BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.	DOCKET NO. 020896-WS
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-04-1156-FOF-WS** ISSUED: November 22, 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

ORDER DENYING MOTIONS FOR RECONSIDERATION AND MOTION FOR BIFURCATION

BY THE COMMISSION:

Case Background

Three customer petitions for deletion of portions of Aloha Utilities, Inc.'s (Aloha or utility) Seven Springs service territory were filed on July 18, 2002, December 29, 2003, and June 10, 2004[1], in Docket No. 020896-WS (deletion petition docket). By Order No. PSC-04-0712-PAA-WS, issued July 20, 2004, in Docket Nos. 010503-WU and 020896-WS, we set the deletion petitions directly for formal hearing. The Order Establishing Procedure, Order No. PSC-04-0728-PCO-WS, was issued July 27, 2004, in Docket No. 020896-WS. Subsequently, a fourth petition for deletion of another portion of Aloha's Seven Springs territory was filed in the docket on August 17, 2004.

Also by Order No. PSC-04-0712-PAA-WS, we proposed to grant Aloha's motion to modify the fourth ordering paragraph of Order No. PSC-02-0593-FOF-WU, issued April 30, 2002, in Docket No. 010503-WU (rate case docket), to require Aloha to, among other things, "meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment

[1] It has recently come to our attention that the petitions filed December 29, 2003 and June 10, 2004 request deletion of two distinct areas of Aloha's Seven Springs territory: Villa del Rio (a.k.a. Riverside Villas); and Riverside Village Estates, Unit 4. Therefore, they constitute two separate petitions. Until now, they were thought to be one petition for deletion of the same area.

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facilities of the utility." The intention of that requirement was to adopt the standard used by the Tampa Bay Water Authority (TBW) to combat a "black water problem" that results from the existence of hydrogen sulfide in the source water.

On August 9, 2004, V. Abraham Kurien, M.D., Harry Hawcroft, and Ed Wood, all parties of record in the deletion petition docket, individually and collectively filed a protest to portions of the proposed agency action contained in Order No. PSC-04-0712-PAA-WS (PAA order).[2] The protest disputes the proposed requirement that Aloha meet the TBW standard as the water leaves Aloha's treatment facilities, as well as the methodology upon which compliance with the TBW standard shall be determined.

By Order No. PSC-04-0929-PCO-WS, issued September 22, 2004, in both dockets (consolidation order), the prehearing officer consolidated Docket Nos. 020896-WS and 010503-WU for the purposes of hearing on the deletion petitions and on the protest to Order No. PSC-04-0712-PAA-WS. On October 4, 2004, Aloha timely filed a motion for reconsideration of the consolidation order, or, in the alternative, a motion for bifurcation of the cases such that they are no longer consolidated for any purpose, along with a request for oral argument on the motion. On October 8, 2004, the Office of Public Counsel (OPC) timely filed a response to the motion.

In its request for oral argument, Aloha stated, among other things, that the action requested in Docket No. 020896-WS is unprecedented in scope, scale, and subject matter and that the outcome of the case is critical to both Aloha and its customers. Upon finding that oral argument may aid us in comprehending and evaluating the issues before us, pursuant to Rule 25-22.058, Florida Administrative Code, we granted the request for oral argument, limiting oral argument to five minutes for Aloha and five minutes for OPC (the only party that filed a response).

Aloha also filed a motion for reconsideration on October 19, 2004, of Order No. PSC-04-1001-PCO-WS, issued October 15, 2004. That order required Aloha to file its written objections, if any, and to respond to a staff motion to compel the utility to produce certain documents requested through discovery, by October 19, 2004. Oral argument was not requested or heard on that motion for reconsideration.

Motion for Reconsideration of Order No. PSC-04-0929-PCO-WS/Motion for Bifurcation

By Order No. PSC-04-0929-PCO-WS, the Prehearing Officer found the subject matter of the protest of Order No. PSC-04-0712-PAA-WS to be sufficiently related to the issues raised in the deletion petitions such that the protested issues may be appropriately included in the deletion petition proceeding, thereby obviating the need to hold separate hearings in the two dockets. Moreover, the Prehearing Officer found that although the two dockets do not involve identical parties because the rate case docket involves intervenors other than utility customers, both dockets involve the utility and its customers as parties. Therefore, the Prehearing Officer found

[2] See Order No. PSC-04-0831-CO-WS, issued August 25, 2004, in Docket No. 020896-WS (partially consummating Order No. PSC-04-0712-PAA-WS).

that consolidation of Docket Nos. 010503-WU and 020896-WS will promote the just, speedy, and inexpensive resolution of the proceedings.

Aloha's Arguments

In its motion for reconsideration, Aloha cites to Rule 28-106.108, Florida Administrative Code, which provides that "[i]f there are separate matters which involve similar issues of law or fact, or identical parties, the matters may be consolidated if it appears that consolidation would promote the just, speedy, and inexpensive resolution of the proceedings, and would not unduly prejudice the rights of a party." Aloha argues that these dockets are clearly separate matters which do not involve similar issues of law or fact and do not have identical parties. According to Aloha, one docket (Docket No. 010503-WU) contests the Commission's proposed agency action as to the detailed vagaries of how certain customers' concerns regarding water quality should be addressed on a going-forward basis. The other docket (Docket No. 020896-WS) assumes no solution will be acceptable or necessary because the water territory in which the very customers who filed the protest in Docket No. 010503-WU reside will no longer be the water service territory of Aloha. Therefore, according to Aloha, the deletion petitions and the protest not only do not involve similar issues of law or fact, they are actually at odds with each other.

Moreover, Aloha argues that consolidation of these two dockets will not promote the just, speedy and inexpensive resolution of the proceedings because it is very likely to be extremely confusing for witnesses (often the same witnesses) to be testifying about why deletion of territory should or should not be ordered while also addressing the issues which are the subject of the protest to the PAA order. Consolidation is also likely to lead to compartmentalization in testimony, cross-examination, rebuttal and briefs, and a possible final order which combines or melds the two matters in a way that the parties could not have reasonably foreseen. According to Aloha, the issues in Docket No. 020896-WS are already sufficiently unsettled such that the addition of issues pertinent to an additional docket which seeks different relief, involves a different fact pattern, and involves different parties, will further confuse the matter. The issues in Docket No. 020896-WS are so encompassing, the need for testimony and evidence so great, and the actions requested by the petitioners so unprecedented and drastic, that no other extraneous matters or distractions should be introduced into the record.

Finally, Aloha argues that the rights of parties will be prejudiced by consolidation and that consolidation will not promote the just, speedy and inexpensive resolution of the two dockets because combining them will result in: the confusion of issues and testimony; the drain of resources; the addition of a new case into a hearing which is already scheduled for a period which may not be sufficiently lengthy for the unconsolidated hearing for which it was established; and the unknown results of the juxtaposition and interplay between the issues in the two dockets in the staff's recommendation or in the Commission's final order. Therefore, Aloha requests that its motion for reconsideration or its alternative motion to bifurcate the cases be granted such that the cases are no longer consolidated for any purpose.

OPC's Arguments

OPC supports and agrees with the result sought by Aloha's motions, but for a different reason. OPC states that the protest of Order No. PSC-04-0712-PAA-WS seeks to establish standards related to the maximum amount of sulfide that Aloha should allow in the water delivered to customers, as well as the testing that should be done to ensure compliance with the standards. OPC argues that a decision on these issues before Aloha changes its treatment processes is vitally important so that Aloha will know the standards it must meet and so that Aloha will not improvidently expend funds on processes which fail to provide the quality of water customers have been seeking for years.

Analysis and Ruling

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order.[3] A motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review."[4]

The basis for the relief requested in the deletion petitions is the quality of water the customers receive from Aloha. In the first petition signed by customers in the Trinity area, the customers state, among other things, that Aloha has not instituted available water processing methods to reduce the incidence of black water and copper pipe corrosion. In the second petition signed by customers in the Villa del Rio subdivision (a.k.a. Riverside Villas), the customers state that they are concerned about the quality of water being provided by Aloha, and that some of the problems they experience are black water and extremely offensive odor. In the third petition signed by customers in Riverside Village Estates, Unit 4, the customers state that over the years, there have been numerous complaints about the poor quality of the water supplied by Aloha. And finally, the cover letter attached to the fourth petition signed by customers in Riviera Estates states that the water provided by Aloha is undrinkable. The protest of the PAA order seeks to establish standards related to the maximum amount of sulfide that Aloha should allow in the water delivered to customers, as well as the testing that should be done to ensure compliance with the standards. The fact that the ultimate relief requested by the deletion petitions differs from that requested by the protest to the PAA order does not negate the fact that the two matters, although separate, involve similar issues of fact concerning water quality. Therefore, we find that the Prehearing Officer did not err in finding that the subject matter of the protest of the PAA Order is sufficiently related to the issues raised in the deletion petitions.

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[3] See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). Moreover, in a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959) (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958)).

[4] Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Moreover, Order No. PSC-04-0929-PCO-WS made the Order Establishing Procedure[5] issued in Docket No. 020896-WS applicable to the protest of the PAA order, as well as to the deletion petition filed August 17, 2004, upon a finding that sufficient time has been given therein for the filing of petitioner, intervenor (including utility), staff, and rebuttal testimony prior to the consolidated hearing to assure that there will be no undue prejudice to the parties. Because consolidation of the two dockets for the purposes of the hearing will promote the just, speedy, and inexpensive resolution of the proceedings, we do not believe that the dockets should be bifurcated.

OPC's suggestion that a decision on the protest to the PAA order should be made before Aloha changes its treatment processes is not feasible. In the PAA order at pages 19-20, this Commission required Aloha to implement a hydrogen sulfide treatment standard to combat the black water problem by February 12, 2005. That requirement was not protested. Moreover, at page 16, we noted that beginning in January 2005, Aloha will have to convert from chlorination to the use of chloramine disinfection in order for its water to be compatible with water purchased from Pasco County, and that the utility's engineering consultant and Dr. Audrey Levine have advised that treatment for hydrogen sulfide is necessary in conjunction with that conversion so that the black water problem is not exacerbated. There is not sufficient time for this Commission to conduct a separate, expedited hearing on the protest to the PAA order before January. There would not be enough time for the filing of petitioner, intervenor, staff, and rebuttal testimony in advance of a November or December hearing in order for us to make a final ruling on the protest by January or February 2005, nor is there a hearing date available within that timeframe. Indeed, consolidation of the two dockets for the purposes of the hearing promotes the speediest resolution of the protest.

In light of the foregoing, Aloha's Motion for Reconsideration of Order No. PSC-04-0929-PCO-WS or, in the Alternative, Motion for Bifurcation, is denied.

Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS

Discovery Request

On October 5, 2004, our staff served Aloha with the Commission's First Request for Production of Documents (Nos. 1-2) (discovery request), requesting that the documents be produced within thirty days of service, pursuant to Rule 1.350, Florida Rules of Civil Procedure. Document Request No. 1 states as follows:

> Please provide, in electronic format, a list of the names and addresses of all of Aloha's water customers in the Seven Springs service area.

[5] Order No. PSC-04-0728-PCO-WS, issued July 27, 2004.

Document Request No. 2 states as follows:

> Please provide, in electronic format, a list of the names and addresses of all of Aloha's wastewater customers in the Seven Springs service area.

Motion to Compel and to Shorten Time

Our staff informally requested Aloha to provide the responses to the discovery request, or its objection thereto, on an expedited basis. Aloha declined to voluntarily comply with that request. Thereafter, on October 14, 2004, the staff filed a motion to compel and to shorten time, requesting that the Prehearing Officer (1) issue an immediate order requiring Aloha to file its written objections, if any, to the discovery request and its response to the motion to compel by October 19, 2004; and (2) following receipt of Aloha's response and objection (if any), promptly enter an order compelling Aloha to fully respond to the discovery request no later than November 3, 2004.

As grounds for the motion, the staff stated that it plans to mail a survey to Aloha's customers in an effort to determine the level of customer support for the deletion petitions. Further, the staff stated that in order to reproduce, address, and mail the survey in time to include a compilation of the survey results in its prefiled testimony due January 13, 2005, the staff requires the response to the discovery request on an expedited basis.

Order No. PSC-04-1001-PCO-WS

By Order. No. PSC-04-1001-PCO-WS, the Prehearing Officer ordered Aloha's written objections, if any, and its response to the staff's motion to compel, to be filed by October 19, 2004, in order to be considered in a ruling on the motion. The Prehearing Officer found that time does not allow for a seven day response time in this instance, and stated that a ruling on the motion to compel will be expeditiously issued after the October 19, 2004, response deadline.

Aloha's Arguments

Rather than filing its response to the motion to compel and its written objections to the discovery request, if any, by October 19, 2004, Aloha instead filed a motion for reconsideration of Order No. PSC-04-1001-PCO-WS on that date. In the motion, Aloha argues that an examination of the sequence of events leading up to the issuance of the order reveals several highly unusual procedural and substantive events. After the service of discovery in a case which was set for hearing over two months before, the Commission staff requested that the Prehearing Officer issue an order requiring an expedited response to the staff's discovery which would allow Aloha only 14 days response time, rather than the 30 days allowed by the Uniform Rules of Procedure. Further, Aloha argues that the staff contemporaneously filed a motion to compel, despite having received no formal or written objection to its outstanding discovery (and, in fact, none was due), and a motion to shorten the time to file the anticipated objections to which the motion to compel was preemptively addressed. The order expediting a response to the motion to compel and requiring expedited responses and objections to staff's discovery was issued the next morning (on October 15, 2004).

According to Aloha, the *de facto* effect of this chain of events is that the Prehearing Officer apparently received a suggestion to expedite the response to staff's motion and immediately issued an order on that suggestion. In other words, the chance to respond to the request to expedite the time to respond to the motion was not merely expedited, it was nonexistent. The order directs Aloha to respond to a motion to compel which anticipated objections to discovery which were not yet due and which Aloha had not yet made. Aloha argues that this sequence of events is not consistent with the Order Establishing Procedure in this case or with the process for discovery established by the Uniform Rules of Procedure, and is highly prejudicial and unfair to Aloha and a violation of its procedural due process rights.

Further, Aloha argues that the order does not suggest that the Prehearing Officer took into account that this case had been set for hearing for over 60 days before the discovery was filed. The reasons requiring an expedited response to the motion are unknown, because if those reasons were set out before the Prehearing Officer, they were done so orally by the staff and Aloha was not privy to those conversations.

Finally, Aloha argues that nothing Aloha has done, said, or filed has placed the staff in the position that it finds itself in. The Uniform Rules of Procedure allow reasoned response times to discovery (and motions), however brief, for good reason. They should not be cast aside at the whim of the staff merely because it, unlike the parties to this proceeding, has unfettered access to the Prehearing Officer. In this case, time allows for the full seven day response time contemplated by rule. Aloha requests that we reconsider Order No. PSC-04-1001-PCO-WS and allow Aloha seven days to respond to the motion.

Analysis and Ruling

In its motion for reconsideration, Aloha has failed to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-04-1001-PCO-WS. Aloha argues that the reasons requiring an expedited response to staff's motion are unknown, because if those reasons were set out before the Prehearing Officer, they were done so orally by the staff and Aloha was not privy to those conversations. This argument is without merit. Staff's motion clearly sets forth the reasons why staff believes that time does not allow for a seven day response time in this instance. Upon consideration of staff's motion setting forth those reasons, the Prehearing Officer shortened the response time. This is clearly within the Prehearing Officer's discretion, as set forth in Rule 28-106.204(1), Florida Administrative Code, which provides that parties may file a response in opposition to a written motion within seven days of service thereof, when time allows. The rule suggests that there is no right to a response time at all when time does not allow for one. In this instance, the Prehearing Officer, in his discretion under the rule, found that time allowed for a response time, albeit a shortened one.

Aloha correctly points out that the order directs it to respond to a motion to compel which anticipated objections to discovery which were not yet due and which Aloha had not yet made. We disagree, however, that this sequence of events is not consistent with the Order Establishing Procedure in this case or with the process for discovery established by the Uniform Rules of Procedure, and is highly prejudicial and unfair to Aloha and a violation of its procedural due process rights. If our staff inaccurately anticipated the objections that Aloha may make, Order

No. PSC-04-1001-PCO-WS affords Aloha with an opportunity to say so. The order provides that Aloha may object to staff's discovery request and to respond to staff's motion to compel prior to the issuance of a ruling on the motion, so long as it does so under a shortened objection and response time. Furthermore, the Order Establishing Procedure does not prohibit the shortening of response times. And Rule 28-106.211, Florida Administrative Code, provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. Order No. PSC-04-1001-PCO-WS does just that.

Finally, Rule 28-106.206, Florida Administrative Code, provides that "parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay. . . ." Rule 1.350(b), Florida Rules of Civil Procedure, concerning requests for production of documents, provides that the party to whom the request is directed shall serve a written response within 30 days after service of the request, and that "[t]he court may allow a shorter or longer time."

For the foregoing reasons, Aloha's Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS is denied. Aloha shall file its written objections to the discovery request, if any, and its response to the motion to compel by Thursday, November 4, 2005.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Motion for Reconsideration of Order No. PSC-04-0929-PCO-WS or, in the Alternative, Motion for Bifurcation, is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Reconsideration of Order No. PSC-04-1001-PCO-WS is denied. Aloha Utilities, Inc. shall file its written objections to the discovery request, if any, and its response to the motion to compel by Thursday, November 4, 2005. It is further

ORDERED that Docket Nos. 020896-WS and 010503-WU shall remain open pending resolution of the deletion petitions and the protest of Order No. PSC-04-0712-PAA-WS.

By ORDER of the Florida Public Service Commission this 22nd day of November, 2004.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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NOTICE OF 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 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 by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.