

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Emergency complaint of)
Pasco Health Investors, LLC)
against Aloha Utilities, Inc. for)
Violation of Sections 367.081 and)
367.101, Florida Statutes)
_____)

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**ANSWER TO EMERGENCY COMPLAINT OF
PASCO HEALTH INVESTORS, LLC**

Aloha Utilities, Inc. ("Aloha"), by and through undersigned counsel, pursuant to Rule 25-22.036, Florida Administrative Code, files this Answer to Emergency Complaint of Pasco Health Investors, LLC, and in support thereof would state as follows:

1. Initially, it should be noted that nothing about the "emergency complaint" of Pasco Health Investors, LLC ("Pasco Health") is of an emergency nature. Despite the statement in paragraph 5 of the "emergency complaint" that the CON was issued to Eastlake based on a demonstrated need for additional nursing home beds serving Medicare and Medicaid patients in western Pasco County, the State Agency Action Report whereby the Agency for Health Care Administration issued the CON (which CON is dated 8/31/05) expressly stated:

In 2001, the Florida Legislature placed a moratorium on the issuance of Certificates of Need (CONs) for additional community nursing home beds until July 1, 2006. This proposal represents the construction of a replacement facility, not additional beds, within District 5 . . .

2. Be that as it may, Aloha, who is in the business of selling water and wastewater services, has no incentive to delay either the construction of the facility proposed by Pasco Health or to contribute in any way to the project's demise. Aloha is simply applying the clear provisions of its own tariff, as it is compelled by Florida law

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and the authority of the Public Service Commission to do. If the Commission determines that Aloha's tariff mandates a different result, or that Aloha has the latitude after filing and approval of a Special Service Availability Contract to consider well documented information about expected demands of a customer that deviate from its tariff, Aloha will, of course, take action consistent with that determination. The Emergency Complaint's tenor, that Aloha has somehow been unreasonable, dilatory, or punitive, flies in the face of the conduct of the respective parties with regard to this matter and is inconsistent with the insurmountable facts that (a) Aloha is in the business of selling utility services; (b) the Commission, and Aloha's tariffs, will ultimately always prevent Aloha from charging more for any given service than it should; and (c) Aloha has been working with this developer for many months and specifically offered proposals two months ago to resolve the issues of the amount of the service availability charges which should be assessed. These letters have essentially agreed with Pasco Health as to the expected demand and offered to present that proposed deviation from the tariff requirements to the PSC for expeditious approval. (See attached letters of January 12, 2007 and February 12, 2007). Such letters have not been replied to until the filing of this Emergency Complaint months later.

3. The above noted actions of Aloha, rather than suggesting that it has been unreasonable, dilatory, punitive or in violation of the statute, rules, or its tariff, instead suggest that the Utility has not only worked with the developer but has proposed to seek an exception to the clear requirements of its tariff. For these reasons, Pasco Health probably would have been better served to have requested some guidance, whether in

the form of a Petition seeking a Declaratory Statement pursuant to Rule 28-105.001, Florida Administrative Code, or otherwise, than it will be by the initiation of this formal proceeding.¹

4. Entirely contrary to the assertion of Pasco Health that Aloha is violating its tariff, or other provisions of applicable law, it is Pasco Health that has taken the position that the only way to resolve this dispute is for Aloha to accept a payment from Pasco Health that is contrary to, and inconsistent with, its duly approved tariff. The service availability charges, the payment of which Aloha has informed Pasco Health are a prerequisite to water and wastewater service, are entirely consistent with Aloha's tariff and past interpretation of the same. Those fees are generated by a formula that essentially has two component parts. The first is the calculation of ERCs. The second is the calculation of the cost per ERC. It is the first component of this formula, the calculation of the ERCs, with which the Emergency Complaint takes issue. It is the position of Aloha that, since there is no dispute that the facility proposed by Pasco Health is a "nursing home", the daily rated gallonage for that facility is determined by Appendix "B", of Original Sheet No. 26.26 of Aloha's tariffs.

5. Section 7.1 expressly provides that "(c)harges to commercial and general service customers pursuant to this Policy are...computed by multiplying the daily rated gallons of demand set forth in Appendix "B" by the respective amount shown above..."

¹It is questionable how a request for a formal proceeding, under the Florida Administrative Procedure Act, can be termed an "emergency", but perhaps this matter can be resolved without having to face that issue.

Section 7.2 of Aloha’s Service Availability Policy provides that Appendix “B” is a list of daily gallons of demand for various occupancies **which will be used** in computing the total contributions (emphasis supplied). In the law, as in daily life, mandatory language, such as “shall” and “will” means that the application of the thing described is not permissive.² Other references in Aloha’s tariff, such as the referenced at Paragraph 21.1, provide that Appendix “B” **will be charged** to each new customer (with a few inapplicable exceptions).

6. Aloha has always interpreted Appendix “B” to set forth those schedules of daily rated gallonage for various types of facilities and proposed uses which must be applied in calculating service availability fees for new customers of the types specified therein. To read Appendix “B” as a mere guideline, or as some sort of mere suggestion, would essential render its inclusion in Aloha’s tariff superfluous and additionally would be contrary to other clear language set forth in Aloha’s tariff. However, as stated previously, Aloha has clearly shown its willingness to apply other well documented demand estimates if deemed appropriate under its tariff by the PSC. Aloha’s only concern is that it collect the service availability fees required by its tariff, or gain approval for a deviation, so that it does not suffer the consequences of an under collection of such fees in the future. Aloha cannot, simply to appease the demands of a prospective customer, ignore its own consistent application and interpretation of its own

²The distinction between “may” and “shall” is often discussed in Florida cases. The word “may” when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word “shall”. See, e.g., *Shands Teaching Hospital vs. Sidky, et al.*, 936 So.2d 715 (4th DCA 2006).

Service Availability Policy and risk imputation of service availability fees. The mechanism for accomplishing this, as clearly set out by rule, is the filing of a Special Service Availability Contract for approval by the Commission.

7. Aloha has attempted to work with Pasco Health in order to facilitate the project's going forward while at the same time affording Aloha protection from any future determination that it had failed to collect the appropriate amount of service availability fees. As the letters attached hereto and those attached by Pasco Health to its emergency complaint indicate, Aloha has attempted to fashion a solution that would involve a lower payment by Pasco Health, but which would protect Aloha should a subsequent determination be made that additional service availability fees were needed. Rather than respond in kind to this attempted solution, Pasco Health has continued to rigidly insist that it would only pay a certain amount, and no more, thus forcing the issue to impasse.

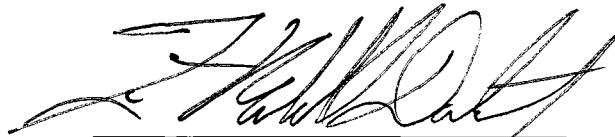
8. Any allegation by Pasco Health that Aloha's actions somehow violated its tariff are incorrect for the reasons set forth above. Any allegation by Pasco Health that Aloha's action violate either any Florida statute or administrative code rule cannot stand if, in fact, Aloha is acting consistent with its tariff. Once a tariff is accepted by the Public Service Commission, it has the force and effect of law. See, e.g., *Bell South Telecommunications, Inc. vs. E. Leon Jacobs, Jr.*, 834 So.2d 855 (Florida 2002). The Commission may have made an error in approving the tariff in such a case, or the tariff might need to be changed because of facts, circumstances, changes in the law, or the like, but if a utility

is acting consistent with its tariff, it cannot be acting inconsistent with other applicable law.

9. The method for dealing with situations in which a utility proposes to assess “...charges for extension of service which is not provided for in the utility’s Service Availability Policy...” is clearly delineated in Rules 25-30.515 and 25-30.550. That is through the filing of a Special Service Availability Contract with the Commission and receiving approval for such a Contract.

WHEREFORE, and in consideration of the above, Aloha respectfully requests that the relief requested by the “Emergency Complaint”, be denied. The Commission should further find that Aloha’s proposal to address this issue through the filing of a Special Service Availability Contract and to seek appropriate security to guarantee payment of the service availability charges required by its tariff, were entirely appropriate and in accordance with its tariff and Commission rules. This request for relief does not indicate, in any way, Aloha’s unwillingness to continue to work this matter out with the developer as expeditiously as possible through the filing of an appropriate Special Service Availability Agreement as provided for by rule, after the dismissal of this Complaint.

Respectfully submitted this 16th day of March, 2007, by:



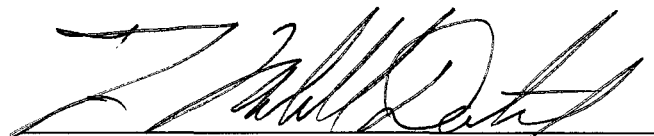
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2548 Blairstone Pines Drive
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(850) 877-6555
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax (*) or Hand Delivery this 16th day of March, 2007, to:

D. Bruce May, Esquire*
Holland & Knight, LLP
Post Office Drawer 810
Tallahassee, Florida 32302

Rosanne Gervasi
Office of General Counsel
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



F. MARSHALL DETERDING

answer to emergency complaint.wpd

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MARTIN S. FRIEDMAN, P.A.
VALERIE L. LORD
BRIAN J. STREET

February 12, 2007

Lee Atkinson
Forizs & Dogali
4301 Anchor Plaza Parkway
Suite 300
Tampa, FL 33634

Re: Aloha Utilities, Inc.; Service to Carrington Place at Trinity in Newport Richey, FL
Our File No. 26038.52

Dear Mr. Atkinson:

After review of your letter dated January 19, 2007 and my telephone call to you on approximately January 30, 2007, I am writing as a follow up to that telephone conversation. As I told you at that time I have discussed the relevant issues with members of the PSC staff, apparently the same staff members with whom you discussed this. I disagree with the conclusions as stated in your letter and as apparently relayed to you by members of the Commission staff, concerning the Utility's obligations and the need to pursue a Special Service Availability Contract and the other requirements as outlined in my letter of January 12, 2007.

As I indicated to you during our phone call, I believe that Aloha has gone above and beyond what is required of the Utility in order to try and accommodate you in determining an appropriate service availability charges for the nursing home that you are proposing to develop. I understand that time is of the essence with regard to this nursing home and that is why I suggested the course of action that I did in my letter dated January 12, 2007. I still believe that this course of action is by far the best, cheapest, and quickest to reach the conclusions as to the appropriate service availability charge to be assessed to your client at the least cost to all.

As we left it during our telephone conversation, it is my understanding that you were going to discuss these issues with your client and get back with me. If you are willing to agree to pursue the course of action outlined in my letter of January 12, 2007, I can move forward quickly in putting together an appropriate agreement.

We are willing to work expeditiously with you in order to get this matter resolved. Please let me know as quickly as possible how you wish to proceed.

Sincerely,

ROSE, SUNDSTROM & BENTLEY, LLP


F. Marshall Deterding
For The Firm

FMD/tms

cc: Stephen G. Watford, President of Aloha Utilities, Inc.

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MARTIN S. FRIEDMAN, P.A.
VALERIE L. LORD
BRIAN J. STREET

January 12, 2007

Bruce Hedrick
Vice President of Development
Pasco Health Investors, LLC
4415 Pheasant Ridge Road, Ste. 301
Roanoke, VA 24014

Re: Aloha Utilities, Inc.; Service to Carrington Place at Trinity in Newport Richey, FL
Our File No. 26038.52

Dear Mr. Hedrick:

I am the attorney who represents Aloha Utilities, Inc. in matters related to the provision of water and wastewater services in New Port Richey and unincorporated Pasco County, Florida. It has been brought to my attention that representatives on your project are concerned with the service availability charges to be imposed by my client on the "Carrington Place at Trinity" nursing home facility.

First of all, let me note that the charges being imposed upon you are those required to be charged under the terms of our tariff, as specifically designated in Appendix B to that tariff.

With that said, Aloha is willing to pursue specific approval by the Public Service Commission of an alternative method for calculating the service availability charges due by your nursing home, under certain conditions.

The information supplied by your engineer to the Florida Department of Environmental Regulation suggests that your facility will utilize a total of 115 gallon per day per bed plus 20 gallons per day per employee, as the demand on my client's system. Given the fact that your facility proposes to have 120 beds and 45 employees, a calculated demand of 14,700 average gallons per day results. While we do not necessarily agree with the method for arriving at that demand figure, our experience indicates that the total average daily demand which results from it may be a reasonable figure. Therefore, we are willing to utilize that demand figure in calculating the appropriate service availability charge provided by my client.

Based upon this information, we are willing to move forward with the preparation and execution of a Developer Agreement utilizing that demand level and calculating a water service availability charge of \$48,995.10 and a sewer service availability charge of \$188,013.00 for a total service availability charge of \$237,008.10. However, we are willing to do this only under the following conditions:

- (1) I will prepare, on behalf of the Utility, a proposed "Special Service Availability Contract." It will utilize, as a basis, the Utility's standard Developer Agreement, but will be modified in order to recognize the demonstration of a lower demand flow than is envisioned under our standard tariff provisions (as outlined above).

Bruce Hedrick
January 12, 2007
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- (2) As part of the Special Service Availability Contract drafted above, your client will be required to execute and provide to Aloha at the time of signing that Special Service Availability Contract, a letter of credit in the amount of \$1,081,466.35 which represents the difference between the charges proposed to be assessed under the Special Service Availability Contract and the amount that would normally be required under the terms of the Utility's tariff as previously relayed to you (\$1,318,474.45 - \$237,008.10 = \$1,081,466.35). That letter of credit will be outstanding until released by Aloha, and Aloha will be authorized to draw up to the full amount of that letter of credit, as soon as the Public Service Commission renders its decision establishing the appropriate service availability charges for your client. In the event that the Florida Public Service Commission agrees with the proposed reduced service availability charges, as outlined above and as will be stated in the agreement, that letter of credit will be released by Aloha. That letter of credit will remain outstanding until released by Aloha, or until drawn upon by Aloha, under the circumstances as outlined above.
- (3) You will be required to execute this Agreement and upon such execution, in addition to those proposed service availability fees, to pay to the Utility an administrative fee equal to \$30,000, to cover the Utility's legal, engineering, and administrative costs, including the cost of preparation of the Agreement and approval for it from the Public Service Commission, among other administrative functions related to the provision of service to this nursing home facility. To the extent our costs exceed this amount, you will be invoiced and required to pay these additional charges within 10 days of such invoice.
- (4) The Utility will submit the Special Service Availability Contract to the Florida Public Service Commission for approval, in accordance with the terms of Florida Public Service Commission rules. This will take approximately 90 days from the date of filing to gain approval.

We believe that this is the only way in which we can move forward with charging you a service availability charge different than that authorized and required by our standard tariff, and we are ready to move forward with that as soon as we receive your approval for the above-outlined course of action. Keep in mind that service availability charges applicable to any development, including yours, are those which are in effect at the time the developer physically connects his facility to the Utility's system and as such, are subject to change at any time.

As soon as you give us the go ahead formally in writing to move forward under the terms as outlined above, I will begin preparation of this Special Service Availability Contract for execution and submission to the Public Service Commission.

If you have any questions in this regard, please let me know.

Sincerely,
ROSE, SUNDSTROM & BENTLEY, LLP



F. Marshall Deterding
For The Firm

FMD/tms

cc: Stephen G. Watford, President of Aloha Utilities, Inc.
Lee Atkinson, Esquire