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July 31, 2002

VIA HAND DELIVERY

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Blanca S. Bayo, Director  
Division of Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-0800

**Re: Docket No. 020413-SU - Initiation of Show Cause Proceedings against Aloha Utilities, Inc. for failure to charge approved service availability charges in violation of Order PSC-01-0326-FOF-SU and Section 367.091, F.S.**

Dear Ms. Bayo:

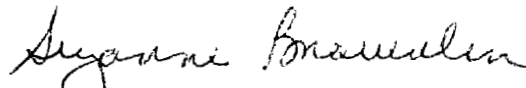
Attached please find the original and fifteen copies of Aloha's Objection to Petition to Intervene to be filed in the above-styled docket. Also attached is a copy to be stamped and returned to our office.

AUS \_\_\_\_\_  
CAF \_\_\_\_\_  
CMP \_\_\_\_\_  
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SEC   1    
OTH \_\_\_\_\_

Should you have questions or need any additional information, please contact me.

Thank you for your assistance in this matter.

Very truly yours,



Suzanne Brownless  
Attorney for Aloha Utilities, Inc.

SB:smh  
Bayo-ltr(d) wpd

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Initiation of Show Cause  
Proceedings against Aloha Utilities,  
Inc. for failure to charge approved  
service availability charges in  
violation of Order No. PSC-01-0326-  
FOF-SU and Section 367.091, F.S.

DOCKET NO. 020413-SU

OBJECTION TO PETITION TO INTERVENE

Pursuant to Rule 28-106.204, Fla. Adm. Code, Aloha Utilities, Inc. (Aloha), through its undersigned attorney, files this Objection to SRK Partnership Holdings, LLC and Benchmark Manmem Corporation's Petition to Intervene, and in support thereof states as follows:

1. On July 24, 2002, SRK Partnership Holdings, LLC (SRK) and Benchmark Manmem Corporation (Benchmark), collectively referred to as the Petitioners or Limited Partners, filed a Petition to Intervene in the above-styled docket.

2. The Petitioners have alleged that their substantial interest in this proceeding is the "effective date of the tariff", i.e., the effective date of Aloha's wastewater service availability tariff. [L.P. Petition at 1, 10] The Petitioners' Statement of Disputed Issues of Material Fact and Ultimate Facts Alleged, however, go far beyond this issue and include: actual and constructive notice given to the Petitioners; refund of monies paid in excess of \$177,265.44; the "wrongful" refusal of Aloha to allow connection to its wastewater system; the date Petitioners requested service; and whether there was a valid tariff in place at the time

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that the Limited Partners requested service.<sup>1</sup> [L.P. Petition at 8-9]

3. The Petitioners correctly state the Agrico<sup>2</sup> criteria for intervention in administrative proceedings: that the intervenor will suffer injury in fact which is of sufficient immediacy to entitle him to a Section 120.57 hearing and that the intervenor's substantial injury is of a type or nature which the proceeding is designed to protect. [L.P. Petition at 10] As a further refinement of the Agrico test, the injury suffered by the intervenor must be "beyond that which might be inflicted upon the general public" as also noted by the Petitioners. [Id.] St. Joe Paper Co. v. Department of Community Affairs, 657 So.2d 27, 28 (Fla. 1st DCA 1995); Grove Isle v. Bayshore Homeowners Association, 418 So.2d 1046 (Fla. 1st DCA 1982), rev.den., 430 So.2d 451 (Fla. 1983).

Substantial injury

4. Aloha agrees with the Petitioners that their "potential liability for the increased service availability charge is impacted by the effective date of the tariff". [L.P. Petition at 7; Emphasis added.] However, based on the issues raised by the Petitioner, the effective date of Aloha's wastewater service availability tariff associated with Order PSC-01-0326-FOF-SU is but

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<sup>1</sup> Aloha strongly disagrees with many of the alleged facts found in ¶¶ 6-20 of the Limited Partners' Petition. However, as discussed in more detail below, this docket is not the proper forum in which to discuss or determine the actual facts related to the Limited Partners receipt of wastewater service from Aloha.

<sup>2</sup> Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 1st DCA 1981).

one consideration in the determination of whether that tariff should be applied to the Petitioners.<sup>3</sup> Further, Petitioners have raised the issue of whether there was any valid tariff in effect on June 14, 2002.<sup>4</sup> Thus, the damage that Petitioners suffer from the determination of an effective date for the "new" service availability charge is highly speculative. Speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process. Village Park Mobile Home Association, Inc. v. State, Department of Business Regulation, 506 So.2d 426, 434 (Fla. 1st DCA 1987).

5. That this proceeding will decide a fact, here the effective date of the "new" service availability tariff, that is

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<sup>3</sup> The bulk of arguments raised by Petitioners can be condensed into one point: Petitioners allege that they did not get adequate notice of the increase prior to June 17, 2002 of the increased service availability charges. Petitioners further argue that lack of adequate notice to them, one of many entities with projects under development in Aloha's service territory, should result in either: 1) the effective date of the "new" service availability tariff being moved to the day after their date of connection (even though Petitioners admit that they received notice on June 17, 2002 - roughly one month prior to connection on July 18, 2002) or 2) that notwithstanding the effective date of the tariff being prior to July 18th the tariff should not be applied to them due to their particular circumstances.

<sup>4</sup> Issue 23.e.: "Whether Aloha had a valid tariff in place on June 14, 2002, when the Project's service connection was requested." [L.P. Petition at 8] Presumably, the Petitioner will take the position that if neither the "old" tariff nor the "new" tariff was in effect on June 14, 2002, the Commission must determine the appropriate amount of service availability charges for its project based on evidence developed at hearing. Should the Commission determine that no valid tariff exists, a determination of the appropriate amount of service availability charges to be paid by the Petitioner is clearly far beyond the scope of this proceeding.

relevant to the Petitioners separate complaint that they were charged too much to connect to Aloha's system, does not, in and of itself, convey a "substantial interest". Where that the case, the Court would have reversed the Commission's decision in AmeriSteel Corp. v. Clark, 691 So.2d 473 (Fla. 1997).

6. In AmeriSteel, the Commission denied AmeriSteel's petition for hearing in a JEA-Florida Power and Light Company (FPL) territorial agreement docket on the grounds that AmeriSteel had no substantial interest in the proceeding. AmeriSteel, 691 So.2d at 477.<sup>5</sup> The Court agreed with the Commission that AmeriSteel's interests were too speculative and thus failed the first prong of the Agrico test.

7. Since Florida does not allow retail customers to select electric providers, the Commission's approval of a territorial agreement which maintained the status quo vis-a-vis AmeriSteel necessarily resulted in AmeriSteel paying FPL's higher electric

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<sup>5</sup> The AmeriSteel company was located in the service territory of FPL and alleged that FPL's higher electricity prices threatened the continued viability of its plant. Further, AmeriSteel alleged that moving its plant from Jacksonville would result in great economic harm to the city. 691 So.2d at 477. Thus, AmeriSteel argued that approval of the territorial agreement which continued its location in FPL's service territory had substantial economic effects for both its company and the City of Jacksonville. AmeriSteel intended to argue at hearing that due to these facts, the Commission should transfer it into JEA's service territory.

rates. Thus, the facts of the AmeriSteel case were even more dispositive than those in the instant case. That is, while there was no doubt that AmeriSteel would be required to continue to receive power from FPL at higher rates if not transferred out of its service territory, whether Petitioners will ultimately have to pay Aloha's new, higher service availability charges, even if an effective tariff date is determined by the Commission in this proceeding, is an open question.

8. In sum, as in AmeriSteel, the Petitioner's interests in this docket are too speculative to constitute a substantial interest. The first prong of the Agrico test has therefore not been met.

#### Nature of proceeding

9. In order to evaluate whether the second prong of the Agrico test has been met one must first determine the purpose of this proceeding. Based on a review of the issues identified in Staff's Recommendation of May 15, 2002<sup>6</sup>, and issues discussed in the Recommendation but not made a formal issue<sup>7</sup>, at most four potential issues are to be addressed in this docket:

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<sup>6</sup> "Issue 1: Should Aloha be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002, and if not, should any such backbilled amounts collected by refunded with interest?" and "Issue 2: Should Aloha be required to file a replacement tariff sheet reflecting its approved service availability charges to be stamped effective for connections made on or after April, 16, 2002."

<sup>7</sup> Imputation of revenues and what type of fines or penalties, if any, should be imposed for failure to file the tariff in May of 2001. [Staff Recom. at 12, 15]

- a) Whether Aloha should be able to "backbill" developers who connected to Aloha's system between May 23, 2001 and the effective date of the tariff: April 16, 2002;
- b) Whether the effective date of Aloha's current wastewater service availability tariff should be changed from May 23, 2001 to April 16, 2002;
- c) What penalties, if any, should be imposed on Aloha for failing to file its service availability tariff in May of 2001; and
- d) Whether service availability charges should be imputed to Aloha for those customers who connected to its wastewater system between May 23, 2001 and the effective date of the tariff: April 16, 2002.

10. With regard to issues a), c) and d) the Limited Partners have alleged no facts in their pleading to support a substantial interest. Indeed, the only issue to be decided in this proceeding which the Limited Partners have argued may affect their substantial interest is the effective date of the tariff. [L.P. Petition at 1]

11. Reviewing the issues identified by Staff to be decided in this docket, it is clear that this is first and foremost an enforcement proceeding initiated by Commission Staff because of Aloha's admitted failure to file a revised wastewater service availability tariff in May of 2001 at the conclusion of its sewer rate case. Since Petitioners did not connect to Aloha's system prior to notice of the tariff change<sup>8</sup>, there can be no "backbilling" with regard to them. Penalties in the form of fines or CIAC imputations also cannot substantially affect Petitioners.

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<sup>8</sup> Whether one uses the May 12, 2002 date Aloha sent the letter to James Carr or the June 17, 2002 date that Petitioners admit their engineer was advised of the increased service availability charges, both dates are prior to connection to Aloha's system.

12. The purpose of an enforcement proceeding is to evaluate whether a company violated Commission rules or orders and then to impose the appropriate penalty. Determining the correct amount that Petitioners should have paid in service availability charges does not fall within that purpose.<sup>9</sup>

13. For these reasons, as in AmeriSteel, the second prong of the Agrico test has not been met.

**WHEREFORE**, for failure to meet either prong of the Agrico test, Aloha Utilities, Inc. requests that:

1) The Commission deny the Petition to Intervene filed by SRK Partnership Holdings, LLC and BenchMark Manmem Corporation in this proceeding; or, in the alternative,

2) If the Commission determines that SRK Partnership Holdings, LLC and BenchMark Manmem Corporation should be granted intervention, the Commission should limit that intervention solely to the issue of the effective date of Aloha's wastewater service availability tariff associated with Order PSC-01-0326-FOF-SU, pursuant to its authority under Rule 28-106.205, Fla. Adm. Code.

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<sup>9</sup> Aloha notes that if Petitioners are denied intervention in this proceeding, they have a means of raising their issue for resolution: file a complaint.



Respectfully submitted this 31st day of July, 2002 by:

  
Suzanne Brownless

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c: 3623

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been provided to the persons listed below by U.S. Mail or (\*)Hand Delivery this 31st day of July, 2002:

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