

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of utility
rates of Aloha Utilities, Inc.
in Pasco County.

DOCKET NO. 960545-WS
ORDER NO. PSC-99-1233-PCO-WS
ISSUED: June 22, 1999

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO STRIKE, GRANTING IN PART
AND DENYING IN PART MOTION TO ESTABLISH BURDEN, AND DENYING
MOTION FOR RECONSIDERATION

BY THE COMMISSION:

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. As of December 31, 1997, Aloha was serving approximately 8,457 water customers in its Seven Springs service area.

On April 30, 1996, Mr. James Goldberg, President of the Wyndtree Master Community Association, filed a petition, signed by 262 customers within Aloha's Seven Springs service area, requesting that the Commission investigate the utility's rates and water quality. The petition and request were assigned Docket No. 960545-WS.

For the purposes of hearing, Docket No. 960545-WS was consolidated with Docket No. 950615-SU (Aloha's reuse case). The hearing was held on September 9-10, 1996 in New Port Richey, and concluded on October 28, 1996 in Tallahassee. Customer testimony concerning quality of service was taken on September 9, 1996. Both customer testimony sessions were attended by more than 500 customers, fifty-six of whom provided testimony about the following quality of service problems: black water, pressure, odor, and

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customer service related problems. The customers also provided many samples of black water.

After evaluation of the evidence taken during the hearing, we rendered our final decision by Order No. PSC-97-0280-FOF-WS (Final Order), issued on March 12, 1997. We determined that the quality of service provided by Aloha's water system was unsatisfactory. Since the evidence indicated that the water quality problems were related to the presence of hydrogen sulfide in Aloha's source water and the cost of treatment might be expensive, we ordered Aloha to prepare a report that evaluated the costs and efficiencies of several different treatment options for the removal of hydrogen sulfide from its source water. In addition to finding the quality of the utility's water to be unsatisfactory, we found that "the utility's attempts to address customer satisfaction and its responses to customer complaints are unsatisfactory. These management practices of Aloha concern us, and will be further addressed in Docket No. 960545-WS, which is to be kept open."

On June 12, 1997, Aloha filed its engineering report, recommending that it be allowed to continue adjusting the corrosion inhibitor dosage level in an ongoing effort to eliminate the black water problem. Aloha also recommended that if hydrogen sulfide treatment facilities were required, then the option of constructing three central water treatment plants which utilize packed tower aeration should be approved. Aloha estimated that construction and operation of the three treatment plants and other water system upgrades would increase customer rates by 398 percent.

On November 26, 1997, by Order No. PSC-97-1512-FOF-WS, we decided that more investigation was needed and ordered the utility to survey its Seven Springs customers to determine the extent of the quality of service problems and to determine if the customers were willing to pay for new treatment facilities that were not required by any current Department of Environmental Protection (DEP) or Environmental Protection Agency (EPA) rule and which would increase their water rates. Aloha distributed 8,597 surveys and we received 3,706 responses. Also, as a follow-up to the survey, we conducted a site survey on July 17, 1998.

In a June 5, 1998 letter to the Commission, Aloha stated that it was willing to begin construction of three centrally located packed tower aeration treatment facilities to remove hydrogen sulfide from the source water. Aloha was willing to proceed with this upgrade in order to address customer quality of service

concerns and to comply with future EPA regulations. However, before commencing construction of these water treatment facilities, Aloha requested that we issue an order declaring that it was prudent for Aloha to construct these facilities.

We considered this request at the December 15, 1998 agenda conference. Also, we considered whether there was a water quality problem in Aloha's Seven Springs service area and, if so, what further actions were required.

Pursuant to the decisions at that agenda conference, on January 7, 1999, we issued Order No. PSC-99-0061-FOF-WS, entitled Notice of Proposed Agency Action Order Determining that the Commission Should Take No Further Actions in Regards to Quality of Service in this Docket and Closing Docket and Final Order Denying the Utility's Request that the Commission Issue an Order Declaring it to Be Prudent to Begin Construction of Three Central Water Treatment Facilities (PAA Order). By that Order, we required any protests to be filed by January 28, 1999 in order to be timely.

Subsequently, three customers -- Edward O. Wood, James Goldberg, and Representative Mike Fasano, filed timely protests to the PAA portions of Order No. PSC-99-0061-FOF-WS, and requested a formal hearing. Based on these protests, a formal hearing was scheduled for September 30, and October 1, 1999.

With the scheduling of a formal hearing, an Order Establishing Procedure, Order No. PSC-99-0514-PCO-WS, was issued on March 12, 1999. That Order required Aloha to prefile its direct testimony and exhibits on June 30, 1999, and the intervenors to file their direct testimony and exhibits on July 13, 1999.

On March 22 and March 23, 1999, respectively, Aloha filed a Motion for Reconsideration of Order No. PSC-99-0514-PCO-WS and a Motion to Correct Scrivener's Error. In the Motion for Reconsideration, the utility requested the prehearing officer to reconsider the Order Establishing Procedure. In its Motion to Correct Scrivener's Error, the utility explained that its Motion for Reconsideration was erroneous in that it really was requesting the full Commission to consider the Motion for Reconsideration. By our staff having brought the Motion for Reconsideration before the full panel, the Motion to Correct Scrivener's Error became moot. On March 30, 1999, the Office of Public Counsel (OPC) filed a Response to Aloha Utilities, Inc.'s Motion for Reconsideration of Order No. PSC-99-0514-PCO-WS (Response).

On April 22, 1999, our staff filed its recommendation on the utility's Motion for Reconsideration. This recommendation was to have been considered at the May 4, 1999 Agenda Conference. However, on April 30, 1999, the utility filed its Motion to Establish the Burden. Arguing that the Motion for Reconsideration and the Motion to Establish the Burden were interrelated, and requesting time to respond to the latter motion, the OPC orally requested that the item be deferred from the May 4 Agenda Conference. This request was granted by the Chairman on May 3, 1999.

On May 12, 1999, the OPC filed its response. However, on May 14, 1999, the utility moved to strike OPC's response as untimely. This Order addresses the utility's Motion for Reconsideration, its Motion to Establish the Burden, its Motion to Strike, and the related responses.

MOTION TO STRIKE

The utility filed its Motion to Establish the Burden on April 30, 1999, and indicated that it had provided the motion by facsimile to the OPC on that same date. However, OPC did not file its response until May 12, 1999.

Based on its interpretation of Rule 1.080(b), Florida Rules of Civil Procedure, and Uniform Rules 28-103 and 28-204, Florida Administrative Code, by motion dated May 14, 1999, Aloha moved to strike OPC's response as untimely. Rule 28-106.204(1), Florida Administrative Code, provides in pertinent part that: "When time allows, the other parties may, within 7 days of service of a written motion, file a response in opposition." Further, Rule 28-106.103, Florida Administrative Code, which provides for an additional five days when service is by mail, specifically states in pertinent part that: "No additional time shall be added if service is made by hand, facsimile telephone transmission, or other electronic transmission." Therefore, when a motion is served by facsimile, it appears that a response is due in seven days.

The OPC stated verbally that it did receive a facsimile copy on April 30, 1999, but that it also received a mailed copy on May 3, 1999, and was not sure initially if they were identical. Also, OPC states that it received a facsimile copy of Aloha's Motion to Strike on May 14, 1999, and filed a timely response on May 19, 1999.

With the advent of service by facsimile, there has been some initial confusion about the time requirements. Also, we note that OPC's error and untimely filing did not prejudice the utility. However, our analysis would be the same with or without OPC's response. Therefore, because the response is untimely, the utility's Motion to Strike is granted.

MOTION TO ESTABLISH THE BURDEN

As stated above, this docket was opened when Mr. James Goldberg, President of the Wyndtree Master Community Association, filed a petition requesting that we investigate the utility's rates and water quality. After a formal hearing, we issued a Final Order in which we specifically found that the quality of service provided by Aloha was unsatisfactory.

Although several orders have been issued since the issuance of the Final Order, no order since the issuance of the Final Order has ever found the quality of service to be satisfactory. The main thrust of the continuing investigations has been to determine the appropriate course of action to improve the quality of service. In addition to the "black water" problem, we found that the utility's attempts to address customer satisfaction and its responses to customer complaints were unsatisfactory. The utility has taken measures to improve its responses to customer complaints and has continued with its program of adding a corrosion inhibitor for the black water problem. Also, on more than one occasion, the utility has requested that we pre-approve the construction of three centrally located packed-tower-aeration facilities. We have declined to do so.

Now, with this new hearing being set, the Order Establishing Procedure, Order No. PSC-99-0514-PCO-WS, requires Aloha to prefile its testimony on June 30, 1999, and the intervenors to file their testimony on July 13, 1999. The utility has filed both a Motion to Establish the Burden and a Motion for Reconsideration of the Order Establishing Procedure.

The utility, citing Florida DOT v. JWC Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981), states that the burden of proof is upon the Petitioners to go forward with evidence to prove the truth of the facts asserted in their petitions, and that Aloha, under any reasoning, cannot be considered an applicant. Aloha states that it was not aggrieved by and did not protest our PAA Order. Therefore, it states that there is simply no issue upon which it can file any

initial direct testimony. Because the Petitioners are protesting and requesting a hearing, Aloha argues that it is up to the Petitioners to carry the burden of going forward and the burden of persuasion in this proceeding. Aloha concludes that it would then be appropriate for Aloha, as a respondent, to respond appropriately. If Aloha is required to go first, it states that its testimony would be very basic at best. Wherefore, Aloha seeks a determination by the full panel that Aloha does not have the burden of proof in this case and that the Petitioners do.

In the past, we have struggled with the question of who has the ultimate burden of proof when the customers initiate a proceeding and seek affirmative relief. However, for the reasons stated below, we do not find that we need to address the issue of who has or had the ultimate burden of proof at this time.

In the prior formal hearing in this case, the OPC and the customers put on evidence and convinced us that the quality of service provided by Aloha was unsatisfactory. The utility has consistently questioned this finding and has asserted that the quality of service should be considered satisfactory. Specifically, the utility has stated that its handling of customer complaints is satisfactory, that it is in compliance with the lead and copper rules and all other rules of DEP, and that its continued addition of a corrosion inhibitor complies with the procedures recommended by DEP. Also, it has on more than one occasion, requested that we pre-approve the construction of three centrally located packed-tower-aeration facilities as a solution to the black water problem.

Although no issues have been specifically defined at this point in time, the issues that we addressed at the December 15, 1998 Agenda Conference and in the PAA order were as follows:

1. Is there a water quality problem in Aloha's Seven Springs service area, and, if so, what actions are required?
2. Should the Commission grant Aloha's request and declare that it is prudent for Aloha to begin construction of three central water treatment facilities for its Seven Springs service area?
3. Should this docket be closed?

In the protested PAA Order, while acknowledging that there still appeared to be a water quality problem, we concluded that no

further actions were required to be taken at this time and that the docket should be closed. The three customers protested this conclusion and the closing of the docket.

Section 120.80(13)(b), Florida Statutes, states that, in a protest of a proposed agency action, the Commission may only address the issues in dispute, and those issues not in dispute are deemed stipulated. At first glance, the only issues appear to be what actions should we require the utility to take and whether the docket should be closed.

However, Issue 1, as set out above, cannot effectively be divided. In any hearing, despite having already found the quality of service to be unsatisfactory, we will, of necessity, have to determine whether there is still a quality of service problem and the extent of the problem. This would directly affect the actions that may or may not be required. Further, the customers have filed their petition as both an investigation into the rates and the quality of service provided by Aloha. Pursuant to Section 367.081(2)(a), Florida Statutes, in fixing rates, we must consider the value and the quality of the service.

Although the Final Order found the quality of service to be unsatisfactory, that decision was based on evidence submitted at a hearing that concluded on October 28, 1996 (over two and one-half years ago). However, that is the only record that we now have.

Even if it could be said that the customers had the ultimate burden of proof (as argued by the utility but disputed by OPC), it appears as though the evidence put on by the customers has conclusively demonstrated that there was, and must still be presumed to be, a quality of service problem. Therefore, in answering whether there is still a quality of service problem, we find that the burden of going forward with the evidence has clearly been shifted, if it was not already on the utility, to the utility. Dependent upon how the utility chooses to present its case, it would then be incumbent on the other parties, to the extent they disagreed, to come forward and present their case.

In consideration of the above, the utility's Motion to Establish the Burden shall be granted in part and denied in part. Specifically, the starting point of the hearing must be whether there is a quality of service problem, and, if so, the extent of such problem. Based on our prior decision in this case, the presumption must be that the quality of the water service provided

by the utility is unsatisfactory. Therefore, the utility has the burden of going forward with the evidence, and, for ease of presentation and for the better flow of the hearing, the utility shall file its testimony first.

MOTION TO CORRECT SCRIVENER'S ERROR AND
MOTION FOR RECONSIDERATION

By our consideration of the utility's Motion for Reconsideration, the Motion to Correct Scrivener's Error is moot. Therefore, we need take no action on that motion.

In regards to the Motion for Reconsideration, Aloha states that it does not object to or:

seek reconsideration, *per se*, for those dates as established in the Order Establishing Procedure unless and except if the establishment of those particular dates in that particular order stands for the proposition that Aloha somehow has the burden of proof in this case. To the extent the Controlling Dates as referenced above stand for the proposition that it is the position of the Commission or the Prehearing Officer that Aloha has the burden of going forward or the burden of possession [sic] in this case, Aloha seeks reconsideration of that Order, as such Order would not be in compliance with the basic tenets of due process and the appropriate and fundamental procedure in administrative cases such as this.

OPC filed its timely response to Aloha's Motion for Reconsideration on March 30, 1999. In that response, citing Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), OPC states that it is well-established in the law that the purpose of reconsideration is to bring to the Commission's attention some point that it overlooked or failed to consider or a mistake of fact or law. OPC argues that Aloha's motion does not allege that the prehearing officer overlooked or failed to consider any point or committed a mistake of fact or law.

OPC then states that Aloha has the responsibility for delivering a safe and adequate product to the customers, and that it is the statutory duty of the Commission to ensure the adequacy of service by regulated utilities. OPC concludes by submitting that it is the burden of Aloha to come forward and either present a plan to remedy its inadequate service, or to justify its current

rates that are paid by customers for safe and adequate service, which they do not currently receive. Therefore, OPC states that the schedule in the Order Establishing Procedure is the customary and legal means by which the parties are offered an opportunity to proceed, and the utility's Motion for Reconsideration should be denied.

We agree with OPC that the standard for determining whether reconsideration is appropriate is set forth in Diamond Cab. In Diamond Cab, the Court held that the purpose of a petition for reconsideration is to bring to an agency's attention a point of fact or law which was overlooked or which the agency failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for rearguing the case merely because the losing party disagrees with the judgment. Id. at 891. In Stewart Bonded Warehouse, 294 So. 2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. We have applied these standards in our analysis of Aloha's Motion for Reconsideration.

We have ruled above that the utility has the burden of going forward with the presentation of evidence on the quality of service. Therefore, we find that there is no point that we overlooked or failed to consider, and there is no mistake of fact or law that would make a motion for reconsideration appropriate. Therefore, the utility's Motion for Reconsideration is denied. The utility shall prefile its testimony on June 30, 1999, and the docket shall remain open to conduct the hearing now scheduled for September 30, and October 1, 1999.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion of Aloha Utilities, Inc., to Strike the Response of the Office of the Public Counsel to the utility's Motion to Establish the Burden is granted and the response is stricken. It is further

ORDERED that the Motion of Aloha Utilities, Inc., to Establish the Burden is granted in part and denied in part as set forth in the body of this Order. It is further

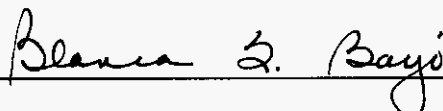
ORDERED that the Motion of Aloha Utilities, Inc., for Reconsideration is denied, and the dates for prefiling testimony

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shall be as set forth in the Order Establishing Procedure. It is further

ORDERED that this docket shall remain open to conduct the formal hearing.

By ORDER of the Florida Public Service Commission this 22nd day of June, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2)

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reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.