



Public Service Commission

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DATE: APRIL 19, 2001

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JAEGER) *RA RB*
DIVISION OF ECONOMIC REGULATION (IWENJIORA) *DM INT 198*

RE: DOCKET NO. 001693-WS - INITIATION OF PROCEEDINGS TO DETERMINE WHETHER ALOHA UTILITIES, INC. SHOULD BE MADE TO SHOW CAUSE WHY IT SHOULD NOT BE FINED FOR ITS APPARENT FAILURE TO AUTOMATICALLY REDUCE RATES DUE TO AMORTIZATION OF RATE CASE EXPENSE IN APPARENT VIOLATION OF SECTION 367.0816, F.S. (1997), AND ORDER NO. PSC-97-0280-FOF-WS.

AGENDA: 05/01/2001 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\001693SC.RCM

CASE BACKGROUND

Aloha Utilities, Inc. (Aloha or utility), is a class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas -- Aloha Gardens and Seven Springs. On June 1, 1995, Aloha filed a reuse project plan and application for increase in rates for wastewater service to its Seven Springs customers pursuant to Section 367.0817, Florida Statutes. This application was assigned Docket No. 950615-SU.

Pursuant to Order No. PSC-97-0280-FOF-WS, issued March 12, 1997, in that docket and in Docket No. 960545-WS, the Commission approved final wastewater rates and charges and a reuse rate. In that Order, the Commission determined that Aloha was entitled to recover a total of \$205,777 in rate case expense. However, the Commission further noted that the utility had already been

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PSC-RECORDS AND REPORTING

recovering rate case expense through its rates and had recovered approximately \$27,434 of this rate case expense over an approximate one year period. Therefore, the Commission reduced the \$205,777 figure by \$27,434 for a rate case expense yet to be recovered of \$178,343.

The Commission noted that Section 367.0816, Florida Statutes, as it existed at that time, required that rate case expense be apportioned for recovery over a four-year period, and that "at the conclusion of the recovery period, the rate of the public utility shall be reduced immediately by the amount of rate case expense previously included in rates." Consistent with that statute and because approximately one year had passed, the Commission directed that the remaining rate case expense of \$178,353 be amortized over three years. This resulted in an annual rate case expense allowance of \$59,448, and an increased annual revenue requirement of \$62,249 to allow for the gross-up for regulatory assessment fees.

The Commission ordered that Aloha reduce its rates upon the expiration of the three-year period as shown on Schedule No. 5 which was attached to and made a part of Order No. PSC-07-0280-FOF-WS. That Order further required the utility to file revised tariffs no later than one month prior to the actual date of the required rate reduction and a proposed customer notice setting forth the lower rates and reason for the reduction. Based on the implementation of the new rates, the rates should have been filed by May 9, 2000, and reduced as of June 9, 2000. Tariffs were not filed until September 20, 2000.

However, upon expiration of the three-year period, the utility failed to reduce its rates as required by the Order and Section 367.0816, Florida Statutes (1997). Therefore, staff opened this docket so that the Commission may determine whether Aloha should be made to show cause why it should not be fined for its apparent failure to reduce rates at the conclusion of the recovery period of the amortization of rate case expense as required by Section 367.0816, Florida Statutes (1997), and Order No. PSC-97-0280-FOF-WS. The Commission has jurisdiction pursuant to Sections 367.0816 and 367.161, Florida Statutes.

ISSUE 1: Should Aloha Utilities, Inc., be ordered to show cause, in writing within 21 days, why it should not be fined for its apparent violation of Section 367.0816, Florida Statutes (1997), and Order No. PSC-97-0280-FOF-WS, issued March 12, 1997, in Dockets Nos. 950615-SU and 960545-WS, for its failure to immediately reduce rates upon completion of the amortization of the allowed rate case expense?

RECOMMENDATION: No, a show cause proceeding should not be initiated. However, the utility should be placed on notice that it is expected to know and comply with this Commission's orders, rules, and regulations, and that future violations could result in fines. (JAEGER, IWENJIORA)

STAFF ANALYSIS: As stated in the case background, Aloha failed to reduce its rates as required by Order No. PSC-97-0280-FOF-WS and Section 367.0816, Florida Statutes (1997). Upon becoming aware that Aloha had failed to reduce its rates on June 9, 2000 as required, staff contacted (in August) the utility to determine why the utility had not reduced its rates. Aloha advised staff that this was an oversight and that Aloha would immediately reduce the rates and make the appropriate refunds or credits to customer bills. On September 20, 2000, the utility submitted revised tariffs reflecting the appropriate rates. On September 29, 2000, staff notified the utility that the tariffs were approved reflecting an effective date of June 9, 2000.

Also, the utility has provided documentation showing that all refunds with interest were completed by credits to the customers' bills on January 15, 2001. The total amount of credits was \$14,069 plus interest of \$538.06. Of the total credits plus interest, there were 77 customers who had terminated service. At the end of February, Aloha issued checks in the total amount of \$139.20 to the terminated customers with credits of \$1 or more. As of April 10, 2001, the utility shows that only \$18.12 in checks have not cleared. Aloha has agreed that any remaining unclaimed checks shall be credited to the CIAC account, and staff believes that this action is appropriate. Therefore, it appears that the utility has now corrected the error that it made by failing to reduce its rates in a timely manner.

Upon being notified by staff about its noncompliance with the above-noted Order and statute, Aloha appeared to be genuinely apologetic that it had overlooked the requirement to reduce its rates and took immediate steps to rectify the situation. Not in justification, but in explanation, Aloha states that in the year 2000 its resources had been strained to the limit. Aloha notes

that in the first six months of 2000, it had been involved in at least four docketed items, and one undocketed overearnings investigation, with all the attendant agenda conferences, filing of petitions and minimum filing requirements, filing of testimony, responses to data requests of staff, responses to multiple sets of discovery from both staff and the Office of Public Counsel, and preparation for formal hearing in a full wastewater rate case. Further, Aloha states that it was trying to comply with the requirements of the Amended and Restated Consent Final Judgment (ARCFJ) which it had entered into with the Department of Environmental Protection (DEP) on March 9, 1999. The ARCFJ required that the utility expand its Seven Springs Wastewater Treatment Plant, and Aloha was in the process of applying for a loan to pay for the improvements and expansion, attempting to complete the improvements and expansion by September of 2000, and applying for a wastewater rate increase to pay for these improvements and expansion. The hearing on the quality of service docket, Docket No. 960545-WS, was held on March 29-30 and April 25, 2000, and had the concomitant discovery, testimony, hearing preparation, and briefs. Then, subsequent to the final order in that docket, the utility moved for clarification and had to begin preparations for filing a service availability case and implementation of a pilot project for removal of hydrogen sulfide.

On top of that, Aloha was also preparing for a hearing on October 2-3, and November 2, 2001 in Docket No. 991643-SU with its concomitant discovery, testimony, hearing preparation, and briefs. As stated above, the utility states that it opened that docket because of its need to recover the expenses that it was incurring to expand and upgrade its wastewater treatment to comply with DEP requirements. That plant was brought on line in September of 2000. Also, staff opened an overearnings investigation, Docket No. 000737-WS, and Aloha was responding to staff inquiries and discovery in that docket. Based on all this activity, Aloha states that it just completely overlooked the need to reduce its rates.

Nevertheless, the utility was in apparent violation of both the requirements of Order No. PSC-97-0280-FOF-WS and Section 367.0816, Florida Statutes (1997). Staff notes that the last sentence of Section 367.0816, Florida Statutes (1997), originally provided as follows: "At the conclusion of the recovery period, the rate of the public utility shall be reduced immediately by the amount of rate case expense previously included in rates." This sentence was deleted by Section 6, Ch. 99-319, Laws of Florida. However, Section 9, Ch. 99-319, Laws of Florida, specifically stated: "This act does not apply to rate cases pending on March 11, 1999." As noted above, the rate case in Docket No. 950615-SU was

filed as of June 1, 1995, and Order No. PSC-97-0280-FOF-WS was issued on March 12, 1997. Therefore, the requirement to automatically reduce rates was still applicable, and both the last sentence in Section 367.0816 (1997), and the Commission Order required an immediate reduction in rates upon amortization of the rate case expense.

Section 367.161(1), Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

Utilities are charged with the knowledge of the Commission's orders, rules and statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, entitled In Re: Investigation Into The Proper Application of Rule 25-14.003, F.A.C., 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. Additionally, "[i]t 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).

Aloha's failure to reduce its rates appears to have violated the requirements of both the Order and the applicable statute. However, the circumstances listed above appear to mitigate the utility's apparent violation. Also, the utility cooperated with staff and quickly filed appropriate tariff sheets as set forth above (and subsequently proceeded with the refund).

Based on the above, staff believes that the utility was simply overwhelmed, and staff does not believe that the apparent violation of Order No. PSC-97-0280-FOF-WS and Section 367.0816, Florida Statutes, rises in these circumstances to the level which warrants the initiation of a show cause proceeding. Therefore, staff recommends that the Commission not order Aloha to show cause for its apparent failure to reduce rates due to amortization of rate case expense as required by Section 367.0816, Florida Statutes (1997), and Order No. PSC-97-0280-FOF-WS. However, staff recommends that the utility be placed on notice that it is expected to know and comply with this Commission's orders, rules and regulations, and that future violations could result in fines.

DOCKET NOS. 001693-WS

DATE: JANUARY 4, 2001

ISSUE 2: Should the docket be closed?

RECOMMENDATION: If Issue 1 is approved and the Commission declines to initiate a show cause proceeding, no further action is required in this docket, and the docket should be closed. (IWENJIORA, JAEGER)

STAFF ANALYSIS: If Issue 1 is approved and the Commission declines to initiate a show cause proceeding, no further action is required in this docket, and the docket should be closed.