

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase
in water rates for Seven Springs
System in Pasco County by Aloha
Utilities, Inc.

DOCKET NO. 010503-WU
ORDER NO. PSC-04-0122-PAA-WU
ISSUED: February 5, 2004

**ALOHA'S MOTION TO TERMINATE
INFORMAL PROCEEDING AND CONVENE A FORMAL PROCEEDING**

ALOHA UTILITIES, INC., by and through its undersigned counsel, and pursuant to Rule 28-106.305(2), Florida Administrative Code, hereby moves that the informal proceeding ordered by the PSC be terminated and that a formal proceeding be convened for the purpose of receiving evidence regarding the disputed issues of material fact raised in Aloha's Petition for a Formal Administrative Hearing. In support of this Motion, Aloha states:

1. In its Petition for Formal Administrative Hearing, Aloha alleged that Aloha had "already refunded more money to its customers than was necessary to bring its revenue requirement to the level established in the Final Order." The underlying facts supporting that ultimate fact are contained within detailed billing information filed with and verified by the PSC staff, as alleged in the Petition. Aloha further alleged 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.” Aloha has completed interim refunds of 4.87%.

2. In the “Citizens’ Response to Aloha’s Petition for Formal Administrative Hearing,” the OPC stated that “in reality the parties have no dispute about the underlying facts” and that “all parties are in accord” as to the underlying facts. The PSC agreed with the OPC and denied Aloha’s request for a formal proceeding. Instead, the PSC ordered that an informal proceeding be conducted, with the parties to file briefs on the issues in Aloha’s Petition no later than July 1, 2004.

3. Briefs have now been filed by Aloha and the OPC. In its brief, the OPC has disputed the factual allegations contained within Aloha’s Petition for Formal Administrative Hearing, which allegations form the underlying factual bases for the material issues in dispute. Moreover, the facts contained within the OPC’s Brief are disputed by Aloha. Accordingly, the informal proceeding must be terminated and formal proceedings must be commenced.

4. In the “Citizens’ Brief,” Section C, pages 4 and 5, the OPC disputes the factual assertions made in Aloha’s Petition regarding the relationship between the revenues collected during the appeal period and the revenues which would have been collected under the rate structure approved in the PSC’s Final Order dated April 30, 2002. Contrary to its prior assertion that “the parties have no dispute about the

underlying facts,” the Brief submitted by the OPC challenges the facts asserted by Aloha and verified by the PSC staff, and asserts different and conflicting facts regarding the revenue amount Aloha would have earned under the new rate structure during the appeal period. Aloha strongly disputes such facts.

5. Similarly, Section D of the OPC’s Brief constitutes nothing more than a stated dispute with Aloha’s factual allegation that interim rates received during the appeal period produced only 4.08% more revenue than would have been produced had the final rates been implemented immediately after the Final Order. Indeed, the OPC’s Brief factually asserts that “Aloha did not need any increase to make it whole.” Aloha disputes that statement of fact and is entitled to produce evidence proving the facts contained within its Petition, and rebutting the conflicting facts contained within the OPC’s Brief.

6. In its Petition, Aloha factually asserted that, in all 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.

In Section E of its Brief, the PSC specifically disputes this statement of PSC precedent, policy and procedure. The OPC then proceeds to factually characterize what it conceives occurred in this case, by stating that the PSC

(1) first allowed a utility interim rates to keep it whole during the pendency of the rate case; (2) then determined the utility was already financially whole without any rate increase; (3) and yet allowed the utility to keep some of the customers' money that was never necessary to make it financially whole in the first place.

Not only do such statements constitute an impermissible and untimely attack upon the April 30, 2002 Final Order which allowed Aloha to retain 11.08% of interim revenues, such statements create an issue of fact as to the amount of revenue required to make Aloha "whole" during the pendency of the rate case. The above-quoted language contained within the OPC's Brief is not found within the Order Granting Interim Rates, nor is it found within the Final Order. Instead, it represents a factual assertion by the OPC that Aloha is and will be "financially whole" if it is required to refund the entirety of the interim rates. Aloha disputes that factual allegation. The OPC is obviously disputing Aloha's factual allegation that the interim revenues collected during the appeal period, 4.87% of which already have been refunded by Aloha, represent an increase of only 4.08% of the revenues which would have been collected under the rates established in the Final Order had no appeal been taken by Aloha. In any event, the existence and applicability of the PSC's prior practice, policy and procedure regarding refunds of interim rates are factual matters which, if disputed, require evidence and proof.

7. Rule 28-106.305(2), Florida Administrative Code, provides as follows:

If during the course of the proceeding a disputed issue of material fact arises, then, unless waived by all parties, the proceeding under this Part [Part III, “Proceedings and Hearing Not Involving Disputed Issues of Material Fact”] shall be terminated and a proceeding under Part II [“Hearings Involving Disputed Issues of Material Fact”] **shall** be conducted. (Emphasis and bracketed language supplied)

8. Two of the prime material issues in this case are whether and to what extent, if any, Aloha received more revenues from the collection of interim rates during the appeal period than authorized by the PSC’s Final Order dated April 30, 2002, and whether the PSC’s proposed agency action constitutes a shift or change in established PSC policy, practice and procedure. In its Brief, the OPC has disputed Aloha’s assertion of the underlying facts necessary for a determination of these two issues. Thus, there are disputed issues of material fact necessitating a formal administrative hearing. In addition, Aloha specifically disputes the OPC’s factual assertions regarding the amount of revenues to which Aloha was entitled under the terms of the Final Order. Aloha is entitled to present evidence rebutting the OPC’s factual assertion that Aloha does not need to retain any of the interim rates collected to make it “financially whole.” Aloha also disputes the factual assertion that this case is so factually distinguishable from prior cases pertaining to refunds of interim rates as to render the PSC’s prior established policy, practice and procedures inapplicable. Aloha is entitled to present evidence rebutting that assertion. Moreover, regardless

of the disputed facts stated in the OPC's Brief, if the PSC's proposed agency action constitutes incipient policy not expressed in rules or prior orders, the PSC is required to explain that policy and Aloha is entitled to present countervailing evidence in a trial-type hearing. McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

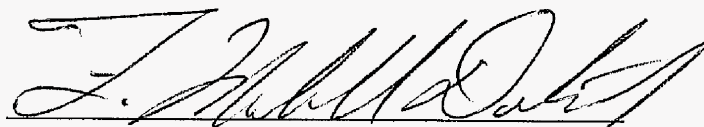
9. Section 120.569(1), Florida Statutes, provides that "unless waived by all parties, §120.57(1) applies whenever the proceeding involves a disputed issue of material fact." Even if Aloha's initial Petition for Formal Administrative Hearing did not contain sufficient disputed issues of material fact (a conclusion with which Aloha does not agree), the Citizens' Brief conclusively establishes that this proceeding now involves disputed issues of material fact. Aloha does not waive its right to a formal administrative hearing. Accordingly, a formal proceeding is required. The law is clear that once it becomes apparent during the course of an informal proceeding that material facts are in dispute, a formal hearing must be convened. Village Saloon, Inc. v. Div. of Alcoholic Beverages, Department of Business Regulation, 463 So.2d 278 (Fla. 1st DCA 1984); Rule 28-106.305(2), Florida Administrative Code.

10. Aloha's request for the release of remaining escrowed funds (i.e., the funds remaining after the 4.87% refund required by the Final Order and already disbursed to Aloha's customers) has been pending before the PSC for over one year.

The scheduling and conclusion of the formal administrative hearing requested in this motion, and required by law, will be substantially lessened if Aloha's Petition is sent to the Division of Administrative Hearings for the conduct of a formal hearing and rendition of a Recommended Order. In the interest of expediency and fairness, Aloha renews its request that its Petition be referred to DOAH for the assignment of an Administrative Law Judge to conduct the formal hearing.

WHEREFORE, Aloha Utilities, Inc. moves for an Order terminating the informal proceeding, granting Aloha's request for a formal proceeding pursuant to Section 120.57(1), Florida Statutes, and transmitting Aloha's Petition to the Division of Administrative Hearing for a formal hearing.

Respectfully submitted this 12th day of July, 2004.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U. S. Mail to the following, this 12th day of July, 2004:

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