

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 991643-SU

ORIGINAL

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RECORDS AND REPORTING

**CROSS MOTION FOR RECONSIDERATION**

Aloha Utilities, Inc. ("Aloha"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby moves for reconsideration of the Public Service Commission ("PSC" or "Commission") Order No. PSC-01-0326-FOF-SU insofar as it: (1) determines that none of the requested costs associated with Aloha's purchase of a new office building would be considered; (2) memorializes its prior granting of an *ore tenus* motion of the Office of Public Counsel ("OPC") to strike portions of the supplemental rebuttal testimony of Aloha's witnesses Robert C Nixon and Stephen G. Watford; and (3) proposes to radically change the PSC's longstanding policy concerning treatment of gross-up taxes collected and to include those taxes in CIAC and as an offset to rate base.

As grounds for this Motion, Aloha states that the Final Order overlooks fact and law with regard to Aloha's satisfaction of its burden of proof, through its supplemental direct testimony and those portions of its supplemental rebuttal testimony which were not stricken, which demonstrates the reasonableness of expenses related to the purchase of new office space. In the alternative, Aloha asserts that the Final Order misapplies the law with respect to the striking of Aloha's supplemental rebuttal testimony on that issue. The Order also overlooks fact and law with regard to the requirements for the Commission to

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alter longstanding Commission policy as expressed through the requirements of several prior Orders, and the burden on the staff when proposing such a change, to present through competent substantial evidence, the appropriateness of such change. In support of these grounds, Aloha states:

## **I. Office Building**

### *Background*

1. At the time Aloha filed its MFRs and its prefiled direct testimony in support thereof, Aloha requested recovery of rental expenses of its office building leased from a related party. Subsequent to such filing, Aloha was informed that its lease would not be renewed and that Aloha must vacate its leased space by December 31, 2000. For this and other reasons, Aloha performed an “extensive search” (TR. 988) for new office space and located an office building for purchase. The PSC permitted Aloha to file supplemental direct testimony and an exhibit pertaining to the recovery of costs associated with the new building. The PSC also set forth an expedited schedule for the subsequent filing of supplemental testimony from the OPC and the PSC staff, the filing of rebuttal testimony by Aloha, and the completion of all discovery regarding the issue of the purchase of a new office building by Aloha. The OPC filed no supplemental testimony concerning that issue. Neither the PSC nor the OPC conducted cross-examination of Mr. Watford on his supplemental direct testimony. (TR. 993) Aloha’s supplemental rebuttal testimony was in response to the PSC’s supplemental direct testimony announcing, for the first time, that a cost-benefit analysis was required to support the recovery of expenses related to the new

office building. Significant portions of that rebuttal testimony were stricken as a result of the *ore tenus* motion of the OPC.

*Aloha Satisfied its Burden of Proof through its Supplemental Direct Testimony and those Portions of its Supplemental Rebuttal which were Not Stricken*

2. Prior to the receipt of any prefiled testimony by the PSC staff and prior to the receipt of any discovery requests from the PSC, Aloha prefiled the supplemental direct testimony of Mr. Stephen G. Watford concerning the purchase of the new office building. There being no rule or prior policy of the PSC to the effect that a utility must prepare a written cost-benefit analysis in connection with the purchase of an office building, and being unaware of any "position" by the PSC that a cost-benefit analysis was required, Mr. Watford did not address such an analysis in his supplemental direct testimony. When that testimony was received into evidence at the hearing, neither the PSC nor the OPC had any questions on cross-examination of Mr. Watford. (TR. 993)

3. In his supplemental direct testimony, Mr. Watford explained Aloha's reasons for acquiring a new office building and explained that an extensive search for office space was made. He further explained the expenses related to the new building, as best as he knew them at the time of the filing of his testimony, and he compared those expenses to the expenses related to Aloha's former lease. (TR. 987 - 992) Aloha's discovery responses provided updates to his supplemental direct testimony. Those portions of Mr. Watford's and Mr. Nixon's supplemental rebuttal testimony which were not stricken address and substantiate the prudence of the purchase of the new office building and the reasonableness of the costs associated therewith. (Watford Supplemental Rebuttal, pp.

1-4 to line 23; p. 22, lines 6-16; p. 29, lines 14-25; p. 30, lines 1-3; p. 36, lines 8-21; p. 37, line 11 through p. 40, line 24; p. 41, line 18 through p. 43; Nixon Supplemental Rebuttal, p. 1, line 23 through p. 3, line 5)

4. In its Final Order, at page 27, the PSC determined, after striking Aloha's supplemental rebuttal testimony which addressed the concerns of Ms. Merchant regarding the lack of a cost-benefit analysis, that "there is insufficient evidence to determine that the purchase of the building was the most cost effective alternative" and that Aloha "has not presented sufficient evidence in this case to show that these costs are prudent." In support of those findings, the PSC relied upon the case of Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982). While agreeing that Aloha had to relocate its office due to the non-renewal of its lease, the PSC refused to consider the costs associated with the purchase of the office building.

5. Aloha asserts that the PSC, in rendering the findings and conclusions recited in the above paragraph, misapplied the law with respect to Aloha's burden of proof and overlooked the fact that the PSC has no rules or prior announced policies which require a cost-benefit analysis in connection with the purchase of a new office building. The MFRs contain no such requirement. Indeed, had Aloha acquired the office building during or prior to the test year utilized in its MFRs, it would have simply included the dollar amounts associated with the building with no further explanation or documentation. Aloha's supplemental direct testimony explains why new office space was needed and explains the expenses related thereto. The prudence of purchasing an office building and the reasonableness of the costs were demonstrated in Aloha's unstricken supplemental

rebuttal testimony. There is no contrary evidence that new office space was not needed by Aloha or that the purchase price of the building was unreasonable or imprudent. Absent contrary evidence presented by another party, the PSC is not authorized to disregard Aloha's evidence regarding the expenses related to its new office building. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. 1<sup>st</sup> DCA 1981). Aloha satisfied its burden to prove that its costs were reasonable and prudent. No burden to present evidence of alternatives considered or that the one chosen was "the most cost effective" exists in the law or in any prior Commission Order or rule.

6. The PSC's reliance upon the case of Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982), is misplaced. That case resulted from a "true-up" hearing, where fuel cost projections are compared with the actual results thereof and adjustments are made to account for underrecovery or overrecovery by the utility. In such a proceeding, utilities are required to demonstrate the reasonableness of their excess fuel costs and that the excess costs were not the fault of management. In that case, there was a dispute as to whether the failure to obtain a spare heat pump was, in part, the reason for the significantly higher fuel costs. Evidence was presented on each side of that dispute. The Florida Supreme Court deferred to the PSC's role as fact-finder, and held that where there is competent substantial evidence that management acted imprudently in not having a replacement pump available during an outage, the PSC was justified in disallowing the recovery of excess costs attributable to such mismanagement.

The Florida Power Corp. v. Cresse case stands for the proposition that where there is a clear conflict in the evidence as to the reasonableness of a cost incurred by a utility,

the PSC must resolve that conflict and its decision will be upheld if supported by competent and substantial evidence. Also see Rolling Oaks Utilities v. Florida Public Service Commission, 533 So.2d 770 (Fla. 1<sup>st</sup> DCA 1988), where competing experts testified as to the value of land and the District Court upheld the PSC's resolution of the conflicting opinions.

In the instant case, there was no conflict in the evidence. Neither the PSC nor the OPC presented any evidence that the costs incurred by Aloha with respect to its new office building were unnecessary or unreasonable. Likewise, there was no evidence of mismanagement on the part of Aloha in determining to purchase the office building in question. The PSC certainly presented no expert testimony to contradict the evidence of Aloha as to the expenses incurred for its new office building. Indeed, Ms. Merchant, the only PSC witness who testified about that issue, admitted that she has no experience or expertise in the commercial real estate market. (TR. 734-45) She further stated that she could take no position on Aloha's "prudence" in purchasing the building or on whether the costs "represent the most cost-effective alternative." (TR. 680) There simply is no competent or substantial evidence to contradict Aloha's testimony or to support a denial of the costs associated with that building. Accordingly, Aloha satisfied its burden of proof with respect thereto.

7. Ms. Merchant's conclusions concerning the requirement of a written cost-benefit analysis and the required contents thereof are not supported by competent substantial evidence. As discussed below, such requirements are unprecedented with respect to a utility's purchase of office space. As clearly set forth in Palm Coast Utility Corp. v. Florida

Public Service Commission, 742 So.2d 482 (Fla. 1<sup>st</sup> DCA 1999), any shift or change in “rate-making policy must be supported by expert testimony, documentary evidence or other evidence appropriate to the nature of the issue involved.” No such evidence exists in the record of this proceeding. By relying solely upon the testimony of Ms. Merchant, who has no experience or expertise in the commercial real estate market, to the exclusion of Aloha’s proof of the reasonableness of its office building expenses, the PSC has overlooked and/or misconstrued controlling law, as well as the only competent substantial evidence of record. And, as further discussed below, the “requirements” announced by Ms. Merchant constitute an unadopted rule, and Ms. Merchant totally failed to demonstrate that such a rule complies with the requirements of Section 120.57(1)(e)2, Florida Statutes.

*Aloha’s Supplemental Rebuttal Testimony Should Not Have Been Stricken*

8. Upon the filing of the supplemental direct testimony of PSC staff witness Patricia W. Merchant (which filing occurred subsequent to the filing of Aloha’s supplemental direct testimony on the same issue), Aloha learned for the first time that the PSC staff required a “cost-benefit analysis” to justify the “prudence” of Aloha’s decision to purchase a building for office use.

9. This “requirement,” as well as the manner of conducting such a cost-benefit analysis, is not found in any promulgated rule of the PSC (TR. 741). Ms. Merchant, who has no experience in the commercial real estate market (TR. 734-735), was unaware of any written prior policy statement or Order of the PSC which sets forth the “requirement” of a documented cost-benefit analysis in connection with a utility’s decision to lease or

purchase property for office use. (TR. 740-42) Likewise, the manner in which such a cost-benefit analysis for the purchase of office space is to be performed, as announced by Ms. Merchant for the first time in her supplemental direct testimony, is not set forth in any promulgated rule or Order of the PSC.

10. In portions of Mr. Watford's supplemental rebuttal testimony which were NOT the subject of the OPC's Motion to Strike, Mr. Watford states that:

. . . this is the first I have ever heard that the Commission believes it is appropriate, as Ms. Merchant suggests, that a Utility perform a "cost benefit analysis" (without even telling us what that is), in order to justify the purchase of a needed office building in an arms length transaction. I know of no business owner the size of Aloha who goes out to buy an office building and performs a "cost benefit analysis." Perhaps if it was somehow provided for or defined in Commission Rules, or even in prior Commission Orders, I could have a better understanding of what is required. It is my opinion though, as someone with actual business experience and as an experienced utility operator and manager, that Aloha undertook all the tasks which were prudent and necessary for it to take in order to relocate its offices under the circumstances I have described. (Supplemental Rebuttal, page 29, lines 14-25 and page 30, lines 1-3)

. . . I know of no utility that has ever been told it had to perform a "written cost benefit analysis" as justification for the purchase of an office building in an arms length transaction. (Supplemental Rebuttal, page 38, lines 6-8)

Mr. Watford states that he was "surprised" by the testimony of Ms. Merchant (Supplemental Rebuttal, page 1, line 18; TR. 1061, lines 4 and 5), and that Aloha's supplemental rebuttal constitutes an attempt to supply information based upon inquiries that Ms. Merchant seemed to be making in her direct testimony. (TR. 1061, lines 15-18) Neither the PSC nor the OPC cross-examined Mr. Watford regarding this supplemental rebuttal testimony.



Also, it is important to note that neither the PSC nor the OPC requested the opportunity to present surrebuttal evidence.

11. An agency statement that implements, interprets or prescribes law or policy or describes the procedure and practice requirements of an agency constitutes a rule. Section 120.52(15), Florida Statutes. Agencies are required to adopt and promulgate their rules by the rulemaking procedures prescribed in Section 120.54, Florida Statutes. When agency action which affects a party's substantial interests is based upon an unadopted rule, it is not presumed valid or invalid, and it is incumbent upon the agency to demonstrate compliance with the criteria set forth in Section 120.57(1)(e)2, Florida Statutes. One of those criteria is that the unadopted rule "is not being applied to the substantially affected party without due notice." Section 120.57(1)(e)2.e, Florida Statutes. All parties in an administrative proceeding have the right "to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence." Section 120.57(1)(b), Florida Statutes.

12. Applying the above specific requirements of Florida law to the facts herein, it is clear that the statements of Ms. Merchant setting forth the requirement of a cost-benefit analysis and delineating the manner in which such an analysis must be performed interpret and prescribe law or policy and purport to describe the procedure or practice requirements of the PSC with regard to the purchase and/or lease of office space. It is clear that such statements have not been promulgated as rules, nor do they appear in prior PSC Final Orders. It is clear that Ms. Merchant made me attempt to satisfy the requirements of Section 120.57(1)(e) 2, Florida Statutes. It is clear that any attempt by Ms. Merchant to

demonstrate that the unadopted rule constitutes a valid exercise of delegated legislative authority, as required by Florida's Administrative Procedure Act, Section 120.57, was subject to Aloha's right to present countervailing evidence in this proceeding. As stated in Gulf Coast Home Health Services v. Dept. of HRS, 513 So.2d 704 (Fla. 1<sup>st</sup> DCA 1987), an "agency's non-rule policy is fair game for a party's challenge" in Section 120.57 proceedings. When an agency relies upon non-rule policy, other parties must be given an opportunity to provide contrary evidence. Florida Power & Light Co. v. State of Florida, Siting Board, etc., 693 So.2d 1025 (Fla. 1<sup>st</sup> DCA 1997). In addition to clear principles of administrative law, principles of due process demand such a result when the non-agency party first learns of the non-rule policy after it has presented its case-in-chief. Prior to the presentation of its direct case, Aloha clearly had no notice of any need to try to prove the cost-benefit analysis "requirements" for the purchase of new office space first announced by Ms. Merchant during her testimony. Here, the only manner in which Aloha could offer countervailing evidence and challenge Ms. Merchant's newly announced cost-benefit analysis "requirements" or demonstrate compliance therewith was to offer rebuttal testimony and exhibits.

13. In summary, Aloha submits that the PSC, in granting the OPC's *ore tenus* Motion to Strike portions of the supplemental rebuttal evidence of Mr. Watford and Mr. Nixon, overlooked or failed to consider clear and material principles of administrative law set forth by statute and judicial opinions. Likewise, concepts of due process of law were overlooked or disregarded when Aloha was deprived of the opportunity to respond, through rebuttal evidence, to testimony concerning an unadopted rule announced subsequent to

the presentation of Aloha's direct evidence.

14. As an additional ground for reconsideration, Aloha submits that the PSC failed to consider and/or overlooked (possibly due to the breadth of the OPC's *ore tenus* motion and the lack of adequate time to consider the substance of the testimony sought to be stricken) the fact that the stricken supplemental rebuttal testimony did, indeed, constitute proper rebuttal.

15. The PSC itself has described 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. In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County, 00 FPSC 1:102 (January 10, 2000). Black's Law Dictionary, 4<sup>th</sup> Edition, defines "rebuttal," in part, as "the showing that statement of witnesses as to what occurred is not true." As discussed above, the testimony stricken by the PSC was directed both to new matter (i.e., a newly announced unadopted requirement concerning the purchase of office space) and to show that certain statements of Ms. Merchant were untrue.

16. For example, in her supplemental direct, Ms. Merchant expressed concern that "Aloha should have documented the minimum requirements for its new office location. . ." (TR. 683-684) In his supplemental rebuttal, Mr. Watford was asked whether it was correct that he did not develop criteria for the new building and submit it to the realtor. Mr. Watford stated that such was not correct, and stated that Aloha did, in fact, provide the realtor with a list of its needs for new offices and did, in fact, discuss with the realtor at length the criteria deemed necessary in its office space search. (Supplemental Rebuttal, pages 4 and

5) Mr. Watford then continued to explain the list of criteria furnished to the realtor. (Supplemental Rebuttal, pages 5-7) During his summary of supplemental rebuttal testimony at the hearing, Mr. Watford explained that it was puzzling to Aloha that Ms. Merchant would think that Aloha would call a realtor on the phone and say, "Go get us a building." (TR., page 1062) In other words, Mr. Watford was explaining why the statements made by Ms. Merchant were not true.

17. As another example, Ms. Merchant specified the kind of analysis which she believed Aloha should have done before purchasing the office building. Among her criteria were a listing of all available properties, a documented comparison of each alternative and a detailed listing of the attributes of the acceptable locations. (TR. 683-684) In response to this newly announced criteria, Mr. Watford provided a detailed description of each of the properties which Aloha reviewed as alternatives, as well as their attributes and disadvantages. (Supplemental Rebuttal, pages 7 through 22) This testimony was directly responsive to new matter brought forth by the PSC through the direct testimony of Ms. Merchant. Had Aloha been placed on notice concerning the criteria deemed necessary to justify its purchase of office space, it would have presented, in its supplemental direct testimony, evidence of the steps it actually took in that regard.

17. As a final ground for reconsideration, Aloha submits that the PSC, in granting the OPC's Motion to Strike, overlooked the bounds of its discretion and, in fact, abused its discretion to the prejudice of Aloha. It is well-established that a trial judge or a presiding officer of an administrative hearing has broad discretion to vary or permit departures from customary procedures regarding the order of proof and the examination of witnesses. This

discretion should be exercised on the basis of fair play and to facilitate the discovery of the truth. Rules of presentation of evidence should be relaxed when there is no prejudice to the adverse parties other than having the evidence in the case. Here, after the submission of its case-in-chief, Aloha learned of a PSC requirement that a detailed, written cost-benefit analysis be submitted to justify its purchase of office space. It is grossly unfair to strike Aloha's attempt to comply with that newly announced requirement. At worst, Aloha's rebuttal testimony was simply cumulative to that presented during Aloha's supplemental direct. The PSC has recognized its discretion to allow such cumulative evidence when such allowance will not prejudice the result of the proceedings. Aloha, 00 FPSC 1:102. Neither the OPC nor the PSC are prejudiced by allowing Aloha to respond to purported requirements discovered for the first time subsequent to the presentation of Aloha's case on direct, particularly when such requirements constitute a rule within the meaning of the Administrative Procedure Act. Had such requirements been properly promulgated or even announced in prior Orders of the PSC, Aloha would have been on notice that it needed to present such evidence during its direct case. The OPC did not offer any evidence whatsoever concerning Aloha's purchase of office space. Neither the OPC nor the PSC conducted cross-examination on that portion of Aloha's supplemental rebuttal evidence which was not stricken. And, neither the OPC nor the PSC requested the opportunity to provide surrebuttal evidence on the issue of Aloha's purchase of office space. Accordingly, the other parties to this proceeding cannot demonstrate any prejudice from the receipt into evidence of the supplemental rebuttal testimony and exhibits offered by Aloha. The allowance of such evidence will afford the PSC more complete information upon which to

base its ultimate decision. On the other hand, if this evidence is excluded, Aloha's rights under the APA, as well as its rights to due process of law, will be violated.

## **II. Inclusion of Gross-Up Taxes as CIAC**

### **Policy Shift is not Properly Supported as Required by Law**

19. In its Final Order, the Commission accepted a proposal by the staff auditor, Mr. James McPherson, to include all contributed taxes in the rate base calculation as though those taxes were CIAC. The Order purports to ground that conclusion on a weighing of the evidence presented by Mr. Bob Nixon, CPA opposing Mr. McPherson's adjustment and the grounds offered by him.

20. Mr. McPherson, through his direct testimony, proposes to make an adjustment to include contributed taxes in CIAC, and therefore as an offset to rate base investment, for the first time in a PSC case. In his direct testimony Mr. McPherson makes no mention of the fact that such an adjustment constitutes a change in longstanding Commission policy (interpretation of Order No. 16971 issued in 1986; Order No. 23541 issued in 1990; Order No. 94-0156-FOF-WS issued on February 9, 1994; and Order No. 94-0156A-FOF-WS issued on April 11, 1994). He therefore makes no attempt to explain why such a substantial shift in rate-making policy is appropriate. There have been no prior rate orders making such an adjustment, and though the tariffs implementing prior generic orders are specifically contrary to this proposed interpretation, Mr. McPherson's testimony provides no analysis or even any discussion of these conflicts. His entire testimony deals only with his interpretation of one prior order. Mr. McPherson admitted on cross-examination that

no prior Commission cases of which he was aware had ever utilized this methodology, including several rate cases where such adjustments would have been equally appropriate since the issuance of generic Order No. 23541, on which he relies for his proposed adjustment.

21. Throughout the period of time when the Commission was considering its policies and procedures to be utilized in dealing with the taxation of CIAC and the gross-up of CIAC collections, each of the Commission's orders which changed (either in significant part or in minor part) the requirements related to utilities authorized to gross-up CIAC for the related tax impact, required the filing of revised tariffs by the Utility. The Commission specifically approved each of those tariffs pursuant to each order. The evidence in this case clearly demonstrates, as Mr. McPherson admitted, that each and every tariff approved for Aloha after the issuance of Order No. 16971, Order No. 23541, Order No. 94-0156-FOF-WS (February 9, 1994), and Order No. 94-0156A-FOF-WS (April 11, 1994) and the tariffs approved by the Commission for every other utility, authorized to implement gross-up authority, specifically stated:

“The amount of CIAC tax impact monies collected by a utility shall not be treated as CIAC for rate-making purposes.”

Mr. McPherson agreed that this statement in all the tariffs was directly contrary to his proposed treatment (TR. 541, lines 3 - 17). As such, Mr. McPherson's proposed interpretation is undeniably directly contrary to all prior interpretations of these orders by the Commission.

22. Mr. McPherson stated that his position proposing this adjustment is based upon

his interpretation of Order No. 23541, and was grounded on the belief that the earlier Order 16971, originally granting gross-up authority, was in effect overruled by Order No. 23541 (TR. 541, lines 7 - 21). Therefore, rather than proposing a change in policy, what Mr. McPherson is proposing, despite the Commission's numerous orders requiring filing of new tariff sheets and approval of those tariff sheets after the issuance of Order No. 23541 and several orders thereafter, is that all such orders and/or tariffs implementing the requirements were in error with regard to an interpretation of the Commission's intent in issuing Order No. 23541.

23. Under the provisions of Chapter 120.68(7), Florida Statutes, an agency's exercise of discretion which departs from prior agency policy is not without limits. The Courts have stated that there is a requirement that the policy shift must be supported "by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved." "...to justify a change in policy required by no rule or statute. That failing, the PSC must adhere to its prior practices..." (Manasota 88, Inc. vs. Gardinier, Inc., 481 So.2d 948, 950 (Fla. 1986), Southern States Utilities vs. FPSC, 417 So.2d 1046 (Fla. 1998), and Florida Cities Water Company vs. FPSC, 705 So.2d 620 (Fla. 1998). That testimony must address the relative merits of the old and new policies to comply with Chapter 120 and the cases interpreting that statutes (Southern States Utilities, supra, at 1057).

Mr. McPherson's testimony makes no attempt to offer such an explanation. Instead, Mr. McPherson simply states a new interpretation of the Order, rather than a change in policy, with no explanation of why the new interpretation or policy was more appropriate.



24. Therefore, the Commission has misapprehended the law by its failure to require, as a prerequisite to any change in its policy, compliance with the evidentiary requirements of Chapter 120 as interpreted by the various cases outlined above.

25. In the alternative, Mr. McPherson's proposed policy change can also be construed as a new interpretation of a prior order, rather than a shift in policy. If so, then such interpretation is contrary to the interpretation specifically enumerated in the tariffs issued and approved pursuant to Order No. 23541 as well as several other prior orders. As such, the Commission's proposed change for the first time in this proceeding is an attempt to retroactively change requirements of prior orders and tariffs under which the gross-up of CIAC was authorized and implemented.

*The Testimony of Mr. McPherson is not Competent Substantial Evidence to  
Support a Policy Shift from 14 Years of Established Precedent and Interpretation*

26. In proposing an adjustment to rate base to include contributed taxes as CIAC, Mr. McPherson's testimony failed to even mention that this constituted a change in Commission policy, but rather purported only to be his initial attempt at interpreting 10 and 14-year old orders, and subsequent orders on the same subject. In fact, Mr. McPherson stated that he did not participate in any of the years of litigation, hearing, and discussion of issues that led to the issuance of the many orders which he purports to now reinterpret. He admitted on cross-examination that he had reviewed none of the background materials leading to the orders, or records of the proceedings, other than the orders themselves (TR. 540). However, he now proposes for the first time to interpret Order No. 23541 as reversing a decision in Order No. 16971 which was issued four years earlier, without any

specific finding within that latter order that it is intended to do so. In fact, the only competent substantial evidence on this issue is that presented by Mr. Nixon and that presented in the cross-examination of Mr. McPherson, which shows that no case has ever considered, much less accepted, the treatment which Mr. McPherson has proposed, and that in fact each and every tariff sheet authorizing the gross-up authority specifically required that the adjustments proposed by Mr. McPherson not be made.

27. Mr. McPherson provided no other evidence that would lead a fact finder to determine that his opinions are well founded, nor that he has the experience and background in this complicated and 15-year long process related to proper treatment of gross-up of CIAC to judge the Commission's intent with regard to orders issued between 6 and 14 years ago. This is especially true when comparing the testimony of Mr. McPherson, who has no experience and has done no research in this area, with that of Mr. Nixon, who was involved in each and every one of the dockets and hearings leading up to the issuance of those orders and in several of the rate cases which the Commission has processed since the issuance of those orders. In each of those cases, no adjustment as proposed by Mr. McPherson was even considered, much less adopted.

28. Therefore, the testimony presented by Mr. McPherson, proposing to reinterpret the Commission's intent and/or change in PSC policy with regard to several prior orders, does not constitute competent substantial evidence upon which the Commission can base its decision.

### III. Rate Case Expense

29. In the Commission's order, certain adjustments to rate case expense were made. In one such adjustment, the Commission eliminated costs related to reconsideration, because those costs had not yet been incurred. It is noted within that order that if a Motion for Reconsideration is filed, a determination will be made at a later time, upon request, as to the reasonableness of the amounts requested to determine whether inclusion of those amounts are appropriate. The Utility submitted within the record a cost of \$12,100 for reconsideration, based upon an assumed filing of reconsideration by the Utility. Since the Utility was required to respond to OPC's reconsideration request, and because the issues raised in this Cross Motion are reasonable issues to raise in such a proceeding, all costs incurred are prudent and should be recognized in the Commission's order disposing of reconsideration, regardless of its finding on the ultimate issues.

#### Conclusion

In conclusion, Aloha asserts that the PSC should reconsider its Final Order:

30. In refusing to consider costs associated with the purchase of Aloha's office building and striking portions of Aloha's supplemental rebuttal testimony on the grounds that:

a. It either overlooked the supplemental direct and unstricken supplemental rebuttal testimony which demonstrates the prudence and reasonableness of expenses related to Aloha's purchase of office space, or it misconstrued the law with respect to Aloha's burden of proof;

b. it overlooked and/or failed to consider the requirements of the

Administrative Procedure Act regarding rulemaking and a party's right to respond to non-rule policies which affect its substantial interests;

c. it overlooked and/or failed to consider that the supplemental rebuttal evidence offered through witnesses Nixon and Watford constitutes proper rebuttal both to new matters and policies offered by Ms. Merchant and to her statements as to what occurred regarding Aloha's analysis of the purchase of office space; and/or

d. it overlooked and/or failed to consider the resulting prejudice to Aloha if the evidence is stricken as opposed to the lack of any prejudice to the PSC or the OPC if such evidence is admitted.

31. In its proposed shift in policy or reinterpretation of prior orders regarding ratemaking treatment of gross-up collected on CIAC on the grounds that:

a. The testimony of Mr. McPherson proposes a shift in policy which is unsupported by testimony that addresses the relative merits of the old and new policies as required by Chapter 120 and the cases interpreting that statute.

b. If Mr. McPherson's testimony, upon which the Commission relied, does not constitute a shift in established policy, then it is in effect a proposal to retroactively apply a new interpretation of an order, directly contrary to prior interpretations under which the gross-up authority was implemented and collected.

c. Mr. McPherson's testimony does not constitute competent substantial evidence on the issue, in that he specifically noted he had no experience, and has done no research whatsoever with regard to this issue, other than a review of one of the many prior generic orders implementing and modifying the gross-up authority.

32. The Commission must recognize the reasonable costs incurred by the Utility in responding to the reconsideration request of the OPC, and in filing its Cross Motion for Reconsideration, reasonably directed to raising appropriate questions of law.

WHEREFORE, Aloha moves for reconsideration of the Final Order which disallows Aloha's office building expenses, strikes portions of Aloha's supplemental rebuttal evidence, proposes to implement either a major shift in policy, or retroactive reinterpretation of prior orders contrary to prior interpretation, and authorization of additional rate case expense as outlined herein.

Respectfully submitted this 5<sup>th</sup> day of March, 2001.



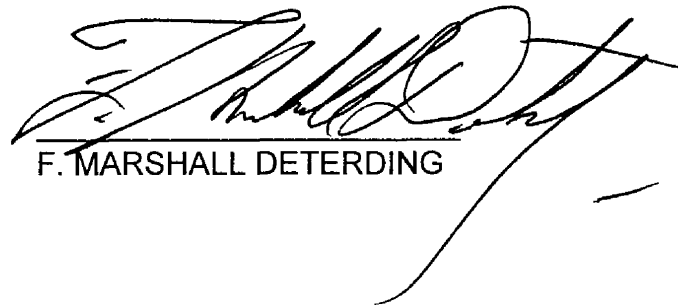
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to the following on this 5<sup>th</sup> day of March, 2001:

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