BEFORE THE 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-04-1050-FOF-WU ISSUED: October 26, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

FINAL ORDER REQUIRING ADDITIONAL REFUNDS

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. At issue here is the refund of interim rates collected in the Seven Springs service area while the Commission's Final Order was on appeal. For the reasons discussed below, we find that Aloha is required to refund to its customers the remainder of the interim increase collected while our Final Order was pending before the First District Court of Appeal (First DCA). We base our decision on the principle of fundamental fairness that Aloha should not benefit from the higher interim rates it collected while our order was on appeal. The intent of our Final Order was clear – Aloha was not entitled to any increase under final rates. Fairness dictates that Aloha refund to its customers all of the interim increase collected after this Commission entered its Final Order, which was upheld on appeal.

We approved a 15.95% interim increase, subject to refund with interest, by Order No. PSC-01-2199-FOF-WU (Interim Rate Order), issued November 13, 2001. Aloha began collecting interim rates as of January 2002, and the 15.95% interim increase was secured by the utility's deposit of all monthly interim revenues in an escrow account through July 31, 2003.

Final rates were set by Order No. PSC-02-0593-FOF-WU (Final Order), issued April 30, 2002. Among other things, we denied a revenue increase, set a two-tiered inclining block rate structure, increased plant capacity charges, and required certain plant improvements. In that Order, we also established the interim refund methodology and required the utility to make an interim refund of 4.87% as set out below:

> According to Section 367.082(4), Florida Statutes, any refund must be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect should be removed.
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> In this proceeding, the test period for establishment of interim rates was the twelve months ended June 30, 2001. The test year for final rates purposes was the projected year ended December 31, 2001. The approved interim rates did not include any provisions or consideration of pro forma adjustments in operating expenses or plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings. Included in the interim test year were three months of expenses for purchased water from Pasco County.
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> To establish the proper refund amount, we calculated a revised interim revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded, because it was not an actual expense during the interim collection period. Aloha did not purchase water from Pasco County during the interim collection period. The interim collection period is from November 13, 2001 to the date that Aloha implements the final rates approved.
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> Using the principles discussed above, we calculated the interim revenue requirement from rates for the interim collection period to be $1,914,375. This revenue level is less than the interim revenue of $2,009,292, which was granted in Order No. PSC-01-2199-FOF-WU. This results in a 4.87% refund of interim rates, after miscellaneous revenues have been removed.

Final Order, pps. 90-91.

The utility appealed our Final Order to the First DCA, and sought a stay while the decision was under appellate review. Neither the above methodology nor the 4.87% refund was raised as an issue on appeal. By Order No. PSC-02-1056-PCO-WU (Stay Order), issued August 5, 2002, we granted in part and denied in part the utility's Motion for Stay. Pending the outcome of the appeal, we stayed the setting of the new rate structure, as well as the interim refund and certain plant improvement requirements. The First DCA affirmed our Final Order on May 6, 2003, Aloha Utilities v. Florida Public Service Commission, 848 So. 2d 307 (Fla. 1st DCA 2003), and subsequently denied the utility's Motion for Rehearing on June 12, 2003. The First DCA issued its mandate on June 30, 2003. As a result, the appellate review process is complete and all provisions of the Final Order are now final and effective.

The Final Order established the interim refund methodology for interim rates collected between the time the interim and final orders were entered (rate case period). The parties dispute

whether the Final Order addressed the appropriate refund amount for the interim rates collected while the Final Order was on appeal (May 2002 – July 2003) (the appeal period). The utility collected interim rates for a 19-month period, from January 2002 through July 2003. The first four months were during the rate case period, and the remaining 15 months were during the appeal period. On or about September 10, 2003, the utility completed the 4.87% interim refunds required by the Final Order for the rate case period, and also refunded 4.87% for the appeal period. Recognizing that Aloha had made this 4.87% refund without using funds from the escrow account, we released $153,510 from the escrow account to Aloha by Order No. PSC-03-1410-FOF-WU, issued December 15, 2003.

By Proposed Agency Action Order PSC-04-0122-PAA-WU (PAA Refund Order), issued February 5, 2004, we proposed to require Aloha to make additional refunds of approximately $278,000 for the appeal period. This amount represented the additional revenues from the interim rates collected during the appeal period, less the 4.87% already refunded by Aloha. This decision never became final because, on February 26, 2004, Aloha protested the PAA Refund Order, requested a formal evidentiary proceeding, and requested that the petition be transferred to the Division of Administrative Hearings (DOAH) (Aloha's Petition). Aloha raised five issues concerning our decision to require additional refunds. Because there appeared to be no disputed issues of material fact, we denied Aloha's request for a Section 120.57(1) formal evidentiary proceeding in Order No. PSC-04-0614-PCO-WU, issued June 21, 2004. We instead directed the matter be set for an informal proceeding pursuant to Section 120.57(2), Florida Statutes, and required briefs to be filed by July 1, 2004, on the issues raised by Aloha. As a result, Aloha's request for the case to be transferred to DOAH became moot.

Aloha and the Office of Public Counsel (OPC) filed briefs on July 1, 2004. Aloha also requested oral argument on the issues raised in its brief. In addition, on July 12, 2004, Aloha filed a motion requesting the Commission to convert the informal proceeding into a formal evidentiary hearing arguing that OPC's brief raised disputed issues of material fact. Aloha also renewed its request that the matter be transferred to DOAH. Aloha did not request oral argument on this motion.

This Order addresses Aloha's July 12, 2004, motion for a formal hearing and the final disposition of the remaining interim revenues collected during the appeal period. We decided against hearing oral argument, and our decisions herein are based on the written arguments filed by the parties. We have jurisdiction pursuant to Sections 367.081 and 367.082, Florida Statutes.

ALOHA'S MOTION TO TERMINATE INFORMAL PROCEEDING AND TRANSFER THIS PROCEEDING TO DOAH

When Aloha filed its Petition and protested our PAA Refund Order, the utility argued that a formal evidentiary hearing was warranted and requested that the matter be transferred to DOAH. By Order No. PSC-O4-0614-PCO-WU, we found that Aloha's Petition did not demonstrate disputed issues of material fact and set the matter for an informal proceeding and

established a briefing schedule. Aloha claims that the arguments raised in the briefs demonstrate the existence of disputed issues of material fact. Aloha also argues that Rule 28-106.305(2), Florida Administrative Code, requires the termination of an informal proceeding when disputed issues of material fact arise, so that a formal proceeding can be conducted, unless waived by the parties. Aloha states that it does not waive its right to a formal administrative hearing, and requests that we terminate the informal proceeding, convene a formal proceeding, and transfer the matter to DOAH.

According to Aloha, OPC's brief shows the existence of the following disputed issues of material fact:

1. In Section C of its brief, OPC disputes the factual assertions made in Aloha's petition regarding the revenues collected during the appeal period and the revenues which would have been collected under the approved rate structure;
2. In Section D of its brief, OPC disputes Aloha's claim that there was only a 4.08% difference between interim rates and final rates. Also, OPC's statement that Aloha did not need any increase to make it whole is a disputed issue of material fact; and
3. In Section E of OPC's brief, OPC disputes Aloha's statement that in all prior cases the Commission has allowed a utility to continue collecting the interim rates and any ultimate refund was based upon the requirements of the original order.

In addition, Aloha argues:

> Two of the prime material issues in this case are whether and to what extent, if any, Aloha received more revenues from the collection of interim rates during the appeal period than authorized by the PSC's Final Order dated April 30, 2002, and whether the PSC's proposed agency action constitutes a shift or change in established PSC policy, practice and procedure.

Concerning whether Aloha collected more revenues than authorized, Aloha alleges that OPC disputes the "factual assertions made in Aloha's Petition regarding the relationship between the revenues collected during the appeal period and the revenues which would have been collected under the rate structure approved in the" Final Order. Also, Aloha alleges that OPC's statement that "Aloha did not need any increase to make it whole," raises a disputed issue of material fact.

In response, OPC states that it has not "disputed the factual accuracy of those calculations," but, instead, "has presented arguments about the relevance of that information." Upon review, we find that OPC does not take issue with Aloha's claim that there is a 4.09% difference in revenues collected under interim rates as opposed to those revenues collected under the approved final rates. OPC suggests that one possible explanation for the difference may be

that final rates, which were designed to reduce consumption, were not implemented, and consumption remained higher than anticipated by the Final Order, i.e., the repression of usage was not realized and higher revenues than anticipated were collected. OPC notes that "a revenue-neutral rate design shift cannot be achieved with absolute perfection," and concludes that "Aloha's application of the new rate structure to actual usage that occurred under the old rate structure does not provide any meaningful analysis."

OPC also notes that the Final Order established two distinct actions: first, the Commission found that Aloha was not entitled to any rate increase, and, second, to encourage conservation, this Commission imposed a revenue neutral rate structure shift. OPC then reaches the legal conclusion that Aloha was already "whole" before the implementation of any interim rates, and, therefore, even with the refund of the entire interim rates, the utility would remain "whole." OPC argues that the Final Order determined that Aloha did not need any revenue increase over what was being produced by the original rates to make it whole. Because "Aloha was never entitled to any interim rate increase," "equity would have dictated that the 15.95% should have been refunded for the entire time that it was collected." OPC further notes that, based on administrative finality, this Commission required no further refunds for the rate case period. Because that part of the decision was final, no further discussion concerning the disposition of refunds for the rate case period is appropriate.

Aloha argues that OPC's statement that "Aloha did not need any increase to make it whole" shows that there is a disputed issue of material fact. We specifically stated in our Final Order that the revenue requirement represented "neither an increase nor a decrease." p. 80 We also stated that the revenue requirement had not increased. p. 85 OPC's statement that "Aloha did not need any revenue increase" to make it whole is a legal conclusion made in accordance with our Final Order. Accordingly, we find the issues about the differences between interim and final rates and whether the utility was made whole do not raise disputed issues of material fact.

Finally, Aloha states that it "disputes the factual allegation that this case is so factually distinguishable from prior cases pertaining to refunds of interim rates as to render the PSC's prior established policy, practice and procedures inapplicable." Aloha also notes that OPC disputes "Aloha's central contention that the procedure which Aloha seeks 'has been implemented in all prior cases.'" Aloha characterizes this dispute as a factual dispute.

OPC disagrees and argues that "to properly apply precedent, one must examine only those prior cases which have identical or analogous relevant circumstances." Moreover, OPC notes that Aloha has made "a blanket assertion about the PSC's precedent," and that as in any appellate brief, the assertions about applicable precedent do not require factual testimony, but are legal arguments appropriate for briefing.

In Aloha's original Petition requesting a formal hearing, Aloha alleged that the PAA Refund Order requiring additional refunds conflicted with and was "contrary to the PSC's prior agency practices, procedures, and policies," and that the Commission "had not explained or

justified its abrupt change in this procedure or policy." In its Motion to Terminate Informal Proceeding, Aloha argues that "the PSC is required to explain that policy and Aloha is entitled to present countervailing evidence in a trial-type hearing. McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977)." Our understanding of McDonald, however, is that trial type hearings should be provided only when disputed issues of material fact are present.

McDonald did state that the Administrative Procedures Act (APA) requires proof of incipient policy, permits countervailing evidence and argument, and requires an agency to explain the exercise of its discretion. In its original petition on proposed agency action, Aloha argued that the alleged change in policy required a formal hearing. We rejected this argument and found that all the issues raised by Aloha raised no disputed issues of material fact, but were mixed questions of policy and law. Therefore, we concluded that any claimed change in policy could be addressed in an informal proceeding. A review of the briefs shows that nothing has changed since we reached this conclusion. Aloha has failed to show that there is a disputed issue of material fact -- all issues remain mixed issues of policy or law.

Based on the above, we find that Aloha merely reiterates the points it previously made in its original petition, and has raised no new points in its Motion to Terminate Informal Proceeding that show the existence of any disputed issues of material fact. In addition, OPC does not believe that it raised any disputed issues of material fact. Accordingly, we deny Aloha's Motion to Terminate Informal Proceeding, and proceed with the informal proceeding, as discussed below.

APPROPRIATE REFUND AMOUNT FOR THE APPEAL PERIOD MAY 1, 2002, THROUGH JULY 31, 2003

The ultimate question here is whether Aloha must make an additional refund for the interim rates it collected while our Final Order was on review at the First DCA. In making our decision, we must keep in mind that the file and suspend law "was designed to provide accelerated [rate] relief without sacrificing the protections inherent in the overall regulatory scheme." Florida Power Corporation v. Hawkins, 367 So. 2d 1011, 1013 (Fla. 1979). Interim rates, which are one aspect of this scheme, were designed "to make a utility whole during the pendency of the proceeding without the interjection of any opinion testimony." Citizens v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983).

Section 367.082, Florida Statutes, governs the setting of interim rates for water and wastewater utilities. According to paragraph (2) (a), interim rates must be designed to bring the utility up to the minimum of its last authorized rate of return. Subsection (4) sets forth guidelines for the determination of any interim refund, which include the following:

> Any refund ordered by the commission shall be calculated to reduce the rate of return of the utility or regulated company during the pendency of the proceeding

> to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis . . . .

In reaching the ultimate question, it is appropriate to address the following five issues raised by Aloha concerning whether additional refunds are required:

1. Whether the PSC's Final Order is binding and conclusive on the issue of refunds;

2. Whether the PSC Order granting a stay along with its Final Order, estops the PSC from changing its position concerning refunds;

3. Whether Aloha has already refunded more money to its customers than was necessary to bring its revenue requirement to the level established in the Final Order, adjusted in accordance with standard Commission practice during the "interim collection period;"

4. Whether the PAA Refund Order results in a windfall to Aloha's customers to the extreme detriment of Aloha; and

5. Whether the directives and statements contained within the PAA Refund Order conflict with and are contrary to the PSC's prior agency practices, procedures, and policies.

By Order No. PSC-04-0614-PCO-WU, issued June 21, 2004, we required the parties to address the above issues in their briefs. Each of the original issues and Aloha's and OPC's positions are discussed in turn below.

1. Whether the PSC's Final Order is Binding and Conclusive on the Issue of Refunds

In the PAA Refund Order, we concluded that the Final Order "did not address the refund amount for the interim rates collected while the appeal was pending (May of 2002 through July of 2003)(the appeal period)." Aloha argues that this conclusion is contrary to the wording of the Final Order, which determined an appropriate refund amount of 4.87% for the "interim collection period" which was defined as the "period from November 3, 2001 to the date Aloha implements the final rates approved." Aloha argues that final rates were not implemented until August 2003, when the stay was lifted and the First DCA issued its mandate. According to Aloha, "a stay simply maintains the status quo pending appellate proceedings," and "does not interfere with what has already been done." Upon the issuance of the First DCA's mandate, Aloha argues that the Final Order became effective and set forth the amount to be refunded. Aloha concludes that separating out the 15-month appeal period and establishing "a new and different methodology and rate of refund" constituted "an unlawful modification of the Final Order."

Aloha also argues that the Final Order's new revenue requirement required a 4.87% refund. According to Aloha, there is nothing in the Final or Stay Orders that provide for one revenue requirement for the rate case period, a lower revenue requirement for the appeal period, and a different revenue requirement for the time the final rates are collected prospectively after the mandate was issued. Aloha further notes that while it refunded 4.87%, there was actually a 4.09% difference between what was collected under the interim rates and what would have been collected under the final rates.

OPC states that it is "astonished" that Aloha took the position that the Final Order could not be modified in light of Aloha's request, which we granted, that the Final Order be modified to eliminate the requirement to remove 98% of the hydrogen sulfide in Aloha's water provided to customers. OPC states that it brings out this point not because it believes that the PAA Refund Order actually modifies the Final Order, but to "highlight Aloha's diametrically inconsistent positions" and the "disingenuousness of Aloha's current position." OPC argues that the PAA Refund Order "identifies the appeal period as a different time frame than the rate case period identified in the" Final Order.

It is undisputed that the Final Order states: "The interim collection period is from November 13, 2001 to the date that Aloha implements the final rates approved." In addition, the calculation of the correct refund amount was not the subject of any appeal. When we set the final rates, we neither contemplated nor made any provision for what would happen in the event of an appeal. Section 367.082(1), Florida Statutes, provides that "[t]he commission may, during any proceeding for a change of rates, . . . authorize the collection of interim rates until the effective date of the final order." The statute contemplates that interim rates would be collected only through the date of the issuance of a final order. This subsection also provides that "interim rates may be based upon a test period different from the test period used in the request for permanent rate relief."

In this case, the interim test period was the historical test year ending June 30, 2001, and the permanent test period was the projected test year ending December 31, 2002. Based on the different test periods, certain expenses such as rate case expense (not allowed in interim) and purchased water costs (in the interim period but not in the period for permanent rate relief) could make the revenue requirements for the two periods diverge, as happened here. Even though we granted no permanent rate increase, using the formula set out in the Final Order, we determined that there was a 4.87% refund requirement for interim rates. We entered our Final Order on April 30, 2002, and it was Aloha's actions that delayed implementation of the final rates for an additional 15 months.

When we set final rates that are affirmed on appeal, instruction concerning the disposition of any refunds can be found in GTE Florida v. Clark, 668 So. 2d 971, 973 (Fla. 1996) and Village of North Palm Beach v. Mason, 188 So. 2d 778, 781 (Fla. 1966). Although, Aloha argues that these cases only pertain to erroneous Commission orders, we disagree. We find that

both GTE and Mason are applicable when, for whatever reason, the charging of the appropriate rates has been delayed. In Mason, when deciding whether to allow the utility to collect higher rates that it was entitled to under a defective order that had been entered two years earlier, the Supreme Court stated that if the "case had involved an order decreasing rates it would be equally inequitable to allow the utility to continue to collect the old and greater rates for the period between the entry of the first and second orders." Id. (quoted in GTE at 973.) The Supreme Court concluded in GTE that the company's customers should not benefit and receive a windfall from an erroneous Commission order. Similarly, Aloha should not benefit and receive a windfall from its unsuccessful appeal of our Final Order. Our decision that Aloha was not entitled to a revenue increase was upheld on appeal. Therefore, our decision that no revenue increase was warranted was correct as of the date of that Final Order – April 30, 2002. It would be inappropriate and inequitable to allow Aloha to keep any of the 15.95% increase it collected over the 15-month appeal period.

Aloha has calculated a 4.09% difference between the interim and final rates. It is unclear why the difference would be 4.09% versus the expected 15.95% interim increase amount. However, ratemaking is not perfect, and there are a multitude of variables, including repression, that could have changed the expectant resulting revenue. The cause of any difference or the existence of any difference is irrelevant here, because if Aloha had implemented the approved final rates during the appeal period, no one could argue that any further refund would be due today. However, Aloha did not implement the final rates affirmed by the court during the appeal period; instead, it continued to collect the 15.95% interim increase. By appealing the Final Order, Aloha caused the delay in collecting final rates. It is fitting that Aloha refund the 15.95% interim increase that was collected during the appeal period. Such a refund is consistent with the purpose of interim rates, which is to provide utilities with a "quick and dirty" means to obtain immediate financial relief while a rate case is pending. Aloha received the immediate relief as intended by the interim statute while the case was pending before this Commission. Aloha should not be allowed to benefit from its appeal when the court unequivocally affirmed our finding that Aloha was not entitled to any prospective increase.

We believe that this analysis is similar to the analysis used in awarding post judgment interest after a judgment has been appealed and any monetary award has been stayed pending the appeal. If the monetary award is upheld on appeal, the courts determine that the award was due on the date of the judgment, and award interest for the duration of the appeal. See Amerace Corporation v. Stallings, 823 So. 2d 110 (Fla. 2002). Similarly, the finding that no rate increase was warranted was effective on April 30, 2002, the date of the Final Order, and the full amount of the 15.95% interim increase which Aloha continued to collect from that date forward was not authorized and must be refunded.

The facts of this case are similar to our decision in Order No. 16462, which was issued on August 12, 1986, in Docket No. 830059-WS, In Re: Application of Spring Hill Utilities, a division of Deltona Utilities, Inc., for increased water and sewer rates and charges to its

customers in Hernando County, Florida. In Spring Hill, this Commission granted interim revenue increases designed to produce annual operating revenues of $1,081,084 (a $202,270 increase) for water, and $957,752 (a $397,943 increase) for wastewater. The final rates set post-hearing were designed to produce less water revenues than the original water rates. The final order established a $856,901 revenue requirement for water, which represented a $21,913 decrease for water over adjusted test year revenues. The utility appealed and requested a stay. In fashioning the stay, this Commission determined that the final revenue requirement for water was $224,183 less than what the utility was currently collecting in interim rates, and yet only $202,270 was subject to refund. This Commission determined that the $202,270 amount "was the maximum amount that the utility could be ordered to refund through the effective date of" the final order. While we allowed the utility to continue collecting interim rates, it determined that on a going forward basis from the date of the final order, the amount held subject to refund for water should be the higher $224,183 figure. Similarly, in this case, we determined that the amount to be refunded prior to issuance of the Final Order was only 4.87%. However, after issuance of the Final Order, we determined that the utility was not entitled to any of the 15.95% increase, and yet the utility continued to collect the full 15.95% interim increase. Therefore, as in Spring Hill, we find that the full 15.95% of interim rates subsequent to the issuance of the Final Order must be refunded.

Until we issued our Final Order, we correctly found that the refund for interim rates collected prior to the Final Order should be calculated on the refund methodology set out in the Final Order. However, after issuance of the Final Order, although we allowed Aloha to continue collecting the interim rates, we had made a final determination that as of the date of the Final Order, no revenue increase whatsoever was warranted. Therefore, the full 15.95% interim increase remained subject to refund from that date on. The Final Order neither contemplated nor made a provision for what would happen in the event of an appeal. The Stay Order noted that the Final Order did require Aloha to modify its rate structure such that it would no longer collect the interim increase allowed by the Interim Rate Order. Because the First DCA upheld the finding that Aloha was not entitled to any rate increase, we find that Aloha shall not be allowed to receive a windfall by its continued collection of the 15.95% interim rate increase. Because we did not specifically address the refund methodology for interim rates collected during the appeal period, we find that the Final Order is not binding and conclusive on the issue of refunds for this period.

2. Whether the PSC Order Granting a Stay Along With Its Final Order, Estops the PSC From Changing Its Positions Concerning Refunds

Aloha argues that the doctrines of administrative finality, res judicata, estoppel by judgment (collateral estoppel), and equitable estoppel preclude this Commission from modifying the refund requirements set forth in the Final Order. Aloha relies on the statement in the Final Order that the refund should be 4.87% for all monies collected "during the interim collection period," which was defined as November 3, 2001, to the date Aloha implements the approved

final rates. Aloha emphasizes that no party sought reconsideration or appealed any refund issue from the final or stay orders. According to Aloha, the Final Order specifically dealt with this issue of the appropriate amount of the refund, and Aloha relied on our decision related to this refund issue throughout the stay and appeal proceeding and thereafter.

Aloha argues that under the doctrine of administrative finality, we are precluded from further considering the issue of interim refunds. According to Aloha, the interim rates refund issue was addressed and determined in the Final Order, and "any contrary theories of refund" could have and should have been pursued in the initial proceeding. In support of its argument, Aloha relies on People's Gas System v. Mason, 187 So. 2d 335 (Fla. 1966), which provides that there must "be a terminal point in every proceeding, both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." Aloha concludes that the "terminal point" in this proceeding was the date of the First DCA's mandate, or even the date the Final Order was rendered because no party sought further review of the interim refund issue.

Aloha argues that the "principle of law, *res judicata*, holds that a Final Order bars subsequent litigation between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised." Moreover, Aloha states that "estoppel by judgment [collateral estoppel] is applicable where the two causes of action are different, but the issue common to both causes of action were actually adjudicated in the prior proceeding." Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952), *cert. denied*, 344 U.S. 878, 73 S. Ct. 165, 97 L. Ed. 680 (1952).

In addition, Aloha argues that our reliance on GTE and Mason is misplaced because those cases involved "defective and erroneous" orders of the Commission. Because the Final Order was upheld on appeal, Aloha states that the dictum in Mason "is simply not applicable," and that we may only implement the provisions of the Final Order.

Finally, Aloha argues that based on the above arguments and prior Commission policy and procedure, the Commission is also equitably estopped from now requiring a 15.95% refund for the appeal period. Reedy Creek Improvement District v. Department of Environmental Regulation and Central Florida Utilities, 486 So. 2d 642 (Fla. 1st DCA 1986). According to the utility, it made "business and financial decisions" on its justifiable reliance that the refund would not exceed 4.87%. For the reasons discussed above, Aloha claims that we may not now change the amount to be refunded for the appeal period.

In its brief, OPC states that it does "not know what issue Aloha is raising here," but notes that Aloha "complains that it 'relied on the Commission's decision related to this refund issue throughout the stay and appeal proceeding and thereafter.'" OPC then notes that it is not reliance but "detrimental reliance" that is relevant. OPC concludes that it cannot see how Aloha has suffered any detriment based on this reliance.

We find that Aloha's reliance on the principles of administrative finality, res judicata, collateral estoppel, and equitable estoppel to show that we are precluded from requiring a refund of all monies collected during the appeal period is unfounded. Under res judicata, "a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue." Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). Administrative orders are also subject to finality. Mason, at 339. In the Final Order, we never addressed what would happen in the event of an appeal or stay of the final rates. Although we allowed the interim rates to remain in effect during the stay, on April 30, 2002, the date of the Final Order, we fixed what we found to be the appropriate final rates. We found that we were bound by the Final Order with respect to the interim refund for the rate case period. However, we never made any pronouncement in the Final Order concerning the methodology for refunding interim rates collected during the appeal period. Therefore, we find that the principles of res judicata and administrative finality are inapplicable to this case.

Collateral estoppel is a judicial doctrine that "prevents identical parties from relitigating the same issues that have already been decided." Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995). For collateral estoppel to apply, the parties and issues must be identical, and the particular matter must have been "fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." Id. Because the question of what amount of interim rates collected during the appeal period should be refunded was never litigated in the evidentiary proceeding or addressed by this Commission in our Final Order, collateral estoppel is not appropriate here. When determining what amount, if any, of the interim rates should be refunded for the rate case period, we look backward to determine what adjustments should be made. The setting of final rates, however, must be prospective. Citizens v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983). When we entered our Final Order, we set the rates that we found the utility should collect on a going forward basis. Despite the arguments Aloha raised on appeal, the First DCA agreed with our decision on the lawful final rates. Despite the stay, we did not set any methodology for refunding the interim rates collected during the appeal period. The Final Order set what we determined to be the fair and reasonable final rates to be applied prospectively. When we issued the Stay Order, we noted that Aloha would continue to charge the 15.95% interim rate increase, but that the Final Order required Aloha to make refunds and modify its rate structure such that it would no longer collect the interim increase. Because the issue of what refund, if any, would be appropriate for the appeal period was not addressed in the rate proceeding, the doctrine of collateral estoppel does not apply here. The appeal of the Final Order was an unanticipated event which created a new legal situation, and makes collateral estoppel inapplicable. See University Hospital, Ltd. v. Agency for Health Care Administration, 697 So. 2d 909 (Fla. 1st DCA 1997).

Equitable estoppel is another judicial doctrine which is applied in situations "where, because of something which a party has done or omitted to do, the party is denied the right to plead or prove an otherwise important fact." 22 Fla. Jur. 2d Estoppel and Waiver § 26.

Equitable estoppel may be applied to a state agency, but only upon a showing of exceptional circumstances. Reedy Creek, at 647; North American Co. v. Green, 120 So. 2d 603, 610 (Fla. 1959). In Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834 (Fla. 2d DCA 2002), the Second DCA noted that equitable estoppel must be applied with great caution, and that the following three elements must be present:

> (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it.

In Watson Clinic, a doctor had spent money to which he was not entitled. The court found that "no detrimental change in position can occur where the only claimed harm is the inability to retain money that should have never been received in the first place." Id. at 835. In this case, the money needed for the additional interim refund of monies collected during the appeal period is still in an escrow account and Aloha never had access to these funds. Aloha cannot have reasonably relied on obtaining those funds without them being released by this Commission. Like the doctor in Watson Clinic, Aloha cannot have detrimentally changed its position based on a claim to money that has never lawfully been in its control. Also, in our Stay Order, we advised Aloha that it was not entitled to keep any of the interim increase. Therefore, we find that none of the elements of equitable estoppel are present, and equitable estoppel is also not applicable to the facts of this case.

Contrary to Aloha's arguments, the Final Order did not address what would happen to the interim rates collected during the pendency of an appeal. Moreover, in our Stay Order, we stated "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-WU." (Stay Order, pages 8-9). Thus, when making our decision on the stay, we acknowledged that the interim rates set after hearing the evidence in the case, were no longer appropriate. Therefore, we find that the language in the Final Order concerning the interim rate period was not intended to address rates collected after we entered our Final Order. Moreover, if Aloha relied on the language in the Final Order as placing a 4.87% cap on the refund, we find that Aloha was not justified in that reliance. In sum, the money has always been held subject to refund with interest, has been maintained in an escrow account, and Aloha has not had access to those revenues. Until the court upheld our decision that no rate increase was warranted and approved the final rates on appeal, there could have been no calculation of the final refund for the appeal period. Based on the above discussion, we find that neither administrative finality, res judicata, collateral estoppel, nor equitable estoppel are applicable here.

3. Whether Aloha Has Already Refunded More Money to Its Customers Than Was Necessary to Bring Its Revenue Requirement to the Level Established in the Final Order, Adjusted in Accordance With Standard Commission Practice During the "Interim Collection Period"

and

4. Whether the PAA Refund Order Results in a Windfall to Aloha's Customers to the Extreme Detriment of Aloha

Aloha's Issues 3 and 4 are sufficiently similar such that they may be considered together. Under Issue 3, Aloha argues that the premise behind the PAA Refund Order is that if the final rates were implemented immediately after issuance of the Final Order instead of interim rates, then those rates would have produced revenues at least 15% less than those produced by the interim rates collected during the appeal period. The utility argues that it has demonstrated through detailed billing information, filed by it and verified by our staff, that the interim rates produced only 4.09% more revenue than would have been produced had the final rates been implemented immediately after the Final Order and no appeal was taken.

OPC takes a different approach. It believes that we took two distinct actions in the Final Order: (1) we found that Aloha was not entitled to any rate increase, and (2) to encourage conservation, we imposed a revenue-neutral rate structure shift. According to OPC, a "revenue-neutral rate design shift cannot be achieved with absolute perfection," and "if the conservation-causing rate structure had actually been in effect during the appeal period, the usage would have been lower than it was with the old rate design." OPC thus argues that "Aloha's application of the new rate structure to actual usage that occurred under the old rate structure does not provide any meaningful analysis."

In Issue 4, Aloha argues that Aloha did not receive a windfall when it continued to collect interim rates in the appeal period for which it refunded 4.87%, but the customers will receive a windfall if the utility is required to make the additional refund. Aloha's argument is based on the premise that there was a 4.09% difference between the interim and final rates, and Aloha has already refunded 4.87% which is more than was required.

In contrast, OPC argues that "in hindsight, it is clear that Aloha did not need any increase to make it 'whole' during a case that determined that its rates were already adequate." Therefore, OPC claims that "the fact that the doctrine of administrative finality" which allowed Aloha to keep some portion of the interim increase during the rate case period could in no way be "characterized as a 'windfall to customers to the extreme detriment of Aloha.'" OPC argues that it is Aloha who actually will receive a windfall because it was allowed to keep over 11% of the interim revenues during the rate case period.

As stated previously, the refund requirement for the rate case period has been finalized and is no longer subject to change. We agree with OPC that ratemaking is not a science, and ratemaking seldom produces the exact revenue required. We do not dispute Aloha's calculations

that the difference between interim and final rates was 4.09%. However, the intent of our Final Order was clear. We found that no revenue increase was warranted, and the final rates, while restructured, were designed to keep Aloha in the same position that it was prior to the filing of its case. The rate restructuring was designed to cause customers to use less water, but give Aloha the same amount of total revenues. Any latent rate increase the utility may have received was clearly not our intent. When we entered our Final Order, we did not intend for Aloha to keep any part of the 15.95% interim increase on a going forward basis, and advised Aloha of this in the Stay Order. Therefore, under Mason and GTE, we find that it is appropriate to require all of the 15.95% interim increase collected during the appeal period to be refunded, as we ordered in the PAA Refund Order.

5. Whether the Directives and Statements Contained Within the PAA Refund Order Conflict With and Are Contrary to the PSC's Prior Agency Practices, Procedures, and Policies

Aloha argues that in every prior case, based on the same methodology stated in the Final Order, we have allowed utilities to maintain interim rates during the pendency of an appeal, and any excessive interim rates were refunded at the appeals' conclusion. Citing North Miami General Hospital, In. v. Office of Community Medical Facilities, Dep't of Health and Rehabilitative Services, 355 So. 2d 1272 (Fla. 1st DCA 1978), Aloha states that "it is a long-established principle of administrative law that agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper." Aloha argues that "when agencies change their established policies and practices and procedures, they must, by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved, give a reasonable explanation of the change supported by record evidence which all parties must have an opportunity to address." See Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d 948 (Fla. 1st DCA 1986); Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620 (Fla. 1st DCA 1998); and Section 120.68(7)(e)3., Florida Statutes. Aloha argues that the requirement for additional refunds over and above that required by the Final Order constitutes a change in policy, which has been neither explained nor justified. Aloha also alleges that this change is unsupported by record evidence and denies "Aloha the right to offer countervailing evidence or otherwise address any potential or claimed reason for a deviation from established precedent and policy."

OPC disputes "Aloha's central contention that the procedure which Aloha seeks 'has been implemented in all prior cases.'" OPC argues that "to properly apply precedent, one must examine only those prior cases which have identical or analogous relevant circumstances." OPC concludes by stating that it was

> Unaware of prior cases in which the Commission: (1) first allowed a utility interim rates to keep it whole during the pendency of the rate case; (2) then determined the utility was already financially whole without any rate increase; (3)

and yet allowed the utility to keep some of the customers' money that was never necessary to make it financially whole in the first place.

We find that a decision to require additional refunds would be consistent with our Order No. 16462, issued in the Spring Hill rate case which we discussed above. In the Spring Hill decision, we determined that one refund was appropriate for the interim rates granted prior to the issuance of the final order, and another refund was appropriate while that order was on appeal and stayed.

Also, such a decision would be consistent with our decision in Docket No. 950387-SU, In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company – Lee County Division, in which we treated the disposition of interim rates differently in the appeal period. Florida Cities did not involve the implementation of interim rates pursuant to Section 367.082, Florida Statutes, but did involve the implementation of proposed agency action (PAA) rates subject to refund after the PAA Order was issued pursuant to Section 367.081(6), Florida Statutes. During the course of two hearings and two appeals, this Commission determined that different revenue requirements and different refund amounts were required.

In calculating the appropriate amount of refund for the time the PAA rates were in effect, we took into account that rate case expense from a previous rate case was completely amortized during the time the PAA rates had been implemented, and Florida Cities had issued credits for the amortization of this previous expense. Also, we took into account that approximately three years of the rate case expense approved in the PAA Order had been amortized and the utility had incurred additional rate case expense subsequent to the issuance of the First Final Order. In the Second Final Order, we stated "we have, therefore, calculated the refund by taking the difference between the revenue requirement, with rate case expense, and the PAA revenue requirement, with rate case expense, excluding the $21,001 credit for rate case expense which expired from Docket No. 910756-SU." This was calculated to be 10.92% for the calendar year 1996, and 10.50% from January 1, 1997, through implementation of the final approved rates. This Second Final Order was also appealed, but was ultimately upheld by the First DCA.

In comparing Florida Cities with this case, we note that there are both differences and similarities. The main difference is that, in Florida Cities, we determined that a rate increase was warranted. Therefore, we had to determine what was the difference in revenues between the PAA rates implemented by the utility and the final rates approved by us. In the case at hand, we do not have to do any such calculation. We know we approved a 15.95% interim increase, but then found no increase whatsoever was warranted, and this decision was upheld by the First DCA. Therefore, there is no need to make any further comparisons, and we properly found that the full 15.95% interim increase, which Aloha continued to collect after issuance of the Final Order, shall be refunded for the appeal period. Therefore, the process used in this case is similar to the process we used in Florida Cities, but is much simpler because no rate increase whatsoever was found to be appropriate.

Moreover, we disagree with Aloha's contention that this change is unsupported by record evidence and denies "Aloha the right to offer countervailing evidence or otherwise address any potential or claimed reason for a deviation from established precedent and policy." The PAA Refund Order set forth the reasons for our decision based on the findings in the Final Order itself and the holdings in GTE and Mason. The findings in the Final Order were made after a full evidentiary hearing whereby we concluded that Aloha was entitled to no rate increase. Moreover, in this informal proceeding, Aloha has been given the opportunity to offer countervailing evidence or cite any case or order which it believes may be appropriate. Aloha has not shown that there is a disputed issue of material fact justifying a formal proceeding pursuant to Section 120.57(1), Florida Statutes. Moreover, Aloha has failed in its brief to cite any specific orders of this Commission which might be applicable or explain our policies and procedures in this type of situation. Aloha did cite Florida Cities, but this was for the principle "that agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper." In both Florida Cities, Spring Hill, as well as this case, this Commission was comparing the revenue requirement found to be appropriate with the actual revenue collected through the utility's continued collection of either the implemented PAA rates or interim rates after issuance of a final order.

Conclusion

The intent behind our Final Order is clear. We did not intend for the utility to collect any increased revenues when we issued our Final Order on April 30, 2002. Aloha's request for a rate increase was denied because the utility failed to meet its ultimate burden of proof. See Final Order, pps. 52, 68, 70, 72. Moreover, we found that Aloha should receive neither a rate increase nor a decrease. See Final Order, pages 80 and 85. Based on the interim statute, we determined that Aloha could keep 11.08% of the 15.95% interim increase for the rate case period. When Aloha appealed the Final Order and we ruled on the utility's request for a stay, we noted that the Final Order set rates such that Aloha would no longer collect the interim increase allowed by Order No. PSC-01-2199-FOF-WU. However, with the stay, Aloha continued to collect the full 15.95% interim increase for the 15-month appeal period. Subsequent to the First DCA's mandate, Aloha refunded 4.87% of the interim increase collected during the appeal period. The ultimate question that must be answered here is: "Whether an additional refund, if any, is required for the period May 1, 2002, through July 31, 2003?"

For the reasons discussed above, we find that Aloha shall refund to its customers the entire interim increase of 15.95% collected during the appeal period, including interest. In the Final Order, when we addressed whether interim rates should be refunded, we addressed only the refund for the rate case period. Thus, based on the principles of administrative finality, the disposition of interim rates collected during the rate case period is now closed. That is not the case for any remaining refunds for the interim rates collected during the appeal period. When reaching a decision on whether to require additional refunds for this period, we must keep in mind the principles of fairness set out in GTE. There the Supreme Court made it clear that it

views "ratemaking as a matter of fairness." 668 So. 3d at 973 Our decision herein is based on the principle of fairness that Aloha's customers should be refunded the interim increase collected during the appeal period. We did not intend for Aloha to receive any increase after we entered our Final Order. The only reason that Aloha was allowed to collect higher rates after we entered our Final Order was because it sought a stay while the order was on appeal, which resulted in the customers paying higher rates for an additional 15 months. Aloha could not have reasonably relied on the use of this money, however, because it has always been held subject to refund. It would be to the customers' detriment if Aloha was allowed to keep those additional revenues that were collected during the appeal period. On the other hand, Aloha remains in the same position it would have been in had it not appealed our Final Order. Accordingly, Aloha shall be required to refund the additional revenues that have not been refunded for the appeal period. Our decision conforms with our finding in the Final Order that Aloha was entitled to no revenue increase.

Because Aloha has already refunded 4.87% or $121,983 (including $530 of interest) for the appeal period, and because the total refund for the appeal period is $397,519 without interest, an additional $276,066 without interest shall be refunded. The additional refund shall be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility shall submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code, and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. The entire amount remaining in the escrow account shall be released to the utility upon our staff's verification that the utility has made the additional refund.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc., shall refund the additional principal amount of $276,066 for the appeal period to its customers in accordance with Rule 25-30.360, Florida Administrative Code. It is further

ORDERED that the additional refund shall be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. It is further

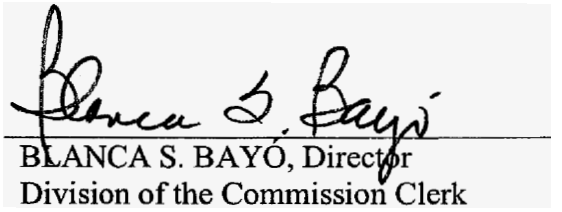
ORDERED that Aloha Utilities, Inc. shall submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code, and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. It is further

ORDERED that the entire amount remaining in the escrow account shall be released to Aloha Utilities, Inc., upon our staff's verification that the utility has made the additional refund. It is further

ORDERED that this docket shall remain open to allow our staff to verify: (1) that Aloha has complied with the Final Order to improve its quality of service as subsequently modified,

and (2) that Aloha has made the additional refunds with interest and treated any unclaimed refunds as contributions in aid of construction.

By ORDER of the Florida Public Service Commission this 26th day of October, 2004.



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

(SEAL)

RRJ

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.