

BEFORE THE PUBLIC SERVICE COMMISSION

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In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

DOCKET NO. 020896-WS

COMMISSION CLERK

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

DOCKET NO. 010503-WU

FILED: DECEMBER 2, 2004

RESPONSE TO MOTION FOR RECONSIDERATION OF ORDER NO. PSC-04-1152-PCO-WS

The staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its Response to Aloha Utilities, Inc.'s (Aloha or utility) Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS filed on November 24, 2004, and states that:

1. On October 5, 2004, the staff served Aloha with the Commission's First Request for Production of Documents, requesting that the documents be produced within thirty days of service, pursuant to Rule 1.350, Florida Rules of Civil Procedure. Document Request No. 1 states as follows:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's water customers in the Seven Springs service area.

Document Request No. 2 states as follows:

Please provide, in electronic format, a list of the names and addresses of all of Aloha's wastewater customers in the Seven Springs service area.

2. In its November 9, 2004 Response to Aloha's Motion for Protective Order filed November 4, 2004, staff narrowed Document Request No. 1 to request that Aloha provide, in electronic format, a list of only those names and addresses of Aloha's water customers who

- CMP _____
- COM 5
- CTR _____
- EGR _____
- GCL _____
- OPC _____
- MMS _____
- RCA _____
- SCR _____
- SEC 1
- OTH Kim P.

Kim P.
12/02/04
KMP

DOCUMENT NUMBER - DATE

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FPSC-COMMISSION CLERK

reside within the areas for which deletion of territory has been requested in this proceeding, and stated that if it is unduly burdensome for Aloha to determine the exact customer names and/or addresses of those customers who reside within those areas, staff continues to request that Aloha provide, in electronic format, a list of the names and addresses of all of its Seven Springs water customers. Staff withdrew Document Request No. 2 in its entirety.

3. By Order No. PSC-04-1152-PCO-WS, issued November 19, 2004, the Prehearing Officer granted staff's Motion to Compel Document Request No. 1 as revised in Paragraph 2, above, denied Aloha's Request for Oral Argument and Motion for Protective Order, and required Aloha to provide staff with the information requested in revised Document Request No. 1 within 5 days of the issuance of the Order.

4. In its Motion for Reconsideration, Aloha argues that the Commission should depart from its traditional standard of review for a motion for reconsideration by distinguishing between motions for reconsideration made to the same panel of Commissioners who rendered the initial decision from those decisions for which reconsideration is sought by the full Commission of an Order rendered by a Prehearing Officer (such as the decision at issue here). Aloha explains that in this case, four members of the Commission have not overlooked or failed to consider any of the points or issues implicated by the Order since this is the first time they have looked at those issues or points. According to Aloha, nothing in the rules or in case law would prevent the Commission from making such a discretionary determination regarding its standard of review in such cases. However, Aloha fails to point to anything in the rules or in case law that requires the Commission to make the suggested distinction. Nor does Aloha

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articulate what other standard of review should apply to orders rendered by a single Commissioner sitting as Prehearing Officer. Aloha points out that the "traditional" standard of review for a Motion for Reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order.¹ Moreover, a motion for 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."² In this instance, the Prehearing Officer did not overlook or fail to consider any point of fact or law in applying the very standard that requires it to determine whether it did so or not. The suggestion that the Commission may have the discretion to alter the standard of review does not meet the standard of review.

5. Aloha argues that Order No. PSC-04-1152-PCO-WS does not discuss Aloha's Motion to Terminate filed on November 9, 2004, which suggests that this proceeding is unlawfully constituted and could not constitute a basis for staff's discovery. The Prehearing Officer was under no requirement to consider that motion in rendering his decision resolving this discovery dispute and thus made no mistake of fact or law by not discussing that motion in the Order. The Motion to Terminate will be ruled upon at a forthcoming agenda conference by the full Commission. Unless and until the Commission rules otherwise, the case must proceed under the current case schedule as set forth in the Order Establishing Procedure issued in the case. And

¹ See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

² Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

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pursuant to Rule 28-106.206, Florida Administrative Code, the Prehearing Officer “may issue appropriate orders to effectuate the purposes of discovery and to prevent delay. . . .”

6. Aloha argues that Order No. PSC-04-1152-PCO-WS does not set forth the basis or foundation for staff to play the role of assisting in the development of the evidence to insure a complete record. Staff set forth a basis or foundation for staff’s role in this proceeding in its Response to Motion for Protective Order and the Prehearing Officer considered that Response in rendering the Order. Aloha points to no authority which would require the Prehearing Officer to set forth the basis or foundation for staff’s role in the Order itself, and no such requirement exists. The Prehearing Officer made no mistake of fact or law by making a finding as to the staff’s role in this proceeding without setting forth the basis for that finding. Nor was the Prehearing Officer under any requirement to address each of Aloha’s arguments made in its Motion for Protective Order regarding the clear wording of the Rules of Civil Procedure and the Uniform Rules of Procedure as they relate to discovery in this proceeding. The Prehearing Officer made no mistake of fact or law by declining to do so in the Order. Moreover, Aloha argues that a proper application of the rules establishes that staff is not a party and is not authorized to engage in discovery, which is the same argument made in its Motion for Protective Order and Response to Staff’s Motion to Compel. In a Motion for Reconsideration, it is not appropriate to reargue matters that have already been considered.³

7. Finally, Aloha argues that the Prehearing Officer should not grant a Motion to Compel and to Shorten Time which does not address the full substance of the objections raised

³ 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)).

by Aloha with regard to staff's authority to send discovery, the prejudicial effect which may result from staff's intended use of the information sought to be discovered, and the pending Motion to Terminate. Staff disagrees. Staff addressed Aloha's objections, albeit in its Response to Aloha's Motion for Protective Order. Staff could not have addressed the currently pending Motion to Terminate in its Motion to Compel since it was not even in existence at the time. Nor could staff have addressed the Motion to Terminate in its Response to the Motion for Protective Order since that motion was filed on November 9, 2004, the same date as staff's response was filed, and staff had not seen the motion at the time of filing its response. Moreover, and more importantly, staff was under no obligation to address the Motion to Terminate either in its Motion to Compel or in its Response to the Motion for Protective Order. The Motion to Terminate is an entirely separate motion apart from the Motion to Compel which Aloha requests that the Commission deny upon reconsideration of the Order at issue.

8. In rendering his decision, the Prehearing Officer considered all of the requisite filings, including staff's Motion to Compel and to Shorten Time, Aloha's Motion for Protective Order and Response to Staff's Motion to Compel, and staff's Response to Aloha's Motion for Protective Order. Aloha has failed to demonstrate that the Prehearing Officer has overlooked or failed to consider a point of fact or law in determining the revised Document Request No. 1 to be discoverable, thereby granting staff's Motion to Compel the discovery.

WHEREFORE, in consideration of the foregoing, the staff respectfully requests that the Commission deny Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS and require Aloha to produce the revised Document Request No. 1 of the Commission's First

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Request for Production of Documents to Aloha, within five days of the Commission's vote on
the motion.

Respectfully submitted,



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FILED: DECEMBER 2, 2004

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Staff's Response to Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS, has been served by U.S. Mail and by facsimile to Marshall Deterding and John Wharton, Esquires, Rose, Sundstrom and Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, FL 32301, and to the following by U. S. Mail this 2nd day of December, 2004:

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