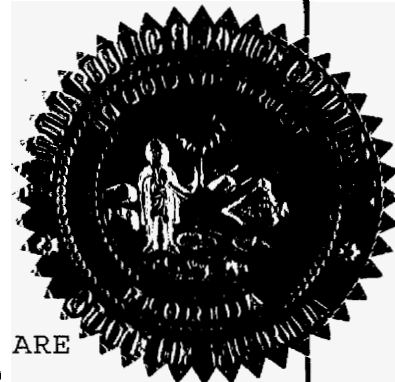


BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010503-WU

In the Matter of

APPLICATION FOR INCREASE IN WATER  
RATES FOR SEVEN SPRINGS SYSTEM IN  
PASCO COUNTY BY ALOHA UTILITIES, INC.



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VOLUME 1

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PROCEEDINGS: HEARING

BEFORE: CHAIRMAN BRAULIO L. BAEZ  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER RUDOLPH "RUDY" BRADLEY  
COMMISSIONER CHARLES M. DAVIDSON  
COMMISSIONER LISA P. EDGAR

DATE: Tuesday, March 8, 2005

TIME: Commenced at 9:30 a.m.  
Concluded at 6:25 p.m.

PLACE: Betty Easley Conference Center  
Hearing Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR  
Chief, Office of Hearing Reporter Services  
FPSC Division of Commission Clerk and  
Administrative Services  
(850) 413-6732

DOCUMENT NUMBER DATE

FLORIDA PUBLIC SERVICE COMMISSION

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## 1 APPEARANCES:

2 HARRY HAWCROFT, 1612 Boswell Avenue, New Port Richey,  
3 Florida 34655, appearing on behalf of Harry Hawcroft.

4 V. ABRAHAM KURIEN, M.D., 1822 Orchardgrove Avenue,  
5 New Port Richey, Florida 34655, appearing on behalf of Dr. V.  
6 Abraham Kurien.

7 CHARLES BECK, ESQUIRE, Office of Public Counsel, c/o  
8 The Florida Legislature, 111 W. Madison St., Room 812,  
9 Tallahassee, Florida 32399-1400, appearing on behalf of the  
10 Office of Public Counsel.

11 MARSHALL DETERDING, ESQUIRE, and JOHN L. WHARTON,  
12 ESQUIRE, Rose Law Firm, 2548 Blairstone Pines Drive,  
13 Tallahassee, Florida 32301, appearing on behalf of Aloha  
14 Utilities, Inc.

15 EDWARD O. WOOD, 1043 Daleside Lane, New Port Richey,  
16 Florida 34655, appearing on behalf of Edward O. Wood.

17 RALPH JAEGER, ESQUIRE, MARY ANNE HELTON, ESQUIRE, and  
18 SAMANTHA CIBULA, ESQUIRE, FPSC General Counsel's Office, 2540  
19 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850,  
20 appearing on behalf of the Commission Staff.

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## P R O C E E D I N G S

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CHAIRMAN BAEZ: We'll call this hearing to order.  
Counsel, can you read the notice.

MR. JAEGER: Pursuant to notice issued February 21st, 2005, this time and place has been set aside for a formal hearing on the protest of three customers to the portion of Proposed Agency Action Order Number PSC-04-0712-PAA-WU that requires Aloha Utilities, Inc., to meet the Tampa Bay water standard as the water leaves the treatment facilities of the utility, and the methodology upon which compliance with the standard shall be determined

CHAIRMAN BAEZ: Thank you, Mr. Jaeger. And we will take appearances.

Commissioner Bradley, you had a question.

COMMISSIONER BRADLEY: No. I want to make a motion.

CHAIRMAN BAEZ: All right. We'll take appearances.

MR. DETERDING: F. Marshall Deterding of the law firm of Rose, Sundstrom, and Bentley here on behalf of Aloha Utilities, Inc.

MR. BECK: Charlie Beck, Office of the Public Counsel, appearing on behalf the Citizens of Florida.

MR. JAEGER: Ralph Jaeger appearing on behalf of the Public Service Commission.

MS. CIBULA: Samantha Cibula appearing on behalf of the Public Service Commission.

1           CHAIRMAN BAEZ: All right. At this time I see no  
2 other appearances. We will keep the appearances open to permit  
3 some time for other parties potentially to get here.

4           Commissioner Bradley.

5           COMMISSIONER BRADLEY: Yes, Mr. Chairman, for a  
6 notion. I move that we recess until 11:00 to allow for the  
7 petitioners to arrive so that they may participate and present  
8 their case.

9           CHAIRMAN BAEZ: Very well. There's a motion. Is  
10 there a second?

11          COMMISSIONER EDGAR: Second.

12          CHAIRMAN BAEZ: A motion and a second.

13          All those in favor, say aye.

14          (Unanimous affirmative vote.)

15          CHAIRMAN BAEZ: Thank you, Commissioners.

16          We're going to recess at this point until 11:00  
17 o'clock, at which time we will reconvene and take up  
18 preliminary matters or whatever else we have before us.

19          Thank you all.

20          (Recess until 11:00 a.m.)

21                               \* \* \* \* \*

22          CHAIRMAN BAEZ: We will reconvene the hearing. And  
23 at this point if there are any other appearances that need to  
24 be taken, we can take them up now.

25          MR. KURIEN: I'm V. Abraham Kurien.

1 MR. HAWCROFT: My name is Harry Hawcroft.

2 MR. WOOD: My name is Ed Wood.

3 MR. DETERDING: And, Commissioners, I already entered  
4 an appearance. But with me is John L. Wharton, also of Rose,  
5 Sundstrom, and Bentley here on behalf of Aloha.

6 CHAIRMAN BAEZ: Thank you.

7 We have some preliminary matters, Mr. Jaeger.

8 Commissioners, we have a series of motions at this  
9 point before we actually get started on the testimony.

10 Mr. Jaeger, can you help me out with this and kind of  
11 lead us through.

12 MR. JAEGER: Chairman Baez, as you say, there are  
13 four motions, three by Aloha and one by staff. And Aloha's  
14 verified motion to disqualify and recuse the Public Service  
15 Commission from all further consideration of this docket would  
16 appear to be the first one that you should take up, because it  
17 is asking that you proceed no further at all, and so that would  
18 be the logical one to take up first.

19 CHAIRMAN BAEZ: Thank you.

20 Ms. Cibula, it is my understanding that you are  
21 counsel to the Commission on this first motion?

22 MS. CIBULA: Yes, sir.

23 CHAIRMAN BAEZ: All right. Can we have a  
24 recommendation?

25 MS. CIBULA: Sure. Actually, there is a motion to

1 disqualify before you, along with a request for oral argument.  
2 Advisory staff recommends that Aloha's motion for oral argument  
3 be denied. Advisory staff believes that Aloha's arguments are  
4 adequately contained in its motion, so oral argument is  
5 unnecessary.

6 CHAIRMAN BAEZ: Very well. Commissioners, we need a  
7 notion on oral argument.

8 COMMISSIONER DAVIDSON: Move staff in its entirety.

9 CHAIRMAN BAEZ: Thank you.

10 Ms. Cibula, I may have missed, you gave an overall  
11 recommendation?

12 MS. CIBULA: That was just for the oral argument.

13 CHAIRMAN BAEZ: That was just for oral argument.

14 MS. CIBULA: I can proceed on to the recommendation  
15 for the motion at this time.

16 CHAIRMAN BAEZ: Let's get oral argument out of the  
17 way first.

18 COMMISSIONER DAVIDSON: Move staff.

19 COMMISSIONER DEASON: Second.

20 CHAIRMAN BAEZ: All those in favor say aye.

21 (Unanimous affirmative vote.)

22 CHAIRMAN BAEZ: Thank you, Commissioners.

23 Go ahead, Ms. Cibula.

24 MS. CIBULA: Section 120.665, Florida Statutes, sets  
25 forth the standard for considering a motion for

1 disqualification. This section states that an agency head may  
2 be disqualified for serving in an agency proceeding for bias,  
3 prejudice, or interest when any party to the agency proceeding  
4 shows just cause.

5 Case laws states that just cause may be demonstrated  
6 when the facts alleged would prompt a reasonably prudent person  
7 to fear that they will not obtain a fair and impartial hearing.  
8 When reviewing Aloha's motion, the Commission must assume the  
9 allegations of fact in the motion are true. However, case law  
10 states that disqualification is not required based on  
11 allegations that are too tenuous or speculative.

12 Aloha alleges in its motion that the show cause order  
13 issued in Docket No. 050018-WU demonstrates that the Commission  
14 is biased and prejudiced with regard to the facts contained in  
15 the order, and has an interest in regard to those facts, and  
16 that the Commission can manipulate the outcome of this docket  
17 to archive its end in the show cause litigation.

18 Advisory staff believes that the allegations  
19 contained in Aloha's motion are not legally sufficient under  
20 Section 120.665 to demonstrate bias, prejudice, or interest in  
21 this proceeding as they are too tenuous and speculative. Thus,  
22 advisory staff recommends that Aloha's motion for  
23 disqualification be denied.

24 CHAIRMAN BAEZ: Thank you, Ms. Cibula.

25 Commissioners, do you have any questions of staff?

1 or a motion, sir.

2 COMMISSIONER DAVIDSON: Move staff.

3 COMMISSIONER DEASON: Second.

4 CHAIRMAN BAEZ: There is a motion and a second. All  
5 those in favor say aye.

6 (Unanimous affirmative vote.)

7 CHAIRMAN BAEZ: Thank you, Commissioners.

8 Mr. Jaeger, we have another motion?

9 MR. JAEGER: Yes, Chairman Baez. I believe the next  
10 motion that should be considered is Aloha's motion for summary  
11 final order, because that would totally dispose of the case  
12 also, so I believe we need to take up that next. They have  
13 requested oral argument on that motion, and staff believes that  
14 oral argument would not aid the Commission, that their motion  
15 is sufficient on its face. So staff recommends oral argument  
16 not be allowed.

17 CHAIRMAN BAEZ: Commissioners, a motion on oral  
18 argument.

19 COMMISSIONER DEASON: Staff's recommendation is to  
20 deny oral argument?

21 MR. JAEGER: That's correct.

22 COMMISSIONER DEASON: Move staff.

23 COMMISSIONER DAVIDSON: Second.

24 CHAIRMAN BAEZ: Moved and seconded. All those in  
25 favor say aye.



1 (Unanimous affirmative vote.)

2 CHAIRMAN BAEZ: Mr. Jaeger, you have a recommendation  
3 on the motion?

4 MR. JAEGER: Yes, Chairman. Aloha is saying that  
5 since Dr. Kurien has moved out of the territory that he is no  
6 longer a proper party in interest. And staff would probably  
7 agree with that part, but then Aloha makes the leap that his  
8 testimony is no longer competent. Staff does not agree with  
9 that leap. Because we have three customers, Mr. Hawcroft, Mr.  
10 Wood, and Mr. Kurien, file a joint protest of this. And then  
11 when they filed their prehearing statement it was the three  
12 customers and OPC.

13 So we believe that Dr. Kurien, while he may not be a  
14 proper party in interest anymore, would be a proper witness  
15 and, therefore, his testimony should not be stricken and that  
16 he can be sponsored by Mr. Hawcroft and the other parties. So  
17 in that case, his testimony should not be stricken and,  
18 therefore, the motion for summary final order would not be  
19 appropriate.

20 CHAIRMAN BAEZ: Commissioners, questions?

21 COMMISSIONER DAVIDSON: A question of staff, just so  
22 I can be clear. So is it staff's recommendation that Dr.  
23 Kurien is no longer a party to the case, so to speak, a real  
24 party in interest, but -- and you probably said this, and I may  
25 be just stating the obvious -- is properly before us as a

1 witness?

2 MR. JAEGER: I did not say because there was not a  
3 notion to dismiss him as a party, Aloha's motion was saying  
4 that his testimony wasn't competent. And so I believe if that  
5 notion was made, then he would not be a proper party at this  
6 point anymore. But that was not in the motion. It was sort of  
7 a leap that because he is no longer a customer that his  
8 testimony shouldn't be allowed.

9 COMMISSIONER DAVIDSON: I understand. It was when  
10 you stated not a real party in interest, that threw me a bit.  
11 Okay. I'm clear. Thanks.

12 CHAIRMAN BAEZ: Then a question. Since the question,  
13 although it may not have been raised as part of a motion, is  
14 that something that we need to -- I mean, is fixing party  
15 status something that we are obligated to address, or that --

16 COMMISSIONER DEASON: That issue is not in front of  
17 us, is it?

18 CHAIRMAN BAEZ: Well, I'm trying to get it -- I know  
19 that the issue is not in front of us, and I understand what the  
20 end result is. I mean, I think part of addressing the motion  
21 is addressing Dr. Kurien's proper participation as a witness in  
22 this, so that the end result, ultimately, is in the best  
23 interest of all involved, that the testimony would be accepted.  
24 I just want to make sure that we have got --

25 COMMISSIONER DAVIDSON: I'm in the same boat.

1 CHAIRMAN BAEZ: -- our Ts crossed.

2 COMMISSIONER DAVIDSON: I don't want someone down the  
3 road to say, oh, you dealt with this improperly. So if --

4 MS. HELTON: May I add something? I think you could  
5 also read their motion as asking for the Commission to dismiss  
6 as parties Mr. Hawcroft and Mr. Wood, because Aloha believes  
7 that they have not proffered testimony in this case to show  
8 that they have standing. The Commission has addressed that  
9 type of an issue before in the Martin/Manatee need case. There  
10 was a reconsideration of a prehearing officer's order that  
11 dealt with the discovery issue and whether you could allow  
12 discovery on matters of standing.

13 So we are not in the exact same procedural posture,  
14 but I think here we are still in a case where we are trying to  
15 prove whether -- or address whether we should take up whether  
16 parties have standing or not. And that order entered in Docket  
17 Number 020262, the Commission stated that a participant in an  
18 administrative proceeding has an obligation to prove standing,  
19 not just allege standing when contested. Here Aloha, I  
20 believe, has contested whether the three customer intervenors  
21 have standing or not.

22 However, in my mind they have waited too late to do  
23 that. They have not done it by the time they filed their  
24 prehearing statement, nor did they do it at the prehearing  
25 conference. So, in my mind, I think that it is within your

1 discretion to hear testimony from the customers as to whether  
2 they do have standing in this case.

3 CHAIRMAN BAEZ: Ms. Helton, I guess I'm just not  
4 clear. I mean, although I can't specifically recall  
5 Mr. Hawcroft, in particular, being a party to some previous  
6 Aloha proceedings, but certainly I remember Mr. Wood. **And I**  
7 guess I'm -- maybe it is all getting stuck together for me  
8 where it shouldn't, but I'm not sure if there is a question of  
9 that.

10 COMMISSIONER DAVIDSON: Chairman, if the Commission  
11 is amenable, I would like to revisit the motion to deny oral  
12 argument on this issue and hear a few words from Aloha. I  
13 mean, they are anxious at the mike, and I'm getting a little  
14 bit more confused, if that is proper.

15 COMMISSIONER DEASON: Before we do that, can I ask a  
16 question?

17 CHAIRMAN BAEZ: Yes. We will hold that one, because  
18 I think maybe that might turn out to be the best solution.

19 Commissioner Deason, go ahead and ask your --

20 COMMISSIONER DEASON: This is a question for staff.

21 Is Public Counsel a party to this proceeding?

22 MR. JAEGER: Yes, Commissioner.

23 COMMISSIONER DEASON: Okay. And Public Counsel has  
24 standing to represent customers by statute.

25 MR. JAEGER: That's correct.

1           COMMISSIONER DEASON: Now, is Public Counsel  
2 sponsoring these individuals as witnesses in this proceeding?

3           MR. JAEGER: Public Counsel has filed the testimony  
4 for them on behalf of the three customers. Dr. Kurien was the  
5 only testimony filed in this docket.

6           COMMISSIONER DEASON: And if a party has standing to  
7 a proceeding as Public Counsel, and if they sponsor testimony,  
8 that testimony can be presented and we just give it the weight  
9 that we deem appropriate, is that not correct?

10          MR. JAEGER: That's correct.

11          COMMISSIONER DEASON: So what difference does it make  
12 whether these individuals have standing or not? They are  
13 witnesses called by somebody that does have standing.

14          MR. JAEGER: I think the only question we would have  
15 is if they wanted to do their own direct or cross-examination  
16 during the hearing and not go through Mr. Beck, that would be  
17 the only difference that we have here.

18          COMMISSIONER DAVIDSON: Or to sort of appear as a  
19 party and give statements during sort of the party phase. But,  
20 Chairman, I still would move to reconsider the motion.

21          COMMISSIONER DEASON: I'm willing to reconsider. I  
22 made the motion. In fact, I'll move --

23          COMMISSIONER DAVIDSON: I'm sorry, you did make it.  
24 All right.

25          COMMISSIONER DEASON: And I will be more than happy

1 to move that we reconsider.

2 COMMISSIONER DAVIDSON: For maybe five minutes, seven  
3 minutes, ten minutes from Aloha and Public Counsel.

4 CHAIRMAN BAEZ: Is five minutes a side okay with the  
5 motion?

6 COMMISSIONER DAVIDSON: Fine. Second.

7 CHAIRMAN BAEZ: And motion and a second to  
8 reconsider. All those in favor say aye.

9 (Unanimous affirmative vote.)

10 CHAIRMAN BAEZ: Very well.

11 It is Mr. Wharton's motion. Five minutes, sir.

12 MR. WHARTON: Thank you, Mr. Chairman. With all due  
13 respect to the staff, let's start over. I don't think the  
14 motion was fairly characterized. There are three petitioners  
15 in this case. Under Agrico, the only way to establish standing  
16 in an administrative proceeding, and under the Florida  
17 Administrative Procedure Act, is through the facts in this  
18 case.

19 We now know that Dr. Kurien is no longer a customer.  
20 As we sit here today, and I will make an ore tenus motion at  
21 the appropriate time to dismiss him, he is not a customer. He  
22 cannot demonstrate standing under Agrico.

23 Staff counsel has correctly advised you that  
24 consistent with the prehearing order, consistent with the order  
25 on prehearing procedure, and consistent with the arguments

1 staff made in their motion to quash our attempts to subpoena  
2 certain staff members to deposition and to trial, it is too  
3 late for parties, parties to testify. Parties don't give  
4 public testimony, they prefile. All of your orders say that.  
5 Those two customers have not testified in any way, shape, or  
6 form as to their standing.

7           Dr. Kurien will acknowledge and has acknowledged in  
8 deposition he does not have standing because he is no longer a  
9 customer and he does not intend to become a customer. OPC is  
10 not a petitioner in this case. OPC is an intervenor in this  
11 case. And there is a long line of administrative case law  
12 saying that if the petitioners are dismissed or withdraw, the  
13 intervenors have the rug pulled out from under them. There is  
14 a line of administrative cases clearly indicating that.

15           An intervenor cannot continue a case, because he  
16 takes the case as he finds it after the petitioners are no  
17 longer petitioners. If OPC would have filed, would have got  
18 into this case during the 21-day period, we would have a whole  
19 different situation, but they didn't. They didn't. They are  
20 an intervenor in this case. And that is something that has  
21 commonly happened in the case law.

22           For that reason, because we believe the only person  
23 who has testified will testify that he is now no longer a  
24 customer, the only other two parties do not have an opportunity  
25 to testify since they had to prefile their testimony, and that

1 time has passed, and the prehearing order is issued, and the  
2 orders are clear. The three petitioners in this case should be  
3 dismissed because they have not satisfied the test of their  
4 substantial effect on their interest under the Agrico case that  
5 we cited.

6 CHAIRMAN BAEZ: Mr. Beck.

7 MR. BECK: Yes, Mr. Chairman. Thank you.

8 Commissioners, the issue before you is really quite  
9 simple. There is no dispute that Dr. Kurien has moved away  
10 from Aloha's territory and is no longer a customer of Aloha.  
11 Likewise, there is no dispute that Mr. Hawcroft and Mr. Wood  
12 are customers of Aloha and do have a substantial interest.

13 In fact, if you listen carefully to what Aloha is  
14 saying, they are not contesting the fact that they have a  
15 substantial interest. What their issue is is they didn't  
16 prefile testimony stating that they are customers of Aloha and  
17 have a substantial interest. This is a requirement that  
18 doesn't exist. They have pulled it out of thin air. There is  
19 no such requirement.

20 We will offer to put Mr. Hawcroft and Mr. Wood on the  
21 stand and testify under oath that they are customers of Aloha  
22 and that they have a substantial interest if the Commission is  
23 interested in hearing that testimony. But there is simply no  
24 need because it is not in dispute. Its only dispute is whether  
25 they prefilled testimony, which is not required. Likewise, we



1 have sponsored, the Office of Public Counsel has sponsored the  
2 testimony of Dr. Kurien, as well. There is no requirement that  
3 witnesses be customers of the utility, obviously, because their  
4 own witnesses aren't customers of the utility. So there is  
5 really no issue. I mean, Dr. Kurien's testimony is sponsored  
6 by people that have an substantial interest, and therefore it  
7 is proper, and therefore their motion for summary final order  
8 fails. Thank you.

9 CHAIRMAN BAEZ: Commissioner Davidson, a couple of  
10 questions.

11 COMMISSIONER DAVIDSON: A couple of questions. When  
12 was it discovered that Dr. Kurien was no longer a customer of  
13 Aloha?

14 MR. BECK: February 11th is when Dr. Kurien moved  
15 away, of this year.

16 COMMISSIONER DAVIDSON: And was his deposition taken  
17 after February 11th in this case?

18 MR. BECK: Yes.

19 COMMISSIONER DAVIDSON: When did the other two  
20 customers -- did they intervene in the case?

21 MR. BECK: They protested the portion of the order  
22 that was proposed agency action, and this occurred last year.

23 COMMISSIONER DAVIDSON: And when was that protest  
24 filed?

25 MR. JAEGER: Commissioner Davidson, it was filed

1 August 9th, although it is dated August 10th. The due date was  
2 August 10th, but the document number is 08639, August 9th, and  
3 n that all three petitioners signed it, and they say, "Each of  
4 he petitioners is a customer of Aloha Utilities, and the  
5 ction taken by the Florida Public Service Commission would  
6 dversely effect the quality of water provided to petitioners  
7 y Aloha Utilities." So that is how they --

8 COMMISSIONER DAVIDSON: And for Aloha, did you all  
9 ver seek to take the depositions of these two customers who  
10 protested the order?

11 MR. WHARTON: No. The only people we wanted to  
12 lepose were the -- other than the staff members, were the  
13 witnesses, persons who were going to be witnesses in this  
14 proceeding.

15 COMMISSIONER DAVIDSON: And for staff, does the  
16 protest of the order, the protest that you referred to being  
17 filed back in August, does that sort of give the customers  
18 standing in this case?

19 MR. JAEGER: It is my opinion, yes, they showed --  
20 when they have a protest, we have to look in that protest to  
21 see if they have standing at that time, and no one contested  
22 that they had standing at that time. And now Kurien wouldn't,  
23 but Hawcroft and Wood still would.

24 COMMISSIONER DAVIDSON: When did they become parties  
25 in the case? Have they become formally parties in the case?

1 MR. JAEGER: With the filing of the protest then  
2 they are listed as parties.

3 COMMISSIONER DAVIDSON: They then become listed as  
4 parties in the case with the filing of the protest.

5 MR. JAEGER: Unless there is some kind of objection  
6 saying they are not proper parties, which there wasn't.

7 COMMISSIONER DAVIDSON: And is that standard agency  
8 practice, or was this the first time this has occurred?

9 MR. JAEGER: I think that is the way it happens  
10 every time that I have seen it. When they protest, they become  
11 parties.

12 COMMISSIONER DAVIDSON: So if Aloha is correct that  
13 Dr. Kurien is no longer a customer, and assuming they are  
14 correct that he is no longer a proper party to the case, is it  
15 correct that there are still, then, customers who are proper  
16 parties to the case, so that as Aloha said it, the rug is not  
17 pulled out from under OPC?

18 MR. JAEGER: That's correct, there's still two  
19 customers left.

20 COMMISSIONER DAVIDSON: Are there -- strike that. I  
21 don't have any other questions at this point.

22 CHAIRMAN BAEZ: Commissioners, any other questions?  
23 Commissioner Deason.

24 COMMISSIONER DEASON: No.

25 CHAIRMAN BAEZ: I have a question. I guess looking a

1 little bit farther, following up on what Commissioner Davidson  
2 was asking, and I would like to clear up staff and Mr. Beck to  
3 at least give me your thoughts on how to correct Dr. Kurien's  
4 status. I think I need to understand that a little better.  
5 Because while I don't -- while I have no intention, personally,  
6 of wanting to exclude his testimony, I think it will be very  
7 useful, obviously, but he is not a party. So how do we  
8 reconcile that? Is there anything that we need to do to  
9 address that?

10 MR. BECK: I don't think there is any need to do,  
11 absent a request. I suspect Aloha, they have stated that they  
12 are going to ask that he be dismissed as a party. He is not a  
13 customer of Aloha any longer. It would be my view that he is a  
14 witness in the proceeding on behalf of the two other  
15 petitioners or protestors.

16 CHAIRMAN BAEZ: Very well.

17 MR. WHARTON: I mean, I will make the motion now, but  
18 I just didn't want to make a motion on top of a motion. You  
19 are already considering a motion.

20 CHAIRMAN BAEZ: Mr. Wharton, then if we can try --

21 MR. WHARTON: I move ore tenus that Dr. Kurien be  
22 dismissed, based on the stipulation that he --

23 CHAIRMAN BAEZ: Understand that I think, and I don't  
24 want to put words in Commissioner Davidson's mouth --

25 COMMISSIONER DAVIDSON: I would move to grant Aloha's

1 motion that Dr. Kurien be dismissed as a party.

2 CHAIRMAN BAEZ: Well, first I need to get a little  
3 bit more comfort as to how we are going to treat -- I want to  
4 understand the impact of that motion, because there is a result  
5 that I don't support, and then there is a result that I can  
6 support.

7 COMMISSIONER DAVIDSON: My intent in sort of granting  
8 that would be that Dr. Kurien, while not a party, be treated as  
9 a witness in the case, like any other witness, and that OPC be  
10 allowed to offer Dr. Kurien's testimony as it would any other  
11 customer. And that Dr. Kurien, while not participating as a  
12 party, would be available for testimony and subject to  
13 cross-examination, so that all that we are doing is eliminating  
14 his status as a party in the case.

15 CHAIRMAN BAEZ: Right.

16 COMMISSIONER DEASON: I have a question on that.

17 CHAIRMAN BAEZ: Commissioner Deason.

18 COMMISSIONER DEASON: Commissioner, you said that he  
19 could be sponsored by Public Counsel like any other customer.  
20 First of all, he is not a customer. And does then that make  
21 him subject to objection as to what his expertise is? Because  
22 then I think he would probably fall in the category of an  
23 expert witness as opposed to a customer. Not that customers  
24 don't have expertise, but procedurally we usually put  
25 customers, I mean witnesses, in two different classifications.

1           CHAIRMAN BAEZ: I think you are starting to taste  
2 what my discomfort is, or certainly where my concerns are  
3 coming from.

4           COMMISSIONER DAVIDSON: I will withdraw the motion to  
5 grant the motion for now, so that after discussion perhaps it  
6 can be remade to encompass everybody's concerns.

7           CHAIRMAN BAEZ: You know, Mr. Jaeger, is there  
8 anything -- go ahead, Commissioner.

9           COMMISSIONER DAVIDSON: I was going to say, I mean,  
10 does granting the motion -- I guess this is for staff, would  
11 granting the motion to remove Dr. Kurien as a party in any way  
12 preclude us from articulating how, if he is proffered as a  
13 witness, he would be proffered? Should we do that, is that for  
14 the parties to do, could the parties then proffer him as an  
15 expert and open that subject to cross, and we would have to  
16 make that determination?

17           MR. JAEGER: I believe his testimony has both  
18 portions of just personal experience as a customer, which he  
19 can address. I believe that -- even though he is still not a  
20 customer, he could say I have been a customer and this is what  
21 I have seen. And then there is also portions of his testimony  
22 which are expert in nature on water chemistry or chemistry.

23           And I believe Aloha -- actually whether he was a  
24 customer to begin with or not a customer, if they were going to  
25 object to that expert testimony, the order establishing

1 procedure says that objection had to be made in their  
2 prehearing statement. It was not.

3 CHAIRMAN BAEZ: It was not.

4 MR. JAEGER: I believe all of his testimony -- Aloha  
5 can argue that some of it is expert and shouldn't be allowed,  
6 and then it would be up to you whether you are going to allow  
7 voir dire on the expert portion.

8 CHAIRMAN BAEZ: But I guess we don't have to address  
9 the proffer of the witness as a result of this motion at this  
10 point, irrespective of what Mr. Wharton or Mr. Deterding may  
11 decide to do at a proper time.

12 MR. WHARTON: Just so the record is clear, it was in  
13 our prehearing statement that we were going to object to Dr.  
14 Kurien's qualifications. It has nothing to do with this  
15 subject right now.

16 CHAIRMAN BAEZ: Thank you. All right. I guess I'm  
17 all right now if anyone wants to make a motion, or if there are  
18 any other questions.

19 COMMISSIONER DAVIDSON: Move to grant Aloha's motion  
20 to remove Dr. Kurien as a party in this matter.

21 CHAIRMAN BAEZ: Very well. Is there a second?

22 COMMISSIONER DEASON: Just for clarification, though,  
23 he will be allowed to testify historically, his experiences as  
24 a customer? Even though he is not presently a customer, he  
25 would still be able to testify as to what he experienced while

1 he was a customer?

2 COMMISSIONER DAVIDSON: That would be my intent, as  
3 well, subject to the right of Aloha to --

4 COMMISSIONER DEASON: Object at the time.

5 COMMISSIONER DAVIDSON: Exactly.

6 COMMISSIONER DEASON: I can second the motion.

7 CHAIRMAN BAEZ: There is a motion and a second All  
8 those in favor say aye.

9 (Unanimous affirmative vote.)

10 CHAIRMAN BAEZ: All right. Now, that's on the ore  
11 tenus motion. We have the motion for summary final order still  
12 to take, and, Mr. Jaeger, you have given us a recommendation.  
13 Commissioner Davidson, you had made a motion originally, I  
14 don't know if we mucked up the works by asking questions after,  
15 but are you comfortable enough with everything to move staff?

16 COMMISSIONER DAVIDSON: Yes. Move staff.

17 CHAIRMAN BAEZ: Very well. There is a motion to  
18 accept staff's recommendation in the motion for summary final  
19 order. Is there a second?

20 COMMISSIONER DEASON: Second.

21 CHAIRMAN BAEZ: A motion and a second. All those in  
22 favor say aye.

23 (Unanimous affirmative vote.)

24 CHAIRMAN BAEZ: Thank you, Commissioners.

25 Mr. Jaeger, there is a third motion I have listed



1 here as an expedited motion for continuance.

2 MR. JAEGER: And there is also a request for oral  
3 argument on that motion.

4 CHAIRMAN BAEZ: And what is your recommendation on  
5 oral argument?

6 MR. JAEGER: Staff recommends that oral argument be  
7 granted, five minutes for each party.

8 COMMISSIONER DAVIDSON: Move staff.

9 COMMISSIONER DEASON: Second.

10 CHAIRMAN BAEZ: There is a motion and a second. All  
11 those in favor say aye.

12 (Unanimous affirmative vote.)

13 CHAIRMAN BAEZ: Thank you, Commissioners.

14 This is Aloha's motion, correct? Yes.

15 Mr. Wharton and Mr. Beck, you have five minutes each  
16 side.

17 Mr. Wharton.

18 MR. WHARTON: Thank you, Mr. Chairman.

19 Mr. Chairman, Aloha's motion to continue stated  
20 several bases for the continuance. One which we did go ahead  
21 and spell out in the motion is something that when we are done  
22 here I'm going to make an ore tenus motion addressing the  
23 prehearing order. I don't want to -- I can get fully into that  
24 now, but I don't think that is necessary. Basically, it is our  
25 position that the issues that have been certified as the issues

1 in this proceeding and the prehearing order are in direct  
2 conflict with the consummating order that you issued in this  
3 case to clarify what the issues would be.

4 An additional basis for continuance, Commissioners,  
5 is the filing of the show cause order. I think that the  
6 Commission needs to think very carefully about what has just  
7 happened in the last ten days. In the last ten days,  
8 Commissioner Bradley, as the prehearing officer, accepted the  
9 argument of OPC and the customers that it is an issue in this  
10 proceeding, and I will address this at length later today, that  
11 it is an issue in this proceeding that whether or not Aloha  
12 should be ordered to remove the hydrogen sulfide in order to  
13 meet the .01 mg/l of sulfides in the raw water or to convert  
14 it. Aloha is presently meeting the standard through conversion.  
15 If Dr. Kurien's issue is accepted and ruled upon by the  
16 Commission, you will be ordering us to do something that will  
17 cost millions and millions of dollars.

18 Well, a week ago -- two weeks ago today you filed the  
19 show cause order. Now you have no idea who is going to pay  
20 that millions and millions of dollars. Inferential in the  
21 filing of the show cause order is that you have carved out  
22 territories that you apparently believe are the neighborhoods  
23 who would benefit the most from the millions and millions of  
24 dollars Dr. Kurien wants you to spend. So you don't know what  
25 is going to be left. To do these two proceedings side-by-side

1 is sheer folly, in our opinion, because you are going off into  
2 an unknown.

3           This proceeding ends today. Who knows when the show  
4 cause proceeding will end and what your order will be. But you  
5 know how long it takes, things get appealed, things have to be  
6 permitted at DEP if you order us in this proceeding to go to  
7 facilities that will remove the hydrogen sulfide rather than  
8 convert it. And, again, you won't be able to quantify the  
9 effect on the ratepayers. You won't be able to quantify how  
10 those monies will be recouped.

11           Because at the same time you have got a proceeding --  
12 and, again, it is enough to say just that we will remove X  
13 percentage of our customers, but I think it is worth  
14 emphasizing that you have designed that proceeding to notice  
15 your intent to remove the very neighborhoods which I assume you  
16 believe are the most effected. They are the neighborhoods that  
17 would benefit the most from what Dr. Kurien's position would  
18 cause you to adopt.

19           For that reason alone, this proceeding -- and because  
20 we are meeting the goal now and, therefore, I don't think the  
21 public is prejudiced by granting the motion to continue.  
22 Through conversion we are under the 0.1 mg/l. For that reason  
23 alone, this proceeding should be continued until the outcome of  
24 the show cause case. You are not able to quantify the economic  
25 effect of what you are ordering. And it will be multiple

1 millions of dollars, which is at the very heart of what the  
2 Commission does, because you won't know what effect your  
3 decision in this case will have vis-a-vis your unmade decision  
4 in the other case.

5 I just think that doing these cases side by side is  
6 indefensible from an economic standpoint, and also perhaps from  
7 the very thing that you would be seeking to accomplish by  
8 ordering Aloha to go to removal of hydrogen sulfide as opposed  
9 to chemical conversion of the water to reduce the hydrogen  
10 sulfide, while at the same time proceeding on your stated  
11 intent to delete four of the large neighborhoods from Aloha's  
12 service area that have formed a critical mass that lead you to  
13 file that proceeding.

14 CHAIRMAN BAEZ: Thank you, Mr. Wharton.

15 Mr. Beck.

16 MR. BECK: Thank you, Mr. Chairman.

17 Commissioners, the purpose of this proceeding is to  
18 put to rest the issues concerning the measurement and certain  
19 issues concerning the quality of the water that Aloha provides  
20 to its customers. This goes back to a final order the  
21 Commission issued almost three years ago. It was on April  
22 30th, 2002, that the Commission issued its final order in a  
23 rate case. In that case you heard customers provide testimony  
24 that they had black or discolored water, they had odor/taste  
25 problems, low pressure, sediment/sludge, that the utility was

1 unresponsive to customer complaints. And the Commission issued  
2 an order that required Aloha to remove 98 percent of the  
3 hydrogen sulfides from its water.

4 For various reasons that has never gone into effect.  
5 Everything from their appeal of that order which the First  
6 District Court of Appeal affirmed per curiam, to then a  
7 proposed agency action. You know, Aloha came in and asked the  
8 Commission to change the final order after they lost the  
9 appeal. The Commission did that. We are here to put this to  
10 rest. And it has been almost three years since that order was  
11 issued that never became effective. So the first response to  
12 Aloha's request is it has been too long already, and it is time  
13 to bring some finality to the matter of the quality of Aloha's  
14 water.

15 Aloha claims that they are in compliance with the  
16 Commission's order. They are compliance with the order that  
17 didn't go into effect. In other words, they are in compliance  
18 with the standard as they want it, but not as -- they can't say  
19 that with respect to the way the customers want it. So their  
20 allegation of compliance is rather meaningless because it is  
21 compliance with a standard that is not in effect.

22 With respect to the deletion docket, the water  
23 quality standards that are going to apply as a result of this  
24 case apply to all of their territory, not just to the areas  
25 that are seeking deletion. So the fact that the Commission is

1 separately pursuing the deletion of certain territories of  
2 Aloha doesn't mean that the entire territory is entitled to  
3 finally have the measurements set for its quality of service.

4 They have also raised the fact they object to the  
5 issues in this case. I guess we are going to address that  
6 briefly. Let me just address that when that comes up.

7 In their motion they cite that their motion for  
8 summary order was pending. That has now been dealt with by the  
9 Commission. They discuss the staff's motion for protective  
10 order. You are about to rule on that. Finally, they argue  
11 that it should be delayed because mediation is in effect. I  
12 think the customers' answer to that is simply mediation can go  
13 forward while this docket goes forward.

14 So the customers are against continuing this case any  
15 longer. It has been far too long and ask the Commission to  
16 proceed today with the hearing.

17 CHAIRMAN BAEZ: Commissioners, questions?

18 MR. JAEGER: Chairman Baez, could staff address that  
19 also?

20 CHAIRMAN BAEZ: Sure, Mr. Jaeger.

21 COMMISSIONER DEASON: I have a question for Mr. Beck,  
22 if that is okay.

23 CHAIRMAN BAEZ: Go ahead, Commissioner. Why don't we  
24 take your question first.

25 COMMISSIONER DEASON: Mr. Beck, do you agree that our

1 decision in this case, that being the appropriate standard,  
2 that it could have an effect or could be affected by our  
3 decision as to whether the territory should or should not be  
4 deleted? And the reason I ask that question, to me there could  
5 be -- and I want your opinion on this -- there could be an  
6 impact upon the cost, the economics, the practical nature of  
7 whether it is or is not practical to do, depending upon the  
8 number of customers out there that are going to actually be  
9 receiving the benefit of a revised standard. But those  
10 customers may not be there, depending upon what this Commission  
11 does with the deletion proceeding. So how do we balance that?  
12 I'm just looking for your opinion and your guidance. I mean,  
13 I'm trying to understand how is the best way to proceed.

14 MR. BECK: I guess part of the answer is that these  
15 standards apply to all of their territory. And what the  
16 Commission has proposed in the deletion docket is deletion of  
17 some very specific defined portions. So I agree with you, if  
18 the Commission --

19 COMMISSIONER DEASON: Let me interrupt. Would you  
20 agree -- it has been represented, but do you agree that the  
21 areas that are subject of the deletion would be those areas  
22 most benefitted by the customers' position that the standard  
23 should be changed?

24 MR. BECK: Well, I don't know that. Because the  
25 Commission has received an awful lot of testimony by customers,

1 and lots of customers not in the territory that would be  
2 deleted. I don't have a count, per se, but the Commission, you  
3 know, you have seen hundreds of customers show up at the  
4 hearings, and it is not just the deletion territories. I can  
5 tell you that because I have been repeatedly contacted by  
6 customers outside of the deletion areas saying how can our  
7 areas be deleted. I mean, this is almost a daily occurrence  
8 for me ever since the Commission voted that order. So there is  
9 lots of customers effected.

10 Certainly, I mean, this would apply -- I mean, I  
11 understand that the impact on the deletion territories, that if  
12 they are deleted then why are we doing this. But I think the  
13 answer is it is for all the customers.

14 COMMISSIONER DEASON: But you would agree there would  
15 be a lesser customer base upon which the costs would have to be  
16 spread, and that could be a consideration the Commission would  
17 have to make.

18 MR. BECK: Certainly. I can't despite that. There  
19 would be a smaller number of customer across which --

20 COMMISSIONER DEASON: So do you think in this  
21 proceeding if we go forward we need to make one decision  
22 assuming there is deletion and another decision assuming there  
23 is not deletion, assuming there would be a difference based  
24 upon the economics?

25 MR. BECK: I think the standard is to supply clean



1 water that the customers are entitled to would apply  
2 regardless. I can't see that you would say the customers are  
3 entitled to one standard of water in the deletion areas as  
4 opposed to the customers not in the deletion areas aren't  
5 entitled to that same standard of water. I mean, I don't  
6 envision that.

7 COMMISSIONER DEASON: And regardless of cost.

8 MR. BECK: Well, that is not the position we have  
9 taken. The position says if it can be done economically. It  
10 is the position of our office at least.

11 COMMISSIONER DEASON: And it can be done economically  
12 on a reduced customer base.

13 MR. BECK: I guess that would be one of the -- that  
14 would necessarily be included on the economically.

15 MR. WHARTON: Briefly, Mr. Chairman, on those two  
16 points that Commissioner Deason just raised?

17 CHAIRMAN BAEZ: Do you wish --

18 COMMISSIONER DEASON: That would be fine.

19 CHAIRMAN BAEZ: Go ahead, Mr. Wharton.

20 MR. WHARTON: First, Commissioner Deason, I think  
21 that to quote Commissioner Gunter and put the hay down where  
22 the goats can get at it about what you have just addressed, you  
23 should picture yourself sitting in a rate case. And all of  
24 these three gentlemen, the only petitioners in this case, lived  
25 in neighborhoods that are no longer served by Aloha because of

1 the decision you made in the deletion docket. And the  
2 customers are saying, now, why did Aloha just spend \$15  
3 million? And you are saying, well, because three gentleman who  
4 are no longer customers of Aloha came to us and asked us to  
5 impose this.

6 So that is one practical matter to consider, is that  
7 none of these gentlemen will have standing under any  
8 conceivable method if you delete their neighborhoods. All  
9 three live in the deletion neighborhoods.

10 Secondly, just as to the question you asked, I don't  
11 think the Commission can do this in a continual fashion without  
12 getting into issues about the issues have already been  
13 certified. I think there are chemical and hydraulic and  
14 engineering differences in those two in terms of whether or not  
15 that is in the system. And I just don't think you could, on  
16 this same set of facts, issue an order saying we will go this  
17 way if this, this way if this.

18 CHAIRMAN BAEZ: Commissioner Davidson, did you have a  
19 question? I actually had a follow-up, and I want to ask the  
20 question a different way. I want to know what your thoughts  
21 are -- I mean, I think Commissioner Deason laid it out very  
22 well. But I am wondering what your thoughts are on how the  
23 decision impacts even the -- would anyone agree or disagree  
24 with the notion that as a result of this docket, whatever  
25 requirements and solutions are imposed or resolved from this

1     loket, that that bears weight on a show cause docket later on  
2     for reasons other than -- for reasons that may be other than on  
3     an economic basis?

4             MR. BECK: Commissioner, I don't agree. The show  
5     cause docket, the Commission -- one of the things Aloha cited  
6     in bringing forth the item that the Commission had to issue a  
7     show cause order was that you had to set forth the facts, the  
8     basis of deletion. So those are done. I mean, there is a show  
9     cause order that has been issued and it sets forth the facts.  
10    So I think those are separate from the issue of what standard  
11    should be applied on a going-forward basis for this for the  
12    customers of Aloha.

13            CHAIRMAN BAEZ: So, in your mind -- and I don't want  
14    to put words in your mouth, Mr. Beck, but in your mind there is  
15    no room for considering remedial measures over the course of a  
16    show cause docket. In effect, there is a static line, and  
17    whatever remedial measures, or whatever improvements, or  
18    whatever changes that happened after that show cause was issued  
19    bear no weight on an ultimate decision, in fact, on this kind  
20    of deletion docket?

21            MR. BECK: No, no. I hope I didn't say that.

22            CHAIRMAN BAEZ: I don't want to put words in your  
23    mouth, but maybe I asked it just so that you can see what I'm  
24    dealing with.

25            MR. BECK: The facts supporting the deletion are set

1 forth in the show cause order and those are -- and the  
2 Commission listed out at some length the facts supporting the  
3 proposed deletion of the territories. Now, Aloha has yet to  
4 file their response, but it is due a week from today.

5           They may raise as a matter of mitigation or in  
6 defense that they have solved the problem. I would expect they  
7 would probably allege something like that, and that will be  
8 something that you will have to take up at that point. Offhand  
9 I think they could probably raise that. You know, they could  
10 concede all the facts that are stated in the show cause order,  
11 but say, look, we have fixed it. You know, even if those facts  
12 were true. I suspect they would try to raise something like  
13 that. You know, there is nothing out there right now for me to  
14 address, so I have not -- I don't have any final position on  
15 that. But offhand I think they would do that.

16           CHAIRMAN BAEZ: Mr. Wharton, part of your argument at  
17 least implied an order of addressing the two concurrent  
18 dockets, if you will. Does the logic apply in both ways or in  
19 reverse?

20           MR. WHARTON: Well, I think so. You know, as we  
21 argued, first of all, when you were asking about an implication  
22 of this docket to that one, and as we argued in our motion to  
23 disqualify, and I understand that motion is denied, the  
24 deletion docket is mostly based on unhappy customers. That's  
25 is the best way to create more unhappy customers, order us to

1 go spend 15 million more dollars.

2 And you can bet that if we are under an order from  
3 the Commission saying go spend \$15 million while we are  
4 simultaneously being prosecuted by the Commission to take away  
5 the best neighborhoods in the service area, we are going to go  
6 to some court somewhere and say something is wrong with this,  
7 because it really is at odds.

8 And, again, I think as Commissioner Deason was asking  
9 questions about, it is, you know, are ten people going to pay  
10 for this or twenty. You won't know when you make the decision.  
11 I mean, those are hypothetical numbers, but you won't know when  
12 you make the decision in this docket. And I agree with Mr.  
13 Beck when I said that no one would be prejudiced because we are  
14 meeting the standard, he is right, the standard has been  
15 challenged. When I refer to the standard, I mean when you  
16 issued your proposed agency action we are meeting that standard  
17 right now.

18 CHAIRMAN BAEZ: Commissioner Bradley, you have a  
19 question?

20 COMMISSIONER BRADLEY: Right. A question of Aloha.  
21 Is it Aloha's intent to tie this up legally, or is it Aloha's  
22 intent to clean up the black water?

23 MR. WHARTON: Commissioner Bradley, Aloha -- you  
24 know, as your staff advised you in the staff recommendation of  
25 the 22nd, and as they argued to you --

1           COMMISSIONER BRADLEY: I tell up what, let me  
2 rephrase my question, and you can answer me with a yes or no  
3 rather than a discussion. Is it Aloha's intent to tie this  
4 matter up legally, yes or no?

5           MR. WHARTON: It is Aloha's intent -- Commissioner  
6 Bradley, with all due respect, I don't think you have the  
7 authority to order me to answer something yes or no. It is a  
8 loaded question, sir, and you know it.

9           COMMISSIONER BRADLEY: The question is not authority.  
10 What I'm trying to do is get clear in my mind --

11          MR. WHARTON: I can answer your question, sir.

12          COMMISSIONER BRADLEY: -- what Aloha's intent it.

13          MR. WHARTON: I can answer your question. Aloha is  
14 is --

15          COMMISSIONER BRADLEY: What do I have the authority  
16 to do, then?

17          MR. WHARTON: I don't believe that you have the  
18 authority to --

19          COMMISSIONER BRADLEY: Tell me what I have the  
20 authority to do then.

21          MR. WHARTON: Well, I think I can answer your  
22 question, sir.

23          COMMISSIONER BRADLEY: Well, that is another  
24 question. What do I have the authority to do?

25          MR. WHARTON: I don't think that you have the

1 authority to direct me to answer one of your questions yes or  
2 no.

3 COMMISSIONER BRADLEY: Well, we are having oral  
4 argument.

5 MR. WHARTON: It is a loaded question.

6 COMMISSIONER BRADLEY: Are we having oral argument  
7 and discussion? And I am trying to establish intent.

8 MR. WHARTON: I will answer your question no then.

9 COMMISSIONER BRADLEY: Okay. Can I assume then that  
10 Aloha's intent is to clean up the black water and have a  
11 customer base that is satisfied with Aloha's service?

12 MR. WHARTON: Aloha's intention is to address these  
13 problems and continue to address them every way we can, and we  
14 take them very seriously.

15 COMMISSIONER BRADLEY: Okay. Now, one other  
16 question. You have used the term removal. Are there methods  
17 of removal that might be used other than cleaning up the  
18 hydrogen sulfide as it relates to the existing source that the  
19 water comes from?

20 MR. WHARTON: I don't believe there is, sir. The  
21 only processes by which removal as Dr. Kurien has suggested it  
22 could be accomplished are -- it could not be done chemically --  
23 are very expensive things, such as aeration.

24 COMMISSIONER BRADLEY: Okay. So what might be some  
25 other methods of removal that might be used in order to satisfy

1 Aloha's needs to not have this matter go on infinitely and to  
2 have the customers get what they are trying to get, and that is  
3 removal of black water from their system?

4 MR. WHARTON: Aloha's engineer, Mr. Porter, could  
5 more technically answer your questions, and he will testify  
6 today. But to my own knowledge, the various things that could  
7 be done are to -- there are issues of purchasing more water  
8 from Pasco County. We are already on schedule to purchase more  
9 in a Phase I and a Phase II, an agreement that we already have  
10 with Pasco County.

11 To the extent there seems to be widespread belief  
12 that Pasco County's water does not have the same  
13 characteristics as Aloha's water, we believe that will help.  
14 We have addressed matters involving Aloha's wells. Dr. Levine  
15 has overseen a process that Aloha is currently putting in  
16 involving hydrogen peroxide. We are subject to the  
17 recommendations of the ad hoc committee that has been meeting  
18 in Pasco County and have two representatives on that ad hoc  
19 committee. And I believe the ad hoc committee is getting close  
20 to recommending something which is an interesting juxtaposition  
21 to what the Commission does. We got that -- Representative  
22 Fasano committed this bill, and we are running down two streets  
23 in kind of the same direction.

24 I can't give you a technical answer. I just know  
25 that it is my understanding that the issue of removal,



1 tripping that hydrogen sulfide is a very, very expensive  
2 process. That's something that when the Commission had its  
3 water quality docket, which was probably a proceeding that  
4 hundreds of thousands of dollars was spent on and all kinds of  
5 experts talked to you about, the Commission decided in 1999 not  
6 to direct that a certain method be used. And to reach that  
7 issue in this case where really we only have just a very few  
8 witnesses and an argument about what the issues are, I don't  
9 think is appropriate.

10 MR. BECK: May I respond briefly?

11 CHAIRMAN BAEZ: Mr. Beck. And, Commissioner  
12 Davidson, you had a -- hold on. Let's start over.

13 Commissioner Bradley, do you have any other  
14 follow-up? And I know Mr. Beck wanted to respond.

15 COMMISSIONER BRADLEY: I'm interested in Mr. Beck's  
16 response.

17 MR. BECK: I just wanted to mention briefly, and this  
18 is in response, I guess, to both Commissioner's questions, is  
19 that, first of all, Commissioners, there's three issues in  
20 front of you today, and this is all centered on one. You know,  
21 there's issues about where do you measure the sulfides in the  
22 water, how often should the measurements be done, and the third  
23 part is removal. And there's various options.

24 Counsel for Aloha is talking \$15 million. There is  
25 not evidence of that. You know, there's plenty of options out

1 there. That is the point of the hearing today is to hear those  
2 sorts of things. So because there's three issues involved, not  
3 just one. And, in fact, the issue of the removal is one that  
4 the Commission is going to address. I mean, they are  
5 presupposing the outcome of what the Commission is going to  
6 decide. It is putting the cart before the horse.

7 I don't think there is grounds for continuing this  
8 case. The Commission needs to hear the evidence and then make  
9 the decision, and the things that you are discussing may effect  
10 the Commission's decision in the case.

11 CHAIRMAN BAEZ: Commissioner Davidson.

12 COMMISSIONER DAVIDSON: Thank you, Chairman.

13 I have a concern about, sort of, the dual proceedings  
14 here. It makes it somewhat difficult if we are at the point  
15 where we can craft a remedy to craft a remedy and then say,  
16 okay, well, we've got a remedy and there is going to be some  
17 cost, but we are also going to delete a certain amount of  
18 territory. I mean, it is problematic. I don't know what the  
19 fix is, and that was the comment.

20 My question for staff is when we initially proceeded  
21 along the deletion route, we went via a specific avenue in the  
22 statutes. We were incorrect in that approach. At the time I  
23 recall expressing a concern that whatever we do needs to be  
24 based upon the statute, and we heard comments and arguments,  
25 well, there is a different burden of proof, and there are

1 different requirements to be met.

2           And my question is, and it may not be on the issues  
3 before us today, but what is different about the show cause  
4 order relating to deletion than we initially engaged in? What  
5 are the differences? Are we focused on a different burden of  
6 proof, on different requirements? Because I think we can't  
7 just sort of do what we intended and couch it in different  
8 language. Whatever we do needs to be based upon the statute.  
9 So I'm trying to get at -- where we were initially was,  
10 everyone agreed, incorrect. And now we are sort of heading  
11 down the same path. What has changed?

12           MS. HELTON: Can I make sure I understand your  
13 question? Are you asking what is the difference between the  
14 show cause order and when the Commission was first going  
15 forward on the customers' petitions with respect to deleting  
16 the territory?

17           COMMISSIONER DAVIDSON: Yes.

18           MS. HELTON: The difference is when we were  
19 proceeding forward on the customers' petitions, we were acting  
20 as if the petitioners, the customers, had the burden of proof,  
21 not the Commission. And we were acting, I guess, with  
22 blinders, for lack of a better word, to the licensing  
23 provisions in Chapter 120. Upon further consideration, and  
24 after the issue was raised by Aloha, staff went back and  
25 further looked at what is the process to follow when we are

1 looking at whether a certificate should be revoked or not, and  
2 decided in an abundance of caution that we should be following  
3 the licensing provisions in Chapter 120, and the instructions  
4 there with respect to how to proceed as far as whether revoking  
5 or deleting a part of the territory.

6 And the language there is clear, as I recall, that it  
7 is the Commission's burden to go forward. It is the Commission  
8 that issued the license, it is the Commission's, then, burden  
9 to go forward with the proof to show whether that license  
10 should be revoked or not. So we are taking a different tack  
11 with respect to the burden of proof. We entered the show cause  
12 order, which is akin to an administrative complaint, which is  
13 required by Chapter 120. Those are all things that we had not  
14 done in the original deletion docket.

15 COMMISSIONER DAVIDSON: And I really don't want to  
16 throw sort of a cog into the wheel here, but would a rulemaking  
17 proceeding be a better type of vehicle pursuant to which we  
18 could articulate some sort of standard guidelines on how the  
19 Commission as a body would consider deletion issues, assuming  
20 that this comes up again with another company, or is the more  
21 appropriate course to do it through a show cause sort of based  
22 on particular facts?

23 MS. HELTON: Well, in my mind there are very  
24 particular facts associated with the Aloha situation that I  
25 don't -- we are dealing with one utility on a particular set of

1 facts. I'm not sure that we are trying to make a global  
2 statement that would be applicable to all similarly situated  
3 persons, so --

4 COMMISSIONER DAVIDSON: I guess my concern is it is a  
5 case of first impression, and we sort of erred in our first  
6 approach. And we are proceeding on a somewhat unique set of  
7 facts, but it is a fairly significant issue that we are  
8 considering.

9 MS. HELTON: And we are following Chapter 120 now  
10 with respect to the show cause proceeding, and there are some  
11 rules, and Ms. Cibula may be able to address this better than  
12 me, but there are some rules associated with the licensing  
13 part, too, and it is my understanding that we are following  
14 those rules now.

15 COMMISSIONER DAVIDSON: Does staff have the same  
16 burden of proof in the show cause as the customers had in the  
17 initial proceeding which was ultimately improper? Is the  
18 burden the same, is it a heightened burden, a different burden?  
19 Do we know? And it is fine if --

20 MS. HELTON: I'm not sure that I have in my  
21 recollection what burden we would have been proceeding under in  
22 the deletion docket dealing with the customer petitioners. I  
23 believe, though, that we were dealing with a heightened burden  
24 in the show cause docket. I don't remember whether we were  
25 proceeding under that same burden in the customers' docket.

Here comes Ms. Gervasi, she may be able to help me.

2 It was a lesser burden in the customers docket that we were  
3 proceeding under, a preponderance of the evidence.

4 COMMISSIONER DAVIDSON: And in the appropriate docket  
5 will staff be demonstrating how the differences in the burden  
6 and the satisfaction of those differences are being met in the  
7 show cause proceeding?

8 MS. HELTON: Well, the burden in the show cause case  
9 would be clear and convincing evidence. And if we get to that  
10 point where we actually have a hearing and the advisory staff  
11 makes a recommendation to you, then for you to move forward on  
12 the recommendation to -- if there is a recommendation to  
13 delete, for you to be able to do so you must find that based on  
14 clear and convincing evidence, the prosecuting staff has shown  
15 that this particular territory should be deleted.

16 COMMISSIONER DAVIDSON: And a final question, two  
17 part. How will the outcome of this docket impact the show  
18 cause, and can we proceed with the show cause prior to complete  
19 resolution of this docket?

20 MS. HELTON: I don't know that there is a direct  
21 correlation between the two. In my mind, I think that it's  
22 pertinent -- in the show cause docket what is the standard and  
23 is Aloha meeting the standard, although -- let me take that  
24 back. Let me strike that. Because what we are dealing with is  
25 past actions of the utility in the show cause docket. Just a

1 second, please.

2 MR. WHARTON: Commissioner Davidson, it seems no  
3 matter how you word it, you have noticed your intent to sever  
4 our arm, but you are having a proceeding about how to fix our  
5 elbow. In that way they do seem related.

6 COMMISSIONER DAVIDSON: I'm fine with that. I mean,  
7 I agree. There is some -- I've got a lingering concern  
8 about -- I mean, if this is the scenario, if the deletion is  
9 just for past actions only and has no -- I don't mean to  
10 mischaracterize. As the Chairman says, I don't want to put  
11 words in your mouth, but if the relationship is such that the  
12 show cause order should have -- future actions should have no  
13 bearing on the show cause order, corrective actions should have  
14 no bearing on the show cause order.

15 If corrective actions going forward have no bearing  
16 on the show cause order, then in a sense the deletion is purely  
17 punitive. I don't know that that is our role. And if going  
18 forward actions do have a relationship, then we cannot -- it  
19 seems that we can't resolve the show cause until we address  
20 whatever the outcome is, the forward-looking --

21 MS. HELTON: Well, let me say upon further  
22 reflection, and after talking to Ms. Gervasi and other staff  
23 members, I think that whether Aloha is meeting the standard as  
24 it may be revised as a result of this hearing or not, and the  
25 actions that they have taken to deal with the problem on a



1 joing-forward basis could be mitigating factors in the show  
2 cause proceeding.

3 COMMISSIONER DAVIDSON: Well, don't we have to then  
4 hold that, if that is true, hold that show cause somehow in  
5 abeyance or stall it somehow? I mean, because it's on a time  
6 track now, right?

7 MS. HELTON: It is on a time track. Aloha will be  
8 filing a response to the show cause order next week. And it is  
9 not until Aloha files its response whether we will even know  
10 whether Aloha will request a hearing or not.

11 COMMISSIONER DAVIDSON: Well, this will be my last  
12 comment. I will just sort of share my view, and I want to  
13 share it from the bench and not outside the bench. My view  
14 is that ultimately any sort of remedy, whether it be deletion,  
15 should not be punitive in nature. My own personal sort of view  
16 at this point, without trying to prejudge the matter, is that a  
17 deletion was sort of the only remedy left. There was nothing  
18 that could be done to remedy or correct the situation, thus  
19 deletion. I have heard that there is some relationship. And I  
20 hope, you know, procedurally it can get worked out such that we  
21 are not sort of proceeding on two tracks independently when  
22 there is a relationship between the two.

23 COMMISSIONER BRADLEY: Mr. Chairman.

24 CHAIRMAN BAEZ: Commissioner Bradley.

25 COMMISSIONER BRADLEY: You know, we have had a very



1 major discussion here. And in spite of what Mr. Wharton might  
2 think that my intention was, or my intent was with my  
3 questions, let me clear up something here. My intent here  
4 is -- and the reason why I asked those questions was to get  
5 some clarity from Aloha as to what it really wants to do with  
6 respect to dealing with this portion of its customer base that  
7 is dissatisfied because of a problem that is emanating from  
8 nature, sulfur water. And I don't -- and I don't know how we  
9 get to where we need to be.

10 The only outcome that I would -- and maybe Aloha  
11 wants to withdraw its motion so that we can get into the actual  
12 hearing and try to come to some solutions as it relates to this  
13 dispute that we are dealing with here. And we are still in the  
14 preliminary stages. My intent, the only thing that I really  
15 want to see as an outcome here is to have Aloha serve some  
16 satisfied customers. And I don't know how we get there with  
17 all the legal maneuvering that is going on.

18 MR. WHARTON: Well, that is what we want, too,  
19 Commissioner Bradley. And I want to tell you that I apologize  
20 earlier to the extent that I was out of line in my comments to  
21 you. That is what we want, too. We were in a defensive  
22 posture in the deletion case, customer deletion case. We are  
23 in defensive posture in this case. We are not the petitioners.  
24 We are going to be in a defensive posture in the show cause.

25 So while there is these articles in the paper and

1 letters to the editor saying that we are litigious and that is  
2 all we do, we would rather concentrate on fixing the problem.  
3 And, unfortunately, and not to cast any aspersions upon Mr.  
4 Beck, he said part of this proceeding was what different  
5 alternatives there were and et cetera. You are not going to  
6 hear any of that today. If you have read the prefiled  
7 testimony, you would know that.

8           Doctor Kurien, the only witness, says I'm not going  
9 to make any recommendation as to how they should accomplish  
10 this. Now, in the past the Commission has solicited from  
11 Aloha, give us something with the various methods, and I'm sure  
12 we would be willing to do that again. Because if this  
13 Commission wants to say now we are making a determination that  
14 you should go to aeration, and we are ordering you to do it, we  
15 will do it. And we have been telling you that for many years.  
16 But you are not going to hear that today.

17           Today you are just going to have this kind of problem  
18 that we have been discussing about that you have got this other  
19 proceeding going on. There is now talks about mitigation,  
20 which was an angle that I didn't even argue. There is no way  
21 to wait for the show cause proceeding, really, for what happens  
22 in this proceeding. Permitting is a slow process. Even if the  
23 decision was made to go, and we came in and, you know, these  
24 things have to -- we would probably have to do a bond deal to  
25 remove the hydrogen sulfide.

1           So we will do things as quickly as we can, but to do  
2 both proceedings at the same time seems to me to just create  
3 tremendous problems for the Commission. And I will tell you,  
4 Chairman Baez, it sounds a little extraordinary, but since I do  
5 see that the Commission has been considering the continuance  
6 motion for awhile, if you want to table it, I will make my ore  
7 tenus argument on the prehearing order, which as you will  
8 recall I said was another good reason to continue this  
9 proceeding, but which I glossed over. And I do believe there  
10 is another very good reason, in addition to this dilemma, this  
11 paradox, that the two proceedings create.

12           CHAIRMAN BAEZ: And I do recognize that that was one  
13 of the points of your -- and because I agree with you, and I  
14 feel that we can't really consider a motion for continuance in  
15 its entirety when you have made arguments that -- or you have  
16 based it on arguments yet to be made, I think, Commissioners,  
17 if it is okay with you all, why don't we table this continuance  
18 motion. Because since Mr. Wharton has indicated that he will  
19 be making, assuming imminently, a motion for reconsideration on  
20 the issues of the prehearing order.

21           Commissioner Deason, you have a question?

22           COMMISSIONER DEASON: I have a question for Mr.  
23 Wharton. I don't have a problem with tabling it, but I do have  
24 question I would like to ask him.

25           CHAIRMAN BAEZ: By all means, please.

1           COMMISSIONER DEASON: In your motion for continuance,  
2 when do you envision it to be continued to, what time frame?

3           MR. WHARTON: Well --

4           COMMISSIONER DEASON: Should I interpret your motion  
5 to say that we should hear the standard and the measuring  
6 criteria for that standard in conjunction with the deletion, or  
7 afterwards? Obviously you don't want to do this before, so it  
8 is either going to have to be at the same time or it is going  
9 to have to be afterwards, if your motion is granted, and how do  
10 you envision that happening?

11           MR. WHARTON: I believe consolidation would be  
12 confusing, because there are different burdens and different  
13 parties. And also it would create the odd juxtaposition that  
14 the moment you ruled in one consolidated case, you might take  
15 away the standing of all the petitioners in the other. But I  
16 believe that this case should be continued, as we argued in our  
17 motion, one, until these issues are clarified. That is an  
18 argument I'm going to make to the Commission in a second.

19           But as far as which comes first here, Commissioner  
20 Deason, I mean, you know, quite frankly, I would prefer the way  
21 I interpreted Commissioner Davidson to be going, that it would  
22 be the show cause. We would table it until we see how this  
23 comes out. I mean, obviously the show cause proceeding is the  
24 proceeding that Aloha feels is a very threatening proceeding  
25 where we are going to have to do everything everywhere we can

1 in a kind of a distracting and time-consuming way to protect  
2 our territory. I don't have a good answer, I guess, is what  
3 I'm telling you. The two proceedings do present a paradox, but  
4 I'm not sure.

5 COMMISSIONER DEASON: So are you really asking us to  
6 continue the deletion proceeding until this is completely  
7 resolved. Because I'm trying to understand what you want. If  
8 you want us to grant what you want, you --

9 MR. WHARTON: Well, the other proceeding hasn't  
10 started. The other proceeding hasn't started. You have shot  
11 the bullet from the gun, but it is not really a litigation  
12 until we file our petition a week from today, or whatever it is  
13 we choose to file. And so, no, I wasn't making a motion in  
14 that case. I mean, can I talk to my client for a second?

15 (Pause.)

16 MR. WHARTON: I think, Commissioner Deason, that I  
17 request, and I think it is the only request that is  
18 procedurally correct because this is the pending proceeding, is  
19 that this proceeding be continued until the completion of the  
20 show cause proceeding.

21 CHAIRMAN BAEZ: And I had a question. If you all  
22 don't have a question before we go on with this, I know that we  
23 have mentioned that we are going to table it, but since we are  
24 trying to get a feel for this, I would have a question of  
25 staff.

1           At this point, even considering the show cause docket  
2 isn't before us, so I'm not sure that we can do anything with  
3 it even though we are all sitting here in public --

4           MS. HELTON: We are not noticed to do anything with  
5 the show cause proceeding. We don't know whether, you know,  
6 what stature the show cause proceeding is going to take at this  
7 point in time. All we have done is we have issued our, in  
8 effect, our administrative complaint to which Aloha has not  
9 responded.

10           MR. WHARTON: You have noticed your intent, though,  
11 to take action, and the action will be automatic next Tuesday  
12 if we don't file something.

13           CHAIRMAN BAEZ: And normally that would really weigh  
14 on my mind, but I had a priest once (simultaneous  
15 conversation) --

16           MR. WHARTON: Yes, sir.

17           CHAIRMAN BAEZ: Commissioners, I don't know where we  
18 take it from here. If you are prepared to -- I did mention to  
19 Mr. Wharton, and I did acknowledge that he has made some  
20 arguments that are really more proper for the reconsideration  
21 that he is hoping to -- the motion he is hoping to make. I  
22 don't know if you all have heard enough. I want to take your  
23 temperature as to how you are feeling at this point on the  
24 continuance matter.

25           COMMISSIONER DAVIDSON: I have another follow-up for

1 staff. And I apologize for my confusion on these issues. So,  
2 staff has issued the complaint, Aloha has a week left to  
3 respond. If Aloha did not respond, staff would automatically  
4 take some action, is that correct?

5 MS. HELTON: I'm not sure that staff would take the  
6 action, I think we will come back to you first.

7 COMMISSIONER DAVIDSON: You would make a  
8 recommendation to the Commission.

9 MR. WHARTON: The Commission issues the complaint.

10 COMMISSIONER DAVIDSON: So if I understand it from  
11 Aloha's vantage, I will go back and forth, to protect your  
12 client's interest you have to file something.

13 MR. WHARTON: Yes, absolutely. And I would  
14 respectfully disagree with what I think I just heard, and that  
15 is the show cause order was issued by you. And if nothing is  
16 filed in on Tuesday, it is automatic. I don't think there is  
17 any further recommendation or discussion.

18 MS. HELTON: Ms. Gervasi just reminded me that the  
19 show cause order states that if Aloha does not respond then the  
20 territory will be deleted contingent upon an alternate provider  
21 being in place and ready to serve.

22 COMMISSIONER DAVIDSON: All right. So the show cause  
23 is not noticed, it is not before us, we can't do anything on  
24 that. Could we procedurally, if the Commission was so inclined  
25 after Aloha's response, hold the shows cause proceeding in

1 abeyance pending completion of what we have heard are the other  
2 issues that might impact whether or not we ultimately wanted to  
3 delete?

4 MS. HELTON: Yes, sir.

5 COMMISSIONER DAVIDSON: And would that be something  
6 that would come up -- well, how would that -- would that be a  
7 request that Aloha would make or would it be a recommendation  
8 that staff would make sua sponte based on --

9 MS. HELTON: It is a recommendation, it is a request  
10 that Aloha could make, it is a recommendation that the staff  
11 could make, or it is also a motion that you could make on your  
12 own.

13 COMMISSIONER DAVIDSON: I mean, just to sort of state  
14 where I'm at, that to me seems to be the best course, but I  
15 also want the benefit of you all's thoughts.

16 CHAIRMAN BAEZ: Believe me it is a difficult -- you  
17 know, following some parallel track, although I don't know that  
18 that is the right term for it, is a very difficult one to do  
19 under normal circumstances. And obviously with the stakes what  
20 they are in these two dockets in particular, it is especially  
21 difficult. I don't know what kind of finality we can bring to  
22 any questions that there may be on the progress of the show  
23 cause docket. The only comment that I would make is that I  
24 would expect logic to rule, and common sense to rule, as well,  
25 and I don't know if that is enough for the parties here, but I



1 would, you know, after it is all said and done, we are all  
2 going to go home and try and figure out what was said here  
3 today. And I want at least my last words on this subject to be  
4 those.

5           It is our responsibility, or I see it as this  
6 Commission's responsibility to pursue the dockets -- where  
7 there is an obvious conflict or correlation to pursue them in a  
8 logical and reasonable manner. Those are the guiding  
9 principles of how you move forward. You take that to mean  
10 whatever you think. I know what it means to me, so it is up to  
11 you all to guess.

12           COMMISSIONER DAVIDSON: Well, I don't want to guess.

13           CHAIRMAN BAEZ: Well, the reason I'm being so oblique  
14 is this, we have neither a motion or the proper forum at this  
15 point to be able to decide on the many suggestions that have  
16 been made in terms of order of the dockets, Commissioner  
17 Davidson. I mean, it would be improper for us to say, you know  
18 what, we are going to make a motion right here and say this  
19 show cause docket doesn't move forward until we resolve this  
20 docket. A, I don't know if that is the right thing to do at  
21 this point. B, we are not in a position to do it. So I guess  
22 that is why --

23           MR. WHARTON: And, Chairman Baez, there is a uniform  
24 rule that I believe that Aloha could request an extension of  
25 next Tuesday's date under. I mean, I will discuss that with my

1 client. That is not something we would do right now.

2 CHAIRMAN BAEZ: We are settling in for what is  
3 quickly turning out to be a very long day, Mr. Wharton, so you  
4 can keep that one in your pocket. And if it becomes necessary  
5 for you, I will assure you, you will have every opportunity to  
6 make that request whether it is to staff or to the Commission  
7 as a part of the hearing.

8 MR. BECK: Chairman Baez, may I briefly? Mr. Wharton  
9 has been talking repeatedly here.

10 CHAIRMAN BAEZ: Mr. Beck, I'm sorry, I didn't mean to  
11 shut you out. All you have got to do is raise your hand or --

12 MR. BECK: I'm doing so. Commissioners, this case is  
13 almost done. I mean, it is to try to bring a resolution to an  
14 order that you issued almost three years ago. We are at the  
15 point of hearing testimony today. It has been filed. We have  
16 had a slew of motions. I mean, you are almost done. I mean,  
17 all you have to do is hear the testimony and make a decision.

18 So, to put this off for some length of time after  
19 waiting three years, I think, would be a big mistake,  
20 particularly because there is lots of complaints by customers  
21 that are not in the deletion proceeding.

22 CHAIRMAN BAEZ: Mr. Beck, and I assure you I heard  
23 you the first time you said that, and it is very compelling.  
24 And that is all I'm going to say about that.

25 COMMISSIONER DAVIDSON: And I hear. On the motion

1 for continuance, I mean, my view is to deny that because the  
2 parties are here. I mean, we can take the testimony. My  
3 concern is not so much proceeding with this, it's proceeding  
4 with the other track, but that is a different issue for a  
5 different day.

6 CHAIRMAN BAEZ: And I think we have sort of beat --

7 COMMISSIONER DAVIDSON: Beat that horse.

8 CHAIRMAN BAEZ: We have beat around that bush, so to  
9 speak, enough to at least give everyone some expectation that  
10 that is a question that is going to get addressed.

11 COMMISSIONER DAVIDSON: But I think it would be sort  
12 of a wasted day and resources to continue this today, because  
13 we have got the parties here. And despite the motion, Mr.  
14 Wharton is prepared to cross and --

15 CHAIRMAN BAEZ: And at the risk of shutting down Mr.  
16 Wharton's further argument, I feel we are ready for a motion.

17 COMMISSIONER DAVIDSON: I move to deny the motion for  
18 continuance.

19 COMMISSIONER DEASON: I'm sorry, I thought there was  
20 another argument that is going to be made in support of a  
21 continuance.

22 MR. WHARTON: Well, what Chairman Baez -- I think  
23 Chairman Baez will say that he is just going to shove my  
24 argument into another forum. I'm still going to make that  
25 argument that the prehearing order should be modified. But I

1 guess if you rule the motion to continue, it won't be.

2 CHAIRMAN BAEZ: That's fine.

3 MR. WHARTON: We are not going to continue.

4 CHAIRMAN BAEZ: Yes.

5 MR. WHARTON: I mean, if you want to table it, that's  
6 fine, but I'm going to make a motion right after this that is  
7 one of the bases we put as our -- we have solicited like five  
8 things in the motion to continue.

9 CHAIRMAN BAEZ: Isn't that always the case?

10 COMMISSIONER DAVIDSON: Should that motion be held?  
11 I mean, should they go through all of their arguments, or --

12 CHAIRMAN BAEZ: Listen, I don't have a problem  
13 tabling the motion. I merely asked if the Commissioners have  
14 heard enough argument on this motion for continuance. You  
15 know, it is a collegial body. You are free to make a motion.  
16 I had also tossed out the idea of tabling --

17 COMMISSIONER DEASON: Well, let me ask this question.

18 COMMISSIONER DAVIDSON: I forgot that.

19 COMMISSIONER DEASON: Let me ask this question.

20 CHAIRMAN BAEZ: If you are persuaded by a motion for  
21 reconsideration, then I don't think we could hold this. I'm  
22 sure there would be some impediment to holding this hearing  
23 based on that.

24 COMMISSIONER DEASON: Well, that's another argument,  
25 and we are not on that argument now. I've got a question about

1 the continuance.

2 CHAIRMAN BAEZ: Go ahead.

3 COMMISSIONER DEASON: I understand the practical  
4 nature that we are all here and witnesses are ready to take  
5 that stand and cross-examination can be done, and that is an  
6 expedient thing to do. But at the same time I'm the  
7 decision-maker, one of the decision-makers, and I've got to  
8 cast a vote based upon what I think is best for the customers  
9 and what is fair to the company.

10 If I hear the evidence today, and based upon the  
11 evidence that I hear and I weigh, if I'm unsure what should be  
12 done because of this big question mark out there about  
13 deletion, what do I do? Somebody tell me what do I do in a  
14 good conscience cast a vote when I don't have everything in  
15 front of me?

16 CHAIRMAN BAEZ: I'm sorry, Commissioner, ask the  
17 question again.

18 COMMISSIONER DEASON: How do I cast a vote? If I go  
19 to hearing, hear this evidence, hear what is said, and the way  
20 that I interpret that and weigh that evidence, if a contingency  
21 out there in my mind is whether there is or is not going be a  
22 deletion, how do I make a decision in good conscience?

23 CHAIRMAN BAEZ: Are you --

24 COMMISSIONER DEASON: And I cannot ignore that this  
25 Commission has issued an order saying that absent some action

1 by the company we are deleting territory.

2 CHAIRMAN BAEZ: Well, clearly that is a good  
3 question, but I guess I would like to understand --

4 COMMISSIONER DEASON: And here again, I don't know  
5 how this evidence is going to come out and how I'm going to  
6 weigh it. I'm just saying that to me what I hear today that  
7 the direct, the cross, everything else, that the fact that  
8 there is a possibility of a deletion could have a material  
9 impact on how I interpret that evidence in coming to a  
10 conclusion as to what the correct action to take is.

11 CHAIRMAN BAEZ: And wouldn't your -- and maybe I'm  
12 asking a question I shouldn't. But if it were working  
13 backwards, which at least at this point in time is how the  
14 dockets have proceeded, it is, in fact, in this order, and not  
15 the other.

16 COMMISSIONER DEASON: And it could have been the  
17 other.

18 CHAIRMAN BAEZ: It could have been the other, I  
19 suppose. And I think you remember questions, or at least I  
20 tried to get from everybody involved what their contemplation  
21 of mitigating factors and whatnot were going to be leading into  
22 the deletion docket. And I think I heard the answer that that  
23 is certainly part of the case to be made. Is that --

24 MS. HELTON: I'm sorry, Mr. Chairman, I didn't hear  
25 your full statement.

1           CHAIRMAN BAEZ: That the deletion -- that as part of  
2 a case, a deletion docket could consider mitigation.

3           MS. HELTON: Yes, sir.

4           CHAIRMAN BAEZ: Okay. And I guess that was my best  
5 stab at trying to play out or at least set my mind at ease as  
6 to now what am I considering, now what am I looking at as  
7 opposed to the deletion. Now, I don't know if that gives you  
8 the same amount of comfort. I suspect it doesn't by virtue of  
9 your question, and I really do appreciate that. I'm really  
10 struggling with this myself. But at the same time,  
11 Commissioner, I don't know if it is a question of which docket  
12 do you do first.

13           COMMISSIONER DEASON: And maybe that is all it boils  
14 down to is which docket do we do first. And what is the  
15 company's position on that, which docket should we do first?

16           MR. WHARTON: I don't see how you are going to wait  
17 for the true outcome of this until you do the show cause.  
18 Because, frankly, the kind of facilities we would have to  
19 install if you accept our per curiam suggestion, would take  
20 years. It would take a bond issue. It would take DEP permits.  
21 It would be incredibly expensive. It might take land  
22 acquisition. None of this is a part of the evidence today, but  
23 --

24           CHAIRMAN BAEZ: And just so that I can understand,  
25 what do you understand to be the physical limits of the show

1 cause docket?

2 MR. WHARTON: You mean in terms of its actual  
3 parameters?

4 CHAIRMAN BAEZ: Not the parameters necessarily. I'm  
5 talking about physical limits. At what point do you say you  
6 know what, Commission, you have let this show cause sit on its  
7 hands for too long, you can't prosecute it anymore, or it can  
8 be an open-ended --

9 MR. WHARTON: I must tell you, Chairman Baez, that in  
10 our view, and I don't want to get into a subject here in an  
11 open forum where I'm giving away my mental impressions about  
12 the show cause docket, but I agree with, like, what  
13 Commissioner Davidson was saying to the extreme. That show  
14 cause docket involves the evidence right up to the day of that  
15 hearing. You have got stuff in your show cause order we did in  
16 1997. And we are certainly going to be saying here is what we  
17 did yesterday, here is what we did last week, et cetera.

18 CHAIRMAN BAEZ: I think that part is already -- I  
19 think we have had some discussion on that.

20 MR. WHARTON: So I do believe that is fair game. So  
21 as far as you waiting, yes, I guess if you have ordered us to  
22 install very expensive facilities, and they are being  
23 permitted, and they are going to be put into place, and hopes  
24 are high, I guess you have weakened your show cause case. But  
25 perhaps you're fine with that. Maybe that is a briar patch you



1 want to be thrown into.

2           CHAIRMAN BAEZ: No. See, the way I see it -- the way  
3 I see it, and I don't mean to give away my mental impressions  
4 on this, is that because mitigation and remediation, if  
5 everybody is in agreement as part of what I would assume the  
6 company would offer up as what have we done lately, I think you  
7 alluded to that, then as long as you are doing lately, then I  
8 think the physical limits of the show cause docket can be  
9 tested further, shall we say, and everybody govern themselves  
10 accordingly.

11           COMMISSIONER BRADLEY: Well, Mr. Chairman --

12           CHAIRMAN BAEZ: Those are my mental impressions for  
13 what it is worth. So I guess I would offer that to my  
14 colleagues as to where I'm sitting on continuing this  
15 particular docket.

16           MR. WHARTON: Well, I will tell you what, Chairman  
17 Baez, rather than this tabling idea, et cetera, with your  
18 permission may I expound on the other basis that I believe  
19 justifies a continuance?

20           CHAIRMAN BAEZ: Commissioners?

21           COMMISSIONER DEASON: I still have got a question  
22 pending. I don't know that Mr. Wharton ever answered it. What  
23 is your preference? If one docket has got to go in front of  
24 the other -- and maybe you answered and I just didn't catch it  
25 -- if one docket has got to go in front of the other, which one

1 needs to go first?

2 MR. WHARTON: Give me a second if you will,  
3 Commissioner.

4 COMMISSIONER DEASON: And, Mr. Beck, I'm going to ask  
5 you as soon as he answers.

6 (Pause.)

7 MR. WHARTON: It's interesting, Commissioners, to  
8 actually spend a few seconds talking to someone who physically  
9 understands the issue. Our position is that we need to  
10 continue this proceeding prior to the deletion proceeding  
11 because, again, if you take this proceeding first, we won't  
12 even know how big to build these things. We won't know how  
13 many customers to build them for. We won't know how many  
14 gallons to build them for.

15 COMMISSIONER DEASON: Mr. Beck, what is your  
16 preference?

17 MR. BECK: Commissioner, I have listened very  
18 carefully to your concerns, and I'm trying to address them.  
19 First of all, I don't see that the completion of this  
20 proceeding has any effect on their ability to defend themselves  
21 in the deletion proceeding, although that may not be your  
22 concern. But they, first of all, will have to respond to the  
23 evidence, what they have done in the past. And they may, but  
24 don't have to, may raise issues in mitigation about whether we  
25 are complying now or providing good water now. They may claim

1 hat. But what you do here has no effect. They are allowed to  
2 do that. In fact, if you come up with standards, maybe they  
3 can come in and tell you we are complying with that.

4 COMMISSIONER DEASON: The question is this, Mr. Beck.  
5 Are your clients willing for us to put the deletion proceeding  
6 on hold until we conclude this proceeding, make a decision, it  
7 goes through the courts and find out what the standard --  
8 assuming we, for example, impose a different standard, a  
9 removal standard or not?

10 MR. BECK: I don't think there is a need to continue  
11 either case. First of all, that is one of three issues in  
12 front of you. I have said that before, but there is plenty.  
13 At the end of the testimony you are in control of what you do.  
14 You will make the decision on it. So you may decide to go and  
15 require removal, you may say we don't have enough evidence. I  
16 mean, you are in control of that. You can delay that issue if  
17 you choose to at the end and rule on the other two. But I  
18 think you need to hear the evidence. And if you are not  
19 comfortable making a decision after that, well, then that is  
20 your decision.

21 COMMISSIONER BRADLEY: Mr. Chairman.

22 CHAIRMAN BAEZ: Commissioner Bradley.

23 COMMISSIONER BRADLEY: First of all, this issue of  
24 requiring removal, I think that removal should be -- and I have  
25 said this all along, removal should be a business decision that

1 Aloha makes. And I don't think that the Commission should  
2 place itself in the position of determining what Aloha needs to  
3 do in order to remediate this problem. However, you know, show  
4 cause and mitigation, show cause is one thing that is out  
5 there, remediating this problem seems to be what we are going  
6 to discuss today if, in fact, we get into the discussion.

7           But I think that Commissioner Deason has a valid  
8 point. We don't know what the testimony is going to lead us  
9 to. And as a Commission we have an obligation to deal with  
10 this as a quality of service issue, but we also have an  
11 obligation to be fair to the company, and not to do one at the  
12 expense of the other. Now, I don't know how we, as a body,  
13 resolve today's issue but still deal with the show cause  
14 matter.

15           You know, you have that what if question. What if  
16 after we take the testimony, the testimony points to the fact  
17 that the customers don't have an argument that is applicable.  
18 Where do we go to from there? And I know that Mr. Wharton has  
19 argued this, and he is being a good attorney, and he is taking  
20 the position that maybe this might not go -- this argument  
21 might not be favorable to -- a decision might not be favorable  
22 to Aloha. But we don't know that.

23           But the question is -- and I somewhat heard  
24 Commissioner Deason ask the customers and Mr. Beck this, you  
25 know, what if, you know, the testimony points to the fact that

1 your argument -- I mean, you do not prevail as it relates to  
2 what you have put before us today. Where do we go to after  
3 that if that, in fact, is the outcome? Now, if you prevail  
4 then that creates another scenario.

5 MR. WHARTON: Two quick comments, Commissioner. One  
6 is if the petitioners don't prevail today, your PAA would  
7 become final, so would the language in the PAA. But the second  
8 is something further to Commissioner Bradley, Commissioner  
9 Deason, Commissioner Davidson's comments that I didn't say  
10 earlier. We won't be able to raise the money to build the  
11 facilities if this case goes first and the deletion case is  
12 hanging over our heads. We will not be able to raise the  
13 money.

14 They are good. These bankers who loan you millions  
15 of dollars, their due diligence is amazing. They are going to  
16 put Aloha's name into Google, and they are going to find out,  
17 and that is going to be the end of that.

18 COMMISSIONER BRADLEY: Well --

19 COMMISSIONER DEASON: I've got one other quick  
20 question. If we go forward and hear the evidence today, are we  
21 under some type of a time frame to make a decision statutorily  
22 or otherwise?

23 MR. JAEGER: 120, I think, says -- is it 90 or 120  
24 days?

25 MS. HELTON: 90.

1 MR. JAEGER: 90 days you should render a decision.  
2 But the decision could be something tentative, and maybe I  
3 think you need to come back in 90 days.

4 COMMISSIONER DEASON: So we are required to enter an  
5 order of some sort within 90 days.

6 MS. HELTON: But there is no ramifications in Chapter  
7 20 from not doing so. And I think the parties could  
8 stipulate, if they were willing to, that we didn't have to do  
9 so.

10 CHAIRMAN BAEZ: I don't think we are going to get a  
11 stipulation on that today.

12 COMMISSIONER DAVIDSON: I would be very curious in  
13 Commissioner Edgar's views. We have all been so entrenched,  
14 and she is really sort of coming at this as an outsider, and  
15 I'm curious as to what is striking her as sensible or not.

16 CHAIRMAN BAEZ: Besides the fact of us going round  
17 and round.

18 COMMISSIONER EDGAR: Well, thank you for asking,  
19 Commissioner Davidson. I will admit to a little confusion here  
20 this morning as to what exactly is before us. And I will ask  
21 for clarification on that here in a few moments. We have had a  
22 motion, and the possibility of table, and then the possibility  
23 of putting it aside and hearing some additional evidence. And  
24 I am a little confused as to procedurally exactly what posture  
25 we are in at this moment. So I will ask for clarification as

1 to that.

2 I tend generally, though, if you are asking me to  
3 telegraph a bit, to say that we have -- again, so much time has  
4 been spent on all of this to get us to this point today. I am  
5 late to this particular dance, for lack of a better word, and  
6 I'm trying to learn and draw from all of the comments of the  
7 parties, our staff, and each of you, of course. But I would  
8 like to know what is before us and how we can begin to move  
9 along.

10 CHAIRMAN BAEZ: Commissioner, what we have before us  
11 is a motion for continuance. Part of Mr. Wharton's argument  
12 involves the promise of an ore tenus motion that concerns the  
13 issues included in the prehearing order. I will admit to you,  
14 and I think, you know, we had general agreement or consensus  
15 that we could table the motion for continuance in order that  
16 Mr. Wharton could make his argument along those lines.

17 However, at the same time, having noticed how much  
18 time we are spending on continuance, and, frankly, my sense  
19 that as a practical matter taking testimony today, or pursuing  
20 the hearing today is merely a physical event and not anything  
21 that compromises this Commission into a particular result or a  
22 particular time line after that, and also understanding that  
23 some people took great pains to be here today. In fact, we had  
24 a delayed start to the hearing, itself, because of that. You  
25 don't want to waste a good opportunity. And there is nowhere

1 hat I would rather be today than right here.

2 COMMISSIONER DEASON: Well, I can't say that.

3 Laughter.)

4 CHAIRMAN BAEZ: You didn't notice the -- but now that  
5 we are, but now that you are. So, Commissioner, I guess what I  
6 had offered up was that if you have heard enough, it was really  
7 merely to take temperature, as I say. If you have heard enough  
8 in continuance and think you have got your mind made up, that  
9 is fine. But also remember that Mr. Wharton had offered other  
10 points that may be compelling to you.

11 COMMISSIONER EDGAR: Mr. Chairman, if you are  
12 asking --

13 CHAIRMAN BAEZ: I don't know if I answered your  
14 question. But do you know better where we are, because then  
15 you can tell me.

16 COMMISSIONER EDGAR: Well, actually you just  
17 confirmed what I thought that I know with the additional  
18 clarification. I think I have a sense of where I am. However,  
19 if you there are additional information, comments, persuasive  
20 discussion that one of the parties would like to add, I'm open  
21 to hearing it, and then let's take it in and go from there.

22 CHAIRMAN BAEZ: And I guess I will take that as a  
23 sign to go ahead and let Mr. Wharton make his arguments on the  
24 reconsideration of the prehearing order. And, Mr. Beck, I  
25 guess we will do five a side there, as well.



1           COMMISSIONER BRADLEY: Are you going to table the  
2 continuance, table it?

3           CHAIRMAN BAEZ: Well, yes, we are going to set aside  
4 the continuance for now.

5           MR. WHARTON: Yes, Chairman Baez, two preliminary  
6 comments. One is that unlike, perhaps, the other matter, this  
7 basis for a continuance is not something that could easily be  
8 both delayed and the evidence go ahead today, because it will  
9 effect motions to strike that may be made later.

10           I also want to give something a shot, and that is  
11 that most Commission orders either have to be appealed or the  
12 subject of a motion for reconsideration. I believe the  
13 prehearing order is an exception to that, because it says right  
14 on it the prehearing order provides it shall govern the conduct  
15 of these proceedings unless modified by the Commission. I want  
16 to make a motion for modification.

17           Essentially, Commissioners, Aloha requests that  
18 Issues 1 and 2 in the prehearing order be changed so that they  
19 conform to the prior unappealed, unchallenged consummating  
20 order. I have caused to be handed out to the Commissioners a  
21 copy of the consummating order because it is so  
22 straightforward.

23           It is also the position of Aloha that the prehearing  
24 officer acting alone did not have the authority to reject our  
25 suggested issues and accept those of the customers and OPC

1 because it is not a procedural matter. But either way, those  
2 arguments are just preliminary to my ability to argue what I am  
3 going to argue, so they don't really go to the heart of  
4 anything.

5           The order in this case, it was a proposed agency  
6 action that was issued on July 20th, 2004. We had indicated to  
7 the Commission staff, and perhaps it doesn't matter at whose  
8 request it happened, the staff decided a consummating order  
9 should be issued by the Commission. The purpose of the  
10 consummating order was to clarify what part of the proposed  
11 agency action had become final and what part was subject to the  
12 petitions. The proposed agency action that resulted in this  
13 proceeding was actually an order that had a whole bunch of  
14 different subjects in it, even involving some things that had  
15 happened prior.

16           On August 25th, 2004, the Commission issued the  
17 consummating order that I have given you. That final order  
18 could not have been subject to an administrative protest. It  
19 was a final order. It has never been appealed. It is not the  
20 subject for a motion for modification. It is essentially  
21 unchallenged and unappealed. It supports Aloha's argument that  
22 customer Issues 1 and 2, those are Issues 1 and 2 in the  
23 prehearing order in Section IX of the prehearing order, are not  
24 the proper issues in this proceeding.

25           Commissioners, if you look at the consummating order,

1 it has very clear language that indicates that in the ordering  
2 paragraph, ordered that Order Number PSC-04-0712-PAA-WS has  
3 become final, has become final and effective to the extent that  
4 it eliminates the 98 percent removal requirement and modifies  
5 the fourth ordering paragraph of the prior order, and the  
6 number is in there, to read that Aloha shall make improvements  
7 to Wells 8 and 9, and then all of its wells as needed to meet a  
8 goal of 0.1 mg/l of sulfides in the finished water.

9 That language, the first ordering paragraph of the  
10 consummating order that says that is the part of the proposed  
11 agency action which was challenged which has become final  
12 cannot be reconciled with Issues 1 and 2 in this proceeding.

13 Issue 1 in this proceeding is should the reference to  
14 sulfide and finished water in the proposed agency action be  
15 stated as a maximum contaminant level. The language in the  
16 consummating order saying that it will be a goal cannot be  
17 reconciled with the request that you established for the first  
18 time in your history an MCL, which is a term of art at DEP,  
19 which assumes action if violated. The order, the consummating  
20 order says the PAA, the part of the PAA that became final said  
21 it would only be a goal, and that is a goal that Aloha is  
22 willing to strive to meet.

23 Issue 2 says should the improvements be such that  
24 sulfide present in raw water are generated during treatment or  
25 transmission be removed. Not converted, and that is what we

1 have been talking about, removal versus conversion, and the  
2 high, high cost between those two issues. Again, the  
3 consummating order said that the PAA had become final as to  
4 Aloha shall make improvements to its Wells 8 and 9, and then to  
5 all of its wells as needed. As needed.

6           If you accept this issue of removal, then you are  
7 going to force us to spend all of these millions of dollars  
8 even if it is not needed to meet the 0.1. In other words, if  
9 we can meet 0.1 with chemicals, you are going to order us, if  
10 you accept Dr. Kurien's position, to spend \$15 million to meet  
11 the 0.1. That is what he's asking you to do, removal versus  
12 conversion.

13           That issue, the as needed, we only do the  
14 improvements as needed to meet the 0.1, and the fact that it is  
15 a goal is in your final unchallenged order. And I'm not  
16 casting aspersions on the Commission for its consummating  
17 order, I'm not casting aspersions on Commissioner Bradley who  
18 heard very long arguments on this issue in the prehearing  
19 conference, but this consummating order can't be reconciled  
20 with Issues 1 and 2 in this case. And if that unchallenged  
21 final language in that consummating order is the Commission  
22 order, you have got an order out there saying something  
23 different than what is considered to be challenged in this  
24 case.

25           And, again, even if Dr. Kurien's petition says that

1 he has set forth these three issues, that is the argument we  
2 heard at the prehearing conference, even if the staff says we  
3 came to this issues conference back in October, and we listed  
4 these issues, and we said at the time we didn't agree that  
5 those were the issues. That is not our problem. The  
6 consummating order should not be our problem.

7           If the Commission made a mistake when it issued an  
8 order on August 25th, 2004, saying this part of the order has  
9 become final and, therefore, is not part of the case that we  
10 are all here about today, that needs to be corrected. And  
11 there needs to be some more testimony on the issues. Because  
12 we counted on this consummating order, and we conducted our  
13 activities accordingly. Not on some discussion we had at the  
14 pre-pre and not on what Dr. Kurien's petition said, but on what  
15 this order says.

16           Your consummating order said these things have become  
17 final. If they have become final, that means they weren't  
18 challenged. And if they weren't challenged, they shouldn't be  
19 issues in this proceeding. That's something that could be  
20 corrected through the passage of time. We did not know these  
21 were going to be certified as the issues until last week in the  
22 prehearing conference, and that we believe provides an  
23 additional basis for a continuance.

24           CHAIRMAN BAEZ: Mr. Beck.

25           MR. BECK: Thank you, Chairman Baez, and I appreciate

1 the response to respond to their oral motion. It would have  
2 been much easier to respond to this had Aloha filed a written  
3 motion. We did argue a similar argument at the prehearing  
4 conference.

5           Let me go back. Back in 2002, the Commission issued  
6 an order that required Aloha to remove 98 percent of the  
7 hydrogen sulfide in its water. That order didn't become final.  
8 There was an appeal. After their appeal was denied, there was  
9 a motion by Aloha to amend that portion of the order that  
10 required the removal of hydrogen sulfide from their water. The  
11 Commission in a proposed agency action adopted the proposed  
12 modification to the order that Aloha proposed. And thereafter  
13 the customers, three customers protested that portion of the  
14 proposed agency action order.

15           In the protest filed by the customers, the three  
16 issues in this case were spelled out word-for-word. In other  
17 words, the protest filed by the customers listed four issues.  
18 One of them was an all-encompassing issue about quality of  
19 water, but the other three issues contained in the protest and  
20 specifically listed are word-for-word exactly what is in the  
21 prehearing order in this case.

22           As an aside, let me mention that what Aloha is  
23 arguing is a reconsideration of the prehearing order. The  
24 Commission has previously determined that a mistake of law or  
25 fact is the criteria for that. There is a high burden on a

1 motion for reconsideration of a prehearing order. We have  
2 word-for-word the three issues that the customers put in their  
3 protest.

4           Afterwards, the staff issued a consummating order,  
5 and consummating orders are well known. The Commission issues  
6 them all the time. There is no vote taken by the Commission  
7 before the issuance of a consummating order. Nothing has been  
8 brought before the Commission. The staff simply issued a  
9 consummating order recognizing the protest matters, the matters  
10 that were protested, and making final those matters that  
11 weren't protested. In fact, you will see in the staff's motion  
12 for a protective order, that is specifically the language the  
13 staff uses.

14           In fact, at the prehearing order (sic) we heard the  
15 staff attorney tell Commissioner Bradley that when the  
16 Commission staff drafted this order, the consummating order,  
17 they thought it encompassed the three. You know, the order  
18 speaks for itself, but when you talk about methodologies  
19 determining compliance, the three paragraphs are exactly as  
20 stated in their protest. And staff was thinking that the  
21 methodology to determine the compliance would encompass those  
22 two issues. So that is the intent of the order, which is  
23 widely known by everybody. Consummating orders simply  
24 consummate the unprotested portions of the order and leave open  
25 that which is protested. That is what is intended by the

1 order, that is what is known.

2           And it is not reasonable for Aloha to claim that a  
3 consummating order, the ministerial act that is issued by staff  
4 without a vote of the Commission, it is not reasonable for them  
5 to claim that they thought that order overruled two of the  
6 three issues that the customers specifically raised in their  
7 protest. It can't happen. It is not how the process works and  
8 it is not intended to happen. And, in fact, staff will tell  
9 you that that is not what their intent was in issuing the  
10 consummating order.

11           What their argument is is that staff acting on its  
12 own issued an order that overruled two of the three issues that  
13 the customers protest. And that can't happen and it is not  
14 what happened. It simply finalized the three issues.

15           MR. WHARTON: Chairman Baez, if your staff could  
16 issue an order, they would probably declare tomorrow a holiday.  
17 I mean, if this order is some kind of a second class citizen,  
18 let's make sure that we are clear about that. That is the  
19 Commission's finding on the record. That is a Commission  
20 order.

21           CHAIRMAN BAEZ: Well, here is a question. And, Mr.  
22 Beck, is it part of your theory of this that even a  
23 consummating order can't be wrong? I mean, can there be some  
24 discrepancy? And maybe it is not a valid question for your  
25 argument, it's just something that popped into my head. I



1 mean, consummating orders are ministerial. Can there ever be  
2 any question about what a consummating order meant, or is there  
3 somewhere we can go to kind of divine what the intent of  
4 that was?

5 MR. BECK: I don't believe so. I mean, my first  
6 argument is that it didn't do what Aloha is claiming, first of  
7 all. It just flat out didn't. And the staff will tell you  
8 that wasn't the intent. I will also argue it is not reasonable  
9 for them to make that interpretation that it did something that  
10 consummating orders don't do; and, that is, they don't rule and  
11 deny issues raised by a protestor. That is simply not a  
12 reasonable or plausible interpretation.

13 You know, for Aloha to claim that they are surprised  
14 because the issues in this case are word-for-word exactly the  
15 issues contained in the protest of the proposed agency action  
16 is not a reasonable position to take, in our view. So it  
17 didn't do that. And, in fact, they couldn't interpret it the  
18 way they are claiming, because that is not what consummating  
19 orders do.

20 MR. WHARTON: Chairman Baez, may I read a comment you  
21 made at the January 4th when you asked a question about this  
22 exact issue?

23 CHAIRMAN BAEZ: God, I hate that. Go ahead.

24 MR. WHARTON: You said, "I'm trying to reconcile the  
25 fact that there are two dockets going on, that there is an

1 expenditure. I'm sure we all agree. And I have a question I  
2 want to ask. Is there, is the appropriateness of the hydrogen  
3 peroxide treatment at issue in any docket?"

4 Me, admittedly me. "It is not the science of it that  
5 is at issue. It is a compliance point issue really, where to  
6 measure compliance."

7 Chairman Baez: "It is not the science of it at  
8 issue. Is that everybody's understanding?"

9 Mr. Wharton: "It is not the process itself."

10 Chairman Baez, "No, not in this docket. Not in this  
11 docket."

12 And Mr. Beck said, "Right." And Dr. Kurien was  
13 sitting there, Mr. Beck was sitting there, and you raised the  
14 exact question. And no one said no, no, no, no, no, it is the  
15 process which is at issue.

16 You know, I think that is the exact purpose for a  
17 consummating order. And a consummating order is issued at the  
18 beginning of the case. Parties conduct their activities on it.  
19 Prehearing orders only come out four business days ago in this  
20 case.

21 MR. BECK: Mr. Wharton has just moved the target.  
22 There is no issue about whether hydrogen peroxide is allowable  
23 treatment or not. They could easily do that and remove sulfur.  
24 I mean, it is correct that hydrogen peroxide is not an issue in  
25 this case. It is not one of the issues. So what he has, it

1 was no relevance to the issue before you.

2 CHAIRMAN BAEZ: Does it have relevance to the removal  
3 versus --

4 MR. WHARTON: That's the conversion.

5 CHAIRMAN BAEZ: The conversion or removal question.

6 MR. BECK: Doctor Levine herself has done an article  
7 about the use of hydrogen peroxide along with the removal of  
8 sulfur. So I can't say there is not a relation. But hydrogen  
9 peroxide isn't at issue. That is not the issue in this case.  
10 It is about removal of sulfides.

11 MR. WHARTON: It is a process for conversion then, as  
12 opposed to removal.

13 CHAIRMAN BAEZ: Commissioner Bradley, you had a  
14 question?

15 COMMISSIONER BRADLEY: Well, basically what we have  
16 here is a PAA that is being protested by customers who have  
17 petitioned, is that correct?

18 MR. WHARTON: Right, three customer petitioners.

19 COMMISSIONER BRADLEY: Well, I will wait on the  
20 Chairman to suggest that he is ready to --

21 CHAIRMAN BAEZ: Commissioners, any other questions?

22 COMMISSIONER DEASON: No other questions. Are we  
23 ready to untable the motion, or what is the procedure, Mr.  
24 Chairman?

25 CHAIRMAN BAEZ: Well, what I would contemplate is

1 to -- if that is the only argument on reconsideration, then we  
2 would have to work inside out, so we would do reconsideration  
3 and --

4 COMMISSIONER DEASON: Can we address, basically, the  
5 appeal of the reconsideration of the prehearing officer's --

6 MR. WHARTON: That was my motion for modification.

7 COMMISSIONER DEASON: I'm sorry?

8 MR. WHARTON: That was my motion for modification.

9 CHAIRMAN BAEZ: This is the only motion. We don't  
10 have -- all right. More properly stated, a motion for  
11 modification.

12 COMMISSIONER BRADLEY: But, Mr. Chairman, with all  
13 respect to Mr. Wharton, but the motion for modification then  
14 would create a situation where the petitioners -- it's my  
15 understanding that when petitioners protest then they have to  
16 set forth the issues that they are protesting because they have  
17 the burden of proof. If we modify the issues, might not that  
18 disadvantage the petitioners?

19 MR. WHARTON: I don't disagree with what you are  
20 saying, Commissioner Bradley, and that is why I have also  
21 segued this same argument into the basis for a continuance. I  
22 think the Commission issued an order that confused the issues.  
23 I understand what you are saying, that if you modify the issues  
24 maybe you have just hoisted the error of the consummating order  
25 on the customers. And that is why I have said I believe it is

1 the basis for a continuance and a clarification of what is  
2 being protested, what is at issue, what is the meaning of -- I  
3 mean, the Commission can modify that consummating order. I  
4 think there is some procedure, you need to make a finding or  
5 something, but --

6 COMMISSIONER DEASON: Mr. Chairman, I'm ready to make  
7 a motion.

8 CHAIRMAN BAEZ: Commissioner.

9 COMMISSIONER DEASON: Mr. Wharton may call it a  
10 motion for modification, but to me it is a reconsideration, and  
11 that is the standard that applies. And I don't see that it  
12 meets the standard for a reconsideration, and I would move that  
13 we deny it.

14 CHAIRMAN BAEZ: There is a motion. Is there a  
15 second?

16 COMMISSIONER DAVIDSON: Second.

17 CHAIRMAN BAEZ: A motion and a second. All those in  
18 favor say aye.

19 (Unanimous affirmative vote.)

20 CHAIRMAN BAEZ: Commissioners, now we are working  
21 inside out. We are at continuance at this point.

22 COMMISSIONER DEASON: I understand that Mr. Wharton  
23 indicates that somehow he feels that his reliance on the  
24 consummating order has somehow prejudiced him or his case such  
25 that he is now requesting -- since there is not going to be

1 reconsideration, he is requesting continuance.

2 MR. WHARTON: I believe it is an additional basis.

3 COMMISSIONER DEASON: It is an additional basis. And  
4 then, of course, we have the other argument that we have had  
5 concerning continuance. Mr. Chairman, I'm at the point to  
6 where I am ready to hear the evidence.

7 And I will be the first to indicate, though, that the  
8 fact that there is a deletion proceeding out there, I cannot  
9 ignore. But I'm going to hear the evidence in this case, give  
10 it the weight that I think is appropriate, and try, in the best  
11 way that I can, try to reach a decision to craft what is in the  
12 best interest of the customers and what is fair to the Company.  
13 But I think it is unreasonable to ask this Commission to do  
14 that in a vacuum and ignore something else. But I'm ready to  
15 hear the evidence, and I will be up to the task to try to do  
16 the best I can with what is presented to me.

17 CHAIRMAN BAEZ: Thank you, Commissioner.

18 COMMISSIONER BRADLEY: If that is a motion, I will  
19 second it.

20 CHAIRMAN BAEZ: That would be a motion to deny  
21 continuance and move forward with the case on this day. And  
22 there is a second. All those in favor -- before we go to vote,  
23 I want to say something extra, at the risk of delaying this  
24 even further.

25 Working from the most practical out, I don't think we

1 can just pack it all up today and go home. All right. Just  
2 based on that, I don't think we should continue the hearing.  
3 Also with the knowledge, and at least some comfort that we  
4 still have -- as Mr. Beck so rightly suggested in my mind,  
5 anyway, that this to me becomes just a physical gathering and  
6 not something that commits us to any particular movement along  
7 the way, I think we need to have this hearing today.

8           Knowing that we have some flexibility as to what our  
9 decision can be even under the APA, also gives me a level of  
10 comfort. Also, as well, I will recognize Commissioner Deason  
11 is correct in saying that there is this 600-pound elephant out  
12 there, and we are going to have to address it or we are going  
13 to include it in the context. And I hope that the petitioners  
14 do understand the situation that we are in in terms of policy.  
15 And I see you all nodding, and I'm glad to see it.

16           So, yes, I would agree with you, Commissioner Deason,  
17 that the outstanding docket has to be part of the context of  
18 our decision here. And it may also be that it is part, that  
19 this decision is part of the context, our decision here is part  
20 of the context and vice versa, but we don't have to decide what  
21 that is today. I think we have talked enough about it. I  
22 think that we are all fairly perhaps a little clearer on where  
23 we are all coming from, and I think that that is enough for  
24 today. So there is a motion to deny.

25           COMMISSIONER BRADLEY: Mr. Chairman, I know that I

1 put the second on the table, but just to make sure.

2 CHAIRMAN BAEZ: Go ahead, Commissioner Bradley, I  
3 already opened the door.

4 COMMISSIONER BRADLEY: Further discussion.  
5 Basically, what we are going to do today is to take testimony  
6 and not make a decision until a time certain, and give staff an  
7 opportunity to weigh the testimony and to come back to us with  
8 a recommendation at some point as it relates to this particular  
9 issue or protest. And I can appreciate what Aloha's concern is  
10 as it relates to the show cause issue, but I think it is  
11 important that we give the customers an opportunity to put  
12 forth their information as it relates to their protest of the  
13 PAA order and see how it all shakes out, as Commissioner Deason  
14 suggested. He didn't say shake out, but see how it all  
15 formulates itself.

16 COMMISSIONER DEASON: Mr. Chairman, if I may. Let me  
17 also add that in denying the continuance, I do not think that  
18 the reliance on the consummating order has somehow prejudiced  
19 Aloha to the extent that they are not able to go forward with  
20 this hearing at this time. I'm just not convinced that that is  
21 the case. I mean, the protest said what it said. And I know  
22 that perhaps there is some conflict with the consummating  
23 order, but I don't think it is a basis for us to continue the  
24 hearing.

25 CHAIRMAN BAEZ: Thank you, Commissioner. There is a



1 motion and a second. All those in favor say aye.

2 (Unanimous affirmative vote.) Thank you,  
3 Commissioners. Give me a moment, please. (Pause.)

4 Mr. Jaeger, I have staff's motion to quash subpoenas  
5 and for protective order. Have any of our decisions affected  
6 this motion or do we still need to entertain it?

7 MR. JAEGER: I believe Samantha Cibula is going to  
8 introduce this item.

9 CHAIRMAN BAEZ: I'm sorry, I pointed to the wrong  
10 person.

11 My apologies, Samantha. Go ahead.

12 MS. CIBULA: Yes, we still need to entertain this  
13 motion.

14 CHAIRMAN BAEZ: Very well.

15 MS. CIBULA: The Commission has received staff's  
16 motion, but has not received a response from Aloha. The  
17 uniform rules state that when time allows other parties may  
18 file a response within seven days of service of the motion.  
19 Staff's motion was filed this Friday, March 4th, but the  
20 seven-day response time has not passed yet, and it is not  
21 feasible to meet that seven-day deadline. So advisory staff  
22 believes that it would be within the Commission's discretion to  
23 allow Aloha to give an oral response to staff's motion.

24 CHAIRMAN BAEZ: Mr. Wharton.

25 MR. WHARTON: Commissioners, this is really the

1 second round of this. And the reason that we are in this  
2 position was we weren't allowed to take the depositions. The  
3 prehearing officer quashed subpoenas for depositions of the  
4 individuals who were the staff members involved in the staff's  
5 recommendation, and that is why normally we would not call  
6 blind witnesses to trial, but that is why we are in this  
7 position.

8           You know, Commissioners, for the sake of brevity, I  
9 will just say that one thing that strikes me about staff's  
10 motions on the depositions and for testimony is that it is a  
11 bit disingenuous. It goes through all of this stuff. I mean,  
12 there is a 1941 Supreme Court case in there, a 1971 Minnesota  
13 federal court case, a 1973 North Dakota case. Why don't you  
14 just come out and admit, and we will see what the court of  
15 appeals think about it, that you have got a policy that  
16 nontestifying staff can't be deposed. That is the real issue.

17           I was an attorney here 18 years ago, and you didn't  
18 allow it then. And yet you won't come out and say that on the  
19 surface. That's your policy. Instead, you go through all the  
20 niceties of, well, is it reasonably calculated. You know,  
21 staff's whole motion in these protective orders, that's the  
22 standard you use for admissibility, that it is not reasonably  
23 calculated or it is not relevant. I still get to take a  
24 deposition or call someone, and then maybe you don't let it  
25 into evidence.

1           And staff is saying, well, we have this deliberative  
2 privilege, and if someone testifies they will be knocked off  
3 the case. And they say that without any sense of  
4 self-awareness that in that case you have made the decision,  
5 his testimony is relevant. That means that I went after that  
6 staff member for a reason. And I'll tell you, what caused all  
7 of this is that there is a lot at stake here. There is a  
8 single witness for the Citizens who is a retired physician. It  
9 is a PAA order you issued after your professional staff made a  
10 recommendation, and Staff didn't file one bit of testimony  
11 except one guy from DEP saying we are in compliance with all  
12 the rules. I was just taken aback by that.

13           And that was like, well, then we will go over, we  
14 will talk to the professional staff who investigated this and  
15 apparently made a determination that they supported Aloha's  
16 position and made that recommendation to the Commission. But,  
17 again, it strikes me how staff says that their role is to  
18 complete the record, but how they filed two 30-page motions to  
19 make sure that we can't take any depositions.

20           I mean, our position is the same as the response that  
21 we put in the depositions, would be the same response to the  
22 testimony, that there is a reason, there is a reason staff's  
23 motion doesn't cite a single administrative decision from the  
24 State of Florida under the Florida Administrative Procedure Act  
25 except for your orders, and that is because no other agency

1 does what you do. No other agency considers staff untouchable.  
2 Every other agency considers it's the normal.

3           Maybe you would move for protective order if it is  
4 being done for harassment or annoyance. The last thing we want  
5 to do right now is harass you or annoy you. You are not even  
6 the other party in this case. We are just trying to develop a  
7 record. And for someone to say, well, there is just nothing  
8 you could ask them that would be relevant, you know, we get to  
9 decide that, not the staff. We do a pretty good job of  
10 uncovering relevant evidence.

11           And to call these witnesses now live, at a minimum it  
12 will cause this proceeding not to be finished today, but it's  
13 the position we have been put in by the denial of the  
14 depositions. And, you know, the Commission has a fondness for  
15 prefiled testimony. And after all of these years, I personally  
16 have strong feelings about that, but it is the Commission's  
17 preference and it is obviously legal under the APA. But the  
18 prefiled testimony, coupled with this policy I'm talking about,  
19 shouldn't combine to crush someone like Aloha beneath the  
20 wheel.

21           Staff said in its motion, well, you didn't try to  
22 prefile these people. Well, I'm putting a subpoena on them and  
23 they won't even come. How am I going to be able to prefile?  
24 That is silly. The staff wouldn't have prefiled. They are  
25 also saying, well, if you were allowed to call these witnesses

1 live everyone will be prejudiced. That is the way every other  
2 trial in every other forum every day at DOAH works. You don't  
3 have prefiled testimony in advance, and you are not prejudiced.  
4 I just wanted to see if your professional staff members, and  
5 when I put the attorney in there, I'm not trying to harass your  
6 attorneys, it was that you made a statement in the PAA, it is  
7 our policy -- very similar to what Commissioner Bradley said  
8 probably an hour and a half ago -- it is our policy not to  
9 micromanage utilities. We are going to tell you to meet this  
10 goal, but we are not going to get into removal versus  
11 conversion.

12           That is a part of what has been challenged here, but  
13 you didn't even defend your own policy. I guess I will wait  
14 and find out, maybe there will be a defense of it in the final  
15 order, and I am not sure that is appropriate. I was going to  
16 call a staff member and say, what's up with this policy, how  
17 long have you had it, what do you know about it, what is the  
18 basis of it? Why did you -- Dr. Kurien's testimony says, boy,  
19 I wrote all of these e-mails. And I said, don't do what Aloha  
20 is doing, say what I'm doing. Somebody inside the staff  
21 investigated that and made a professional decision, but we have  
22 been denied the opportunity to take those depositions, and  
23 now -- and I guess I will make an ore tenus motion to  
24 reconsider that order, which is also, I believe, within ten  
25 days. But the truth is it is your policy, and I'm just not

1 sure that it is a policy that emanated from the Administrative  
2 Procedure Act. And I don't think that this whole concept of  
3 the importance of staff at the Commission is anymore true here  
4 than it is in the other agencies that handle very complex  
5 matters.

6 And I think that we should have been allowed to take  
7 the depositions. We should be allowed to call a staff  
8 engineer, like a Tom Walden, and say, "You worked on this,  
9 didn't you? You investigated it, you read what Kurien  
10 proposed, you read what we proposed. What else did you do?  
11 Why did you decide to recommend to the Commission you should  
12 accept what Aloha has proposed as proposed to what Dr. Kurien  
13 has proposed?" But that is information we haven't been allowed  
14 to get to.

15 COMMISSIONER DEASON: Can I ask a question?

16 CHAIRMAN BAEZ: Yes, please do. Mr. Wharton, you  
17 just -- just a few paragraphs ago you used the word  
18 reconsideration. I didn't know that there was anything here to  
19 be reconsidered. This is staff's motion, and then you are  
20 providing your response orally. What is the reconsideration?

21 MR. WHARTON: It is true, Commissioner Deason,  
22 earlier I sent a subpoena for deposition to these same  
23 individuals, and the prehearing officer granted a motion to  
24 quash. That was issued within ten days ago, too. I will  
25 withdraw that motion for reconsideration, without waiver to our

1 rights to say that was not the right decision and that we are  
2 prejudiced, but I will withdraw that motion. And what is in  
3 front of you is the fact that we subpoenaed certain staff  
4 members for trial in reaction to that order, and that the staff  
5 has moved to quash that.

6 CHAIRMAN BAEZ: Commissioners, any other questions?  
7 And I must confess, I'm a little out of sorts. I know that Mr.  
8 Wharton was offering his client's response to that motion and  
9 perhaps --

10 MS. CIBULA: Well, staff has already filed a  
11 written --

12 CHAIRMAN BAEZ: Yes, I understand that. Is there  
13 anything that you need to respond to? And also I know that Mr.  
14 Beck may technically not be involved in this fight, but if he  
15 has got any comments he needs to make.

16 MR. BECK: Ever so briefly, Chairman Baez. I'm not  
17 going to address most of the motion. And I don't know what  
18 every other state agency does in Florida with respect to  
19 prefiling testimony, but I suspect that they don't require  
20 prefiled testimony. There are witnesses lists, and people are  
21 put on notice of who the witness would likely be at the  
22 hearing.

23 And staff in its motion states that staff and  
24 parties, including customers, would be prejudiced by this late  
25 calling of staff witnesses. And I simply want to concur with

1 that. That there is no witness list, there is no prefiled  
2 testimony, and by just simply calling witnesses out of the blue  
3 at this point, we feel we would be prejudiced by allowing that  
4 to happen.

5 CHAIRMAN BAEZ: Thank you, Mr. Beck.

6 COMMISSIONER BRADLEY: Mr. Chairman, I want to make  
7 sure I'm following what is transpiring here. Is it Mr.  
8 Wharton's -- have you put forth a motion for reconsideration as  
9 it relates to the motion to quash?

10 MR. WHARTON: I just want to do things orderly. I  
11 don't want to lay one motion on the top of another. But, yes,  
12 for all the reasons that I have argued, and I apologize,  
13 Commissioners, for going back and forth on this, we will move  
14 to reconsider the order quashing the subpoenas for the  
15 depositions. Because that is how I could have really  
16 narrowed -- maybe I would have just had ten questions today of  
17 a certain staff member, but we weren't allowed to take those  
18 depositions.

19 COMMISSIONER DEASON: Can I ask a procedural  
20 question?

21 CHAIRMAN BAEZ: You're going to have to ask somebody  
22 else, because now I'm just a little confused as to where we  
23 are.

24 COMMISSIONER DEASON: I will ask this to staff. Can  
25 we go forward with this hearing today, hear testimony that has



1 been prefiled, allow depositions to take place, and then if Mr.  
2 Wharton wants to present that in a deposition in lieu of  
3 prefiled testimony, or parts of it, allow him to make such a  
4 motion, and then allow there to be objections made to that as  
5 to why that is inappropriate or irrelevant information? Can  
6 that be done?

7 CHAIRMAN BAEZ: And then enter them into the record.

8 COMMISSIONER DEASON: And then enter them into the  
9 record, and then we will have a complete record. And then, if  
10 need be, reconvene another hearing to allow cross-examination  
11 if parties feel that they need that. Can that be done  
12 procedurally?

13 MS. CIBULA: I guess not today. I mean, we would  
14 have to continue the hearing if that was going to be the course  
15 that the Commission wanted to take.

16 COMMISSIONER DEASON: You didn't hear my question.  
17 Go ahead and hear the testimony that has been prefiled, allow  
18 the depositions to be taken at some later time, allow Mr.  
19 Wharton to review that information. If he feels it is  
20 necessary, then to make a motion to have those depositions or  
21 portions of those depositions entered into the record as  
22 testimony. And then allow, if need be, reconvene another  
23 hearing to allow cross-examination. Can that be done

24

25

1 would have to hold this hearing today. Then, I guess,  
2 reconvene the hearing at a later date and notice that new  
3 hearing for another date, and then just continue the hearing at  
4 that time.

5 CHAIRMAN BAEZ: But that only -- the reconvening and,  
6 I guess, I want to understand, maybe I'm not understanding the  
7 suggestion that Commissioner Deason is making, but the  
8 reconvening of a hearing or the finding of an extra hearing  
9 late is only by necessity. The first consideration is whether  
10 the depositions, subject to objections, get entered into the  
11 record in lieu of testimony.

12 COMMISSIONER DEASON: Mr. Wharton may -- he may take  
13 depositions and not hearing anything that he thinks is relevant  
14 or helpful to his case, and may not even want to file anything.

15 MS. CIBULA: That's true.

16 CHAIRMAN BAEZ: Or he can also, likewise, choose to  
17 file it and not have any need for, at least, you know, physical  
18 cross-examination in front of the Commission and so on.

19 COMMISSIONER BRADLEY: Are we discussing depositions  
20 of staff?

21 CHAIRMAN BAEZ: It's a question --

22 COMMISSIONER DEASON: It's a procedural question at  
23 this time. I'm not suggesting we should do it, I want to know  
24 if we can procedurally.

25 MS. CIBULA: Procedurally, like I said, you would

1 have to end the hearing today, reconvene it at another date,  
2 and determine whether there is any more testimony that needs to  
3 be put into the record. If there is not, then you probably  
4 just close the record then, and then proceed on like you would  
5 normally proceed on.

6 COMMISSIONER BRADLEY: Before we get into that  
7 discussion, if Mr. Wharton has put forth a motion for  
8 reconsideration of the decision that allows for staff to not  
9 testify --

10 COMMISSIONER DEASON: Well, that's where I guess my  
11 confusion comes in. I thought that we were dealing with a  
12 brand new staff's motion to quash subpoenas, and that has never  
13 been ruled upon, or has it been ruled upon?

14 MS. CIBULA: Staff's motion to quash subpoenas for  
15 the hearing have not been ruled on. There was an exact same  
16 motion to -- Mr. Wharton and Aloha asked to depose these same  
17 witnesses. And staff filed a motion --

18 COMMISSIONER DEASON: And that was ruled upon?

19 MS. CIBULA: Yes. Staff filed a motion to quash  
20 those subpoenas for deposition. That was ruled upon on March  
21 1st. And then, I believe, three days later Aloha filed or  
22 submitted their subpoenas to bring these witnesses to hearing,  
23 the same witnesses, and staff filed a motion to quash those  
24 subpoenas for hearing.

25 COMMISSIONER DEASON: So you are saying that if we do

1 not grant your motion, staff's motion to quash the subpoenas,  
2 we are, in effect, reconsidering a prior decision.

3 MS. CIBULA: It would be very similar, but it is not  
4 the exact same motion. Because the other one had to do with  
5 the subpoenas for deposition, and this has to do with subpoenas  
6 for the hearing.

7 COMMISSIONER DAVIDSON: Can I ask a question?

8 CHAIRMAN BAEZ: Commissioner Davidson.

9 COMMISSIONER DAVIDSON: A basic question here. Are  
10 any of the motions to quash relating to members of staff who  
11 will, in fact, be testifying?

12 MS. CIBULA: No, there are no staff that are  
13 testifying that the subpoenas are directed towards. These are  
14 nontestifying staff members.

15 COMMISSIONER BRADLEY: Staff that might be  
16 subpoenaed, will they in any shape, form, or fashion be  
17 participating in this docket?

18 MS. CIBULA: They could be advisors to the staff.  
19 Advisor to the Commission, I'm sorry.

20 COMMISSIONER BRADLEY: Okay. I need a legal opinion.  
21 What is the effect upon staff as it relates to their ability to  
22 advise us if they also offer testimony in this?

23 MS. CIBULA: If these staff people testify, they will  
24 be barred from advising the Commission in this proceeding under  
25 Section 120.66 and Rule 25-22.033.

1           COMMISSIONER DEASON: Even if they testify in the  
2 form of a deposition that is being entered into the record?

3           MS. CIBULA: That would be considered testimony, so  
4 that would be testifying in front of the Commission.

5 Therefore, they would be barred from advising the Commission in  
6 this proceeding.

7           CHAIRMAN BAEZ: Commissioners, any other questions?

8           COMMISSIONER BRADLEY: Yes, one other question  
9 procedurally. Do we have before us a motion for  
10 reconsideration or a motion to consider?

11           CHAIRMAN BAEZ: And I could be wrong, Commissioner  
12 Bradley, but I think as a practical matter what we are down to  
13 here is we may have the kind of flexibility to resolve this  
14 notion in a manner that will not delay the hearing and yet  
15 serve whatever interests we decide to serve.

16           MR. WHARTON: Maybe, Chairman Baez, the way to  
17 proceed is to allow us to take the depositions at a time  
18 certain subject to if we deem it appropriate that we would file  
19 a motion to reopen the record.

20           CHAIRMAN BAEZ: And if what you are stating and what  
21 you are suggesting is akin to what Commissioner Deason has  
22 already asked questions about, I think I can get behind it. I  
23 do have one concern, Mr. Wharton. The inevitable effect of  
24 deposing staff witnesses is that they are no longer qualified  
25 to serve as advisory staff on a recommendation in the hearing,

1 and that really concerns me. And I don't know how to figure  
2 that.

3 COMMISSIONER DEASON: Mr. Wharton, you need to weigh  
4 the fact that if you depose somebody you think is going to give  
5 testimony beneficial, you may be taking out an advisor who is  
6 going to advise something that is beneficial to your case. I  
7 know that it is a roll of the dice, but that is something you  
8 have got to consider.

9 MR. WHARTON: I don't disagree with what you are  
10 saying, Commissioner.

11 CHAIRMAN BAEZ: I'm wondering if you're not -- and,  
12 again, you don't have to answer the question, but I'm wondering  
13 if the logic behind actually deposing -- I mean, it wouldn't  
14 seem to me that you would be looking to depose staff members  
15 that you once upon a time made an assessment were adverse to  
16 your position. And I think from there you get the logic of  
17 Commissioner Deason's --

18 MR. WHARTON: Just give me one moment, Mr. Chairman.

19 MS. HELTON: With great trepidation --

20 CHAIRMAN BAEZ: Jump on in, Ms. Helton.

21 MS. HELTON: With the understanding that Ms. Cibula  
22 is the one advising you today, I just wanted to make sure that  
23 you all are aware of a particular rule that is in the Rules of  
24 Civil Procedure that does apply to Commission proceedings under  
25 the Uniform Rules of Procedure. That's Rule 1.330, and it

1 contemplates the use of depositions at hearing. And I'm not  
2 sure that the circumstances under which Commissioner Deason has  
3 suggested that the depositions would take place fall under the  
4 parameters of this rule. Obviously you all are the trier of  
5 fact, and if you decide that you want that information in the  
6 record, the staff will not contest that.

7 But I just wanted to make sure that you were aware  
8 that this rule does exist, and it provides that the deposition  
9 of a witness, whether or not a party, may be used by -- whether  
10 or not a party may be used by any party for the purpose, if the  
11 court finds that the witness is dead, that the witness is a  
12 greater distance than 100 miles, that the witness is unable to  
13 attend or testify because of age, illness, infirmity, or  
14 imprisonment, that the party offering the deposition has been  
15 unable to procure the attendance of the witness by subpoena --

16 COMMISSIONER DEASON: And that is exactly the point.  
17 It was an attempt to have them here for the hearing by subpoena  
18 and that did not happen. I'm fully aware of the rule you just  
19 read. I have heard it many times.

20 CHAIRMAN BAEZ: And as far as it sounds, it is pretty  
21 consistent.

22 COMMISSIONER DEASON: Mr. Chairman, the problem I'm  
23 having now is that I'm hesitant to have witnesses -- the actual  
24 motion that is in front of us is to have witnesses -- quash the  
25 subpoenas and to have the witnesses appear here today in live

1 testimony. Is that really what you are asking, Mr. Wharton?

2 MR. WHARTON: Well, we filed a subpoena asking that  
3 they come for testimony, and the staff filed a motion to quash.

4 COMMISSIONER DEASON: And I'm not willing to do that.  
5 And the only other remedy is to do what I suggested, but that  
6 is exactly what was put before the prehearing officer and he  
7 denied it. So, in effect, I think it is still reconsideration,  
8 so --

9 CHAIRMAN BAEZ: It may smell like reconsideration,  
10 but it doesn't have to be as long as we are comfortable that we  
11 have got the flexibility to try and resolve this matter before  
12 us in a way that is not necessarily the absolute relief that  
13 the moving party is requesting.

14 MS. CIBULA: I would say that the same balancing test  
15 that applied -- that the prehearing officer applied should be  
16 applied in this case to determine whether the subpoenas should  
17 be quashed.

18 COMMISSIONER DEASON: Let me say this. I have  
19 never -- I have always understood this argument by staff you  
20 are going to be taking advisors away. I don't buy it. Now, if  
21 somebody was intentionally trying to depose everybody on staff  
22 so nobody could advise the Commission, obviously that's the  
23 case. I don't have a problem with staff being deposed, I'm  
24 going to say that up front.

25 However, there was a decision made by a prehearing



1 officer that that is not the correct procedure to follow in  
2 this case. I'm not in a position to disagree with that. If it  
3 were me, though, I probably would have done differently, but  
4 that is not the standard. And I am not willing to have live  
5 witnesses without the other parties having the benefit of  
6 knowing what they are going to say. **If there had been a**  
7 deposition, they would know, they would be prepared. We are  
8 not here with that today.

9 CHAIRMAN BAEZ: And if there are no other questions,  
10 we can entertain a motion, Commissioners.

11 COMMISSIONER DEASON: I **move** that we grant the motion  
12 by staff to quash the subpoenas.

13 CHAIRMAN BAEZ: Is there a second?

14 COMMISSIONER EDGAR: Second.

15 CHAIRMAN BAEZ: Motion and a second. All those in  
16 favor say aye.

17 (Unanimous affirmative vote.)

18 CHAIRMAN BAEZ: Moving right along. Thank you,  
19 Commissioners.

20 Are there any other preliminary matters?

21 Commissioners, I just want to state my intention. I  
22 think we are going to have to take a break at some point, and  
23 now seems like a pretty good time. But I feel compelled to ask  
24 Mr. Jaeger if there are any other preliminary questions.

25 MR. JAEGER: Believe it or not, there are actually

1 two stipulations I think the full Commission has to rule on.  
2 One is just that Mr. Sowerby wouldn't have to show up until  
3 1:30, and it is 1:24 now. And the other one was just that the  
4 docket wouldn't be closed, and nobody had any problems with  
5 that. That was just instead of having the issue of closing the  
6 docket, it would be closed after this hearing.

7 MR. WHARTON: And, Mr. Chairman, we are trying to get  
8 Doctor Levine out of here by 3:30. You know, she only filed  
9 one set of testimony, because we didn't have rebuttal. But she  
10 has got an airplane and a childcare problem.

11 CHAIRMAN BAEZ: Mr. Beck, how much -- any round  
12 figures so that I can figure out how long we can break for? We  
13 are going to break either way, Mr. Wharton, it's just a matter  
14 of how much time.

15 MR. BECK: For Doctor Levine.

16 CHAIRMAN BAEZ: Yes.

17 MR. BECK: A half hour, 45 minutes. I'm just  
18 guessing, though.

19 CHAIRMAN BAEZ: Mr. Jaeger?

20 MR. JAEGER: Fifteen minutes for her.

21 CHAIRMAN BAEZ: All right. We are going to get  
22 Doctor Levine out in time, even if we do break here. So,  
23 Commissioners, is 45 minutes all right with you? We are going  
24 to break for 45 minutes.

25 (Lunch recess.)

(Transcript continues in sequence with Volume 2.)

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STATE OF FLORIDA )

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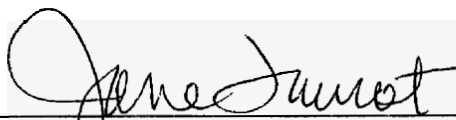
COUNTY OF LEON )

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 14th day of March, 2005.



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