reviews in general rate cases provide more than ample protections for the public interest. This Commission's involvement in the determination of which treatment alternative that Aloha implements should take the form of a prudency review during the rate proceeding wherein Aloha requests, and carries the burden to prove, that the costs of the treatment process should be included in rates. This is the tool that this Commission now uses to protect the public interest while avoiding the direct management by the Commission of utility operations.⁹

2. Purchase all water from Pasco County for Seven Springs. We considered an alternative that would involve the purchase of all of Aloha's water from Pasco County. Aloha is currently in negotiations with the County for a new bulk water agreement, which will potentially result in the utility coming into compliance with its WUP. However, County officials have indicated that the County cannot provide sufficient bulk water supply to the entire Seven Springs area on a going-forward basis without investing in substantial infrastructure to assure that its supply is not compromised for its own customers. The County has offered to provide up to 45,000,000 gallons per month (1.5 MGD), but Aloha's 2003 annual report shows 103,016,000 gallons was provided to the Seven Springs customers in June, 2003. Thus, the demand exceeds the supply. For this reason, purchasing all of its water from the County does not appear to be a viable alternative.

Monthly Reports

Aloha is now in the process of planning its strategy for the installation of treatment equipment to include design, permit application to the DEP, pilot testing of the process, and installation of the equipment at each of the treatment plant sites, such that the treatment process will be operational by no later than January, 2005. Timelines have not yet been established for any of the steps. In light of this, Aloha shall file monthly updates in Docket No. 020896-WS of the progress made each month and the events planned for each upcoming month. If tests were conducted during the past month, Aloha shall file a summary of the test results. Updates shall be filed by the tenth of each month beginning August 10, 2004 through August, 2005.

⁹ See, e.g., Order No. PSC-94-0296-PHO-EI, issued March 15, 1994, in Docket No. 930676-EI, In Re: Petition of Florida Power Corporation to open investigation into Tampa Electric Company's proposed construction of 69 kV transmission line to serve the Cities of Wauchula and Fort Meade.

Summary

Considering the alternatives and approaches noted above, we find it appropriate for the utility and its consultants to decide the treatment method to be chosen to attain the goal of hydrogen sulfide reduction to 0.1 mg/L. Aloha is already meeting standards set forth by the DEP, and has achieved a reduced level of monitoring for lead and copper due to past compliance with the lead and copper rule. Additionally, Commission practice is not to specify a method of treatment for a regulated utility, but rather to set a goal or standard to be reached. We note that any change requested in the water treatment process must be approved by the DEP. Therefore, Aloha will rely upon the expertise of that agency's district office in Tampa in addition to the opinion of its consulting engineer.

Based upon the foregoing, Aloha's motion to modify the rate case order is granted. The fourth ordering paragraph of the rate case order is hereby modified to read that

Aloha shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment facilities of the utility. Compliance with such requirement shall be determined based upon samples taken at least annually from a point of connection just after all treatment systems and before entry of such water into the transmission and distribution system of the utility. Aloha shall implement this standard no later than February 12, 2005.

Aloha is directed to use the treatment process that Aloha concludes will achieve this level of treatment in the most cost-effective manner. Additionally, Aloha shall file comments within 60 days from the date of the Commission's vote on this item, by August 30, 2004, regarding the feasibility of collecting and testing monthly samples at domestic meters as proposed by Dr. Kurien. Finally, Aloha shall file monthly progress reports, as set forth above.

FORMAL HEARING ON DELETION PETITIONS

As requested in the deletion petitions, and evidenced by the testimony taken at the April 8, 2004 service hearings and in numerous letters received subsequent to the service hearings, the customers have expressed a desire for deletion of territory. We find it appropriate to proceed directly to a formal hearing on the merits of the deletion petitions.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Motion to Strike the "Rebuttal to Motion to Dismiss the Petition Submitted by Certain Customers of Aloha Utilities, Inc." is granted. It is further

ORDERED that Aloha Utilities, Inc.'s Motion to Dismiss the first deletion petition is granted in part and denied in part, as set forth in the body of this order. It is further

ORDERED that Aloha Utilities, Inc.'s Supplemental Motion to Dismiss the second deletion petition is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion to Modify Order No. PSC-02-0593-FOF-WU is granted. The fourth ordering paragraph of Order No. PSC-02-0593-FOF-WU is hereby modified to read that "Aloha shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment facilities of the utility. Compliance with such requirement shall be determined based upon samples taken at least annually from a point of connection just after all treatment systems and before entry of such water into the transmission and distribution system of the utility. Aloha shall implement this standard no later than February 12, 2005." It is further

ORDERED that Order No. PSC-02-0593-FOF-WU is affirmed in all other respects. 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 25-106-201, Florida Administrative Code, is received by the Director, Division of 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 Aloha Utilities, Inc. shall file comments within 60 days from the date of this Commission's vote on this item, by August 30, 2004, regarding the feasibility of collecting and testing monthly samples at domestic meters. It is further

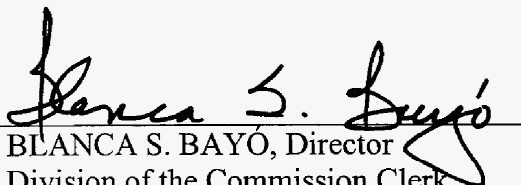
ORDERED that Aloha Utilities, Inc. shall file monthly updates in Docket No. 020896-WS of the progress made each month and the events planned for each upcoming month regarding the installation of treatment, as set forth in the body of this order. Updates shall be filed by the tenth of each month beginning August 10, 2004 through August, 2005. It is further

ORDERED that Docket No. 020896-WS will proceed directly to a formal hearing on the merits of the deletion petitions. It is further

ORDERED that Docket No. 010503-WU shall remain open to further address the interim rate refund issue, and Docket No. 020896-WS shall remain open to monitor compliance with the applicable treatment and reporting requirements and to conduct a hearing on the requests to delete the Seven Springs area from Aloha's certificated territory.

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By ORDER of the Florida Public Service Commission this 20th day of July, 2004.


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

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

As identified in the body of this order, our action granting Aloha Utilities, Inc.'s Motion to Modify Order No. PSC-02-0593-FOF-WU is 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 August 10, 2004. If such a petition is filed, 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. In the absence of such a petition, this order shall become effective and final 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 Commission's procedural or intermediate action in this matter 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.