



Public Service Commission

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DATE: APRIL 22, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF WATER AND WASTEWATER (MURPHY, GEDUCH) *[Signature]*
DIVISION OF LEGAL SERVICES (JAEGER) *[Signature]*

RE: DOCKET NO. 960545-WS - INVESTIGATION OF UTILITY RATES OF ALOHA UTILITIES, INC. IN PASCO COUNTY

AGENDA: MAY 4, 1999 - RECONSIDERATION OF ORDER ESTABLISHING PROCEDURE - REGULAR AGENDA - PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\WAW\WP\960545MR.RCM

CASE 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. As of December 31, 1997, Aloha was serving approximately 8,457 water customers in its Seven Springs service area.

On April 30, 1996, Mr. James Goldberg, President of the Wyndtree Master Community Association, filed a petition, signed by 262 customers within Aloha's Seven Springs service area, requesting that the Commission investigate the utility's rates and water quality. The petition and request were assigned Docket No. 960545-WS.

For the purposes of hearing, Docket 960545-WS was consolidated with Docket 950615-SU (Aloha's reuse case). The hearing was held on September 9-10, 1996 in New Port Richey, and concluded on October 28, 1996 in Tallahassee. Customer testimony concerning quality of service was taken on September 9, 1996. Both customer

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

testimony sessions were attended by more than 500 customers, fifty-six of whom provided testimony about the following quality of service problems: black water, pressure, odor, and customer service related problems. The customers also provided many samples of discolored black water.

After evaluation of the evidence taken during the hearing, the Commission rendered its final decision by Order No. PSC-97-0280-FOF-WS (Final Order), issued on March 12, 1997. The Commission determined that the quality of service provided by Aloha's water system was unsatisfactory. Since the evidence indicated that the water quality problems were related to the presence of hydrogen sulfide in Aloha's source water and the cost of treatment might be expensive, the Commission ordered that Aloha prepare a report that evaluated the costs and efficiencies of several different treatment options for the removal of hydrogen sulfide from its source water. In addition to finding the quality of the utility's water to be unsatisfactory, the Commission found that "the utility's attempts to address customer satisfaction and its responses to customer complaints are unsatisfactory. These management practices of Aloha concern us, and will be further addressed in Docket No. 960545-WS, which is to be kept open."

On June 12, 1997, Aloha filed its engineering report with the Commission, recommending that it be allowed to continue adjusting the corrosion inhibitor dosage level in an ongoing effort to eliminate the black water problem. Aloha also recommended that if hydrogen sulfide treatment facilities are required, then the option of constructing three central water treatment plants which utilize Packed Tower Aeration should be approved. Aloha estimated that construction and operation of the three treatment plants and other water system upgrades would increase customer rates by 398%.

On November 26, 1997, by Order No. PSC-97-1512-FOF-WS, the Commission decided that more investigation was needed and ordered the utility to survey its Seven Springs customers to determine the extent of the quality of service problems and to determine if the customers were willing to pay for new treatment facilities that were not required by any current Department of Environmental Protection (DEP) or Environmental Protection Agency (EPA) rule and which would increase their water rates. Aloha distributed 8,597 surveys and the Commission received 3,706 responses. Also, as a follow-up to the survey, the Commission conducted a site survey on July 17, 1998.

In a June 5, 1998 letter to the Commission, Aloha stated that it was willing to begin construction of three centrally located packed tower aeration treatment facilities to remove hydrogen

sulfide from the source water. Aloha was willing to proceed with this upgrade in order to address customer quality of service concerns and to comply with future EPA regulations. However, before commencing construction of these water treatment facilities, Aloha requested the Commission to issue an order declaring that it was prudent for Aloha to construct these facilities.

This request was considered by the Commission at the December 15, 1998 agenda conference. Also, the Commission considered whether there is a water quality problem in Aloha's Seven Springs service area and, if so, what further actions were required.

Pursuant to the decisions at that agenda conference, the Commission, on January 7, 1999, issued its Notice of Proposed Agency Action Order Determining That the Commission Should Take No Further Actions in Regards to Quality of Service in this Docket and Closing Docket and Final Order Denying the Utility's Request That the Commission Issue an Order Declaring it to Be Prudent to Begin Construction of Three Central Water Treatment Facilities (Order No. PSC-99-0061-FOF-WS). By that Order, the Commission required any protest to be filed by January 28, 1999 in order to be timely.

Subsequently, three customers -- Edward O. Wood, James Goldberg, and Representative Mike Fasano, filed timely protests to the proposed agency action (PAA) portions of Order No. PSC-99-0061-FOF-WS, and requested a formal hearing. Based on these protests, a formal hearing is scheduled for September 30, and October 1, 1999.

With the scheduling of a formal hearing, an Order Establishing Procedure, Order No. PSC-99-0514-PCO-WS, was issued on March 12, 1999. That Order required Aloha to prefile its direct testimony and exhibits on June 30, 1999, and the intervenors to file their direct testimony and exhibits on July 13, 1999.

On March 22 and March 23, 1999, respectively, Aloha filed a Motion for Reconsideration of Order No. PSC-99-0514-PCO-WS and a Motion to Correct Scrivener's Error. In the Motion for Reconsideration, the utility erroneously requested the prehearing officer to reconsider the Order Establishing Procedure. In its Motion to Correct Scrivener's Error, the utility explained that it really was requesting the full Commission to consider the Motion for Reconsideration. By placing the Motion for Reconsider before the full Commission, the Motion to Correct Scrivener's Error is moot.

DOCKET NO. 960545-WS
DATE: APRIL 22, 1999

On March 30, 1999, the Office of Public Counsel (OPC) filed a Response to Aloha Utilities, Inc.'s Motion for Reconsideration of Order No. PSC-99-0514-PCO-WS (Response). This recommendation addresses Aloha's Motion for Reconsideration and the Response of OPC.

DISCUSSION OF ISSUE

ISSUE 1: Should the Commission reconsider the decision rendered by Order No. PSC-99-0514-PCO-WS to have Aloha Utilities, Inc., file testimony first?

RECOMMENDATION: No. Aloha's Motion for Reconsideration should be denied. (JAEGER)

STAFF ANALYSIS: As stated in the Case Background, this docket was opened when Mr. James Goldberg, President of the Wyndtree Master Community Association, filed a petition, signed by 262 customers within Aloha's Seven Springs service area, requesting that the Commission investigate the utility's rates and water quality. An investigation was begun, and after several days of formal hearing, the Commission, by Order No. PSC-97-0280-FOF-WS (Final Order) found that the quality of service provided by Aloha was unsatisfactory.

Although several orders have been issued since the issuance of the Final Order, no order since the Final Order has ever found the quality of service to be satisfactory. The struggle that the Commission has had concerns what actions, if any, should it require the utility to take to improve the quality of service. In addition to the "black water" problem, the Commission found that the utility's attempts to address customer satisfaction and its responses to customer complaints were unsatisfactory. The utility has taken measures to improve its responses to customer complaints and has continued with its program of adding a corrosion inhibitor for the black-water problem. Also, on more than one occasion it has requested the Commission to pre-approve its construction of three centrally located packed tower aeration facilities. The Commission has declined to do so.

Now, with the hearing being set, the Order Establishing Procedure, Order No. PSC-99-0514-PCO-WS, requires Aloha to prefile its testimony on June 30, 1999, and the intervenors to file their testimony on July 13, 1999. The utility has filed a Motion for Reconsideration of that Order. In its motion, Aloha states that it does not object to or:

seek reconsideration, *per se*, for those dates as established in the Order Establishing Procedure unless and except if the establishment of those particular dates in that particular order stands for the proposition that Aloha somehow has the burden of proof in this case. To the extent the Controlling Dates as referenced above stand for the proposition that it is the position of the

Commission or the Prehearing Officer that Aloha has the burden of going forward or the burden of possession [sic] in this case, Aloha seeks reconsideration of that Order, as such Order would not be in compliance with the basic tenets of due process and the appropriate and fundamental procedure in administrative cases such as this.

The utility, citing Florida DOT v. JWC Company, Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981), states that the burden of proof is upon the Petitioners to go forward with evidence to prove the truth of the facts asserted in their petitions, and that Aloha, under any reasoning, cannot be considered an applicant. Aloha states that it was not aggrieved by and did not protest the Commission's PAA Order. Therefore, it states that there is simply no issue on which it can file any initial direct testimony. Because the Petitioners are protesting and requesting a hearing, Aloha argues that it is up to the Petitioners to carry the burden of going forward and the burden of persuasion in this proceeding. Aloha concludes that it would then be appropriate for Aloha, as a respondent, to respond appropriately. If Aloha is required to go first, it states that its testimony would be very basic at best. Wherefore, Aloha seeks a determination by the full panel that Aloha does not have the burden of proof in this case and that the Petitioners do.

OPC filed its response to Aloha's Motion for Reconsideration on March 30, 1999. In that response, OPC, citing Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962), states that it is well-established in the law that the purpose of reconsideration is to bring to the Commission's attention some point that it overlooked or failed to consider or a mistake of fact or law. OPC argues that Aloha's motion does not allege that the prehearing officer overlooked or failed to consider any point or committed a mistake of fact or law.

OPC then states that Aloha has the responsibility for delivering a safe and adequate product to the customers, and that it is the statutory duty of the Commission to ensure the adequacy of service by regulated utilities. OPC concludes by submitting that it is the burden of Aloha to come forward and either present a plan to remedy its inadequate service, or to justify its current rates which are paid by customers for safe and adequate service which they do not currently receive. Therefore, OPC states that the schedule in the Order Establishing Procedure is the customary and legal means by which the parties are offered an opportunity to proceed, and the utility's Motion for Reconsideration should be denied.

Staff agrees with OPC that the standard for determining whether reconsideration is appropriate is set forth in Diamond Cab. In Diamond Cab, the Court held that the purpose for a petition for reconsideration is to bring to an agency's attention a point of fact or law which was overlooked or which the agency failed to consider when it rendered its order in the first instance, and it is not intended as a procedure for rearguing the case merely because the losing party disagrees with the judgment. Id. at 891. In Stewart Bonded Warehouse v. Bevis, 294 So. 2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. Staff has applied these standards in its analysis of Aloha's Motion for Reconsideration.

Staff notes that in the formal hearing in this case, the Petitioners and the customers did put on evidence and convinced the Commission that the quality of service provided by Aloha was unsatisfactory. The utility has consistently questioned this finding and has asserted that the quality of service should be considered satisfactory. Specifically, the utility has stated that its handling of customer complaints is now satisfactory, that it is now in compliance with the lead and copper rules and all other rules of DEP, and that its continued addition of a corrosion inhibitor complies with the procedures recommended by DEP. Also, it has on more than one occasion, requested the Commission to pre-approve the construction of three centrally located packed-tower-aeration facilities as a solution to the black-water problem.

Although no issues have been specifically defined at this point in time, staff notes that the issues in its December 15, 1998 recommendation and addressed in the PAA order were as follows:

1. Is there a water quality problem in Aloha's Seven Springs service area, and, if so, what actions are required?
2. Should the Commission grant Aloha's request and declare that it is prudent for Aloha to begin construction of three central water treatment facilities for its Seven Springs service area?
3. Should this docket be closed?

Even if the utility admits that there is a water quality problem in the Seven Springs service area and drops its request that the Commission declare it prudent for Aloha to construct three central water treatment plants, staff believes that the burden should remain on the utility to present what actions Aloha believes are appropriate to correct the quality of service problems. Staff

DOCKET NO. 960545-WS
DATE: APRIL 22, 1999

believes that this is the case even if the utility believes that no further actions are required. This is doubly true if the utility thinks that there is no longer a quality of service problem and wishes to put on evidence that the best solution is three centrally located packed-tower-aeration facilities. At the very least, staff believes that the utility must put on evidence that shows that the utility should be required to take no further actions in this quality of service investigation.

Therefore, Aloha's Motion for Reconsideration has failed to bring to the Commission's attention a point of fact or law which was overlooked or which the prehearing officer failed to consider when the order was rendered in the first instance, and the utility's arguments are inappropriate for reconsideration under the Diamond Cab case. Accordingly, staff believes that the Order Establishing Procedure correctly established the correct order for testimony to be filed, and contains no mistake of fact or law. Based on the foregoing, staff recommends that the Commission deny Aloha's Motion for Reconsideration.