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ORIGINAL

January 24, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0800

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 PSC-01-0326-FOF-SU and Section 367.091, F.S.

Dear Ms. Bayo:

Please find the original and fifteen copies of Aloha Utilities, Inc.'s Response in Opposition to Adam Smith Enterprises, Inc.'s Motion to Strike Prefiled Testimony to be filed in the above-stated docket. Also attached is a copy to be stamped and returned to our office.

Should you have questions or need any additional information, please contact me. Thank you for your assistance in this matter.

Very truly yours,

Suzanne Brownless
Attorney for Aloha Utilities, Inc.

SB:smh
Bayo-ltr-Aloha.wpd

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

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RESPONSE IN OPPOSITION TO ADAM SMITH ENTERPRISES, INC.'S MOTION TO STRIKE PREFILED TESTIMONY

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 strike portions of the prefiled direct testimony of Aloha's witness, Stephen G. Watford, and in support thereof states as follows:

1. There are essentially two arguments raised by Adam Smith to strike Mr. Watford's prefiled testimony from page 4, line 21 through page 13, line 4. First, that Aloha did not raise the "interpretation" of Adam Smith's Developer Agreement with Aloha as an issue in this proceeding. Second, that "interpretation" of the terms and conditions of Adam Smith's Developer Agreement is the sole province of the judiciary, not the Commission. [Adam Smith Motion at 2-3]

Backbilling charges are at issue

2. In Order PSC-02-1250-SC-SU (Order 02-1250), issued on September 11, 2002, the Commission: 1) rejected Aloha's proposed Settlement Agreement; 2) allowed Aloha to backbill developers for service availability charges that should have been collected from May 23, 2001 until April 16, 2002; 3) imputed as CIAC the $659,547 in service availability charges that Aloha should have collected; 4) established the effective date of the service availability tariff as

April 16, 2002 ; 5) show caused Aloha for failure to file the service availability tariff and failure to collect the appropriate service availability charges and 6) granted intervention to SRK Partnership Holdings, LLC. The imputation of CIAC, backbilling and effective date of the tariff were issued as Proposed Agency Action (PAA) decisions.

3. On October 2, 2002 both Aloha and Adam Smith Enterprises, Inc. (Adam Smith) timely filed requests for hearing in this docket. In its Petition for Formal Proceeding (Protest), Adam Smith identified as a "Disputed Issue of Material Fact "*Whether Adam Smith transferred title to certain lots during the period May 23-April 16, 2002 prior to service being taken, such that responsibility for payment of any applicable service availability charges now rests with the purchasers of such lots.*" [Adam Smith Protest at 3; Emphasis added] This issue was restated as a "[l]egal principle not subject to dispute" in Adam Smith's informal issue list provided to all parities on December 18, 2002 at the second issue identification meeting held in this proceeding thus: "When the utility connects a lot to its system, (i) the amount of the applicable service charge is determined by the charge that is in effect as of the date of the connection; and (ii) the *liability for any service availability charge due at the time of connection rests with the entity that then owns the lot and requests the connection.*" [Attachment A; Emphasis added] At the December 18th meeting, Aloha did not agree to the characterization of this statement as "not subject to dispute" and stated that Aloha's Developer Agreement with Adam Smith, as well as the H. Miller and Sons, Inc. v. Hawkins[1] decision would have a bearing on who should pay the charge at the time of connection.

4. As has been stated on numerous occasions, there is no dispute in this case

[1] 373 So.2d 913 (Fla. 1979).

regarding the fact that the imputation of CIAC for uncollected service availability charges and the backbilling for service availability charges that should have been collected from May 23, 2001 until April 16, 2002 are at issue in this case. In fact, Adam Smith raised the backbilling issue in its Protest.[2] [Adam Smith Protest at 3] It stands to reason that if backbilling is at issue in this case, the entities or person(s) who should, or can, be backbilled is also at issue. Aloha is entitled to file testimony in support of its position that developers and builders who have prepaid service availability charges pursuant to developer agreements should be the entities backbilled. The Developer Agreement entered into between Aloha and Adam Smith is both material and relevant to this point and appropriately considered by the Commission.

5. In its Protest Adam Smith identified its direct and substantial interest in this case as follows: "If the April 16, 2002 tariff were to be applied retroactively in this manner to the connections that Adam Smith made during the period May 23, 2001 through April 16, 2002, *Aloha would try to collect the difference of $220,817.25 from Adam Smith.*" [Adam Smith Protest at 2] Adam Smith also indicated that Aloha was actually attempting to collect a higher amount than the $220,817.25. [Id.] Given these statements, how can Adam Smith possibly argue that it had no notice that this proceeding would determine the amount Adam Smith owed Aloha if backbilling of developers was allowed? Adam Smith has itself put at issue whether it should pay additional service availability fees and, if so, what those fees should be. Adam Smith has alleged no other "substantial interest" in this docket. If these issues are not appropriately determined here, then Adam Smith should be dismissed from this docket on the grounds that it

[2] As did Aloha in its Request for Hearing. [Aloha Request at 3]

has not met the Agrico[3] standing test.

4. Further, many "subissues" are rightfully contained in each of the three broad issues which have been raised in this case: imputation of CIAC, effective date of the service availability tariff and backbilling. Many arguments can be made in support of each party's position on each issue. It has never been the Commission's practice to require that each such argument be identified as a separate issue in Prehearing Statements or at the Prehearing Conference much less in a party's protest/request for hearing.

5. The purpose of identifying issues in a party's protest/request for hearing is give all substantially affected persons an opportunity to present all relevant testimony and legal arguments regarding those issues to the trier of fact. Adam Smith has not alleged, nor could it, that it will not be able to fully prepare or present either testimony or legal arguments to the Commission. All that need be done is for Adam Smith to rebut Mr. Watford's testimony in its direct testimony filed on February 3, 2003 and file a post hearing brief. Adam Smith has been in no way prejudiced by Aloha's disputed testimony. Any attempt to delete of the portion of Mr. Watford's testimony contested by Adam Smith on the grounds that his testimony improperly addresses whether Adam Smith should be backbilled and in what amount is blatantly bogus and should be rejected by the Commission.

Commission jurisdiction

6. Adam Smith's second argument is that the Commission does not have the authority to "construe the terms of a contract and/or adjudicate a future contractual dispute."

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[3]Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981)(Entity must sustain an injury of sufficient immediacy due to the action of the agency and the interest asserted must be of the type the proceeding is designed to protect.)

[Adam Smith Motion at 3] Aloha disagrees. The Commission does not have the authority to determine if a contract has been breached or to award money damages for such breach[4]. However, neither contract breach nor money damages are at issue in this proceeding. What is at issue is whether Adam Smith is required to pay additional service availability charges at the time of connection for lots for which it has already prepaid a service availability charge. In other words, *Aloha is asking the Commission to determine the charges that should be imposed on Adam Smith.* Adam Smith concedes that the Commission has exclusive jurisdiction to set "just and reasonable charges and conditions for service availability." [Section 367.101, Florida Statutes] That is what is being done here. A review by the Commission of the entire Developer Agreement as well as the Commission rules and regulations regarding service availability is relevant to answering this question. Aloha is not asking that the Commission "interpret" the Developer Agreement *per se* but to implement its service availability charges as proposed.

7. However, even if one were to characterize this regulatory request as an "interpretation" of the Developer Agreement's terms and conditions, the Commission has the ability to do so and to modify that agreement in the interest of the public. That is the holding of the Florida Supreme Court in H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979) and remains the law today.

8. Rule 25-550(1), Florida Administrative Code, requires that a utility file all developer agreements with the Commission within 30 days of execution. Rule 25-550(1), Florida Administrative Code, also specifically reserves to the Commission the right to "affect"

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[4] These were the remedies sought by the plaintiffs in Cohee v. Crestridge Utilities, Corp., 324 So.2d 155, 156 (Fla. 2d DCA 1975).

the provisions of an approved developer agreement "if, pursuant to Commission action, the terms and conditions of the utility's service availability policy are changed."

9. Rule 25-30.560(1), Florida Administrative Code, states that "[d]isputes concerning the application of these rules or concerning developer agreements may be referred to the Commission for disposition by the filing of a complaint in accordance with Rule Chapter 25-22, F.A.C." Pursuant to this rule the Commission has routinely interpreted the terms and conditions of previously approved developer agreements.

10. In re: Complaint by Florida Department of Natural Resources against St. George Island Utility Co., Ltd. in Franklin County regarding refund for water meter hookups,[5] concerned the Department of Natural Resources'(DNR) complaint that the failure of St. George to reimburse DNR for monies advanced to extend a water main to the state park on the island violated the provisions of its developer agreement with the utility. The Commission, citing §§ 367.011, 367.101 and 367.121(1)(a), Florida Statutes, and Rules 25-30.550 and 25-30.560, Florida Administrative Code, found that it did have jurisdiction to consider the complaint, even though DNR had also instituted a civil action for contract breach in Franklin County Circuit Court, stating:

> **The instant case involves interpretation of a charge in a developer's agreement, as opposed to the establishment of a charge.** However, **in view of the statutory provisions** cited above and the **procedures established by this Commission for handling such disputes (Rule 25-30.560,** Florida Administrative Code), it is **clear that the Commission has jurisdiction** over the issue.
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> [89 FPSC 6 at 494; Emphasis added.]

[5] Order No. 21451, issued on June 26, 1989; 89 FPSC 6:490, 494 (1989).

Further, the Commission found that the decision in Hill Top Developers v. Holiday Pines Service Corp.,[6] relied upon by Adam Smith in its motion, acted as no bar to this position. [89 FSPC 6 at 493-4] See also: In re: Petition by Coggin-O'Steen Land Company for declaratory statement regarding reimbursement of connection fees by Jacksonville Suburban Utilities Corporation in Duval County, 92 FSPC 5:379 (1992)(Commission interpreted the terms and conditions of two separate developer agreements and determined the amount of refund to be made to developer for construction of water and wastewater lines); In re: D.R. Horton Custom Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake County, 01 FPSC 6:262 (2001).

11. As proven above, the Commission has the jurisdiction to determine what service availability charges Adam Smith, as well as other developers and builders in Aloha's service territory, should pay and when they should pay them. Adam Smith seems to be under the misconception that other developers and builders will not likewise have their charges determined by this proceeding. That is not the case. Aloha has protested the imputation of CIAC and the amount of CIAC to be imputed if imputation is appropriate. The amount of CIAC to be imputed is directly linked to the amount of service availability charges which should have been paid by developers and builders from May 23, 2001 until April 16, 2002. Thus, each builder and developer will have the amount of CIAC that it owes determined in this proceeding as well.

12. With regard to Adam Smith's assertion that Aloha is attempting to have the Commission "adjudicate a future contractual dispute", time will tell. Only Adam Smith knows what it will do in the future.

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[6] 478 So.2d 368 (Fla 2d DCA 1985).

13. Finally, Adam Smith objects to page 10, line 4- line 12 of Mr. Watford's testimony on the grounds that it consists of "improper legal argument." [Adam Smith Motion at 6-7] Aloha disagrees. Mr. Watford has been qualified and tendered as an expert in the field of "water and wastewater utility management". [Watford testimony at 1-2, line 2] As a utility manager Mr. Watford is required to both understand and apply Commission and judicial decisions affecting the water and wastewater industry. His statements reflect his understanding of these decisions and the simple "fact" that the Miller[7] decision had been rendered for ten years at the time Aloha and Adam Smith executed their Developer Agreement.

WHEREFORE, because page 4, line 21 through page 13, line 4 of the prefiled testimony of Stephen Watford: 1) addresses an issue raised by Adam Smith in this proceeding, i.e., who should pay for an increase in service availability charges if backbilling is allowed; 2) is material and relevant to the imposition of those charges on Adam Smith and other developers; and 3) the Commission has the jurisdiction to determine the amount of service availability charges and to interpret and modify service availability contracts, the Commission must deny *in toto* Adam Smith's Motion to Strike Portions of the Prefiled Testimony of Stephen G. Watford.

Respectfully submitted this 24th day of January, 2003 by:

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[7]H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979).

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 24th day of January, 2003.

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INFORMAL ISSUE ID MEETING OF DECEMBER 18, 2002

ADAM SMITH ENTERPRISES, INC.

1. **Established by Order:**

The effective date of the revised tariff implementing the $1650/ERC service availability charge is April 16, 2002.

2. **Legal principle not subject to dispute**:

When the utility connects a lot to its system, (i) the amount of the applicable service charge is determined by the charge that is in effect as of the date of the connection; and (ii) the liability for any service availability charge due at the time of connection rests with the entity that then owns the lot and requests the connection.

3. **Established by Order and/or not subject to dispute:**

Order No. PSC-01-0326-FOF-SU required Aloha to prepare and file, within 20 days of the date of the Order, a tariff increasing Aloha's service availability charge from $206.75/ERC to $1650/ERC.

In late February or early March, 2002, PSC Staff apprised Aloha that Aloha had failed to file the revised service availability tariff required by Order No. PSC-01-0326-FOF-SU.

Counsel for Aloha submitted such a tariff on March 11, 2002. At that time, Counsel for Aloha represented to Staff that Aloha had been collecting the $1650/ERC service charge from developers, not withstanding Aloha's failure to file a tariff.

Based on the representation that Aloha had been collecting the higher service availability charge from the time it had been directed to revise its service availability tariff, PSC Staff backdated the "approved" stamp that it placed on the tariff submitted by Aloha on March 11, 2002, to reflect a May 23, 2001 date.

ATTACHMENT A

At the time Aloha submitted a tariff on March 11, 2002 and Staff applied a backdated "approved" stamp date of May 23, 2001 to that tariff, Aloha had never collected the $1650/ERC service availability charge for connections made. Instead, to that point Aloha had collected for each connection the $206.75/ERC charge that was then in effect, by virtue of the approved and effective tariff then in place.

Subsequent to the time Staff backdated the March 11, 2002 tariff to reflect an "approved" stamp date of May 23, 2001, Aloha attempted for the first time to collect from developers the higher $1650/ERC service availability charge for connections made following May 23, 2001, for which it had already collected $206.75/ERC.

When Aloha attempted to collect from developers the difference between $206.75/ERC and $1650/ERC, in its communications to developers Aloha justified the measure by referring to the May 23, 2001 "approved" stamp date that Staff had backdated based on Staff's acceptance of Aloha's representation that Aloha had already been collecting the $1650/ERC charge.

At the time it attempted, for the first time, to collect the difference between $206.75/ERC and the $1650/ERC from developers, Aloha did not inform developers that it had filed the tariff on to which it referred on March 11, 2002.

At the time Aloha attempted for the first time to collect the difference between $206.75/ERC and $1650/ERC from developers, relying as it did so on the backdated tariff, Aloha had not informed Staff that the representation it had made at the time it filed the tariff on March 11, 2002, to the effect that it had already been collecting $1650/ERC from developers when it submitted the tariff, was not true.

Aloha did not inform Staff that its representation of March 11, 2002, regarding the point in time at which it had begun collecting the $1650/ERC charge was in error until Staff, after receiving inquiries from developers who had received the first efforts by Aloha to collect the difference between $206.75 and $1650 per ERC, contacted Aloha for an explanation of the circumstances.

Aloha began providing written notices to developers of the increased service availability charge in April of 2002.

ISSUES

Where, as a result of the dates on which Aloha accomplished (i) the filing of an approved tariff and (ii) written notice to affected developers, the Commission has established an effective date of April 16, 2002 for the tariff implementing Aloha's service availability charge of $1650/ERC, and where developers had paid the service availability charge of $206.75/ERC that was applicable by virtue of the tariff that was in place and effective for connections prior to that date, may Aloha legally apply the $1650/ERC charge made effective on April 16, 2002 to connections that were made prior to that date?

Assuming, for the sake of argument, that the Commission has legal authority to allow Aloha to apply the $1650/ERC charge made effective on April 16, 2002 to connections that occurred prior to that date, is such a decision supported by the facts and circumstances of this case?