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January 30, 2003

VIA HAND DELIVERY

COMMISSION  
CLERK

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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 (1) Aloha Utilities, Inc.'s Motion for Reconsideration and Clarification of Order PSC 03-0130-PCO-SU; and (2) Request for Oral Argument to be filed in the above-stated docket. Also attached is a copy of each 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

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FPSC-COMMISSION CLERK

Request  
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00982 JAN 30 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

ALOHA UTILITIES, INC.'S MOTION FOR  
RECONSIDERATION AND CLARIFICATION OF ORDER PSC-03-0130-PCO-SU

Pursuant to Rule 25-22.0376(1), Florida Administrative Code, Aloha Utilities, Inc.  
(Aloha) seeks reconsideration of non-final Order PSC-03-0130-PCO-SU (Order 03-0130), issued  
on January 24, 2003, by Commissioner Deason, the Prehearing Officer assigned to this docket,  
and in support thereof states as follows:

1. Order 03-0130 granted Adam Smith Enterprises, Inc.'s (Adam Smith) Motion to  
Strike Aloha's Objections to Discovery and denied Aloha's Motion for Protective Order  
regarding the requests and interrogatories that were the subjects of the objections: Admissions  
Nos. 1-3, 5 and 6; Interrogatories Nos. 1-3; and Requests for Production Nos. 1, 2, 3, 4, and 7.  
The rationale for these decisions was twofold: that Aloha's objections were untimely filed and  
that "the discovery requests at issue concern Aloha's failure to file a revised service availability  
tariff on May 23, 2001, and are directed related to the issues in this case." [Order 03-0130 at 2;  
Emphasis added]

2. Order 03-0130 also addressed Aloha's Motion concerning the role of its former  
counsel, Marshall Deterding, in this proceeding. In its Motion, Aloha requested that Mr.  
Deterding be allowed to do two things: participate in the preparation of the answers to the  
discovery requests and testify at trial concerning the facts surrounding the late filing of the

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service availability tariff of which he has personal knowledge<sup>1</sup>, if those facts were determined to be relevant. Commissioner Deason denied Aloha's Motion finding that "officers and employees of Aloha would have knowledge of the information sought by Adam Smith, and that the information is thus available to Aloha by sources other than its prior counsel." [Order 03-0130 at 5]

### RECONSIDERATION

#### Relevancy of discovery

3. It appears that Aloha's objections were rejected in part on the grounds that Commissioner Deason concluded the facts surrounding Aloha's failure to file its wastewater service availability tariff on May 23, 2002 are relevant to the issues raised in this proceeding: imputation of CIAC, backbilling and the effective date of the tariff. That is, if Aloha's employees or its former counsel purposely mislead Commission Staff to believe that Aloha had collected the higher service availability charges beginning in May 23, 2001, that fact would be grounds to disallow backbilling - even if the Commission has the authority to allow such backbilling. Aloha disagrees.

4. Order PSC-02-1250-SC-SU (Order 02-1250), issued September 11, 2002, show caused Aloha for failure to timely file its revised service availability tariff. Aloha filed a timely response to this show cause which was disposed of by Order PSC-02-1774-FOF-SU, issued December 18, 2002. Aloha did not appeal this final action of the Commission. Aloha did not request a hearing on the show cause portion of Order 02-1250. Order 02-1250 has now become

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<sup>1</sup> Specifically, his conversations with Staff Counsel and Aloha employees about the late filing and whether service availability charges had been or had not been collected starting May 23, 2001.

final by operation of law and is *res judicata* with regard to any penalties which can be levied against Aloha for its failure to file the service availability tariff. If the Commission disallows backbilling but imputes CIAC for the amounts which should have been collected, for any reason, a penalty is being imposed on Aloha - a penalty prohibited by the doctrine of *res judicata*, contrary to the provisions of § 367.161, Florida Statutes and constituting an unconstitutional taking.

5. Thus, Commissioner Deason in ruling that the facts surrounding Aloha's failure to file its wastewater service availability tariff on May 23, 2002 are relevant to the issues raised in this proceeding has failed to take into account the doctrines of *res judicata* and unconstitutional taking and the provisions of § 367.161, Florida Statutes. For those reasons, in accord with the holdings of Diamond Cab Co. v. King<sup>2</sup>, the finding of Order 03-0130 regarding the relevance of the facts surrounding Aloha's failure to file its wastewater service availability tariff should be set aside by this Commission panel. If the facts surrounding the filing of the tariff are found to be irrelevant to this proceeding, there is no necessity to reach the role of prior counsel discussed below.

Motion regarding role of prior counsel

6. With regard to the participation of Marshall Deterding, Aloha's former counsel, in answering the discovery and providing testimony at hearing, Aloha seeks clarification of Order 03-0130. The finding by Commissioner Deason that other employees of Aloha could answer the discovery regarding the facts surrounding the filing of the tariff might lead one to conclude that

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<sup>2</sup>146 So.2d 889 (Fla. 1962)(Reconsideration should be granted when a point of fact or law has been overlooked or not considered by the Commission.)

the Commission Deason does not believe it appropriate for Mr. Deterding to participate at all in the preparation of answers to discovery. However, Order 03-0130 also states that “the act of providing files of documents to Aloha for inclusion in Aloha’s review for the purposes of responding to the document request *does not require actions taken in a “representative” capacity.*” [Order 03-0130 at 3; Emphasis added] It is Aloha’s understanding that Adam Smith will not allow Mr. Deterding to provide his files to Aloha for the purposes of responding to Adam Smith’s discovery because they believe that this action does, in fact, fall within the scope of activity prohibited by its assertion of conflict of interest. Thus, Aloha requests that the Commission clarify whether or not Mr. Deterding can assist Aloha by providing files of documents to Aloha for purposes of answering Adam Smith’s discovery and whether or not such activity falls within the asserted conflict of interest privilege, i.e., whether giving factual testimony constitutes “representation” of Aloha.

7. Likewise, it is Aloha’s understanding that Adam Smith opposes Aloha’s use of Mr. Deterding as a factual witness at hearing on the grounds that this too constitutes an activity prohibited by its assertion of conflict of interest, i.e., constitutes “representation” of Aloha. Further, it is Aloha’s understanding that Adam Smith would only allow such testimony if Aloha “waives the attorney-client privilege.” [Order 03-0130 at 4] The scope of the attorney-client privilege waiver demanded by Adam Smith is unclear to Aloha , i.e., waiver with regard *only* to the facts concerning the filing of the service availability tariff or complete and total waiver with regard to every activity and every conversation between Aloha employees and Mr. Deterding.<sup>3</sup>

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<sup>3</sup> The mechanics of prefiled testimony would appear to solve any attorney-client privilege wavier issue related to the testimony filed by Mr. Deterding on behalf of Aloha. To the extent that statements were made in the testimony, the attorney client privilege has already been waived

8. Aloha's Motion was not, as asserted by Adam Smith, an effort to "stonewall" or to keep "facts" concerning the late filing of the service availability tariff away from the Commission. On the contrary, Aloha's Motion was an attempt to provide the Commission with the best source of those "facts": the man who actually talked to Staff Counsel regarding the service availability tariff in March of 2001. In Aloha's opinion it is absolutely necessary that Mr. Deterding and Staff Counsel be given the opportunity to testify at hearing regarding the circumstances surrounding the late filing of the tariff.<sup>4</sup>

9. The reason why each man must testify is simple: anyone else's testimony on this point is classic hearsay. Section 120.57(1)(c), Florida Statutes, states as follows:

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, *but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.*

[Emphasis added.]

There is no exception to the hearsay evidence rule that would allow a third party's recitation of

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with regard to those statements. Aloha has never sought to place a witness on the stand for the purpose of limiting his testimony only to that prefiled. Aloha expects that every witness will be fully cross examined on the content of his or her testimony. However, without knowing what Adam Smith's cross examination might consist of, Aloha is unwilling to grant a blanket waiver of any objection - including privilege- that might be appropriate. Finally, the attorney client privilege issue is one easily taken care of at hearing by the presiding Commissioner. If a privilege or any other objection is made by Aloha the presiding Commissioner will have the ability to rule on whether the question is within the scope of the waiver already given. If so, the witness answers the question. if not the witness does not.

<sup>4</sup>It would be fundamentally unfair to allow Staff Counsel to testify without also allowing Mr. Deterding to testify. The Commission should be allowed to evaluate the demeanor of both parties who engaged in the disputed March, 2001 conversation regarding collection of Aloha's service availability fees. If this is not done, Adam Smith will have been allowed to use its assertion of conflict of interest improperly as a sword, not appropriately as a shield.

the conversation between Mr. Deterding and Staff Counsel regarding the filing of the service availability tariffs to be admissible over objection. These third party conversations can't be used as competent substantial evidence to support any factual finding in this proceeding.

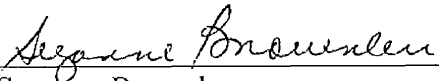
10. Order 03-0130 does not specifically address whether, or under what conditions, Mr. Deterding can appear as a witness on behalf of Aloha to relate his conversations with Staff Counsel and Aloha employees regarding the circumstances of the late filing of the service availability tariff. Aloha requests that the Commission panel clarify these issues.

**WHEREFORE**, for the reasons stated above, Aloha Utilities, Inc. requests that the Commission panel assigned to this docket:

1) Grant reconsideration of Order 03-0130 and find that the facts surrounding the late filing of the wastewater service availability tariff are not relevant to this proceeding, in which case consideration of Mr. Deterding's role in this proceeding is unnecessary or, in the alternative if reconsideration of this finding is denied.

2) Clarify the role of Aloha's former counsel, Marshall Deterding, specifically whether he can turn over files to Aloha for the purposes of answering Adam Smith's discovery and whether, and under what conditions, Mr. Deterding can testify at the hearing on behalf of Aloha concerning the circumstances surrounding the late filing of Aloha's service availability tariff if the facts surrounding the late filing of the wastewater service availability tariff are found to be relevant to this proceeding.

Respectfully submitted this 30th day of January, 2003 by:



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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 30th day of January, 2003.

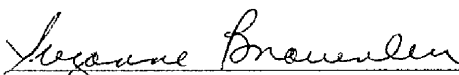
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