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ORIGINAL

March 12, 2001

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 991643-SU

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Citizens' Response to Aloha's Cross Motion for Reconsideration for filing in the above-referenced docket.

Also Enclosed is a 3.5 inch diskette containing the Citizens Response to Aloha's Cross Motion for Reconsideration in WordPerfect for Windows 6.1 format. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Stephen C. Burgess
Deputy Public Counsel

SCB/dsb
Enclosures

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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 Filed: March 12, 2001

CITIZENS' RESPONSE TO ALOHA'S CROSS MOTION FOR RECONSIDERATION

The Citizens of the State of Florida, through their attorney, pursuant to Rule 25-22.060, Florida Administrative Code, hereby responds to the cross motion for reconsideration filed by Aloha Utilities, Inc. ("Aloha") on March 5, 2001. Aloha's cross motion identifies three separate issues, but actually appears to address four issues, namely: Aloha claims that the Commission overlooked facts and law in determining that Aloha did not prove the prudence of new office building expenditures; Aloha claims the Commission overlooked facts and law in striking portions of supplemental rebuttal testimony filed by Mr. Watford and Mr. Nixon; Aloha claims that the Commission overlooked facts and law in its adoption of the proper treatment of contributed taxes; and Aloha claims the Commission overlooked facts in granting the utility $426,676 in rate case expense. Each of Aloha's four issues will be addressed in turn, as follows:

ALOHA'S ERRS IN ITS CLAIM THAT THE COMMISSION OVERLOOKED FACTS AND LAW IN ITS FINDING THAT ALOHA FAILED TO PROVE THE PRUDENCE OF OFFICE BUILDING EXPENDITURES

1. Central to Aloha's argument on this issue is its claim that the PSC misapplied Florida Power Corp. v. Cresse, 413 So.2d 1187 (Fla. 1982). Aloha states that in Florida Power Corp., "[e]vidence was presented on each side of the dispute." (Aloha's cross motion paragraph 6). In point of fact, however, the only evidence in that case was presented by the utility, Florida Power

Corporation. There was no competing witness to offer testimony concluding that the utility's expenditure was imprudent or unreasonable. Rather, the Commission evaluated Florida Power's evidence and concluded from the utility's own evidence that the utility was imprudent for failing to keep a spare heat pump on hand (See FPSC Order No. 9950, P. 3,4). The Florida Supreme Court unequivocally upheld the Commission's discretion to disallow costs upon a finding that the costs were not proven to be reasonable or prudent. An examination of the Supreme Court's reasoning demonstrates its applicability to the facts in the instant case. First, the Court stated:

> The requirement that utilities demonstrate the reasonableness of their fuel costs is not improper or unusual. "Burden of proof in a commission proceeding is always on a utility seeking a rate charge, and upon other parties seeking to change established rates."
>
> [Id., at 1191]

Likewise, in the instant case, the Commission's requirement that Aloha prove the reasonableness of their costs is neither "improper or unusual." Secondly, just as with FPC, the Commission rejected the reasonableness of Aloha's costs without questioning the accuracy of the amount actually spent. Again, the Supreme Court upheld the Commission's discretion to make such a decision, stating:

> Simple production of cost records and documentation cannot satisfy the requirements imposed on a utility in a true-up proceeding. The PSC did not improperly place the burden on FPC and there was a sufficient basis for its finding regarding the excess costs.
>
> [Id.]

In the instant case Aloha failed to demonstrate the reasonableness of the higher costs that it was seeking for office space. The Commission's rejection of Aloha's requested increase was based on the sound discretion approved by the Florida Supreme Court.

2. While Florida Power Corp. v. Cresse involved only testimony presented by the utility, in the instant case there genuinely has been evidence presented by different parties on each side of the dispute. On September 14, 2000, Aloha filed a motion requesting to file supplemental direct testimony on the new office building expenditures. In that motion (paragraph 6) Aloha directly quotes from that portion of the statute that calls on the Commission to determine "the prudent cost of providing service." Section 367.081(3), Florida Statutes. Thus, by its identification of the issue to be presented, Aloha acknowledged its responsibility to establish the prudence of the expenditure, rather than merely the amount of the expenditure. In its apparent effort to meet that requirement, Aloha filed the direct testimony of Stephen G. Watford.

3. In response to Mr. Watford, Staff witness Patricia Merchant filed testimony in which she concluded that she could not support a position on the prudence of the purchase of the building. Contrary to Aloha's single-minded focus solely on cost-benefit analysis, Ms. Merchant gave a multitude of reasons for her conclusion, including, but not limited to, a recount of the chronology of Staff's effort to obtain information necessary to properly evaluate the prudence of the costs. Ms. Merchant's reasons are fully explained in Order No. 0326 (p. 24-26) and will not be repeated here. The fact that the Order takes two pages of single-spaced text just to recount Ms. Merchant's testimony belies Aloha's claim that "[t]here is simply no competent or substantial evidence . . . to support a denial of the costs associated with that building." (Aloha's Cross Motion, paragraph 6)

4. It is not surprising that Aloha is disappointed with Ms. Merchant's conclusion and with the Commission's decision on the issue. The Commission's decision, however, is clearly based on an abundance of evidence in the record and a proper application of relevant legal principles.

THE COMMISSION SHOULD NOT RECONSIDER ITS DECISION TO STRIKE PORTIONS OF ALOHA'S SUPPLEMENTAL "REBUTTAL" TESTIMONY

5. To properly evaluate the complaints that Aloha has presented against the PSC's decision to strike the rebuttal testimony, the Commission should first place the issue in the full context of all relevant actions in this case. The relevant events are:

- On July 31, OPC filed the direct testimony of Ted L. Biddy, which addressed, among other issues, the subjects of used and useful, and inflow and infiltration

- The PSC Staff filed the testimony of David MacColeman who appeared to reach conclusions opposing Mr. Biddy on facts that affect the subjects of used and useful, and inflow and infiltration.

- On September 11, OPC filed rebuttal testimony of Ted L. Biddy, disputing the conclusions of Mr. MacColeman.

- On September 18, Aloha moved to strike Mr. Biddy's rebuttal testimony, based on various grounds, including the claim that:

> Mr. Biddy could have propounded pages and pages and pages of direct testimony on the issue . . . when he filed his direct [testimony]. What Mr. Biddy cannot do is lay in wait until the rebuttal filing date in this case and then to pounce and attempt to "prop up" . . . his testimony . . ..

[Aloha's Motion to Strike, p. 5]

- On September 29, the PSC granted Aloha's motion to strike on the following grounds:

> Mr. Biddy's proffered rebuttal testimony is direct testimony that OPC could have or should have filed in its direct testimony. The used and useful calculation and the issue of infiltration and inflow have been identified as issues in this proceeding and should have been addressed in OPC's direct testimony. [Order No. PSC-00-1779-PCO-SU; p. 2]

6. It was therefore Aloha itself that initiated the imposition of a very strict standard in prohibiting rebuttal testimony from including anything on an issue that was presented in direct. It

is Aloha that stridently objected to a witness "laying in wait until the rebuttal filing date" to "pounce" and attempt to "prop up" prior testimony.

7. The PSC, at the behest of Aloha, adopted the standard to disallow rebuttal testimony that "could have or should have" been included in direct testimony on issues that had been identified in the proceeding.

8. After enthusiastically and successfully urging that this standard be imposed on OPC witnesses, Aloha now cries foul merely because it cuts both ways. In its oral motion to strike, all OPC asked was that the same standard urged by Aloha (and adopted by the Commission) also be applied to Aloha. That is, that Aloha witnesses not be allowed to "lay in wait until rebuttal" in order to "pounce and attempt to prop up prior testimony," when they "could have propounded pages and pages of direct testimony on the issue." These are Aloha's very words. If Aloha did not want that standard to apply, it should not have sought the Commission to impose the standard.

9. OPC asked reconsideration of the Commission's decision to strike Mr. Biddy's testimony. All issues were again fully aired. OPC even warned that the standard espoused in Order 1779 would disqualify much of the testimony offered as rebuttal by Aloha (Tr. 122, 123). This gave all parties the clear opportunity to express any concerns about the standards being applied to rebuttal testimony. Through it all, Aloha remained adamantly and steadfastly in support of the standard which prohibited Mr. Biddy's rebuttal testimony. Aloha's current howls of protest when the same standard is applied to its own witnesses simply ring hollow.

10. The standard established is that the Commission may strike proffered rebuttal testimony which addresses an issue that previously had been identified and which could have or should have been addressed in direct testimony. Applying that standard to the testimony in question

produces a clear demonstration of the correctness of the Commission's decision to strike. Beyond any debate, the proffered rebuttal testimony addressed an issue that had been identified prior to Aloha's direct testimony. The issue of proper expenditures for the newly purchased building was the specific subject for which the Commission extended the hearing dates. Aloha was given an open invitation to file any direct testimony it saw fit to cover this issue. Aloha, in its own words, "could have propounded pages and pages and pages of direct testimony on the issue." The additional information that Aloha held back for rebuttal was available to Aloha at the time direct testimony was filed. Clearly, then, that testimony could have been filed in direct.

11. As the preceding paragraph demonstrates, the Commission correctly and consistently applied the standard for rebuttal testimony that had been articulated in a written order (Order No. 1779). The Commission should not reverse its decision to strike the specified testimony.

THE COMMISSION'S TREATMENT OF GROSS-UP TAXES ON CIAC REFLECT PROPER ACCOUNTING FOR THE FACTS AT HAND AND IS NOT A "POLICY SHIFT" AS CLAIMED BY ALOHA

12. Aloha's next issue for reconsideration is the proper accounting treatment of previously collected gross-up taxes for CIAC (II. Inclusion of gross-up taxes as CIAC; paragraphs 19 through 28 of Aloha's cross motion). Aloha has mischaracterized the issue the issue as being a "policy shift ... not properly supported as required by law." (see heading on page 14 of Aloha's motion). Aloha's mischaracterization is a result of its failure to perceive the issue as it was presented by the facts of the case.

13. Aloha was an approved gross-up utility for the period during which CIAC collections were considered taxable revenue by the IRS. From a regulatory standpoint, therefore, Aloha incurred

a need for funds (the immediate payment of the CIAC tax liability) contemporaneously with the cost-free source of funds (the contributed taxes) to meet that need.

14. Initially, then, the source of funds precisely offset the need for funds. Under normal circumstances this precise offset would continue through the accounting process over the life of the CIAC assets. As the CIAC assets depreciate, they would provide an annual tax reduction that would directly coincide with the amortization of the CIAC gross-up contributed taxes. In this fashion, the reflected amount of the remaining cost-free source of funds (contributed taxes) would decline in perfect step with the remaining outstanding need for the funds (the debit tax-timing difference). As long as this balance remains, it makes no difference whether Mr. McPherson's approach is adopted or Mr. Nixon's approach is adopted. The effect on rates is the same as long as the unamortized contributed tax remains in balance with the deferred tax debit.

15. Aloha itself, however, created an imbalance with its decision on amortization timing and rate. Aloha made the accounting decision not to begin amortizing the CTs in the year they were received. As a result of Aloha's accounting decision, the CTs were no longer balanced with the debit deferred taxes. In other words, the cost-free source of funds (CTs) is now greater than the corresponding need for funds (deferred tax debits).

16. Given this specific situation, the Staff auditor was faced with a question of regulatory accounting judgment. What is the proper treatment for the imbalance created by Aloha? Should the imbalance be ignored as Aloha recommends, or should it be recognized in the regulatory accounting treatment? Mr. McPherson, an expert in regulatory accounting, reached the conclusion that the imbalance should be recognized by reducing rate base by including the CTs with the CIAC, and reflecting the deferred tax debits as an increase to overall cost of capital by reducing the deferred tax

credit balance in the capital structure. Mr. McPherson's approach makes perfect accounting sense in light of the specific set of circumstances at hand and is consistent with the USOA and Rule 25-30.433(3), Florida Administrative Code.

17. As Order PSC-01-0326-FOF-SU points out, Mr. McPherson also presented considerable record evidence that his recommended accounting method was consistent with the language of a prior PSC order that dealt with the subject. In Order No. 23541, the Commission dealt with the issue at hand. At the hearing, Mr. McPherson noted three specific elements of Order No. 23541 that supported his recommended accounting treatment: Order No. 23541 indicates that CTs are to be treated the same as other contributions; Order No. 23541 indicates that the entirety of grossed-up CIAC would be considered in rate base; Order No. 23541 indicates that CTs were to offset the corresponding debit deferred taxes, which can take place only by recognizing the CTs when calculating the rate base. Previous PSC Order No. 23541 clearly supports Mr. McPherson's recommended treatment in the instant case.

18. Despite the fact that Mr. McPherson's treatment reflects a perfectly logical accounting treatment and is consistent with the USOA, with PSC Rule, and with previous Order No. 23541, Aloha complains that it is a violation of a non-rule policy that Aloha claims was somehow created through other previous PSC orders. Mr. McPherson, however, effectively refuted Aloha's technical contention with several points presented as testimony and written evidence in the record. First, to the extent that Order No. 16971 (the order upon which Aloha relies so heavily for precedent) would otherwise provide guidance, Mr. McPherson testified that he believed that it had been superseded by subsequent Order No. 23541. Mr. McPherson also noted that because it had been issued on an expedited basis, Order No. 16971 within its very language recognized its own limitations. Order No.

16971 recognized the likelihood of a subsequent need to "handle any generic problems that arise in accounting . . . ." Further, even when Order No. 16971 was issued, the Commission instructed its Staff to "continue to investigate the necessity and appropriateness of the gross-up."

19. Clearly, then, Aloha's effort to characterize the requirements of Order No. 16971 as being a statement of indelible policy is entirely misplaced. The Commission's treatment of gross-up taxes on CIAC reflects proper accounting treatment and is consistent with the USOA, with Commission Rule and with prior Commission orders.

ALOHA'S REQUEST FOR ADDITIONAL RATE CASE EXPENSE IS UNTIMELY. SHOULD THE COMMISSION ENTERTAIN ALOHA'S REQUEST, HOWEVER, IT SHOULD NOT ALLOW ANY MORE RATE CASE EXPENSE THAN THE $426,676 ALREADY GRANTED

20. On page 78 of Order No. 0326, the Commission states:

> 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 and whether inclusion of those amounts are appropriate.

OPC understands that language to mean that any further decision on the reasonableness of rate case expense would be made at a subsequent time, rather than contemporaneously with the motion for reconsideration. If that is the proper interpretation of the Commission's intent, Aloha's current request for more rate case expense is untimely.

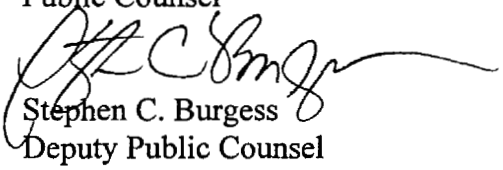
21. Should the Commission decide to entertain Aloha's request in this forum, however, OPC responds that Aloha's cross motion does not raise reasonable issues for reconsideration, but rather is based on nothing more than "an arbitrary feeling that a mistake may have been made." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974). As such, the customers

should not be required to fund Aloha's effort. Neither does Aloha's eight-page response to OPC's motion for reconsideration merit the $12,100 that Aloha is now seeking to recover. Such a recovery would equate to $1,500 per page -- extravagant even for an attorney of Mr. Wharton's caliber.

WHEREFORE, the Citizens of the State of Florida respectfully requests the Public Service Commission to deny Aloha's Cross Motion for Reconsideration in its entirety.

Respectfully submitted,

Jack Shreve
Public Counsel



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Attorneys for the Citizens
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CERTIFICATE OF SERVICE
DOCKET NO. 991643-SU

I HEREBY CERTIFY that a copy of the foregoing CITIZENS' RESPONSE TO ALOHA'S CROSS MOTION FOR RECONSIDERATION has been furnished by U.S. Mail or *hand-delivery to the following parties this 12th day of March, 2001.

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