



Public Service Commission

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

DATE: DECEMBER 7, 2000

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

FROM: DIVISION OF LEGAL SERVICES (FUDGE, JAEGER)
DIVISION OF ECONOMIC REGULATION (WILLIS, FLETCHER)

RE: DOCKET NO. 991643-SU - APPLICATION FOR INCREASE IN WASTEWATER RATES IN SEVEN SPRINGS SYSTEM IN PASCO COUNTY BY ALOHA UTILITIES, INC.

AGENDA: 12/19/2000 - POST HEARING - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\991643.RCM

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RECORDS AND REPORTING

CASE BACKGROUND

On February 9, 2000, Aloha Utilities, Inc. (Aloha or utility) filed an application for an increase in rates for its Seven Springs wastewater system. The utility was notified of several deficiencies in the minimum filing requirements (MFRs). Those deficiencies were corrected and the official filing date was established as April 4, 2000, pursuant to Section 367.083, Florida Statutes. The application was set directly for formal hearing.

In compliance with the Orders Establishing Procedure, the Office of Public Counsel (OPC) filed the prefiled rebuttal testimony of Ted L. Bidy, on September 11, 2000. In response, on September 18, 2000, Aloha filed its Motion to Strike "Rebuttal" Testimony (Motion) of OPC witness Bidy. In that Motion, Aloha raised two points. First, it claimed that it was improper for OPC to file rebuttal testimony at all. Secondly, Aloha claimed that the testimony filed by Mr. Bidy did not constitute proper rebuttal testimony.

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On September 25, 2000, OPC timely filed its Response to Aloha's Motion to Strike Rebuttal Testimony. In that response, OPC argued that staff witness MacColeman's use of 150 gallons per day (gpd) per equivalent residential connection (ERC) and his failure to find that there was excessive infiltration and inflow (I&I) was adverse to its position, that OPC was therefore entitled to rebut this testimony, and that Mr. Bidy's prefiled rebuttal testimony did rebut this testimony.

By Order No. PSC-00-1779-PCO-SU, issued September 29, 2000, the Prehearing Officer granted Aloha's Motion to Strike. In that Order, the Prehearing Officer found that Mr. Bidy's prefiled rebuttal testimony was direct testimony that OPC could have or should have filed in its direct testimony.

Subsequent to that ruling, on October 2-3 and November 2, 2000, the Commission conducted the formal hearing on Aloha's application for increased wastewater rates. On the first day of the hearing (October 2, 2000), OPC presented its ore tenus motion requesting reconsideration of the portion of the Order that struck the portion of witness Bidy's rebuttal testimony which concerned the existence of excessive I&I. OPC's request for reconsideration was denied (with one Commissioner dissenting).

At the hearing on November 2, 2000, OPC moved to strike major portions of the supplemental rebuttal testimony and exhibits of utility witnesses Watford and Nixon. On that same day, Aloha moved to strike in its entirety the supplemental direct testimony of staff witness Merchant. On the days those motions were presented, upon consideration of the motions and arguments of counsel, the Commission made rulings on each motion.

DECISION OF COMMISSION DENYING
OPC'S MOTION FOR RECONSIDERATION OF ORDER
STRIKING WITNESS BIDDY'S REBUTTAL TESTIMONY

As noted above, on October 2, 2000, OPC presented its oral motion for reconsideration of Order No. PSC-00-1779-PCO-SU, striking that portion of witness Bidy's rebuttal testimony concerning the existence of excessive I&I. First, OPC noted that the Order stated that the issue of I&I had been identified as an issue in this proceeding and should have been addressed in OPC's direct testimony. OPC argued that at the time of filing its rebuttal testimony, the issues had not been crystallized by any Order, and to the extent the Order stated that the issue of I&I had been identified as an issue in this proceeding, this was a misapprehension of fact. As to the misapplication of law, OPC

argued that the Order placed upon OPC, as a party, the obligation to anticipate an adverse position by another party, and that this was contrary to case law. In conclusion, OPC argued that if Mr. Biddy's testimony was improper rebuttal, then portions of the utility's rebuttal were also improper rebuttal.

In response to this oral motion for reconsideration, the utility again argued that the stricken testimony was not proper rebuttal testimony and that OPC should not have stipulated to staff witness MacColeman's testimony. The utility further argued that OPC had failed to demonstrate that there had been a mistake of fact or law, and that, therefore, the motion for reconsideration should be denied.

After consideration of all the above, the Commission (in a 2-1 vote) found no mistake of fact or law contained in Order No. PSC-00-1779-PCO-SU. Therefore, the Commission denied OPC's oral motion for reconsideration of the Order striking that portion of witness Biddy's rebuttal testimony which concerned the existence of excessive I&I.

DECISION OF COMMISSION GRANTING
OPC'S MOTION TO STRIKE PORTIONS OF SUPPLEMENTAL REBUTTAL
TESTIMONY AND EXHIBITS OF WITNESSES NIXON AND WATFORD

As stated above, on November 2, 2000, OPC moved to strike major portions of the supplemental rebuttal testimony of utility witnesses Watford and Nixon. Specifically, OPC moved to strike the supplemental rebuttal testimony of utility witness Watford as follows: from page 4, line 20 through page 22, line 5; from page 22, line 17 through page 24, line 11; from page 25, line 13 through page 28, line 3; from page 28, line 22 through page 29, line 3; from page 29, line 7 through page 29, line 13; from page 30, line 3 through page 30, line 5; from page 32, line 22 through page 36, line 8; from page 36, line 22 through page 37, line 11; and from page 40, line 25 through page 41, line 17. Moreover, OPC moved to strike Exhibits Nos. SGW-SR2 through SGW-SR7 which were attached to utility witness Watford's supplemental rebuttal testimony.

Similarly, OPC moved to strike all of utility witness Nixon's supplemental rebuttal testimony except the testimony beginning at page 1, line 23 through page 3, line 5. OPC also requested that Exhibits Nos. RCN-18 through RCN-20, which were attached to utility witness Nixon's supplemental rebuttal testimony, be stricken.

In moving to strike the above-noted testimony and exhibits, OPC stated that the utility should be held to the same standard that OPC was held to in the Commission's decision to strike OPC witness Bidy's rebuttal testimony. OPC argues that a great deal of evidence that the utility provided in response to the listing of perceived deficiencies by staff witness Merchant could have or should have been included in the utility's direct testimony and was not proper rebuttal testimony. In responding to the perceived deficiencies, OPC stated that the utility should have done one of two things: (a) it could have said "yes we did provide those things that you are looking for;" or (b) "we didn't provide those things, but we didn't need to because our justification lies elsewhere." Instead, OPC argues that Aloha merely filed additional evidence seeking to bolster its case, which evidence should have been submitted in the utility's direct testimony.

Aloha stated that the Order striking OPC witness Bidy's rebuttal testimony was based, at least in part, on the fact that Mr. Bidy was attempting to say what staff witness MacColeman meant to say or was attempting to put words in his mouth and that this was improper rebuttal. Aloha argued that its response to staff witness Merchant's criticisms was different from Mr. Bidy's rebuttal testimony. According to Aloha, its supplemental rebuttal testimony shows that it did the analysis and instructed the realtor on the requirements for a building, which staff witness Merchant stated was not evident in the utility's supplemental direct testimony.

Upon consideration of the above, the Commission found it appropriate to grant the ore tenus motion of OPC to strike certain rebuttal testimony and exhibits of Aloha witnesses Watford and Nixon, and such testimony and exhibits, as indicated by OPC, were stricken from the record. OPC did not move to strike all such testimony, and the utility proffered the prefiled supplemental rebuttal testimony and exhibits to the extent that they were stricken.

ALOHA'S MOTION TO STRIKE SUPPLEMENTAL DIRECT TESTIMONY
OF WITNESS MERCHANT

On November 2, 2000, after initially stipulating that the supplemental direct testimony of staff witness Merchant could be inserted into the record as though read, and subsequent to the Commission having granted OPC's motion to strike major portions of Aloha's supplemental rebuttal testimony and exhibits, Aloha moved to strike all of staff witness Merchant's supplemental direct testimony. Aloha argued that staff witness Merchant failed to take

a position on the prudence of the purchase of the office building and that her testimony was therefore irrelevant and immaterial.

OPC argued that because the utility had already stipulated that the testimony could be entered, the Commission was past the phase during which an objection could be entered.

Staff counsel noted that this testimony was not rebuttal and that the rationale supporting the striking of rebuttal testimony did not apply in this instance. Moreover, staff counsel noted that it was for the Commission to decide whether the testimony of staff witness Merchant would aid it in making a decision on the appropriateness of including the cost of the new building in calculating the appropriate rates for the utility.

Based on all the above, the Commission found that staff witness Merchant had already testified, and denied Aloha's motion to strike her testimony. The Commission further found that the points made by counsel for Aloha as to relevancy and immateriality could be argued by Aloha in its brief which was originally due to be filed on November 22, 2000.

SUBSEQUENT FILINGS

On November 16, 2000, OPC filed a Motion for Extension of Time to File Brief. The Motion was granted by Order No. PSC-00-2191-PCO-SU, issued November 17, 2000, which made all briefs due on November 29, 2000.

On November 15, 2000, Aloha filed a Motion for Reconsideration of the Commission's ruling granting the ore tenus motion of OPC to strike portions of the supplemental rebuttal testimony and exhibits of Aloha witnesses Robert C. Nixon and Stephen G. Watford. A timely response to the Motion was filed by OPC on November 29, 2000. This recommendation addresses Aloha's Motion for Reconsideration. The Commission has jurisdiction pursuant to Section 367.081, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Aloha's Motion for Reconsideration be granted?

RECOMMENDATION: No, Aloha's Motion for Reconsideration is premature and should be denied, without prejudice to refile, in accordance with Rule 25-22.060, Florida Administrative Code, after rendition of the Final Order memorializing the Commission's ruling. (FUDGE, JAEGER)

STAFF ANALYSIS: On November 15, 2000, Aloha filed a Motion for Reconsideration of the Commission ruling granting the ore tenus motion of OPC to strike portions of the supplemental rebuttal testimony and exhibits of Aloha witnesses Robert C. Nixon and Stephen G. Watford.

Aloha's Motion for Reconsideration

Aloha contends that it learned for the first time through the direct testimony of staff witness Merchant, that the Commission staff required a cost-benefit analysis to justify the prudence of Aloha's decision to purchase a building for office use. The requirement of conducting a cost-benefit analysis and the manner in which it is to be performed is not found in any promulgated rule or order of the Commission. Aloha goes on to argue that such requirement constitutes a rule pursuant to Section 120.52(15), Florida Statutes, which states that a rule is an agency statement that implements, interprets or prescribes law or policy or describes the procedure and practice requirements of an agency.

Aloha contends it has the right to challenge any portion of Ms. Merchant's testimony which attempted to demonstrate that the unadopted rule constituted a valid exercise of delegated legislative authority. See Gulf Coast Home Health Services v. Dept. Of HRS, 513 So. 2d 704 (Fla. 1st DCA 1987). Moreover, Aloha argues that when an agency relies upon non-rule policy, other parties must be given an opportunity to provide contrary evidence. See Florida Power & Light Co. v. State of Florida, Siting Board, etc., 693 So. 2d 1025 (Fla. 1st DCA 1997). However, Aloha asserts that the only opportunity to scrutinize Ms. Merchant's newly announced cost-benefit analysis "requirements" was through rebuttal testimony and exhibits.

In addition, Aloha alleges that the stricken supplemental rebuttal testimony of Watford and Nixon did constitute proper rebuttal. Aloha states that the Commission has defined rebuttal as testimony offered by the plaintiff which is directed to new matter

brought out by evidence of the defendant, or as additional facts required by new matter developed by the defendant. Moreover, Black's Law Dictionary, 4th Edition, defines "rebuttal," in part, as "the showing that statement of witnesses as to what occurred is not true."

For example, Ms. Merchant expressed concern that "Aloha should have documented the minimum requirements for its new location . . ." In his supplemental rebuttal testimony, utility witness Watford stated that this was incorrect and then explained the list of criteria furnished to the realtor.

As another example, Aloha states that it was merely responding to Ms. Merchant's newly established criteria of a listing of available properties, a documented comparison of each alternative and a detailed listing of the attributes of the acceptable locations. In response to the new matter, Mr. Watford provided a detailed description of each of the properties which Aloha reviewed as alternatives, as well as their attributes and disadvantages.

Finally, Aloha contends that the Commission overlooked or failed to consider clear and material principles of administrative law, concepts of due process of law, and the resulting prejudice to Aloha if the evidence is stricken as opposed to the lack of any prejudice to the Commission or OPC if such evidence is admitted. Aloha contends that the presiding officer should have exercised his broad discretion to allow the testimony, when there is no prejudice to the adverse parties other than having evidence in the case. Aloha states that the only harm, if any, was that the evidence was simply cumulative to that presented during Aloha's supplemental direct testimony. The Commission has allowed such cumulative evidence when it did not prejudice the result of the proceedings. Aloha states that OPC and staff did not conduct cross-examination on the portion of testimony not stricken, nor request the opportunity to provide surrebuttal evidence. Consequently, OPC and staff cannot demonstrate any prejudice from the receipt into evidence of the supplemental rebuttal testimony and exhibits and that the allowance of such evidence will provide the Commission with more complete information upon which to base its decision.

OPC's Response to Aloha's Motion for Reconsideration

OPC timely filed its Response pursuant to Rule 25-22.0376, Florida Administrative Code, claiming that the evidentiary ruling should be a non-final order and under that rule Aloha's Motion is untimely.

Even if the Motion is timely, OPC states that Aloha has misinterpreted the entire rationale for the oral motion and the Commission's ruling on that Motion. OPC states that:

Ms. Merchant's position is basically two-fold: (1) the utility was given the opportunity to present whatever information it considered necessary to demonstrate the prudence of the building purchase; (2) the information that the utility brought forward was not adequate to demonstrate the prudence of its decision.

There are only two ways to rebut the two-fold position. Either:

(a) the utility could have argued that it had, in fact, provided the information that Ms. Merchant said was missing; or

(b) the utility could have argued that notwithstanding the omission of the information suggested by Ms. Merchant, the utility's supplemental direct testimony nevertheless demonstrated the prudence with the information it did contain.

OPC argues that the utility did neither, but instead untimely provided the information that should have been provided in the first instance. OPC goes on to state that in paragraph 10, Aloha admits that Mr. Watford was simply "responsive" in providing the information. "That [OPC argues] is precisely the point: Mr. Watford rebutted nothing."

Next, OPC argues that the portions of Aloha's Motion alleging that Ms. Merchant adopted improper criteria for Aloha's burden of proof have nothing to do with the Commission's evidentiary ruling. Finally, OPC argues that paragraph 11 of Aloha's Motion merely reargues the points raised during the hearing and does not show any point of law or fact which the Commission misapprehended or misapplied.

Staff's Analysis

The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA

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1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

Aloha states that its Motion for Reconsideration is filed pursuant to Rule 25-22.060, Florida Administrative Code. However, OPC argues that it should have been filed pursuant to Rule 25-22.0376, Florida Administrative Code, and is therefore untimely. In reviewing these rules, staff notes that both rules state that any party who is adversely affected by either a non-final order (Rule 25-22.0376), or a final order (Rule 25-22.060), may file a motion for reconsideration within ten days of issuance of a non-final order and within 15 days of issuance of a final order. In the case at hand, the Commission has not yet issued any order on its ruling on November 2, 2000, to grant OPC's Motion to Strike. Consequently, staff believes that neither Rule is applicable at this time, and that the Motion for Reconsideration is premature. Therefore, staff recommends that Aloha's Motion for Reconsideration be denied without prejudice to refile, in accordance with Rule 25-22.060, Florida Administrative Code, after rendition of the Final Order memorializing the Commission's ruling.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending a ruling on Aloha's application for an increase in wastewater rates. (FUDGE, JAEGER)

STAFF ANALYSIS: Aloha's application for an increase in wastewater rates in its Seven Springs system is currently pending before the Commission. Therefore, the docket should remain open pending a ruling on Aloha's application.