



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

## -M-E-M-O-R-A-N-D-U-M-

**DATE:** DECEMBER 9, 1999

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (JAEGER)  
DIVISION OF WATER AND WASTEWATER (WILLIS)

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

**AGENDA:** 12/21/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\960545.RCM

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RECORDS AND REPORTING

### 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 this docket.

For the purposes of hearing, this docket was consolidated with Docket No. 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.

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FPSC-RECORDS/REPORTING

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 were unsatisfactory.

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 Environmental Protection Agency (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 was still 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, on January 7, 1999, the Commission 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).

However, 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 was scheduled for September 30, and October 1, 1999.

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However, the hearing dates were later rescheduled for December 13 and 14, 1999.

With the scheduling of the formal hearing, several orders concerning procedure were issued. Pursuant to Order No. PSC-99-1499-PCO-WS, issued August 3, 1999, both the prehearing statements and rebuttal testimony and exhibits were to be filed on October 29, 1999.

On October 29, 1999, the Office of Public Counsel (OPC) filed its Prehearing Statement. On November 1, 1999, Aloha Utilities, Inc. (Aloha), filed both its Prehearing Statement and the rebuttal testimony of Stephen G. Watford, Robert C. Nixon, David W. Porter, and F. Marshall Deterding. Also, by letter dated November 8, 1999, and filed on November 9, 1999, Representative Mike Fasano, Intervenor, adopted the Prehearing Statement of the OPC.

On November 10, 1999, the OPC and Representative Mike Fasano (Intervenors), filed their Motion to Correct Scrivener's Error and their Motion to Strike Certain Testimony and Exhibits. In response to these motions, on November 22, 1999, Aloha filed its Response to Motion of Intervenors to Strike Certain Testimony and Exhibits and, also, a Motion to Supplement Direct Testimony.

On November 15, 1999, the hearing dates were changed from December 13 and 14 to December 16 and 17, 1999. With this change in hearing dates, the Intervenors filed a Motion for Continuance. With the approval of the Chairman's Office, this motion was granted by Order No. PSC-99-2285-PCO-WS, issued November 22, 1999. The hearing was tentatively rescheduled for March 1 and 2, 2000, but was then changed to March 29 and 30, 2000.

Also, on November 29, 1999, the Intervenors filed their Motion for More Time to Respond to Aloha's Motion to Supplement Direct Testimony. In that motion, the Intervenors requested that they be given until 5:00 p.m. on December 2, 1999 to respond to the utility's motion. However, even before the order granting this request could be issued, the Intervenors filed their Response to Aloha's Motion to Supplement Direct Testimony on November 30, 1999. An Order granting the request was issued on December 6, 1999. This recommendation addresses the above-noted motions and responses.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant Intervenors' Motion to Correct Scrivener's Error?

**RECOMMENDATION:** Yes, the Commission should grant Intervenors' Motion to Correct Scrivener's Error. (JAEGER)

**STAFF ANALYSIS:** In this motion, the Intervenors state that the prehearing statement filed by OPC on October 29, 1999, should have been styled Intervenors' Prehearing Statement and should have reflected Intervenor Mike Fasano's joinder therein. The utility did not respond to this motion. Also, staff notes that by letter dated November 8, 1999, Representative Fasano notified the parties that he adopted OPC's prehearing statement. Therefore, staff does not believe that this correction prejudices the utility and recommends that the Intervenors' Motion to Correct Scrivener's Error be granted.

**ISSUE 2:** Should the Commission grant Intervenors' Motion to Strike Certain Testimony and Exhibits?

**RECOMMENDATION:** Yes, the Commission should grant Intervenors' Motion to Strike Certain Testimony and Exhibits. Moreover, the utility's request for oral argument need not be ruled upon. (JAEGER)

**STAFF ANALYSIS:** In this motion, the Intervenors have moved to strike certain testimony that Aloha has styled as rebuttal testimony. Specifically, the Intervenors request that the following testimony and exhibits be stricken: pages 32 and 33, and Exhibit DWP-5 (pages 1-37) of Mr. Porter's rebuttal testimony; page 1, beginning at line 18, and continuing to page 2, line 16 and all of Exhibit SGW-1 of Mr. Watford's testimony; the entirety of Mr. Nixon's rebuttal testimony and exhibits; and the entirety of Mr. Deterding's rebuttal testimony and exhibits.

In support of this motion, the Intervenors note that nowhere in the direct testimony of Aloha's case nor in the testimony of the Intervenors or staff is there even a mention of regulatory expense or its recovery. However, for the first time in rebuttal, the Intervenors argue that Aloha presents evidence which does not rebut anything, but, rather, presents a direct case which is beyond the scope of the Intervenors' direct case. The Intervenors cite Driscoll v. Morris, 114 So. 2d 314, 315 (3d DCA 1959). In that case, the court held:

Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant. If the proffered evidence appears to be cumulative rather than rebuttal, it is within the sound discretion of the trial judge to allow its admission and the exercise of this discretion will not be disturbed on appeal unless it appears to so prejudice the result as to indicate an abuse of discretion.

The Intervenors do note that there is an exception for cumulative evidence and that the Commission has allowed in a

petition for general or limited rate relief the filing of rebuttal testimony on rate case expense. However, the Intervenor state that the objectionable testimony in this instance is not cumulative and "amounts to an impermissible expansion of Aloha's case-in-chief."

In its Response to Motion of Intervenor to Strike Certain Testimony and Exhibits, Aloha states that whether the testimony and exhibits which are the subject of OPC's Motion fit the "technical definition of 'rebuttal,' it is in the public interest that those issues be placed before the Commission." Aloha further states that the testimony and exhibits relate directly to the case at hand and that, with the continuation of the hearing, it would be logical, expeditious, and economical to resolve the issue of regulatory expense in this docket. Aloha then refers to its Motion to Supplement Direct Testimony and requests oral argument.

The utility's request for oral argument does not comply with Rule 25-22.058, Florida Administrative Code (rule governing oral argument). However, because this action is prior to hearing, pursuant to Rule 25-22.0021(1), Florida Administrative Code, this item has been listed as parties may participate. Therefore, staff does not believe that it is necessary for the Commission to rule on this request.

Having reviewed the Intervenor's motion and the utility's response, staff believes that the testimony and exhibits that the Intervenor seek to strike do not rebut any parties' testimony, are not cumulative to any other testimony, and are, therefore, not proper rebuttal testimony and exhibits. Therefore, staff recommends that the Intervenor's Motion to Strike Certain Testimony and Exhibits be granted and the requested testimony and exhibits should be stricken.

**ISSUE 3:** Should the Commission grant Aloha Utilities' Motion to Supplement Direct Testimony?

**RECOMMENDATION:** No, Aloha's Motion to Supplement Direct Testimony should be denied. (JAEGER, WILLIS)

**STAFF ANALYSIS:** In its Motion to Supplement Direct Testimony, Aloha states that if the Intervenor's Motion to Strike is granted, then the utility should be allowed to file such testimony and exhibits as supplemental direct testimony. Aloha filed its proposed supplemental direct testimony with its motion.

Aloha claims that the allowance of such testimony would be in the public interest, "would not prejudice any party, and would be in furtherance of the principles of both fundamental fairness and judicial economy, particularly in light of the fact that this case has now been tentatively continued until" March 29 and 30, 2000. Aloha further states that all parties should be given an opportunity to file additional testimony in response within thirty days of the date of its motion.

The Intervenor's filed their Response to Aloha's Motion to Supplement Direct Testimony on November 30, 1999. In that response, they divided their argument into three main sections. Each are summarized below:

A. There Is No Pending Request For Rate Relief - The Intervenor's state that the current docket does not form a basis or vehicle upon which the Commission may lawfully change the rates charged to customers. The Intervenor's note that the proceedings which followed the determination of unsatisfactory quality of service found in Order No. PSC-97-0280-FOF-WS, issued March 12, 1997, could be characterized as attempts to explore by what means quality of service might be improved. The Intervenor's further note that the utility has neither availed itself of nor complied with the provisions for obtaining general rate relief under Section 367.081, Florida Statutes, or a limited rate proceeding under Section 367.0822, Florida Statutes. The Intervenor's state that "[t]he various filing requirements and subsequent procedures contemplated by Sections 367.081 and 367.0822, Florida Statutes (1999), many of which dictate the rights of affected parties, are entirely unaddressed and thus neglected in this docket." Finally, they conclude that "[i]f Aloha wishes to call upon the

customers for reimbursement, . . . that Aloha must do so by means of a petition for general rate relief, or by a petition for a limited proceeding supported by appropriate evidence -- not by bare testimony that it has spent money."

B. Aloha Has Shown Neither Injury Nor Entitlement to Relief - In this section, the Intervenor's state that Aloha has never alleged "that the alleged costs ever rendered its earnings to be other than fair and reasonable, and fully compensatory . . ." and the "test prerequisite to commission action is whether the utility is earning outside its last authorized rate of return." The Intervenor's note that even in a price-index or pass-through proceeding the utility must by affidavit certify that such proceeding would not cause the utility to earn above its previously authorized rate of return.

The Intervenor's further argue that the principle rate-making statute, Section 367.081, Florida Statutes, "provides that the Commission shall establish rates which provide for a fair return on the investment of the utility in its property used and useful in the provision of utility service to the public," and that it is the utility's burden to show that its rates are not compensatory. Because the utility has failed to do this, the Intervenor's argue that the utility is not entitled to any rate relief.

C. Expenses Directly Flowing From Non-Feasance or Misfeasance Are Not Prudently Incurred - In this final section, the Intervenor's state that Order No. PSC-97-0280-FOF-WS stands unchallenged that Aloha has provided quality of service that is unsatisfactory. They then argue that it would be unfair to require customers to endure unsatisfactory quality of service and to pay the expenses of Aloha's subsequent disagreement with a Commission finding. They further argue that Aloha has made no material, incremental investment to cure the unsatisfactory quality of service, and that there has been no material improvement in the quality of service since the issuance of Order No. PSC-97-0280-FOF-WS. Based on all the above, the Intervenor's state that Aloha's Motion to Supplement Direct Testimony should be rejected.



Staff notes that Rule 25-22.0407, Florida Administrative Code, applicable to all requests for general rate increases, requires notice of any rate request be sent to all customers within the service areas included in the rate request. Such notice must be sent within fifty days after the official date of filing. Staff further notes that similar notice requirements are generally applied to limited rate proceedings and believes that the customers have a right to notice, not only under the Rule, but under due process principles of both the United States and the Florida Constitutions. In the case at hand, staff does not believe that the first time or place for notice of a request for increased rates should come with the filing of "rebuttal" testimony.

#### CONCLUSION

In Order No. PSC-97-0280-FOF-WS, the Commission specifically attempted to remove all expenses associated with the quality of service issues, finding that it was not appropriate for those expenses to be included in setting rates for the reuse docket. However, that Order did not state how or if those expenses should be recovered. Further, that Order only set wastewater rates for the Seven Springs Division of Aloha. That Order did not address the earnings situation for the water service provided by the Seven Springs Division or the water and wastewater service provided by the Aloha Gardens Division.

Therefore, there is no way to determine whether the utility is overearning or underearning, and the utility has submitted no allegations or proof of its earnings situation. Based on all the above, it appears that, at this late stage of the proceeding, it would be improper to convert this investigation into quality of service into a "limited rate proceeding" and allow the testimony as requested by the utility. Staff believes that it would be more appropriate for these expenses to be considered separate from this proceeding in either a limited proceeding or in a full rate case. Therefore, staff recommends that Aloha's Motion to Supplement Direct Testimony be denied.

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**ISSUE 4:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open to conduct the hearing scheduled for March 29-30, 2000. (JAEGER)

**STAFF ANALYSIS:** The docket should remain open to conduct the hearing scheduled for March 29-30, 2000.