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February 6, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
Division of Records and Reporting
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4075 Esplanade Way
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COMMISSION
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SECRETARY OF
STATE

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 Motion for Reconsideration and Clarification or Order PSC-03-0130-PCO-SU.

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,

Joe McGlothlin

Joseph A. McGlothlin

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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, DECKER, KAUFMAN & ARNOLD, P.A.

DOCUMENT NUMBER DATE
01291 FEB 6 8

FPSC-COMM. DIV. CLERK

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: February 6, 2003

**ADAM SMITH ENTERPRISES, INC.'S RESPONSE TO
ALOHA UTILITIES, INC.'S MOTION FOR RECONSIDERATION AND
CLARIFICATION OF ORDER PSC-03-0130-PCO-SU**

Adam Smith Enterprises, Inc. ("Adam Smith"), through its undersigned counsel, responds to the Motion for Reconsideration and Clarification of Order PSC-03-0130-PCO-SU filed by Aloha Utilities, Inc. ("Aloha") on January 30, 2003, and states:

STANDARD FOR MOTION FOR RECONSIDERATION

The standard for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. *Stuart Bonded Warehouse, Inc. v. Bevis*, 294 So.2nd 315 (Fla. 1974); *Diamond Cab Company v. King*, 146 So. 2nd, 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So. 2nd 162 (Fla. 1st DCA 1981). Adam Smith submits that Aloha has failed to satisfy this standard. For the following reasons, Aloha's motion should be denied.

ARGUMENT

In Adam Smith's Response to the Objections that Aloha stated to Adam Smith's discovery request, Adam Smith pointed out that Aloha failed to file its objections timely. Specifically, while the order on procedure required objections to be filed within 10 days, Aloha did not file its objections until the 20th day. In Order 03-0130, the Prehearing Officer noted Aloha's failure to submit objections timely. The untimely objections were an explicit basis for

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denial of the motion for protective order. In its motion, Aloha *acknowledges* that the untimely objections comprised part of the rationale for the Prehearing Officer's decision. However, nowhere in its motion for reconsideration does Aloha contend that grounds exist to reconsider this dispositive aspect of the ruling. For this reason alone, Aloha's motion must be denied.

Aloha also takes issue with the determination of the Prehearing Officer that the facts surrounding Aloha's failure to file its waste water service availability tariff on May 23, 2001 and its subsequent conduct, are relevant to the issues raised in this proceeding. In its argument Aloha asserts the Prehearing Officer failed to take into account the doctrine of the *res judicata*, the issue for unconstitutional taking, and the provisions of Section 367.161, Florida Statutes.

Aloha's arguments fail. Central to Aloha's position in the argument that facts that are relevant to the show cause portion of the Commission's Order cannot also be relevant to the PAA portions of the order. However, just as the same facts may be relevant to separate criminal and civil proceedings, the same facts may be relevant to a show cause issue and to a separate ratemaking issue. The facts that are the subject of Adam Smith's discovery are relevant (though secondary to the threshold legal consideration) to the issue of whether, in light of Aloha's conduct, the facts of this case support a decision to permit Aloha to attempt to apply the higher service availability charge to periods prior to April 16, 2002. In past cases, the Commission has determined, that – even where “backbilling” is *legally* permissible (Adam Smith contends such is not the case here), the facts led the Commission to deny the use of the backbilling rule. *In re: Application for Rate Increase in Marion County for Rainbow Springs Utilities Company, LC*, Docket No. 950828 –WE; and *In re: Complaint of William B. Recklaw Regarding Back Billing Against Gulf Utilities Company in Lee County*, Docket No. 930168-WU, Order No. PSC-93-1173-FOF-WU. Therefore, the circumstances regarding Aloha's failure to file a tariff for over a

year; the failure to provide notice of the increase; erroneous or misleading representations by Aloha leading to the decision of the Staff to back date a tariff submitted in March, 2002; and other aspects of Adam Smith's discovery are relevant to core issues in this case.

Finally, in its Motion for Reconsideration, Aloha says it did not request a hearing on the show cause portion of Order No. 02-1250. It is worth noting, however, that Aloha protested that portion of the same order in which the Commission proposed to impute CIAC. Nor is the imputation of CIAC a "penalty" that corresponds to the fine levied under the show cause case. Rather, it is a ratemaking adjustment, which, like other ratemaking adjustment, simply protects ratepayers from imprudence or mismanagement by the company.

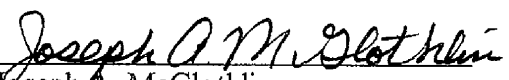
ALOHA'S REQUEST FOR CLARIFICATION

With regard to Aloha's request for "clarification" of the appropriate role of its former counsel in this case, Adam Smith stated, in its response to Aloha's original motion, that Adam Smith objects to Mr. Dederding participating in a *representative* capacity, and the mere providing of a file as a source of documents responsive to the discovery request is not such a representative capacity. The order is similarly unambiguous on this point; accordingly, this particular request for clarification is baseless.

With respect to the possibility that Mr. Dederding could be called as a fact witness in this case, Adam Smith has stated repeatedly that it would object unless Aloha waives the attorney/client privilege that otherwise could be used to prevent Adam Smith from cross-examining the "fact testimony" fully. (Adam Smith also objected to the manner in which Aloha sought to leverage the fact of a conflict of interest into an argument that *Adam Smith* should be precluded from developing a factual record!) Adam Smith submits that it is inappropriate for Aloha to seek, through a request for "clarification," a "ruling" on the *scope* of waiver that would

be called for under such circumstances. Similarly, it is premature and inappropriate for Aloha to argue that particular potential testimony by Staff would be “inadmissible as hearsay.” In essence, Aloha has objected to testimony of Staff before it has been proffered! The argument is premature and anticipatory, and in any event provides no grounds for reconsidering or modifying the Prehearing Officer’s order.

Adam Smith incorporates by reference its Response to Aloha Utilities, Inc.’s Motion Regarding Role of Prior Counsel in Responding to Discovery, filed December 12, 2002.


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Attorneys for Adam Smith Enterprises, Inc.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of Adam Smith Enterprises, Inc.'s Response to Aloha Utilities, Inc.'s Motion for Reconsideration and Clarification or Order PSC-03-0130-PCO-SU was sent via (*) Hand Delivery, (**) Electronic mail or U.S. Mail on this 6th day of February 2003 to the following:

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