

MCWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:

TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

December 12, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020413-SU

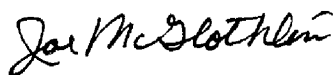
Dear Ms. Bayo:

On behalf of Adam Smith Enterprises, Inc. I am enclosing the original and 15 copies of the following:

- ▶ Adam Smith Enterprises, Inc.'s Response to Aloha Utilities, Inc.'s Motion Regarding Role of Prior Counsel in Responding to Discovery

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and pleading by returning the same. Thank you for your assistance in this matter.

Yours truly,



Joseph A. McGlothlin

JAM/mls
Enclosure

DOCUMENT NUMBER DATE

13587 DEC 12 02

FFSC-COMMISSION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings
Against Aloha Utilities, Inc. in Pasco
County for failure to charge approved
Service availability charges, in violation
Of Order No. PSC-01-0326-FOF-SU and
Section 367.091, Florida Statutes

Docket No. 020413-SU

Filed: December 12, 2002

**ADAM SMITH ENTERPRISES, INC.'S RESPONSE TO
ALOHA UTILITIES, INC.'S MOTION REGARDING ROLE OF
PRIOR COUNSEL IN RESPONDING TO DISCOVERY**

Adam Smith Enterprises, Inc. ("Adam Smith"), through its undersigned counsel, responds to the Motion filed by Aloha Utilities, Inc. ("Aloha") on December 5, 2002, and states follows:

1. During a recent Agenda Conference, the Commission's General Counsel observed that, with respect to the chronology of events that led to the issuance of Order No. PSC-02-1250-SC-SU, the facts are well known, and there should be a way to streamline the process of establishing those facts. It happens that Adam Smith had already initiated an attempt, primarily through Requests for Admissions and related discovery, to do just that.

2. However, Aloha has objected to certain of the Requests for Admissions and related discovery of central facts. Adam Smith will address Aloha's objections in a separate Motion to Compel. In this Response, Adam Smith will address a related Motion that Aloha filed concurrently with the filing of its objections, regarding Aloha's contention that its previous counsel, who is precluded from representing Aloha in this matter because of a conflict of interest, is the "sole source" of information and documents that are responsive to Adam Smith's requests. In its motion, Aloha asks the Commission to require Adam Smith, who pointed out the

conflict of interest, to allow Aloha's previous counsel to respond to discovery and perhaps testify for Aloha, or be precluded from presenting essential facts in evidence from *any* source.

3. In its Motion, Aloha first recites that it has filed objections to certain discovery requests served by Adam Smith in this docket. With respect to certain of the discovery requests, at paragraph 3 Aloha states:

However, should the Commission disagree with Aloha and order Aloha to answer these discovery requests, the assistance of Martin Deterding, Aloha's previous counsel will be required since only Mr. Deterding is able to answer many of these questions, i.e., Admissions Requests Nos. 3, 4, and 6; Interrogatory Nos. 2 and 3. Additionally, Mr. Deterding would have relevant documents and information in addition to those in Aloha's possession which relates to Requests for Production Nos. 1, 2, 4, 7, and 8.

4. In the balance of its pleading, Aloha states that "Mr. Deterding was unable to represent Aloha in this matter due to the fact that another member of the Rose, Sundstrom and Bentley Law Firm represents Adam Smith Enterprises, Inc. and Adam Smith objected to Mr. Deterding's representation of Aloha on the basis of the conflict of interest." Aloha then requests the Commission to order Adam Smith to either allow Mr. Deterding to answer the discovery requests and provide testimony at hearing or to strike the discovery request *and* prohibit Adam Smith from using in this case the information relating to Aloha's failure to file a revised service availability tariff on May 23, 2001. In short, Aloha argues that the previous counsel -- who is disqualified from representing Aloha in this case by reason of a conflict of interest -- must be the sole source of critical information in discovery, or Adam Smith must be precluded from presenting the same information from *any* sources. The beginning point of analyzing this unusual claim is the evaluation of the assertion that previous counsel is the unique and exclusive source of responses to Adam Smith's discovery requests. A review of the requests will

demonstrate that admissions/information requested by Adam Smith are virtually common knowledge that can be provided by others within Aloha.

5. The first discovery request that is the subject of Aloha's motion is Admission Request No. 3. This Request for Admissions states:

PSC Staff notified counsel for Aloha on or before March 7, 2002 that the tariff for the increased service availability charge that the Commission directed Aloha to file in Order No. PSC-01-0326-FOF-SU had not yet been filed.

6. Aloha's Motion is premised on the proposition that its previous counsel is the "sole source" of information needed to respond to the requests, and the "only" person who can respond. It is obvious that with respect to Admissions Request No. 3, this is not the case. Aloha's previous counsel would have communicated the notification by Staff to officers or employees of Aloha. In fact, Aloha's later efforts to deal with the fact of the omitted tariff are evidence that knowledge of the omission was not limited to previous counsel. Anyone who has that knowledge is qualified to prepare a response to the Request for Admissions. Adam Smith notes that Admissions Request No. 3 is taken straight from the factual recitation contained in Order No. PSC-02-1250-SC-SU, page 17.

7. The next discovery request that is the subject of Aloha's Motion is Admission Request No. 5, which states:

When it filed the revised tariff sheet to increase service availability charges, on or about March 11, 2002 counsel for Aloha represented to the PSC Staff that developers were aware of and had been paying the increased service availability charge since May 23, 2001.

8. Again, previous counsel is not the "sole source" of information responsive to this Request. Previous counsel communicated the information to an officer or employee of Aloha, or others became aware of the fact in another manner. Previous counsel's *subsequent* act of informing Staff that his representation was in error is proof that Aloha knew of the original

communication; else, how could Aloha have informed counsel of his mistake? Again, this Request for Admission is taken from a factual recitation in Order No. PSC-02-1250-SC-SU, page 10.

9. The next discovery request that is the subject of Aloha's Motion is Admission Request No. 6, which states:

On May 6, 2002, counsel for Aloha advised PSC Staff that he had been misinformed by Aloha in early March 2002 and that this earlier representation that Aloha had been applying the higher service availability charges since May 23, 2001 was incorrect.

10. It is obvious that counsel for Aloha would have informed officers or employees of Aloha of the communication to the PSC Staff described in this Admission Request No. 6. Accordingly, previous counsel for Aloha is not the "sole source" of knowledge and information necessary to admit to the truth of Request No. 6. In fact, in response to Adam Smith's request to produce, Aloha has already furnished a letter written by previous counsel for Aloha to PSC Staff to this effect. See Attachment A.

11. The next discovery request that is the subject of Aloha's Motion is Interrogatory No. 2, which states:

Interrogatory No. 2: Please identify the person or person(s) on whom Aloha placed the responsibility to (a) prepare and (b) file tariffs, and including the revised service availability tariff that was required by Order No. PSC-01-0326-FOF-SU.

12. Inasmuch as Interrogatory No. 2 asks Aloha to identify the person or person(s) to whom Aloha delegated this responsibility, that knowledge/answer necessarily rests in the first instance with Aloha, and not previous counsel. Accordingly, previous counsel for Aloha is not the "sole source" of information and knowledge needed to respond to the interrogatory.

13. The next discovery request that is the subject of Aloha's Motion is Interrogatory No. 3, which states:

Interrogatory No. 3: When was the revised service availability tariff prepared and by whom?

14. If anyone in the company has knowledge of the identity of the person or person(s) who prepared the revised service availability tariff, and when it was prepared, that person is in a position to respond to the interrogatory, and previous counsel for Aloha is not the "sole source" of the answer.

15. The next discovery request that is the subject of Aloha's Motion is Adam Smith's Request for Production of Documents No. 1, which states:

Request for Production of Documents No. 1: Please provide any and all correspondence, memorandum, emails, written communications, and all other documents between and among officers, employees, and consultants of Aloha regarding the revised service availability charge of \$1,650 per ERC that the Commission directed Aloha to implement by tariff and written notice to developers in Order No. PSC-01-0326-FOF-SU.

16. On its face, the Request for Production No. 1 is not limited to documents that may be in the possession, custody or control of Aloha's previous counsel. Any documents in the possession and control of Aloha, which fall within the category defined in Request for Production of Documents No. 1, are responsive to the Request, whether or not they were authored by previous counsel, and whether or not previous counsel may also have copies of the documents. In any event, the act of providing files of documents to Aloha for inclusion in Aloha's review for purposes of responding to the document request does not require actions taken in a "representative" capacity.

17. The next discovery request that is the subject of Aloha's Motion is Request for Production of Documents No. 2, which states:

Request for Production of Documents No. 2: Please provide any and all correspondence, memorandum, emails, written communications, and all other documents between Aloha (including its officers, employees, consultants and counsel) and the Florida Public Service Commission that relate in any way to the revised service availability charge of \$1,650 per ERC that the Commission directed Aloha to implement by tariff and written notice to developers in Order No. PSC-01-0326-FOF-SU.

18. On its face, the Request for Production of Documents No. 2 is not limited to documents authored by or in the exclusive possession of previous counsel for Aloha. Further, the category includes only correspondence and communications between Aloha on the one hand, and the Florida Public Service Commission, on the other, that relate to the revised service availability charge. Any copies of such correspondence and written communications that fall within this category and are within the possession, custody or control of Aloha are responsive to the Request to Production of Documents and previous counsel is not the “sole source” of such documents. In any event, the act of providing files of documents to Aloha to be included in Aloha’s review for purposes of responding to the request to produce does not require action taken in a representative capacity.

19. The next discovery request that is the subject of Aloha’s Motion is Request for Production of Documents No. 4, which states:

Request for Production of Documents No. 4: Please provide any and all correspondence, notices and all other written communications, memorandum, notes and minutes of meetings, and all other documents that refer to or relate in any way to the subject of written notices to developers relating to the revised service availability charge of \$1,650 per ERC sent by Aloha to developers. This request includes, but is not limited to, documents that relate to the obligation to provide notices that the Commission imposed in Order No. PSC-01-0326-FOF-SU; Aloha’s failure to provide such notices timely; and documents relating to the content and format of the notices that Aloha eventually sent to developers.

20. On its face, Request for Production of Documents No. 4 is not limited to documents originated by or in the exclusive possession of previous counsel for Aloha. Any

copies of documents that fall within the category defined by Request No. 4 that are within Aloha's possession, custody or control are responsive to the Request for Production of Documents No. 4. Previous counsel is not the "sole source" of the information. In any event, the act of providing files of documents to Aloha for inclusion in Aloha's review for purposes of responding to the request to produce documents does not require actions taken in a representative capacity.

21. The next discovery request that is the subject of Aloha's Motion is Request for Production of Documents No. 7, which states:

Request for Production of Documents No. 7: If not already provided in response to the above items, please provide any and all communications to and from President Steve Watford referring in any way to the fact that Aloha did not file revised service availability tariffs as required by Order No. PSC-02-0326-FOF-SU.

22. On its face, Request for Production of Documents No. 7 is not limited to documents authored by or in the exclusive possession of previous counsel for Aloha. Any copies of documents that fall within the category defined by Request for Production of Documents No. 7 that are within the possession, custody or control of Aloha are responsive to this Request, and previous counsel for Aloha is not the "sole source" of the information. In any event, the act of providing files of documents to Aloha for inclusion in Aloha's review for purposes of responding to the request does not require actions taken in a representative capacity.

23. The last discovery request that is the subject of Aloha's Motion is Request for Production of Documents No. 8, which states:

Request for Production of Documents No. 8: If not already provided in response to earlier items, please provide any and all communications between the Florida Public Service Commission and Aloha (including Aloha's officers, employees, consultants, and counsel) relating in any way to:

(a) the requirement of Order No. PSC-01-0326-FOF-SU to submit tariffs, including a revised service availability tariff conforming to the order;

(b) the failure of Aloha to file the service availability tariff timely;

(c) the requirement that Aloha provide advance notice of the revised service availability charges to affected developers prior to applying the revised charge;

(d) Aloha's failure to send the notices required by Order No. PSC-01-0326-FOF-SU timely;

(e) representations by Aloha that Aloha had applied the revised service availability charge of \$1,650 per equivalent residential connection prior to having filed the appropriate tariff;

(f) the processing by Staff of the service availability tariff that Aloha submitted in March of 2002, including the stamping of the date of May 23, 2001 on a tariff that was submitted in March 2002; and

(g) communications to Staff to the effect that earlier representations regarding the time frame in which Aloha first applied the higher service availability charges were incorrect.

24. Request for Production of Documents No. 8 requests written communications between Aloha and the Florida Public Service Commission, including communications to or from Aloha's officers, employees, consultants and counsel. On its face, this Request is not limited to communications authored by and/or in the exclusive possession of previous counsel to Aloha. Any documents that fall within the category defined by Request for Production of Documents Request No. 8 and in the possession or control of Aloha are responsive to the Request, and previous counsel to Aloha is the "sole source" of the information. In any event, the providing of files to Aloha for inclusion in the file review for purposes of responding to Adam Smith's request to produce does not require actions taken in a representative capacity.

25. Aloha's contention that Aloha's previous counsel, Mr. Deterding, is the exclusive source of information responsive to the discovery requests identified herein -- such that either he

should provide the information or Adam Smith should be denied that information -- is baseless, and Aloha's arguments are frivolous. Further, the premise of the Motion is in error. Adam Smith objected to the conflict of interest that would have occurred had the law firm to which Mr. Deterding belongs *represented* Aloha in this matter. It appears to Adam Smith that the real purpose of Aloha's Motion is to limit the source of *factual* information to an individual who would be constrained by the attorney client privilege (unless waived by Aloha) as to the answers he would be able to provide. In short, Aloha wants to leverage the relationship into a means of resisting disclosure of *facts* relevant to the issues in the case. However, there is nothing about the nature of the information requested by Adam Smith in any of the discovery requests that are the subject of Aloha's Motion that renders Aloha's previous counsel as the exclusive source of factual answers. With respect to the possibility that Aloha may wish to sponsor previous counsel as a fact witness, Adam Smith will object unless Aloha waives the attorney-client privilege that would be available to Aloha. The previous counsel's participation in this case, if any, as a source of facts, cannot be colored or limited by his association as counsel to Aloha. This means that previous counsel is precluded from providing any advice to Aloha with respect to the matters in this docket.

26. Curiously, in its last prayer for relief, Aloha asks (in the event Mr. Deterding is not allowed to become the source of answers) that the Commission "strike these discovery requests and prohibit Adam Smith from offering testimony or other evidence related to the information requested in Adam Smith Enterprises, Inc.'s Admission Request No. 3, 5, 6; Interrogatories 2 and 3; and Request for Production of Documents Nos. 1, 2, 4, 7, and 8, i.e., regarding Aloha's failure to file the revised service availability tariff on May 23, 2001."

27. It is clear that Aloha hopes, through the pending Motion, to establish its prior counsel, whose participation would be complicated by both a conflict of interest and a relationship of privileged communications with respect to Aloha, as the exclusive source of discovery information and testimony on facts that are now a matter of common knowledge, that are recited in the Commission Order, and that can be answered by persons other than previous counsel; or alternatively, prevent Adam Smith from offering testimony or other evidence on the subjects gained from sources other than Aloha's previous counsel. Together with Aloha's separate objections, the motion is a form of stonewalling; one that depends on a distorted view of the ramifications of previous counsel's conflict of interest. The entire thrust of the motion is unfounded, frivolous, and absurd on its face. The motion should be summarily rejected by the Commission.



Joseph A. McGlothlin
McWhirter, Reeves, McGlothlin, Davidson,
Decker, Kaufman & Arnold, PA
117 South Gadsden Street
Tallahassee, Florida 32301
Telephone: (850) 222-2525
Facsimile: (850) 222-5606
jmcglothlin@mac-law.com

Attorneys for Adam Smith Enterprises, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Response Aloha Utilities, Inc.'s Motion Regarding Role of Prior Counsel in Responding to Discovery was sent via (*)Hand Delivery, (**) Electronic Mail or U.S. Mail on this 12th day of December 2002 to the following:

(*)Rosanne Gervasi
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Blvd
Tallahassee, FL 32399-0850

Stephen G. Watford
6915 Perrine Ranch Road
New Port Richey, FL 34655-3904

Stephen Burgess
Office of Public Counsel
111 W. Madison Street, #812
Tallahassee, FL 32399-1400

J. Ben Harrill
Figurski & Harrill
2435 U.S. Highway 19, Suite 350
Holiday, Florida 34691

(**)Suzanne Brownless, P.A.
1975 Buford Blvd
Tallahassee, FL 32308-4466

Diane Kiesling
Landers & Parsons, P.A.
310 West College Ave.
Tallahassee, FL 32302


Joseph A. McGlothlin

LAW OFFICES
ROSE, SUNDBSTROM & BENTLEY, LLP

2548 BLAIRSTONE PINES DRIVE
TALLAHASSEE, FLORIDA 32301

(850) 877-6555

CHRIS H. BENTLEY, P.A.
ROBERT C. BRANNAN
F. MARSHALL DETERDING
MARTIN S. FRIEDMAN, P.A.
JOHN R. JENKINS, P.A.
STEVEN T. MINDLIN, P.A.
DAREN L. SHIPPY
WILLIAM E. SUNDBSTROM, P.A.
DIANE D. TRENOR, P.A.
JOHN L. WHARTON

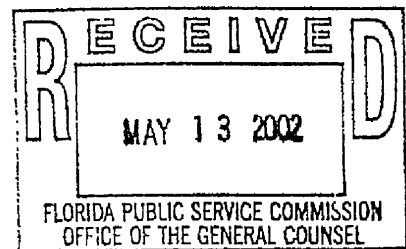
MAILING ADDRESS
POST OFFICE BOX 1567
TALLAHASSEE, FLORIDA 32302-1567

TELECOPIER (850) 656-4029

ROBERT M. C. ROSE
WAYNE L. SCHIEFELBEIN
OF COUNSEL

May 13, 2002
VIA HAND DELIVERY

Rosanne Gervasi, Esquire
Legal Division
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0873



Re: Aloha Utilities, Inc.
Wastewater Service Availability Charges
Our File No. 26038.01

Dear Rosanne:

You have asked that I briefly outline the circumstances surrounding the mistake in billing the new service availability charge approved by Commission Order No. PSC-01-0326-FOF-SU. Through a mistake that occurred after issuance of that Order on my part, one of the Utility employee's part and to some extent, on the part of the staff in approving a notice and tariffs that did not include these required charges, no tariffs or customer notice were issued, prepared, submitted or approved after the Commission's Order in Docket No. 991643-SU became final after reconsideration. The Order did not specifically require any separate notice of this change. No one noticed this mistake until I was contacted by a member of the Commission staff on March 7, 2002 and was informed that the tariff was not on file. The Commission Staff Attorney, myself and the President of the Utility all assumed, once informed of this error, that the charge had been imposed after the Order became final, but that the Utility had simply failed to file a tariff sheet or to submit a Customer Notice on the charge. Immediately after notification of the error with the tariff not being on file, I submitted with a letter dated March 8, 2002, the appropriate tariff reflecting the new charge. The Commission staff returned the approved tariff on March 26, 2002 with an effective date of May 23, 2001 as would be appropriate given the estimated date the Order would have become final and the tariffs could have been submitted.

1. Circumstances Leading to Current Situation - It came to the attention of the Utility's President on approximately April 12, 2002 that the Utility had not been charging the proper service availability charge. The President then gave instructions to his staff to immediately begin charging the appropriate charge and he began investigating what to do about the situation. He sent a notice to each of the developers who had outstanding "arrearages" for connections made between May 23, 2001 and the date of the discovery of the mistake in not imposing that charge. Soon after the notice was sent, the Commission began hearing from developers and the Utility began trying to work with developers and the staff to find a solution to this problem. The Utility is now and has been since April 12, 2002, charging the appropriate connection fee to

Attachment A

Rosanne Gervasi, Esq.

May 13, 2002

Page 2

all new connections that have occurred since that date.

2. Letters to Developer - Beginning on April 16, 2002, within four days of learning of the mistake in failure to properly charge the new service availability charge, the President of Aloha had his staff send out the attached first notices to all current developers and builders informing them of the increase in service availability charges applicable to all future connections. Soon thereafter, for all of the developers who would have arrearages in such service availability charges related to connections made between May 23, 2001 and the date of his letter, a second notice was forwarded to those affected developers outlining the amount of potential arrearages and suggesting that they contact the Utility immediately to discuss appropriate payment.

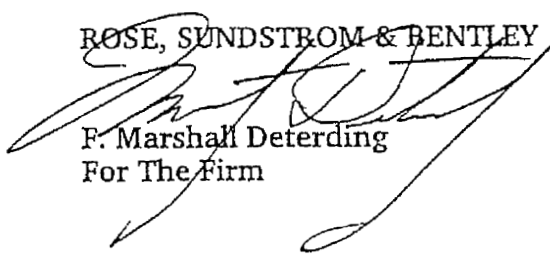
Attached hereto are copies of each of the two letters. The shorter one was sent on April 16, 2002 to those persons who had outstanding prepaid connections, which would be assessed the higher rate upon attempting to connect any of their homesites. The longer one is the one that was sent on April 22, 2002 to the persons with potential arrearage charges.

3. Connections - Attached hereto is a list by month of connections made between May 23, 2001 and April 12, 2002. There are a total of 409. 407 are 5/8 X 3/4" meters and the remaining 2 are 1" general service meters. All of these were made at the lower connection fee. Since April 12, 2002, all connections actually made to the system, have been made at the new required connection fee.

Should you have any further questions, please let me know.

Sincerely,

ROSE, SUNDBROM & BENTLEY


F. Marshall Deterding
For The Firm

FMD/tms

cc: Mr. Stephen G. Watford
aloha\general\gervasi.ltr