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October 2, 2002

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: Docket No.: 020413-SU

Dear Ms. Bayo:

On behalf of Adam Smith Enterprises, Inc. I am enclosing the original and 15 copies of Petition of Adam Smith Enterprises, Inc. for Formal Proceeding on Proposed Agency Action and Request for Hearing.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and pleading by returning the same. Thank you for your assistance in this matter.

Thank you for your assistance in this matter.

Yours truly,


Joseph A. McGlothlin

JAM/mls
Enclosure

DOCUMENT NUMBER DATE
10644 OCT-28
FPSC-REGISTRATION CLERK

BEFORE THE PUBLIC SERVICE COMMISSION

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, Florida Statutes

Docket No. 020413-SU

Filed: October 2, 2002

**PETITION OF ADAM SMITH ENTERPRISES, INC. FOR FORMAL
PROCEEDING ON PROPOSED AGENCY ACTION AND REQUEST FOR HEARING**

Pursuant to Rule 28.106.201, Florida Administrative Code, Adam Smith Enterprises, Inc. (“Adam Smith”), files this Petition for Formal Proceeding on Proposed Agency Action regarding the portion of Order No. PSC-02-1250-SC-SU which purports to allow Aloha Utilities, Inc. to “try to collect,” for connections made during the period May 23, 2001-April 16, 2002, a service facilities tariff that, by operation of the same order, did not become effective until April 16, 2002. In support, Adam Smith states:

Introduction

1. The name and address of the agency affected is:
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
2. The agency’s file number is Docket No. 020413-SU.
3. The name, address and telephone number of petitioner is:
Adam Smith Enterprises, Inc.
43309 U.S. Highway 19N
P.O. Box 1608
Tarpon Springs, Florida 34688-1608
4. Copies of orders, notices and pleadings should be provided to the undersigned

counsel and to:

Daniel E. Aldridge
Adam Smith Enterprises, Inc.
43309 U.S. Highway 19N
P.O. Box 1608
Tarpon Springs, Florida 34688-1608

Substantial Interests

5. In the portion of Order No. PSC-02-1250-SC-SU entitled “Backbilling,”¹ the Commission found that Aloha Utilities should be afforded the opportunity to try to collect from Adam Smith and other developers certain amounts that relate to a service availability tariff that became effective on April 16, 2002, but that Aloha wishes to apply to connections made between May 23, 2001 and April 16, 2002. Aloha seeks to collect from developers the difference between \$206.75, the amount charged pursuant to the tariff then in place, and \$1650, the service availability charge that the Commission allowed to become effective on a prospective basis on April 16, 2002.

6. If the April 16, 2002 tariff were to be applied retroactively in this manner to connections that Adam Smith made during the period May 23, 2001 through April 16, 2002, Aloha would try to collect the difference of \$220,817.25 from Adam Smith.² Therefore, Adam Smith’s substantial interests are immediately and directly affected by Order No. PSC-02-1250-SC-SU.

How Notice of Agency Decision was Received

7. Notice of the agency decision was received by obtaining the order from the Commission’s website on September 11, 2002.

Disputed Issues of Material Fact

8. Adam Smith identifies the following facts that are in dispute:

¹ As developed below, the term “Backbilling,” as used here, is a complete misnomer. “Backbilling” refers to corrections made to calculations that resulted from the erroneous application of a properly filed and noticed tariff. The service availability tariff in question was not filed, and notice to customers was not given, until April 16, 2002. Because there was no tariff containing the \$1650 charge to “bill” in the first instance, there is no error to correct through “backbilling”

² By including lots that are outside Adam Smith’s development, Aloha is attempting to collect a higher amount.

(a) Whether the “business risk” of developers such as Adam Smith includes the risk of absorbing retroactively applied increases in service availability charges, where (i) such charges are passed through to purchasers of lots as a line item expense separate and apart from the purchase price; (ii) the transactions to which the connections occurring during the period May 23, 2001 – April 16, 2002 have closed, and Adam Smith has no ability to recoup retroactive increases to the charges that were included in those closings; (iii) Aloha failed to file a tariff establishing the \$1,650 charge, so that the \$206.75 charge was the tariffed fee on file with the Commission during the period; (iv) Aloha failed to provide notice of an increase to customers, as required by Commission order, until April of 2002; and (v) Aloha misrepresented to Commission Staff the period during which it had been collecting the higher charges. Adam Smith disputes the finding of Order No. PSC-02-1250-SU which states “. . . increased service availability charges are a business risk to developers generally” to the extent the statement is intended to apply to the instant situation so as to justify the action challenged herein. “Developers generally” are not “at risk” of increased service availability charges in the absence of the utility’s compliance with legal and regulatory requirements, such as the filing of an approved tariff and the receipt of notice; such requirements are in place to protect developers, just as they protect other customers.

(b) Whether Adam Smith sold, and transferred title to, certain lots during the period May 23-April 16, 2002 prior to service being taken, such that responsibility for payment of any applicable service availability charges now rests with the purchasers of such lots. Adam Smith asserts that certain of the lots for which Aloha seeks retroactive application of higher service availability charges were sold by Adam Smith during the period May 23, 2001-April 16, 2002, and that title transferred from Adam Smith to the purchasers, before the connections were made. Accordingly, the purchasers, not Adam Smith, are responsible for the applicable service availability charges.

Ultimate Facts Alleged Entitling Petitioner to Relief

9. The ultimate facts which entitle Adam Smith to relief are as follows:

(a) In Order No. PSC-01-0326-FOF-SU, the Commission authorized Aloha to file a tariff increasing wastewater service availability charges from \$206.75 to \$1,650 per connection. Such authority was expressly conditioned on the filing of a conforming tariff and the sending of a notice to affected customers.

(b) Aloha did not file the tariff and did not provide a notice to customers.

(c) In April 2002, Aloha falsely represented to Staff that it had been charging \$1,650 per connection since May 23, 2001. In fact, Adam Smith and other developers were not charged \$1,650 per connection until April 2002.

(d) Because it accepted Aloha's misrepresentation as accurate, the Commission Staff erroneously assigned to the revised tariff a retroactive effective date of May 23, 2001.

(e) Consistent with the service availability tariff that was approved and in effect during the time, Adam Smith paid the proper and approved amount of \$206.75 per connection for connections made to Aloha's system between May 23, 2001 and April 16, 2002.

(f) The service availability charges applicable to a lot or parcel are one example of numerous "impact fees" that are identified separately and apart from the purchase price. (Other examples include impact fees related to water, schools, and parks and recreation). These various impact fees are treated as "pass through items" and are paid by the person who purchases the lot from Adam Smith at the time of closing. Because the transactions on the lots in question have closed, Adam Smith has no ability to pass through to the ultimate purchaser of the connected property the difference between the proper charges that were paid and any improper, retroactive application of the new/higher service availability charges.

(g) Adam Smith sold certain other lots and transferred title to the purchasers of those lots prior to connections being made and prior to service being established.

(h) Aloha substantially completed notice of the new service availability charge on April 16, 2002.

(i) In the order that is the subject of this protest, the Commission established the effective date of the tariff to be April 16, 2002.

Specific Rules or Statutes Entitling Petitioner to Relief

10. A portion of Order No. PSC-02-1250-SC-SU purports to allow Aloha Utilities to attempt to collect amounts that represent the difference between the \$206.75 per connection service availability charge (which was the amount indicated in Aloha's tariff between May 23, 2001 and April 16, 2002) and \$1,650 per connection (which is the amount that Aloha had been authorized to place in a filed tariff, but which Aloha had failed to do prior to April 2002). This portion of the order is in conflict with Section 367.091(3), Florida Statutes, which provides that "[e]ach utility's rates, charges, and customer service policies must be contained in a tariff approved by and on file with the commission." The availability charge of \$1,650 was not contained in a tariff approved by and on file with the Commission during the period May 23, 2001 and April 16, 2002. Collection of the higher amount is precluded by Section 367.091(3).

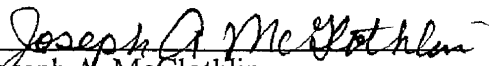
11. The challenged portion of the order also conflicts with Rule 25-30.475(2), Florida Administrative Code. Rule 25-30.475(2) provides that: "Non-recurring charges (such as service availability, guaranteed revenue charges, allowance for funds prudently invested, miscellaneous services) shall be effective for service rendered or connections made on or after the stamped approval date on the tariff sheets provided customers have received notice" (emphasis added). The Commission has determined that Aloha's customers substantially received notice of the increased service availability charge on April 16, 2002. For that reason, the Commission determined the effective date of the tariff containing the increased charge to be April 16, 2002, even though at one point Staff erroneously assigned a retroactive date of May 23, 2001 based on its acceptance of misrepresentations by the utility. Any attempt to collect the increased charge for connections made before April 16, 2002 would represent a violation of Rule 25-30.475(2).

12. The challenged portion of the order would misapply Rule 25-30.350. In the same order that is the subject of this protest, the Commission established the effective date to be April 6, 2002. Application of the concept of "backbilling" to May 23, 2001 conflicts with this

determination. Once a tariff is effective and customers have been notified, clerical mistakes resulting from the erroneous application of the approved and noticed tariff over time may be corrected and “backbilled” for a prescribed period. However, *fundamentally*, a bill rendered in May 23, 2001 cannot possibly be in error because it does not reflect the application of a tariff that does not become effective until April 16, 2002. For this reason, the Commission’s “backbilling” rule is wholly inapplicable to the situation.

Relief Sought

13. Adam Smith requests that the Commission set this matter for an evidentiary hearing, and, upon the conclusion of appropriate proceedings, find that, as a result of (i) Aloha’s failure to file the prescribed tariff; (ii) Aloha’s failure to provide notice in advance of the higher charge; (iii) Aloha’s misrepresentations regarding the date it began applying the higher tariff; (iv) the effective date of April 16, 2002 fixed by the Commission, which governs the applicability of the higher tariff; (v) the requirements of Rule 25-30.475(2); and (vi) the inapplicability of Rule 25-30.350 (backbilling), Aloha cannot collect the difference in old and new service availability tariffs from Adam Smith for the period May 23, 2001 – April 16, 2002.


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Attorneys for Adam Smith Enterprises, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition of Adam Smith Enterprises, Inc. Formal Proceeding on Proposed Agency Action and Request for Hearing was on this 2nd day of October 2002, sent via (*) Hand Delivery and U.S. Mail.

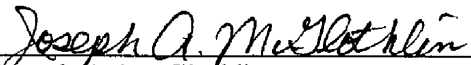
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