

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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DOCKET NO. 991643-SU

RECORDS AND REPORTING

In re: Application for increase )  
in wastewater rates in Seven )  
Springs System in Pasco County )  
by Aloha Utilities, Inc. )  
\_\_\_\_\_ )

ALOHA'S RESPONSE TO STAFF'S MOTION TO COMPEL AND  
REQUEST FOR EXTENSION OF TIME TO FILE PREFILED TESTIMONY AND  
OPC'S MOTION FOR EXTENSION OF TIME TO FILE TESTIMONY

Aloha Utilities, Inc. (Aloha), by and through undersigned counsel, hereby files this Aloha's Response to Staff's Motion to Compel and Request For an Extension of Time to File Prefiled Testimony and OPC's Motion for Extension of Time to File Testimony and in support thereof would state and allege as follows:

MOTION TO COMPEL

1. Because Staff's Motion clearly demonstrates a certain confusion regarding Aloha's responses to interrogatories and the issues raised by those responses, Aloha would take this opportunity to state the following clearly, definitively, and concisely:

Aloha has not filed objections to discovery as required by the Civil Rules. Aloha has fully responded to the outstanding discovery.

- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM 3
- CTR \_\_\_\_\_
- ECR Merchant
- LEG 2
- OPC \_\_\_\_\_
- PAI 1
- REG 1
- SEC 1
- SER \_\_\_\_\_
- OTH \_\_\_\_\_

While the Staff's Motion implies a refusal to answer certain discovery responses on the part of Aloha, the fact is that where the information exists, Aloha has provided the information. Where the information does not exist, Aloha can not and could not supply the information. Aloha's answers are completely consistent with

the proper and appropriate scope of discovery. A party to whom

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discovery is directed is not required to produce or create information or answer questions requesting information that is not presently in existence. If an interrogatory or document requests or solicits a projection or calculation or estimate and the projection or calculation, or estimate has already been prepared by that party for its own or other purposes, then that party should answer the discovery (if it does not otherwise properly object to the same.) However, if the discovery solicits a projection or calculation or estimate and the projection or calculation or estimate does not exist, the party to whom the discovery is directed need not answer the discovery other than to indicate that the projection or calculation or estimate does not exist. That is all Aloha did in this case. Aloha has not objected to the discovery and has not moved for a Protective Order with regard to the discovery. It has answered the questions fully and completely with regard to the existence or availability of the information.

2. The above referenced principles could not be more clearly set out than they are in the case in *In re: Application For Rate Increase In (Various Counties) By Southern States Utilities* Docket no. 920199-WS; Order no. PSC- 92-0819-PCO-WS (1992). In that case, Commissioner Easley held that:

. . . I cannot agree that the utility should be

*required to produce information or answer questions based on information which is not presently in existence. . . . Therefore, if an interrogatory or document requests or solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not exist, the utility need not answer the discovery.*

3. Just as a party can not require another party to create a non-existent document, see, e. g., *Allstate Insurance Company vs. Nelson, Wardell, Pinder e.t. al.*, 746 So. 2d 1255 ( 4<sup>th</sup> DCA 1999), a party cannot be required to require another party, through the vehicle of discovery, to create, calculate, project, or accumulate information not in existence. The staff has every right to ask for base facts from which the staff may make projections, calculations, or from which the staff will extrapolate certain conclusions. But to require Aloha to engage in this type of "information creation" is well beyond the proper scope of discovery.

4. It is particularly noteworthy that the staff's Motion does not cite a single case to support its apparent position that it may require the utility to create information, projections, or estimates not presently in existence. That is because there is no authority to support the staff's position. Additionally, it is surprising to see the staff refer to section 367.121 (1)(c) regarding the Commission's power to require preparation of

information and reports from utilities under certain circumstances. Surely the staff has not confused itself with the Commission. And surely the staff has not confused the authority vested upon parties to litigation by the Florida Rules of Civil Procedure with the statutory authority of the commission. If the staff requests something through the auspices of discovery, then the Florida Rules of Civil Procedure and the case law interpreting the Florida Rules of Civil Procedure are applicable. If the Commission requests information from a utility, through operation of the power vested in the Commission by section 367.121 (1)(c), then the Commission must do so by proper order and if the utility is aggrieved by the order then the utility has an opportunity to protest or otherwise have that order reheard.

Perhaps this confusion on the part of staff, between the power to send discovery under the Florida Rules of Civil Procedure and the Commission's statutory power is the basis for staff's erroneous position. Aloha cannot be compelled to create, calculate, project, or estimate information which is not currently in existence merely because the staff sends the utility an inter-rogatory telling it to do so. In either case, the position of the staff is incorrect. The fact that the Commission has the statutory power to require a utility to submit certain information in certain circumstances does

not somehow magically bestow upon the staff the power to require information through interrogatories which exceeds the type and scope of information which the Civil Rules afford to other parties to litigation.

5. So that there is no misunderstanding or misapprehension whatsoever, with regard to interrogatory no. 3, Aloha would state the following: Aloha does not possess the projection required by interrogatory no. 3 and the same is not in existence. Aloha does not need, in the ordinary course of business, the information or projection required by interrogatory no. 3 and has never created the same. Aloha is not required to have previously prepared the projection or information required by interrogatory no. 3.

6. So that there is no misunderstanding or misapprehension whatsoever, with regard to interrogatory no. 7, Aloha would state the following: Aloha has never created this information, the information is not in existence, Aloha has not needed this information in the ordinary course of business, and Aloha is not required to have previously prepared this information. Additionally, the base data for the creation of this information has previously been provided to the staff. Despite this fact, and in the spirit of good faith, Aloha will create this information and present it to the staff of the Commission by July 18, 2000.

7. So that there is no misunderstanding or misapprehension whatsoever, with regard to interrogatory no. 28(c), Aloha would state the following: Aloha has not previously created this information, Aloha has no need for this information in the ordinary course of business at this time, and Aloha is not required to have previously created this information. The fact that the interrogatory requests this information from a "registered professional engineer" also evidences confusion on the part of the staff, since even if this projection had been previously created it could not be done in total by a "registered professional engineer without accounting expertise to classify such projections by NARUC accounts."

8. So that there is no misunderstanding or misapprehension whatsoever, with regard to interrogatory no. 31, Aloha would state the following: The information required by interrogatory no. 31 is not in existence and has not been previously created by Aloha, the information is not needed (in the form requested) by Aloha in the ordinary course of business, and the information is not required to have been previously created by Aloha. The staff's statement in its Motion that it is Aloha's position regarding certain documents required to be kept or retained the NARUC Regulations is either coy or rests upon an additional misapprehension. In fact, Aloha keeps

all such documents required by all such NARUC Regulations. Aloha's responses to the staff merely pointed out that the records and documents which staff's interrogatories would require to be created do not exist.

The base data does exist from which the detailed analysis requested could be created (for the last 4 years) with expenditure of substantial funds for reprogramming the Utility's computer system. Such reprogramming and document creation would require an estimated 45 days and approximately \$14,000 in consulting programmer fees. Staff's Motion admits at page 9 that what the interrogatory really expects is for Aloha to accumulate all of the records and then to "compile" information (no matter whether it exist or not, no matter how difficult that would be or not, and no matter whether or not the information would be useful to any person or party) and then to send that information to the staff. This is an improper use of the Civil Rule's discovery provisions and in fact acknowledges the staff is seeking discovery of information which they know or suspect does not exist presently.

9. Arguments about the issue of relevancy in the staff's Motion, and a demand that the prehearing officer order this information created and produced by next Tuesday, reveal a basic misapprehension on the part of the staff as to what they are

actually asking for. Relevancy is not the issue here. The issue is that Aloha doesn't have this information, hasn't needed it in the ordinary course of business, and is not required to have previously calculated, estimated, or compiled this information. To think that this information could be projected, calculated, estimated, or compiled by next Tuesday is absurd. Any order of this Commission which requires that Aloha create, compile, project, calculate, and estimate this information, which does not exist, which Aloha is not required to have in which Aloha has never needed in the ordinary course of business, by next Tuesday would be an order which Aloha could not possibly comply with.

10. With regard to Instruction E of the staff's First Set of Interrogatories, Aloha would submit the following: Mr. David Porter, Mr. Bob Nixon, Mr. Steve Watford with the assistance of individuals at Aloha, and Aloha's counsel responded to the interrogatories. The address of each is previously known to the staff or may be obtained by contacting Aloha's counsel.

EXTENSION OF TIME TO PREFILE DIRECT TESTIMONY

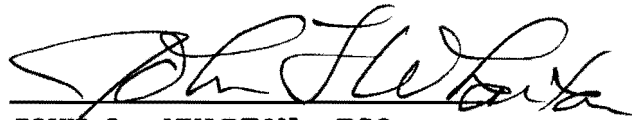
11. Staff has not set forth an adequate basis for an extension of time to prefile testimony. Staff knew or should reasonably have known what information it could obtain through the Florida Rules of Civil Procedure and what information it would not be able to obtain through the Florida Rules of Civil Procedure.



Disappointment over proper and valid responses to previously tendered interrogatories is not a sound basis for an extension of time in which to file testimony. However, in any case, if the time for staff and/or the Office of Public Counsel, to prefile direct testimony is in fact extended, an extension of equal length should be granted to Aloha for the preparation and filing of its rebuttal testimony.

WHEREFORE, and consideration of the above, Aloha respectfully the prehearing officer to deny the staff's Motion in all respects.


DATED this 13<sup>th</sup> day of July, 2000.



JOHN L. WHARTON, ESQ.  
F. MARSHALL DETERDING, ESQ.  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by Fax and U.S. Mail to Steve Burgess, Esquire, Office of Public Counsel, and Ralph R. Jaeger, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850 on this 13<sup>th</sup> day of July, 2000.



John L. Wharton, Esq.  
F. Marshall Deterding, Esq.