BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for approval of Reuse Project Plan and increase in wastewater rates in Pasco County by Aloha Utilities, Inc.	Docket No. 950615-SU
In Re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County.	Docket No. 960545-WS

PETITION FOR RECONSIDERATION

ALOHA UTILITIES, INC. (hereinafter "Aloha" or "Utility"), by and through its undersigned attorneys and pursuant the provisions of Rule 25-22.060, Florida Administrative Code ("F.A.C.") files this Petition for Reconsideration of Commission Order No. PSC-97-0280-FOF-WS issued on March 12, 1997, in the above referenced dockets:

RELATED PARTY CONTRACTOR

The Commission's order takes issue with Aloha's contract with an affiliated entity as a general contractor on labor related to the reuse force main for which Aloha seeks recovery in this proceeding. Based upon this concern and the Utility's failure to bid the general contract, the Commission removed 10% of the total project cost. This issue presents several specific misapprehended or overlooked points of fact or law.

The Commission first takes issue with the fact that the Utility did not go through a bidding process before selecting the general contractor. The Commission specifically notes that the Utility could have solicited bids which ". . . would not have adversely affected the Utility's schedule and would have allowed anyone reviewing the application to easily verify that the project

costs were reasonable." First, it should be noted that there is absolutely no evidence of record upon which to base a conclusion that a utility is required to bid a project of this sort. Secondly, both Mr. Watford and the Utility's consulting engineer testified that under the constraints and potential penalties of the consent judgment, there was not time, due to DEP imposed time constraints, to go through all the processes of bidding through a general contractor and then after securing the general contractor bidding all the subcontractors (TR 276) in the approximately 60 days between the time of issuance of the permit with revisions by DEP and the date the contract was entered into (TR 279-280). Finally, as noted by both Mr. Porter and Mr. Watford, the vast majority of the project was bid out to subcontractors and suppliers directly by the Utility (TR 217, TR 294-296) such that only approximately 19% of the total reuse project cost was not bid out and was paid to a related party (TR 522).

The Commission specifically references the legal test for evaluating affiliated transactions and the reasonableness of such transactions. In the case of GTE Florida, Inc. vs. Deason, 642 So.2d 545 (Fla. 1994), the Supreme Court established that the standard to use in evaluating affiliate transactions is "whether those transactions exceed the going market rate or are otherwise inherently unfair." The Utility obtained an independent engineering evaluation of the estimated cost of constructing the reuse facilities and utilized that as the basis for determining the amount of the affiliated party's share of the total contract (TR

202, 215, 283). There has never been any suggestion by any party, nor was any evidence presented at hearing that the estimates were unreasonable or improperly calculated. The only competent substantial evidence of record is that provided by the Utility that the contract with the related party was based upon an estimate by an independent professional engineer of the appropriate cost for such facilities and that the contract was entered into based upon that estimate. Further, Mr. Watford testified that based upon his experience in the industry, he felt confident that the Utility could not get any general contractor anywhere to perform the work for the same amount of money as the related party had, especially in light of the significant changes in required labor that were undertaken by the contractor without changes in the contract price charged to the Utility (TR 521).

While the Commission seemed to take exception to the use of the independent engineer's estimate as a basis for determining the related party contract price, it cannot fairly be said that doing so does not comply with the Court's requirement in GTE Florida, Inc. vs. Deason, Supra. The independent engineer's estimate by definition is an estimate of the cost to construct those facilities by a professional engineer intended to reflect what the average costs for such facilities would be in an arm's length transaction. Therefore, the Commission's action in finding fault with utilizing that estimate as a basis for the contract price is plainly contrary to the case law referenced and/or overlooks the only competent substantial evidence of record.

Finally, the Commission proposes to eliminate 10% of the total cost of all three phases of the reuse project based upon the Utility's failure to bid out a small portion of the project and allowing the related party general contractor to utilize the engineer's estimate as a basis for the contract price. Even if there were evidence upon which the Commission could rely to determine: (1) that the Utility must bid out contracts of this nature; (2) that the Utility, in this case, was not constrained by regulatory time requirements from bidding out the project; and (3) that the Utility should not have utilized the engineer's estimate as a basis for determining the related party contract price, a penalty of 10% of the total cost when the related party portion equates to only approximately 19% of the total reuse system cost (TR 217 and TR 520) effectively results in an elimination of cost far in excess of any reasonable basis for adjusting that related party transaction.

If the Commission felt that the inappropriateness of the price paid to related party was demonstrated, it might be reasonable to make some adjustment to <u>that</u> related party portion of the contract, such as disallowing the 10% contingency related directly the related party. But there is no basis of record for disallowing 10% of the entire contract costs. The Commission action in making such a broad adjustment has effectively reduced costs wholly unassociated with the related party, and costs which were bid out as the Commission's order proposes is appropriate. The Commission's misapprehension of the facts in applying a 10%

"penalty" for the related party contract effectively imposes a penalty at least five times as great when inappropriately applied to the entire contract rather than the related party portion of the total.

The Commission should reconsider its decision concerning the disallowance of 10% of the total contract cost for all of the above stated reasons and find that the total contract price paid by the Utility adheres to the standard required by the Supreme Court's decision in GTE, Florida, Inc. vs. Deason, Supra. In the alternative, to the extent that the Commission believes some adjustment has been demonstrated to be appropriate, the Commission's Order misapprehends the facts and rather than adjusting the related party portion of the contract, has misapplied that adjustment to the entire contract. Such an adjustment is counter to the only evidence of record on this issue.

IMPUTATION OF REUSE REVENUE

The Commission's order proposes to impute to the Utility after completion of Phase III of the reuse project, yearly revenues equal to one-quarter of the total reuse revenue which could be derived from the sale of the entire amount of effluent generated by the Utility sewage treatment plant. This imputation is proposed to be phased in over a four year period, thereby reducing wastewater revenue requirements and rates as a result in each of the four years of the phase-in period. The Commission's proposal to impute revenues is plainly contrary to the requirements of law under Sections 367.0817(3) and 403.064(10), Florida Statutes, whereby the

Commission is required to recognize the full cost of a reuse system in establishing rates. In addition, the Commission's determination as to the amount of reuse revenue that the Utility can reasonably be expected to sell and its conclusions about the period of time necessary to reach the level of full sales of that effluent are both based upon misapprehensions of the facts of record and are contrary to the only competent substantial evidence of record.

The Commission's proposal to impute revenue is plainly contrary to the requirements of Sections 367.0817(3), and 403.064(10), Florida Statutes. Both of these statutory sections require the Commission to allow recovery of all prudent costs of the reuse project in rates. Imputation of revenues based upon anticipated growth and sales of Utility services plainly does to comply with that requirement. Imputation is no more appropriate in order to comply with the reuse provisions of Chapter 367.0817, Florida Statutes, than it would be under the general rate setting provisions of Section 367.081, Florida Statutes. In fact, the stated intent of the provisions of Sections 367.0817 and 403.064, Florida Statutes, is to encourage reuse. The unprecedented proposal to impute revenues based upon assumed and extremely optimistic customer growth rates is punitive and far more so than ever proposed under the general rate setting provisions of Section 367.081, Florida Statutes.

If the Commission's intent by imputing revenues is to ensure that the Utility wastewater rates properly reflect the increase in reliance of the Utility over time on reuse customer revenues, the

statute specifically provides for true-ups of such rates and costs under Section 367.0817(6), Florida Statutes. The revenue to be derived from reuse service, even under the most aggressive assumptions is not sufficient in any given year to significantly affect the Utility's overall earnings and, as such, lends itself to an annual review or true-up under the statute.

In several places in the Commission's discussion of this issue at the bottom of Page 30 of Order No. PSC-97-0280-FOF-WS, the Commission refers to the Utility's "hopes" of selling "all the effluent". Based upon these statements, the Commission concludes that the imputation of revenues should be based upon sales of 1.2 million gallons of effluent on a daily basis. Such a conclusion is wholly without foundation in the record. In fact, the record evidence is to the contrary. All of these allegations appear to be grounded upon the statement by Mr. Watford in his rebuttal testimony that

> "However, because we believe that we will be able to sell the effluent very soon after Phase III is complete, I do not think more than an extension of an year or two of the five year agreement, at most, will be needed or desired by Aloha" (TR 1115).

Nowhere in the above quoted language does Mr. Watford state that the Utility will ever be able to sell <u>all</u> of its effluent. In fact, on numerous occasions, both Mr. Watford and Mr. Porter, the Utility's professional engineer, discussed the need for wet weather storage and for "off-spec" holding requirements at the existing percolation ponds (TR 1169, TR 235-237, TR 971. By definition,

these statements envision that significant amounts of effluent will be held in and percolate through the Utility's existing ponds.

Mr. Watford specifically noted that it would be impossible to determine the quantities of effluent that can be sold until such time as the Utility enters into agreements and gains some experience with the provision of reuse service (TR 1186 and TR 1113).

As further evidence of the amount of effluent which the Utility can expect to be able to sell, Mr. Yingling, of the Southwest Florida Water Management District, provided Exhibit 13. On Page 46 of JWY-5 (Exhibit 13), Mr. Yingling's district-wide reuse system information shows a total reuse available by private and public utilities providing reuse service of 287.32 million gallons a day. Those same reuse utilities were only able to dispose of 104.40 million gallons a day through reuse, or approximately 36% of the total reuse water available. This analysis provided by Mr. Yingling is a comparison of the total reuse flows available to reuse gallons distributed, not simply a comparison of gallons of sewage treated to reuse sold, which would be a much smaller percentage.

Mr. Bramlett, Utility Director of Pasco County, provided a schedule in Exhibit 2 on Pasco County's experience and specifically testified that they were able to sell or give away 52.75% of the total effluent which entered into the reuse system (TR 196-197). This relatively high percentage was only possible because of the fact that the County has such high demands for reuse, that during

dry periods they do not have sufficient quantities to meet demand (TR 188). To hold Aloha to a standard of being expected to sell every gallon of reuse generated by its plant is not only plainly contrary to reason, but is plainly contrary to the experience of other reuse providers, even the most successful of those such as Pasco County, who has a demand for effluent higher than its ability to provide during periods of dry weather. Based upon these facts, it is clear that the Commission order and its conclusion on this issue is based on misapprehended facts and has overlooked the only competent substantial evidence of record, ie. that even in the best of circumstances, other reuse utilities including those with substantial systems and high established demand can only expect to sell or otherwise dispose of approximately 36-50% of their total reuse commodity.

Also, underlying the Commission's decision is the assumption that the Utility's reuse will grow so fast as to enable it to sell all of its effluent within a four year period from the date of completion of Phase III and its entry into the reuse sales business. Nowhere in this record was such an aggressive schedule for adding reuse customers proposed. It is apparent that the Commission's inclusion in this regard is based solely upon the above quoted statement from Mr. Watford at TR 1115 and the misattribution of the terms "sales of <u>all</u> effluent" to that quote as noted previously on Page 30 of the order. As noted numerous times by Mr. Watford in his direct and rebuttal testimony, this Utility expects to receive reuse customers only from new growth

within its service territory and therefore the assumption that the Utility will able to sell all effluent within a four year period is not only unsupported by the evidence, but is contrary to any reasonable interpretation of the Utility's expected source of customers.

The actions of the Commission in proposing to impute revenue for future reuse sales is not only unprecedented, but is contrary to the plain language and stated legislative intent as expressed in Sections 367.0817 and 403.064, Florida Statutes. The Commission's action in imputing that revenue is therefore plainly contrary to law. In addition, there is no factual support for the Commission's conclusion that the Utility will, within four years, be able to sell every gallon of its average 1.2 million gallon a day production of effluent upon completion of Phase III of the reuse project. In fact, the only evidence of record on this subject demonstrates that utilities providing reuse service are only able to sell or give away reuse water in a range of 36% to 52% of the total amount which enters their reuse systems. The Utility therefore requests that the Commission reconsider its decision with regard to imputation of reuse revenues and specifically eliminate such imputation as contrary to the plain wording and stated legislative intent of the applicable statutory law or, in the alternative, if the Commission disagrees with this interpretation of law, to at least adjust the assumptions underlying that imputation to those supported by the record evidence as outlined above.

QUALITY OF WATER SERVICE

In its order, the Commission has reached the conclusion that quality of water service is unsatisfactory. This conclusion is not supported by any competent substantial evidence and specifically references evidence not of record while ignoring the competent evidence of record.

The Commission's conclusion as the Utility's quality of service appears to be primarily based upon a review of "customer satisfaction" and several factors thereunder.

The order first notes that many customers provided testimony concerning problems with low pressure. As noted in the Utility's Late Filed Exhibit No. 24, the Utility's responses to customer concerns, there were a total of 12 customers who provided any testimony concerning pressure concerns.

The Utility's Late Filed Exhibit No. 24 provides customer specific response concerning each of those cases, and in none of them has the Utility's analysis ever revealed pressure below that required by Florida Law. The DEP witness, Mr. Screnock, provided testimony of the Utility's compliance with Florida law on minimum pressures and two studies, prepared by two independent engineers (Exhibits 34 and 37), both conclude that there are no pressure problems within the Utility's system and that the system pressures exceed all standard. There is no competent substantial evidence of record to the contrary.

The order next states that many customers testified about the water's offensive taste and odor. Mr. Screnock of DEP testified

that the Utility is supplying water in conformance with all requirements and is meeting all standards except copper (TR 562-563) and specifically noted that the Utility is not in violation of any rule by its copper exceedance since he agreed that the Utility has done everything they are required to do to be in compliance with the lead and copper rules at this time (TR 593). Also in evidence, is the letter from Dr. Richard Garrity, Director of the Tampa District office of DEP, agreeing with these conclusions (Exhibit 28). In Late Filed Exhibit No. 24, in response to some of the 12 customers who testified about concerns of odor, the Utility provided an explanation not only on a customer by customer basis, but in general as to the possible sources inside the customers' homes of odor problem arising from reformation of hydrogen sulfide as a result of home treatment system use. However, as noted by Mr. Porter, the Utility's sulfate levels (which is the form that sulphur would take in the treated water supply) ranges from 7-16 parts per million at the wells, compared to a State limit allowed of 250 parts per million (TR 1081-1082 and TR 1033-1034).

Next, the Commission notes that several customers testified about the damage which Aloha's water has done to the plumbing inside their homes. The Utility provided extensive testimony, both in the rebuttal testimony of Mr. Watford and Mr. Porter, and in Late Filed Exhibit 24 directly in response to the one customer who expressed concerns about corrosion to copper piping. In addition, under the requirements of the Commission's rules, the Utility is responsible for delivery of water in conformance with standards up

to the point of delivery into the piping of the customer (see Rule 25-30.231, F.A.C.). To impose a further obligation beyond that imposed by DEP and the Commission's own rules is not reasonable. There is therefore no competent substantial evidence of record that the Utility is taking anything but appropriate actions with regard to this issue.

The Commission next notes that the customers are concerned with the way in which the Utility handles customer complaints and specifically, in its conclusion, the Commission notes that "Aloha has also failed to maintain adequate records of its customer complaints about poor water quality." The Utility specifically responded to each of the customer concerns raised in Late Filed Exhibit 24. Those responses were based primarily upon an analysis of the Utility's existing work order records and the results of investigation by the Utility of each previous complaint and current complaint investigated by the Utility. The Utility further provided as part of Late Filed Exhibit 24 (final two pages), a detailed description of the complaint handling process utilized by Aloha which as noted is fully in conformance with, and is structured around the requirements of Rule 25.30.555(1), (2) and (3), F.A.C. There is no competent substantial evidence to suggest that the Utility has failed to properly respond to customer complaints or that the Utility has done anything other than maintain records in accordance with Commission rule concerning customer complaints.

Next, the Commission specifically found that the customers provided black water samples which "effectively demonstrated the poor quality of the water which is coming out of their faucets". However, the only competent substantial evidence of record on this issue is that provided by Mr. Porter's extensive testimony (TR 1012-1032) and by the DEP witness, Mr. Screnock, that the Utility implemented the corrosion control plan to address this problem in a timely manner (TR 589-590) less than 3 months after the problem was identified in January 1996; that the measures taken by the Utility are standard operating procedures; and "that there is nothing wrong with what they are doing" and "these are prescribed treatments to control copper levels" (TR 590-591). In addition, as noted by Mr. Porter and Mr. Watford, the great majority of those customers experiencing this problem are those with home softening units. Mr. Porter explained in detail why those home softening units appear to be primarily responsible for the existence of this problem. The Commission's rules and statutes, as discussed previously, specifically note that the Utility's responsibility ends long before water passes through these home softening units. No other competent substantial evidence was provided in the record on this issue. Therefore, the only competent substantial evidence of record can only lead to the conclusion that while a limited number of customers may have experienced some problems with copper sulfide which forms inside the customer homes and beyond the point of connection, the Utility has taken all appropriate actions to correct the problem in a timely manner. Further, the problem

appears to be significantly attributable to the existence of home softening units which change the Utility's water chemistry.

Finally, the Commission notes that approximately 250 letters have been placed in the correspondence side of the file concerning this Utility. The order further notes that at least 200 of these letters describe the same water quality problems which were discussed in the September hearing and outlined above. Not only were these letters never made a part of the record in this proceeding and therefore cannot form a basis for the Commission's findings even in part, they were plainly solicited to be sent to Representative Fasano and even after repeated attempts and requests for copies of same by Aloha on the record (TR 495-496), they have never been forwarded to the Utility for proper follow-up or response. In this proceeding, the Utility has had no opportunity to review, respond to, or cross-examine the contents of those letters and, as such, they cannot and should not in any way form a basis for the Commission's decision on the Utility's quality of service. Apparently, based on these letters, the Commission concludes "the record reflects that a significant percentage of Aloha's customers are dissatisfied with the water quality." In fact, only 57 customers even registered complaints with the Commission in the record of this proceeding out of over 7,000. That represents a percentage of less than 1%. The Commission's finding that a significant percentage of Aloha's customers are dissatisfied with the water quality is therefore contrary to the only evidence of record.

In conclusion, the Commission's finding that the quality of Aloha's water service is unsatisfactory is not supported by the competent substantial evidence of this record on any of the bases noted. The standards imposed by the Commission in finding the Utility's quality of service and customer relations unsatisfactory are above and beyond those authorized by Florida Statute and by the DEP and the Commission's own rules. Therefore, Aloha requests that the Commission specifically reconsider its decision finding that Aloha's water service quality is unsatisfactory because that decision has overlooked or misapprehended the only competent substantial evidence of record and is contrary to law.

While the Commission may impose on the Utility under the provisions of Section 367.121, an obligation to make certain improvements above and beyond those specifically required by statute, rule and the environmental regulatory agency, a decision by the Commission to require such changes does not in and of itself render the Utility's existing service unsatisfactory nor support a finding to that effect. In fact, the Commission has ordered that a study of how the Utility can further improve its water quality beyond regulatory requirements, which the Utility is in the process of preparing. Dissatisfaction of customers alone, even if expressed by much more than 1% of the Utility's customers, cannot and should not in light of the great weight of evidence of record constitute a basis for finding service to be unsatisfactory.

CONCLUSION

WHEREFORE, Aloha Utilities, Inc. requests that the Florida Public Service Commission reconsider it decision as rendered in Order No. PSC-97-0280-FOF-WS, on the issues of: the related party contract labor costs; imputation of reuse revenue; and water quality of service issues which decisions were based upon misapprehensions or overlooked law or fact and are contrary to the great weight of competent substantial evidence in this record.

Respectfully submitted this 27th day of March, 1997, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by *Hand Delivery or U.S. Mail to the following parties this 27th of March, 1997.

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