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December 20, 2002

VIA HAND DELIVERY

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

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COMMISSION
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Re: Docket No.: 020413-SU

Dear Ms. Bayo:

On behalf of Adam Smith Enterprises, Inc. I am enclosing the original and 15 copies of the following:

- ▶ Adam Smith Enterprises, Inc.'s Motion to Strike Aloha Utilities, Inc.'s Objections to Discovery and Alternative Motion to Compel Discovery.

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.

Yours truly,

Joseph A. McGlothlin

JAM/bac
Enclosure

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DOCUMENT NUMBER PAGE
13920 DEC2002

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: December 20, 2002

ADAM SMITH ENTERPRISES, INC.'S
MOTION TO STRIKE ALOHA UTILITIES, INC.'S OBJECTIONS
TO DISCOVERY
AND
ALTERNATIVE MOTION TO COMPEL DISCOVERY

Adam Smith Enterprises, Inc. ("Adam Smith") moves to strike, as untimely filed, the Objections of Aloha Utilities, Inc. to Adam Smith Enterprises Inc.'s Discovery ("Objections") filed by Aloha Utilities, Inc. ("Aloha") on December 5, 2002. In the alternative, in the event the Commission does not strike the Objections, Adam Smith files its Motion to Compel Discovery. In support, Adam Smith states:

MOTION TO STRIKE

1. Adam Smith moves to strike the Objections of Aloha Utilities, Inc. to Adam Smith Enterprises Inc.'s Discovery, on the grounds that the Objections were not filed timely. Order No. PSC-02-1460-PCO-SU, the First Order On Procedure, was issued on October 23, 2002. This order states:

When discovery requests are served and the respondent intends to object to or ask for clarification of the discovery request, the objection or request for clarification shall be made within ten days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

2. Adam Smith filed its Notice of Service First Set of Interrogatories (Nos. 1-10), First Request for Production of Documents (Nos. 1-8) and First Request for Admissions (Nos. 1-

10) to Aloha on November 14, 2002. Aloha did not file its Objections until December 5, 2002, which was *twenty* days after service, rather than the required ten.

3. Pursuant to a voluntary agreement between the parties, Aloha filed a partial response to Adam Smith's discovery requests on the same day that it filed the Objections.¹ In other words, Adam Smith did not receive objections from Aloha until the same date on which Adam Smith received Aloha's responses. Aloha's failure to file objections timely frustrated the purpose stated by the Order Establish Procedure, which was to enable the discovering party to initiate measures to contest the objections prior to receiving responses reflecting those objections. Accordingly, the Commission should strike the untimely Objections and require Aloha to answer all of the requests that were the subjects of the Objections.

ALTERNATIVE MOTION TO COMPEL DISCOVERY

In the event that the Commission does not strike the Objections as untimely filed, Adam Smith moves to compel responses, notwithstanding those Objections, on the following grounds:

Requests for Admissions

4. Aloha objected to Adam Smith's First Request for Admissions Nos. 1, 2, 3, 5, and
6. The Requests for Admissions stated:

REQUEST NO. 1: Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, required Aloha to file an appropriate revised tariff sheet reflecting an increase in the approved service availability charges from \$206.75 to \$1,650 per equivalent residential connection within 20 days of the date of the order.

REQUEST NO. 2: Aloha failed to submit timely the tariff sheets for increased service availability charges required by Order No. PSC-01-0326-FOF-SU.

REQUEST NO. 3: PSC Staff notified counsel for Aloha on or before March 7, 2002 that the tariff for the increased service availability charges that the Commission directed Aloha to file in Order No. PSC-01-0326-FOF-SU had not yet been filed.

¹ On the same day, Aloha filed its "Motion," in which it contended that Aloha's previous counsel is the "sole source" of answers to certain discovery requests. Adam Smith filed its response to the Motion on December 12, 2002. The Motion is pending.

REQUEST NO. 5: When it filed the revised tariff sheet to increase service availability charges, on or about March 11, 2002 counsel for Aloha represented to the PSC Staff that developers were aware of and had been paying the increased service availability charge since May 23, 2001.

REQUEST NO. 6: On May 6, 2002, counsel for Aloha advised PSC staff that he had been misinformed by Aloha in early March 2002 and that his earlier representation that Aloha had been applying the higher service availability charges since May 23, 2001 was incorrect.

5. Aloha argues that these Requests for Admissions are irrelevant to the issues in this hearing, which Aloha describes as “backbilling, imputation of CIAC and the effective date of the service availability tariff.”² (Objections, at 2.) Aloha argues that the facts recited in the Request for Admissions bear only on the show cause portion of Order No. PSC-02-1250-SC-SU, which Aloha has not contested. Aloha is mistaken. The Requests for Admissions -- which are taken directly from affirmative findings made by the Commission in Order No. PSC-02-1250-SC-SU, none of which were disputed by Aloha -- relate directly to issues in the case.

6. Adam Smith has argued repeatedly that the core issue in this case is the illegality of Aloha’s efforts to apply the higher service availability charge to prior periods, in which a different, lower tariff was effective and in place. The two key requirements, which Adam Smith contends are effectively legal conditions precedent of implementing a new tariff, are (i) the filing of an approved tariff and (ii) providing written notice to affected customers in advance of the application of the new tariff. See Rule 25-30.475(2).³ In support of its contention, Adam Smith is entitled to discover facts that support its assertions (or establish, through admissions, those facts that are beyond dispute). Requests Nos. 1, 2, and 3 therefore relate directly to the issue of

² This statement by Aloha is in error. Aloha did not protest the April 16, 2002 effective date established by the Commission; the date is therefore not at issue. Further, as explained by Adam Smith in prior pleadings, the term “backbilling” is a misnomer when used to describe the proposed retroactive application of the revised service availability tariff.

³ 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

whether Aloha satisfied the conditions applicable to Aloha's ability to implement a higher service charge, which Adam Smith contends constitute legal conditions precedent. It is worth observing that these very facts led the Commission to establish the effective date of the revised service availability tariff to be April 16, 2002.

7. Requests for Admissions Nos. 5 and 6 are also relevant to the issues in this case. Adam Smith contends that the legal conditions precedent (the filing of an approved tariff and the providing of written notice in advance) are dispositive of the Aloha's desire to apply the higher service availability charge retroactively to periods prior to the effective date of the tariff. However, even considering, *arguendo*, that the Commission has the legal authority to consider a request to relate the tariff back to periods prior to the effective date, the fact remains that a decision to approve or disapprove such a request will be dependent on the factual circumstances. In this case, based primarily on the unchallenged findings of Order No. PSC-02-1250-SC-SU, it appears that (1) Aloha represented to Staff that the utility had been collecting the higher availability charges of \$1650/ERC since May 23, 2001; (ii) based on Aloha's representation to this effect, Staff agreed to "backdate" the "approved" stamp for the tariff that Aloha filed in March 2002 to May 23, 2001; (iii) in fact Aloha had not been collecting the higher charge at all; (iv) subsequently, Staff began receiving letters from developers who had been approached by Aloha regarding the higher service availability charges for the first time *following* the submission of the (backdated) March 2002 tariff; and (v) Aloha did not apprise Staff that its earlier representations regarding the point in time when it began efforts to collect the \$1650/ERC charge were incorrect until Staff contacted Aloha for an explanation of the letters from developers. In short, it appears that *either* Aloha misled Staff regarding past collections for the purpose of

connections made on or after the stamped approval date on the tariff sheets provided customers have received notice." (emphasis added).

persuading Staff to backdate the March 2002 tariff *or* Aloha mistakenly assumed the higher charge had been collected. If the latter, upon learning that was not the case, Aloha nevertheless set out to use the tariff it had urged Staff to backdate to justify collections to developers, while failing in the meantime to rectify the erroneous representation on which Staff based the “backdated” approval. An example of numerous such communications is Attachment A, provided to Adam Smith by Aloha in response to the Request to Produce. In either case, the factual setting is relevant to the issue (secondary to the dispositive threshold legal considerations) of whether, in light of Aloha’s conduct, the facts support a decision to permit Aloha to attempt to apply the higher service availability charge to periods prior to April 16, 2002.⁴ Adam Smith is entitled to establish the factual circumstances through discovery or admissions.

8. As Adam Smith understands Aloha’s argument, Aloha contends that the facts relating to its failure to file a tariff until prompted by Staff a year out of time, and the manner in which it conducted itself thereafter with respect to representations to Staff and affected developers, would relate only to the “show cause portion” of Order No. PSC-02-1250-SC-SU. Aloha also contends that the Commission “must” allow Aloha to collect the differential in service availability charges from developers because otherwise Aloha would not have “agreed” to “accept” the imputation of CIAC, which Aloha regards as a “taking” or a “penalty.”

9. Aloha’s arguments fail to support its resistance to Adam Smith’s discovery requests for two reasons. First, just as the same facts may be relevant to separate criminal and civil proceedings, the same facts may be relevant to a show cause issue and to a separate

⁴ Specifically, there are two cases where the surrounding factual situation led the Commission to not allow the use of the backbilling rule: In re: Application for rate increase in Marion County by Rainbow Springs Utilities, L.C., Docket No. 950828-WE, Order No. PSC-96-1229-FOF-WS and In re: Complaint of Wilham P. Recklaw Regarding

ratemaking issue. The imputation of CIAC and the establishment of tariffed charges are examples of ratemaking activities. (A decision by the Commission to impute CIAC for uncollected service availability charges would be—not a “penalty”—but a form of regulatory disallowance to limit the utility’s rates to those associated with prudent and reasonable management of the utility, so as to not require customers to bear the costs of imprudence or mismanagement.) Next, while Aloha may argue that its “agreement” to “accept” imputation of CIAC was “conditioned” on Commission endorsement of its efforts to apply the new, higher service availability charge to periods prior to April 16, 2002, the Commission’s Order on Proposed Agency Action was protested and therefore became a nullity: *there is no “agreement” and no determination that Aloha may apply the higher charge to connections occurring prior to April 16, 2002.* That Aloha understands this fully well is evident in the fact that *Aloha protested the portion of the Commission’s PAA in which the Commission proposed to impute CIAC.* The Commission should require Aloha to respond to all of the Requests for Admissions to which Aloha objected.

Interrogatories

10. Aloha also objected to Interrogatories 1-3 in the December 5, 2002 filing. These stated:

INTERROGATORY NO. 1: When did Aloha receive Order No. PSC-01-0326-FOF-SU?

INTERROGATORY NO. 2: Please identify the person or persons on whom Aloha placed the responsibility to (a) prepare and (b) file tariffs, including the revised service availability tariff that was required by Order No. PSC-01-0326-FOF-SU.

INTERROGATORY NO. 3: When was the revised service availability tariff prepared, and by whom?

Backbilling Against Gulf Utility Company in Lee County, Docket No. 930168-WU, Order No. PSC-93-1173-FOF-WU.

11. Aloha simply stated that these interrogatories, like the above requests for admissions, were irrelevant.

12. Like the above Requests for Admissions, the information sought in these interrogatories is relevant to the core issues in this case. Adam Smith contends that the requirements of filing an approved tariff and providing written notice in advance govern the ability of Aloha to apply a higher service availability charge. In the course of establishing the facts that bear on Aloha's failure to submit a tariff timely, as directed by Commission order, Adam Smith is entitled to establish the facts surrounding Aloha's failure. By discovering when Aloha received the order requiring tariffs to be filed, Adam Smith can establish Aloha's opportunity to conform to the Order. The identification of the persons whom Aloha made responsible for the preparation of the tariff is obviously related to the issue of whether and how Aloha failed to adhere to the requirements of the Order. The interrogatories are designed reasonably to lead to the discovery of admissible evidence.

Requests for Production of Documents

13. Aloha objected to Requests for Production of Documents numbers 1, 2, 4, 7, and 8 in the December 5, 2002 filing.

14. These requests are:

REQUEST NO. 1: Please provide any and all correspondence, memoranda, emails, written communications, and all other documents between and among officers, employees, and consultants of Aloha regarding the revised service availability charge of \$1,650 per equivalent residential connection that the Commission directed Aloha to implement by tariff and written notice to developers in Order No. PSC-01-0326-FOF-SU.

REQUEST NO. 2: Please provide any and all correspondence, memoranda, emails, written communications, and all other documents between Aloha (including its officers, employees, consultants and counsel) and the Florida Public Service Commission that relate in any way to the revised service availability charge of \$1,650 per equivalent residential connection that the Commission directed Aloha to implement by tariff and written notice to developers in Order No. PSC-01-0326-FOF-SU.

REQUEST NO. 4: Please provide any and all correspondence, notices and all other written communications, memoranda, notes, minutes of meetings, and all other documents that refer to or relate in any way to the subject of written notices to developers relating to the revised service availability charge of \$1,650 sent by Aloha to developers. This request includes, but is not limited to, documents that relate to the obligation to provide notices that the Commission imposed in Order No. PSC-01-0326-FOF-SU; Aloha's failure to provide such notices timely; and documents relating to the content and format of the notices that Aloha eventually sent to developers.

REQUEST NO. 7: If not already provided in response to the above items, please provide any and all communications to and from Aloha President Steve Watford referring in any way to the fact that Aloha did not file revised service availability tariffs as required by Order No. PSC-01-0326-FOF-SU.

REQUEST NO. 8: If not already provided in response to earlier items, please provide any and all communications between the Florida Public Service Commission and Aloha (including Aloha's officers, employees, consultants, and counsel) relating in any way to:

(a) the requirement of Order No. PSC-01-0326-FOF-SU to submit tariffs, including a revised service availability tariff conforming to the order;

(b) the failure of Aloha to file the service availability tariff timely;

(c) the requirement that Aloha provide advance notice of the revised service availability charges to affected developers prior to applying the revised charge;

(d) Aloha's failure to send the notices required by Order No. PSC-01-0326-FOF-SU timely;

(e) representations by Aloha that Aloha had applied the revised service availability charge of \$1,650 per equivalent residential connection prior to having filed the appropriate tariff;

(f) the processing by Staff of the service availability tariff that Aloha submitted in March of 2002, including the stamping of the date of May 23, 2001 on a tariff that was submitted in March 2002; and

(g) communications to Staff to the effect that earlier representations regarding the time frame in which Aloha first applied the higher service availability charges were incorrect.

15. Aloha made a general objection to any of these requests which sought privileged information, as well as to those they considered irrelevant. Aloha asserts Request No. 4, Request No. 7 and Request No. 8 (a)-(e) and (g) seek information that is irrelevant.

16. The relevancy of these Requests to Produce to the core issues in the docket is obvious. Certain documents that Adam Smith seeks may disclose information bearing on Aloha's failure to file a tariff, which goes to one of the legal conditions precedent on which Adam Smith relies; others, to the failure to provide timely notice to developers, which relates to the second legal condition precedent on which Adam Smith relies. The remaining document requests that are the subjects of objections relate to the circumstances surrounding Aloha's request that Staff backdate the March 2002 tariff to May 23, 2001; any false representations made by Aloha, whether intentionally or unintentionally at the time, to persuade Staff to assign a date of May 23, 2001 to a tariff that Aloha submitted in March 2002; and Aloha's failure to rectify the misinformation after the fact until Staff, having received letters from developers, contacted Aloha. These facts bear on whether (assuming, for the sake of argument, the Commission has authority to allow Aloha to apply the higher service availability charge retroactively) the factual circumstances of this case support such an action. Adam Smith incorporates here by reference the argument presented in Paragraph 6, above.

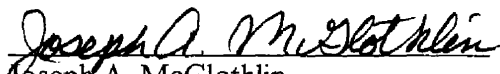
17. In addition, Aloha objected to Request Nos. 3, 6, 7 and 8 as being repetitive of Nos. 1, 2, 4 and 5. Request numbers 7 and 8 are reproduced above. Numbers 3 and 6 are:

REQUEST NO. 3: If not already produced in Response to Nos. 1 and 2 above, please provide copies of any and all tariff filings, and all documents, such as, but not limited to, attachments and supporting materials, that accompanied those tariff filings, that relate in any way to the revised service availability charge of \$1,650 per equivalent residential connection described in Nos. 1 and 2 above.

REQUEST NO. 6: Please provide copies of all correspondence, memoranda, written communications, and all other documents between Aloha and developers on the subject of the revised service availability charge of \$1,650 per equivalent residential connection.

18. Request numbers 3, 6, 7 and 8, by their very terms, are not repetitive. All but Number 6 included the qualifying statement “if not already produced.” Request number 6 seeks “documents between Aloha and developers on the subject of the revised service availability charge,” whereas request number 5 sought “copies of all written notices that Aloha prepared and sent to affected developers that relate to the subject of the revised service availability charge,” a related, and possibly overlapping, but different topic.

WHEREFORE, Adam Smith respectfully requests the Commission to compel Aloha to comply with the discovery requests identified in its Objections and herein.



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April 22, 2002

Mr. Michael Ryan
Village Development Inc.
P.O. Box 1119
Elfers, FL 34680

VIA CERTIFIED RETURN RECEIPT:
7099-3400-0018-4330-7738

RE: Briar Patch Phase I Development-Wastewater Plant Capacity Charge

Dear Mr. Ryan:

Effective May 23, 2001, Aloha Utilities, Inc. was authorized by the Florida Public Service Commission to increase its wastewater service availability charge from \$206.75 to \$1,650.00, a difference of \$1,443.25 per ERC. All connections from that day forward are required to be assessed the new fee. Unfortunately, through a mistake on the part of the Utility, several developers/builders were not assessed the additional fee, either as to their connections made since that time, or assessed for the increase for future connections which have been reserved. Your Company has connected 22 connections since May 23, 2001. As such, we are required by our tariff, Public Service Commission Orders, and by Florida law, to assess you at this increased rate. While the Utility mistakenly failed to charge you for this increase previously, we are authorized both under our Developer Agreement with you and under Public Service Commission Rules to back bill in the case of such a mistake.


The total amount that is due to Aloha from your Company for prior connections is \$31,751.50. For reservation of capacity and connections not yet made, the additional amount owed is \$76,492.25 (53 connections X \$1,443.25 increased charge) per additional connection.

We apologize for this mistake and we will be glad to work with you on the method of repayment. However, we must receive all of these overdue monies for prior connections in order to comply with PSC requirements.

We need to hear from you shortly or we will have to consider alternative measures in order to collect these monies. If you have any questions, please let me know. Again, we appreciate your cooperation in resolving this matter quickly.

Sincerely,

ALOHA UTILITIES, INC.


Stephen G. Watford
President

SGW/ck

Letters/02gencon/dev sewer impact.doc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Motion to Strike or Motion to Compel Discovery was sent via (*)Hand Delivery, (**) electronic mail or U.S. Mail on this 20th day of December 2002 to the following:

(*)Rosanne Gervasi
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Joseph A. McGlothlin