

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application of ALOHA)
UTILITIES, INC. for an increase)
in water rates for its Seven)
Springs System in Pasco County,)
Florida.)
_____)

DOCKET NO. 010503-WU

ALOHA’S EXPEDITED MOTION FOR CONTINUANCE

Aloha Utilities, Inc. ("Aloha" or "Utility"), by and through the undersigned counsel, and pursuant to Rule 28-106.210, Florida Administrative Code, hereby files this Expedited Motion for Continuance and in support thereof would state and allege as follows:

1. This matter is currently set for a one-half day administrative hearing before the full Commission on March 8, 2005. As set forth herein, Aloha suggests that good cause exists for a continuance of this proceeding.

2. Several reasons exist which, collectively and individually, support a continuance of this matter. At the threshold, Aloha represents that neither any party, any member of the public, the Commission, or its staff will be prejudiced by a continuance of this matter. Aloha is currently meeting the goal established by the Commission in Order No. PSC-04-0831-CO-WS. In that regard, delay of this proceeding will not delay implementation of the Commission’s unappealed directive as set forth in that Order.¹

¹The goal referred to above is the directive that Aloha shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water.

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3. The initial basis for a continuance of this matter is the unreasonable, illogical, and contradictory nature of this proceeding when compared with the proceeding which has been initiated by the Commission's Show Cause Order (Order No. PSC-04-0712-PAA-WS) issued on February 22, 2005. In the present proceeding, Aloha and three customers will litigate the implementation of certain measures which the Commission contends are designed to benefit certain customers experiencing concerns with the quality of water in their homes. In the Show Cause proceeding, the very neighborhoods whom the Commission intends and believes will benefit the most from the implementation of the processes at issue in this docket are proposed by the Commission to be deleted. Each of the Petitioners in this case lives in a neighborhood which is subject to the Show Cause Order.² No person living in any portion of Aloha's service area which is not the territory which the Commission has noticed its intent to delete in the Show Cause Order has protested the Proposed Agency Action at issue in this docket. There are chemical, hydraulic, engineering, rate, legal, and practical questions which will be answered in this docket whose answer might be one thing if the territory at issue in the Show Cause Order is not deleted but whose answer might be another if those same territories are deleted. To proceed to hearing in this case, before the completion of the Show Cause proceeding is illogical, will not promote judicial economy and may lead to confusing if not disastrous results.

²In fact, Dr. Kurien is no longer a customer.

4. Another basis for a continuance in this matter is that there is significant disagreement as to exactly what the issues in this proceeding should be. The Commission's process of reducing the issues to an order (the Prehearing Order) long after the parties have been required to file prefiled testimony may work in most Commission cases, but it is a process that has gone awry in this case. After three customers filed a Petition challenging the Proposed Agency Action in this case, counsel for Aloha contacted the Commission staff and indicated that there was some confusion as to what part of the Proposed Agency Action (which touched upon several subjects) had become final and what portions of that Order were subject to the Petitioners' challenge. The Commission thereafter, on August 25, 2004, issued a "Consummating Order" for the express purpose of clarifying what portion of the Commission's Proposed Agency Action had been challenged and what portion had become final.

5. The Consummating Order clearly provided that the Proposed Agency Action had become final and effective "to read that Aloha Utilities, Inc. shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water". The Prehearing Order establishes as an issue in this case the following:

Should the reference to sulfide in "finished water" in the proposed agency action order be stated as a maximum contaminate level . . .

Stating the reference as a maximum contaminate level cannot be reconciled with the consummating orders declaration that 0.1 mg/L of sulfides is a "goal". A "maximum contaminant level" as that phrase is used by environmental regulatory authorities, and

the word “goal”, can never be read to mean the same thing. The Prehearing Order also established as an issue the following:

Should the improvements be such that sulfide present in raw water or generated during treatment and transmission be removed, not converted, to a level not to exceed 0.1 mg/L in finished water . . .

The establishment as an issue in this proceeding of whether the 0.1 mg/L should be achieved by removal or conversion cannot be reconciled with the Consummating Order’s directive that the improvements only need to be made “as needed”. Aloha currently meets the goal by conversion of hydrogen sulfide. If the Petitioners’ position is accepted, Aloha will be ordered to implement an extremely expensive water process to secure removal of hydrogen sulfide to meet the goal, even though the same **is not needed** to meet the goal of 0.1 mg/L of sulfides in its finished water. This will render the Consummating Order’s directive that the improvements only need to be made “as needed” nonsensical, without any force and effect, and a nullity.

6. Consummating Order No. PSC-04-0831-CO-WS provides in relevant part:

The Petition does protest the proposed requirement of Order No. PSC-04-0712-PAA-WS **that Aloha meet the TBW standard as that water leaves the treatment facilities of the utility.** Moreover, the Petition protests the **methodology upon which compliance** with the TBW standard shall be determined.

and

ORDERED that Docket No. 010503-WS shall remain open pending resolution of the protest to portions of Order No. PSC-04-0712-PAA-WS, **including the methodologies for, which the revised standard and the location at which compliance is measured.** (emphasis added)

At the Prehearing Conference on February 24, 2005 during oral argument, the legal effect of the Consummating Order was called into question. OPC argued that the Consummating Order had not been voted upon by the Commission, but was rather an Order which was issued “administratively”. If the Consummating Order is not the lawful and proper order of the Commission, then a continuance of this matter is justified while that particular issue is determined. In either case, proceeding to hearing on March 8, 2005, to essentially attack two matters clearly made final by the unappealed, unchallenged Consummating Order deprives Aloha of due process and does not promote judicial economy.³ Aloha relied upon the Consummating Order in conducting its activities in this case, and to the extent that the Commission is either renouncing, shying away from, or otherwise revisiting the force, effect, and meaning of the Consummating Order, then good cause exists for a continuance of this proceeding.

7. It is Aloha’s position that the Prehearing Order is in direct conflict with the Consummating Order, to Aloha’s prejudice. When the Prehearing Officer ruled that one party’s issues should be included in the Prehearing Order, and that another party’s issues should not be thusly included, he made a substantive, as opposed to procedural, ruling. Aloha will either seek reconsideration of the Prehearing Officer’s ruling or seek an interlocutory appeal of the Prehearing Order.⁴

³Certainly, the ruling of a Prehearing Officer, which seems irreconcilable with the Consummating Order, indicates that the Consummating Order may occupy, as OPC suggests, some second class status which is neither apparent on its face nor supported by the APA.

⁴The time for Reconsideration will not have even run as of the date of the hearing in this case.

8. Another basis for the continuance of this proceeding is Aloha's Motion for Summary Final Order filed on February 28, 2005. Only one of the three Petitioners in this case filed any prefiled testimony, and that individual is no longer a customer of Aloha, and has no standing to participate as a party in this proceeding. The two other Petitioners have not prefiled testimony to establish their standing, and their opportunity to present such testimony has passed.

9. Another basis for a continuance of this matter is the outstanding issue regarding Aloha's desire to take the deposition of certain staff members. The Commission staff moved for a protective order and filed a motion to quash Aloha's notices of deposition, and no ruling has been made as of the date of the filing of this pleading. Even a favorable ruling on this date would not allow Aloha enough time to adequately gather and utilize the testimony and evidence adduced therein, if it deemed the same necessary and appropriate, in a hearing set for March 8, 2005.

10. Another basis for a continuance of this matter is the ongoing mediation in which the parties are currently engaged. The disclosure of any details regarding such mediation would not appropriate at this time, and the other participants in the mediation, no doubt, do not see its continued pursuit as a basis for a continuance, but the Commission may want to consider the fact nonetheless.

11. Another basis for a continuance is Aloha's Motion to Verified Motion to Disqualify and Recuse the Public Service Commission from All Further Consideration of this Docket filed on this date. The issuance of the Show Cause Order, as argued in that Motion to Recuse, has adversely affected the Commission's ability to preside over quasi-

judicial proceedings involving Aloha consistent with the requirements of due process and fair play.

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests that this motion be ruled upon expeditiously, and that this matter be continued and that Aloha be allowed to bring before the full Commission (or such other person or entity to whom this case has been referred pursuant to Aloha's Motion to Recuse) such filings as are necessary to clarify the issues, to clarify Dr. Kurien's status, and to allow the Commission to rule on the Motion for Summary Final Order and other pending motions.

Respectfully submitted this 1st
day of March, 2005, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax (*) and U.S. Mail this 1st day of March, 2005, to: .

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