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September 24, 2002

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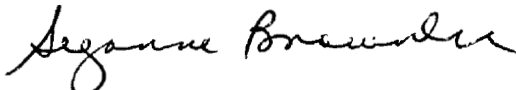
RE: Docket No. 020413-SU
In re: Initiation of show cause proceedings against Aloha
Utilities, Inc. in Pasco County for failure to charge
approved service availability charges, in violation of
Order No. PSC-01-0326-FOF-SU and Section 367.091, F.S.

Dear Ms. Bayo:

Enclosed please find the original and fifteen (15) copies of
Aloha Utilities, Inc.'s Motion for Clarification and Motion for
Reconsideration to be filed in this docket. Please stamp and
return to our office the additional copy of this motion that is
enclosed.

Your attention to this matter is appreciated. Should you have
any questions or need any additional information, please contact
me.

Very truly yours,



Suzanne Brownless
Attorney for Aloha Utilities, Inc.

AUS _____
CAF _____
CMP _____
COM _____
CTR _____
ECR cc: 3680
GCL cc: Steve Watford
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10224 SEP 24 02

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Initiation of show cause)
proceedings against Aloha Utilities,)
Inc. in Pasco County for failure to)
charge approved service availability) DOCKET NO. 020413-SU
charges, in violation of Order No.)
PSC-01-0326-FOF-SU and Section)
367.091, Florida Statutes.)
_____)

ALOHA UTILITIES, INC.'S MOTION FOR CLARIFICATION
AND
MOTION FOR RECONSIDERATION

Pursuant to Rules 25-22.060 and 28-106.204, F.A.C., Aloha Utilities, Inc. (Aloha) files this Motion for Clarification and Reconsideration of Order PSC-02-1250-SC-SU (Order 02-1250), issued on September 11, 2002, and in support thereof states as follows:

1. Order 02-1250 addressed seven issues: Issues 1, 3, 4, and 6¹ as proposed agency action and Issues 2, 5 and 7² as final agency action. [Order 02-1250 at 1-2]

RECONSIDERATION

2. In Order 02-1250 the Commission granted SRK Partnership Holdings, LLC and Benchmark Manmem Corporation ("Limited Partners") intervention in this docket but limited the intervention to Issues 3 and 6 which concern the ability of Aloha to backbill developers who connected to its wastewater system between May 23, 2001 and April 16, 2002 and the effective date of Aloha's wastewater service availability tariff increasing rates to \$1,650 per ERC and \$12.79

¹ Issue 1: Aloha's proposed Settlement Agreement; Issue 3: backbilling; Issue 4: Imputation of CIAC; Issue 6: Effective date of wastewater service availability tariff.

² Issue 2: Show cause; Issue 5: Intervention of SRK Partnership Holdings, LLC and Benchmark Manmem Corporation; Issue 7: Closure of docket.

DOCUMENT NUMBER DATE

10224 SEP 24 8

per gallon for all other connections, respectively. [Order 02-1250 at 9-10].

3. Reconsideration is appropriate when an agency has overlooked or failed to consider some point of fact or law in its initial decision. Diamond Cab Company v. King, 146 So.2d 889, 891 (Fla. 1962).

4. The Commission's grant of intervention to Limited Partners is the appropriate subject for reconsideration because the Commission's decision granting the Limited Partners intervention on both Issue 3, backbilling, and Issue 6, the effective date of Aloha's wastewater service availability tariff, is contrary to the undisputed facts presented to the Commission. Application of these undisputed facts to the test for substantial interest stated in Agrico clearly establishes that the Limited Partners do not have a substantial interest in the backbilling issue.

5. As stated in the Limited Partner's Petition to Intervene and repeated in Order 02-1250, the Limited Partners did not formally request to be connected to Aloha's system until June 14, 2002 and did not actually connect to Aloha's system until July 18, 2002. [Limited Partners' Petition at 4-5; Order 02-1250 at 6-7] Therefore, under the undisputed facts presented to the Commission by the Limited Partners, upon which the Commission relied, there can be no "backbilling" with regard to the Limited Partners for the simple reason that the Limited Partners neither formally requested nor connected to Aloha's wastewater system prior to April 16, 2002.

6. Simply stated, the Limited Partners have no substantial

interest in the backbilling issue because they were charged a service availability fee based on the higher rate of \$12.79 per gallon for nonresidential connections set by Order PSC-01-0326-FOF-SU. Under no circumstances will the Limited Partners be asked by Aloha to pay any more than they have already paid, i.e., be backbilled. In fact, the Limited Partners contend that Aloha should refund approximately \$500,000 to them because they were billed the higher service availability fee. That being the case, the Commission's decision on this issue of backbilling cannot affect the Limited Partners. The Limited Partners do not meet the first prong of the Agrico³ two-pronged test for intervention.

7. A review of the August 20th agenda conference reveals that the Limited Partners agree that their only substantial interest in this proceeding is the effective date of the tariff. This statement was made in various forms by the Limited Partners' counsel no less than four separate times during the course of the four hour agenda conference discussion.⁴ Of particular note is

³ Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

⁴ In response to the question of whether she wished to speak on Issue 1, the proposed Settlement Agreement, the Limited Partners' counsel replied: "No. We're only interested in the issues that determine the effective date of the tariff that did get filed finally." [T. 19] "W]e take issue with staff's position that the effective date of the tariff should be April 16th, and we will be substantially affected by the effective date of the tariff, depending on when it is." [T. 21] "As I've tried to make clear, our only interest here is in your decision regarding the effective date of the tariff, and we simply do disagree with staff's recommendation that Aloha substantially completed its noticing on April 16, 2002." [T. 38] "That's the end of my argument. That's the only issue that we have any interest in in this case, is the

that when given a chance to address Issue 3, the backbilling issue, the following exchange took place:

CHAIRMAN JABER: Great. Ms. Kiesling?

MS. KIESLING: I only have one issue to address here, and you've basically voted on it as it affects my client in Issue 6 [effective date of the tariff].

[T. 68; Emphasis added.]

8. The Commission has misapplied the facts in this case to the Agrico standing test. The intervention of the Limited Partners should be limited, as the testimony of the Limited Partners clearly establishes, to Issue 6, the effective date of the wastewater service availability tariff.

CLARIFICATION

9. There are several instances in Order 02-1250 in which the language used in one section might be interpreted as contrary to that found in other sections of the order. In order to clarify the Commission's intent, Aloha requests that the following changes be made:

- a. Pages 1-2 "Notice is hereby given by the Florida Public Service Commission that the actions discussed herein rejecting the proposed settlement agreement, requiring Aloha Utilities, Inc. to file a replacement tariff sheet to be stamped effective for connections made on or after April 16, 2002, authorizing Aloha Utilities, Inc. to backbill for its approved service availability charges for connections made between May 23, 2001 and April 16, 2002, and recognizing the full amount of the uncollected service availability charges as CIAC, are preliminary in nature and will become final

effective date." [T. 44]

unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code."

This conforms the notice language to the Commission's finding that Aloha may backbill developers for connections made between May 23, 2001 and April 16, 2002. [Order 02-1250 at 14]

- b. Page 10 "Also, for charges between April 12, 2002, and April 16, 2002, the developers received no written notice of the approved service availability charges."

This conforms this sentence with the remainder of the paragraph which states that:

In its May 13, 2002, discovery response, Aloha states that it began charging its authorized service availability charges on April 12, 2002, and that all developers who have inquired about service availability have been advised of the correct charges since that date.

[Order 02-1251 at 10]

- c. Page 11 "~~Based on this provision, for developers/builders who connected to the system from May 23, 2001 to April 16, 2002, the previous service availability charge of \$206.75 appears to apply. For those developers/builders who were connected on or after April 16, 2002, the service availability charge of \$1,650 per equivalent residential connection (ERC) and \$12.79 per gallon for all other connections shall be effective.~~"

These changes conform this section with the residential and non-residential wastewater service availability rates set by Order PSC-01-0326-FOF-SU, issued on February 6, 2001 and the Commission's decision that Aloha may backbill all developers/builders who connected to Aloha's system between May 23, 2001 and April 16,

2002.

- d. Page 11 "However, it is apparent from the copies of notices that Aloha provided to our staff that not all developers and builders who were connected to the system during that time frame [April 12, 2002 to April 16, 2002] received ~~actual~~ written notice by that date."

This change is required for the same reason as stated in paragraph b above.

- e. Pages 11-2 "Although the Limited Partners did not receive ~~actual~~ written notice of Aloha's approved service availability charges until June 17, 2002, actual connection did not take place until one month later, on July 18, 2002. Unlike the other developers and builders who did not receive notice of Aloha's approved service availability charges until after [emphasis in original] they were connected to the system, the Limited Partners received oral and written notice of Aloha's approved service availability charges before [emphasis in original] they were connected to the system."

This conforms this section with those cited above in paragraphs b and d.

- f. Page 12 "Therefore, with respect to persons who prepaid the erroneous \$206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, including the Limited Partners, Aloha shall charge its approved service availability charge of \$1,650 per equivalent residential connection and \$12.79 per gallon for all other connections provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code."

This conforms this section with the residential and non-residential wastewater service availability rates set by Order PSC-01-0326-FOF-SU, issued on February 6, 2001.

- g. Page 12 "Based upon all of the foregoing, Aloha shall file a replacement tariff sheet within 10 days of the issuance effective date of this Order, reflecting its approved service availability charges."

Later in this same paragraph, the Commission has required that Aloha submit "proposed notices [to be provided to developers and builders to whom Aloha has submitted a backbilling letter and to any persons who have either requested service or inquired about service with the utility in the past 12 months] for our staff's administrative approval within 10 days of the effective date of this Order."

The effective date of the wastewater tariff is Issue 6, an issue which has been denominated as proposed agency action. This issue will not become final agency action until either the protest time runs on October 2, 2002 with no protest having been filed or, if a protest is filed, at the conclusion of the requested administrative hearing.

The current wastewater service availability tariff on file at Aloha reflects the higher rates set in Order PSC-01-0326-FOF-SU. Rather than file a tariff in which the only difference reflected is the substitution of an effective date of April 16, 2002 for May 23, 2001, on or before September 23, 2002, Aloha suggests that this filing date be set to coincide with the date that notices must be filed with the Commission regarding the increased service availability charges: within 10 days of the effective date of Order 02-1250. If this course of action is followed, Aloha will have a tariff on file which correctly reflects the decision made by the

Commission in Order PSC-01-0326-FOF-SU, but will not have a tariff on file which may be challenged and not become final.

- h. Page 14 "We find it appropriate in this instance to exercise our discretion to allow Aloha the opportunity ~~to try~~ to collect from the developers the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers, so long as the existing ratepayers are not affected in any way by the utility's collection efforts."

This language conforms the sentence with the affirmative directive of the Commission at agenda.

- i. Page 14 "The incremental difference between the prior and current charge is ~~\$1,443.75~~ \$1,443.25 (\$1,650 - 206.75) per ERC."

This corrects for a mathematical error.

- j. Page 16 "Accordingly, we impute the entire amount to Aloha, noting that it is Aloha and Aloha alone that bears the risk that the amounts backbilled are uncollectible for whatever reason, including inability to locate developers, or insolvency of developers, ~~if~~ ~~[or]~~ ~~illegality~~. By this Order we authorize Aloha ~~to try~~ to backbill developers its approved service availability charges that the utility should have collected from May 23, 2001, to April 16, 2002. "

Aloha is confused regarding the purpose of the above stricken language. The Commission has the legal authority to allow Aloha to backbill the developers and builders who connected to Aloha's system between May 23, 2001 and April 16, 2001.⁵ In fact, Florida

⁵ "Commissioner Jaber: My question is do you think that [Section 367.101, F.S.] gives us enough discretion and flexibility to allow backbilling for a mistake related to service availability charges?"

case law holds that every utility is required to backbill when it has failed to collect the full amount of a utility fee or charge in order to fulfill its statutory obligation to charge nondiscriminatory rates to all of its customers. (Corporation De Gestion Ste-Foy, Inc. v. Florida Power & Light Company, 385 So.2d 124, 126 (Fla. 3d DCA 1980) ("[I]t is universally held that a public utility or common carrier is not only permitted but is required to collect undercharges from established rates, whether they result from its own negligence or even from a specific contractual undertaking to charge a lower amount.") The inclusion of the stricken language invites the conclusion that the Commission has acted illegally with regards to the allowance of backbilling. It should be removed.

- k. Page 21 "Aloha's failure to timely file its service availability tariff and charge its approved service availability charges ~~has~~ would have put its customers at risk of subsidizing future connections had the revenues associated with the undercollection of CIAC not been fully imputed."

This language is modified to recognize the full imputation of all service availability revenues that Aloha should have collected from developers and builders who connected to Aloha's system between May 23, 2001 and April 16, 2002 by the Commission.

- l. Page 22 "ORDERED that Aloha Utilities, Inc. shall file a replacement tariff sheet within 10 days of the ~~issuance~~ effective date of this Order,

Mr. McLean: Yes, I do. I believe that you can backbill legally, or you can decline legally."
[T. 107]

reflecting its approved service availability charges."

This language is modified for the reasons discussed in paragraph g above.

m. Page 22 "ORDERED that Aloha Utilities, Inc. shall provide notice of this Order to all developers to whom it has sent a backbilling letter and to ~~any persons who have either requested service or inquired about service with the utility~~ all persons in its Seven Springs service area who have filed a written request for service or who have been provided a written estimate for service within the past 12 months. Aloha shall submit the proposed notice for our staff's administrative approval within 10 days of the effective date of this Order."

The proposed language tracks the language of Rule 25-30.4345, Notice of Requests for New or Revised Service Availability Charges or Policies and Notice of Requests for Allowance for Funds Prudently Invested (AFPI), F.A.C., and clarifies who must receive notice.

n. Page 23 "ORDERED that, pursuant to Order No. PSC-01-0326-FOF-SU, Aloha Utilities, Inc. is hereby authorized ~~to try~~ to collect from those developers that uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers."

This language is modified for the reasons discussed in paragraphs h and j above.

WHEREFORE, Aloha Utilities, Inc. requests that the Commission limit the intervention of the Limited Partners to Issue 6, the effective date of the wastewater service availability tariff, and clarify the language of Order PSC-02-1250-SC-SU as stated in the

body of this motion.

Respectfully submitted this 27th day of September, 2002 by:

Suzanne Brownless

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Attorney for Aloha Utilities,
Inc.

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 24th day of September, 2002:

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