

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a limited proceeding
increase in water rates in Pasco County
by Aloha Utilities, Inc.

Docket No. 060122-WU

Filed: August 25, 2008

**ALOHA UTILITIES, INC.'S RESPONSE TO
CITIZENS' MOTION TO COMPEL**

ALOHA UTILITIES, INC. ("Aloha"), by and through its undersigned attorneys, pursuant to applicable Uniform Rules and Florida Rules of Civil Procedure, hereby files this response to the Citizens' Motion to Compel (the "Motion"), and would state as follows:

1. The Motion runs so far afield of the appropriate scope of a proper Motion to Compel, and strays so much in its requested relief and various assertions from the Motions' ostensible and stated purpose, that several points must be and shall be made by Aloha at the threshold:

a) The parties are in litigation, and the discovery which is the supposed subject of the Motion is controlled by the Uniform Rules and the Florida Rules of Civil Procedure. This administrative litigation is imbued with the same fundamental considerations of fairness, due process, and adherence to the applicable rules and appropriate precedents as is any state or federal litigation. The Commission's decision on the stated purpose of the Motion, to compel discovery to two interrogatories, must be more mindful of this fact than is the Motion itself.

b) *The Citizens have finally dropped all pretense in this Motion and now clearly reveal that their primary present agenda and fixation is the matter of the proposed anion exchange facilities. Anion exchange is not the subject of this litigation. Anion exchange is currently subject to an abatement order issued by the Commission. Aloha's need for an additional water source to meet its present and future customer demand predates the Commission's Order to Aloha to implement the anion exchange process. Putting rates into place which would allow Aloha to purchase these needed bulk water supplies was the purpose of Aloha's application; it was the purpose of the staff's review; it was the purpose of the agenda conference at the which the Commission voted; and it is the purpose of this proceeding. The Commission should refuse to take its eye off of the ball as OPC now so strongly suggests.*

c) *Reading the Motion, one could not be aware that if Aloha's application for a rate increase fairly meets the rules and statutes of the Commission, it should be granted. Rather, the Citizens' Motion attempts to argue that the clock should be turned back with regard to various subjects such as the implementation of anion exchange; the purchase of water from Pasco County; and the application of chloramination itself. The great irony of the Citizens' argument thereon is that the Citizens now raise concerns, ex post facto, which they did not raise at the appropriate time and that they now question some decisions (and even some stipulations) in which they themselves were a participant. It is additionally noteworthy that the Citizens were out front in exclaiming at the time that Aloha "must do something" (about the need for alternative water service and the need to address the concerns of some customers about the discoloration of water within their homes) even though they now apparently seek to revisit the very Commission decision (which they helped to craft) as to what should be done.*

d) *OPC now essentially lays the groundwork, in the first sentence of ¶13 of the Motion, that the rate case cannot go forward until the anion exchange docket is resolved. This strikingly belated epiphany is one the Citizens never directly raised during the application process; nor during the multi-hour agenda conference on this case; nor in any way, shape, or form in OPC's Petition in this case. The attempt to now inextricably link the anion exchange docket and this rate case is apparently based upon the advice of the Citizens' engineer du jour. OPC initially utilized engineering expert Ted Bidy to address the issues of the discolored water experienced by some customers. In an interim period, they*

located and hired an expert from U.S.F. Now, they are utilizing an engineer from the firm of Baskerville, Donovan. It is particularly ironic that OPC fully participated in the many meetings involving the Commission, the County, the Water Management District, the Utility, and the customers, and an independent expert retained by the Staff (which resulted in Commission orders directing how Aloha should move forward) all the while participating without the advice of an expert, despite being urged contemporaneously at those meetings to retain one. To revisit these settled issues based on the advice of a recently retained expert is not legally, practically, or technically possible or feasible. All parties need to focus now on this rate case, and on the appropriate rates which the Commission should authorize Aloha to charge so that it may purchase the needed bulk water from Pasco County as expeditiously as possible.

2. Addressing Aloha's objection to Interrogatory 63(a), first, the Motion does not even attempt to hide the fact that the interrogatory is completely and entirely based upon OPC's theory that revisiting the Commission's Order directing Aloha to implement anion exchange is a fundamental prerequisite to going forward with this rate case. This premise can not be accepted by this Commission (and has not even properly been brought before this Commission) and can not form a proper basis for compelling Aloha to respond to Interrogatory 63. While OPC at least tosses up the veneer of relevance in asserting that it needs the information "to prepare the Citizens' proposal concerning the best plan to purchase water from Pasco County", it is clear by the context of this statement that the "plan" to which OPC refers is its oft-repeated desire to explore whether Aloha should shut down certain wells; whether this would affect the scope of the anion exchange project in

a certain way; whether some wells need to be treated by anion in a form or fashion differently than some other wells; etc. These areas are all matters which are clearly outside the scope of this rate case and which would reverse or completely unwind the global resolution which the parties reached and the Commission ordered. This rate case isn't about OPC forming a "proposal concerning the best plan to purchase water from Pasco County". The cost, timing and the fact that water must be purchased from Pasco County is established and the only issue in this proceeding is the setting of appropriate rates so that the water may be delivered as expeditiously as possible so as to provide Aloha the water it needs to serve its present and future customers. OPC's acknowledgement that the "best plan" to which it refers cannot be finalized without consideration of the "black water problem" once again reveals the irrelevance, immateriality, and complete lack of reasonable calculation to lead to the discovery of admissible evidence in Interrogatory 63(a) and 63(b). OPC's desire to climb into a time machine and address the discolored water concerns of some customers anew is imprudent, irrelevant to Aloha's pending application, could not be accomplished before the hearing as scheduled, and is nothing but a distraction for OPC, Aloha and this Commission as preparation for this rate case proceeds. OPC's Motion to Compel Interrogatory No. 63 (a) and 63(b) should be denied.

3. OPC's Interrogatory 62 has the same flaw as OPC's earlier attempts to require Aloha (through the guise of discovery) to create documents which a) Aloha does not have; b) which do not exist; c) which Aloha is not required to have by any rule or statute; and d) which Aloha has never needed to operate its system. Aloha has repeatedly offered, and in fact has a standing offer, to OPC that it may access the very system maps, which Aloha itself utilizes to operate its system, in order to create the information it seeks. However, this Commission should decline OPC's request for an order directing Aloha to engage in this burdensome, questionable, expensive, and time-consuming exercise when OPC itself could accomplish the task with the application of the same effort which would be required of Aloha.

If Aloha could merely convey this information to OPC based upon its current knowledge, or if the information were readily available, then perhaps OPC's interrogatory (or its non-discovery, outside-of-the-Uniform Rules' request) might have some merit. But Aloha does not have the information, either in the form of maps or in any other readily available and ascertainable format or form, which is responsive to OPC's request, and this has repeatedly been explained to OPC. OPC could extract this information from the system maps but has steadfastly refused to do so. This is not an issue of Aloha hiding the ball. Rather, it is a case of OPC attempting to secure an order from the Commission to direct

Aloha to assist OPC in the preparation of its case for it in an active and on-going litigation.¹

The fact that the information is not presently in existence is the basis for denial of OPC's Motion in and of itself. This principle could not be more clearly set out than in the case of *In Re: Application For Rate Increase In (Various Counties) By Southern States Utilities*, Docket No. 920199-WS; Order No. PSC-92-0819-PCO-WS (1992). In that case, Commissioner Easley held that:

. . . I cannot agree that the utility should be required to produce information or answer questions based on information which is not presently in existence Therefore, if an interrogatory or document requests or solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not exist, the utility need not answer the discovery.

Just as a party cannot require another party to create a non-existent document, see, e.g., *Allstate Insurance Company vs. Nelson, Wardell, Pinder, et al*, 746 So.2d 1255 (4th DCA 1999), a party cannot be required to require another party, through the vehicle of discovery, to create, calculate, project, or accumulate information not in existence. OPC has every right to ask for base documents (in

¹ It is obviously problematic that the more involved Aloha is in marshalling the information reflected on the system maps into the form that OPC has demanded, the more OPC is likely to criticize Aloha's effort in that regard if OPC's modeling does not yield the results which OPC hopes.

existence) from which it may create the maps it seeks. These base documents are precisely what Aloha provided to OPC, as described hereinbelow. These documents and system maps are the same information as to which staff, in a meeting with OPC and Aloha, informed OPC were in compliance with the Commission's rules and were the types of system maps routinely maintained by utilities such as Aloha. However, it is obvious that OPC's real agenda is to require Aloha to expend the time, money and effort to help OPC prepare its case. To order Aloha to do so would be improper and to order Aloha to engage in this type of document creation is well beyond the proper scope of discovery.

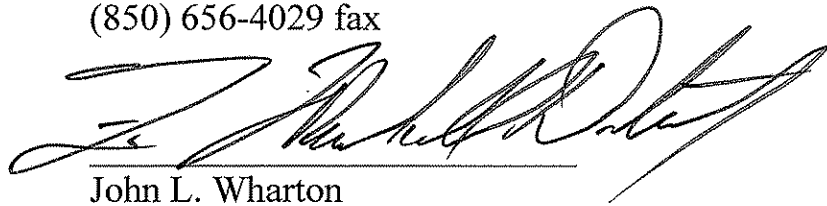
4. Many of the same facts and circumstances upon which denial of OPC's Motion should be based are the same facts and circumstances set forth in Aloha's response to the Citizens' Motion to Compel filed on July 21, 2008 (of which all relevant parts thereto are incorporated by this reference as if fully set forth herein). Aloha has attempted to accommodate OPC in a way that is fair, fundamental, and consistent with the discovery rules. Aloha produced the system maps, voluntarily and not pursuant to any specific discovery requests, to OPC months ago. Yet, for some reason, OPC has not availed itself of review of the available maps, data, and documents such that it could create the information it

seeks. This is not the fault of Aloha and cannot form the basis for an Order directing Aloha now to essentially do OPC's homework, in order to support some questionable theory of the case, or to enable or assist OPC in investigating the abated and unrelated matter of anion exchange. OPC's Motion as it relates to Interrogatory 62 should be denied.

WHEREFORE, in consideration of the above, Aloha respectfully requests the Commission deny OPC's Motion to Compel.

Respectfully submitted this 25th day of August, 2008.

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A handwritten signature in black ink, appearing to read "John L. Wharton", written over a horizontal line.

John L. Wharton
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For the Firm

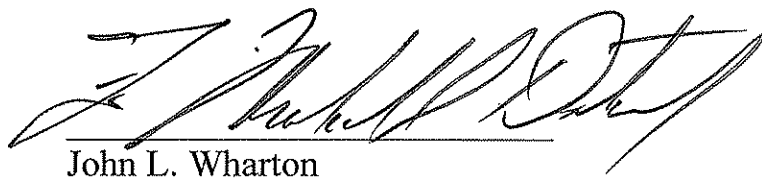
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail and U.S. Mail* to the following this 25th day of August, 2008:

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