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GOVERNMENTAL LAW
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December 27, 2002

VIA HAND DELIVERY

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COMMISSION
CLERK

Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0800

Re: Docket No. 020413-SU - Initiation of Show Cause Proceedings against Aloha Utilities, Inc. for failure to charge approved service availability charges in violation of Order PSC-01-0326-FOF-SU and Section 367.091, F.S.

Dear Ms. Bayo:

Please find the original and one copy of Aloha Utilities, Inc.'s Motion for Protective Order to be filed in the above-stated docket. Also attached is a copy to be stamped and returned to our office.

Should you have questions or need any additional information, please contact me. Thank you for your assistance in this matter.

Very truly yours,

Suzanne Brownless
Suzanne Brownless
Attorney for Aloha Utilities, Inc.

SB:smh
Bayo-ltr-Aloha.wpd

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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
charges, in violation of Order No. PSC-01-0316-
FOF-SU and Section 367.091, Florida Statutes.

DOCKET NO. 020413-SU

MOTION FOR PROTECTIVE ORDER

Pursuant to Rule 1.280(c), Florida Rules of Civil Procedure; and Rule 28-106.206,
Florida Administrative Code, Aloha Utilities, Inc. (Aloha) files this Motion for Protective Order,
and in support thereof states as follows:

1. Adam Smith Enterprises, Inc. (Adam Smith) served its First Set of Interrogatories
Nos. 1-10, First Request for Production of Documents Nos. 1-8 and First Request for Admissions
Nos. 1-10 on Aloha on November 14, 2002.

2. On December 5, 2002, Aloha filed Objections to Admissions Nos. 1-3, 5 and 6,
Interrogatories Nos. 1-3 and Request for Production Nos. 1, 2, 4, 7, 8. On December 5, 2002,
Aloha served responses to Admissions Nos. 4, 7, 8, 9 and 10. Aloha's revision to its response to
Admission No. 9 was served on December 6, 2002. Aloha served its response to Interrogatories
Nos. 4-10 on December 6, 2002 and served its response to Production of Documents Requests
Nos. 1-7 and 8(f).

3. On December 5, 2002, Aloha also filed a motion requesting that its former
counsel be allowed to participate in developing responses to Adam Smith's discovery and to
testify to those facts at hearing, should the Commission determine, over Aloha's objection, those
facts to be relevant to this proceeding, or that the Commission strike these discovery requests and
prohibit Adam Smith from offering testimony or evidence related to the information in those

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discovery requests. On December 12, 2002, Adam Smith filed a Response to Aloha's December 5th Motion arguing for the complete rejection of the relief requested by Aloha. Finally, on December 20, 2002, Adam Smith filed a Motion to Strike Aloha's objections and Motion to Compel Discovery.

4. Aloha seeks protection from the following discovery for the reasons stated below:
 - a. **Admissions 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."

Order PSC-01-0326-FOF-SU (Order 01-0326) speaks for itself. No interpretation by Aloha of Order 01-0326 is necessary or required.

- b. **Admissions 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."

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

Admissions 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."

Admissions 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 this earlier representation that Aloha had been applying the higher service availability charges since May 23, 2001 was incorrect."

- (1) All of the above requests seek to have Aloha admit facts which are irrelevant to the issues which have been raised in this proceeding: backbilling, imputation of CIAC and the

effective date of the service availability tariff.¹ The facts which are stated in the above admissions requests are germane to the issue of whether Aloha violated Order PSC-01-0326-FOF-SU, issued on February 6, 2001 (Order 01-0326). Aloha did not request a hearing on the show cause portion of Order PSC-02-1250-SC-SU (Order 02-1250). Aloha filed a response to Order 02-1250 objecting to the imposition of a \$10,000 fine for its admitted violation of Order 01-0326. The Commission voted on December 2, 2002 to affirm the \$10,000 fine. The final order disposing of the show cause proceeding, Order PSC-02-1774-PCO-SU (Order 02-1774), was issued on December 18, 2002. That order will become final in 30 days when the time in which to file a notice of appeal runs. [Order 02-1774 at 19; Rule 9.900(a), Florida Rules of Appellate Procedure.]

(2) Adam Smith has characterized the Admissions Nos. 2, 3, 5 and 6 as findings made by the Commission in Order No. PSC-02-1250-SC-SU which were undisputed by Aloha. This is incorrect on two counts. First, Order 02-1250 is the first step in a show cause process that can not become final until that process is finished, i.e., until Order 02-1774, the final resolution of the show cause portion of Order 02-1250, becomes final. Until Order 02-1250 becomes final, nothing recited therein can constitute competent, substantial evidence on which the Commission can base a factual "finding". Second, Aloha has **never** agreed that its counsel "represented to the PSC Staff that developers were aware of and had been paying the increased service availability charge since May 23, 2001" (Admissions No. 5) or "advised PSC staff that he had been misinformed by Aloha in early March 2002 and that this earlier representation that Aloha had been applying the higher service availability charges since May 23, 2001 was incorrect."

¹ Aloha's Request for Hearing at 2-4.

(Admissions No. 6).

(3) Aloha's position has been clearly stated in correspondence between its previous counsel and the Commission, provided to Adam Smith on December 9, 2002 in response to Request for Production No. 2: that "[t]he Commission Staff Attorney, myself [Aloha's counsel] and the President of the Utility *all assumed*, once informed of the error, that the charge had been imposed after the Order became final, but that the Utility had simply failed to file a tariff sheet or to submit a Customer Notice on the charge." [Emphasis added; Letter dated May 13, 2002 from F. Marshall Dederding to Rosanne Gervasi.] The fact is that when first discussing the failure of Aloha to file its service availability tariff the Staff Counsel did not ask Aloha's attorney if the service availability charge had been imposed and *Aloha's counsel made no representation at all regarding whether the higher service availability fee had been imposed or had not been imposed*. Finally, Aloha's counsel did not advise Staff Counsel that "his representation that Aloha had been applying the higher service availability charges since May 23, 2001 was incorrect" as stated in Admissions No. 6. *Having made no previous statement that service availability fees had been collected prior to March 7, 2002, Aloha's counsel had no need to retract that statement*. Contrary to the allegations of Adam Smith, the "facts" referenced in Admissions Nos. 5 and 6 are far from either being either finally established by prior Commission action or undisputed.

(4) Finally, the "facts" which Adam Smith seeks to compel Aloha to respond to are irrelevant to this proceeding. Aloha's representations to Commission Staff, or lack thereof, concerning its imposition of the increased service availability charge were factors in the Commission's decision to impose a \$10,000 fine on Aloha. As Adam Smith has correctly stated, these "facts" are found in the show cause portions of Order 02-1250. [Order 02-1250 at 16-19]

Adam Smith had no standing with regard to any portion of the show cause portion of Order 02-1250. By definition, the Commission's decision to levy a penalty on Aloha based on a finding of cause cannot "substantially affect" Adam Smith, the standing requirement of Chapter 120, Florida Statutes, since any penalty so levied must be borne completely by Aloha. Allowing Adam Smith to litigate these issues is to allow Adam Smith to do indirectly in this proceeding what it could not do directly in the show cause proceeding.

(5) Adam Smith has identified as a fundamental issue whether there was a tariff implementing the higher service availability tariff in place.² Adam Smith has sought information regarding both written notice³ to developers and the actual filing of the revised service availability tariff. Aloha has provided responses to those Adam Smith admissions, interrogatories and requests for production⁴ which address these issues. Contrary to its allegations, Admissions 1-3, do not relate to the information necessary to determine if Rule 25-30.475(2), Florida Administrative Code, has been satisfied.

(6) Finally, Adam Smith argues that if the Commission does have the statutory authority to allow Aloha to backbill Adam Smith, the information sought in Admissions Nos. 5

²While arguing that the higher service availability tariff was not in effect because the requirements of Rule 25-30.475(2), Florida Administrative Code, were not complied with, Adam Smith contends that the effective date of the revised service availability tariff is not at issue in this case. If the effective date of the revised service availability tariff is not at issue, then this discovery is irrelevant on that basis alone. This contradiction will be addressed by Aloha in a separate motion to establish issues for hearing.

³ Rule 25-30.475(2), Florida Administrative Code, does not require *written* notice, but "adequate" notice.

⁴Adam Smith's Admissions 4, 7-10; Adam Smith's Interrogatories Nos. 4-10; Adam Smith's Request for Production Nos. 1-7, 8(f).

and 6 is relevant because if Aloha acted deceitfully or negligently backbilling should not be allowed. In short, it is Adam Smith's position that Aloha should be *penalized* for such actions by disallowing backbilling in addition to the \$10,000 fine already imposed. As Aloha has repeatedly stated, the show cause/penalty portion of Order 02-1250 was not protested. These requests all solicit information that is irrelevant to this process and not reasonably calculated to lead to information which is admissible at hearing.⁵

c. **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?"

(1) For the reasons stated in paragraph b. above these interrogatories are irrelevant and not reasonably calculated to lead to relevant evidence.

d. **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."

(1) To the extent that this request asks for documents which fall within the attorney-client and accountant-client privilege, Aloha seeks a protective order for same. However,

⁵ Objections on the grounds of relevancy to requests for admissions, and motions for protective orders regarding requests for admissions are appropriate responses and pleadings, respectively, even though requests for admissions are not technically discovery but used to narrow the issues for proof at trial. Trawick, H., Florida Practice and Procedure, §§ 18-1, 18-2 (2003 Edition).

without waiving its right to assert its privileges, Aloha did respond to Adam Smith on December 9, 2002 by stating that "no such documents exist with regard to officers, employees or consultants of Aloha."

- e. **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."

- (1) Aloha has completely responded to this request in Attachment A to its Response filed on December 9, 2002.

- f. **Request No. 4:** "Please provide any and all correspondence, notices and all other written communications, memoranda, notes and 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."

- (1) To the extent that this request asks for documents which fall within the attorney-client and accountant-client privilege, Aloha seeks a protective order for same. All other documents have been given to Adam Smith as Attachments A and B.

- g. **Request No. 7:** "If not already provided in response to the above items, please provide any and all communications to and from 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."

- (1) This request asks for documents which fall within the attorney-client and accountant-client privilege, Aloha seeks a protective order for same.

- h. **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 and conforming to the order;
 - (b) the failure of Aloha to file the service availability tariff timely;
 - (c) the requirement that Aloha provide adequate 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;⁶ 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.

(1) Aloha seeks that a protective order be entered with regard to the material sought in Request Nos. 8(a)-(e) and (g) on the grounds that it is irrelevant and not likely to provide admissible information relevant to the issues appropriately raised in this proceeding as discussed in paragraph b. above.

- i. **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."

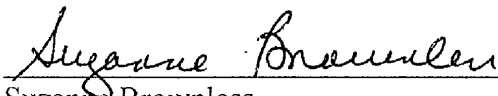
⁶ This material was provided to Adam Smith in Aloha's December 9, 2002 Response.

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.

(1) As indicated in its response filed on December 9, 2002, Aloha has produced all of the information sought by these two responses in Attachments A, B and C. Thus, Aloha seeks a protective order regarding these requests on the grounds that it has already fully complied.

WHEREFORE, Aloha respectfully requests that the Commission enter a Protective Order with regard to the discovery served by Adam Smith as outlined above.

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



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Attorney for Aloha Utilities, Inc.

c: 3745

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 and (*) Hand Delivery or (**) E-mail this 27th day of December, 2002:

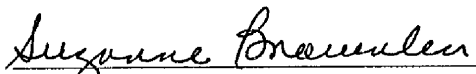
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