

ORIGINAL

SUZANNE BROWNLESS, P. A.

ATTORNEY AT LAW
1975 Buford Boulevard
Tallahassee, Florida 32308

ADMINISTRATIVE LAW
GOVERNMENTAL LAW
PUBLIC UTILITY LAW

TELEPHONE (850) 877-5200
TELECOPIER (850) 878-0090

January 22, 2003

VIA HAND DELIVERY

Blanca Bayo
Clerk and Director of Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

RECEIVED-FPSC
03 JAN 22 PM 4:44
COMMISSION
CLERK

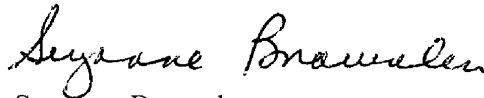
RE: Docket No. 020413-SU
IN RE: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco
County for failure to charge approved service availability charges, in violation of
Order No.PSC-01-0326-FOF-SU and Section 367.091,Florida Statutes.

Dear Ms. Bayo:

Enclosed please find the original and fifteen (15) copies of Aloha Utilities, Inc.'s
Response in Opposition to Adam Smith Enterprises, Inc.'s Motion to Confirm and Motion to
Strike to be filed in the above-styled docket. Also enclosed is an extra copy to be stamped and
returned to our office for our files.

Thank you for your assistance in this matter. Please contact me if you have any questions
or need any additional information regarding this filing.

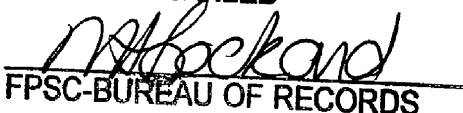
Very truly yours,



Suzanne Brownless
Attorney for Aloha Utilities, Inc.

AUS _____
CAF _____
CMP _____
COM 3
CTR _____
ECR _____
GCL _____
JPC _____
VMS _____
SEC 1
OTH _____
cc: 3767
cc: Rosanne Gervasi
Joe McGlothlin
Steve Watford

RECEIVED & FILED


FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00685 JAN 22 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA 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

**RESPONSE IN OPPOSITION TO ADAM SMITH ENTERPRISES, INC.'S
MOTION TO CONFIRM AND MOTION TO STRIKE**

Pursuant to Rule 28-106.204, Florida Administrative Code, Aloha Utilities, Inc. (Aloha), files this Response in Opposition to Adam Smith Enterprises, Inc.'s (Adam Smith) Motion to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date, and in support thereof states as follows:

Motion to Confirm Effective Date

1. Adam Smith cites §120.80(13)(b), F.S., correctly for the proposition that the Commission may only address the "issues in dispute" when a hearing is requested in response to a Proposed Agency Action (PAA) order and all other proposed actions of the Commission, are deemed stipulated. [Adam Smith Motion at 1] Adam Smith goes on to allege that the April 16, 2002 effective date for Aloha's revised service availability tariff was not protested by either Aloha or Adam Smith and thus became effective by operation of law. [Motion at 1-2] In support of this position, Adam Smith cites five cases in which the Commission has "recognized and applied this requirement." [Adam Smith Motion at 2-3] Adam Smith also appears to take the position that a hearing may only address the issues disputed in parties' petitions for a formal hearing citing Order No. PSC-98-1254-GU, issued September 22, 1998. Id. Aloha disagrees with this characterization of both the facts and the law.

DOCUMENT NUMBER-DATE

00685 JAN 22 8

2. First, it is an incorrect statement of law that a hearing on proposed action of the Commission *may only address the issues raised by the parties in their petitions for hearing*. Were this so, the Commission would be unable to raise issues itself that it found were necessary to fully and fairly resolve the matters before it. The Commission has very specifically reserved this right in the procedural order in this docket, Order PSC-02-1460-PCO-SU (Order 02-1460), issued in this docket on October 23, 2002. Order 02-1460 states that the “*scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission.*” [Order 02-1460 at 1; Emphasis added] Commission Staff does not file protests of PAA orders. However, once a protest has been timely filed by an appropriate party, the Commission through its Staff has the ability to identify issues in dispute which it believes are necessary to fully resolve the dispute.

3. This reservation of authority has been recognized by the Commission in orders interpreting §120.80(13)(b), F.S.: Order PSC-97-0860-PCO-TL (Order 97-0860), issued July 16, 1997¹, and Order PSC-00-1549-PCO-WS (Order 00-1549), issued August 25, 2000². In Order 97-0860, Commissioner Clark denied Sprint-Florida’s request to limit the issues in the docket to those protested by MCI in its protest stating:

Also, Section 120.80(13)(b), Florida Statutes, does not limit the Commission’s discretion to address all issues that it determines to be relevant to a full resolution of a case when the initial PAA order is protested. Section 120.80(13)(b), Florida Statutes, is

¹ In re: Establishment of intrastate implementation requirements governing federally mandated deregulation of local exchange company payphones, 97 FPSC 7:483 (1997).

² In re: Complaint and request for hearing by Linda J. McKenna and 54 petitioners regarding unfair rates and charges by Shangri-la by the Lake Utilities, Inc. in Lake County, 00 FPSC 8:402 (2000).

designed to limit the parties to the issues presented by the protest in order to prevent them from relitigating issues that the Commission has already decided and that were not protested. **It is not designed to prevent the Commission from addressing matters it deems necessary to a full resolution of the case in the manner it deems appropriate.**

Sprint-Florida's restrictive interpretation of Section 120.80(13)(b), Florida Statutes, would unnecessarily hamstring the Commission in its proper exercise of regulatory authority. Accordingly, Sprint-Florida's Motion is hereby denied.

[97 FSPC 7 at 484; Emphasis added.]

4. Likewise in Order 00-1549, Commissioner Jacobs considered Office of Public Counsel's (OPC) Motion in Limine seeking to limit the issues in the case to those raised in OPC's objection to Order PSC-00-0259-PAA-WS. OPC opined that §120.80(13)(b), F.S., prohibited "the Commission from hearing any issue that was not raised by a party in an initial objection filed against the PAA." [00 FSPC 8 at 403] In rejecting this interpretation of §120.80(13)(b), F.S., Commissioner Jacobs cited Order 97-0860 and reiterated that **"to the extent that OPC seeks to limit the Commission's discretion to address all issues that it determines to be relevant to the full resolution of the case, the Motion in Limine is denied."** [00 FSPC 8 at 404]

5. As discussed in Aloha's Motion to Establish Issues, filed on January 16, 2003, the effective date of the service availability tariff has been clearly raised by both Aloha and the Commission Staff.³ This issue was clearly identified by Aloha and discussed at the first issues

³ Aloha has raised the issue of the effective date of the service availability tariff both directly and indirectly as discussed in Aloha's Motion to Establish Issues, ¶¶ 5-7. There is no question that the imputation of CIAC associated with the uncollected higher service availability charges and the ability to backbill for those charges are at issue in this case. It is simply impossible to segregate the tariff's effective date from either the imputation of CIAC or

meeting on October 8th and included in the Staff's preliminary issues list distributed on December 18th at the second issues meeting. [Attachment A] The effective date issue was also included in the Staff's revised preliminary issues list prepared after the December 18th meeting. [Attachment B]

6. Allowing the effective date to be included as an issue in this case will not prejudice Adam Smith. Both Aloha and Staff advised Adam Smith that the effective date of the tariff was at issue at the first issues meeting on October 8th, more than three months ago. Aloha appropriately raised this issue at both issues meetings and filed testimony on the issue in the prefiled testimony of Stephen Watford, the subject of Adam Smith's corollary Motion to Strike. Adam Smith's testimony is not due to be filed until February 3, 2003. Adam Smith has not alleged, nor could it, that including the effective date of the service availability tariff as an issue in this case will prejudice it in any way.

7. All parties agree that issues raised in a protest/request for hearing are properly before the Commission. All parties agree that the Commission has the authority to establish the issues to be litigated in this docket. As stated above, Aloha has both directly and indirectly raised the effective date of the service availability tariff as an issue in this docket.. Further, the Commission Staff has raised the effective date of the revised service availability tariff as an issue in this docket. The imputation of CIAC, backbilling and the effective date of the service availability tariff have been properly protested and thus the findings made in Order PSC-02-1250-SC-SU regarding these issues are a nullity and of no force or effect. In re: Petition for

backbilling. The very inconsistencies raised by Adam Smith between an effective date of April 16, 2002 and both the imputation of CIAC and backbilling demonstrate that the effective date is intrinsic to both issues.

approval of a special contract with IMC Phosphates Company for provision of interruptible electric service by Tampa Electric Company, 01 FPSC 4:267, 268 (2001)(“Given that IMC protested the Order in its entirety, the findings made in PAA Order No. PSC-01-0104-PAA-EI are of no force and effect.”)

8. For these reasons, the effective date of April 16, 2002 has not become final by operation of law but is at issue in this proceeding. Adam Smith’s request to confirm the effective date of the service availability tariff as April 16, 2002 must be denied.

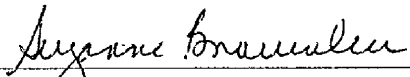
Motion to Strike Testimony

9. The basis for Adam Smith’s motion to strike portions of Stephen Watford’s prefiled direct testimony is that the effective date of April 16, 2002 for the service availability tariff is not at issue in this case. [Adam Smith Motion at 8] As proven above, the effective date of the service availability tariff is properly at issue in this proceeding.

10. Adam Smith’s request to strike portions of Mr. Watford’s testimony addressing the effective date must be denied.

WHEREFORE, Aloha Utilities, Inc. requests that this Commission enter an order denying Adam Smith’s Motion to Confirm as Final the April 16, 2002 Effective Date of the Revised Service Availability Tariff and denying Adam Smith’s Motion to Strike Testimony on Effective Date, to wit page 13, line 5 through page 16, line 2 of Stephen Watford’s prefiled direct testimony.

Respectfully submitted this 22 day of January, 2003 by:



Suzanne Brownless
1975 Buford Blvd.
Tallahassee, Florida 32308
Phone: (850) 877-5200
FAX: (850) 878-0090
E-mail: sbrownless@comcast.net

Attorney for Aloha Utilities, Inc.

Legal

Preliminary Issues List - DN 020413-SU

Does the Commission have the legal authority to allow

1. Should Aloha be allowed to collect from developers the difference in the prior and current service availability tariffs for the period May 23, 2001 through April 16, 2002?
2. Should CIAC be imputed on Aloha's books for the uncollected service availability charges which should have been collected from May 23, 2001 until April 16, 2002, and if so, in what amount?
3. What should be the effective date for Aloha's current service availability tariff for its Seven Springs wastewater system?

all

Suggested Stipulations

1. From May 23, 2001 to April 16, 2002, Aloha erroneously failed to notice and implement its service availability charge increase to \$1,650 per residential ERC and \$12.79 per gallon for all other connections, which charges were approved by Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU.
2. The tariff on file with the Commission from May 23, 2001, to April 16, 2002, erroneously reflected Aloha's old service availability charge of \$206.75 per ERC, which was Aloha's approved service availability charge prior to the issuance of Order No. PSC-01-0326-FOF-SU.
3. The full amount of service availability charges which Aloha should have charged to various developers from May 23, 2001 to April 16, 2002, had the charges been correctly noticed and implemented pursuant to Order No. PSC-01-0326-FOF-SU is \$659,547.
4. The full amount of service availability charges which Aloha should have charged to Adam Smith from May 23, 2001 to April 16, 2002, had the charges been correctly noticed and implemented pursuant to Order No. PSC-01-0326-FOF-SU is \$220,817.25. (according to Adam Smith's protest)

Preliminary Issues List - DN 020413-SU

Legal Issues

1. Does the Commission have the legal authority to permit Aloha Utilities, Inc. to collect from developers the difference in the prior and current wastewater service availability tariffs for the period May 23, 2001 through April 16, 2002?
2. Would the imputation of CIAC on the utility's books in the amount of the uncollected service availability charges without authorizing the utility to collect these charges from developers constitute a taking and/or a penalty?

Factual Issues

1. If the Commission has the legal authority to do so, should Aloha Utilities, Inc. be allowed to collect from developers the difference in the prior and current service availability tariffs for the period May 23, 2001 through April 16, 2002, under the facts of this case?
2. Should CIAC be imputed on the utility's books for the uncollected service availability charges which should have been collected from May 23, 2001 until April 16, 2002, and if so, in what amount?
3. What should be the effective date for Aloha Utilities, Inc.'s current service availability tariff for its Seven Springs wastewater system?

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been provided to the persons listed below by U.S. Mail, (*) Hand Delivery, or (**) E-Mail, this 22^d day of January, 2003.

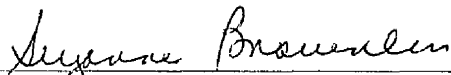
*Rosanne Gervasi
Senior Attorney
Florida Public Service Commission
Tallahassee, FL 32399-0850

*Joe McGlothlin, Esq.
McWhirter Reeves Law Firm
117 South Gadsden Street
Tallahassee, FL 32301

Kathryn G.W. Cowdery
Ruden, McClosky Law Firm
215 South Monroe Street
Suite 815
Tallahassee, FL 32301

Stephen C. Burgess
Jack Shreve
Office of Public Counsel
c/o Florida Legislature
111 West Madison Street
Room 812
Tallahassee, FL 32399-1400

Stephen Watford
President
Aloha Utilities, Inc.
6915 Perrine Ranch Road
New Port Richey, FL 34655-3904



Suzanne Brownless, Esq.

c: 3765