

State of Florida



Public Service Commission  
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**DATE:** May 20, 2004

**TO:** Director, Division of the Commission Clerk & Administrative Services (Bayó)

**FROM:** Office of the General Counsel (Jaeger, Vining) *Walt KLV*  
Division of Economic Regulation (Merchant, Fletcher, Willis) *SB*

**RE:** Docket No. 010503-WU – Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

**AGENDA:** 6/1/04 – Regular Agenda – Oral Argument Not Requested – Participation At Discretion of Commission

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** The Parties Did Not Request Oral Argument On Their Petitions and Motions. Staff Believes That Oral Argument Would Aid The Commission In Comprehending And Evaluating Issues One and Two, But Not Issue Three.

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\010503.RCM.DOC

**Case Background**

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility in Pasco County. The utility consists of two distinct service areas: Aloha Gardens and Seven Springs. On August 10, 2001, Aloha filed an application for an increase in rates for its Seven Springs water system. By Order No. PSC-01-2199-FOF-WU (Interim Rate Order), issued November 13, 2001, the Commission approved interim rates subject to refund with interest, which increased rates by 15.95%. This 15.95% interim increase was secured by the utility's deposit of those funds in an escrow account.

After a formal hearing, the Commission set final rates by Order No. PSC-02-0593-FOF-WU (Final Order), issued April 30, 2002. Among other things, the Commission denied a revenue increase, set a two-tiered inclining block rate structure, increased plant capacity charges, required certain plant improvements, and set the methodology that required a 4.87% interim

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refund. The utility appealed the Final Order to the First District Court of Appeal (First DCA), and sought a stay while the decision was under appellate review.

By Order No. PSC-02-1056-PCO-WU (Stay Order), issued August 5, 2002, the Commission granted in part and denied in part the utility's Motion for Stay. The Commission stayed the setting of the new rate structure, as well as the interim refund and certain plant improvement requirements. The First DCA affirmed the Final Order on May 6, 2003, Aloha Utilities v. Florida Public Service Commission, 848 So. 2d 307 (Fla. 1st DCA 2003), and subsequently denied the utility's Motion for Rehearing on June 12, 2003. The First DCA issued its mandate on June 30, 2003. As a result, the appellate review process is complete and all provisions of the Final Order are now final and effective.

By letter dated June 30, 2003, Aloha requested the release of the escrow funds above the amount required for the 4.87% refunds. Due to billing cycle constraints, the utility was unable to cease its collection of interim rates and begin collecting the final rates affirmed by the First DCA until August of 2003. The utility completed the 4.87% interim refunds required by the Final Order on or about September 10, 2003.

By Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, the Commission recognized that Aloha had refunded \$153,510 to its customers without withdrawing any funds from the escrow account. By that Order, the Commission directed that \$153,510 of escrowed funds be released to Aloha. That Order further recognized that the issue of additional refunds and release of the remaining escrowed funds would be addressed at a later date.

At the January 20, 2004 Agenda Conference, the Commission voted to require additional refunds of \$278,000 for the appellate period (the period subsequent to the issuance of the Final Order and prior to the implementation of the approved final rates -- May 1, 2002 through July 31, 2003). The \$278,000 represented revenues from the interim rates collected during the appellate period less the 4.87% already refunded by Aloha. This decision was issued as proposed agency action (PAA), and commemorated by the issuance of PAA Order No. PSC-04-0122-PAA-WU (PAA Refund Order) on February 5, 2004. On February 26, 2004, Aloha protested the PAA Refund Order by filing its timely Petition for Formal Administrative Hearing and Request That Petition Be Transferred to DOAH (Aloha's Petition). However, it appears that Aloha's Petition was not served on any of the other parties in this docket.

On March 5, 2004, the Office of Public Counsel (OPC) filed the Citizens Response to Aloha's Petition for Formal Administrative Hearing and Request That Petition Be Transferred to DOAH (OPC's Motion to Dismiss and Response). In its Response, OPC requests that the Commission dismiss Aloha's Petition for Aloha's failure to follow rules of procedure in not serving the Petition on all parties. In the alternative, OPC argued that this matter should not be assigned to DOAH.

On March 17, 2004, Aloha filed its Motion to Strike Citizen's "Response" or, in the Alternative, Response to Citizen's Motion to Dismiss and Citizen's Objection to Transfer Petition to DOAH (Aloha's Motion to Strike and Response). Neither Aloha nor OPC requested oral argument on their respective petitions, motions, and responses.

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This recommendation addresses Aloha's Petition, OPC's Response and Motion to Dismiss, and Aloha's Response and Motion to Strike.

The Commission has jurisdiction pursuant to Sections 367.081 and 367.082, Florida Statutes.

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### **Discussion of Issues**

**Issue 1:** What is the proper disposition of OPC's Motion to Dismiss Aloha's Petition for Formal Administrative Hearing for Aloha's purported failure to follow rules of procedure, and Aloha's Motion to Strike OPC's Motion to Dismiss?

**Recommendation:** Aloha's Motion to Strike OPC's Motion to Dismiss should be denied. OPC's Motion to Dismiss should also be denied. (Jaeger)

**Staff Analysis:** As stated in the Case Background, Aloha filed its timely Petition on February 26, 2004. However, it did not initially serve the petition on any of the other parties.

Staff counsel talked to OPC on March 1, 2004, and discussed Aloha's Petition, and it was shortly after that, that OPC obtained a copy of the Petition. Subsequently, on March 5, 2004, OPC filed its Response and Motion to Dismiss. Its Motion to Dismiss was based on the purported failure of Aloha to comply with Rule 28-106.104(4), Florida Administrative Code. Finally, on March 17, 2004, Aloha filed its Motion to Strike and Response.

OPC cites Rule 28-106.104(4), Florida Administrative Code, which requires that "whenever a party files a pleading or other document with the agency, that party shall serve copies of the pleading or other document upon all other parties to the proceeding." OPC argues that "because Aloha failed to meet this fundamental requirement, the Commission should dismiss the pleading."

In Aloha's Motion to Strike, Aloha argues that at the time of the filing of its Petition on the PAA Refund Order, because no other substantially affected person filed a petition, the only parties to the proceeding were Aloha (the Petitioner) and the Commission (the Respondent). It then points to the Notice of Further Proceedings ending language found in the PAA Refund Order which states that any former objection or protest filed prior to the issuance of the Order is deemed abandoned unless a petition was filed by February 26, 2004. It also argues in its Petition that this docket closed at the issuance of the court's mandate in mid-2003, and styled its Petition as Aloha Utilities, Inc., Petitioner v. Florida Public Service Commission, Respondent.

Based on these arguments, Aloha argues that at the time of the filing of its Petition, there were no other parties to be served within the meaning of Rule 28-106.104(4), Florida Administrative Code. Therefore, in Aloha's interpretation, that rule was inapplicable. Moreover, Aloha alleges that because OPC was not a party and has not complied with Rules 25-22.039 or 28-106.205, Florida Administrative Code, OPC has no status or standing in this proceeding and is not entitled to respond and file motions.<sup>1</sup>

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<sup>1</sup> Rule 25-22.039 governs intervention and states that a petition to intervene must be filed at least five days before the hearing and must demonstrate that the intervenor is entitled to participate as a matter of constitutional or statutory right, or by Commission rule, or that their substantial interests are subject to determination or will be affected through the proceeding. Rule 28-106.205 also governs intervention and the main difference with Rule 25-22.039 is that it requires the petition to be filed 20 days before the hearing. In this case, the time limits imposed by Commission Rule 25-22.039 govern.

Aloha also disputes OPC's allegation that "this is not a new case. It is a continuation of a rate case filed by Aloha on August 10, 2001." Aloha argues that the language in the PAA Refund Order specifically noted that all provisions of the Final Order entered in this rate case are now final and effective.

Finally, if the Commission disagrees with the above-noted arguments, Aloha states that there has been no prejudice to OPC, that dismissal is too harsh a remedy, and that OPC has clearly received notice and did not request an extension of time to respond to Aloha's Petition. Therefore, Aloha concludes that OPC's Motion to Dismiss should be denied.

Staff notes that this case is unusual in that a PAA Order was issued after a final order was issued in the same docket. Staff believes that Aloha has misinterpreted the notice language found at the end of the PAA Refund Order, the above-noted rules, the meaning and effect of the language in the Final Order, and the result of only one party objecting to a PAA Order. Pursuant to Aloha's argument, a party who fails to object to a PAA Order loses party status.

The notice language required by Section 120.569, Florida Statutes, provides that "any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it . . . is renewed within the specified protest period." This language does not mean that those parties who had party status lose party status if they fail to file a petition on the PAA Order.

Aloha alleges that OPC has failed to comply with the rules governing intervention, Rules 25-22.039 and 28-106.205, Florida Administrative Code. Staff disagrees. By Order No. PSC-01-1750-PCO-WU, issued August 28, 2001, the Commission acknowledged that OPC had exercised its statutory right to intervene pursuant to Section 350.0611, Florida Statutes, and acknowledged OPC's intervenor and party status in this docket. The PAA Refund Order was issued in this docket, and Aloha's Petition was filed in this docket. Staff believes it is incongruous to argue that a party must refile for party status if the party filed no protest to the proposed agency action. Therefore, staff believes that OPC and all other parties continue to have party status for any proceeding in this docket.

As noted above, Aloha has styled its Petition as a new proceeding. Although Aloha has attempted to change the style, OPC notes that this is not a new case, but a continuation of the case filed by Aloha on August 10, 2001. Staff agrees. The interim rates are part of Aloha's rate case in this docket, and their final disposition is part and parcel of this proceeding. Staff believes that this Petition is clearly filed in Docket No. 010503-WU, and arose from the Commission's attempt to dispose of the interim refund issue. Therefore, staff believes that however Aloha styled its Petition, the interim refund issue is still a part of this docket. Based on the above, staff recommends that Aloha's Motion to Strike be denied.

However, this does not mean that OPC's Motion to Dismiss for Aloha's failure to properly serve the petition should be granted. Rule 28-106.104(4), states that "[w]henver a party files a pleading or other document with the agency, the party shall serve copies of the pleading or other document upon all other parties to the proceeding." Aloha's Petition is filed in Docket No. 010503-WU, and protests Order No. PSC-04-0122-PAA-WU which was issued in Docket No. 010503-WU. Senator Mike Fasano, Mr. Edward Wood, the Southwest Florida

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Water Management District (SWFWMD), and OPC have long been recognized as parties in this docket. Therefore, staff believes that the rule is applicable, and Aloha should have filed its protest and objection to the PAA Refund Order on all parties.

However, staff notes that OPC was aware of the Petition no later than March 1, 2004 (a Monday), and either obtained a copy that day or the next. The Petition was not filed with the Commission until February 26, 2004 (a Thursday). Therefore, the delay appears to have been no more than two-working-days. This is probably no longer a delay than if Aloha had mailed a copy of the Petition to OPC.

Because OPC actually received a copy of Aloha's Petition within just a few days of filing, staff believes that dismissal is too harsh a consequence under the facts of this case. Also, pursuant to Rule 28-106.201(4), Florida Administrative Code, any dismissal would be without prejudice, and would only further delay the processing of this case. All parties have now been advised of Aloha's Petition. Therefore, staff recommends that OPC's Motion to Dismiss be denied.

**Issue 2:** Should the Commission grant Aloha Utilities, Inc.'s Petition for Formal Administrative Hearing?

**Primary Staff Recommendation:** Because there appears to be no disputed issues of material fact, Aloha's request for a formal administrative hearing should be denied. Instead, the Commission should grant an informal administrative hearing in accordance with Section 120.57(2), Florida Statutes, and require briefs on the legal issues within 30 days of the Commission's vote. (Vining)

**Alternate Staff Recommendation:** If the Commission agrees that the actual difference between what was collected under interim rates and what would have been collected under final rates is a material fact, or that Issue E, concerning whether there has been a change in policy involves a disputed issue of material fact, the Commission should initiate a formal proceeding in accordance with Section 120.57(1), Florida Statutes. If the parties subsequently stipulate to the disputed issues of material fact, the formal proceeding should be converted to an informal proceeding conducted in accordance with Section 120.57(2), Florida Statutes. (Jaeger)

**Staff Analysis:** In its Petition, Aloha seeks a formal administrative proceeding pursuant to Section 120.57(1), Florida Statutes, which governs administrative proceedings that involve disputed issues of material fact. Aloha raises five alleged issues of disputed material fact in Paragraph Six of its Petition (A copy of Paragraph 6 is attached as Attachment A). In its response, OPC addresses each of those subparagraphs.

Primary Staff and alternate staff are in agreement that subparagraphs 6.A. and 6.B. do not demonstrate a disputed issue of material fact. Each of those subparagraphs are analyzed below. However, for subparagraphs 6.C., 6.D., and 6.E., Primary Staff and Alternate Staff are in disagreement and the analysis is divided into a Primary Staff Analysis and Alternate Staff Analysis.

For subparagraph 6.A. (Issue A), Aloha takes issue with the statement in the PAA Refund Order that said the Final Order "did not address the refund amount for the interim rates collected while the appeal was pending (May of 2002 through July of 2003)(the appeal period)." Aloha argues that the language in the Final Order was unambiguous, and "specifically determined an appropriate refund for 'the interim collection period' which was defined as the 'period from November 3, 2001 to the date Aloha implements the final rates approved.'" OPC responds that "Issue A raises the question of proper interpretation of the refund language contained in [the Final Order]. This is clearly a legal issue and does not involve matters of factual dispute." Staff agrees with OPC. Issue A is a legal issue involving an interpretation of the refund language contained in the Final Order and does not involve a disputed issue of material fact warranting an evidentiary hearing.

In subparagraph 6.B. (Issue B), Aloha raises the issue whether the Commission is estopped from changing its position regarding refunds because no one contested this portion of the Final Order determining interim refunds, and that Aloha had relied on the Commission's decisions related to the refund issue. OPC notes that Issue B "raises the legal issue of estoppel as it would apply to the refund language contained in" the Final Order. Staff agrees with OPC.

Issue B is a legal issue involving estoppel and does not involve a disputed issue of material fact warranting an evidentiary hearing.

Thus, both Primary and Alternate Staff recommend that Issues A and B do not involve disputed issues of material fact. With respect to Issues C, D, and E, the analysis of Primary Staff and Alternate Staff diverge. Therefore, the analysis and recommendations for Primary Staff and Alternate Staff are listed separately below for those two issues.

**Primary Staff Analysis:** In subparagraph 6.C. (Issue C), Aloha raises the issue whether it “has already refunded more money to its customers than was necessary to bring its revenue requirement to the level established in the Final Order, adjusted in accordance with standard Commission practice during the ‘interim collection period.’” Aloha then points to the PAA Refund Order, which concludes with the finding that:

. . . by appealing the decision and collecting interim rates during the 15-month appeal period, Aloha had the benefit of the higher interim rates during this time. Since we found, and the First DCA ultimately agreed, that no revenue increase was justified, we find that it is patently unfair to allow Aloha to benefit from the higher interim rates collected during the appeal period.

Aloha argues that “underlying this finding is a belief that the final rates authorized by the Commission if implemented immediately after issuance of the Final Order in place of interim rates, would have produced revenues over 15.00% less than those that were produced by the interim rates which were charged during that appeal period.” According to Aloha, the utility has shown “that the interim rates produced only 4.08% more revenue than would have been produced had the final rates been implemented immediately after the Final Order” with no appeal and stay.

OPC notes that “Aloha’s Issue C purports to raise a factual question about the relationship between total refunds and the final revenue requirement.” However, OPC argues that though “couched as a factual dispute, in reality the parties have no dispute about the underlying facts. The only question here is the proper amount of refunds that are required under the facts on which all parties are in accord.”

Primary Staff agrees with OPC. The PAA Refund Order acknowledges that the Final Order changed the rate structure, and found no rate increase was warranted. However, it is undisputed that the Interim Rate Order granted a 15.95% interim rate increase across the board, which Aloha was allowed to continue to charge during the appeal period. Clearly, the interim rates were 15.95% higher than the original rates, and there can be no dispute of material fact in this regard.

Primary Staff believes that it is an issue of policy and law with respect to what the Commission should consider when an order specifically provides no increase is warranted, but changes the rate structure. Aloha argues that the actual revenues collected under interim rates should be compared against the revenues that would have been collected under the newly approved rates, and that, with the change in rates and rate structure, you should not compare the interim revenues against the revenues that would have been collected under the original rates. If



the Final Order was correct, and Primary Staff notes that the Final Order was upheld on appeal, then there should have been no difference. In the PAA Refund Order the Commission concluded that the Final Order said no rate increase over the original rates was warranted, and yet it was clear that the Interim Rate Order had increased the original rates by 15.95% across the board, and so the Commission directed that the full 15.95% be refunded for the appeals period. Based on the above, Primary Staff believes that Aloha has failed to demonstrate a disputed issue of material fact in regards to Issue C warranting a formal hearing.

In subparagraph 6.D. (Issue D), Aloha argues whether the PAA Refund Order “results in a windfall to Aloha’s customers to the extreme detriment of Aloha.” Aloha notes that the PAA Refund Order finds that Aloha “should not benefit and receive a windfall from its unsuccessful appeal of our Final Order.” Aloha argues that “that finding assumes that a refund of 4.87% of revenues collected under interim rates results in some sort of windfall to Aloha.” Aloha further argues that:

there is no foundation for such an allegation and in fact, the facts provided by the Utility to the Commission staff which were audited and verified by the Commission staff, show that no such windfall occurred and that, to the contrary, the Commission’s Final (sic) [Aloha apparently was really referring to the PAA Refund Order] Order requiring a refund of all monies held in escrow during the “appeal period” in fact results in a windfall to the customers.

OPC argues that “Aloha’s Issue D raises the issue of the proper characterization and usage of the term ‘windfall’ under the facts on which all parties are in accord.” Primary Staff believes that Aloha has again failed to show a disputed issue of material fact for Issue D, and that there is no dispute of the actual facts of this case.

In subparagraph 6.E. (Issue E), Aloha argues that the directives and statements contained within the PAA Refund Order “conflict with and are contrary to the PSC’s prior agency practices, procedures, and policies.” Aloha further argues that the Commission:

has not explained or justified its abrupt change in this procedure or policy as expressed in the PAA Order and indeed has admitted that the refunds previously provided by Aloha result in a revenue requirement for the appeal period which is less than the revenues which would have been produced had the final rates approved in the Final Order been immediately implemented and no appeal taken.

According to OPC, Issue E raises the legal question of whether the PAA Refund Order conflicts with prior Commission practices, procedures, and policies, and that this is a legal question which the Commission “is clearly in the best position to reach a proper answer.” Staff agrees with OPC. However, staff does not see where in the PAA Refund Order that the Commission “admitted that the refunds previously provided by Aloha result in a revenue requirement for the appeal period which is less than the revenues which would have been produced had the final rates approved in the Final Order been immediately implemented and no appeal taken.” Nonetheless, Primary Staff believes Issue E is a legal issue involving whether the PAA Refund Order conflicts with prior Commission practices, procedures, and policies, and does not involve a disputed issue of material fact warranting a formal hearing.

Primary Staff believes that the situation in this case is similar to the situation in the remand proceeding following the reversal and remand by the Florida Supreme Court in GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). In that remand proceeding, the Commission issued a proposed agency action order requiring surcharges. OPC protested that Order and requested a Section 120.57(1) formal hearing. In considering this request, the Commission issued Order No. PSC-96-1021-FOF-TL, on August 7, 1996, in Docket No. 920188-TL, In re: Application for a rate increase by GTE Florida Incorporated. In that Order, the Commission found that of the five issues raised by OPC, two were issues of fact, and three were mixed issues of policy and law. For the two alleged factual issues, the Commission found that there was really no dispute. Therefore, the only issues remaining were mixed issues of policy and law, and the Commission denied OPC's request for a Section 120.57(1) hearing. While the Commission found that a Section 120.57(1) proceeding was not appropriate, it did find that it was appropriate to set the matter for an informal proceeding under Section 120.57(2), Florida Statutes, and to require briefs.

As in the GTE case, Primary Staff believes that Aloha's Issues C, D, and E are not factually in dispute, and are issues of policy and law, which would be more appropriately handled through the process of an informal proceeding in accordance with Section 120.57(2), Florida Statutes. Therefore, Primary Staff recommends that Aloha's request for a formal hearing pursuant to Section 120.57(1), Florida Statutes, be denied, and that, instead, the Commission direct that an informal proceeding in accordance with Section 120.57(2), Florida Statutes, be conducted, and that the parties be required to file briefs within 30 days of the Commission's vote.

**Alternate Staff Analysis:** For Issues C, D and E, Alternate Staff believes that Aloha has raised mixed questions of fact and law when it points to the portions of the PAA Refund Order that find that it would be "blatantly [actually the PAA Order used the word "patently"] unfair to allow Aloha to benefit from the higher interim rates collected during the appeal period," or that Aloha "should not benefit and receive a windfall from its unsuccessful appeal of our Final Order." Alternate Staff believes that the question of whether Aloha benefited from its appeal of the Final Order is a mixed question of fact and law. Aloha is arguing that if you compare the revenues collected under interim rates to the revenues that would have been collected under the final rates, that there would have only been a 4.08% overcollection. Therefore, Aloha claims that when it refunded 4.87%, it actually retained less money than it would have retained if it had just charged the approved final rates, and that, therefore, Aloha received no windfall.

It is unclear whether all parties agree on the difference between revenues collected under interim rates and the revenues that would have been collected pursuant to the final rates approved in the Final Order. The Commission did not specifically address this question when it issued its PAA Refund Order requiring additional refunds, and so Alternate Staff is not sure if the Commission considers this to be a "material fact." If the Commission believes that this is a material fact, then there could be a dispute of material fact and the Commission should begin the process as a formal proceeding.

For Issue E, Alternate Staff believes Aloha has raised a disputed issue of material fact when it states that the PAA Refund Order conflicts with and is contrary to prior Commission practice, policy, and procedure. Alternate Staff further believes that it is a disputed issue of

material fact as to what that policy should be. Therefore, Alternate Staff believes that Aloha has shown that there are disputed issues of material fact, and recommends that a formal proceeding pursuant to Section 120.57(1), Florida Statutes, be initiated.

If the parties subsequently stipulate to all disputed issues of material fact, the formal proceeding should be converted to an informal proceeding conducted in accordance with Section 120.57(2), Florida Statutes. Of course, if the Commission does not believe that the actual difference between the interim rates and the final rates approved in the Final Order is a material fact or that the policy question is a disputed issue of material fact, then Alternate Staff agrees with Primary Staff that the request for a formal proceeding pursuant to Section 120.57(1), Florida Statutes, is inappropriate. In that case, Aloha's request for a formal proceeding should be denied, and the Commission should direct that an informal proceeding in accordance with Section 120.57(2), Florida Statutes, be conducted.

**Issue 3:** Should the Commission grant Aloha Utilities, Inc.'s request that its Petition for Formal Administrative Hearing be transferred to DOAH?

**Recommendation:** No, this matter is infused with public policy considerations and the need for the special expertise of the Commission. Therefore, the Commission should deny Aloha's request to transfer this matter to DOAH. (Jaeger)

**Staff Analysis:** As stated in the Case Background, in addition to objecting to certain portions of the PAA Refund Order, Aloha requests that the Commission forward this matter to the Florida Division of Administrative Hearings (DOAH) for assignment to an Administrative Law Judge to expeditiously conduct a formal administrative hearing on the issues raised in Aloha's Petition.

In OPC's Response in opposition, OPC notes that there are "virtually no areas of disputed fact," and that "it is axiomatic that the . . . Commission is uniquely suited to have the best background and understanding of the . . . Commission's legal practice, policy and procedure." Also, OPC argues that "continuity and cohesiveness demand" that the Commission "retain authority to resolve the final array of legal disputes raised by Aloha" over a case which has been going on for almost three years and which has a "multitude of pleadings, testimony, hearings, arguments, decisions, and orders since the case was initiated."

Staff believes that the issue of the appropriate amount of the refunds for the appellate period is imbued with public policy considerations, and this is the type of situation where the special expertise and knowledge of the Commissioners is warranted. Because of these policy considerations, staff believes that the Commission should preside over the hearing.

In McDonald v. Department of Banking and Finance, 346 So. 2d 569, 579 (Fla. 1<sup>st</sup> DCA 1977), and Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1085 (Fla. 1<sup>st</sup> DCA 1995), the District Court recognized that agencies had special expertise and that many decisions concerning ultimate facts are actually opinions infused by policy considerations for which the agency has special responsibility. It would seem incongruous that where these policy considerations appear to be the main issue, the Commission would take an action that would limit its ability to use its special expertise. Also, it appears that Aloha is merely unhappy with the Commission's interpretation of its own rules and statutes and is simply seeking a different forum.

In summary, staff believes that Aloha has failed to demonstrate why this case should be assigned to DOAH. Therefore, while the Commission could assign this case to DOAH if it finds there is a disputed issue of material fact, staff recommends that this request be denied.

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**Issue 4:** Should this docket be closed?

**Recommendation:** No. This docket should remain open for the Commission to conduct a formal proceeding if the Commission determines there are disputed issues of material fact, and for an informal hearing if it is determined that there are no disputed issues of material fact. Also, Aloha has not yet made the improvements required by Order No. PSC-02-0593-FOF-WU. (Jaeger)

**Staff Analysis:** This docket should remain open for the Commission to conduct a formal proceeding if there are disputed issues of material fact, and for an informal hearing if it is determined that there are no disputed issues of material fact. Also, Aloha has not yet made the improvements required by Order No. PSC-02-0593-FOF-WU.

6. The following disputed issues of material fact, as well as mixed issues of fact and law, are raised by Aloha, and include specific facts that require modification of the Proposed Agency Action Order (hereinafter "PAA Order"):

A. Whether the PSC's Final Order is binding and conclusive on the issue of refunds.

The PAA Order alleges that Order No. PSC-02-0593-FOF-WU (the "Final Order"), issued on April 20, 2002 "...did not address the refund amount for the interim rates collected while the appeal was pending (May of 2002 through July of 2003) (the appeal period)." Such a statement is clearly contrary to the unambiguous wording of Final Order No. 04-0122-PAA-WU which specifically determined an appropriate refund for "the interim collection period" which was defined as the "period from November 3, 2001 to the date Aloha implements the final rates approved." Aloha implemented the "final rates" approved in August of 2003, after exhaustion of appeals.

B. Whether the PSC Order granting a stay along with its Final Orders, estops the PSC from changing its positions regarding refunds.

The Final Order specifically dealt with the issue of refunds for all monies collected "during the interim collection period" which is defined as being from November 3, 2001 to the date Aloha implements the final rates approved. No party sought reconsideration of this refund issue; sought

appeal of this refund issue; sought cross appeal of this refund issue; or sought any action on this refund issue in the Stay Order entered related to the rates to be accessed and the monies to be held subject to refund under the terms of the Final Order during the pendency of the appeal. Aloha therefore relied on the Commission's decisions related to this refund issue throughout the stay and appeal proceeding and thereafter.

- C. Whether Aloha has already refunded more money to its customers than was necessary to bring its revenue requirement to the level established in the Final Order, adjusted in accordance with standard Commission practice during the "interim collection period."

The Refund Order concludes with its finding that:

"...by appealing the decision in collecting interim rates during the 15 month appeal period, Aloha had the benefit of the higher interim rates during this time period to which we found, and the First DCA ultimately agreed, that no revenue increase was justified. We find that it is blatantly unfair to allow Aloha to benefit from the higher interim rates collected during the appeal period."

Underlying this finding is a belief that the final rates authorized by the Commission if implemented immediately after issuance of the Final Order in place of interim rates, would have produced revenues over 15.00% less than those that were produced by the interim rates which were charged during that appeal period. The Utility has demonstrated through detailed billing information filed and verified by the Commission staff that the interim rates produced only 4.08% more revenue than would have been produced had the final rates been implemented immediately after the Final Order and no appeal had been taken at all.

- D. Whether the PAA Order results in a windfall to Aloha's customers to the extreme detriment of Aloha.

The Refund Order also finds that Aloha "...should not benefit and receive a windfall from its unsuccessful appeal of our Final Order." That finding assumes that the refund of 4.87% of revenues collected under interim rates results in some sort of windfall to Aloha. There is no foundation for such an allegation and in fact, the facts provided by the Utility to the Commission staff which were audited and verified by the Commission staff, show that no such windfall occurred and that, to the contrary, the Commission's Final Order requiring a refund of all monies held in escrow during the "appeal period" in fact results in a windfall to the customers.

- E. Whether the directives and statements contained within the PAA conflict with and are contrary to the PSC's prior agency practices, procedures, and policies.

In prior cases, the PSC has allowed utilities to maintain interim rates during the pendency of an appeal and to refund any excessive interim rates at the conclusion of that appeal, based upon the requirements of the original order and a methodology as proposed by Aloha in this case. That procedure has been implemented in all prior cases.

In spite of the fact that this was brought to the attention of the Commission, the PSC has not explained or justified its abrupt change in this procedure or policy as expressed in the PAA Order and indeed has admitted that the refunds previously provided by Aloha result in a revenue requirement for the appeal period which is less than the



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ATTACHMENT A

**revenues which would have been produced had the final rates approved  
in the Final Order been immediately implemented and no appeal taken.**

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