

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION
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IN RE: Petition by Customers of)
ALOHA UTILITIES, INC., for deletion of)
portion of territory in Seven Springs)
Area in Pasco County, Florida.)

Docket No. 020896-WS

IN RE: Application for increase in water)
rates for Seven Springs System in Pasco)
County by **ALOHA UTILITIES, INC.**)

Docket No. 010503-WU

**ALOHA UTILITIES, INC.'S MOTION FOR
RECONSIDERATION OF ORDER NO. PSC-04-1152-PCO-WS**

Aloha Utilities, Inc. ("Aloha"), by and through undersigned counsel, hereby requests reconsideration by the Commission panel assigned to this proceeding of Order No. PSC-04-1152-PCO-WS, and in support thereof would state and allege as follows:

1. On July 20, 2004, the Commission set this matter for hearing.
2. The Procedure Order setting this case for a formal administrative hearing was issued on July 27, 2004.

CMP _____ 3. On October 5, 2004, the staff filed its First Request for Production of
 COM 5 Documents directed to Aloha.
 CTR _____

ECR _____ 4. On Thursday, October 14, 2004, nine days after the filing of said discovery,
 GCL _____ the Commission staff filed its Motion to Compel and to Shorten Time (sometimes hereafter
 OPC _____ referred to as "the Motion") requesting, among other things, that Aloha file its written
 MMS _____ objections, if any, to the Commission's First Request for Production of Documents (Nos.
 RCA _____
 SCR _____

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1-2) and its response to the Motion by Tuesday, October 19, 2004, just five days after the motion was filed.

5. On Friday, October 15, 2004, the Prehearing Officer issued Order No. PSC-04-1001-PCO-WS directing Aloha to respond to the Motion by Tuesday, October 19, 2004.

6. On October 19, 2004, Aloha filed its Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS.

7. On October 21, 2004, Aloha filed its Response to Motion to Compel and To Shorten Time. The Commission voted to deny Aloha's Motion for Reconsideration in its November 2, 2004 agenda conference.

8. On November 4, 2004, Aloha filed its Response to Staff's First Request for Production of Documents, Motion for Protective Order, and Response to Staff's Motion to Compel and Request for Oral Argument. On November 9, 2004, Staff filed its Response to Motion for Protective Order.

9. On November 19, 2004, the Prehearing Officer issued Order No. PSC-04-1152-PCO-WS granting Staff's Motion to Compel regarding request for production of documents number 1, and denying Aloha's Request for Oral Argument and Motion for Protective Order.

**The Commission should not apply the same standard to a
Motion for Reconsideration from a Prehearing Officer
as it does to a Motion for Reconsideration
from the full Commission**

10. The Commission's traditional standard of review for a Motion for Reconsideration is whether the motion identifies a point of fact or law that the Commission

overlooked or failed to consider in rendering its Order. See, e.g., Order No. PSC-04-1156-FOF-WS (issued in this docket on November 22, 2004). The Commission should distinguish between motions for reconsideration which are being made to the same panel of Commissioners who rendered the initial decision, from those decisions (such as this) for which reconsideration is sought by the full Commission of an Order rendered by a Prehearing Officer. In the latter case, the requirement that the motion identify a point of fact or law that the “Commission overlooked or failed to consider in rendering its Order” presumes that the Commissioners adjudicating the Motion for Reconsideration have already rendered a prior decision on the same issue. Such is not the case in a request for reconsideration of an Order issued by a Prehearing Officer, and the Commission should consider itself to be sitting *en banc*. Stated otherwise, in this case, four members of the Commission have not “overlooked or failed to consider” any of the points or issues implicated by the Order. This is the first time they have looked at those issues or points.

10. Nothing in the Commission’s Administrative Code Rules or case law would prevent the Commission from making such a discretionary determination regarding its standard of review for such Motions.

**The Commission should reconsider
Order No. PSC-04-1152-PCO-WS**

11. Although the Order itself regurgitates the substance of Aloha’s Request for Oral Argument, Aloha’s response to Staff’s Motion to Compel and Aloha’s Motion for Protective Order, the actual Findings and Conclusion section of the Order determines that the discovery is reasonably calculated to lead to the discovery of admissible evidence but

does not discuss, either in the context of Aloha's Motion for Protective Order or Aloha's Objection to the Discover, Aloha's Motion to Terminate filed on November 9, 2004. The Motion to Terminate, which is incorporated by this reference as if fully set forth herein, suggests that this proceeding is unlawfully constituted, is not a proceeding or quasi judicial litigation which is contemplated by the Administrative Procedure Act, and accordingly could not constitute a basis for Staff's discovery, even if the discovery were proper discovery and the Staff were the proper "party" to send such discovery.

12. Order No. PSC-04-1152-PCO-WS states that Staff has a "role of assisting in the development of the evidence to insure a complete record" but does not set forth the basis or foundation for Staff to play that role and does not address Aloha's arguments regarding the clear wording of the Rules of Civil Procedure and the Uniform Rules of Procedure as they relate to discovery in this proceeding. As argued in Aloha's Motion for Protective Order and Response to Staff's Motion to Compel, incorporated by this reference as if fully set forth herein, a proper application of those rules establishes that Staff is not a party as that phrase is used or understood in Florida law and under the Florida Administrative Procedure Act and is not authorized to engage in discovery of this form or fashion.

13. Under both Aloha's Response to Staff's Motion to Compel and Aloha's Motion for Protective Order, and the arguments herein, Order No. PSC-04-1152-PCO-WS should be reconsidered by the full panel of Commissioner's assigned to the case. Even if Staff is the proper party to tender the discovery, and even if the discovery is proper discovery, then the Protective Order should be granted because of the serious questions which have

been raised about the legality of this proceeding and the results and effects of Staff's intentions with regard to the requested documents.

14. Staff's Motion to Compel and To Shorten Time, filed October 14, 2004, does not even address the issues raised by Aloha with regard to Staff's authority to send discovery, the prejudicial effect which may result from Staff's intended use of the information sought to be discovered, and the pending Motion to Terminate. Staff's Motion to Compel is limited, in that regard, to an argument that the discovery request is reasonably calculated to lead to the discovery of admissible evidence. The Prehearing Officer should not grant a Motion to Compel which does not address the full substance of the objections to the discovery requests to which the Motion is directed. The Prehearing Officer overlooked or failed to consider these facts.

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests that full Commission panel grant this Motion for Reconsideration, and to thereafter grant Aloha's Motion for Protective Order and/or deny Staff's Motion to Compel.

Respectfully submitted this 24th
day of November, 2004, by:



JOHN L. WHARTON
FL BAR ID NO. 563099
F. MARSHALL DETERDING
FL BAR ID NO. 515876
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555
(850) 656-4029 FAX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail and via facsimile (indicated by *) to the following on this 24th day of November, 2004:

Rosanne Gervasi, Esquire*
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0873

Edward O. Wood
1043 Daleside Lane
New Port Richey, FL 34655-4293

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

Senator Mike Fasano
8217 Massachusetts Avenue
New Port Richey, FL 34653

V. Abraham Kurien, MD
1822 Orchardgrove Avenue
New Port Richey, FL 34655

John H. Gaul, Ph.D.
7633 Albacore Drive
New Port Richey, FL 34655

Mr. Harry Hawcroft
1612 Boswell Avenue
New Port Richey, FL 34655

James (Sandy) Mitchell, Jr.
5957 Riviera Lane
New Port Richey, FL 34655-5679

Office of the Attorney General
Charlie Crist/Jack Shreve
PL-01, The Capitol
Tallahassee, FL 32399-1050



JOHN L. WHARTON

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