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 ORDER NO. PSC-01-0961-FOF-SU ISSUED: April 18, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
LILA A. JABER
BRAULIO L. BAEZ

ORDER DENYING MOTION FOR RECONSIDERATION AND GRANTING IN PART AND DENYING IN PART CROSS MOTION FOR RECONSIDERATION AND RELEASING PORTION OF ESCROWED FUNDS

BY THE COMMISSION:

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.

On June 27, 2000, the Office of Public Counsel (OPC) filed its Notice of Intervention. By Order No. PSC-00-1175-PCO-SU, issued June 29, 2000, we acknowledged OPC's intervention.

In compliance with the Orders Establishing Procedure, OPC filed the prefiled rebuttal testimony of Mr. Ted L. Biddy, on September 11, 2000. In response, on September 18, 2000, Aloha filed its Motion to Strike "Rebuttal" Testimony (Motion) of OPC witness Biddy. 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. Biddy did not constitute proper rebuttal testimony.

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. Biddy'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. Biddy'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, we conducted the formal hearing on Aloha's application for increased wastewater rates. On the first day of the hearing, OPC presented its ore tenus motion requesting reconsideration of the portion of the Order that struck the portion of witness Biddy's rebuttal testimony which concerned the existence of excessive I&I. OPC argued that if Mr. Biddy's testimony were improper rebuttal, then portions of the utility's rebuttal were also improper rebuttal. After consideration of OPC's motion, by a two to one vote, we found no mistake of fact or law contained in Order No. PSC-00-1779-PCO-SU. Therefore, we 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.

Subsequently, at the hearing on November 2, 2000, OPC made an ore tenus motion to strike major portions of the supplemental rebuttal testimony and exhibits of utility witnesses Stephen G. Watford and Robert C. Nixon. 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 our decision to strike OPC witness Biddy's rebuttal testimony. OPC argued 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 supplemental 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 Biddy's rebuttal testimony was based, at least in part, on the fact that Mr. Biddy 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. Biddy'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, we 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.

Prior to our granting the above-noted motion of OPC to strike, Aloha had initially stipulated that the supplemental direct testimony of staff witness Merchant could be inserted into the record as though read. However, subsequent to our having granted OPC's motion to strike, 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 prudency 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, that we were 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 us 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, we found that staff witness Merchant had already testified, that her testimony was appropriate and aided us in our decision, and denied Aloha's motion to strike her testimony. We 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.

FILINGS AFTER HEARING BUT PRIOR TO ISSUANCE OF FINAL ORDER

On November 15, 2000, Aloha filed a Motion for Reconsideration of our ruling granting the ore tenus motion of OPC to strike portions of the supplemental rebuttal testimony and exhibits of Aloha witnesses Nixon and Watford. By Order No. PSC-00-2534-PCO-SU, issued December 28, 2000, we denied Aloha's Motion for Reconsideration without prejudice to refile upon issuance of a final order.

The eight-month deadline for the suspension of the requested rates expired on December 4, 2000. On December 1, 2000, Aloha filed a notice of intent to implement its final proposed rates, along with revised tariff sheets, a proposed customer notice, and a corporate undertaking of the utility pursuant to Section 367.081(6), Florida Statutes. However, upon being advised by our staff that it appeared Aloha could not support a corporate undertaking, Aloha filed an escrow agreement on December 8, 2000.

By Order No. PSC-01-0130-FOF-SU, issued on January 17, 2001, we acknowledged Aloha's Notice to Implement its final proposed rates, subject to refund, pending the outcome of this proceeding. The utility had requested a final revenue increase of $1,593,501, and implemented its proposed rates which were designed to produce this increase. Aloha was directed to place the difference in the revenue generated by implementation of its proposed rates over that generated by its original rates in the approved escrow account. The rates were made effective for service rendered on or after December 8, 2000, provided that the customers had received a copy of the notice of a change in rates in accordance with Rule 25-

30.475, Florida Administrative Code. Moreover, the escrow agreement between Aloha, the Bank of America, and this Commission, dated December 8, 2000, was approved, and pursuant to Rule 25-30.360(6), Florida Administrative Code, Aloha was directed to provide a report by the 20th of each month indicating the monthly and total revenue collected subject to refund.

FINAL ORDER AND FILINGS SUBSEQUENT TO THE FINAL ORDER

On February 6, 2001, we issued Order No. PSC-01-0326-FOF-SU - Final Order Approving Rates and Charges, Requiring Refunds, Requiring Reports on Reuse Customers, and Imposing Fine (Final Order). The Final Order also provided for the closing of the docket if there was no appeal and upon completion of the refund.

Subsequent to the issuance of that Order, OPC timely filed its Motion for Reconsideration and a Request for Oral Argument on February 21, 2001. On February 26, 2001, Mr. Edward Wood, a customer of Aloha, filed a letter dated February 24, 2001. In that letter, Mr. Wood took issue with many of our findings and stated that the letter was sent "as an appeal to the Commission's recent ruling on Docket 991643 SU."

On March 5, 2001, Aloha filed its timely Response to OPC's Motion for Reconsideration and a Cross Motion for Reconsideration (Cross Motion). OPC filed its timely response to the Cross Motion on March 12, 2001. Also, on March 9, 2001, Aloha filed its Motion for Release of Escrowed Funds.

Our staff filed its recommendation on March 22, 2001. Aloha subsequently filed its request for oral argument on March 26, 2001. At the April 3, 2001 Agenda Conference, upon finding that oral argument would aid us in comprehending and evaluating the issues, we allowed oral argument on OPC's Motion for Reconsideration and on Aloha's Cross Motion.

This Order addresses OPC's Motion for Reconsideration, Mr. Edward Wood's February 24, 2001 letter, Aloha's Cross Motion, and the issue of the release of escrowed funds. We have jurisdiction pursuant to Section 367.081, Florida Statutes.

OFFICE OF PUBLIC COUNSEL'S MOTION FOR RECONSIDERATION

As stated above, OPC filed a Motion for Reconsideration (Motion) of Order No. PSC-01-0326-FOF-SU on February 22, 2001. In its Motion, OPC raises two issues. These issues are:

> 1. By denying the customers the benefit of flow reductions that have been predicted by the utility itself and are the result of a program fully funded by the customers' rates, the Commission improperly relied on prior cases that have no factual relation to the facts at hand; and
>
> 2. By allowing the utility $175,000 of additional projected operation and maintenance (O&M) expenses for the purpose of maintaining a new treatment plant, the Commission has improperly placed the burden of proof on the customers, as respondents in this proceeding.

The first issue refers to the $15,000 per month cost of the continuing Infiltration and Inflow (I&I) Reduction Program and will be referred to as the I&I Reduction Program Issue. The second issue will be referred to as the Maintenance of the New Treatment Plant Issue.

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our 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 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.

I. I&I Reduction Program Issue

OPC's Argument

OPC states that Order No. PSC-01-0326-FOF-SU held that Aloha's customers should be required to continue paying approximately $15,000 per month for a two-year program that is specifically designed to reduce I&I. Moreover, OPC argues that the Order found that, as this program progresses, it should reduce I&I by an additional 30,000 gpd, but then the Order would not allow the customers to receive the benefits from this I&I reduction program for which they were paying.

OPC argues that whoever bears the cost of a program should receive the beneficial results of that program, i.e., the reduced electrical and chemical expense to reflect the reduced I&I, or, if there is no benefit, then the program expenditures should be removed. OPC further argues that it was improper for us to cite to Orders Nos. PSC-96-1320-FOF-WS, issued October 30, 1996, in Docket No. 950495-WS, and PSC-00-1163-PAA-SU, issued June 26, 2000, in Docket No. 990937-SU, as justification for the "practice not to adjust O&M expenses in these cases unless there is excessive I&I."

OPC states that by relying on these two Orders, we committed two fundamental errors. First, the cases cited have no application to the facts in the current case and no application to the rationale for making an adjustment in the current case. OPC states that in neither of the cited cases was the utility undertaking a major capital project to reduce I&I, and that this fact is at the very heart of the rationale for reflecting an expense adjustment for reduced flow in the projected test year.

In the case at hand, OPC argues that the ongoing capital project was designed to reduce the flow due to I&I by the identified 30,000 gpd, and that this reduction would occur in the projected test year. Therefore, to obtain an accurate projection for the flows in the test year and the related chemical and electrical expenses, OPC states that this reduction would have to be taken into account. Moreover, in the cited cases, OPC states that there was no such flow reduction program, that those customers were not being charged the cost of a program undertaken for the specific purpose of reducing the I&I, that therefore, no change in

the I&I was expected, and that no change was needed to those test years.

OPC alleges that the second fundamental error is our reliance on the two above-noted Orders to follow the policy to not "adjust O&M expenses in these cases unless there is excessive I&I." OPC states that there can be other valid reasons to adjust O&M expenses, and one such reason is when the company itself admits that its projected flows actually will be 30,000 gpd less than reported because of this specific I&I program. OPC concludes its argument on this issue by stating:

> If the PSC is to reject OPC's regulatory theory, it must rely on either (1) evidence adduced in this case or (2) applicable administrative rule. The bare reference to two past orders does not substitute for evidence or rule to support a finding.

Aloha's Response

Aloha filed its timely response to OPC's Motion on March 5, 2001. In that response, Aloha argues that OPC "does nothing more than reargue two issues which were the subject of detailed testimony." Aloha then set forth the standard for review of a Motion for Reconsideration.

Aloha argues that OPC does not take issue with the prudency of Aloha's ongoing I&I reduction program, but that the real point was that we should reduce chemicals and purchased power expense which would "somehow" have been brought about by this prudent I&I reduction program. Aloha states that this I&I reduction program is "not a program strictly designed to 'hunt down' some '30,000 gpd of I&I' and eliminate it." While this is one goal of the program, Aloha states that a second goal is to avoid the kind of pitfalls that Mr. Porter testified about in his testimony by finding problems before they mature or become exacerbated. Aloha notes that new I&I appears on a sporadic basis in any large utility and must be dealt with appropriately and on a continuing basis. Therefore, the program will not end or cease to exist if 30,000 gallons of I&I are located.

Aloha argues that "OPC's request that this matter be reconsidered is nothing more than an attempt to have this

Commission make an adjustment based upon the removal of an anticipated amount of 'excessive' I/I in the system which . . . evidence clearly revealed did not exist in the first place." Aloha states that when OPC witness Biddy's testimony regarding excessive I&I could not stand, then OPC witness Larkin's conclusions on adjustments to expenses, being based on Mr. Biddy's testimony, also could not stand.

Finally, Aloha argues that our findings were not based on a "bare reference to two past orders," but on a "plethora of evidence presented." Aloha concluded its argument by stating that we correctly determined that the I&I reduction program "was a prudent and necessary function on behalf of any well-managed utility," and that it "was advisable as a continuing matter of sound utility practice, rather than some extraordinary capital project being undertaken under some unique or unusual circumstances."

Decision

OPC is essentially arguing that the evidence shows that the I&I reduction program costing $15,000 per month will result in a further net reduction of 30,000 gpd in flows in the test year. Consequently, OPC argues that adjustments should be made to both purchased power expenses and chemical expenses for the test year.

We find that this argument is similar to the one raised at hearing and is a misreading of the evidence. Mr. Porter, starting on page 910 of the transcripts, testified as follows:

> Therefore, there is now approximately 30,000 gallons per day of remaining I/I that has been identified in the remainder of the system. This quantity of I/I is comparatively small and well below the anticipated I/I flow rates expected in a system of this age and type according to the standard manuals of practice for this industry. However, even though the 30,000 gallons of remaining I/I identified is quite small, it represents defects in the piping and manhole systems that must be found and corrected as part of an ongoing sewer system maintenance program. These defects, if not corrected, can lead to serious damage to the roadways which are located over the sewer line and manhole defects. . . . The repairs needed after a roadway collapse are orders of

> magnitude larger than the cost of repairing the pipeline and manhole defects before the problems expand. This is why Aloha has, as do all properly managed sewer utility systems, a program to inspect and repair sewer line and manhole defects on an ongoing basis. Another indicator that proves that the SSWCS [Seven Springs Wastewater Collection System] is not receiving excessive I/I flows is that the average per connection flow contribution for the system is less than 150 gallons per connection per day. The national average for per connection wastewater generation flow rates is approximately 250 to 300 depending on the source of the data. This would indicate that Aloha's wastewater generation rate is low because its I/I flow contribution is lower than average. FDEP witness MacColeman also states that the FDEP finds the 150 gallons per day connection "normal." For all the reasons stated herein, it is my opinion that the SSWCS does not exhibit excessive I/I.

The evidence shows that the utility reduced I&I by approximately 140,000 gpd (actually 138,000 gpd) in one of the oldest sections of the service area where the sewers were constructed of clay tile pipe buried deep under heavily traveled highways and where I&I could be expected to be the highest. Also, the evidence shows that the expected infiltration for this type and age of wastewater system could have been between 350,000 and 1,400,000 gpd. The evidence further shows that a "potential additional 30,000 gallons per day could be removed, but at a higher cost as the defects would be spread out over a much larger area requiring much more detailed investigation to locate them." (TR 910) Therefore, the remaining 30,000 gpd of infiltration represents approximately 8.5% of the minimum amount that could be expected, and also represents over an 80% reduction from what the utility had been experiencing. Finally, the evidence shows that the utility is experiencing returning flows of approximately 150 gallons per connection per day, when the average would be expected to be between 250 to 300 gpd.

There is nothing in the testimony that indicates the utility will ever reach a zero level of I&I. In fact, we have long held that some I&I is unavoidable and acceptable. Each system is evaluated on a case by case basis to determine whether a utility has excessive I&I. As a general rule, any collection system

experiencing I&I flows of more than 10% of the legitimate flow will be carefully scrutinized to determine if there are any reasonable and acceptable circumstances which might justify this high level of I&I. Another consideration is the expense which would be incurred in attempting to further reduce I&I or whether it would be more cost effective to simply treat the remaining I&I.

We note that there have been numerous cases where electrical and chemical costs, as well as used and useful percentage, were adjusted (reduced) because the utility was treating excessive I&I flows, which flows could have, and should have been decreased by proper maintenance and operational procedures. However, the evidence presented shows that Aloha does not have excessive I&I. Any O&M savings as a result of reduced I&I treated by the new plant will be recognized in future rate proceedings and earnings reviews.

OPC seems to put special emphasis on the fact that the I&I program was an extraordinary capital project brought about by the need for Aloha to make additional capacity available for new customers. The catalyst for this program appears to be this need; however, every well managed wastewater utility should have an active I&I reduction program in effect and be actively working to reduce I&I to the lowest amount that is economically possible. This endeavor is a part of normal O&M and, as such, is a prudent O&M expense. A well managed utility will keep control of I&I and correct problems before they become excessive. In Aloha's case, reduction of I&I was also the only way it could have the capacity to add new customers until such time as the new, larger plant could be brought on line. Although the program was mandated by the Department of Environmental Protection (DEP), DEP never claimed that Aloha had excessive I&I.

Moreover, OPC apparently believes that we based our decision on Orders Nos. PSC-96-1320-FOF-WS and PSC-00-1163-PAA-SU. However, as discussed above, the evidence shows that there was not excessive I&I and that there was no indication that the remaining 30,000 gpd of I&I would be eliminated in the test year. Therefore, there was no reason to make any further adjustments. Those orders were cited merely to show that we were being consistent with what this Commission has done in the past.

Finally, because the customers are paying for the cost of this I&I reduction program, OPC argues that they should receive the

benefit. The customers appear to be receiving the benefit in that I&I is being kept at what appears to be a very low level, and the continuing program should insure that I&I remains within acceptable levels.

Based on all the above, OPC has not shown that there has been a mistake of fact or law when we declined to make adjustments to purchased power and chemical expenses for the test year for the remaining 30,000 gpd of I&I estimated to be in the system. Therefore, OPC's Motion for Reconsideration on this issue is denied.

II. Maintenance of the New Treatment Plant Issue

OPC's Argument

OPC argues that the authorized maintenance expense of $175,000 (5% of the cost) as projected additional O&M expense to service the new treatment plant as allowed in Order No. PSC-01-0326-FOF-SU is unrealistic and overstated, and that the actual expense will be nowhere near the 5% or $175,000 figure. OPC states, in pertinent part:

> [T]he 5% was originated by DEP as a reasonable expectation for average annual expenses over the full lifetime of the asset. It should be intuitively obvious that over the lifetime of a large plant, there will be a greater number of significant non-capitalized repairs encountered toward the end of the life of the plant, as compared to its first few years. This difference would be particularly accentuated during any warranty period . . . . This phenomenon is painfully evident to anyone who uses an automobile (or boat, or large air conditioning unit) for its entire useful life. If the lifetime annual average benchmark is used for the early, less expensive years, what happens when the more expensive breakdowns are encountered in later years? Will the Commission hold to the annual average because of the generosity in the early years? The OPC does not expect that it will. It is out of this concern that OPC argued that the Commission should hold Aloha to the burden of demonstrating affirmatively and specifically why a purported lifetime annual average is appropriate

for the first years' operations. Instead, the Commission held OPC to the burden of proving the negative, stating:

> In reviewing this issue of the appropriate maintenance expense, we note that this is a projection and that no one can state what the exact expenses will be for the next year. OPC gave no estimates of its own; it only stated that the utility should produce an accurate figure.
>
> [Order No. PSC-01-0326-FOF-SU, at p. 67].

OPC then states that we "relied on Mr. Porter's bare, unsubstantiated statement that based on his 25 years' experience, the 5% is a reasonable figure". OPC claims that this "places the burden of proof on the OPC, rather than where it legally belongs, on the utility which initiated a case seeking an affirmative change to its existing rates."

Aloha's Response

Aloha notes that there was the expert testimony of two witnesses, and that the Order properly determined that Aloha's testimony was based both upon appropriate guidelines and the expert opinion of Mr. Porter. Aloha further notes that Mr. Porter had 25 years experience, while Mr. Biddy acknowledged he had no experience in the startup and ongoing O&M of a new wastewater treatment plant the size of Aloha's system.

As to OPC's argument that the Commission Order somehow shifts the burden on this issue to OPC, Aloha notes that there was credible evidence on the issue produced by Aloha, and that there was a complete lack of evidence produced on the issue by OPC. Moreover, Aloha argues that OPC has misinterpreted the role experts play in litigation when OPC claims that Mr. Porter's and Mr. Nixon's expert opinions are a "bare, unsubstantiated statement." Moreover, Aloha argues that "[i]f any opinion testimony was unfounded or improper, the time to prove that was in cross-examination, not in a motion for reconsideration."

Aloha goes on to state that the evidence provided by Aloha clearly supports the projected maintenance expense as being a

conservative figure, and that "there is no credible evidence on the record to otherwise suggest or support any adjustment whatsoever to that projected maintenance expense." Aloha states that "Mr. Porter testified that the five percent allowance was an accepted figure . . . one that Mr. Porter had been using in the industry for 25 years," and "was certainly fair and reasonable and, if anything, it was actually understated." (TR 930, lines 5 and 12) Moreover, Mr. Porter calculated that the preventative maintenance component "amount would in fact be $188,000 just for preventative maintenance, and that this figure did not even address the issue of repair because he did not know what that figure was going to be as of yet." (TR 930, lines 5-13).

As to the manufacturer's warranties, Aloha argues that Mr. Porter noted that those "warranties apply only to the repair of defects in materials and workmanship and that they do not apply to: normal operations; preventative maintenance; the purchase of necessary spare parts; equipment repair due to normal operation; updates to the process computer controller programming; electronic control equipment service contracts; master computer system software upgrades; replacement of controls and equipment damaged by lightning; electrical generator diesel motor maintenance; electric generator power system maintenance contracts; etc." (TR 914, line 19). Mr. Porter also "noted that the system must be 100% reliable as required by DEP Rule 62-610 and that this system required a great deal of preventative maintenance to maintain that 100% reliability." (TR 915, line 7). Aloha further notes that the 5% figure "was one initially used by EPA in published documents related to operation and maintenance costs that would be associated with facilities built under the 201 program." (TR 211 and 212, lines 22-25, and 1-6, respectively). Aloha also argues that Mr. Nixon noted that Mr. Biddy and Mr. Larkin had:

> confused the manufacturer's warranty on equipment failure (structural defects, imperfections, etc.) with the cost of routine maintenance necessary for proper functioning of the equipment . . . . Mr. Nixon testified that no manufacturer can guarantee equipment that is not properly cared for under a routine maintenance protocol, and that this would be no different than an auto manufacturer voiding his guarantee for improper maintenance. (TR 777, lines 4-12)

Mr. Nixon further found that it was incredible that OPC's witnesses were assuming a manufacturer would pay for all maintenance just because the equipment is guaranteed for one year.

Aloha argues that Mr. Larkin relied completely on Mr. Biddy for his proposed adjustment to the projected maintenance expense, and that Mr. Biddy utterly failed to provide any credible source or foundation for his opinions regarding the adjustment. Therefore, Aloha concludes "Mr. Biddy's testimony cannot possibly form the foundation for an adjustment to projected maintenance expense, particularly when the record reflects the reasoned testimony of Mr. Porter based on his application of an accepted projected maintenance expense percentage which he had utilized for 25 years and which has been accepted previously by this Commission."

Finally, Aloha disputes OPC's suggestion that our Order somehow shifts the burden to OPC on this issue. Aloha states "that all of the credible evidence on this issue came from Aloha, and that none of the credible evidence on this issue came from OPC," and, that therefore, there is no shifting of the burden. Rather, it is nothing more than this Commission having properly determined "that one side has carried its position on this issue through the presentation of competent and substantial evidence." Aloha concludes that OPC's motion does not identify a point of fact or law which was overlooked or which we failed to consider in rendering our order on either of these issues.

Decision

Upon consideration, we find that we did not shift the burden of proof to OPC. The utility had the burden of proof and carried its burden of proof when its expert justified the 5% or $175,000 figure, and even indicated that it could have possibly been as high as $188,000. Therefore, we properly found and still find that the $175,000 figure is the correct amount.

Based on all the above, we find that OPC's Motion does not identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order on this issue. Therefore, OPC's Motion for Reconsideration on this issue is denied.

ALOHA'S CROSS MOTION FOR RECONSIDERATION

On March 5, 2001, Aloha filed its Cross Motion seeking reconsideration of 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 OPC to strike portions of the supplemental rebuttal testimony of Aloha's witnesses Nixon and Watford;

3. Proposes to radically change the Commission's longstanding policy concerning treatment of gross-up taxes collected and to include those taxes in contributions-in-aid-of-construction (CIAC) and as an offset to rate base; and

4. Eliminated costs related to reconsideration, because those costs had not yet been incurred.

I. Office Building

Aloha's Argument

Aloha asserts that it satisfied its burden of proof through its supplemental direct testimony and those portions of its supplemental rebuttal testimony that were not stricken. Aloha states that on supplemental direct, Mr. Watford explained the reason for acquiring a new office building, the extensive search for office space, and the expenses related to the new building as compared to its former lease. In addition, Aloha argues that those portions of Mr. Watford's and Mr. Nixon's rebuttal testimony that were not stricken substantiate the prudency of the purchase of the new office building and the reasonableness of those costs.

Aloha also asserts that we have overlooked Aloha's burden of proof and the fact that we had no rules or prior announced policies which require a cost-benefit analysis. Aloha maintains that if the building were acquired before or during the test year used in the

MFRs, then Aloha would simply have included the costs of the new building without further explanation or documentation.

Aloha argues that because there was no contrary evidence that new office space was not needed or that the purchase price was unreasonable or imprudent, we are not authorized to disregard Aloha's evidence regarding the expenses related to its new office building. See Florida Dept. of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Consequently, Aloha contends that it satisfied its burden that the costs were reasonable and prudent and there was no burden to present evidence of alternatives considered or that the one chosen was the most cost effective.

Aloha also argues that our reliance upon Florida Power Corp. v. Cresse, 413 So. 2d 1187 (Fla. 1982) (hereinafter Florida Power), is misplaced. Aloha states that Florida Power stands for the proposition that when there is conflicting evidence on the reasonableness of a cost incurred by the utility, then our resolution of that conflict will be upheld if supported by competent substantial evidence. Aloha also cited Rolling Oaks Utilities v. FPSC, 533 So. 2d 770 (Fla. 1st DCA 1988) (upholding the Commission's resolution of conflicting opinions on the value of land).

In this case, Aloha argues that there was no conflicting evidence, and that the only Commission witness who testified on the issue took no position on the prudence of Aloha's purchase, or on whether the costs represent the most cost effective alternative. Consequently, Aloha believes that it has satisfied its burden of proof.

Next, Aloha argues that staff witness Merchant's requirement of a written cost-benefit analysis represents a change in "rate-making policy [that is not] supported by expert testimony, documentary evidence or other evidence appropriate to the nature of the issue involved." Palm Coast v. FPSC, 742 So. 2d 482 (Fla. 1st DCA 1999).

OPC's Response

OPC argues that our requirement that Aloha prove the reasonableness of its costs is neither improper or unusual. OPC

contends that Aloha failed to demonstrate the reasonableness of the higher costs that it was seeking for office space. Moreover, OPC states that unlike Florida Power, which involved only utility testimony, in this case there has been evidence presented by different parties on each side of the dispute.

OPC states that in the motion requesting to file supplemental direct testimony, Aloha has acknowledged the responsibility to establish the prudence of the expenditure, by quoting Section 367.081(3), Florida Statutes, which calls on this Commission to determine the prudent cost of providing service.

In response to the utility's testimony, staff witness Merchant testified that she cannot support a position on the prudence of the purchase of the building. Contrary to Aloha solely focusing on the cost-benefit analysis, Ms. Merchant gave a plethora of reasons for her conclusion, such as "a recount of the chronology of staff's effort to obtain information necessary to properly evaluate the prudence of the costs."

Decision

Aloha states that it believes that it has satisfied its burden of proof because of the unstricken testimony of Mr. Watford and Mr. Nixon. In addition, Aloha argues that there was no conflicting evidence and that the only staff witness who testified on the issue took no position on the prudence of Aloha's purchase.

However, we note that: "The act of filing creates issues of material fact for all factors comprising the justification for the increase." South Florida Natural Gas Co. v. FPSC, 534 So. 2d 695 (1988) [hereinafter South Florida]. Not only must the utility show why the present rates are unreasonable, it must also "show by a preponderance of the evidence that the rates fail to compensate the utility for prudently incurred expenses and that the rates fail to produce a reasonable return on its investment." Id. (Citing Gulf Power Co. v. FPSC, 453 So. 2d 799 (Fla. 1984)). Simple production of cost records and documentation does not serve to prove that the costs are reasonable and prudent.

In South Florida, the company argued, in pertinent part, that we placed an improper burden of proof on the company; created disputed issues of fact even though no party challenged the

company's evidence; and disregarded the company's unchallenged evidence on numerous issues of fact. See id. at 697. The Court found that the record justified our conclusion that the utility failed to satisfy its burden. See id. See also Gulf Power Co., 453 So. 2d at 805 (stating that "it is the [Commission's] prerogative to evaluate the testimony of competing experts and accord whatever weight to the conflicting opinions it deems necessary.").

Likewise, in this case, we find that the utility failed to satisfy its burden of proof. Specifically, the utility failed to demonstrate that the purchase of the office building was prudent. Accordingly, Aloha's Cross Motion is denied on this point as there has been no mistake of fact or law.

II. Stricken Supplemental Rebuttal Testimony

Aloha's Argument

Aloha contends that it learned for the first time through the direct testimony of staff witness Merchant, that our staff required a cost-benefit analysis to justify the prudence of Aloha's decision to purchase a building for office use. Aloha argues that 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 this 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 witnesses Watford and Nixon did constitute proper rebuttal. Aloha states that we have 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 we 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 this 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. Aloha argues that we have allowed such cumulative evidence when it did not prejudice the result of the proceedings. See Order No. PSC-00-0087-PCO-WS, issued January 10, 2000, in Docket No. 960545-WS. Aloha states that OPC and our staff did not conduct cross-examination on the portion of testimony not stricken, nor request the opportunity to provide surrebuttal evidence. Consequently, Aloha argues that OPC and our 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 us with more complete information upon which to base our decision.

OPC's Response

OPC argues that to properly evaluate Aloha's argument, we must examine the issue in the context of all relevant actions in this case. OPC outlines the events leading to Aloha's request to impose a strict standard in prohibiting rebuttal testimony from including anything on an issue that was presented on direct. OPC points out that it was Aloha who objected to a witness "laying in wait until the rebuttal filing date" to "pounce" and attempt to "prop up" prior testimony.

OPC states that all it urged in its oral motion to strike was that the same standard be applied to Aloha. Aloha should not be allowed to "lay in wait until rebuttal" to "pounce and attempt to prop up prior testimony," when they "could have propounded 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."

Decision

Aloha contends that Ms. Merchant's newly announced requirement of a cost benefit analysis is an unpromulgated rule or policy, which it has the right to challenge through rebuttal testimony and exhibits. However, as stated above, it is the utility's burden of proof to show that the expenses have been prudently incurred. See South Florida, 534 So. 2d at 695. Ms. Merchant testified that she did not believe that it was prudent for the utility to purchase the building without performing a cost benefit analysis. On cross-examination, Ms. Merchant testified that a cost benefit analysis is not required, but that if a utility wants a major item in its rate case, then the utility should submit documentation to show that the steps the utility undertook and its final actions were prudent.

When the requirement for a new office building occurred after the filing of the MFRs, the utility was allowed to supplement its filing and given the opportunity to demonstrate that these new costs were reasonable and prudent. However, we find that the utility did not take advantage of this opportunity. While the

utility argues that a cost-benefit analysis is a new requirement, we did not find that a cost-benefit analysis was required, but merely that there was insufficient evidence to determine that the purchase of the building was the most cost effective alternative. Consequently, there is simply no unpromulgated rule or policy that a cost benefit analysis is required.

Ms. Merchant's testimony merely outlined areas in which she believed the utility had failed to meet its burden of proof. In other words, she identified what she believed the utility should have provided in its MFRs, responses to discovery, or direct testimony. Also, Aloha's rebuttal testimony should not have consisted of testimony which should have properly been submitted in its case-in-chief. See Driscoll v. Morris, 114 So. 2d 314, 315 (Fla. 3d DCA 1959).

Our reliance on Florida Power is not misplaced. There was conflicting testimony as to whether the utility had met its burden of proof on the prudency of the new office building. The utility believed that it had met its burden in its supplemental direct testimony. Ms. Merchant, however, believed that although a cost benefit analysis is not required, the utility had failed to demonstrate how it determined that the purchase of the office building was prudent. In weighing this conflicting testimony, we found that the utility had not presented sufficient evidence to show that the costs were prudent.

Aloha also contends that the stricken supplemental rebuttal testimony is directed 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. As stated above, a cost benefit analysis is not a requirement.

In addition, while the utility accurately quoted Ms. Merchant's opinion that Aloha should have documented the minimum requirements for its new location, an entirely different question was posed to Mr. Watford. He was asked: "Ms. Merchant expressed concern that you did not develop criteria for the new building and submit it to the realtor. Is this correct?" (TR 1082-1083, emphasis added) Ms. Merchant did not take issue on what the utility asked of its realtor, but was concerned that the utility had not documented what it had done, so that she could determine the prudency of purchasing the new office building.

Finally, Aloha argues that we abused our discretion to the prejudice of Aloha. Aloha believes that the rules of presentation of evidence should be relaxed when there is no prejudice to either party, especially when Aloha is attempting to comply with a newly announced requirement.

We agree with OPC that it would have been prejudicial to allow a party to "lay in wait until rebuttal" to "pounce and attempt to prop up prior testimony," when it "could have propounded pages and pages of direct testimony on the issue." Moreover, the information filed in Aloha's supplemental rebuttal testimony was available to Aloha at the time the direct testimony was filed and could have been filed in its direct case. Based on the foregoing, Aloha's Cross Motion is denied on this point, as there has been no mistake of fact or law.

III. Inclusion of Gross-Up Taxes as CIAC

Aloha's Argument

Aloha states that our inclusion of contributed taxes in CIAC as an offset to rate base investment represents a change in long standing Commission policy without any attempt to explain why such a substantial shift in rate-making policy is appropriate. Aloha notes that every tariff approved by this Commission for Aloha after the issuance of Orders Nos. 16971, 23541, PSC-94-0156-FOF-WS, and PSC-94-0156A-FOF-WS, and 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." Staff witness McPherson agreed that this statement was directly contrary to his proposed treatment. Therefore, Aloha argues that Mr. McPherson's interpretation is directly contrary to all prior interpretations of these Orders by this Commission.

Aloha argues that Mr. McPherson's interpretation of Order No. 23541 is based on his belief that Order No. 16971 was overruled by Order No. 23541. Despite numerous Commission orders requiring the filing of new tariff sheets and approval of those tariff sheets after the issuance of Order No. 23541, Mr. McPherson proposes that all such orders and/or tariffs implementing the requirements were in error regarding the interpretation of Order No. 23541. Aloha

argues that this represents a change in policy that is not supported by competent substantial evidence.

Alternatively, Aloha argues that even if Mr. McPherson's proposal is not a change in policy, it represents a new interpretation of a prior order and is contrary to the interpretation enumerated in the tariffs issued and approved pursuant to Order No. 23541. According to Aloha, this is an attempt by this Commission to "retroactively change the requirements of prior orders and tariffs under which the gross-up of CIAC was authorized and implemented."

In addition, Aloha argues that Mr. McPherson's testimony is not competent substantial evidence to support the shift in policy. Mr. McPherson's testimony failed to mention that this was a change in policy, but was merely his "initial attempt at interpreting ten and fourteen year old orders, and subsequent orders on that subject." There was no specific finding in Order No. 23541 that we intended to reverse a decision in Order No. 16971. Aloha argues that the only competent substantial evidence was presented by Mr. Nixon and through cross-examination of Mr. McPherson, that showed that no case had ever considered, nor accepted, the treatment proposed by Mr. McPherson, and that every tariff sheet authorizing gross-up authority required that the adjustments proposed by Mr. McPherson not be made.

OPC's Response

OPC states that Aloha has mischaracterized the issue as a policy shift. OPC notes that as an approved gross-up utility, "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."

"Under normal circumstances the need and source of funds would offset through the accounting process over the life of the CIAC asset." As long as the two amounts continued to offset, it does not matter whether Mr. McPherson's or Mr. Nixon's approach is used.

However, OPC argues that Aloha's decision on amortization timing and rate created an imbalance. Aloha decided not to begin amortizing contributed taxes (CTs) in the year they were received, resulting in CTs no longer being balanced with the deferred taxes.

This created a cost free source of funds (contributed taxes) greater than the corresponding need for funds (deferred tax debits).

OPC states that Mr. McPherson's approach of "reducing rate base by including contributed taxes 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", makes perfect accounting sense in light of the specific set of circumstances at hand.

OPC points out that Mr. McPherson enumerated three elements in Order No. 23541 that support his accounting treatment: contributed taxes are to be treated the same as other contributions; the entirety of grossed-up CIAC would be considered in rate base; and contributed taxes were to offset the corresponding debit deferred taxes, which can take place only by recognizing the contributed taxes when calculating the rate base.

OPC states that while Aloha claims that it is a violation of non-rule policy, Mr. McPherson refuted Aloha's technical contention with testimony and written evidence in the record. Mr. McPherson testified that Order No. 16971 had been superseded by Order No. 23541. He also testified that because it was issued on an expedited basis, Order No. 16971 was self-limiting. In addition, Order No. 16971 recognized that any generic problems would be handled later, and instructed our staff to continue to investigate the necessity and appropriateness of gross-up.

According to OPC, our treatment of gross-up taxes on CIAC reflects the proper accounting treatment and is consistent with the National Association of Utility Commissioners (NARUC) Uniform System of Accounts (USOA), with our rules and with our prior orders.

Decision

Aloha alleges that our treatment of CTs is a change in policy. However, as OPC points out in its response, this is not a change in policy, but an accounting method to address the specific facts of this case. Our treatment of CTs is required because of Aloha's deviation from our policy.

Aloha also contends that Mr. McPherson's interpretation of Order No. 16971, in light of Order No. 23541, is incorrect. However, Mr. McPherson testified that he believed Order No. 16971 was superseded because it was issued on an expedited basis and that there were limitations of that order when it was recognized that any generic problems would be handled later.

By Order No. 16971, issued December 18, 1986, in Docket No. 860184-PU, we found that "[t]he amount of CIAC Tax Impact collected by a utility shall not be treated as CIAC for ratemaking." By Order No. 23541, issued October 1, 1990, in Docket No. 860814-PU, we also found that "[u]nder the full gross-up method, the debit-deferred taxes would be fully offset by the contributed taxes." Further, Order No. 23541 requires that the benefits of CTs be passed back to the ratepayers over the lives of the related assets.

As set forth on page 35 of Order PSC-01-0326-FOF-SU, we agreed with Aloha that the effect of the full gross-up method should result in no ratemaking impact because the CTs included as CIAC in rate base would be virtually offset by the debit-deferred tax assets (DTAs) related to the CTs included in rate base. However, as utility witness Nixon testified, the primary reason why the debit-DTAs related to grossed-up CIAC and CTs do not offset is because the utility did not begin amortizing its CTs in the year they were received. As OPC correctly points out in its response, this action by the utility is contrary to our directive in Order No. 23541 and our policy that the benefits of CTs shall be passed back to the ratepayers over the lives of the related assets. To ignore this result, the utility would retain the benefit by not recognizing the effect in the ratemaking equation. To not recognize the effect would be fundamentally unfair to the ratepayers, who are entitled to receive the benefits of CTs over the lives of the related assets.

Staff witness McPherson pointed out that the NARUC USOA for Class A utilities describes the amounts that should be recorded in Account 271 for CIAC. Specifically, item 4 of the USOA's description of CIAC states in pertinent part the following:

> Any amount of money received by a utility, any portion of which is provided at no cost to the utility, which represents an addition or transfer to the capital of the utility and which is utilized to offset the federal,

> state or local income tax effect of taxable contributions in aid of construction . . . shall be reflected in a sub-account of this account.

Further, Rule 25-30.433(3), Florida Administrative Code, states in pertinent part:

> Used and useful debit deferred taxes shall be offset against used and useful credit deferred taxes in the capital structure. Any resulting net debit deferred taxes shall be included as a separate line item in the rate base calculation. Any resulting net credit deferred taxes shall be included in the capital structure calculation. . . .

Consistent with the USOA and Rule 25-30.433(3), Florida Administrative Code, by Order No. PSC-01-0326-FOF-SU, we decided to follow the accounting treatment to recognize the ratemaking effect.

Alternatively, we could have recognized the effect as a Regulatory Liability. However, the ratemaking effect of this treatment would be the same. The Regulatory Liability would be a reduction in the utility's net investment in the determination of its rates and plant capacity charges.

Based on the above, we find that it is the utility which deviated from our policy and the correct treatment of CTs, and this required an accounting adjustment. Therefore, there has been no mistake of fact or law by this Commission, and Aloha's Cross Motion on this issue is denied.

IV. Rate Case Expense

Aloha's Argument

By Order No. PSC-01-0326-FOF-SU, we disallowed costs for reconsideration because those costs had not yet been incurred. However, we noted that if a Motion for Reconsideration were filed, a determination of the reasonableness of the amounts would be made at that time.

Aloha submitted within the record a cost of $12,100 for reconsideration. Aloha believes that because it was required to

respond to OPC's Motion for Reconsideration, and because the issues raised in the Cross Motion are reasonable, all costs incurred are prudent and should be allowed in our order disposing of reconsideration, regardless of our finding on the ultimate issues.

OPC's Response

OPC alleges that Aloha's request for additional rate case expense is untimely. OPC believes that the Order contemplated 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.

However, if we were to entertain Aloha's request, OPC believes that Aloha's Cross Motion does not raise reasonable issues for reconsideration, but is based on "an arbitrary feeling that a mistake may have been made." Stewart Bonded Warehouse, at 317. Moreover, Aloha's eight page response at a cost of $12,100 would equate to $1,500 per page, which OPC argues is extravagant.

Decision

We note that we have broad discretion with respect to allowance of rate case expense. See Florida Crown Util. Servs., Inc. v. Utility Regulatory Bd. of Jacksonville, 274 So. 2d 597, 598 (Fla. 1st DCA 1973). Nonetheless, it would be an abuse of discretion for us to automatically award rate case expense without reference to the prudence of the costs incurred in rate case proceedings. Meadowbrook Util. Sys., Inc. v. FPSC, 518 So. 2d 326, 327 (Fla. 1st DCA 1987), rehearing denied, 529 So. 2d 694 (Fla. 1988). Further, Section 367.081(7), Florida Statutes, states in pertinent part that we "shall determine the reasonableness of rate case expenses and shall disallow all rate case expenses determined to be unreasonable."

As such, no rate case expense determined to be imprudent or unreasonable shall be paid by a consumer. As discussed above, the utility has failed to point out a mistake of fact or law regarding our decisions on the treatment of the utility's new office building, stricken supplemental rebuttal testimony, and the treatment of gross-up taxes. Therefore, we find that the additional rate case expense incurred for reconsideration of these issues was imprudent.

An estimate of the $12,100 associated with reconsideration was contained in Exhibit No. 22. Specifically, the utility provided a description of work to be performed by its legal and engineering consultants which totaled $10,500 and $1,600, respectively. Based on our review, the hourly rates for the reconsideration are in line with the actual expense that was approved by Order No. PSC-01-0326-FOF-SU. However, the estimate is very broad in that we are unable to identify the cost associated with each task performed and more importantly what time was spent on each issue raised for reconsideration by either OPC or Aloha.

Nevertheless, based on the motions filed by OPC and Aloha, with the exception of rate case expense, there are basically four issues raised for reconsideration: 1) I&I Reduction Program Issue (OPC); 2) Maintenance of the New Treatment Plant Issue (OPC); 3) New Office Building Issue (Aloha); and 4) Inclusion of Gross-up Taxes as CIAC Issue (Aloha). The utility has every right to defend against the two issues that OPC raised in its Motion for Reconsideration, and, therefore, we find that Aloha's costs associated with addressing those issues were prudent. However, as stated earlier, the additional rate case expense incurred for reconsideration of our decisions on the treatment of the new office building and gross-up taxes was imprudent because Aloha has failed to point out a mistake of fact or law made regarding our decisions on those issues.

We find it logical and reasonable to allow 50% of the additional requested rate case expense, which is based on our finding that the cost associated with the utility's response to the two issues raised by OPC in its Motion for Reconsideration were prudent. However, the costs incurred in filing the Cross Motion for the building and gross-up taxes were not prudent and shall not be allowed. We have allowed appellate rate case expense based on the number of issues which the utility successfully appealed. Although we have not applied this approach to a Motion for Reconsideration, we believe that the rationale is similar. It was prudent for the utility to respond to the two issues raised by OPC, but it was not prudent for the utility to reargue the two issues it raised in its Cross Motion.

Therefore, based on the above, $6,050 (50%) of additional rate case expense, is hereby approved. However, an additional $6,050

increase grossed up for regulatory assessment fees has no effect upon the rates previously approved in Order No. PSC-01-0326-FOF-SU.

EDWARD WOOD LETTER DATED FEBRUARY 24, 2001

As stated above, on February 26, 2001, we received a letter from Mr. Edward Wood dated February 24, 2001. In his letter, Mr. Wood objected to many of our findings set forth in Order No. PSC-01-0326-FOF-SU, issued February 6, 2001. Mr. Wood states that the letter was sent as an appeal of our recent ruling in Docket No. 991643-SU.

Mr. Wood specifically raises the following observations, statements and questions:

1. Whether the Commission considered any testimony that was presented by the customers regarding Aloha's performance and management;
2. That the requested rate increases were the direct result of inept business management;
3. That the rate of return "awarded was ludicrous;"
4. That the rate case expense was "abnormal" and customers should not be made to absorb it;
5. The DEP reasons for the upgrade have never been explained;
6. The performance of Aloha has been and continues to be totally unsatisfactory;
7. Aloha has done nothing to promote customer satisfaction and merely waits to be ordered to do something;
8. That Aloha continues to accept new customers and current customers are required to support Aloha's growth;
9. That current customers pay for the provision of reclaimed water, and that the costs of the reclaimed water are not paid for by those receiving it, i.e., the "golf courses" and the "neighbors' ranches";
10. That customer satisfaction will never be acquired because the utility's "operating policy is stated as, 'the expansion and plant upgrading will only be undertaken once it is mandated by either a local, state, or federal regulatory authority.'"

Mr. Wood states that: "A company that provides an inferior product could only exist as a state regulated monopoly, if the state is not concerned for its citizens." He then concludes his letter with the hope that "the appeal hearing will be in Pasco County so that many Aloha customers can come, and express their opinions."

Mr. Wood's letter is much in the nature of a Motion for Reconsideration. Rule 25-22.060(1)(a), Florida Administrative Code, governs Motions for Reconsideration and states, in pertinent part: "Any party to a proceeding who is adversely affected by an order of the Commission may file a motion for reconsideration of that order." (emphasis supplied) Mr. Wood is not a party of record in this docket. Therefore, we find that it is not appropriate to treat his letter as a Motion for Reconsideration. See Order No. PSC-00-1628-FOF-WS, issued September 12, 2000, in Docket No. 960545-WS.

We note that if it were proper to treat Mr. Wood's letter as a Motion for Reconsideration, the proper standard of review for a Motion for Reconsideration would be whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our Order. See Stewart Bonded Warehouse.

Mr. Wood's letter fails to identify a point of fact or law which was overlooked or which we failed to consider in rendering our Order. Mr. Wood states that we did not consider any testimony that was presented by the customers. However, we believe that we appropriately considered the customer testimony as well as the customer letters received.

Mr. Wood states that the requested rate increases were the direct result of inept business management. However, Aloha has shown by a preponderance of the evidence that the additions to rate base and increases in expenses allowed by Order No. PSC-01-0326-FOF-SU were prudent and reasonable.

Mr. Wood also states that the rate of return awarded was ludicrous. However, in Stipulation 4, the parties stipulated to the use of the current leverage graph to calculate the appropriate return on equity. Further, in Stipulation 13, the parties stipulated to the appropriate adjustments to retained earnings. With the cost of long-term debt being 9.84% and the cost of customer deposits being 6%, the overall rate of return was

calculated to be 9.71%, with a range of reasonableness from 9.56% to 9.86%.

The issue of rate case expense was fully litigated, and we appropriately disallowed $46,139 of rate case expense.

Regarding DEP's reasons for the upgrade, Aloha and DEP entered into an Amended and Restated Consent Final Judgment on March 9, 1999. Pursuant to page three of that Order of Circuit Judge L. Ralph Smith, Jr., Aloha was ordered to go to Part III public access reuse capacity with class one reliability. Whatever the reasons may have been, there is no question but that Aloha was required by DEP, a governmental agency, to construct a plant with class one reliability. Therefore, pursuant to the requirements of Section 367.081(6), Florida Statutes, Aloha must be given the opportunity to earn a fair rate of return on that investment through its rates.

As to the quality of service provided by Aloha, we thoroughly reviewed the testimony of both the expert witnesses and the customers. Although one customer had complained about odor problems with lift stations, it appears that the utility has satisfactorily responded to this problem by placing a cap over the end of a pipe. Having reviewed the quality of the utility's product, the operational conditions of the utility's plant and facilities, and customer satisfaction, we found that the quality of service provided by Aloha for its Seven Springs wastewater system was satisfactory.

The main problem that Aloha continues to have is with the quality of its water service for Seven Springs. As stated in Order No. PSC-01-0326-FOF-SU, that problem is being considered in a separate docket. However, as noted at the hearing on October 2, 2000, the responsiveness of the utility as a whole is a quality of service issue. Taking this into consideration, we determined that the overall quality of service provided by Aloha was satisfactory.

Mr. Wood further states that Aloha has done nothing to promote customer satisfaction and merely waits to be ordered to do something. Mr. Wood goes on to say that customer satisfaction will never be obtained with this being the attitude. We are concerned that this does appear to be the attitude of the utility and that it could cause a delay of what may otherwise be necessary improvements or expansions. Instead of waiting to be ordered to do something,

the utility should take more initiative and plan further ahead. However, in the case at hand, the utility appears to be in compliance with all DEP standards and directives. In consideration of all the above, we are not aware of any further action that we should require Aloha to take at this time.

Mr. Wood next claims that the current customers are being made to pay for Aloha's growth. To help pay for customer growth, we specifically raised Aloha's service availability charges from $206.75 to $1,650 per residential ERC. However, not all of Aloha's increased costs are due to growth. Many of the increased costs are due to more stringent requirements on disposal of wastewater effluent. Based on the test year, we set final rates in order to allow the utility the opportunity to earn a fair rate of return on its investment currently used and useful in the public service, as required by Section 367.081, Florida Statutes. Therefore, we do not believe that the approved final rates are improperly making the current customers pay for Aloha's growth.

Mr. Wood also states that the current customers pay for the provision of reclaimed water, and that the costs of the reclaimed water are not paid for by those receiving it, i.e., the "golf courses" and the "neighbors' ranches". Because the Fox Hollow Golf Course could have contracted with the County for reuse, we found it appropriate for Aloha to offer reuse to the golf course at no charge for four years. Also, we found that at the time Aloha entered into the Mitchell contract (and its extension), the utility had little choice, and the agreement benefited Aloha as much as it benefited Mr. Mitchell. Therefore, we specifically addressed Mr. Wood's concern, and found both agreements to be appropriate and specifically approved them.

Mr. Wood concludes his letter by stating that Aloha does not deserve the increase and requesting that "the appeal hearing . . . be in Pasco County so that many Aloha customers can come and express their opinions." Mr. Wood has not identified a point of fact or law which was overlooked or which we failed to consider in rendering our Order. Therefore, there is no reason to reconsider our decision in Order No. PSC-01-0326-FOF-SU. Also, Mr. Wood has given no legal basis for reopening the record.

Based on the foregoing, we shall take no further actions in regards to Mr. Wood's letter.

RELEASE OF ESCROWED FUNDS

As stated above, Aloha implemented its proposed rates designed to increase revenues by $1,593,501, subject to refund, effective December 8, 2000. Aloha was directed to place the revenues attributable to the increased rates in an approved escrow account. By Motion dated and filed on March 9, 2001, Aloha requests that the escrowed funds be released.

With our rulings on OPC's Motion for Reconsideration and Aloha's Cross Motion, there is no change to the rates determined in Order No. PSC-01-0326-FOF-SU. Therefore, the final rates and refund requirement shall be as set forth in that Order.

That Order specifically found that:

> [T]he utility shall refund the percentage of the difference of the utility's proposed final revenue requirement for residential and general service and our approved final revenue requirement for residential and general service divided by Aloha's proposed final revenue requirement for residential and general service, during the period of time Aloha collected revenues under its proposed final rates. As indicated on Schedule No. E-13(A) of the MFRs, Volume I, page 120, the utility's projected final revenue requirement for residential and general service is $4,305,036 ($3,937,227 plus $367,809). Our projected final revenue requirement for residential and general service is $4,025,224. This results in a 6.5% differential (($4,305,036 less $4,025,224) divided by $4,305,036) that shall be applied to the revenues collected under Aloha's proposed final rates for residential and general service, in order to determine the appropriate amount of refund. Further, the utility shall administer this refund pursuant to Rule 25-30.360, Florida Administrative Code.

The amount of funds ordered to be refunded by Order No. PSC-01-0326-FOF-SU shall be maintained in the escrow account pending our staff's verification that the refunds have been made and that Aloha is charging the rates approved in Order No. PSC-01-0326-FOF-SU, upon which time, those funds may be released. That portion of the escrowed funds which represents the increases granted by Order No.

PSC-01-0326-FOF-SU, issued February 6, 2001, shall be immediately released.

Therefore, pending Aloha reducing its rates to the appropriate final rates, Aloha shall continue to escrow 6.5% of its revenues. Therefore, only 93.5% of the revenues currently in the escrow account shall be released at this time.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Reconsideration filed by the Office of Public Counsel is denied. It is further

ORDERED that the Cross Motion for Reconsideration filed by Aloha Utilities, Inc., is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that $6,050 of additional rate case expense is approved. It is further

ORDERED that the portion of the escrowed funds which represents the increases granted by Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, i.e., 93.5% of the revenues currently in the escrow account, shall be immediately released. It is further

ORDERED that Aloha Utilities, Inc., shall continue to escrow 6.5% of its revenues until it reduces its rates to the appropriate final rates approved in Order No. PSC-01-0326-FOF-SU. It is further

ORDERED that the remaining amounts in the escrow account may be released upon the utility reducing its rates to the appropriate final rates approved in Order No. PSC-01-0326-FOF-SU and upon our staff's verification that the refunds have been made. It is further

ORDERED that, in accordance with the requirements of Order No. PSC-01-0326-FOF-SU, this docket may be closed after the time for filing an appeal has run, the revised tariff sheets have been administratively approved and our staff has verified that the required refund has been made.

By ORDER of the Florida Public Service Commission this 18th day of April, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action on the Office of Public Counsel's Motion for Reconsideration or Aloha Utilities, Inc.'s Cross Motion for Reconsideration in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

Any party adversely affected by the Commission's final actions other than the actions on the Office of Public Counsel's Motion for Reconsideration or Aloha Utilities, Inc.'s Cross Motion for Reconsideration in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review as set forth in the paragraph above.