

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-02-1056-PCO-WU
ISSUED: August 5, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR STAY

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. The utility's service area is located within the Northern Tampa Bay Water Use Caution Area as designated by the Southwest Florida Water Management District (SWFWMD). Critical water supply concerns have been identified by SWFWMD within this area.

On August 10, 2001, Aloha filed an application for an increase in rates for its Seven Springs water system, and this date was set as the official filing date pursuant to Section 367.083, Florida Statutes. In its minimum filing requirements, the utility requested total water revenues of \$3,044,811. This represented a revenue increase of \$1,077,337 (or 54.76%). These final revenues were based on the utility's requested overall rate of return of 9.07%.

The utility's requested test year for setting final rates was the projected year ended December 31, 2001. By Order No. PSC-01-2092-PCO-WU, issued October 22, 2001, we suspended the utility's requested final rates. Also, by Order No. PSC-01-2199-FOF-WU,

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issued November 13, 2001, we approved interim rates subject to refund with interest. Rates were increased by 15.95%.

Edward O. Wood, the Office of Public Counsel (OPC), SWFWMD, and Representative Mike Fasano were all granted intervenor status upon their requests. A hearing in Pasco County was held on January 9 through 11, 2002. Subsequent to this hearing, we issued Order No. PSC-02-0593-FOF-WU (Final Order on Appeal) on April 30, 2002.

In the Final Order on Appeal, based on a finding that the overall quality of service of Aloha was unsatisfactory, we directed Aloha to improve its water treatment system starting with wells 8 and 9 and then continuing with all of its wells to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in the raw water. Such improvements to all of Aloha's wells were to be placed into service by no later than December 31, 2003. Moreover, Aloha was directed to submit a plan within 90 days of the Final Order on Appeal showing how it intended to comply with the above-noted requirements for the removal of hydrogen sulfide. Finally, Aloha was directed to implement five customer service measures within 120 days from the date of the Final Order on Appeal, and to implement the conservation programs described in the Order.

Also, we recognized that the utility had proceeded with the pilot project and provided monthly reports as required in Docket No. 960545-WS through Orders Nos. PSC-00-1285-FOF-WS and PSC-00-1628-FOF-WS, issued July 14, 2000 and September 12, 2000, respectively. However, we further noted that there had been little progression on the pilot project since July 2001.

Having considered the value and quality of the service, we determined that the utility's rates should be set so as to give it the opportunity to earn the minimum of its authorized rate of return on equity. Also, we determined that the continuing problems with "black water" over at least the last six years, the customers dissatisfaction with the way they were being treated and the service they received from the utility, and the failure of the utility to aggressively and timely seek alternate sources of water supply reflected poor management of this utility.

We also determined that the appropriate projected number of purchased water gallons from Pasco County at this time is zero with a resulting expense of \$0. Moreover, we directed Aloha to perform a cost benefit analysis of an appropriate alternative water supply that allows it to fit permanently into the long-term alternative water supply plan in a manner that is not deleterious to the environment, or to Aloha's ratepayers. This analysis was to include negotiating with Pasco County for a better bulk rate, which might include paying an impact fee up-front.

In addition to the above, we determined that:

- (1) the royalty fee charged by the related parties should be reduced to \$0.10 per thousand gallons for regulatory purposes; and
- (2) the annual expense for rate case expense should be reduced by \$60,323 to remove the costs of a duplicative filing for interim rates, and the imprudency and additional costs incurred for filing separate water and wastewater rate cases which could have been avoided if the utility had filed a combined filing for its Seven Springs water and wastewater divisions.

Although no increase in revenues was found to be necessary, we determined that the rate structure for residential customers should be a base facility charge and two-tier inclining-block rate structure. Because there was no change in the revenue requirement from that provided by the original rates, Aloha was directed to "refund 4.87% of water revenues collected under interim rates."

We also directed that the interim plant capacity charge be increased from \$500 (approved on an interim basis in Order No. PSC-00-1285-FOF-WS, issued July 14, 2000, in Docket No. 960545-WS) to \$1,000 to offset future plant requirements. The utility was directed to deposit the difference between \$1,000 and the last non-interim charge of \$163.80 in its current interest bearing escrow account to guarantee the interim funds collected subject to refund. The escrowed funds were not to be released until we verified that Aloha had sufficiently invested in the required plant improvements. All other escrow requirements with respect to the interim service availability charges as established by us in Order No. PSC-00-1285-FOF-WS were to continue to apply. By our Final Order on Appeal, we

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directed Aloha to file revised tariff sheets and a proposed customer notice by April 30, 2002, to reflect the \$1,000 interim plant capacity charge. We found that this second interim increase was necessary in order to fund future plant requirements necessary to address solutions to the "black water" and long-term water supply issues.

On May 28, 2002, Aloha filed its timely Notice of Appeal. Also, on June 14, 2002, Aloha filed its Motion for Stay which was accompanied by a Request for Oral Argument. On June 21, 2002, OPC filed its timely Response to Motion for Stay (Response).

This Order addresses Aloha's Request for Oral Argument, its Motion for Stay, and OPC's Response. We have jurisdiction pursuant to Sections 367.081 and 367.111, Florida Statutes.

REQUEST FOR ORAL ARGUMENT

Aloha specifically requested oral argument on its Motion for Stay, and argued that it would assist us in understanding all of the facts and circumstances of Aloha's Motion. We agreed, and allowed ten minutes for each party at the July 23, 2002, Agenda Conference.

MOTION FOR STAY

Rule 25-22.061(1)(a), Florida Administrative Code provides that:

When the order being appealed involves the refund of moneys to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the utility or company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, and such other conditions as the Commission finds appropriate.

Aloha contends that, pursuant to this rule, the Commission shall, with the filing of Aloha's Motion, grant a stay of the entire Order. Alternatively, Aloha seeks a stay of Order No. PSC-02-0593-FOF-WU pursuant to Rule 9.190(e)(2), Florida Rules of

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Appellate Procedure. That rule merely allows the filing of a Motion for Stay with the lower tribunal, and that the lower tribunal or court may grant a stay upon appropriate terms.

Aloha alleges that "to require Aloha to undertake the various tasks required by Order No. PSC-02-0593-FOF-WU prior to final determination of the merits of the appeal would be counter-productive, confusing to the customers, cause Aloha to suffer irreparable harm, and would not be in the public interest," and that Aloha would "not be able to 'undo' those matters, tasks, analysis, and expenditures" if it were made to proceed with the various tasks. Moreover, Aloha argues that a stay of execution of that Order "is necessary to prevent a change of the status quo and provide meaning to Aloha's appeal." Aloha alleges that, in issuing this Order, we have formulated our "Final Order outside of the only public meeting which was held for consideration of the Order," and that we have exceeded our "jurisdiction, acted unlawfully, deprived Aloha of due process, and . . . made findings of fact and conclusions of law which are not supported by competent, substantial evidence."

Based on the above, Aloha argues that it is in the public interest for us to grant a stay. Moreover, Aloha argues that it is likely to succeed on appeal on several issues which include, but are not limited to, the following:

The Order determines that Aloha has not "sustained its burden of proof" regarding its request to recover expenses for purchased water from Pasco County. The Commission reached this conclusion in the face of an overwhelming amount of evidence that Aloha's only alternative in order to come into compliance with its Water Use Permit was to purchase water from Pasco County, and in the face of a complete and total lack of evidence to the contrary.

The Commissions [sic] Order is an unlawful Order in that it was not rendered as required by the Florida Administrative Procedure Act and other applicable tenents [sic] of Florida Law. At a minimum, the Commission's vote on the Final Order on this matter was nothing more

than a ceremonial acceptance of a decision previously made in private, in violation of Florida's Sunshine Law.

Aloha is ordered to make improvements to wells number eight and nine, and eventually to all its wells, to implement a treatment process designed to remove at least 98% of the Hydrogen Sulfide in its raw water. This requirement is arbitrary, capricious, exceeds the Commission's jurisdiction, and imposes upon Aloha an environmental standard stricter than that imposed upon any utility, private or governmental, in the State of Florida by any regulatory or jurisdictional authority. In addition, the finding that such a requirement is appropriate is unsupported by any evidence or expert testimony that such a requirement is permissible, or technically feasible.

The Final Order requires Aloha to submit a plan within ninety (90) days of the date of the Final Order showing how Aloha intends to comply with the requirement to remove Hydrogen Sulfide. Such a plan, if it can be accomplished at all within that time frame, will be expensive, time consuming, and a significant drain on the resources of Aloha. Given the certainty that Aloha's appeal of the Commission's Order will take longer than ninety (90) days such a requirement cannot be completed while the appeal is pending.

The Order directs Aloha to make refunds with interest to Aloha's customers. Such refunds with interest cannot be retrievable and will not be retrievable should Aloha prevail on appeal.

The Order directs that Aloha's rate case expense shall be reduced by 50% because this case was not filed in conjunction with the prior wastewater case. The Commission's directive in this regard is arbitrary, capricious, and not supported by any facts in the record.

The Order requires Aloha to implement certain customer service measures which will be counterproductive, which

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are unlawful, and which are not either required or advisable under the law and the evidence in this case.

The Order requires Aloha to undertake certain billing format changes without any foundation in the law or the evidence in this case.

The Order unlawfully and improperly reduces the President's and Vice President's salary without any justification or competent evidence to support the same.

If we stay the rate and refund portion of the Final Order on Appeal, Aloha notes that it has been escrowing the increased revenues associated with the interim rates, and that continuation of which would be "more than ample security to cover any potential refund."

OPC filed its timely Response to Aloha's Motion for Stay on June 21, 2002. In its Response, OPC states that it does not object to staying the "effectiveness of the refund, as long as Aloha posts a sufficient bond as required by Rule 25-22.061, Florida Administrative Code." However, OPC does object "to Aloha's motion to the extent that it seeks to stay or delay the implementation of the five customer service measures, the submission of the plan for reducing the hydrogen sulfide, or the plant improvement program."

OPC argues that Aloha has misinterpreted Rule 25-22.061(1) and has ignored the provisions of Rule 25-22.061(2), Florida Administrative Code, and specifically the provisions of Rule 25-22.061(2)(c), Florida Administrative Code, which requires us to consider "whether the delay will cause substantial harm or be contrary to the public interest." OPC states "that any delay in the requirements for improving the quality of the water or the quality of the customer service will cause substantial additional and continuing harm to the customers," and that it is clearly in the public interest for there to be a "supply of acceptable quality water and reasonable customer service."

OPC further argues "that there is very little likelihood that Aloha will prevail in its appeal of any issues challenging" our decisions on the customer service measures, the hydrogen sulfide removal plans, or the hydrogen sulfide removal plant improvements.

OPC argues that Aloha's primary focus is to accuse this Commission of improprieties such as making our "decision in private, in violation of Florida's Sunshine Law," and making decisions based on "political considerations." OPC argues that these are unsupported charges and do not show that there is "a likelihood of prevailing on appeal."

Finally, OPC addresses Aloha's alternative request for relief pursuant to Rule 9.190(e)(2), Florida Rules of Appellate Procedure, and notes that the rule merely states that "[t]he lower tribunal or court may grant a stay upon appropriate terms." OPC argues that the "specificity of the elements described in Rule 25-22.061, Florida Administrative Code, define the 'appropriate terms.'" OPC requests us to deny Aloha's request for a stay with respect to our "order on customer service measures, the hydrogen sulfide removal plan or plant improvements to reduce hydrogen sulfide levels."

When an order requires a refund or reduction in rates, the application of Rule 25-22.061(1)(a), Florida Administrative Code, is mandatory. However, when an order requires other actions by a utility, we find that subsections (2)(a), (b), and (c) of that same Rule apply. Rules 25-22.061(2)(a), (b), and (c), Florida Administrative Code, provide in pertinent part:

(2) Except as provided in subsection (1), a party seeking to stay a final or nonfinal order of the Commission pending judicial review shall file a motion with the Commission, which shall have authority to grant, modify, or deny such relief. . . . In determining whether to grant a stay, the Commission may, among other things, consider:

(a) Whether the petitioner is likely to prevail on appeal;

(b) Whether the petitioner has demonstrated that he is likely to suffer irreparable harm if the stay is not granted; and

(c) Whether the delay will cause substantial harm or be contrary to the public interest.

The Final Order on Appeal specifically requires Aloha to make refunds and modify its rate structure such that it will no longer collect the interim increase allowed by Order No. PSC-01-2199-FOF-

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WU. Therefore, these provisions shall be stayed pending the resolution of the judicial proceedings pursuant to Rule 25-22.061(1), Florida Administrative Code. Pending this resolution, Aloha shall be allowed to continue to collect the interim rates and continue escrowing the amounts subject to refund in accordance with Order No. PSC-01-2199-FOF-WU, which we find is sufficient security.

Aloha has also requested that we stay those provisions of the Final Order on Appeal which require Aloha to first make improvements to Wells Nos. 8 and 9, and then to all of its wells, to implement a treatment process designed to remove at least 98 percent of the hydrogen sulfide in its raw water, with such improvements being placed into service by no later than December 31, 2003. Aloha claims that this requirement is not supported "by any evidence or expert testimony that such a requirement is permissible, or technically feasible," and that it will be irreparably harmed if forced to implement the improvements pending the appeal.

We believe there is evidence to show that hydrogen sulfide is the primary problem causing the formation of copper sulfide (black particulate in the water) and that virtually all of it needs to be removed. Also, it appears that packed tower aeration can remove over 98% of the hydrogen sulfide. Therefore, it appears that there is evidence in support of this decision and that it is technically feasible. However, we note that there is a multi-million dollar cost associated with this requirement, and that, pursuant to Rule 25-22.061(2)(b), Florida Administrative Code, we must consider whether there will be irreparable harm to Aloha. At the same time, OPC points to Rule 25-22.061(2)(c), Florida Administrative Code, and states that further delay will harm the public and not be in the public interest.

Considering the likelihood of Aloha's prevailing on appeal, the irreparable harm to Aloha, and the fact that further delay may harm the customers who are experiencing "black water," and that this is contrary to the public interest, we find that we must consider a "middle ground" in fashioning a stay. Specifically, we find that the risk of irreparable injury to Aloha is too great to require it to proceed with the improvements designed to remove 98% of the hydrogen sulfide, and that the portion of the Final Order on Appeal requiring this shall be stayed. However, we do not believe

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that Aloha would be irreparably harmed by proceeding with the plans for how it intends to remove hydrogen sulfide. While these costs could be significant, the costs would be significantly less than the costs of the actual improvements, and would enable Aloha to promptly proceed upon the appeal process being concluded.

Pursuant to Orders issued in Docket No. 960545-WS, Aloha has been conducting a pilot project for almost two years now, and the engineer for Aloha admitted that it was now in the third stage or demonstration phase, and that the demonstration phase could be used on Wells Nos. 8 and 9. We find that it is in the public interest to minimize any delay in searching for a solution to the "black water" problem, and that Aloha shall at least continue to work toward submitting a plan for the removal of the hydrogen sulfide.

Also, the costs associated with the five Customer Service Measures are not significant, and these measures could greatly improve Aloha's interactions with its customers and promote customer well-being for minimal output on the part of Aloha. For Customer Service Measure (1), the Transfer Connect Program, Aloha must merely provide a toll-free telephone number (\$20 monthly rate with per minute charge of \$.216) and consumer assistance personnel during business hours. The cost of the toll-free number is minimal, and Aloha should already have personnel available during business hours to handle customer complaints.

For subsection A of Customer Service Measure (2), Customer Service Improvements, Aloha has already been directed in previous orders to provide training to its personnel concerning customer relations. It would not appear to be that great a burden to have this training standardized through creation of a manual. Moreover, if Aloha is handling outages and reconnections as it should, the credits outlined in subsection B of this portion (\$15 for either a missed appointment, out-of-service repair exceeding 24 hours, or a reconnection taking over 12 hours) should not even come into play. Finally, subsection C of this portion is a mere listing of standards that Aloha should try to obtain and no penalty is set for failing to meet these standards.

For Customer Service Measure (3), Customer Billing Improvements, customer Nowack complained about the bill itself and indicated that it was hard to understand. We agreed, and our staff

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designed a bill to help clarify the rates and any past payments received. Again, it does not appear that it would be that burdensome or costly to modify the bill.

For Customer Service Measure (4), the Citizens Advisory Council, we merely gave Aloha guidance on how this should work, required someone from Aloha to attend meetings at least once a month, and required that Aloha provide the executive secretary. This type of Council was suggested by Dr. Kurien and Aloha initially seemed to agree that it could help customer relations.

Finally, for Customer Service Measure (5), the Consumer-Friendly Web Site, President Watford indicated that Aloha was contemplating a utility Web site, and we agreed that this was a good idea and ordered Aloha to go forward with it. We merely listed eight factors that Aloha should consider in designing its Web site so that it could be more user friendly. We fail to see how any of the above five Customer Service Measures could burden Aloha, and believe that they could aid greatly in improving Aloha's customer relations and its responsiveness to its customers.

Based on the above, Aloha shall submit a plan showing how it intends to comply with the requirement to remove hydrogen sulfide, and Aloha shall implement the five Customer Service Measures set forth in the Final Order on Appeal listed as follows: (1) The Transfer Connect Program; (2) Customer Service Improvements; (3) Customer Billing Improvements; (4) Citizen's Advisory Committee; and (5) Develop a Consumer-Friendly Website, and these provisions shall not be stayed. Aloha shall submit the plan within 90 days and implement the five customer service measures within 120 days of July 23, 2002, the date of our vote on the Motion for Stay. Also we find that it is in the public interest for Aloha to implement the conservation measures described and allowed in the Final Order on Appeal.

Moreover, Aloha is cautioned to proceed with due diligence in completing the pilot project it was directed to conduct in Orders Nos. PSC-00-1285-FOF-WS and PSC-00-1628-FOF-WS. The requirements for the pilot project were set forth in those orders issued in Docket No. 960545-WS, and the first order referring to the pilot project was issued approximately two years ago. Therefore, a stay

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of the Final Order on Appeal does not affect Aloha's actions concerning the pilot project.

Also, failure by Aloha to increase and implement the second interim water service availability charge of \$1,000 could irreparably harm the current customers, and the implementation of the charge could not harm Aloha in any way. Therefore, the provision for increasing the interim water service availability charge from \$500 to \$1,000 is not stayed, and Aloha shall comply with the requirements set out in the Final Order on Appeal for increasing its interim water service availability charges. Aloha shall submit revised tariff sheets and the notice reflecting this \$1,000 interim service availability charge within 20 days of July 23, 2002, and comply with all other requirements of the Final Order on Appeal as regards the implementation of the second interim water service availability charges.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Stay of Order No. PSC-02-0593-FOF-WU filed by Aloha Utilities, Inc., is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Aloha Utilities, Inc., shall be allowed to continue collecting the interim rates and escrowing the amounts subject to refund and making monthly reports as required by Order No. PSC-01-2199-FOF-WU. It is further

ORDERED that the provisions of Order No. PSC-02-0593-FOF-WU setting new rates and requiring refund of the interim rates is stayed. It is further

ORDERED that those provisions of Order No. PSC-02-0593-FOF-WU which require Aloha to make improvements to Wells Nos. 8 and 9, and then to all its wells, to implement a treatment process designed to remove at least 98 percent of the hydrogen sulfide in its raw water, with such improvements being placed into service by no later than December 31, 2003, shall also be stayed. It is further

ORDERED that the requirement that Aloha Utilities, Inc., submit a plan showing how it intends to comply with the requirement

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to remove hydrogen sulfide, that it implement the five Customer Service Measures, and that it implement the conservation programs described in the Order shall not be stayed. Aloha shall submit the plan within 90 days and implement the five customer service measures within 120 days of July 23, 2002, the date of our vote on the Motion for Stay. It is further

ORDERED that Aloha Utilities, Inc., shall be cautioned to proceed with the pilot project as directed in Orders Nos. PSC-00-1285-FOF-WS and PSC-00-1628-FOF-WS. It is further

ORDERED that the provision for increasing the interim water service availability charge from \$500 to \$1,000 shall not be stayed, and Aloha Utilities, Inc., shall comply with the requirements set out in Order No. PSC-02-0593-FOF-WU for increasing its interim water service availability charges. Aloha Utilities, Inc., shall submit revised tariff sheets reflecting this \$1,000 interim service availability charge within 20 days of July 23, 2002, the date of our vote on this Motion for Stay, and shall also comply with all other requirements of Order No. PSC-02-0593-FOF-WU as regards the interim service availability charges. It is further

ORDERED that this docket shall remain open pending the outcome of the appeal.

By ORDER of the Florida Public Service Commission this 5th day of August, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records and Hearing
Services

(S E A L)

RRJ

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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) 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 the Commission Clerk and Administrative Services, 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.