

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.

DOCKET NO. 020413-SU
ORDER NO. PSC-03-0159-PCO-SU
ISSUED: January 31, 2003

ORDER DENYING REQUESTS FOR ORAL ARGUMENT, DENYING MOTION TO CONFIRM AS FINAL THE APRIL 16, 2002 EFFECTIVE DATE OF REVISED SERVICE AVAILABILITY TARIFF AND MOTION TO STRIKE TESTIMONY ON EFFECTIVE DATE, GRANTING IN PART AND DENYING IN PART REVISED MOTION TO ESTABLISH ISSUES, AND GRANTING MOTION TO STRIKE PORTIONS OF THE PREFILED TESTIMONY OF STEPHEN G. WATFORD RELATING TO POTENTIAL CONTRACT DISPUTE

On January 15, 2003, Adam Smith Enterprises, Inc. (Adam Smith) filed a Motion to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date (Motion to Confirm as Final and Motion to Strike Testimony), along with a Request for Oral Argument on the Motions. Aloha Utilities, Inc. (Aloha or utility) timely filed its Response in opposition thereto on January 22, 2003. On January 16, 2003, Aloha filed a Motion to Establish Issues, along with a Request for Oral Argument on the Motion, and on January 22, 2003, Aloha filed a Revised Motion to Establish Issues, to correct certain scrivener's errors contained in its original Motion. Adam Smith timely filed a Response thereto on January 23, 2003. Finally, on January 17, 2003, Adam Smith filed a Motion to Strike Portions of the Prefiled Testimony of Stephen G. Watford Relating to Potential Contract Dispute (Motion to Strike Portions of Prefiled Testimony). Aloha timely filed its Response in opposition thereto on January 24, 2003. This Order disposes of these filings.

I. Requests for Oral Argument

In its Request for Oral Argument on its Motion to Confirm as Final and Motion to Strike Testimony, Adam Smith submits that the subject motions relate to the determination of the effect of

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Section 120.80(13)(b), Florida Statutes, on the fundamental scope of the proceeding. According to Adam Smith, in view of the significance of the issue, and the important interplay between the mechanisms created by the Administrative Procedure Act, Order No. PSC-02-1250-SC-SU, issued September 11, 2002, in this docket, and the protests filed in this case, oral argument will assist the Commission in determining the legal status of its proposed agency action and the issues remaining to be litigated.

In its Request for Oral Argument on its Motion to Establish Issues, Aloha states that oral argument would allow the Commission to more completely understand the arguments presented by both Adam Smith and Aloha and thereby assist the Commission in reaching a just and reasonable decision in this matter.

Ruling

Because I do not find it necessary to hear oral argument with respect to the above-identified Motions in order to comprehend and evaluate the issues at hand, Adam Smith and Aloha's separate Requests for Oral Argument are denied.

II. Motion to Confirm as Final and Motion to Strike Testimony

In its Motion to Confirm as Final the April 16, 2002, effective date of Aloha's revised service availability tariff, Adam Smith argues that the April 16, 2002, date proposed by Order No. PSC-02-1250-SC-SU was not protested and therefore became final and effective by operation of law. Section 120.80(13)(b), Florida Statutes, states that "[n]otwithstanding Subsection 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Adam Smith cites to various orders which reference this language, in which the Commission has declined to address issues that were not included in a party's protest.

Adam Smith points out that in Order No. PSC-02-1250-SC-SU, by proposed agency action (PAA), the Commission required Aloha to submit a replacement tariff sheet and determined the effective date of Aloha's revised service availability tariff to be April 16, 2002. That decision was based on undisputed facts concerning the

date on which Aloha substantially accomplished written notice of the revised service availability charge to affected developers and builders. The Order required any protests to the PAA components to be filed by October 2, 2002. The proposed effective date, the proposed imputation of contributions-in-aid-of-construction (CIAC), and the proposed "backbilling authority" were treated as separate and distinct subjects in the PAA.

Adam Smith argues that in its protest to the Order, Aloha challenged only the proposed imputation of CIAC, and Adam Smith protested the Commission's decision to allow Aloha to apply the higher service availability charge "retroactively." No party protested the proposed tariff effective date. Therefore, the April 16, 2002, effective date became final by operation of law. By belatedly attempting to treat the tariff effective date as an issue, Aloha is trying to enhance its litigation position and alter the posture of the Commission's PAA. Aloha's attempt is improper, illegal, and of no effect. According to Adam Smith, neither Aloha, nor any other party, nor the Commission can now attempt to challenge or revise the April 16, 2002, effective date for the purpose of anticipating or avoiding issues or infirmities associated with the interplay between the April 16, 2002, effective date and the Commission's other proposed actions. Adam Smith requests that the Commission enter an order confirming that the effective date of Aloha's revised service availability tariff is April 16, 2002.

Moreover, for the reasons stated in its Motion to Confirm as Final, Adam Smith moves for an order striking page 13, line 5, through page 16, line 2, from the prefiled testimony of Aloha witness Stephen Watford submitted on January 6, 2003. This testimony advocates a different effective date other than April 16, 2002.

In its Response to the Motions, Aloha states that Adam Smith correctly cites to Section 120.80(13)(b) for the proposition that the Commission may only address the issues in dispute when a hearing is requested in response to a PAA order, and that all other proposed actions are deemed stipulated. However, Aloha disagrees that a hearing on a proposed action of the Commission may only address the issues raised by the parties in their petitions for hearing. Were this so, the Commission would be unable to raise

issues itself that it found were necessary to fully and fairly resolve the matters before it. The Commission has specifically reserved this right in Order No. PSC-02-1460-PCO-SU (Order Establishing Procedure), issued October 23, 2002, in this docket. That Order states that the "scope of this proceeding shall be based upon the issues raised by the parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission."

Aloha argues that this reservation of authority has been recognized by the Commission in orders interpreting Section 120.80(13)(b), in which the Commission has found that that Section does not limit the Commission's discretion to address all issues that it determines to be relevant to a full resolution of a case when the initial PAA order is protested. Specifically, Aloha cites to Orders Nos. PSC-97-0860-PCO-TL, issued July 16, 1997, in Docket No. 970281-TL; and PSC-00-1549-PCO-WS, issued August 25, 2000, in Docket No. 990080-WS. Moreover, Aloha states that it identified the effective date of the service availability tariff as an issue at the first issue identification meeting of the parties and staff on October 8, 2002, and the issue was included in staff's preliminary list of issues distributed on December 18, 2002, at the second issue identification meeting held in this docket. Aloha further states that there is no question that the imputation of CIAC associated with the uncollected higher service availability charges and the ability to backbill for those charges are at issue in this case. According to Aloha, it is impossible to segregate the tariff effective date from either of those issues. The very inconsistencies raised by Adam Smith between an effective date of April 16, 2002, and both the imputation of CIAC and backbilling demonstrate that the effective date is intrinsic to both issues. Aloha argues that because the effective date of the service availability tariff is properly at issue in this proceeding, Adam Smith's Motion to Confirm as Final and Motion to Strike Testimony must be denied.

Ruling

Adam Smith correctly points out that no party has raised as an issue in dispute the proposed decision concerning the tariff effective date. This Commission has found in the past that Section 120.80(13)(b), Florida Statutes, is designed to limit the parties

to the issues presented by the protests in order to prevent them from litigating issues that the Commission already decided and that were not protested. See Order No. PSC-00-1549-PCO-WS. For this reason, in many instances, this Commission has declined to address issues at hearing which were not included in any party's protest. Adam Smith is correct that those issues which are not in dispute are deemed stipulated and become final by operation of law.

Nevertheless, Adam Smith is not correct that this Commission does not have the discretion to include the effective date of the tariff as an issue in this case. As Aloha points out, Section 120.80(13)(b) is not designed to prevent the Commission from addressing matters it deems necessary to a full resolution of the case in the manner it deems appropriate. I find that the effective date of Aloha's service availability tariff is integral to the issues raised in the parties' protests, and that it is necessary to address the issue in order to fully and appropriately resolve this case. Adam Smith's Motions to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and to Strike Testimony on Effective Date are therefore denied.¹

III. Motion to Establish Issues

In its Motion to Establish Issues, Aloha advises that after two issue identification meetings, the parties continue to be in disagreement about the exact wording to be used in phrasing the issues of this case. Aloha proposes the following wording for the issues:

Legal Issues

1. Does the Commission have the statutory authority to authorize Aloha Utilities, Inc. to collect from developers \$1,650 per equivalent residential

¹It is noted that in Aloha's Motion to Establish Issues, which is the subject of Section III of this Order, Aloha provides further argument for the inclusion of the tariff effective date as an issue, and in its response thereto, Adam Smith provides further argument for its exclusion. This ruling obviates the need to address those arguments.

connection and \$12.79 for other connections made during the period of May 23, 2001 through April 16, 2002?

2. Does the imputation of CIAC on Aloha's books in the amount of the uncollected wastewater service availability charges without authorizing Aloha to collect these charges constitute an unconstitutional taking and/or a penalty?

Factual Issues

3. If the Commission has the statutory authority to do so, should Aloha Utilities, Inc. be authorized to collect from developers \$1,650 per equivalent residential connection and \$12.79 for other connections made during the period of May 23, 2001 through April 16, 2002?

4. Is it appropriate to impute CIAC on Aloha's books for the uncollected wastewater service availability charges which should have been collected from May 23, 2001 through April 16, 2002, and if so, in what amount?

Moreover, Aloha requests that the effective date of the service availability tariff be established as an issue in this proceeding.

In addition to providing further argument as to why the effective date of the tariff should not be at issue in this case,² with respect to Aloha's proposed rewording of issues, Adam Smith objects to Aloha's effort to delete all references to the prior and

²Adam Smith's argument that in establishing the April 16, 2002 effective date, the Commission took into account that Aloha failed to file the tariff for close to one year, that it sought and received from staff an administrative "backdating" of a March 2002 tariff based on the representation that it had been collecting the higher charges, that it had never provided notice to affected developers/builders or collected the higher charge, etc., can appropriately be included in Adam Smith's position that the effective date of the tariff should be April 16, 2002.

current wastewater service availability tariffs, which references were included in a preliminary list of issues proposed by staff. Adam Smith argues that the crux of this case is the fact that Aloha had in place during the period May 23, 2001 through April 16, 2002, a valid tariff that specified a charge of \$206.75 per ERC, and wants now to apply to the same period a revised, higher charge found in a new tariff. According to Adam Smith, with Aloha's proposed language, Aloha hopes to obscure the fundamental facts of the case by deleting all references to former and later tariffs and substituting a single dollar amount it wants to collect. The issues should be framed to include references to the tariff that was in place and the tariff that Aloha filed a year later.

Adam Smith proposes the following issue wording for this case:

1. Where Aloha had applied, during May 23, 2001-April 16, 2002, the service availability charge of \$206.75/ERC contained in the tariff that was in place and effective during that time frame, may the Commission legally authorize Aloha to collect from developers/builders, for connections made between May 23, 2001-April 16, 2002, the difference between the \$206.75/ERC charge and the \$1650/ERC service availability charge of the revised tariff that became effective on April 16, 2002?
2. In the event the Commission determines it has legal authority to allow Aloha to apply the \$1650/ERC charge made effective on April 16, 2002 to connections that occurred prior to that date, should it authorize Aloha to do so under the facts and circumstances of this case?

In the alternative, if Adam Smith's wording is not used, Adam Smith proposes that staff's formation of the issues should be used, modified to refer to "developers/builders" rather than simply to "developers," to avoid any inference that the party responsible for a service availability charge applicable to a given lot is necessarily a "developer." Thus, the list of issues would read:

Legal Issues

1. Does the Commission have the legal authority to permit Aloha Utilities, Inc. to collect from

developers/builders the difference in the prior and current wastewater service availability tariffs for the period May 23, 2001 through April 16, 2002?

2. Would the imputation of CIAC on the utility's books in the amount of the uncollected service availability charges without authorizing the utility to collect these charges from developers/builders constitute a taking and/or a penalty?

Factual Issues

3. If the Commission has the legal authority to do so, should Aloha Utilities, Inc. be allowed to collect from developers/builders the difference in the prior and current service availability tariffs for the period May 23, 2001 through April 16, 2002 under the facts of this case?

4. Should CIAC be imputed on the utility's books for the uncollected service availability charges which should have been collected from May 23, 2001 until April 16, 2002, and if so, in what amount?

Ruling

Because the parties are unable to agree among themselves as to the wording of the issues, and for the sake of efficiency, this Order sets forth the issues of this case. The following issues shall be the subjects of the hearing scheduled in this docket and shall be included in prehearing statements:

Legal Issues

1. With respect to connections made to Aloha's Seven Springs wastewater system during the period of May 23, 2001 to April 16, 2002, does the Commission have the legal authority to authorize Aloha to collect from developers/builders the difference between Aloha's prior \$206.75 per ERC service availability charge and its current service availability charges of \$1,650 per ERC and \$12.79 per gallon for non-residential connections?

2. Does the imputation of CIAC on Aloha's books in the amount of the uncollected wastewater service availability charges without authorizing Aloha to collect these charges from developers/builders constitute an unconstitutional taking and/or a penalty?

Factual Issues

3. If the Commission has the legal authority to do so, should Aloha be authorized to collect from developers/builders the difference between its prior \$206.75 per ERC service availability charge and its current service availability charges of \$1,650 per ERC and \$12.79 per gallon for non-residential connections, for connections made to its Seven Springs wastewater system during the period of May 23, 2001 to April 16, 2002?

4. Should CIAC be imputed on Aloha's books for the uncollected wastewater service availability charges which should have been collected from May 23, 2001 through April 16, 2002, and if so, in what amount?

5. What should be the effective date for Aloha's current service availability tariff for its Seven Springs wastewater system?

Accordingly, Aloha's Motion to Establish Issues is granted in part and denied in part.

IV. Motion to Strike Portions of Prefiled Testimony

In its Motion to Strike Portions of Prefiled Testimony, Adam Smith moves to strike page 4, line 21, through page 13, line 4 of the prefiled testimony of Aloha witness Watford. Mr. Watford proffers opinions and arguments concerning Aloha's interpretation of the developer agreement between Aloha and Adam Smith. Adam Smith argues that the subject of the testimony, a potential contractual dispute between Aloha and Adam Smith, involves contract interpretations, claims of breach of contract, and claims for damages. As such, the matter would fall within the jurisdiction of a circuit court.

In its protest, Adam Smith noted that Aloha was attempting to collect from Adam Smith the differential in charges pertaining to many lots that Adam Smith had sold to others prior to the time they were connected to Aloha's system. Adam Smith states that during an informal issue identification meeting conducted on December 18, 2002, Adam Smith proffered, as a proposed stipulation of law, the proposition that any responsibility for an increase in service availability charges belongs to the entity that owns the lot at the time of connection. In response, Aloha orally asserted that the developer agreement between Aloha and Adam Smith places a contractual obligation on Adam Smith to pay any and all increases in service availability charges applicable to a given lot, whether or not Adam Smith owned the subject property at the time the lot is connected to Aloha's system. Adam Smith argues that the dispute over the interpretation of the developer agreement to which Aloha's contention gives rise would fall under the jurisdiction of the judiciary, not the Commission.

Moreover, according to Adam Smith, the subject of the testimony is not in the nature of a challenge to an action proposed by the Commission in the PAA portions of Order No. PSC-02-1250-SC-SU. When the Commission proposed to authorize Aloha to try to collect the differential in charges from developers and builders, it did not contemplate that it would referee individual disputes between Aloha and dozens of entities regarding the details of their relationships and the extent of the liability of each under their contractual arrangements.

Finally, Adam Smith argues that the testimony is largely in the nature of improper legal argument. Mr. Watford is a fact witness, yet he opines on the import of H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913 (Fla. 1979), to the proceeding. Mr. Watford is not an attorney, nor is his testimony limited to a layman's understanding and application of the law to the business he operates. Moreover, such legal arguments belong in post-hearing briefs, not in evidence to be received at hearing.

Aloha responds that in its protest, as a "disputed issue of material fact," Adam Smith identified "Whether Adam Smith transferred title to certain lots during the period May 23-April 16, 2002 prior to service being taken, such that responsibility for payment of any applicable service availability charges now rests

with the purchasers of such lots." Moreover, Aloha argues that it stands to reason that if backbilling is at issue in this case, the entities or persons who should, or can, be backbilled is also at issue. Aloha believes that it is entitled to file testimony in support of its position that developers and builders who have prepaid service availability charges pursuant to developer agreements should be the entities backbilled. According to Aloha, the developer agreement entered into between Aloha and Adam Smith is both material and relevant to this point and appropriately considered by the Commission.

With respect to Adam Smith's argument that the Commission does not have the authority to construe the terms of a contract, Aloha responds that the issue is whether Adam Smith is required to pay additional service availability charges at the time of connection for lots for which it has already prepaid a service availability charge. In other words, Aloha is asking the Commission to determine the charges that should be imposed on Adam Smith. Aloha is not asking the Commission to interpret the developer agreement per se, but to implement Aloha's service availability charges as proposed. Even if one were to characterize this regulatory request as in interpretation of the developer agreement, pursuant to H. Miller & Sons, the Commission has the ability to do so and to modify that agreement in the interest of the public.

Aloha further argues that every builder and developer will have the amount of CIAC that it owes determined in this proceeding, since Aloha has protested the imputation of CIAC and the amount of CIAC to be imputed if imputation is appropriate. According to Aloha, the amount of CIAC to be imputed is directly linked to the amount of service availability charges which should have been paid by developers and builders from May 23, 2001 until April 16, 2002.

Finally, with respect to Adam Smith's argument that Mr. Watford's testimony consists of improper legal argument, Aloha responds that Mr. Watford has been qualified as an expert in the field of "water and wastewater utility management." As a utility manager, Mr. Watford is required to both understand and apply Commission and judicial decisions affecting the water and wastewater industry. His statements reflect his understanding of these decisions.

Ruling

It is apparent from a review of the filings that the parties dispute whether any responsibility for paying the uncollected amounts of service availability charges in question belongs to the entity that owned the lot at the time of connection, typically the builder, or to the entity that prepaid service availability charges prior to the connection, often the developer. That dispute goes beyond the issues of this case as identified herein.

Aloha argues that each builder and developer will have the amount of CIAC that it owes determined in this proceeding because of the fact that the amount of CIAC to be imputed is directly linked to the amount of service availability charges which should have been collected during the time in question. That is simply not the case.³ For example, one potential outcome of this proceeding is that Aloha could be ordered to impute 100% of the uncollected amounts on its books as CIAC, even if backbilling is not authorized at all. If backbilling is authorized, it will be incumbent upon Aloha to determine from which entities and in what amounts it should have collected the increased service availability charges had it correctly charged them in the first place, and to backbill those entities accordingly.

Although this Commission does not have the authority to resolve disputes over contract interpretation, the Commission certainly may consider, evaluate, approve, and even, when deemed to be in the public interest, preempt them. Nevertheless, the testimony in question concerns which entities Aloha should backbill if backbilling is authorized. The testimony is irrelevant to the issues of this case. For this reason, Adam Smith's Motion to Strike Portions of the Prefiled Testimony of Stephen G. Watford Relating to Potential Contract Dispute is granted.

³As Adam Smith pointed out in its Response to Aloha's Motion to Establish Issues, during the August 20, 2002 agenda conference, Aloha argued that this docket is not the appropriate venue for a determination of the amount that a particular developer owes Aloha.

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Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason as Prehearing Officer, that Adam Smith Enterprises, Inc.'s Request for Oral Argument is denied. It is further


ORDERED that Aloha Utilities, Inc.'s Request for Oral Argument is also denied. It is further

ORDERED that Adam Smith Enterprises, Inc.'s Motion to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date are denied. It is further

ORDERED that Aloha Utilities, Inc.'s Revised Motion to Establish Issues is granted in part and denied in part, as set forth in the body of this Order. The parties are directed to adhere to the issues as set forth in the body of this Order. It is further

ORDERED that Adam Smith Enterprises, Inc.'s Motion to Strike Portions of the Prefiled Testimony of Stephen G. Watford Relating to Potential Contract Dispute is granted. Accordingly, Page 4, line 21, through page 13, line 4 of the prefiled testimony of Mr. Watford shall be stricken.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 31st day of January, 2003.



J. TERRY DEASON
Commissioner and Prehearing Officer

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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.