

**ORIGINAL**

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In Re: Application of Aloha Utilities, Inc. )  
for Increase in Wastewater Rates in its Seven )  
Springs System in Pasco County, Florida )

DOCKET NO. 991643-SU

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RECORDS AND REPORTING

**ALOHA'S MOTION TO STRIKE "REBUTTAL" TESTIMONY**

Aloha Utilities, Inc. ("Aloha"), by and through its undersigned counsel, hereby files this Motion to Strike "Rebuttal" Testimony and in support thereof would state and allege as follows:

1. On September 11, 2000, the Office of Public Counsel caused to be filed in this proceeding "rebuttal" testimony of Mr. Ted Bidy, an expert witness for OPC. After review of the testimony, it is difficult to ascertain exactly what the nature of Mr. Bidy's testimony is. However, a cursory review of the testimony definitively reveals what the testimony is not: It is not "rebuttal" testimony.

2. Even if it was proper (which it is not) for OPC to file rebuttal testimony in this case, it is apparent that the testimony filed by Mr. Bidy is not "rebuttal" testimony in any sense of the word or in any generally accepted understanding of the concept of rebuttal testimony. Mr. Bidy's testimony does not even attempt to hide the fact that its purpose is "to offer comments on the testimony of Public Service Commission (PSC) Staff witness David G. MacColeman". (See, rebuttal testimony of Ted L. Bidy, page 1, line 9).

3. Clearly, Mr. Bidy's "rebuttal" testimony is nothing more than Mr. Bidy's attempt to put words in the mouth of Mr. MacColeman. The testimony is replete with examples such as:

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

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- ◇ My comment is that Mr. MacColeman was speaking of the “normal” average daily flow (ADF) which an engineer would use in the design of future upgrades to the Aloha treatment facilities and that he was not speaking of . . . (page 2, line 1).
- ◇ Mr. MacColeman certainly knows that . . . (page 2, line 5)
- ◇ Mr. MacColeman was simply agreeing to . . . (page 2, line 8)
- ◇ His agreement that 150 GPD per ERC was normal for the Aloha System was in no way in reference to . . . (page 2, line 10).
- ◇ Mr. MacColeman did not go on to say, as he could have to have made his answer more clear, that . . . (page 2, line 21).
- ◇ The “engineering standards” which Mr. MacColeman referred to in his answer are . . . (page 3, line 6).
- ◇ Mr. MacColeman’s further answer that . . . is directly to the point . . . (page 4, line 3).
- ◇ Mr. MacColeman’s answer to the capacity question on page 2, lines 13-15 makes clear that . . . (page 4, line 7).
- ◇ [t]he mere fact that Mr. MacColeman would not give an amount of excessive I/I does not mean that Aloha’s I/I is not excessive (page 4, line 18).

4. Mr. Bidy prefled 12 pages of prefled testimony in this matter on July 31, 2000 (and accompanying exhibits). Mr. MacColeman filed four pages of prefled testimony on August 28, 2000. Mr. MacColeman had every opportunity to testify as fully, as plainly, as directly, as succinctly, or as expansively as his heart desired. His testimony is the result of his affirmative decision to put just that testimony into evidence in this case and not to include more testimony therein and not to include less

testimony therein. Mr. MacColeman is an expert with the Department of Environmental Protection whose testimony has been stipulated into this proceeding and who will not appear as a witness at this proceeding. Mr. MacColeman's testimony, as should the testimony of every witness in this proceeding, must stand or fall on its own merits. Mr. MacColeman does not need, and it would not be proper to allow, the assistance of Mr. Bidy in helping the finder of fact understand what Mr. MacColeman "really meant" or any clarification of Mr. MacColeman's "unstated intentions".

5. The simple fact is that Mr. Bidy's "rebuttal" testimony does not rebut one single thing. "Rebuttal evidence is evidence which is offered by a party after he has rested his case and after the opponent has rested in order to contradict the opponent's evidence". *Black's Law Dictionary, 5<sup>th</sup> Edition*. "Rebuttal evidence is that which tends to explain or contradict or disprove evidence offered by the adverse party." *Id.* To quote "rebut" something is to defeat, refute, or take away the effect of something. *Id.* Mr. Bidy's testimony does not even pretend to "defeat, refute, or take away" the effect of Mr. MacColeman's testimony and there is nothing to support any inference or suggestion in this case that Mr. MacColeman's testimony is evidence offered by an "adverse party" to OPC. Additionally, Mr. Bidy's testimony not only reveals that Mr. MacColeman's testimony is not "adverse" to the position which Mr. Bidy espouses, it is actually an attempt to harmonize the prior testimony of Mr. Bidy and the testimony of Mr. MacColeman. Mr. Bidy does not take Mr. MacColeman's testimony and defeat it, refute it, or take away the effect of it. Rather, he attempts to "supplement it" or to "explain it" to show that he and Mr. MacColeman are of one mind (or at least in harmony) with regard to certain facets of the I/I issue. This is not rebuttal testimony and it is not evidence which rebuts anything. In fact, it is nothing more than an attempt to prop up testimony already rendered by Mr. Bidy.

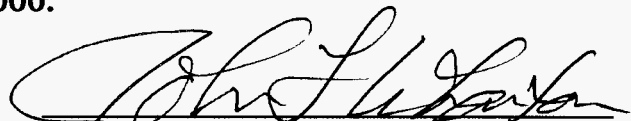
6. Aloha could have similarly chosen to have filed “rebuttal” testimony on behalf of its expert engineer which, paraphrased, could have suggested that “no, Mr. MacColeman actually meant this (insert interpretation favorable to Aloha here)”. However, to do so would have been procedurally improper and factually unnecessary. Mr. MacColeman said exactly what he wanted to say and exactly what he felt he could justifiably say based on his personal knowledge and expertise. Mr. Bidy had an earlier opportunity to say exactly what he wanted to say and what he felt he could justifiably say based on his particular expertise. The Commission should not hear from Mr. Bidy about what Mr. MacColeman “really meant” in his prefiled testimony and neither should the Commission similarly entertain any suggestions from any other witness about what Mr. Bidy “really meant” when he filed his prefiled testimony. If a witness means something different from what he says, then cross examination is the time to bring that point out.

7. Also, it is improper for the Office of Public Counsel to be filing rebuttal testimony in this proceeding in any case. Rebuttal testimony is testimony which is allowed, in administrative proceedings, by the Applicant because the Applicant has the burden of proving that its application should be granted. Opposing parties in administrative litigation are already provided the opportunity to provide responsive testimony to parties which are “adverse” to them (in this case -- “Intervenor’s testimony”). The fact that parties which are similarly aligned file testimony at the same time (in a PSC rate case such as this) has no implications to the concept of rebuttal testimony. While one party may be “disappointed” that another (non-adverse) party did not say something more clearly (or more favorably to that party), that does not trigger an occasion to “rebut” that testimony (much less to supplement it as is really the case here) because that party has already had an opportunity to file

all the testimony it wanted on any given issue and which it could justifiably file on any given issue and which completely and entirely responded to the Applicant's already-filed testimony. Mr. Bidy could have propounded pages and pages and pages of direct testimony on the issue addressed by Mr. MacColeman, when he filed his direct on July 3st. What Mr. Bidy cannot do is lay in wait until the rebuttal filing date in this case and then to pounce and attempt to "prop up" either his prior testimony or the testimony of Mr. MacColeman by filing "rebuttal" testimony (which, in point of fact, rebuts nothing). Whether it is the concept of direct examination of a witness, of argument by counsel in a motion hearing, or the presentation of testimony in an administrative proceeding, the moving party or Applicant goes first and also gets to go last. This general rule of procedure allows, in each case, the offering party to put into the record or the evidence that amount of information which it deems necessary to carry its position in any given proceeding, and thereafter allows both the opposing party (and the initial party) the opportunity to "respond" to the position of the other side.

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests that the Commission strike the "rebuttal" testimony of Mr. Ted Bidy. Should the Commission allow the testimony of Mr. Bidy to stand, then Aloha should be provided an opportunity to file responsive testimony and to further engage in a deposition of Mr. Bidy on the points raised by his "rebuttal" testimony.

Dated this 18<sup>th</sup> day of September, 2000.



JOHN L. WHARTON  
E. MARSHALL DETERDING  
Rose, Sundstrom, & Bentley, LLP  
2548 Blairstone Pines Drive  
Tallahassee, FL 32301

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and U.S. Mail to the following on this 18<sup>th</sup> day of September, 2000:

Ralph Jaeger, Esquire  
Jason Fudge, Esquire  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Stephen Burgess, Esq.  
Office of Public Counsel  
111 Madison Street  
Tallahassee, FL 32399-1400



JOHN L. WHARTON

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