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DATE: MAY 15, 2002

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

FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI) *Met for kg*
DIVISION OF ECONOMIC REGULATION (FLETCHER, MERCHANT, WILLIS) *JDJ*

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

AGENDA: 05/21/2002 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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

CASE BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas, Aloha Gardens and Seven Springs.

On February 9, 2000, Aloha filed an application for an increase in rates for its Seven Springs wastewater system. By Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, the Commission approved increased rates and charges for Aloha. The Commission also directed Aloha to increase its wastewater service availability charges for its Seven Springs wastewater system from \$206.75 per equivalent residential

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connection (ERC) to \$1,650 per residential ERC and \$12.79 per gallon for all other connections. The order required Aloha to file an appropriate revised tariff sheet reflecting the approved service availability charges within 20 days of the date of the order.¹

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

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

This recommendation addresses: 1) Aloha's authorization 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; 2) whether any backbilled amounts already collected should be refunded, with interest; and 3) the effective date of the increased service availability charges. Staff will file another recommendation at a later date to address Aloha's failure to timely collect the increased service availability charges and to address whether the utility should be ordered to show cause, in writing within 21 days, why it should not be fined for failure to charge its approved service availability charges and to timely file a revised tariff sheet reflecting those charges, in

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

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apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. The Commission has jurisdiction pursuant to Section 367.091, Florida Statutes.

ISSUE 1: Should Aloha be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002, and, if not, should any such backbilled amounts collected be refunded, with interest?

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

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

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

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notice for increased wastewater rates, as required by Order No. PSC-01-0326-FOF-WS. The wastewater rate tariffs were stamped approved effective May 23, 2001. However, the utility failed to file the required tariff and proposed customer notice for the increased wastewater service availability charges, which the utility was also required to file by that order.

In late February or early March, 2002, during a review of service availability charges for private utilities in Pasco County, staff noted that Aloha had not filed the service availability tariff sheet required by Order No. PSC-01-0326-FOF-SU. Staff contacted counsel for Aloha on or before March 7, 2002 and advised him that the service availability tariff had not been filed. Staff also asked Aloha's attorney what service availability charge had Aloha been charging. Aloha's attorney said he would have to call the utility. After having contacted the utility, Aloha's attorney advised staff 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. Based on the representation of counsel for Aloha, it appeared that Aloha's failure to timely file its wastewater service availability charge tariff was merely an administrative oversight, in that the tariff should have been included with the other tariffs approved on May 23, 2001. Based on this information, staff believed that the developers were aware of the increased service availability charge and had been paying the higher charge since May 23, 2001, when the other revised rate tariff sheets became effective. Having not yet received any developer inquiries about the charge, staff 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.

On April 30, 2002, staff received the first developer inquiry with respect to 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, Suncoast may or may not owe an additional \$1,443.25 for each connection. See H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 916 (Fla. 1979) (finding that the crucial time in regard to service availability charges must be the date of connection, since the actual cost of maintaining sufficient capacity cannot be ascertained until that date).

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

On May 1, 2002, staff counsel contacted counsel for Aloha about the Windward Homes letter and requested a copy of the letters on backbilling that were being sent to the developers. In a follow-up telephone conversation on May 6, 2002, counsel for Aloha stated 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. Regardless, Aloha never notified staff that it had been charging the lower charge and that it had decided to backbill for the difference between the previous and new charge. Had staff known that the utility had not been charging the increased charge, 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. Moreover, a staff audit will be conducted to verify connections made and contributions-in-aid-of-construction (CIAC) collected from May 23, 2001, to the present. A formal report is expected to be issued for internal Commission use on May 17, 2002, and a copy of the final report will be mailed to the utility.

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 its review of the utility's discovery response, staff believes 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, it 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 also 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 \$206.75 charge. Counsel for Aloha represents that the utility is now and has been since April 12, 2002, charging the appropriate connection fee to all new connections that have occurred since that date. On April 16, 2002, Aloha sent a letter to persons who had outstanding prepaid connections who would be assessed the higher rate upon attempting to connect any of their home sites to Aloha's system. On April 22, 2002, a second letter was sent to each of the developers who had outstanding "arrearages" for connections made between May 23, 2001 and April 12, 2002.

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

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

BACKBILLING

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

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

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

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

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

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

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

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

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

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

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

2) It was only because Aloha represented that the developers were aware of the increase in service availability charges and had been paying the increased amounts since the charges were approved that staff stamp-approved the tariff sheet filed on March 11, 2002, retroactively to May 23, 2001.

3) In actuality, from May 23, 2001 to March 11, 2002 (and on to April 12, 2002, when the utility began charging the increased service availability charges), the developers relied on Aloha's erroneous representations, and the outdated tariff sheet on file resulting from Aloha's failure to timely submit the revised tariff sheet, in paying what they had reasonably believed was the correct service availability charge of \$206.75 per ERC. The developers did not receive actual notice of the approved service availability charges until apparently April 16, 2002, with some developers being charged the higher amount as early as April 12, 2002, when the utility began charging them for connections made beginning on that date.

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

For the foregoing reasons, staff recommends that under the circumstances of the instant case, and consistent with its prior decisions in Rainbow Springs and Gulf, the Commission should not allow Aloha to backbill customers for the approved service

availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002.

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

REFUNDS

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

FAILURE TO TIMELY COLLECT INCREASED SERVICE AVAILABILITY CHARGES

As previously stated, 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, it 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. Had Aloha timely complied with Order No. PSC-01-0326-FOF-SU, the utility would have been collecting the increased service availability charges since May 23, 2001. The difference between the previous and the charge approved by Order No. PSC-01-0326-FOF-SU for each residential connection made from May 23, 2001 to April 12, 2002 is \$1,443.25 (\$1,650 - \$206.75). Therefore, Aloha should have collected approximately

\$590,289.25 more in service availability charges than it actually collected for connections made during that time period. ($\$1,443.25 \times 409 \text{ connections} = \$590,289.25$).²

Absent backbilling all the developers who paid the incorrect service availability charges for connections made during the time in question, there appears to be no way for Aloha to recover the CIAC that has been lost during this period. Basing rates on the resulting increased rate base would significantly increase the rates to Aloha's customers in the future. Staff will be filing another recommendation soon to address Aloha's failure to timely collect the increased service availability charges.

CONCLUSION

Based upon all of the foregoing, Aloha should not be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002. Aloha should be required to refund any such backbilled amounts received, calculated with interest in accordance with Rule 25-30.360, Florida Administrative Code. The amount of interest should be based on the thirty-day commercial paper rate for the appropriate time period. The refund should be made within 30 days of the effective date of the order and the utility should be required to file refund reports consistent with Rule 25-30.360, Florida Administrative Code. With respect to persons who prepaid the erroneous charge, but did not connect to Aloha's system prior to April 16, 2002, Aloha should charge its approved service availability charge of \$1,650.

²This amount is estimated since two of the 409 connections were to 1-inch general service meters, for which the \$12.79 per gallon charge would apply.

ISSUE 2: Should Aloha be required to file a replacement tariff sheet reflecting its approved service availability charges, to be stamped effective for connections made on or after April 16, 2002?

RECOMMENDATION: Yes, Aloha should be required to file a replacement tariff sheet within 10 days of the effective date of the order arising from this recommendation, reflecting its approved service availability charges. The tariff sheet should be stamped effective for connections made on or after April 16, 2002. However, no developer should be billed until such time as proper notice has been provided to the developer. Aloha should also be required to provide notice of the Commission's order arising from this recommendation to all developers to whom it has sent a backbilling letter and to any persons who have either requested service or inquired about service with the utility in the past 12 months. Aloha should submit the proposed notice for staff's administrative approval within 10 days of the effective date of the order. (FLETCHER, GERVASI)

STAFF ANALYSIS: As discussed in Issue 1, staff stamp-approved the service availability tariff sheet filed on March 11, 2002, retroactively to May 23, 2001, because Aloha 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 relied on Aloha's erroneous representations, and the outdated tariff sheet on file resulting from Aloha's failure to timely submit the revised tariff sheet, in paying what they had reasonably believed was the correct service availability charge of \$206.75 per ERC. Also, for charges between April 12, 2002 and April 16, 2002, the developers received no notice (notices were sent out on April 16, 2002). As discussed previously, Aloha never notified staff that the utility had not, in fact, been charging the higher approved service availability charge. In its May 13, 2002 discovery response, Aloha states that it began charging its authorized service availability charges on April 12, 2002, and all developers who have inquired about service availability have been advised of the correct charges since that date.

However, as previously stated, Aloha did not substantially complete its noticing until April 16, 2002. Rule 25-30.475(2), Florida Administrative Code, provides that service availability charges "shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets

provided customers have received notice." (Emphasis added.) Based on this provision, staff believes that increased service availability charges should be effective April 16, 2002. However, no developer should be billed until such time as proper notice has been provided to the developer.

Staff recommends that Aloha should be required to file a replacement tariff sheet within 10 days of the effective date of the order arising from this recommendation, reflecting its approved service availability charges. The tariff sheet should be stamped effective for connections made on or after April 16, 2002, the date that Aloha substantially completed noticing to its developers. Aloha should also be required to provide notice of the Commission's order arising from this recommendation to all developers to whom it has sent a backbilling letter and to any persons who have either requested service or inquired about service with the utility in the past 12 months. Aloha should submit the proposed notice for staff's administrative approval within 10 days of the effective date of the order.

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ISSUE 3: Should this docket be closed?

RECOMMENDATION: The docket should remain open to allow staff to file another recommendation to address Aloha's failure to timely collect the increased service availability charges and to address whether the utility should be ordered to show cause, in writing within 21 days, why it should not be fined for failure to charge its approved service availability charges and to timely file a revised tariff sheet reflecting those charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. (GERVASI, FLETCHER)

STAFF ANALYSIS: The docket should remain open to allow staff to file another recommendation to address Aloha's failure to timely collect the increased service availability charges and to address whether the utility should be ordered to show cause, in writing within 21 days, why it should not be fined for failure to charge its approved service availability charges and to timely file a revised tariff sheet reflecting those charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.