

State of Florida



Public Service Commission  
CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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**DATE:** JANUARY 23, 2003

**TO:** DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (GERVASI) *FJG*  
DIVISION OF ECONOMIC REGULATION (FLETCHER, MERCHANT, WILLIS)

**RE:** DOCKET NO. 020413-SU - 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.  
COUNTY: PASCO

**AGENDA:** 02/04/2003 - REGULAR AGENDA - PARTICIPATION IS DEPENDENT ON COMMISSION'S RULING ON ISSUE 1.

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** RECOMMENDATION SHOULD BE ADDRESSED BY COMMISSIONERS JABER, DEASON, BAEZ, AND BRADLEY.

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\020413.RCM

CASE BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas, Aloha Gardens and Seven Springs. On February 9, 2000, Aloha filed an application for an increase in rates for its Seven Springs wastewater system. By Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, the Commission approved increased rates and charges for Aloha. The Commission also directed Aloha to increase its wastewater service availability charges for its Seven Springs wastewater system from \$206.75 per equivalent residential

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DOCKET NOS. 020413-SU  
DATE: January 23, 2003

connection (ERC) to \$1,650 per residential ERC and \$12.79 per gallon for all other connections. The Commission required Aloha to file an appropriate revised tariff sheet reflecting the approved service availability charges within 20 days of the date of the order.<sup>1</sup>

Aloha should have submitted revised tariff sheets on wastewater service availability charges and had them approved at the same time as the wastewater rate tariffs, on May 23, 2001. However, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, the utility did not submit the tariff sheets until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until almost 11 months later, on April 12, 2002.

By Order No. PSC-02-1250-SC-SU, issued September 11, 2002, among other things, the Commission granted in part and denied in part SRK Partnership Holdings, LLC and Benchmark Manmen Corp.'s (Limited Partners) Petition to Intervene in this docket, ordered the effective date of the service availability tariff to be April 16, 2002, authorized Aloha to backbill developers for the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers, and ordered that regardless of whether Aloha is successful in collecting the full backbilled amounts from the developers or any portion thereof, 100% of the amount of these charges, or \$659,547 shall be recognized as contributions-in-aid-of-construction (CIAC). The Commission also ordered Aloha to show cause as to why it should not be fined in the amount of \$10,000 for failure to timely file a revised tariff sheet on service availability charges and charge its approved service availability charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes. On October 2, 2002, Aloha filed its Response to the Show Cause Order. By Order No. PSC-02-1774-FOF-SU, issued December 18, 2002,

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<sup>1</sup>Both Aloha and the Office of Public Counsel (OPC) filed petitions for reconsideration of Order No. PSC-01-0326-FOF-SU. Those petitions were disposed of by Order No. PSC-01-0961-FOF-SU, issued April 18, 2001, by which the Commission granted Aloha's motion in part and denied OPC's motion. Order No. PSC-01-0961-FOF-SU reaffirmed the wastewater service availability charges approved by Order No. PSC-01-0326-FOF-SU.

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

the Commission denied the relief requested in Aloha's Response to Show Cause Order and disposed of the show cause proceeding by assessing the \$10,000 fine.

Protests to the proposed agency action (PAA) portion of Order No. PSC-02-1250-SC-SU concerning backbilling were timely filed by three developers: Windward Homes, Greene Builders, Inc. (Greene Builders), and Adam Smith Enterprises, Inc. (Adam Smith). In addition, Aloha timely filed a Request for Hearing on the PAA portion of the Order concerning the imputation of CIAC.<sup>2</sup> Therefore, this docket has been scheduled for a formal hearing to be conducted on April 11, 2003. Greene Builders and Windward Homes have filed Notices of Withdrawal from the docket, and the Limited Partners have filed a Notice of Withdrawal of Intervention.

On October 7, 2002, Aloha filed a Motion for Emergency Relief, which the full Commission granted by Order No. PSC-02-1774-FQF-SU. On January 2, 2003, Adam Smith timely filed a Motion for Reconsideration of that decision. On January 9, 2003, Aloha filed a Motion to Strike or, in the Alternative, Response in Opposition to Adam Smith's Motion for Reconsideration and a Request for Oral Argument. Finally, on January 16, 2003, Adam Smith filed a Response to Aloha's Motion to Strike Adam Smith's Motion for Reconsideration. This recommendation addresses these motions and responses. The Commission has jurisdiction pursuant to Sections 367.081 and 367.121, Florida Statutes, and Rule 25-22.0376, Florida Administrative Code.

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<sup>2</sup>Aloha filed its Request for Hearing in order to preserve its right to backbill developers and builders who connected to its system from May 23, 2001 until April 16, 2002.

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

DISCUSSION OF ISSUES

**ISSUE 1:** Should Aloha's Request for Oral Argument on its Motion to Strike or, in the Alternative, Response in Opposition to Adam Smith's Motion for Reconsideration be granted?

**RECOMMENDATION:** Yes, the Request for Oral Argument should be granted. Parties should be allotted ten minutes each to address the Commission. (GERVASI)

**STAFF ANALYSIS:** In its Request for Oral Argument, which accompanied its Motion to Strike, or in the Alternative, Response in Opposition to Adam Smith's Motion for Reconsideration, Aloha states that oral argument would allow the Commission to more completely understand the arguments presented by both Adam Smith and Aloha and would thereby assist the Commission in reaching a just and reasonable decision in this matter. Aloha filed its Request for Oral Argument pursuant to Rules 25-22.058 and 28-106.204, Florida Administrative Code.

Rule 25-22.058(1), Florida Administrative Code, states that "[a] request for oral argument must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof." Staff agrees that oral argument may aid the Commission in evaluating the issues before it. Therefore, staff recommends that Aloha's Request for Oral Argument should be granted. Parties should be allotted ten minutes each to address the Commission.

**ISSUE 2:** Should Adam Smith's Motion for Reconsideration of Order No. PSC-02-1774-FOF-SU Granting Aloha's Motion for Emergency Relief be granted?

**RECOMMENDATION:** No, Adam Smith's Motion for Reconsideration should be denied. Nevertheless, Aloha should be required to provide notice to all potentially affected developers that by Order No. PSC-02-1774-FOF-SU, the Commission allowed Aloha to immediately backbill developers who connected to its system from May 23, 2001, until April 16, 2002 and to hold those monies subject to refund with interest, pending the conclusion of this proceeding. Moreover, Aloha's Motion to Strike Adam Smith's Motion for Reconsideration should be denied. (GERVASI)

**STAFF ANALYSIS:**

Motion for Reconsideration

In the Motion for Reconsideration, Adam Smith points out that in granting Aloha's Motion for Emergency Relief, the Commission allowed Aloha to attempt to immediately collect from developers the difference between the previously-effective tariff charge of \$206.75 per ERC and the \$1,650 per ERC tariff charge that was approved to become effective on April 16, 2002. The Commission further ordered the monies collected to be held in escrow pending the final hearing in this matter. According to Adam Smith, in so ruling, the Commission overlooked several matters and made mistakes of law that require reconsideration.

First, Adam Smith argues that there is no basis in law for Aloha to collect charges retroactively that are the subject of preliminary agency action. Adam Smith protested the PAA portion of Order No. PSC-02-1250-SC-SU which proposed to authorize retroactive collections for the higher service availability charges. Therefore, that portion of the order is a nullity and of no force and effect, and there is therefore no authority for Aloha to collect the differential in charges. In the ruling on the Motion for Emergency Relief, the Commission overlooked the fact that it ruled previously that the effective date of the tariff would be April 16, 2002, which is totally different from whether Aloha is authorized by the Commission to try to collect charges retroactively to May 23, 2002. By its very nature, the Order Granting Emergency Relief assumes the current lawfulness of the matter that is the subject of the protest.

DOCKET NOS. 020413-SU

DATE: January 23, 2003

Moreover, Adam Smith argues that the Commission also made a mistake of law by relying on orders which do not support its decision to grant emergency relief. In granting the emergency relief, the Commission found it had inherent authority to do so under its general ratemaking power. However, according to Adam Smith, the Commission overlooked the fact that prior notice to customers is a condition precedent to any general authority it may have to grant emergency relief. Such authority cannot apply to retroactive applications of a tariff for which no prior notice was given. Order No. PSC-97-0207-FOF-SU, issued February 21, 1997, in Docket No. 961475-SU,<sup>3</sup> upon which the Commission relied in support of its inherent authority, involves the prospective application of a tariff and clearly required prior customer notice of the emergency rates granted by the order.

Adam Smith argues that the Commission also incorrectly relied on U.S. Sprint Communications Co. v. Nichols<sup>4</sup> and Order No. PSC-95-0045-FOF-WS, issued January 10, 1995, in Docket No. 941137-WS.<sup>5</sup> In the U.S. Sprint case, Sprint protested the fact that it was not given the opportunity for a hearing when Southern Bell corrected an incorrectly filed tariff. However, in that case, at no time did Southern Bell attempt to collect the charges pursuant to the incorrectly filed tariff on a retroactive basis. And Order No. PSC-95-0045-FOF-WS concerned a case where, even though the tariff sheets were missing from the files, the utility had been collecting the charges in the missing sheets. Thus, customers had notice of the utility's approved charges. Unlike in those orders, in the current case there was no customer notice of the increase in service availability charges until April 16, 2002. As required by Rule 25-30.475, Florida Administrative Code, and by the basic notions of procedural due process, no customer can be expected to pay a charge of which they did not have adequate notice. For these reasons, Adam Smith argues that on reconsideration, Aloha's Motion for Emergency Relief should be denied.

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<sup>3</sup>In Re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc.

<sup>4</sup>534 So. 2d 698 (Fla. 1988)

<sup>5</sup>In Re: Complaint of Indianwood Development Corporation, Inc. against Indiantown Company, Inc. regarding certain refunds and provision of service in Martin County.

Motion to Strike

In its Motion to Strike Adam Smith's Motion for Reconsideration, Aloha argues that the portion of Order No. PSC-02-1774-FOF-SU which granted Aloha's Motion for Emergency Relief is, by its nature, a preliminary or intermediate order. That is, it does not dispose of the case or bring the adjudicative process to a close. According to Aloha, when such orders are made by a Prehearing Officer, Rule 25-22.0376(1), Florida Administrative Code, authorizes a party to seek reconsideration by the Commission panel assigned to the case within ten days of the date of the order. However, there is no provision in the rule 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. Nevertheless, under the heading "Notice of Further Proceedings or Judicial Review," Order No. PSC-02-1774-FOF-SU states that

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....

However, Rule 25-22.060, Florida Administrative Code, does not apply to preliminary or intermediate orders but to final orders of the Commission. Therefore, 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.

Moreover, according to Aloha, not allowing reconsideration for Aloha's request for emergency relief is consistent with the treatment given by the Commission to other intermediate or preliminary orders; *i.e.*, orders granting interim rate relief which held that interim rate relief orders are non-final orders not subject to judicial review. As in the case of interim rates, Adam Smith will have the opportunity to file a motion for

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

reconsideration of the final order to be issued in this proceeding at the conclusion of the evidentiary hearing.

Response to Motion to Strike

In its response to Aloha's Motion to Strike, Adam Smith argues that in the section of Order No. PSC-02-1774-FOF-SU titled "Notice of Further Proceedings or Judicial Review," the Commission provided parties with notice of the judicial and administrative remedies that were available with respect to the Order. Adam Smith, and any other party, is entitled to rely upon the explicit instructions regarding remedies given in the Order.<sup>6</sup> Adam Smith timely filed its Motion for Reconsideration in compliance with the directions set forth in the "Notice" section of the Order. According to that section, an adversely affected party had 15 days from the date of the issuance of the Order to seek reconsideration of the Order. Having met those requirements, Adam Smith is entitled to have its Motion for Reconsideration decided by the Commission.

Moreover, Adam Smith argues that if Aloha wishes to pursue its argument that there is fault either with the Commission's rules or with the Commission's interpretation of its rules, it should do so in a generic setting. If the Commission then takes action based on Aloha's argument, any such action should apply prospectively. In no event should Aloha's argument be allowed to prejudice the rights of a party that relied on instructions contained in an order that is the subject of the party's Motion for Reconsideration.

Response to Motion for Reconsideration

If the Commission denies Aloha's Motion to Strike Adam Smith's Motion for Reconsideration, Aloha responds that the Motion for Reconsideration 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. Aloha argues that according to Adam Smith, its protest was limited to that portion of the Order which authorized Aloha to attempt to collect amounts for the service availability tariff not in effect; *i.e.*, backbilling, and that Adam Smith argues that because the effective date of the tariff is April

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<sup>6</sup>See Homestead v. Johnson, 760 So. 2d 80 (Fla. 2000) (City of Homestead did not waive its right to appeal because it was entitled to rely upon the directions in the order for requesting appeal).



DOCKET NOS. 020413-SU  
DATE: January 23, 2003

16, 2002, the Commission cannot grant temporary relief retroactively from that date.

Aloha responds that while Adam Smith did not explicitly protest the effective date of the tariff, a protest of the backbilling issue necessarily places the effective date of the tariff at issue since one cannot backbill for a tariff that is not in effect. Moreover, Aloha argues that Aloha has raised the effective date of the tariff as an issue in this proceeding. 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 argues that it 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 of both.

Further, Aloha argues that even had Aloha not timely raised the effective date of the tariff as an issue, the Commission is free to grant the temporary relief sought by Aloha, which is the ability to recover the higher service availability fees from Adam Smith subject to refund. Pursuant to its broad authority granted by Sections 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 No. PSC-02-1774-FOF-SU, at pages 10-11, 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.

Finally, Aloha argues that 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. 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. For these reasons,

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

Aloha requests that the Commission strike, or, in the alternative, deny the Motion for Reconsideration.

Analysis and Recommendation

By Order No. PSC-02-1774-FOF-SU, the full Commission granted Aloha's Motion for Emergency Relief and authorized Aloha to collect, subject to refund with interest, its service availability charges that it should have collected from May 23, 2001, until April 16, 2002, had the utility correctly implemented these charges pursuant to Order No. PSC-01-0326-FOF-SU in the first place. The Commission also ordered Aloha not to attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount subject to refund pending resolution of the protests.

Motion to Strike

In its Motion to Strike, Aloha argues that Rule 25-22.0376(1), Florida Administrative Code, authorizes a party to seek reconsideration of a preliminary or intermediate order issued by a Prehearing Officer within ten days of the date of the order, but does not authorize reconsideration of orders issued by a full panel. Aloha is incorrect that the Rule precludes a Commission panel assigned to a proceeding from addressing motions for reconsideration of non-final rulings made by the panel. Rule 25-22.0376(1), Florida Administrative Code, states, in pertinent part, that "[a]ny party who is adversely affected by a non-final order may seek reconsideration by the Commission panel assigned to the proceeding by filing a motion in support thereof within 10 days after issuance of the order." However, the Rule does not appear to address reconsideration of non-final rulings made by the full Commission. Nevertheless, Section 350.01(5), Florida Statutes, provides that petitions for reconsideration are to be voted upon by those Commissioners who participated in the final disposition of the proceeding. Although the Order for which reconsideration is being sought in this instance is not a final order, it follows that the same Commissioners who ruled on the Motion for Emergency Relief should rule on the Motion for Reconsideration of that decision.

Aloha correctly argues that the "Notice" section of the Order is faulty because Rule 25-22.060, Florida Administrative Code, which allows for a 15-day time period to file a motion for reconsideration, only applies to reconsideration of final orders.

Rule 25-22.0376 allows 10 days, not 15 days, for the filing of motions for reconsideration of non-final orders. Therefore, since Adam Smith's Motion for Reconsideration was filed on the 15<sup>th</sup> day after issuance of the Order, pursuant to Rule 25-22.0376, the Motion for Reconsideration was filed five days late.

However, in the "Notice of Further Proceedings or Judicial Review" attached to the Order, the Commission notified parties that they may request reconsideration of those portions of the Order which are preliminary, procedural, or intermediate in nature "within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer, or within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission." In accordance with Rule 25-22.0376(1), that language should be changed on a prospective basis to show that reconsideration of all non-final orders must be filed within 10 days.

Nevertheless, Adam Smith is correct that it is entitled to rely upon the explicit instructions regarding remedies given in the Order. Pursuant to the "Notice" section of the Order, Adam Smith's Motion for Reconsideration was timely filed on the 15<sup>th</sup> day after the issuance of the Order. Moreover, the granting of emergency relief subject to refund pending the conclusion of the case is in the nature of an interim order, and as such, judicial review is not available until a final order is issued. See Citizens of the State of Florida v. Mayo, 316 So. 2d 262 (Fla. 1975). Therefore, the deadline as set forth in the "Notice" section of the order is not a jurisdictional deadline and the directive which gave parties an extra five days beyond what the rule allows to file for reconsideration was harmless error. For these reasons, Aloha's Motion to Strike should be denied.

#### Motion for Reconsideration

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or that the Commission failed to consider in rendering its Order. See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. See Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). A motion for

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Adam Smith's argument that there is no basis in law for Aloha to collect charges retroactively that are the subject of preliminary agency action is flawed. Aloha's current service availability charges were approved by Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, which was a final order issued post-hearing. Therefore, allowing Aloha to backbill for those approved charges for connections made from May 23, 2001, to April 16, 2002, subject to refund pending a final decision in this case, is not retroactive application of an approved charge.

With respect to Adam Smith's argument that prior notice to customers is a condition precedent to any general authority it may have to grant emergency relief, Adam Smith fails to consider that affected customers have received notice of the Commission's decision to allow Aloha to backbill for these charges from May 23, 2001, to April 16, 2002. By Order No. PSC-02-1250-SC-SU, the Commission proposed to authorize Aloha to backbill the developers in question and to try to collect from them the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers. The Commission required Aloha to submit a proposed notice of that Order for staff's administrative approval within 10 days of the effective date of the Order. Although the Order did not become effective because it was protested, all potentially affected developers received a copy of the Order from the Commission and therefore have received notice of the Commission's proposed decision to allow the backbilling. Nevertheless, staff agrees that Aloha should be required to provide notice to all potentially affected developers that by Order No. PSC-02-1774-FOF-SU, the Commission allowed Aloha to immediately backbill developers who connected to its system from May 23, 2001, until April 16, 2002 and to hold those monies subject to refund with interest, pending the conclusion of this proceeding.

Under Sections 367.081 and 367.121, Florida Statutes, the Commission has the authority to grant the temporary relief sought by Aloha in this case. Moreover, Aloha is correct that Adam Smith's concerns surrounding the lack of noticing received by the

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

developers in the first instance largely concerns the merits of whether the Commission should ultimately allow Aloha to backbill for the service availability charges at issue. If Adam Smith prevails in this case and the Commission disallows the backbilling at issue, the amounts held in escrow as a result of Aloha's backbilling efforts will be refunded with interest by final order issued post-hearing.

For the foregoing reasons, Adam Smith has not demonstrated any point of fact or law that the Commission overlooked or failed to consider in rendering its Order to cause the Commission to reverse its decision to grant Aloha's Motion for Emergency Relief. Therefore, its Motion for Reconsideration of Order No. PSC-02-1774-FOF-SU should be denied. Nevertheless, Aloha should be required to provide notice to all potentially affected developers that by Order No. PSC-02-1774-FOF-SU, the Commission allowed Aloha to immediately backbill developers who connected to its system from May 23, 2001, until April 16, 2002 and to hold those monies subject to refund with interest, pending the conclusion of this proceeding.

DOCKET NOS. 020413-SU  
DATE: January 23, 2003

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** No, this docket should remain open pending final resolution of the protests filed to the PAA portions of Order No. PSC-02-1250-SC-SU. (GERVASI)

**STAFF ANALYSIS:** This docket should remain open pending final resolution of the protests filed to the PAA portions of Order No. PSC-02-1250-SC-SU.