

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of ALOHA)
UTILITIES, INC. for an increase)
in water rates for its Seven)
Springs System in Pasco County,)
Florida.)
_____)

DOCKET NO. 010503-WU

MOTION FOR STAY

COMES NOW, Aloha Utilities, Inc. (hereinafter "Utility" or "Aloha"), by and through its undersigned attorneys and files this Motion for Stay of the requirements of Order No. PSC-02-0593-FOF-WU, issued on April 30, 2002, and in support thereof states as follows:

1. Order No. PSC-02-0593-FOF-WU was issued as a final order in Docket No. 010503-WU on April 30, 2002, and requires the Utility to implement the rates approved therein, notice customers, and refund the excess of temporary rates granted in Order No. PSC-01-2199-FOF-WU over those granted in the Commission's final order. The Order also requires, *inter alia*, that Aloha implement certain conservation programs, that Aloha implement five customer service measures, that Aloha create and supplement and submit a plan within ninety (90) days of the date of the Order showing how it intends to comply with the requirement to remove Hydrogen Sulfide, and that Aloha make certain improvements to certain wells to remove at least 98% of the Hydrogen Sulfide in its raw water from those wells, for two wells by December of 2002 and on the remaining wells by December of 2003. The Order further denies Aloha's request for rates which would allow Aloha to purchase needed water from Pasco County in order to provide safe, efficient, and uninterrupted service to its customers in accordance with mandates from the Southwest Florida Water Management District .

2. The Utility filed its Notice of Appeal of Order No. PSC-02-0593-FOF-WU on May 28, 2002. If any of the points raised in the Appeal are accepted by the Court, they will effect the

DOCUMENT NUMBER-DATE

06218 JUN 14 8

FPSC-COMMISSION CLERK

final rates of the Utility and/or substantially affect the other tasks, analysis, and efforts which Aloha has been ordered to undertake.

3. A Stay of Execution of Order No. PSC-02-0593-FOF-WU is necessary to prevent a change of the status quo and provide meaning to Aloha's appeal. Many of the tasks which Aloha has been instructed to undertake are time consuming, expensive, and time-sensitive. Aloha will not be able to "undo" those matters, tasks, analysis, and expenditures which it undertakes pursuant to the Order if Aloha's appeal of the Order is well taken.

**THE COMMISSION MUST STAY THE ORDER
PURSUANT TO RULE 25-22.061 FLA. ADMIN CODE.**

4. Rule 25-22.061(1)(a) provides:

"When the Order being appealed involves the refund of monies to customers or a decrease in rates charged to customers, the Commission shall, upon motion filed by the Utility or Company affected, grant a stay pending judicial proceedings. The stay shall be conditioned upon the posting of good and sufficient bond, or the posting of a corporate undertaking, or such other conditions as the Commission finds appropriate."

In this case, Order No. PSC-02-0593-FOF-WU clearly and unequivocally provides that "we find that the Utility shall refund 4.87% of water revenues collected under interim rates".

5. The Commission's Administrative Code Rule provides that when the order being appealed involves the refund of monies to customers that the Commission *shall*, upon motion filed by the Utility, grant a stay pending judicial proceedings. Clearly, this order involves the refund of monies to customers. Equally clear is that this motion constitutes a motion filed by the utility requesting a stay. The normal meaning of the word "shall" is mandatory by nature, and our Supreme Court has held that the word "shall" has a mandatory connotation. *Neal v. Bryant* 149 So.2nd 529 (Florida 1962).

6. In this case, the fact that the order requires a refund of money to customers and the fact that the utility has filed this motion seeking a stay mandates that the Commission “grant a stay pending judicial proceedings”. Those “judicial proceedings” will be prosecuted at the First District Court of Appeal pursuant to Aloha’s Notice of Appeal in this case.

7. Notwithstanding prior erroneous interpretations of its own rule to the contrary, this Commission must apply a plain meaning and interpretation of the rule and stay the entire Order. Rule 25-22-061(1)(a), Fla. Admin. Code, creates a special category for orders that require a refund or rate reduction, and the PSC cannot lawfully disregard or modify its own rules. See, e.g., *Bayonet Point Reg’l Med. Ctr. v. Dept. of Health and Rehab. Serv.*, 516, So. 2nd 995 (Fla. First DCA 1987)

**ALTERNATIVELY, THE COMMISSION SHOULD STAY
ORDER NO. PSC-02-0593-FOF-WU PURSUANT TO
RULE 9.190(e)(2), FLA RULES OF APPELLATE PROCEDURE**

8. Aloha seeks a stay in order to ensure that the Order here at issue is only implemented after due consideration by the District Court of all the applicable facts and law raised on appeal.

9. To require Aloha to undertake the various tasks required by Order No. PSC-02-0593-FOF-WU prior to final determination of the merits of the appeal would be counter-productive, confusing to the customers, cause Aloha to suffer irreparable harm, and would not be in the public interest.

10. The Utility has previously agreed to escrowed funds under an arrangement with the Commission, continuation of which is more than ample security to cover any potential refund after consideration of the points raised on appeal. As such, the customers of the Utility are adequately protected during the period of any stay granted by the Commission.

11. The potential harm to Aloha if this motion is not granted is clear, unequivocal, and significant. While fully recognizing that this Commission is unlikely to revisit the merits of the very

Order which it so recently issued, Aloha respectfully submits that the Commission in Order No. PSC-02-0593-FOF-WU has exceeded its jurisdiction, acted unlawfully, deprived Aloha of due process, and has made findings of facts and conclusions of law which are not supported by competent, substantial evidence.

12. In this case, the PSC has acted outside of Chapter 120, Florida Statutes, and has failed to provide essential procedural protections afforded under Chapter 120, Florida Statutes. Such a failure to follow the tenets of the Florida Administrative Procedure Act constitute grounds for a stay See, e.g., *First Nat'l Bank of Miramar v. Lewis* 355 So. 2nd 869 (Fla. First DCA 1978). In this case, the Commission clearly formulated its Final Order outside of the only public meeting which was held for consideration of the Order.

13. A stay of this matter is in the public interest. Not only is it obviously in the public interest that the Commission's orders be rendered in conformance with applicable law and that such orders be supported by competent and substantial evidence, but it is in the public interest that the Commission exercise its jurisdiction in a logical, reasoned, and non-agendized manner. Frustration, political considerations, and exterior pressures should never play a part in the Commission's decisions. In cases such as this one given the Commission legal authority to render the decision; the lack of factual support for the decision reached; and the process under which the decision was reached, are all to be called in to question on appeal, a stay of the decision is without question in the public interest while the appeal is being heard.

14. The potential harm to Aloha if the Commission's Order is not stayed is practically incalculable. Many of the things that the Commission has directed Aloha to undertake simply cannot be undone, whether in terms of expense, effort, or in the eyes of Aloha's customers. Aloha should

be moving forward to purchase water from Pasco County at this point and time but instead will be burdened by the Commission's Order with directives that exceed any ever placed upon any regulated utility in the State of Florida, customer service measures which are well beyond its authority, much less past practice, and other aspects of the Order which will be financially devastating to Aloha even if they are technically possible.

15. Again, recognizing the Commission's anticipated pride of authorship of Order No. PSC-02-0593-FOF-WU, Aloha can demonstrate a likelihood of success on appeal. Aloha can hardly brief each of the issues on appeal within the body of this motion,¹ but a minimum Aloha is likely to succeed on appeal on several issues which include, but are not limited to, the following:

- The Order determines that Aloha has not "sustained its burden of proof" regarding its request to recover expenses for purchased water from Pasco County. The Commission reached this conclusion in the face of an overwhelming amount of evidence that Aloha's only alternative in order to come into compliance with its Water Use Permit was to purchase water from Pasco County, and in the face of a complete and total lack of evidence to the contrary.
- The Commission's Order is an unlawful Order in that it was not rendered as required by the Florida Administrative Procedure Act and other applicable tenets of Florida Law. At a minimum, the Commission's vote on the Final Order on this matter was nothing more than a ceremonial acceptance of a decision previously made in private, in violation of Florida's Sunshine Law.

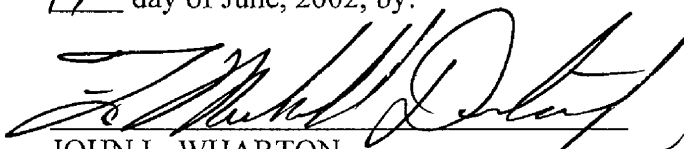
¹Aloha hereby incorporates, by this reference, its Post Hearing Memorandum filed on February 12, 2002, as if fully set forth herein.

- Aloha is ordered to make improvements to wells number eight and nine, and eventually to all its wells, to implement a treatment process designed to remove at least 98% of the Hydrogen Sulfide in its raw water. This requirement is arbitrary, capricious, exceeds the Commission's jurisdiction, and imposes upon Aloha an environmental standard stricter than that imposed upon any utility, private or governmental, in the State of Florida by any regulatory or jurisdictional authority. In addition, the finding that such a requirement is appropriate is unsupported by any evidence or expert testimony that such a requirement is permissible, or technically feasible.
- The Order requires Aloha to submit a plan within ninety (90) days of the date of the Final Order showing how Aloha intends to comply with the requirement to remove Hydrogen Sulfide. Such a plan, if it can be accomplished at all within that time frame, will be expensive, time consuming, and a significant drain on the resources of Aloha. Given the certainty that Aloha's appeal of the Commission's Order will take longer than ninety (90) days such a requirement cannot be completed while the appeal is pending.
- The Order directs Aloha to make refunds with interest to Aloha's customers. Such refunds with interest cannot be retrievable and will not be retrievable should Aloha prevail on appeal.
- The Order directs that Aloha's rate case expense shall be reduced by 50% because this case was not filed in conjunction with the prior wastewater case. The Commission's directive in this regard is arbitrary, capricious, and not supported by any facts in the record.

- The Order requires Aloha to implement certain customer service measures which will be counterproductive, which are unlawful, and which are not either required or advisable under the law and the evidence in this case.
- The Order requires Aloha to undertake certain billing format changes without any foundation in the law or the evidence in this case.
- The Order unlawfully and improperly reduces the President's and Vice President's salary without any justification or competent evidence to support the same.

WHEREFORE Aloha Utilities, Inc. requests that the Florida Public Service Commission stay the requirements of Order No. PSC-02-0593-FOF-WU until such time as the First District Court of Appeal disposes of the pending appeal. No prejudice will result to any party or the public interest as a result of the granting of such a stay.

Respectfully submitted this
14th day of June, 2002, by:



JOHN L. WHARTON
 F. MARSHALL DETERDING
 Rose, Sundstrom, & Bentley, LLP
 2548 Blairstone Pines Drive
 Tallahassee, FL 32301
 Counsel for *Aloha Utilities, Inc.*

CERTIFICATE OF SERVICE

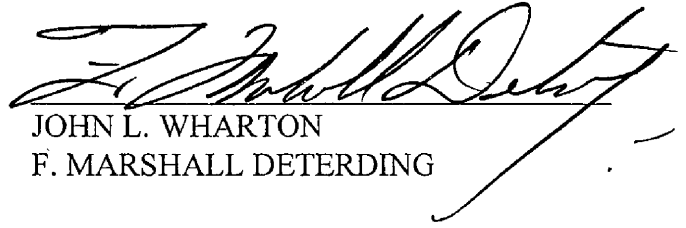
I HEREBY CERTIFY that a true and correct copy of Aloha's Motion for Stay has been furnished by U.S. Mail and by Facsimile (*) to the following this 14th day of June, 2002:

Ralph Jaeger, Esq. (*)
 Division of Legal Services
 Florida Public Service Commission
 2540 Shumard Oak Boulevard
 Tallahassee, FL 32399-0850

Stephen C. Burgess, Esq. (*)
 Deputy Public Counsel
 Office of Public Counsel
 111 Madison Street, Room 812
 Tallahassee, FL 32399-1400

Edward O. Wood
1043 Daleside Lane
New Port Richey, FL 34655-4293

Margaret Lytle, Esq. (*)
S.W. Florida Water Management District
2379 Broad Street
Brooksville, FL 34604-6899



JOHN L. WHARTON
F. MARSHALL DETERDING

aloha35\stay.mot