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October 16, 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:

- ▶ Response of Adam Smith Enterprises, Inc. to Aloha Utilities, Inc.'s Motion for Emergency Relief

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 NUMBER-DATE

MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, 11274 OCT 16 2002

FPSC-COMMISSION 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 16, 2002

**RESPONSE OF ADAM SMITH ENTERPRISES, INC.
TO ALOHA UTILITIES, INC.'S MOTION FOR EMERGENCY RELIEF**

Adam Smith Enterprises, Inc. ("Adam Smith"), through its undersigned counsel, files its Response to Aloha Utilities, Inc.'s ("Aloha") Motion for Emergency Relief, and states:

1. In Paragraph 1 of its Motion, Aloha states that it "undercollected" wastewater service availability charges during the period May 23, 2001 through April 16, 2002 by \$659,547. The term "undercollected" mischaracterizes the situation. As the Commission stated in Order No. PSC-02-1250-SC-SU, Aloha failed to file a tariff implementing higher service availability charges, failed to provide notice of an increase in service availability charges to affected developers, and later misrepresented to Staff the date on which it began applying the higher service availability charges. As a result, the order cited by Aloha the Commission established the effective date of the higher service availability charge that Aloha eventually filed as April 16, 2002. It is fundamental that rates approved for regulated utilities apply prospectively. Aloha applied and collected the service availability charge that was approved and in effect during the period May 23, 2001 – April 16, 2002. By definition, unless it collected less than \$206.75 per ERC, which was the approved rate in effect during the period, Aloha did not "undercollect."

2. In Paragraph 2, Aloha refers to the fact that Aloha filed a protest to that portion of Order PSC-02-1250-SC-SU in which the Commission imputed CIAC for the difference between the service availability charges that were generated by the approved tariff then in effect and the

amount that would have been generated if Aloha had filed a tariff implementing the higher charge prior to April 16, 2002 AND if it had provided notice to customers in advance, as the Commission required. In its pleading, Aloha said it protested the CIAC imputation ruling “subject to withdrawal” in the event it collected from developers. In other words, Aloha’s efforts have nothing to do with pursuing a legal position, and everything to do with requiring someone--*anyone* - other than itself to bear the consequences of its mismanagement. However, because the developers to whom Aloha now turns are entitled to the requirement of an approved tariff and prior notice of the increase, legally they cannot be required to bear the consequences of Aloha’s omission.

3. In Paragraph 3, Aloha refers to its Motion for Clarification of the . . . “language used by the Commission regarding authorization of backbilling.” So that the procedural posture of that motion is clear when the Commission considers Aloha’s Motion for Emergency Relief, Adam Smith points out that on October 11, 2002, Adam Smith moved to strike Aloha’s Motion for Clarification on the grounds that (i) it is an impermissible pleading; (ii) to modify the PAA as requested by Aloha would prejudice the protest process; and (iii) in its motion Aloha seeks - not to clarify – but to alter the Commission’s order.

4. In Paragraph 4 Aloha refers to the issues of disputed fact raised by Adam Smith in its protest. The paragraph implies that Adam Smith is the only party that intends to raise factual matters. In a preliminary meeting of parties held on October 10, 2002, Aloha indicated that at the hearing held in this docket Aloha intends to litigate such matters contained in Order PSC-02-1250-SC-SU as the Commission’s ruling that the effective date for the service availability tariff is April 16, 2002 and the finding that Aloha misrepresented to Staff the date on which it first applied the higher, unapproved service availability charges.

5. The specific relief requested by Aloha is unwarranted for the following reasons:

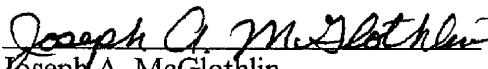
(a) By operation of law, the protests filed by Adam Smith and others rendered the portion of PAA Order PSC-02-1250-SC-SU that relates to Aloha's desire to apply the April 16, 2002 tariff retroactively a nullity. To the extent the PAA order purported to allow Aloha to look to developers such as Adam Smith, any such approval terminated with the filing of protests, and the Commission is undertaking a proceeding de novo. Order No. PSC-98-0450-FOF-EQ, issued in Docket No. 961477-EQ on March 30, 1998; Florida Department of Transportation v. J.W.C. Company, Inc., 396 So.2d 778 (Fla. App., 1st DCA, 1981). Accordingly, the PAA affords no basis for the "relief" requested by Aloha.

(b) Even if there were some basis of authority to support the motion, Aloha has failed to show an "emergency." For the utility that failed until April 2002 to file the tariff and the required notice to customers that were legal conditions precedent to its ability to implement a higher charge, and operated without apparent financial hardship for almost a year without the incremental revenues associated with that tariff, to assert now that an emergency exists is both ironic and audacious. The irony aside, the description in Paragraph 6, of "peripatetic" developers and "empty corporate shells" is an abstract construct so devoid of factual support as to be meaningless.

(c) It appears to Adam Smith that the real purpose of Aloha's Motion for Emergency Relief is -- similar to that of its motion for clarification -- to try again to persuade the Commission to place its complete imprimatur on Aloha's efforts to require developers who received no notice of an increase to nonetheless carry the burden of Aloha's mismanagement. Thus, the statement: "In this way Aloha will be protected from a de facto reversal of the Commission's decision in Order 02-1250 authorizing Aloha to backbill developers." More

precisely, in the order the Commission said the charges “. . . shall be shouldered by Aloha, either alone or together with the developers . . .”. It said Aloha could “try to collect” from developers, the amounts claimed “or any portion” through such means as “negotiations”, but placed on Aloha the consequences of “illegality.” Order PSC-02-1250-SC-SU, at pages 9-11. The instant motion is another effort by Aloha to recast the PAA order, in which the Commission said plainly that Aloha has only itself to blame for the missteps that resulted in forgone revenues. Order PSC-02-1250-SC-SU, at page 14.

For the foregoing reasons, the Commission should deny Aloha’s Motion for Emergency Relief.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of Adam Smith Enterprises, Inc. to Aloha Utilities, Inc.'s Motion for Emergency Relief was sent via (*)Hand Delivery or U.S. Mail on this ____ day of October, 2002 to the following:

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