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ADMINISTRATIVE LAW
GOVERNMENTAL LAW
PUBLIC UTILITY LAW

January 9, 2003 ..

VIA HAND DELIVERY

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

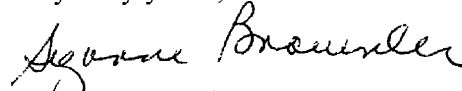
Re: Docket No. 020413-SU - Initiation of Show Cause Proceedings against Aloha Utilities, Inc. for failure to charge approved service availability charges in violation of Order PSC-01-0326-FOF-SU and Section 367.091, F.S.

Dear Ms. Bayo:

Please find the original and one copy each of Aloha Utilities, Inc.'s Motion to Strike or, in the Alternative, Response in Opposition to Adam Smith Enterprises, Inc.'s Motion for Reconsideration and Aloha's Request for Oral Argument to be filed in the above-stated docket. Also attached is a copy of each 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
Attorney for Aloha Utilities, Inc.

SB:smh
Bayo-ltr-Aloha.wpd

Motion
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FPSC-COMMISSION CLERK

Request
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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-01-0326-FOF-SU and Section 367.091,
Florida Statutes.

DOCKET NO. 020413-SU

**MOTION TO STRIKE OR, IN THE ALTERNATIVE, RESPONSE IN
OPPOSITION TO ADAM SMITH ENTERPRISES, INC.'S
MOTION FOR RECONSIDERATION**

Aloha Utilities, Inc. (Aloha) files this Motion to Strike, or in the alternative, Response in Opposition to Adam Smith Enterprises, Inc.'s (Adam Smith) Motion for Reconsideration of Order PSC-02-1774-FOF-SU (Order 02-1774) granting Aloha's Motion for Emergency Relief filed on January 2, 2003, and as grounds therefore states as follows:

1. In its Motion for Reconsideration, Adam Smith states that the Commission has overlooked both the facts and the law in reaching its decision to allow Aloha to collect service availability charges of \$1,650 from developers for lots connected to Aloha's wastewater system from May 23, 2001 until April 16, 2002 to be held in an escrow account subject to refund pending the Commission's final decision. [Adam Smith Motion at 1-2.]

MOTION TO STRIKE

2. Prior to a discussion of the merits of Adam Smith's argument, it is necessary to address whether a motion for reconsideration of Order 02-1774's grant of emergency relief is allowed by the Commission's rules. First, the portion of Order 02-1774 granting Aloha the ability to collect \$1,650 in service availability charges from Adam Smith subject to refund at the resolution of this proceeding, is by its nature a "preliminary" or "intermediate" order. That is, it

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is an order which does not dispose of the case or where the administrative adjudicative process has not been brought to a close by the action. Hill v. Division of Retirement, 687 So.2d 1376 (Fla. 1st DCA 1997). With regard to such orders made by a Prehearing Officer, a party is authorized by Rule 25-22.0376(1), Florida Administrative Code, to seek reconsideration by the Commission panel assigned to the case within 10 days of the date of the order. A party is not entitled to seek reconsideration of the full panel's ruling.¹ There is no provision in Rule 25-22.0376, Florida Administrative Code, which addresses the procedure to be applied to a preliminary or intermediate order which is made initially by the full panel assigned to the docket or, as in this case, made initially by the full Commission. [Vote Sheet, December 2, 2001, Item No.6]

3. Order 02-1174 under the heading "Notice of Further Proceedings or Judicial Review", states as follows:

Any party adversely affected by the portions of this order which are preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility...."

¹ The Commission determined to whom Aloha's Motion for Emergency Relief should be submitted for resolution. Had Commissioner Deason, the Prehearing Officer, made the decision to grant emergency relief, Rule 25-22.0376(1), Florida Administrative Code, would have allowed reconsideration by the panel assigned to the case: Commissioners Deason, Bradley and Davidson. Had the panel initially made the decision, one might hypothesize that Commissioner Deason had simply waived his opportunity to make the decision and passed it to the full panel. In which case, the provisions of Rule 25-22.0376(1), Florida Administrative Code, would appear to preclude a reconsideration. Nothing, however, addresses the situation where the full Commission, including Commissioners not assigned to a docket, render a non-final opinion.

[Emphasis added.]

Order 02-1774 at 19. However, Rule 25-22.060, Florida Administrative Code, does not apply to preliminary or intermediate orders but to final orders of the Commission.² The Commission has relied erroneously on its procedural rules to advise parties that reconsideration of an intermediate order issued by the full Commission is available.³ Absent an affirmative vote by the Commission to allow reconsideration under these circumstances, which was not done in this case, reconsideration is precluded.⁴

4. Not allowing reconsideration for Aloha's request for emergency relief is consistent with the treatment given by the Commission to other intermediate or preliminary

² Rule 25-22.060(1), Florida Administrative Code, is entitled "Motion for Reconsideration", and where the term "order" is qualified refers to "final order" (Sections (1)(c) and (3)) or indicates that the order is one "adopting, repealing or amending a rule" (Section (1)(e)), i.e., meets the definition of "final order". Rule 25-22.0376, Florida Administrative Code, entitled "Reconsideration of Non-Final Orders", does not address reconsideration of non-final orders decided initially by the full Commission or the assigned Commission panel.

³ Section 120.569(1), Florida Statutes, requires that parties be notified of all orders and given notice of all administrative hearing or judicial review that is available under §§120.569, 120.57 or 120.68 and the time limits which apply. However, the Commission cannot create by this notice procedural rules or authority which do not otherwise exist.

⁴ An argument could be made that the Uniform Rules of Procedure adopted pursuant to §120.54(5)(a)1, Florida Statutes, allow such motions to be made citing Rule 28-106.204, Florida Administrative Code, entitled "Motions". However, the Commission sought and was granted permission by the Administration Commission to enact Rules 25-22.060 and 25-22.0376 on the grounds that these rules had no uniform rules counterpart. Rule 25-40.001, Florida Administrative Code. Presumably this is true because the Commission does not use Administrative Law Judges provided by the Department of Administrative Hearings but instead relies on its own members acting as Prehearing Officers and fact finders either sitting *en banc* or in panels. Thus, Rule 28-106.204, Florida Administrative Code, offers no rule authority for filing a motion for reconsideration here.

orders, i.e., orders granting interim rate relief. See: In re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities in Osceola County and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia and Washington Counties, Order No.PSC-96-0125-FOF-WS, issued January 25, 1996, at 17 citing Citizens of the State of Florida v. Mayo, 316 So.2d 262, 264 (Fla. 1975), which held that interim rate relief orders are non-final orders not subject to judicial review.⁵ As in the case of interim rates, Adam Smith will have the opportunity to file a motion for reconsideration of the final order which is issued in this proceeding at the conclusion of the evidentiary hearing consistent with the Commission's current rules.

5. Thus, for the reasons stated above, the Commission should strike Adam Smith's Motion for Reconsideration as being unauthorized by Commission rules or by affirmative Commission vote.

RESPONSE IN OPPOSITION

6. If, however, the Commission finds that Adam Smith should be allowed to file for reconsideration of Order 02-1774, its motion should be denied for failing to identify a point of fact or law which was overlooked or misconstrued by the Commission in reaching its decision.

7. Adam Smith sets forth several arguments in support of its position the lynch pin

⁵Aloha is aware that the Commission allowed parties to file reconsiderations of Order PSC-01-1348-PCO-EI (Order 01-1348), issued June 20, 2001, which placed money subject to refund pending an earnings investigation. Likewise, the Commission allowed reconsideration of Order PSC-01-1346-PCO-EI, issued on June 19, 2001, which did not require Florida Power & Light Company to hold any potential overearnings subject to refund in a similar investigation. However, both of these orders cite Rule 25-22.060, Florida Administrative Code, as the basis for this reconsideration and are likewise infirm for the reasons previously stated.

of which is the allegation that the Commission overlooked the fact that the effective date of the service availability tariff was not protested by Adam Smith, and is, therefore, uncontested in this proceeding. Based on this oversight, Adam Smith argues that Order 01-1250 can only grant prospective, not retroactive application of the higher service availability charges, a position supported by the orders and cases (Order PSC-97-0207-FOF-SU; Order PSC-95-0045-FOF-WS; U.S. Sprint Communications Co. v. Nichols, 534 So.2d 698 (Fla. 1988) relied upon by the Commission as precedent. [Adam Smith Motion at 3.]

8. Adam Smith states that its protest was limited to “that portion [of Order 02-1250] authorizing Aloha to attempt to collect amounts for the service availability tariff not in effect”, i.e., backbilling. Adam Smith goes on to argue that the effective date of the tariff established by Order 02-1250, April 16, 2002, was not protested by Adam Smith. And, Adam Smith’s argument continues, because the effective date is April 16, 2002, the Commission cannot grant temporary relief retroactively from that date. [Adam Smith Motion at 3.] In sum, it is Adam Smith contention that the grant of temporary relief is not only the retroactive application of a tariff contrary to law, but is inconsistent with the factual finding that supports the establishment of April 16, 2002 as the effective date, i.e., receipt by the customers of notice of the service availability charge increase. [Adam Smith Motion at 4-6.]

9. First, while Adam Smith did not explicitly protest the effective date of the service availability tariff, a protest of the backbilling issue necessarily places the effective date of the tariff at issue since one can’t “backbill” for a tariff that is not in effect.⁶ Second, Aloha has

⁶ While “backbilling” is discussed in the “Substantial Interest” section of Adam Smith’s petition for hearing, it is not contained in the “Disputed Issues of Material Fact” section of the petition. [Adam Smith Petition at 2.] The “disputed material facts” section contains two

raised the effective date of the tariff as an issue in this proceeding. Aloha placed the imputation of CIAC for the uncollected service availability charges at issue in this proceeding by the inclusion in the “Disputed Issues of Fact and Law” section of the following issues: “Is it appropriate to impute CIAC for the uncollected service availability charges which should have been collected from May 23, 2001 until April 16, 2002, and if so, what amount of CIAC should be imputed?” and “Does the imputation of CIAC without the ability to fully backbill for the uncollected service availability charges which should have been collected from May 12, 2001 to April 16, 2002 constitute a taking?” [Aloha Petition at 3-4.] In the “Substantial Interest” portion of its petition, Aloha stated that Aloha’s substantial interests were impacted because “the effective date of the tariff controls the date by which CIAC can be imputed”. [Aloha’s Petition at 2.] In footnote 3 of its petition Aloha made its intent clear: “this request for hearing is being filed in order to preserve Aloha’s right to backbill developers and builders who connected to Aloha’s system from May 23, 2001 until April 16, 2002 ... [Aloha Petition at 3.] It is Aloha’s position that the effective date of the tariff is May 23, 2001 because that is the date that is consistent with both the imputation of CIAC and backbilling for the uncollected service availability charges. Aloha has clearly raised the imputation of CIAC as a disputed issue, clearly tied the ability to impute CIAC to the effective date of the tariff and clearly alleged the substantial impact on Aloha

paragraphs which identify two issues: “Whether the ‘business risk’ of developers such as Adam Smith includes the risk of absorbing retroactively applied service availability charges” and “Whether Adam Smith sold, 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 the lots.” [Adam Smith Petition at 2-3.] Clearly, the second issue raised by Adam Smith assumes that *even if the effective date of the service availability tariff is May 23, 2001*, Adam Smith still is not responsible for payment of the increased service availability charge. As demonstrated by Adam Smith’s own pleading, the effective date of the tariff cannot be separated from the issue of backbilling.

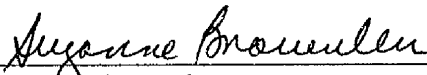
of both. The effective date of the service availability tariff has been timely raised by Aloha. With the effective date clearly at issue, Adam Smith's argument that the Commission overlooked facts or misconstrued the law must fail.

10. Third, even had Aloha not timely raised the effective date of the service availability tariff as an issue, the Commission is free to grant the temporary relief sought by Aloha: the ability to recover the higher service availability fees from Adam Smith subject to refund. Pursuant to its broad authority granted the Commission in §§367.011 and 367.101, Florida Statutes, the Commission is free to take whatever action will protect all parties pending the resolution of this proceeding. In Order 02-1774 the Commission found that: Aloha will have increasing difficulty recovering uncollected service availability charges as time passes; that numerous developers besides Adam Smith would be affected by the collection of the higher service availability charges and that holding the backbilled service availability charges in an escrow account subject to refund with interest will not place the developers at greater risk. [Order 02-1774 at 10-11.] These factual findings supporting the Commission's decision to grant emergency relief are undisputed by Adam Smith.

11. Finally, Adam Smith has discussed customer notice at length as it relates to this case and those cited by the Commission as precedent for its decision. [Adam Smith Motion at 3-6] This discussion largely concerns the merits of whether the Commission should ultimately allow Aloha to backbill for the service availability charges at issue. Just as granting interim rates does not preclude the Commission from ultimately finding that a rate increase is not justified, granting Aloha the ability to collect these service availability charges does not prohibit the Commission from ordering refunds at the conclusion of this proceeding.

WHEREFORE, for the reasons stated above Aloha requests that this Commission strike, or in the alternative deny, Adam Smith's Motion for Reconsideration of Order No. PSC-02-1774-FOF-SU.

Respectfully submitted this 9th day of January, 2003 by:



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c: 3756

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, (*) Hand Delivery, or (**) E-Mail, this 14th day of January, 2003.

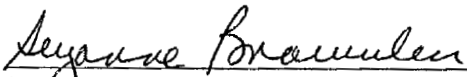
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