

**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

January 15, 2003

**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 Motion to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date

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

McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A. DOCUMENT NUMBER DATE

00450 JAN 15 8

FPSC-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: January 15, 2003

**ADAM SMITH ENTERPRISES, INC.'S MOTION TO CONFIRM AS FINAL THE  
APRIL 16, 2002 EFFECTIVE DATE OF REVISED SERVICE AVAILABILITY TARIFF  
AND  
MOTION TO STRIKE TESTIMONY ON EFFECTIVE DATE**

Pursuant to Rule 28-106.204, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), moves for an order confirming as final the effective date of April 16, 2002 that the Commission imposed on Aloha Utilities, Inc.'s ("Aloha") revised sewer service availability tariff in the Proposed Agency Action portion of Order No. PSC-02-1250-SC-SU. Based on the April 16, 2002 effective date that the order established with finality through the operation of law, Adam Smith also moves to strike portions of the prefiled testimony of Aloha witness Stephen Watford.

**MOTION TO CONFIRM EFFECTIVE DATE OF APRIL 16, 2002**

**Argument**

*The April 16, 2002 date in Order No. PSC-02-1250-SC-SU was not protested and became final and effective by operation of law.*

1. Section 120.80(13)(b), Florida Statutes states: "Notwithstanding Subsection 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Accordingly, those aspects of a PAA order that are not

specifically protested become final and effective by operation of law. The Commission has recognized and applied this requirement on numerous occasions, and in a variety of contexts. Examples include Order No. PSC-01-2212-PAA-FP, entered in Docket No. 000808-EI on November 15, 2001 (“Pursuant to Section 120.80(13)(b), Florida Statutes, issues in a proposed agency action which are not in dispute are deemed stipulated. Gulf protested that part of the PAA Order denying recovery of the wetland mitigation plan through the ERC, but did not protest that part of the PAA pertaining to consumptive use monitoring”); Order No. PSC-01-1548-PCO-WS, entered in Docket No. 980992-WS on July 26, 2001 (“Pursuant to Section 120.80(13)(b), Florida Statutes, the hearing in this matter may only address the issues in dispute (i.e., protested). Issues in the PAA order which are not in dispute are deemed stipulated”); Order No. PSC-01-0084-FOF-EI, entered in Docket No. 991779-EI on January 10, 2001 (“no person challenged Item 4 of Part III of Order 00-1744. Pursuant to Section 120.80(13)(b), Florida Statutes, Item 4 is deemed stipulated”); and Order No. PSC-01-0051-PAA-TP, entered in Docket No. 981444-TP on January 8, 2001 (“Specifically, the Joint Petitioners protested and sought a hearing regarding only the portions of the PAA Order that related to . . . The remaining portions of the PAA Order were not protested by the Joint Petitioners and were deemed stipulated pursuant to Section 120.80(13)(b), Florida Statutes.”) In Order No. PSC-98-1254-FOF-GU, entered in Docket No. 970365-GU on September 22, 1998, the Commission approved and adopted the Recommended Order of the Administrative Law Judge assigned to the case, who stated, in his “Conclusions of Law”:

54. Section 120.90(13)(b) (sic) provides that “a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.” *Therefore, this proceeding may only address the issues disputed in Petitioner’s petition for a formal hearing.*

Order No. PSC-98-1254-FOF-GU, at page 12. (emphasis added).

2. Similarly, as Adam Smith will show, in the instant case no party disputed or protested the effective date of April 16, 2002; it is therefore deemed stipulated by operation of statute, and cannot be the subject of the hearing on disputed matters.

3. In Order No. PSC-02-1250-SC-SU, based on undisputed facts concerning the date on which Aloha substantially accomplished written notice of the revised service availability charge to affected developers and builders, the Commission required Aloha to submit a replacement tariff sheet and determined the effective date of Aloha's revised service availability charge tariff to be April 16, 2002.<sup>1</sup> In the order, the Commission stated:

The [revised service availability charge] tariff sheet will be stamped effective for connections made on or after April 16, 2002, the date that Aloha substantially completed noticing to developers and builders who were connected to the system by April 16, 2002.

Order No. PSC-02-1250-SC-SU, at page 21-22.

4. The portion of Order No. PSC-02-1250-SC-SU relating to the effective date of the service availability tariff was issued as a Proposed Agency Action (PAA) item. In the same order, also issued in the form of PAA, the Commission separately proposed to impute an amount of CIAC represented by the amount of forgone service availability charges for the period May 23, 2001 through April 16, 2002 (the period of time during which Aloha failed to file the revised tariff, provide notice to affected developers and builders, and collect the higher charge). It also proposed to allow Aloha to attempt to apply the revised service availability charge to

---

<sup>1</sup> The Commission's determination of the effective date was premised upon these undisputed facts: (1) Prior to March 11, 2002, Aloha had not submitted a revised service availability tariff; (2) prior to April 12, 2002, Aloha had never collected the increased service availability charge; and (3) Aloha did not substantially complete providing notice of the increased service availability charge to affected developers and builders until April 16, 2002. See Order No. PSC-02-1250-SC-SU.

connections made during the period May 23, 2001 through April 16, 2002.<sup>2</sup> The order required any protests to the PAA components to be filed by October 2, 2002.

5. Aloha, which earlier had attempted to rely on a tariff that it had filed on March 11, 2002 (and that Staff – acting on the erroneous belief that Aloha had been collecting the higher charge – had mistakenly backdated to May 23, 2001), promptly submitted the revised tariff sheet required by Order No. PSC-02-1250-SC-SU. In its letter of transmittal, Aloha acknowledged that the only difference between this tariff and the (discredited) tariff it superseded was the change in the effective date from May 23, 2001 to April 16, 2002.

6. On October 2, 2002, Aloha filed its protest to the PAA order, which it styled as its Request for Hearing. The portion of Aloha’s protest in which Aloha identifies the matters in dispute appears in the section identified as “Disputed Issues of Fact and Law.” Aloha identified only the subject of CIAC. The section states:

The following issues have been identified by Aloha as disputed issues of material fact in this proceeding:

Issue 1: Does the imputation of CIAC without the ability to fully backbill for the undercollected service availability charges, which should have been collected from May 23, 2001 to April 16, 2002 constitute a taking?

Issue 2: Is it appropriate to impute CIAC for the uncollected service availability charges which should have been collected from May 23, 2001 until April 16, 2002 and, if so, what amount of CIAC should be imputed?

Aloha’s Request for Hearing at 3-4.

7. In a footnote, Aloha emphasized that it was challenging *only* the proposed imputation of CIAC, and that its protest was “contingent” in nature:

Aloha wishes to make its intent clear: this request for hearing is being filed in order to preserve Aloha’s right to backbill developers and builders who connected to Aloha’s system from May 23, 2001 until April 16, 2002 should Aloha’s Motion

---

<sup>2</sup> Adam Smith timely protested the portion of the PAA in which the Commission proposed to allow Aloha to apply the higher change retroactively.

for Reconsideration and Clarification . . . not be granted. . . If, for whatever reason, the Commission reverses its decision to authorize 100% backbilling, Aloha will go to hearing. If, however, the Commission sticks with its decision to allow 100% backbilling, Aloha will withdraw its request for hearing.

Aloha's Request for Hearing at page 3, footnote 3.

8. The footnote in Aloha's Request for Hearing underscores the complete absence of the effective date subject from its protest. Aloha protested the imputation of CIAC; Aloha alluded to the "backbilling" feature that would induce it to withdraw its protest of the CIAC imputation; Aloha *did not protest* the effective date.

9. Indisputably, in the PAA portion of Order No. PSC-1250-SC-SU, the Commission determined the date on which Aloha provided affected developers and builders with written notice of the increased service availability charge; applied the requirements of Rule 25-30.475(2) regarding the relationship of the requirement of prior notice to the effective date of a tariff; repudiated the "backdated" tariff that Aloha had submitted on March 11, 2002; imposed the requirement of a revised, replacement tariff; and determined the effective date of the revised tariff to be April 16, 2002. Indisputably, in its Request for Hearing Aloha did not dispute or protest either the April 16, 2002 effective date established in the PAA or the Commission's basis for establishing that date.<sup>3</sup> Aloha protested only the portion of the PAA related to the imputation of CIAC.

10. *After the fact*, in much the same way that it attempted to overhaul the Commission's PAA order through an elaborate and inappropriate "motion for clarification" earlier in the case, Aloha is now trying -- by belatedly attempting to treat the "effective date" as

---

<sup>3</sup> In fact, when identifying the matters to which it objected, in its Request for Hearing Aloha implicitly recognized the April 16, 2002 effective date as a "given" in the case. If the effective date were anything other than April 16, 2002, there would be no occasion for Aloha to define, *in its protest*, the period May 23, 2001 through April 16, 2002 as the period during which higher charges "should have been collected."

an issue<sup>4</sup> -- to enhance its litigation position and alter the posture of the Commission's PAA. Given the effect of Section 120.80(13)(b) and the fact that no party, including Aloha, protested the effective date that the Commission issued as PAA, Aloha's attempt is improper, illegal, and of no effect.

11. This result is not changed by the fact that Aloha *did* protest the Commission's proposed action to impute CIAC in the amount of forgone service availability charges for the period May 23, 2001 through April 16, 2002. Aloha cannot parlay or leverage either its limited protest or its "statement of purpose" into a protest of the April 16, 2002 effective date. The reason is simple: the proposed effective date, the proposed imputation of CIAC, and the proposed "backbilling authority" *were treated as separate and distinct subjects in the PAA*. In other words, in the PAA portion of Order No. PSC-02-1250-SC-SU the Commission separately and simultaneously (a) determined the effective date of the revised service availability tariff to be April 16, 2002; (b) proposed to impute CIAC for the amount of higher service charges not collected prior to April 16, 2002; and (c) proposed to allow Aloha to attempt to apply the higher charge to connections made prior to April 16, 2002.<sup>5</sup> Because these were separate proposals, a protest of one does not constitute a protest of another. In another pleading Aloha has asserted, in effect, that Aloha must be deemed to have *implicitly* protested the April 16, 2002 effective date because it wants to "backbill," and the April 16, 2002 effective date is problematic in that regard. See Aloha's Motion to Strike, or in the Alternative, Response to Adam Smith's Motion for Reconsideration at 5-6. In other words, Aloha wants to use the end result it hopes to reach in the case as a starting point; proceed to "back into" an identification of additional matters on

---

<sup>4</sup> Aloha has (erroneously) portrayed the effective date as being at issue in pleadings related to discovery, and has prefiled testimony supporting an effective date other than April 16, 2002.

<sup>5</sup> In fact, at the outset of its Request for Hearing Aloha noted that "backbilling" (Issue 3), imputation of CIAC (Issue 4), and effective date (Issue 6) were addressed as separate issues in the PAA.

which it was silent in its protest but that it could have or should have protested to help enhance its litigation position; and regard the missing component as an “implied protest.” In view of the clear requirement of Section 120.80(13)(b) that an affected party affirmatively protest the specific portion of the PAA with which it is aggrieved to avoid stipulating to the action proposed, Aloha’s argument amounts to no more than wishful thinking.

12. Neither Aloha nor any other party protested the April 16, 2002 effective date, which became final by operation of law. Neither Aloha, nor any other party, nor the Commission can now attempt to challenge or revise the April 16, 2002 effective date for the purpose of anticipating or avoiding issues or infirmities associated with the interplay between the April 16, 2002 effective date and the Commission’s other proposed actions.

### **CONCLUSION**

Florida Statutes §120.80(13)(b) clearly provides that any portion of a PAA issued by the Commission that is not identified as the subject of an objection is “deemed stipulated.” The Commission’s approval of April 16, 2002 as the effective date of the tariff was not identified by Aloha in its Request for a formal hearing as a disputed issue. *No party protested* the portion of the PAA that established the effective date of the tariff to be April 16, 2002. Thus, the effective date of April 16, 2002 was “deemed stipulated” by operation of law. Section 120.80(13)(b), Florida Statutes. As a matter of law, the April 16, 2002 effective date is not at issue in this proceeding.


**WHEREFORE**, Adam Smith requests that the Commission enter an order confirming the effective date of Aloha’s revised service availability tariff to be April 16, 2002.



**MOTION TO STRIKE PREFILED TESTIMONY  
RELATING TO EFFECTIVE DATE**

As part of this Motion to Strike, Adam Smith incorporates by reference the above Motion to Confirm Effective Date. For the reasons stated in the above motion, by Order No. PSC-02-1250-SC-SU the Commission established the effective date of the service availability tariff to be April 16, 2002. The portion of the PAA relating to the effective date of the tariff was not protested and, pursuant to statute, is deemed stipulated in this proceeding. Yet, in prefiled testimony submitted on January 6, 2003, Aloha witness Stephen Watford attempts to sponsor testimony advocating a different effective date. For the reasons set forth in the above motion, the Commission should strike page 13, line 5 through page 16, line 2, inclusive, of Mr. Watford's prefiled direct testimony.

**WHEREFORE**, Adam Smith moves for an order striking from the prefiled testimony of Aloha witness Stephen Watford the testimony identified herein.

  
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](mailto:jmcglothlin@mac-law.com)

Attorneys for Adam Smith Enterprises, Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of Adam Smith Enterprises, Inc.'s Motion to Confirm Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date was sent via (\*)Hand Delivery, (\*\*) Electronic mail or U.S. Mail on this 15th day of January 2003 to the following:

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

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

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

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

  
Joseph A. McGlothlin