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October 11, 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. (Adam Smith), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ Motion of Adam Smith Enterprises, Inc. to Strike Aloha Utilities, Inc.'s Motions for Clarification.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,



Joseph A. McGlothlin

JAM/mls
Enclosure

DOCUMENT # 11071 OCT 11 2002
FFSC-0011100101 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 11, 2002

**MOTION OF ADAM SMITH ENTERPRISES, INC. TO STRIKE
ALOHA UTILITIES, INC.'S MOTIONS FOR CLARIFICATION**

Pursuant to Rule 28.106.204, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), files this Motion to Strike Aloha Utilities, Inc.'s (Aloha) Motions for Clarification. As grounds therefore, Adam Smith states:

Introduction

1. In Proposed Agency Action Order No. PSC-02-1250-SC-SU (PAA Order), issued on September 11, 2002, the Commission proposed, *inter alia*, to allow Aloha to try to collect from Adam Smith, and other developers, monies that relate to a service availability tariff that became effective on April 16, 2002 but that Aloha wants to apply to connections made between May 23, 2001 and April 16, 2002.

2. On October 2, 2002, Adam Smith, a developer that would be affected by the retroactive application of a higher service availability tariff that did not become effective until April 16, 2002, timely filed a petition in which it protested that portion of the Commission's PAA Order and requested a hearing.

3. On September 24, 2002, Aloha filed a pleading styled "Motion for Clarification and Motion for Reconsideration" of the Commission's PAA Order. Two days later Aloha amended the pleading. These pleadings should be stricken for the following reasons:

(a) Neither “clarification” nor “reconsideration” of a PAA order is countenanced or permitted by the Commission’s rules and practice;

(b) Under the guise of a request for clarification, Aloha improperly seeks – not clarification – but *reconsideration* of the PAA, and pursues the objective of a *different* order with additional legal argument; and

(c) The “amended” motion is an effort to circumvent Rule 25-22.058, F.A.C., which requires a party that wishes to present oral argument to request the opportunity at the time it files the related pleading.

Argument

Clarification/Reconsideration of a PAA Order Is Impermissible

4. Aloha seeks “clarification” of a number of sections of the Commission’s PAA Order. However, the Commission often has held that clarification of a PAA Order is not contemplated by its rules:

Clarification of a proposed agency action order is not recognized under our rules, and reconsideration of a proposed agency action order is contrary to Rule 25-22.060(1)(a), Florida Administrative Code.¹

Because the Commission’s rules do not permit clarification of a PAA Order under these circumstances, Aloha’s motion must be stricken. It is an impermissible pleading that the Commission should not consider.²

5. Further, on October 2, 2002 Adam Smith protested the PAA Order. Adam Smith’s timely protest of course addressed the PAA as it was issued by the Commission. To modify the PAA now, in response to a request for “clarification” by an adverse party, would

¹ Order No. PSC-99-2393-FOF-TP. *See also*, Order No. PSC-00-2190-PCO-TP.

² This is not a situation in which “clarification” of the PAA would render a protest moot and obviate the need for related proceedings. Instead, as will be developed herein, Aloha seeks to alter the PAA Order so as to bolster its litigation position.

prejudice the protest process. Adam Smith submits this is the very type of complication that led the Commission to formulate the policy of refusing to entertain “clarification” of a PAA order in such circumstances.

While Styled A Motion For Clarification, Aloha’s Pleading Is In Reality An Impermissible Attempt To Seek Reconsideration of the Commission’s PAA Order

6. Aloha’s “Motion for Clarification” is inappropriate and should be stricken because it does not actually seek to “clarify” language in the PAA Order. Rather, Aloha seeks to insert self-serving language into the PAA Order which conflicts with, and would have the effect of altering, the Commission’s decision. In effect, Aloha is attempting to have the Commission reconsider aspects of its PAA. As stated above, this is impermissible.

7. Without wading into the details of the *numerous* proposed changes, it is evident that Aloha seeks – not to have the Commission clarify its order – but to write a different order.³ Aloha does not point to areas of ambiguity or unclear meaning. The many portions of the PAA order that Aloha would delete or alter are neither vague nor unclear. Instead, Aloha improperly uses the “motion for clarification” to bolster Aloha’s litigation position by changing the outcome more to Aloha’s liking. However, *the order faithfully memorializes the Commission’s decision*. The motion is improper and should be stricken.⁴

³ For instance, Aloha asks the Commission to delete language in which the Commission said Aloha may try to collect “any portion” of the amounts at issue as “negotiated” between Aloha and the developers. Aloha seeks - not to clarify - but to alter the order.

⁴ Throughout the PAA Order, the Commission notes that Aloha’s failure to comply with Commission Order No. PSC-01-0326-FOF-SU has resulted in the situation in which Aloha finds itself today. For instance, the Commission said:

We can ascertain no mitigating circumstances which contributed to Aloha’s apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. . . . Aloha is charged with the knowledge of this Commission’s orders, statutes, and rules.⁴

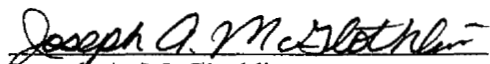
Aloha's Amended Motion Attempts to Circumvent Rule 25-22.058(1)

8. Finally, on September 26, 2002, Aloha filed an "Amended" Motion for Reconsideration and Clarification. However, the only difference between the "Amended" Motion and the original motion filed on September 24 is that the "Amended" Motion includes a request for oral argument. Rule 25-22.058(1), Florida Administrative Code, states that a request for oral argument:

must accompany the pleading upon which argument is requested. . . . Failure to file a timely request for oral argument shall constitute waiver thereof.

When it filed its motion on September 24, Aloha did not accompany its pleading with a request for oral argument. Aloha should not be permitted to circumvent the cited rule through the expedient of filing an "amended" pleading which is amended only to request oral argument. Thus, Aloha's "amended" filing must be stricken as well.

WHEREFORE, Adam Smith Enterprises, Inc. moves to strike Aloha's Motion for Clarification and its Amended Motion for Clarification.



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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 Motion of Adam Smith Enterprises, Inc. to Strike Aloha Utilities, Inc.'s Motion for Clarification was sent via (*)Hand Delivery or U.S. Mail on this 11th day of October, 2002 to the following:

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