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January 23, 2003

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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. I am enclosing the original and 15 copies of the following:

- Adam Smith Enterprises, Inc.'s Response to Aloha Utilities, Inc.'s Revised Motion to Establish Issues

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

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Enclosure

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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: January 23, 2003

/

ADAM SMITH ENTERPRISES, INC.'S RESPONSE TO ALOHA UTILITIES, INC.'S REVISED MOTION TO ESTABLISH ISSUES

Adam Smith Enterprises, Inc. ("Adam Smith"), through its undersigned counsel, responds to Aloha Utilities, Inc.'s ("Aloha") Revised Motion to Establish Issues, and states:

1. Much of Aloha's Revised Motion to Establish Issues is devoted to the argument that the April 16, 2002 effective date of Aloha's revised service availability charge that the Commission established in Order No. PSC-02-1250-SC-SU is properly at issue in this proceeding. In the interest of avoiding duplication of effort, as part of its response to Aloha's motion Adam Smith incorporates by reference the arguments contained in its Motion to Confirm as Final the April 16, 2002 Effective Date of Revised Service Availability Tariff, which motion is presently pending before the Commission. For ease of reference, Adam Smith is providing a copy of the motion as **Attachment A**.

2. Aloha argues, among other things, that the subject of the effective date of the revised tariff and the subject of backbilling are so intertwined that one cannot be raised without entangling the other.[1] The transcript of the August 20, 2002 agenda conference during which the Commission entered its decision on the PAA items of Order No. PSC-02-1250-SC-SU provides *proof positive* that this is not so. At an early point during the decision conference, the Commission voted to establish April 16, 2002 as the effective date of the revised sewer service

[1] In its motion, Aloha also attributes this view to Staff.

availability charge tariff. (TR-49) With the decision on the effective date in place, the Commission later turned to the issue of backbilling. Significantly, Chairman Jaber then posed this question to Counsel for Aloha:

> CHAIRMAN JABER: Ms. Brownless, one of the things I've had trouble with on the backbilling rule is, are companies allowed to backbill customers for utility mistakes and they have a tariff on file?
>
> MS. BROWNLESS: Yes, Ma'am.
>
> CHAIRMAN JABER: So with what we just approved on Issue 6, that the replacement tariff will be effective post April 16th, I think is (sic) we just said, *how can the company be authorized to backbill for any period before then?* (TR-54) (Emphasis provided).

3. In Aloha's answer to that question -- which, because of its length, is appended to this pleading as **Attachment B** -- Counsel for Aloha proceeded to argue that case law and the Commission's backbilling rule provide authority to permit Aloha to backbill under the circumstances posed by Chairman Jaber. Significantly, Aloha did *not* argue that such authority is dependent on a decision by the Commission to unravel its analysis and repudiate its decision on the April 16, 2002 effective date -- to which Chairman Jaber specifically referred in the question that she posed to Counsel for Aloha.

4. From the time of the Commission's vote on the effective date, the Commissioners understood, Staff understood, and *Aloha understood*, that from that point forward the question became: *GIVEN* the April 16, 2002 effective date of the revised service availability charge of $1,640/ERC, can the Commission authorize Aloha to collect from developers/builders the differential between that amount and the $206.75/ERC charge associated with the tariff that was in place during the period May 23, 2001 – April 16, 2002? While some Commissioners openly expressed misgivings regarding the validity of this "backbilling" proposed action, the Commission voted to allow Aloha to "attempt" to collect the differential *notwithstanding* the

April 16, 2002 effective date. Order No. PSC-02-1250-SC-SU was prepared and issued accordingly.

5. As Adam Smith pointed out in the motion appended as Attachment A, in its formal request for Hearing *Aloha* treated the April 16, 2002 effective date as a given. Aloha's belated contentions that (a) it "directly" protested the effective date and (b) alternatively, even if it didn't, it "indirectly" protested the effective date; and (c) alternatively, even if it didn't, the subjects are "intertwined," constitute a disingenuous effort to revise history. Aloha's argument overlooks that in establishing the April 16, 2002 effective date the Commission took into account the following: Aloha failed to file the tariff for close to a year; based on the representation that it had been collecting the higher charges, Aloha sought and received from Staff an administrative "backdating" of a March 2002 tariff; prior to April 2002, Aloha had never provided notice to affected developers/builders or collected the higher charge; Aloha did not substantially complete providing notice to affected developers until April 16, 2002; in its order the Commission explicitly repudiated the "updated" May 23, 2001 date. All of this was spelled out in the PAA. None of it was disputed or protested by Aloha.

6. Thus, Aloha's revision would stand the analysis of the Commission that led to the PAA Order on its head. In the PAA, the Commission reviewed the facts and set the effective date accordingly. Here, Aloha begins with the desire to backbill, and invites the Commission to back into an effective date designed to help legitimize that result.

7. In short, Aloha attributes to the Commission's treatment of the effective date and "backbilling" a relationship that never existed. The Commission should recognize that, in an effort to bolster its litigation posture with regard to "back*billing*," Aloha is now engaged in "back*filling*."

8. Aloha also argues that the Commission created an opportunity to expand issues in Order on Procedure No. PSC-02-1460-PCO-SU, in which the Commission placed boiler plate language regarding the parties' ability to identify issues until the date of the Prehearing Conference. However, the Commission cannot – nor did it purport to -- expand the scope of the proceeding established by operation of Section 120.80(13)(b), Florida Statutes through the issuance of an order on procedure. That section limits matters for hearing to the items identified in the parties' protests. Even if one were to assume, for the purpose of argument, some discretion on the part of the Commission to include incidental matters necessary to the resolution of the items identified in the protests, by no stretch of the imagination can Section 120.80(13)(b) be read to authorize the inclusion of *unprotested* matters which a party wants to raise in order to enhance the ability to withstand a legal challenge of a proposed action that *was* protested. In other words, the fact that the April 16, 2002 effective date is "inconsistent" with the "backbilling" portion of the PAA may (as the Commission's General Counsel pointed out on August 20, 2002) render the "backbilling proposed action" subject to challenge, but that does not -- absent a separate protest, missing in this case -- place the April 16, 2002 effective date at issue.

9. With respect to the issue lists attached to Aloha's Motion to Establish Issues, Adam Smith notes that the lists do not mention an issue relating to Adam Smith's developer agreement. (During the August 20, 2002 agenda conference, Aloha vigorously resisted the notion that this docket is the appropriate venue for a determination of the amount that a particular developer owes Aloha. See Transcript at page 22, appended as **Attachment C**.) Aloha's limited protest, Aloha's argument during the decision conference, and the issue lists that Aloha attached to its motion all support the granting of Adam Smith's pending Motion to Strike Portions of the

Prefiled Testimony of Stephen G. Watford Relating to Potential Contract Dispute, which Adam Smith incorporates by reference. A copy is attached as **Attachment D**.

10. Finally, with respect to Aloha's proposed rewording of issues, Adam Smith objects strenuously to Aloha's effort to delete all references to the prior and current wastewater service availability tariffs. The crux of this case is the fact that Aloha had in place during the period May 23, 2001 – April 16, 2002 a valid tariff that specified a charge of $206.75/ERC, and wants now to apply to the same period a revised, higher charge found in a new tariff. With its proposed language, Aloha hopes to obscure the fundamental facts of the case by deleting all references to former and later tariffs and substituting a single dollar amount it wants to collect. The causes of clarity, neutrality, effective education of the reader, and conformity to the facts of the case require that the issue be framed so as to include references to the tariff that was in place and the tariff that Aloha filed a year later.

11. Further, Adam Smith would point out that, at different points in the PAA order, when discussing the possibility of "backbilling" the Commission referred variously to the entitles from whom Aloha might seek to collect the differential as "developers," "builders," and "customers:"

> Our staff recommended that under the circumstances of the instant case, Aloha should not be authorized to backbill customers for the approved service availability charges that it should have collected for connections made between May 23, 2001 and April 16, 2002. We reject our staff's recommendation in this regard. At the agenda conference, Aloha agreed to the imputation of the full amount of foregone collections if Aloha were afforded the opportunity to backbill developers who did not pay. We hereby authorize Aloha to backbill the developers and builders in question and to exercise its ability to try to collect its approved service availability charges pursuant to Order No. PSC-01-0326-FOF-SU. (Order No. PSC-02-1250-SC-SU at pg. 13).

The word "developers" has since been used as a kind of shorthand. The issue should be worded so as to avoid any inference that the party responsible for a service availability charge applicable

to a given lot is necessarily a "developer." A neutral wording will avoid the possibility that the Commission could be misconstrued in the event the question of who is responsible for a particular lot/connection arises in the future. Adam Smith's suggested language is appended as **Attachment E**. If Adam Smith's wording is not used, then Staff's formulation should be modified to refer to "developers/builders."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Adam Smith Enterprises, Inc.'s Response to Aloha Utilities, Inc.'s Revised Motion to Establish Issues was sent via (*) Hand Delivery, (**) Electronic mail or U.S. Mail on this 23rd day of January 2003 to the following:

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Joseph A. McGlothlin

ATTACHMENT A

FILE COPY

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: January 15, 2003

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ADAM SMITH ENTERPRISES, INC.'S MOTION TO CONFIRM AS FINAL THE APRIL 16, 2002 EFFECTIVE DATE OF REVISED SERVICE AVAILABILITY TARIFF AND MOTION TO STRIKE TESTIMONY ON EFFECTIVE DATE

Pursuant to Rule 28-106.204, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), moves for an order confirming as final the effective date of April 16, 2002 that the Commission imposed on Aloha Utilities, Inc.'s ("Aloha") revised sewer service availability tariff in the Proposed Agency Action portion of Order No. PSC-02-1250-SC-SU. Based on the April 16, 2002 effective date that the order established with finality through the operation of law, Adam Smith also moves to strike portions of the prefiled testimony of Aloha witness Stephen Watford.

MOTION TO CONFIRM EFFCTIVE DATE OF APRIL 16, 2002

Argument

The April 16, 2002 date in Order No. PSC-02-1250-SC-SU was not protested and became final and effective by operation of law.

1. Section 120.80(13)(b), Florida Statutes states: "Notwithstanding Subsection 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Accordingly, those aspects of a PAA order that are not

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specifically protested become final and effective by operation of law. The Commission has recognized and applied this requirement on numerous occasions, and in a variety of contexts. Examples include Order No. PSC-01-2212-PAA-FP, entered in Docket No. 000808-EI on November 15, 2001 ("Pursuant to Section 120.80(13)(b), Florida Statutes, issues in a proposed agency action which are not in dispute are deemed stipulated. Gulf protested that part of the PAA Order denying recovery of the wetland mitigation plan through the ERC, but did not protest that part of the PAA pertaining to consumptive use monitoring"); Order No. PSC-01-1548-PCO-WS, entered in Docket No. 980992-WS on July 26, 2001 ("Pursuant to Section 120.80(13)(b), Florida Statutes, the hearing in this matter may only address the issues in dispute (i.e., protested). Issues in the PAA order which are not in dispute are deemed stipulated"); Order No. PSC-01-0084-FOF-EI, entered in Docket No. 991779-EI on January 10, 2001 ("no person challenged Item 4 of Part III of Order 00-1744. Pursuant to Section 120.80(13)(b), Florida Statutes, Item 4 is deemed stipulated"); and Order No. PSC-01-0051-PAA-TP, entered in Docket No. 981444-TP on January 8, 2001 ("Specifically, the Joint Petitioners protested and sought a hearing regarding only the portions of the PAA Order that related to. . . The remaining portions of the PAA Order were not protested by the Joint Petitioners and were deemed stipulated pursuant to Section 120.80(13)(b), Florida Statutes.") In Order No. PSC-98-1254-FOF-GU, entered in Docket No. 970365-GU on September 22, 1998, the Commission approved and adopted the Recommended Order of the Administrative Law Judge assigned to the case, who stated, in his "Conclusions of Law":

> 54. Section 120.90(13)(b) (sic) provides that "a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." ***Therefore, this proceeding may only address the issues disputed in Petitioner's petition for a formal hearing.***

Order No. PSC-98-1254-FOF-GU, at page 12. (emphasis added).

2. Similarly, as Adam Smith will show, in the instant case no party disputed or protested the effective date of April 16, 2002; it is therefore deemed stipulated by operation of statute, and cannot be the subject of the hearing on disputed matters.

3. In Order No. PSC-02-1250-SC-SU, based on undisputed facts concerning the date on which Aloha substantially accomplished written notice of the revised service availability charge to affected developers and builders, the Commission required Aloha to submit a replacement tariff sheet and determined the effective date of Aloha's revised service availability charge tariff to be April 16, 2002.[1] In the order, the Commission stated:

> The [revised service availability charge] tariff sheet will be stamped effective for connections made on or after April 16, 2002, the date that Aloha substantially completed noticing to developers and builders who were connected to the system by April 16, 2002.

Order No. PSC-02-1250-SC-SU, at page 21-22.

4. The portion of Order No. PSC-02-1250-SC-SU relating to the effective date of the service availability tariff was issued as a Proposed Agency Action (PAA) item. In the same order, also issued in the form of PAA, the Commission separately proposed to impute an amount of CIAC represented by the amount of forgone service availability charges for the period May 23, 2001 through April 16, 2002 (the period of time during which Aloha failed to file the revised tariff, provide notice to affected developers and builders, and collect the higher charge). It also proposed to allow Aloha to attempt to apply the revised service availability charge to

[1] The Commission's determination of the effective date was premised upon these undisputed facts: (1) Prior to March 11, 2002, Aloha had not submitted a revised service availability tariff; (2) prior to April 12, 2002, Aloha had never collected the increased service availability charge; and (3) Aloha did not substantially complete providing notice of the increased service availability charge to affected developers and builders until April 16, 2002. See Order No. PSC-02-1250-SC-SU.

connections made during the period May 23, 2001 through April 16, 2002.[2] The order required any protests to the PAA components to be filed by October 2, 2002.

5. Aloha, which earlier had attempted to rely on a tariff that it had filed on March 11, 2002 (and that Staff – acting on the erroneous belief that Aloha had been collecting the higher charge – had mistakenly backdated to May 23, 2001), promptly submitted the revised tariff sheet required by Order No. PSC-02-1250-SC-SU. In its letter of transmittal, Aloha acknowledged that the only difference between this tariff and the (discredited) tariff it superseded was the change in the effective date from May 23, 2001 to April 16, 2002.

6. On October 2, 2002, Aloha filed its protest to the PAA order, which it styled as its Request for Hearing. The portion of Aloha's protest in which Aloha identifies the matters in dispute appears in the section identified as "Disputed Issues of Fact and Law." Aloha identified only the subject of CIAC. The section states:

> The following issues have been identified by Aloha as disputed issues of material fact in this proceeding:
>
> Issue 1: Does the imputation of CIAC without the ability to fully backbill for the undercollected service availability charges, which should have been collected from May 23, 2001 to April 16, 2002 constitute a taking?
>
> Issue 2: 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?

Aloha's Request for Hearing at 3-4.

7. In a footnote, Aloha emphasized that it was challenging *only* the proposed imputation of CIAC, and that its protest was "contingent" in nature:

> Aloha wishes to make 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 should Aloha's Motion

[2] Adam Smith timely protested the portion of the PAA in which the Commission proposed to allow Aloha to apply the higher change retroactively.

> for Reconsideration and Clarification . . . not be granted. . . If, for whatever reason, the Commission reverses its decision to authorize 100% backbilling, Aloha will go to hearing. If, however, the Commission sticks with its decision to allow 100% backbilling, Aloha will withdraw its request for hearing.

Aloha's Request for Hearing at page3, footnote 3.

8. The footnote in Aloha's Request for Hearing underscores the complete absence of the effective date subject from its protest. Aloha protested the imputation of CIAC; Aloha alluded to the "backbilling" feature that would induce it to withdraw its protest of the CIAC imputation; Aloha *did not protest* the effective date.

9. Indisputably, in the PAA portion of Order No. PSC-1250-SC-SU, the Commission determined the date on which Aloha provided affected developers and builders with written notice of the increased service availability charge; applied the requirements of Rule 25-30.475(2) regarding the relationship of the requirement of prior notice to the effective date of a tariff; repudiated the "backdated" tariff that Aloha had submitted on March 11, 2002; imposed the requirement of a revised, replacement tariff; and determined the effective date of the revised tariff to be April 16, 2002. Indisputably, in its Request for Hearing Aloha did not dispute or protest either the April 16, 2002 effective date established in the PAA or the Commission's basis for establishing that date.[3] Aloha protested only the portion of the PAA related to the imputation of CIAC.

10. *After the fact,* in much the same way that it attempted to overhaul the Commission's PAA order through an elaborate and inappropriate "motion for clarification" earlier in the case, Aloha is now trying -- by belatedly attempting to treat the "effective date" as

[3] In fact, when identifying the matters to which it objected, in its Request for Hearing Aloha implicitly recognized the April 16, 2002 effective date as a "given" in the case. If the effective date were anything other than April 16, 2002, there would be no occasion for Aloha to define, *in its protest,* the period May 23, 2001 through April 16, 2002 as the period during which higher charges "should have been collected."

an issue[4] -- to enhance its litigation position and alter the posture of the Commission's PAA. Given the effect of Section 120.80(13)(b) and the fact that no party, including Aloha, protested the effective date that the Commission issued as PAA, Aloha's attempt is improper, illegal, and of no effect.

11. This result is not changed by the fact that Aloha *did* protest the Commission's proposed action to impute CIAC in the amount of forgone service availability charges for the period May 23, 2001 through April 16, 2002. Aloha cannot parlay or leverage either its limited protest or its "statement of purpose" into a protest of the April 16, 2002 effective date. The reason is simple: the proposed effective date, the proposed imputation of CIAC, and the proposed "backbilling authority" *were treated as separate and distinct subjects in the PAA*. In other words, in the PAA portion of Order No. PSC-02-1250-SC-SU the Commission separately and simultaneously (a) determined the effective date of the revised service availability tariff to be April 16, 2002; (b) proposed to impute CIAC for the amount of higher service charges not collected prior to April 16, 2002; and (c) proposed to allow Aloha to attempt to apply the higher charge to connections made prior to April 16, 2002.[5] Because these were separate proposals, a protest of one does not constitute a protest of another. In another pleading Aloha has asserted, in effect, that Aloha must be deemed to have *implicitly* protested the April 16, 2002 effective date because it wants to "backbill," and the April 16, 2002 effective date is problematic in that regard. See Aloha's Motion to Strike, or in the Alternative, Response to Adam Smith's Motion for Reconsideration at 5-6. In other words, Aloha wants to use the end result it hopes to reach in the case as a starting point; proceed to "back into" an identification of additional matters on

[4] Aloha has (erroneously) portrayed the effective date as being at issue in pleadings related to discovery, and has prefiled testimony supporting an effective date other than April 16, 2002.

[5] In fact, at the outset of its Request for Hearing Aloha noted that "backbilling" (Issue 3), imputation of CIAC (Issue 4), and effective date (Issue 6) were addressed as separate issues in the PAA.

which it was silent in its protest but that it could have or should have protested to help enhance its litigation position; and regard the missing component as an "implied protest." In view of the clear requirement of Section 120.80(13)(b) that an affected party affirmatively protest the specific portion of the PAA with which it is aggrieved to avoid stipulating to the action proposed, Aloha's argument amounts to no more than wishful thinking.

12. Neither Aloha nor any other party protested the April 16, 2002 effective date, which became final by operation of law. Neither Aloha, nor any other party, nor the Commission can now attempt to challenge or revise the April 16, 2002 effective date for the purpose of anticipating or avoiding issues or infirmities associated with the interplay between the April 16, 2002 effective date and the Commission's other proposed actions.

CONCLUSION

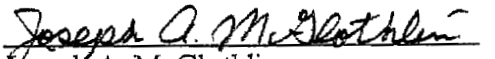
Florida Statutes §120.80(13)(b) clearly provides that any portion of a PAA issued by the Commission that is not identified as the subject of an objection is "deemed stipulated." The Commission's approval of April 16, 2002 as the effective date of the tariff was not identified by Aloha in its Request for a formal hearing as a disputed issue. ***No party protested*** the portion of the PAA that established the effective date of the tariff to be April 16, 2002. Thus, the effective date of April 16, 2002 was "deemed stipulated" by operation of law. Section 120.80(13)(b), Florida Statutes. As a matter of law, the April 16, 2002 effective date is not at issue in this proceeding.

WHEREFORE, Adam Smith requests that the Commission enter an order confirming the effective date of Aloha's revised service availability tariff to be April 16, 2002.

MOTION TO STRIKE PREFILED TESTIMONY
RELATING TO EFFECTIVE DATE

As part of this Motion to Strike, Adam Smith incorporates by reference the above Motion to Confirm Effective Date. For the reasons stated in the above motion, by Order No. PSC-02-1250-SC-SU the Commission established the effective date of the service availability tariff to be April 16, 2002. The portion of the PAA relating to the effective date of the tariff was not protested and, pursuant to statute, is deemed stipulated in this proceeding. Yet, in prefiled testimony submitted on January 6, 2003, Aloha witness Stephen Watford attempts to sponsor testimony advocating a different effective date. For the reasons set forth in the above motion, the Commission should strike page 13, line 5 through page 16, line 2, inclusive, of Mr. Watford's prefiled direct testimony.

WHEREFORE, Adam Smith moves for an order striking from the prefiled testimony of Aloha witness Stephen Watford the testimony identified herein.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Adam Smith Enterprises, Inc.'s Motion to Confirm Final the April 16, 2002 Effective Date of Revised Service Availability Tariff and Motion to Strike Testimony on Effective Date was sent via (*)Hand Delivery, (**) Electronic mail or U.S. Mail on this 15th day of January 2003 to the following:

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ATTACHMENT B

of Aloha has already lost her job over this, a longstanding employee. That's not in their best interest. They don't want to make that kind of mistake.

Well, what about the law firm who failed to file the tariff? They certainly don't want to make this kind of mistake, because it may be that ultimately the law firm ends up having to provide money that is not allowed to be collected from the developers. Nobody in private practice wants that type of claim against their errors and omissions policy.

This is without a doubt on the part of the utility a mistake.

CHAIRMAN JABER: Ms. Brownless, one of the things I've had trouble with on the backbilling rule is, are companies allowed to backbill customers for utility mistakes and they have a tariff on file?

MS. BROWNLESS: Yes, ma'am.

CHAIRMAN JABER: So with what we just approved on Issue 6, that the replacement tariff will be effective post April 16th, I think is what we just said, how can the company be authorized to backbill for any period before

then?

MS. BROWNLESS: You have also allowed companies to backbill in the Mid-County case when there was no tariff on file at all because the order of the Commission set that rate. The position that you're taking here and the position that you took to the utility is that when the initial mistake was discovered, you said, "Well, you obviously failed to file the tariff," and we said, "That's right." You said, "Well, have you been collecting the money? What about that? If you've been collecting the money, notwithstanding the fact you didn't have a tariff on file, that's going to be fine, and we'll file this administrative tariff."

CHAIRMAN JABER: Staff said that.

MS. BROWNLESS: Yes, ma'am. And that is consistent with your Mid-County decision. That's what you decided in that. I think it's a 1999 case.

CHAIRMAN JABER: Remind me what the Aloha order said with respect to approval of the tariffs. Would you -- I know it's --

MS. BROWNLESS: The Aloha order --

CHAIRMAN JABER: -- in the recommendation,

but if you could remind me what the actual language is.

MS. BROWNLESS: This is the language of 01-0326. These are the ordering paragraphs. First of all, it says Aloha shall charge the increased service availability charges as set forth in the body of this order and shall file an appropriate revised tariff sheet within 20 days of the date of this order. Then you go in one, two, three, four paragraphs to say that prior to the implementation of the rates and charges, Aloha shall submit and have approved revised tariff sheets. The revised tariff sheets will be approved upon staff's verification that they are consistent with this decision and that the proposed customer notice is adequate. And that basically tracks the effective date tariff rule that you have.

CHAIRMAN JABER: Okay. And then Mid-County you've cited to as an example. What were the circumstances of that case?

MS. BROWNLESS: The circumstances of that case were that a utility acquired a whole development. They had an existing tariff on file. They were ordered by the Commission to

apply those existing rates or file another set of tariff rates for this new 242 development, and they simply didn't do so. But they collected the rates they were supposed to for a period of six years before folks figured out that they didn't have a tariff on file. So --

CHAIRMAN JABER: And they were allowed to backbill for what? You said there was a backbilling issue with them?

MS. BROWNLESS: There was not a backbilling issue for them, but the point is that you allowed them to collect those tariffs based upon solely the Commission's order that those tariffs should be in effect.

And if you think about it, you would like to impute CIAC based solely upon the fact that the Commission ordered the utility to implement those rates, so it occurs to me that you ought to be consistent across that front.

I believe that the Commission does have the ability to interpret your backbilling rule, but you don't have the ability to do such interpretation unless the plain language of the rule is ambiguous. The plain language of this rule is not ambiguous. I mean, it is clear on

its face, and on its face, Aloha should be allowed to backbill.

I would also argue that the Commission is bound by its rules, just as the utilities are bound by their rules. And if you look at the instances in which a utility can request a waiver from the rule, they have to show that they're going to have a substantial hardship if they comply with the rule or that failure -- that if you don't let them waive the rule, it's going to violate the principles of fairness.

I would suggest to you that if you want to deviate from your own rule, you must also meet those same standards. And in this instance, not allowing Aloha to backbill for the 12-month period certainly constitutes a substantial hardship on them, and that is particularly true when you couple it with the fact that you would impute the very CIAC you're not allowing them to collect, and it would violate the principles of fairness.

The staff has cited Gulf Utility Company and the Rainbow Springs Utility Company as examples of previous cases in which an honest mistake was made, but the utility was not

allowed to backbill. And here are the five things that the staff has cited as being mitigating circumstances there that should apply here:

First, that there were multiple opportunities by the utility to find the error. And I would suggest to you that that's a question of the passage of time. Certainly as more time goes by and an error remains in place over a greater period of time, there's a greater amount of time when you could have found your error.

Second, the utility didn't advise customers of what the real charges were.

Third, the customer has relied upon the utility's representation to their detriment.

Fourth, the customer has paid substantial sums. In the Gulf Utilities case, he did pay a significant amount of CIAC.

And fifth, that both parties had completed performance of their actions. In the Gulf Utility case, the customer had disconnected his well and connected up to the utility system, and in the Rainbow Springs case, the customers had connected up irrigation wells.

Well, I would suggest to you that in absolutely every instance in which a utility fails to collect the right amount of service availability fee, you're going to meet four of these five criteria. There's always going to be ample opportunity to discover the error, particularly as time passes on. You will never have advised the customer of the real charge, because if you had done so, you would have collected it.

The customer will have always detrimentally relied upon the representation to a greater or lesser extent, even if that detrimental reliance consists of consummated or made plans based upon a certain amount of fee, which really is what SRK is complaining about here. In other words, if we had known that the service availability fee was going to be $5 million, we would have gone to HUD and asked for more. You're always in service availability cases going to have that situation.

And finally, you're always going to have a situation where the utility has performed their part of the bargain. They've hooked them up, and the guy -- you know, they've done their

piece, and the person paying the fee has done their piece. And I want to remind you that in the H. Miller & Sons case, the fact that the parties had a contractual agreement and had performed each piece of the bargain was specifically rejected by the Court. That's exactly what the H. Miller people argued. They said, "Look, we signed a developer agreement. We agreed to pay this much money, and you're impairing our contract. We've done what we were supposed to. You can't change the rules on us now." Well, the Court specifically rejected that argument.

So what I'm suggesting to you here is that the case law that's being cited here has so compromised your rule that your rule, it can never be applied. You've essentially eviscerated your own rule. There's never going to be any instance in a service availability undercharge case where the utility can collect the money. And when you do that, you are confiscating the utility's property. The confiscation issue that was originally argued by the Florida Waterworks Association has in fact come to pass.

I don't think the Commission can deny the utility the use of the backbilling rule and have it essentially turn into a penalty. As I've argued before, I think your ability to penalize a utility because you don't like them, or you think their management is poor, or you believe that they are not doing what they're supposed to do is limited to what's in 367.161, which we've discussed before. You can fine them $5,000 a day, you can amend, suspend, or revoke their certificate, and that's what you can do.

And I would also say here that in the staff's recommendation, they're saying, "Well, look, this is really unfair, because the developers detrimentally relied on a certain amount of service availability fee." Well, there's nothing in this record to say that the developers would have lowered the price of their homes or raised the price of their homes to cover this fee. It has been my experience in the real estate business that you charge the fair market value or whatever you can get for your home.

The real impact on these developers is that they may lose a certain amount of profit that

they otherwise would make. But the truth is that they may have had those homes priced at what the market would bear anyway, and there's nothing in this record that indicates the developers would have been able to pass on these increased fees to their homes.

So for these reasons, I would say that Aloha has met the criteria for being able to backbill, and if you do not allow them to backbill, that you're using this denial and this waiver of your own rule -- you're waiving it incorrectly to start with, and you're actually using it as a penalty.

CHAIRMAN JABER: Thank you, Ms. Brownless.

Mr. Burgess, like the previous issue, is this an issue you don't take a position on?

MR. BURGESS: No, Commissioners. I think we would like to speak to it very briefly.

CHAIRMAN JABER: Go ahead.

MR. BURGESS: We agree with the staff recommendation. We agree that the Commission has discretion in allowing backbilling. We think that in this case, the circumstances and the equities speak loudly against allowing Aloha to do any backbilling. The amount of the

ATTACHMENT C

second, that injury that had been identified has to be the type of injury that the proceeding is designed to protect. And we don't think Ms. Kiesling's client meets either prong of this test.

It doesn't meet the first test because the injury to her client of setting the effective date is highly speculative. We don't think this is the forum to get into litigating what is the appropriate service availability fee that Ms. Kiesling's client should have paid. We believe that's resolved in a complaint proceeding and that that's the vehicle that should be used to address that tissue.

However, if you look at what Ms. Kiesling has written in her request for intervention, she's basically saying no matter what the effective date of this tariff, it shouldn't be applied to us, because here are a whole list of mitigating circumstances why it shouldn't be applied to us.

So I would argue that this is not -- whatever effective date is determined here, Ms. Kiesling is going to argue that it shouldn't apply to her anyway because she has mitigating

ATTACHMENT D

BEFORE THE PUBLIC SERVICE COMMISSION

FILE COPY

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: January 17, 2003

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MOTION TO STRIKE PORTIONS OF THE PREFILED TESTIMONY OF STEPHEN G. WATFORD RELATING TO POTENTIAL CONTRACT DISPUTE

Pursuant to Rule 28.106.204, Florida Administrative Code, Adam Smith Enterprises, Inc. (Adam Smith), files this motion to strike portions of the testimony of Aloha Utilities, Inc. (Aloha) witness Stephen G. Watford. Specifically, Adam Smith moves to strike page 4, line 21, through page 13, line 4 of the prefiled testimony. In the testimony, Mr. Watford proffers opinions and arguments concerning Aloha's interpretation of the developer agreement between Aloha and Adam Smith. The subject of the testimony, a potential contractual dispute between Aloha and Adam Smith (1) is a matter that, because it necessarily would involve contract interpretations, claims of breach of contract, and claims for damages, would fall within the jurisdiction of a circuit court, not the Commission; and (2) is not in the nature of a challenge to an action proposed by the Commission in PAA Order No. PSC-02-1250-SC-SU.[1] In addition, the testimony is largely in the nature of improper legal argument.

BACKGROUND

1. On September 11, 2002, the Commission issued Order No. PSC-02-1250-SC-SU in this docket. The order included several actions that the Commission undertook through

[1] Further, the potential dispute will become moot in the event the Commission resolves Adam Smith's protest in Adam Smith's favor.

Proposed Agency Action. They included: (1) the establishment of an effective date of April 16, 2002 for Aloha's increased sewer service availability tariff; (2) the imputation of CIAC in the amount of service availability charges forgone during the period May 23, 2001 through April 16, 2002, due to Aloha's failure to file a tariff as directed by Commission order and its related failure to notify affected developers and builders of the change; and (3) a proposal to allow Aloha to attempt to apply the new service availability charge to connections that occurred between May 23, 2001 and April 16, 2002.

2. On October 2, 2002, Adam Smith protested the PAA portion of Order No. PSC-02-1250-SC-SU in which the Commission purported to authorize Aloha to collect the differential in service charges from developers and builders who paid charges to Aloha during the period May 23, 2001-April 16, 2002. In its pleading, Adam Smith noted that Aloha was trying to collect from Adam Smith the differential in charges pertaining to many lots that Adam Smith had sold to others prior to the time they were connected to Aloha's system.

3. On December 18, 2002, parties and Staff participated in an informal "issue identification" meeting. Adam Smith proffered, as a proposed stipulation of law, the proposition that any responsibility for an increase in service availability charges belongs to the entity that owns the lot at the time of connection. (Adam Smith regards this as a corollary of the decision in the case of *H. Miller and Sons, Inc. v. Hawkins,*[2] in which the court determined that the amount of service availability charge applicable to a given lot is to be determined as of the date that the lot is connected.) In response, Aloha orally asserted that the developer agreement between Aloha and Adam Smith places a contractual obligation on Adam Smith to pay any and all

[2] 373 So.2d 918 (Fla. 1979)

increases in service availability charges applicable to a given lot, *whether or not* Adam Smith owns the subject property at the time the lot is connected to Aloha's system. However, the dispute over the interpretation of the developer agreement to which Aloha's contention gives rise would fall under the jurisdiction of the judiciary, not the Commission. *Neither Aloha nor any other party identified a dispute over the interpretation of the developer agreement between Adam Smith and Aloha on any of the "preliminary issue lists" that were circulated then and afterwards.*

4. On January 6, 2003, Aloha filed the prefiled direct testimony of Stephen G. Watford. From page 4, line 20 through page 13, line 4 of his testimony, Mr. Watford argues Aloha's interpretation of the developer agreement between Aloha and Adam Smith, and asks the Commission to construe the terms of a contract and/or adjudicate a future contractual dispute. For the following reasons, the testimony should be stricken.

ARGUMENT

5. The Commission's authority over water/wastewater utilities subject to its regulatory powers is limited by § 367.101, Florida Statutes, to those proceedings related to "authority, service and rates." When carrying out these regulatory responsibilities, frequently the Commission deals with certain aspects of developer agreements. The Commission approves such developer agreements (Rule 25-30.550(1), Florida Administrative Code). The Commission can also (subject to requirements of statutes and rules, including those related to the reasonableness of rates, the obligation to provide notice to affected parties prior to the effective date, and the prohibition against retroactive ratemaking) modify, prospectively, the rates contained in a developer agreement. Rule 25-30.560(2), Florida Administrative Code provides a mechanism under which a developer may complain to the Commission that the utility has failed to provide

service consistent with the agreement.[3] However, while developer agreements represent a significant *regulatory* tool related to the functions of the Commission in the areas of "authority, rates, and service," there are important limits on the Commission's jurisdiction with regard to contracts between regulated water/wastewater utilities and developers. The Commission has observed that it "does not have jurisdiction to determine the legal rights and obligations pursuant to contracts nor can it award damages *of any sort*."[4] The Commission has over time reiterated its inability to delve into contractual disputes.[5]

6. A useful analogy can be drawn to the Commission's role in the formation of contracts between electric utilities and cogenerators that are Qualifying Facilities under federal law. The Commission approves such contracts if they meet the Commission's standards and regulations governing cost recovery. However, as the Commission determined in Order No. PSC-95-0209-FOF-EQ,[6] the resolution of contractual disputes between QFs and purchasing utilities, questions of contract interpretation, and claims for damages by parties to the agreement that arise after the contract has been approved for regulatory purposes, fall under the jurisdiction of the courts, not the Commission.

7. The same is true with respect to developer agreements between regulated water/wastewater utilities and developers. When establishing the rates to be charged by the utility, the Commission has primary -- even preemptive-- jurisdiction. However, contract interpretations, the resolution of contract disputes, and the awarding of damages for the claimed

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[3] It is clear that the rule contemplates the scope of the complaint would be the area of rates and service that are within the regulatory province of the Commission.

[4] *In re: Complaint of Naples Orangetree, Inc. against Orange Tree Utility Company in Collier County for refusal to provide service*, Docket No. 940056-WS, Order No. PSC-94-0762-FOF-WS, June 21, 1994 (emphasis added).

[5] *In re: Application for Staff-assisted rate case by CWC Communities, LP d/b/a Palm Valley,* Docket No. 010823-WS Order No. PSC-02-1111-PAA-WS, August 13, 2002.

[6] *In re: Petition for resolution of a cogeneration contract dispute with Orlando Cogen Limited, L.P., by Florida Power Corporation*, Docket No. 940357-EQ, Order No. PSC-95-0209-FOF-EQ, February 15, 1995.

breach of the contract remain the province of courts.[7] This view is consistent with the case of *Hill Top Developers v. Holiday Pines Service Corp.*[8] In that case, the utility sued a developer in circuit court for failure to pay additional amounts that the utility claimed the developer owed for service. The additional amounts were based on charges that had not been approved by the Commission. The trial court dismissed Hill Top's counterclaim for $25,000 in additional charges it had paid, and barred it from pursuing a defense based upon the absence of Commission approval for the additional charges sought by Holiday Pines. The Second District Court of Appeals reversed the trial court and ordered Holiday Pines' complaint dismissed because the trial court lacked subject matter jurisdiction to award Holiday Pines a judgment absent Commission approval of the charge. The DCA recognized that after the PSC had exercised its statutory authority with respect to the charge "a juridically [sic] cognizable debt would exist if the charge were not satisfied."[9]

Applying the holding of *Hill Top* to the instant case, Adam Smith agrees that the Commission has jurisdiction to establish the tariffed service availability charge applicable (again, subject to the standards and limitations delineated above) to the party responsible for such charges at the time the lot is connected to Aloha's system. However, the establishment of the rate to be included in a utility's tariff must be distinguished from the interpretation of contract terms that bear on the extent of obligations to pay service availability charges. A dispute over whether the terms of the developer agreement bind Adam Smith to pay additional service

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[7] *Cohee v. Crestridge Utilities Corp.*, 324 So.2d 155 (Fla. 2d DCA 1975). *See also In re: Application of Lake Tarpon Homes, Inc. for a staff-assisted rate case in Pinellas County*, Docket No. 890442-WU, Order No. 22160, November 7, 1989.

[8] 478 So.2d 368 (Fla. 2d DCA 1985).

[9] *Id.* at 371.

availability charge for a connection, even after it has sold the property that is the subject of the connection and the application to Aloha for connection is made by a new and different entity, involves an interpretation of the contract that would fall within the province of the courts, not the Commission.

8. During the period May 23, 2001-April 16, 2002, Aloha connected hundreds of lots as a result of a myriad of transactions between Aloha and numerous builders, developers, and homeowners. Certainly, when the Commission proposed to authorize Aloha "to try to collect"[10] the differential in charges from those many entities, the Commission did not contemplate that it would referee individual disputes between Aloha and dozens of entities regarding the details of their relationships and the extent of the liability of each under their contractual arrangements. It would be the height of irony for the proceeding initiated by the only developer who is protesting the Commission's *regulatory, ratemaking* proposed action to be converted into an adjudication of Adam Smith's individual *contractual* obligations. Indeed, so that there is no ambiguity in the event that Aloha's contention is presented to a court at some point, it is incumbent on the Commission in this case to disavow any intent to resolve any contractual disputes that may arise in the future as a result of its disposition of the regulatory matters before it.

9. On page 10, line 4–line 12 of his testimony, Mr. Watford -- a fact witness -- offers improper legal argument. Specifically, he opines on the import of *H. Miller and Sons, Inc. v. Hawkins*[11] to the proceeding. Mr. Watford is the president of Aloha. In his testimony he states his purpose is to address the *facts* surrounding the case. (Testimony of Stephen G. Watford, page 2, line 4) Mr. Watford does not state that he is an attorney; nor is his "testimony" limited to

[10] Order No. PSC-02-1250-SC-SU at 25.
[11] 373 So.2d 913 (Fla. 1979)

a layman's understanding and application of the law to the business he operates. In any event, such legal arguments belong in post-hearing briefs, not in "evidence" to be received at an evidentiary hearing. Thus, page 10, line 4 – line 12 should be stricken for this reason as well.

CONCLUSION

In summary, Mr. Watford's "testimony" on the subject of the developer agreement is improper. It is one of several improper excursions into legal opinions and arguments of legal interpretation that he is not qualified to offer, and that in any event are not properly the subject of testimony. More importantly, the assertions are in the nature of an anticipatory dispute which may be rendered moot by the decision on Adam Smith's challenge to the PAA, and which, if not rendered moot, would be the province of the judiciary, not this Commission. Thus, page 4, line 4 through page 13, line 4 of Mr. Watford's testimony should be stricken.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Adam Smith Enterprises, Inc.'s Motion to Strike Testimony of Stephen H. Watford Relating to Potential Contract Dispute has been furnished by (*)Hand delivery, (**)Electronically, or U.S. Mail this 17th day of January 2003 to the following:

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ATTACHMENT E

Where Aloha had applied, during May 23, 2001-April 16, 2002, the service availability charge of $206.75/ERC contained in the tariff that was in place and effective during that time frame, may the Commission legally authorize Aloha to collect from developers/builders, for connections made between May 23, 2001-April 16, 2002, the difference between the $206.75/ERC charge and the $1650/ERC service availability charge of the revised tariff that became effective on April 16, 2002?

In the event the Commission determines it has legal authority to allow Aloha to apply the $1650/ERC charge made effective on April 16, 2002 to connections that occurred prior to that date, should it authorize Aloha to do so under the fact and circumstances of this case?