BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION
DOCKET NO. 010503-WU

POST-HEARING MEMORANDUM FILED ON BEHALF OF ALOHA UTILITIES, INC.

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INTRODUCTION AND BACKGROUND

Aloha Utilities, Inc. (Aloha or utility), is a Class A water and wastewater utility in Pasco County. By Order No. PSC-02-0593-FOF-WU, issued April 30, 2002, the PSC required Aloha, among other things, to make improvements to Well Nos. 8 and 9, and then to all its wells, to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in its raw water. A deadline of December 31, 2003 was established for these improvements to be in place. Aloha appealed Order No. PSC-02-0593-FOF-WU and was granted a partial stay pending the appeal. Accordingly, by operation of law, the date for making the plant improvements was extended to February 12, 2005.

The removal of 98% of the hydrogen sulfide in the raw water Aloha produced was, quite simply, a directive that could not be feasibly, technologically, operationally, or economically accomplished. After arriving at a point in which the PSC's staff, the Office of Public Counsel and Aloha all acknowledged this fact, Aloha filed a motion to modify the requirements of the Final Order, requesting that the requirement to remove 98% of hydrogen sulfide from the raw water should be replaced with a requirement that Aloha make improvements as needed to meet a goal of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility, and that this standard be implemented no later than February 12, 2005.

By Proposed Agency Action Order No. PSC-04-0712-PAA issued July 20, 2004, the PSC proposed to approve Aloha's request. This latter Order, which addressed a variety of subjects, stated that "it appears that the 98% removal standard required by the rate case order is not obtainable for all of Aloha's wells, due to low concentration

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of hydrogen sulfide in some of the wells." That Order also specifically declined to accept the suggestions of Dr. Abraham Kurien that the reference to sulfide in finished water should be stated as a maximum contaminant level at the point of its entry into the domestic system at the domestic meter, and that the improvements should be such that sulfide present in raw water or generated during treatment and transmission should be removed rather than converted. V. Abraham Kurien, Harry Hawcroft, and Edward Wood (the Customers) filed a timely Petition protesting several, but not all, provisions of the PAA Order.

The PSC issued a partial Consummating Order, Order No. PSC-04-0831-CO-WS, on August 25, 2004, which consummated the portions of Order No. PSC-04-0712-PAA that were not protested and recognized the portions of that Order contested by the Customers.

A Prehearing Conference was held on February 24, 2005. The customers attended by telephone. The case was set for hearing in Tallahassee on March 8, 2005. At hearing, the Petitioners presented the testimony of a single witness, Dr. Kurien, and the staff presented the testimony of John Sowerby, an employee with the Florida Department of Environmental Protection. Aloha presented the testimony of Mr. David Porter and Dr. Audrey Levine. The opinion testimony of Dr. Kurien was allowed over objection, based on his level of commitment and participation in the case, and subject to an appropriate assignment of its weight from an evidentiary perspective.

The Prehearing Order in this case established four issues to which the proceeding would be addressed. The first was whether the Tampa Bay Water goal for hydrogen sulfide would be stated as a goal or a target, or whether it should be established by

the PSC as a maximum contaminant level. On this issue, Dr. Kurien, the only witness for the Petitioners, failed to carry the Petitioners burden or, to present competent, substantial evidence upon which the PSC could establish such a maximum contaminant level. In fact, the testimony revealed that Dr. Kurien himself does not differentiate between the phrase "maximum contaminant level" and a "goal" or a "target". The second issue in the proceeding was whether the PSC should mandate that sulfide present in Aloha's raw water be removed as opposed to converted. Again, the Petitioners' only witness failed to present any competent, substantial evidence to support such a result, or to persuade the PSC to abandon its policy as stated in its Proposed Agency Action. Issue 3 in this proceeding addressed how compliance with any PSC directive should be measured. The competent, substantial evidence presented by Aloha (which was the only such evidence on the issue) demonstrated that Dr. Kurien's compliance methodology would not yield any useful, reliable, or legitimate results and that the PSC's proposed action on this issue should stand. The final issue in this proceeding, whether the PSC has the authority to impose water quality standards, is one which the PSC and its staff seem to believe has been resolved by the First District Court of Appeal. In fact, the *per curiam* affirmance of the appellate court of Aloha's 2002 rate case order did not affirm the PSC's directive that Aloha remove 98% of the hydrogen sulfide from Well Nos. 8 and 9, and then such other wells as needed. The PSC subsequently acknowledged that its first attempt to engage in such a water quality directive was unsuccessful, and it should not again stray into that area of regulation, particularly in the absence of any statutory or lawful authority to do so.

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1. **SHOULD THE REFERENCE TO SULFIDE IN FINISHED WATER IN THE PROPOSED AGENCY ACTION ORDER BE STATED AS A MAXIMUM CONTAMINANT LEVEL FOR TOTAL SULFIDES OF 0.1 MG PER LITER OF DELIVERED WATER AT THE POINT OF ITS ENTRY INTO THE DOMESTIC SYSTEM AT THE DOMESTIC METER?**

The background of this issue, the totality of the evidence on this issue, and in fact the testimony of the only witness for the Petitioners, all demonstrate that this "issue", at best, is one for which no competent, substantial evidence exists such that the issue could be answered in the affirmative and, at worse, is an accidental issue or one based on a misunderstanding.

On April 30, 2002, the PSC issued a Final Order (Order No. PSC-02-0593-FOF-WU), which required Aloha, among other things, to make improvements to Well Nos. 8 and 9 and then to all of its wells, to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in its raw water. On June 9, 2004, Aloha filed a motion to modify the requirements of that Final Order, such that the requirement to remove 98% of hydrogen sulfide from the raw water should be replaced with a requirement "that Aloha make improvements as needed to meet a **goal** of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility . . ." (Prehearing Order, p.2, emphasis added). Thereafter, the PSC issued a Consummating Order, on August 25, 2004, which expressly provides that Order No. PSC-04-0712-PAA-WS is final as to the modification of the fourth ordering paragraph of Order No. PSC-02-0593-FOF-WU "to the extent that such modification eliminates the 98% removal requirement and requires Aloha to make improvements to its Well Nos. 8 and 9 and then to all of its wells ***as needed to meet a goal*** of 0.1 mg/L of sulfides in its finished water . . ." See,

Order No. PSC-04-0831-CO-WS, p. 2.

There is absolutely no competent, substantial evidence upon which this PSC could implement a maximum contaminant level (MCL) for total sulfides of 0.1 mg/L for Aloha, as opposed to "a goal" of 0.1 mg/L. By his own testimony, the only witness for the Petitioners has revealed conclusively that he (albeit erroneously) uses the word "goal" and the phrase "maximum contaminant level" interchangeably. Additionally, he offered no evidence (competent, substantial or otherwise) to support the implementation of an MCL. The PSC's only witness, Mr. Sowerby, did not even address the issue in his prefiled testimony. However, Mr. Sowerby did acknowledge, on cross examination, that the PSC has not, in any way, shape or form, engaged in the exhaustive investigation which is appropriate before the implementation of an MCL by a regulatory agency. Finally, Aloha's expert witness, Mr. Porter, testified that the implementation of an MCL is entirely inappropriate in this circumstance.

The burden of proof in a Section 120.57 proceeding is upon the petitioner to go forward with evidence to prove the truth of the facts asserted in his petition. *Florida DOT v. J.W.C. Co., Inc.*, 396 So.2d 778, 789 (Fla. 1st DCA 1981). The *Florida DOT* Court explains that:

> the term "burden of proof" has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of the evidence, rests throughout upon the party asserting the affirmative of the issue, and

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> unless he meets this obligation upon the whole case he fails.

The Petitioners had the burden to come forth with competent, substantial evidence to support their burden in this proceeding, and the PSC may only make findings of fact which are supported by such competent, substantial evidence. See, Section 120.68(7), Fla. Stat. In 1957, the Florida Supreme Court held in *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957), that:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion ... In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." (interior citations omitted).

The Petitioners in this case called a single witness, Dr. Kurien. While the Prehearing Order in this case established as an issue whether the reference to sulfide and finished water should be stated as a maximum contaminant level, as opposed to a goal, the Petitioner's only witness failed to offer any competent, substantial evidence to support such a result. Instead he testified that he attached no special significance to the phrase "maximum contaminant level" and instead was only using that phrase in a vernacular sense, rather than as a term of art as do Florida's administrative agencies and administrative code rules. In reaction to the direct testimony of Aloha, Dr. Kurien clarified, in his own prefiled rebuttal testimony, that:

> When I use the words "standard" and "MCL", I was

> using the terminology the way it is used almost interchangeably . . . such as maximum contaminant level, goal, standard, compliance level and action level.

(Tr. 353)

Later, in his prefiled rebuttal testimony, Dr. Kurien again establishes that he believes "performance", "standard", "compliance level", "action level", and "goal" all have the same meaning, at least as he uses those words or phrases, when he testifies that:

> Yet, when it comes to insuring the water it delivers to the customers meets the TBWA performance standard (compliance level, action level, goal) . . .

(Tr. 356)

Dr. Kurien's testimony regarding his own use and interpretation of the phrase "maximum contaminant level" stands in stark contrast to the testimony in this case and to the utilization of that same phrase in Florida law. Mr. Porter, on behalf of Aloha, testified regarding the Tampa Bay Water goal and explained why it was established as a goal and not an MCL (Tr. 286). Mr. Porter opined that an MCL is an entirely different standard than a goal and that while the former requires that a given substance never exceed a given level, the latter is a target, to be strived for to the extent possible both from a technical and economic standpoint (Tr. 286). Tampa Bay Water and the water experts that developed Tampa Bay Water's goal recognize that to apply an MCL instead of a goal would not be feasible and would be cost prohibitive (Tr. 286). MCL levels are set by EPA and DEP for substances that pose a health related risk of sufficient magnitude such that the cost of compliance is justified. The process these agencies go through to set an MCL is very complicated and time consuming (Tr. 289). A cost benefit analysis is undertaken as part of the MCL development process, and the entire analysis involves utility representatives, state regulatory agency staff, water users, and many others who are assembled and

who engage in a detailed analysis of the feasibility of setting an MCL for the substances at issue (Tr. 290). This process can often take years to complete (Tr. 290). It was Mr. Porter's opinion that the PSC should not attempt to set an MCL for any substance without undertaking a study and evaluation process at least as detailed as that used by the EPA and the DEP for water contaminants (Tr. 290). Mr. Porter reiterated that the existing Tampa Bay Water standard specifies a goal, and that an MCL is a "different animal" (Tr. 302). An MCL is something that is a maximum level, not a ongoing monitoring point, and an MCL is only established after careful determination and development within EPA and DEP (Tr. 302). Mr. Porter testified that the Tampa Bay Water goal does not impose on Tampa Bay Water an obligation to do something to come into conformance if they do not meet the goal (Tr. 331).

The PSC's only witness in this proceeding, Mr. Sowerby, agreed with Mr. Porter that the EPA goes through a very involved process before it determines that a particular MCL should be established (Tr. 256). During Mr. Sowerby's 12 years with the drinking water program at DEP, the Department has never chosen to establish an MCL which did not originate from EPA (Tr. 256). Mr. Sowerby also was in agreement with Mr. Porter's testimony that it can take years from its initiation at EPA until a particular MCL is actually put into place (Tr. 256). Mr. Sowerby opined that the existing primary and secondary drinking water standards that apply to utilities in Florida are adequate to safeguard the health of water consumers, and that if DEP felt there was some inadequacy in a current primary or secondary water standard, it would be trying to do something about that (Tr. 259). In point of fact, DEP is not currently contemplating imposing or establishing any standard with regard to hydrogen sulfide (Tr. 259).

Aloha's expert witness, Dr. Audrey Levine, testified that to develop an enforceable standard, such as an MCL, a more reliable measurement method for the detection of a monitoring of hydrogen sulfide would need to be developed (Tr. 191).

She indicated that the Tampa Bay Water goal is a "reasonable target level" for hydrogen sulfide for water quality entering the retailed distribution system (Tr. 192).

In Florida law, a "maximum contaminate level" is the establishment, in an administrative code rule, of a maximum level for a given contaminant which, if exceeded, establishes a violation of the provision of Chapter 403 declaring that it is unlawful for any person "to cause pollution...so as to harm or injure human health or welfare, animal, plant, or aquatic life or property." See, e.g. *Department of Environmental Protection vs. George and Anne Belleau, Crown Laundry and Dry Cleaners, Inc., American Lend and Supply Company, Jura Services, Inc.* , 96 ER FALR 86 (Final Order, 1996). Proof of a violation of a given MCL is by definition proof of pollution. *id.* Obviously, once DEP has thusly established a violation of Chapter 403, the Department may take action against the violator. In this case, there is no evidence, issue, testimony, exhibit, policy, precedent, or even any discussion of what "action" the PSC would take if it determined that Aloha was violating an MCL for hydrogen sulfide, or even how such a violation could or would be determined. These are the types of issues that are dealt with in the long and involved process EPA and DEP utilize when establishing an MCL, and the PSC has not even begun such a process.

Dr. Levine's testimony is correct. The Tampa Bay Water goal is a "reasonable target level" but, ultimately, it is exactly what Dr. Kurien says it is, and Aloha's testimony says it is, and what the PSC's unchallenged Consummating Order says it is, and what the Prehearing Order says it is; i.e., a goal. The PSC should not stray even further into the realm of water quality regulation and attempt to establish an MCL for hydrogen sulfide which would only apply to a single utility in the entire state of Florida.

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2. SHOULD THE IMPROVEMENTS BE SUCH THAT SULFIDE PRESENT IN RAW WATER OR GENERATED DURING TREATMENT AND TRANSMISSION BE REMOVED, NOT CONVERTED, TO A LEVEL NOT TO EXCEED 0.1 MG/L IN FINISHED WATER AT THE POINT OF ENTRY INTO THE DOMESTIC SYSTEM?

Dr. Kurien and the other Petitioners raised this issue in their Petition and contend that the PSC's refusal to require Aloha to undertake removal rather than conversion of hydrogen sulfide is inappropriate. Dr. Kurien provided the only evidence in the record in support of that position. Dr. Levine and Mr. Porter provided responsive testimony on this issue.

Inherent in any discussion of this issue and the positions taken by the Petitioners on both Issue 2 and Issue 3 is the fact that Dr. Kurien, as the sole witness on behalf of the Petitioners in this proceeding, shoulders the entire burden of proof with regard to the Petitioners' positions. Both Issues 2 and 3 are technical engineering issues that can only be addressed by highly specialized expert testimony. While the PSC denied a Motion by Aloha to Strike Dr. Kurien's testimony on the basis of his voir dire examination, that ruling neither confers upon the witness the status of an expert, nor does it establish the weight that should be given to his testimony. As such, this issue is divided into two parts: the weight that should be afforded to the testimony of the various witnesses on Issue 2 and 3, given their respective expertise (and particularly Dr. Kurien's admissions about his lack of the same); and the evidence presented by the witnesses as it relates to this substantive issue.

a) Dr. Kurien's Expertise

During voir dire, Dr. Kurien clearly and unequivocally admitted, among other things, the following:

1. He is not current a licensed medical doctor in the Florida, or in any state.

2. No part of his medical training consists of courses specifically about water treatment plants or water treatment methods.

3. He has never taken any engineering courses.

4. He is not familiar with the standard practices of the engineering profession or the engineering method.

5. He does not hold himself out as an expert in engineering.

6. None of the articles he has published have been about engineering, water chemistry, hydrogen sulfide in drinking water, or water treatment.

7. He has not taken any courses in water chemistry.

8. He has not taken any courses in water hydraulics.

9. He has not taken any courses about water distribution system design.

10. He has not taken any courses with regard to water treatment plant design.

11. He has never taken courses with regard to water treatment processes.

12. He does not hold himself an expert in water treatment plant design.

13. He does not hold himself as an expert in water treatment plant operation.

14. He does not hold himself as an expert in the hydraulics of water treatment systems.

15. He does not hold himself as an expert in DEP or EPA regulations.

16. He has no training or experience in development or estimating costs of water systems.

17. He has no training or experience in the development or estimating cost of operation of water systems.

18. He has never conducted any pilot studies for water plants or modifications to water plants.

19. He does not consider himself sufficiently qualified to conduct the audits that were conducted by Dr. Levine.

20. He has no specific training or experience in sampling and testing and interpretation of the rules of testing and sampling of drinking water.

21. He has never personally conducted water sampling testing and interpretation of such results in accordance with standard methods.

22. He has not personally conducted any study regarding the efficacy of removal versus conversion of hydrogen sulfide.

The provisions of Section 90.702, Florida Statutes provide as follows:

> "Testimony by experts - if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial."

Under the requirements of this section concerning testimony by experts, Dr. Kurien has failed to demonstrate qualifications as an expert by knowledge, skill, experience, training or education. In fact, his lack of knowledge, skill, experience, training or education in the areas which are relevant to Issues 2 and 3 in this proceeding has clearly been admitted to in the above admissions.

While Dr. Kurien has testified as to his credentials as a medical doctor, a degree which he received approximately 50 years ago, there is no showing that the knowledge, skill, experience, training or education he gained in becoming and practicing as a physician, has any relationship whatsoever to the relevant issues in this proceeding.

The only basis for the opinions that Dr. Kurien has rendered throughout his direct and rebuttal testimony, which relates to his knowledge, skill, experience, training or education in the issues before the PSC, is his contention that he has an

undergraduate degree in chemistry from the University of Mysore in India. There is no evidence that this degree is recognized as accredited by the State of Florida or the United States Department of Education (Tr. 131-132) pursuant to Section 817.567(1), Florida Statutes.

Based on this complete lack of demonstrated expertise and more specifically, his admissions about his lack of expertise, Dr. Kurien's prefiled direct testimony on Issues 2 and 3 as outlined in the Prehearing Order, is clearly outside any field for which he could qualify as an expert and as such, should be given little if any weight.

Specifically, his testimony at Tr. 156-158 concerning Issue 2, his testimony on Tr. 158, Tr. 161, Tr. 165-168, and Tr. 171-173 must be afforded no weight, as the entirety of those pages constitute testimony of Dr. Kurien about water hydraulics, water distribution, water processing, water testing, water plant design, water plant operation and maintenance and engineering, water chemistry, and the financial aspects of all of the above. These are all topics upon which Dr. Kurien admitted during voir dire that he lacked the required expertise to render competent expert opinions. In addition, his opinions as expressed throughout his responses offered to questions posed by the PSC staff are well beyond any expertise that Dr. Kurien might possess as demonstrated by his own admissions above. This applies to Tr. 270-281. Dr. Kurien's rebuttal testimony is given as expert opinion testimony throughout. Therefore, the opinions expressed on Tr. 340-356 must be afforded little to no weight.[1]

By comparison, Dr. Levine provided a detailed resume (Exhibit 20) which

[1]One point regarding this witness cannot be overemphasized: he was the sole witness for the Petitioners, who have the burden of proof in this proceeding.

demonstrates her more than 30 years of training and experience in areas related to engineering, biological and environmental science, water chemistry and environmental engineering, including a PhD in environmental engineering. Mr. Porter testified concerning his 32 years of experience in the operation, management, design and troubleshooting of water treatment facilities and having taught 14 years in the area at a community college (Tr. 284). These are fields one cannot just "read himself into" to be considered an expert.

Clearly the testimony of Dr. Kurien in these intensely technical engineering and highly technical subjects related to the water industry can be given little or no weight, especially when compared to the contrary evidence and opinions provided by experts such as Dr. Levine and Mr. Porter.

Therefore, it is clear that even by Dr. Kurien's own admissions (even if one accepts, arguendo, his alleged qualifications in chemistry), he is not an expert in any of the fields needed in order to render reliable opinions on the subject he attempted to address in his prefiled testimony. Certainly to the extent those opinions are at odds with the conclusions reached by Mr. Porter and Dr. Levine, both of whom have more than 30 years of training and experience in the areas directly relevant to these issues, Dr. Kurien's positions can be given little, if any, weight whatsoever.

b) <u>The Substantive Issue</u>

The Petitioners have protested the PSC's decision in its Order whereby the PSC declined to require Aloha to undertake removal rather than conversion of hydrogen sulfide. As Petitioners' only witness on this issue, Dr. Kurien's sole underlying basis for proposing that the PSC should require Aloha to pursue this substantial plant

upgrade is his contention that:

> "The sole use of chlorination as a method of converting hydrogen sulfide to sulfate by oxidation does not reduce the total sulfur load, but merely changes the form in which sulfur remains in the finished water. Evidence has accumulated since 1991 that the production of one form of oxidized hydrogen sulfide namely elemental sulfur, is associated with black water and hence must be removed from the finished water as a preventive measure toward control of black water and copper corrosion. (Exhibit VAK-9)." (Tr. 161-162)

In the first instance, the exhibit referenced in support of this opinion is a letter from David Porter to a Mr. Doug Bramlett, wherein Mr. Porter adamantly disagrees with the conclusion reached by Dr. Kurien concerning the relationship between elemental sulfur and black water (Page 2 of Exhibit 9).

Secondly, even if this conclusion by Dr. Kurien were intended to reference the 1991 article by Troy Lyn which Dr. Kurien has included as Exhibit VAK-8, that article is complete and uncorroborated heresay and as such cannot be relied on by the PSC as the basis for its findings in this or any proceeding. At least as troubling is the fact that the article includes only one conclusory sentence on its first page which suggests a correlation could exist between black water and the presence of sulfur. The article itself relates to the relationship of turbidity (indicative of the presence of sulfur) to chlorination of water containing hydrogen sulfide. It in no way attempts to present any proof or analysis of a relationship between the presence of sulfur and black water. Therefore, even if accepted on its face for the truth of the matters asserted therein, the article presents no proof that the mere presence of elemental sulfur will or can result in black water.

As to turbidity, Dr. Kurien's testimony openly admits that the existence of

elemental sulfur is indicated by the presence of turbidity and that turbidity is an indicator of lower disinfection efficiency. In fact, Dr. Kurien specifically references Mr. Porter's prior statements that existence of elemental sulfur would likely be a possible source for lower disinfection efficiency (Tr. 156-157). Mr. Porter clearly responded by noting that there is absolutely no indication of disinfection inefficiency in Aloha's plants or systems and that in fact the opposite is true. The disinfection process at Aloha's plants are operating efficiently, a conclusion Mr. Porter discusses in detail (Tr. 292). As noted by Mr. Porter, Dr. Levine's own tests taken at the extremities of the Aloha system at eight customers' homes also lead to the same conclusion (Tr. 292). As such, Mr. Porter's statements clearly rebut the underlying (and unfounded) assertions which form the only basis for Dr. Kurien's proposal.

Therefore, the clear weight of the evidence presented by Mr. Porter and Dr. Levine, the lack of expertise demonstrated by Dr. Kurien in this area and the clear admissions by Dr. Kurien of his lack of expertise, all compel the PSC to reject Dr. Kurien's theory. Combine this with the fact that the evidence underlying Dr. Kurien's proposal that removal rather than conversion of hydrogen sulfide is necessary and appropriate is wholly unsubstantiated and rebutted, the PSC must find that Dr. Kurien has failed to carry his burden. Even to the extent that the PSC finds that he has carried his initial burden, the underlying basis has clearly been rebutted through the testimony presented by Mr. Porter. The PSC should not require Aloha to implement a specific treatment alternative which is clearly contrary to the longstanding PSC practice[2] and which will cost millions of dollars to implement (Tr.

[2]As stated in Order No. PSC-04-0712-PAA-WU at Page 38.

323-324) based upon unreliable evidence and an unsubstantiated theory.

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3. SHOULD COMPLIANCE WITH SUCH REQUIREMENTS BE DETERMINED BASED UPON SAMPLES TAKEN AT LEAST ONCE A MONTH AT A MINIMUM OF TWO SITES AT DOMESTIC METERS MOST DISTANT FROM EACH OF THE MULTIPLE TREATMENT FACILITIES WITH SUCH SITES ROTATED TO PROVIDE THE GREATEST LIKELIHOOD OF DETECTING ANY DEPARTURE FROM THE MAXIMUM LEVELS PERMITTED?

In its Motion to Modify the Requirements of Order No. PSC-02-0593-FOF-WU, Aloha proposed to incorporate the goal utilized by the wholesale water supplier, Tampa Bay Water Authority, in providing service to its retail utility member governments. Dr. Kurien has taken exception with the location at which samples to determine compliance with that goal are taken and the frequency of such sampling. Rather than have those samples taken at the point at which the treated water enters the distribution system from Aloha's treatment facilities, Dr. Kurien proposes that samples should be taken at domestic meters most distant from each of the multiple treatment facilities and at multiple and ever changing locations each month. Aloha contends that not only is such a proposal nonsensical and provides useless information, but it is not analogous to the Tampa Bay Water Authority's standard and method of measurement.

Dr. Kurien's proposal, if read literally, is clearly nonsensical. Taking samples at domestic meters at the farthest points from each of the treatment facilities on its face ensures that the analysis and results will have absolutely no relationship to the treatment facilities upon which the location of those tests are based. Mr. Porter and Dr. Levine testified that the purpose of tests taken at the point of entry into the transmission facilities of the Utility was to provide feedback and process control to the treatment undertaken by the Utility (Porter Tr. 235-236, Levine Tr. 288). Both Mr. Porter and Dr. Levine testified that not only are the tests taken at the plant more

accurate and simpler to administer, but that those taken at the extremities of the system as proposed by Dr. Kurien tells you nothing, are unprecedented in the industry are useless, and provide much less benefit to the customers (Porter Tr. 288-289, Levine Tr. 192, 235-236).

Dr. Kurien's primary basis for proposing tests at the extremities of the systems is based upon his contention that sulfide reforms in the transmission system of the Utility and that Dr. Levine's study found such reformation exists in Aloha's system (Tr. 156). Both Dr. Levine and Mr. Porter stated that Dr. Kurien's allegation about Dr. Levine's previous findings was inaccurate. In fact Dr. Levine found no sulfide in the transmission system and the tests were performed by her even at the extremities of the system yielded no evidence of sulfide (Porter Tr. 291-292, Levine Tr. 197).

Both witnesses Levine and Porter also stated that the method for testing proposed by Aloha was equivalent to the Tampa Bay Water standard (Tr. 289 and Tr. 192). Dr. Kurien contends that testing for sulfide at the extremities of the system as proposed by him, is more equivalent to the Tampa Bay Water standards because in both cases it is at the end of the system, nearest the point at which customers receive the water (Tr. 157-158). Such a contention is without merit. Tampa Bay Water Authority is a wholesale provider of water and provides large quantities of water to its member governments who are then the retail providers of domestic water service. Tampa Bay Water does not provide water to any individual customers (Tr. 235).

As noted by both Dr. Levine and Mr. Porter, such tests as proposed by Dr. Kurien not only yield no useful results, but in effect would incorporate tests of water from various sources, including purchased water from Pasco County, over which Aloha has no control (Levine Tr. 235-236, Porter Tr. 288-289). Finally, as noted by

Dr. Levine, there are no tests required of any utility of which she is aware that analyzes hydrogen sulfide at the individual retail customer meter (Tr. 192).

Dr. Kurien has proposed an alternative location and frequency for testing for hydrogen sulfide in Aloha's water. As such, and as the Petitioners' only witness, Dr. Kurien alone carries the burden to demonstrate the appropriateness of such testing locales and frequency, contrary to the findings of the PSC's Proposed Agency Action Order. Dr. Kurien has failed to provide any significant, much less competent or substantial, evidence to demonstrate that the testing locations or frequency which he proposes is in any way equivalent to the Tampa Bay Water standard or that it is feasible or even useful in any way. In addition, Dr. Levine and Mr. Porter's training and expertise of over 30 years each in water treatment analysis, engineering, testing, etc. is clearly far superior to the extremely limited amount of knowledge and experience of Dr. Kurien in these areas. **Therefore, the clear and great weight of** evidence demonstrates that Dr. Kurien's proposal for the location and frequency of testing for compliance is inappropriate, unnecessary and unsupported by competent or substantial evidence. Based upon these facts, the PSC must reject Dr. Kurien's proposal to impose these unprecedented, unworkable and useless testing proposals.

4. DOES THE COMMISSION HAVE THE AUTHORITY TO REGULATE, IMPOSE, OR ESTABLISH DRINKING WATER STANDARDS, MAXIMUM CONTAMINANT LEVELS, ACTION LEVELS, OR TREATMENT TECHNIQUE REQUIREMENTS?

On April 30, 2002, the PSC issued Order No. PSC-02-0593-FOF-WU, in Docket No. 010503-WU. That Order directed Aloha, among other things, to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in its raw water. Aloha appealed Order No. PSC-02-0593-FOF-WU and on May 6, 2003 the First District Court of Appeal rendered a *per curiam* affirmance. The Prehearing Order in this case sets forth the position of Aloha, OPC/customers and the PSC's staff. On Issue 4, staff's position was that the PSC does have the authority to regulate, impose, or establish drinking water standards, maximum contaminant levels, action levels or treatment technique requirements "as evidenced by the First District Court of Appeal's affirmance of the Final Order, Order No. PSC - 02-0953- FOF-WU, which requires that 98% of the hydrogen sulfide in Aloha's raw water should be removed". In fact, the 2002 *per curiam* appellate decision of the First District Court of Appeal is not a "affirmance" of that portion of the PSC's Order which required that 98% of the hydrogen sulfide in Aloha's raw water be removed. *Per curiam* appellate court decisions do not establish any point of law, and create no presumption that an affirmance was on the merits. Florida's Supreme Court, noting that the District Courts of Appeal, which have addressed the issue of the effect of a *per curiam* affirmance, have been firm in holding that such has no precedential value and have consistently held that a *per curiam* decision without opinion cannot be cited as precedent. *Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So.2d 310 (1983). Such a decision does not establish any point of law, and there is

no presumption that the affirmance was on the merits. *Schooley v. Judd*, 149 So.2d 587 (Fla. 2d DCA) *rev'd on other grounds* 158 So.2d 514 (Fla. 1963) as cited by *Department of Legal Affairs*, at 311. A *per curiam* affirmance without opinion does not bind the appellate court in another case to accept a conclusion of law on which the decision of the lower court was based. *Goldberg v. Graser*, 365 So.2d 770, 773 (Fla. 1st DCA 1978). Accordingly, no appellate court has ever ruled that the PSC has the lawful authority to impose water quality standards.

Even assuming, arguendo, that the PSC had some competent, substantial evidence upon which to impose a water quality standard in this case, the PSC lacks the lawful authority to undertake such an imposition. The Legislature has expressly provided, at Section 367.121(1)(a), Florida Statutes, that in the exercise of its jurisdiction, the PSC shall have the power:

> To prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and to prescribe service rules to be observed by each utility, ***except to the extent such authority is expressly given to another agency.***

In the past, the PSC has consistently, and properly, deferred to the appropriate environmental protection agencies on water quality issues. In *In re: Application of South Brevard Utility, Inc.*, 90 F.P.S.C. 4:438, 442 (1990), where many customers had complained that the water had color and a strange odor, the PSC found that "there is no requirement for opacity or odor control established by DER. . ." As economic regulators, the PSC may not impose an environmental standard that is greater than the standard set by the agency charged with enforcing various environmental standards. In *In re: Application of RHV Utility, Inc.*, 95 F.P.S.C. 8: 115, 117(1995), the PSC explicitly deferred to the environmental protection authority and held "[a]s

long as the utility appears to be cooperating with the agency of primacy in this area, our involvement is unnecessary."

The PSC is no stranger to customer dissatisfaction regarding the effects of hydrogen sulfide. On numerous past occasions, the PSC has dealt with the subject of hydrogen sulfide in the water of the utilities it regulates and has consistently observed that hydrogen sulfide is not harmful, that problems associated with it are typically localized in the customer's plumbing, and that the water in each of those cases nonetheless satisfied safe drinking water requirements. *See,In re: Application of Pennbrooke Utilities, Inc.*, 01 F.P.S.C. 6:75, 81 (2001); *In re: Application of United Water Florida, Inc.*, 97 F.P.S.C. 5:641, 648-50 (1997); *In re: Application of Heartland Utilities, Inc.*, 96 F.P.S.C. 11:268, 270-72 (1996); *In re: Application of JJ's Mobile Homes, Inc.*, 95 F.P.S.C. 10:480, 485-87 (1995); *In re: Application of Lake Josephine Water*, 95 F.P.S.C. 8:389, 390-91 (1995); *In re: Application of St. George Island Util. Co., Ltd.*, 94 F.P.S.C. 11:141, 146-49 (1994); *In re: Application of Ocean City Utilities, Inc.*, 94 F.P.S.C. 3:97, 99 (1994); *In re: Application of CGD Corp.*, 93 F.P.S.C. 1:70, 71 (1993); *In re: Application of Springside at Manatee, Ltd.*, 92 F.P.S.C. 4:213, 214 (1992); *In re: Application of Laniger Enterprises of Am., Inc.*, 91 F.P.S.C. 7:341, 342 (1991); *In re: Application of Fisherman's Cove of Stuart, Inc.*, 91 F.P.S.C. 3:656, 658 (1991). In none of those cases did the PSC choose to extend its jurisdiction to the implementation of water quality standards or water treatment protocols and by extension the PSC has never before proposed to implement a uniform water quality standard applicable to all regulated utilities.

The PSC had no lawful authority to stray into those areas of regulation whose implementation has expressly been reserved by state and federal law for

environmental agencies who are equipped to interpret, implement, and enforce such regulations. It has often been said by our courts that the PSC has "only those powers granted by statute expressly or by necessary implication." *Deltona Corp. v. Mayo*, 342 So. 2d 510 (Fla. 1977) (citing *Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493 (Fla. 1973)) In *Deltona*, the PSC found that "[i]f Deltona has engaged in an unfair business practice or committed fraud . . . it might be a concern of other state agencies or the basis for private law suits, . . . but that it is not a matter of statutory concern to the [PSC]." *Id. at* 512. In the *Cape Coral* case, the Florida Supreme Court noted that "[a]ll administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute," and that "the PSC's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." 281 So. 2d at 495 - 6. The Court further declared that "[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the PSC must be resolved against the exercise thereof . . . and the further exercise of the power should be arrested." *Id.* (citing *Southern Armored Car Service, Inc. v. Mason*, 167 So. 2d 848 (Fla. 1964) and *State ex rel Burr v. Jacksonville Terminal Co.*, 71 So. 474 (Fla. 1916)) Finally, the Court also noted that the Legislature has never conferred upon the PSC a general authority to regulate public utilities. *Id.* Similarly, the Court in *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 177 So. 2d 577 (Fla. 1964), noted that while the PSC's Orders come before the Court with a presumption of regularity, the Court "cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature."

If the PSC has jurisdiction to force a water treatment standard upon Aloha which

exceeds any existing state or federal law or any standard applied to any (much less all) other utilities, that authority would not logically be limited to the element of hydrogen sulfide. If the PSC has such jurisdiction, it assumably has such jurisdiction with regard to any water quality standard whether that standard applies to odor, taste, clarity, or fitness for human consumption. However, it is no accident that neither the PSC's enabling statutes, nor its administrative rules even attempt to either establish any such standards or to provide when or how the implementation of any such standards would or could be appropriate. It is neither lawful nor appropriate for the PSC to attempt to change the requirements of state and federal agencies who do have jurisdiction over the water quality of Florida's regulated utilities by simply issuing an Order to Aloha which effectively usurps the jurisdiction of those agencies and which, in fact, goes further (in terms of implementing a standard which is more strict) than any applicable standard either imposed, implemented or enforced by those agencies. The PSC has neither the expertise nor the jurisdiction to decide that something about the chemical constituencies in Aloha's raw or finished water makes it appropriate for the PSC to force upon Aloha a treatment standard which cannot be found in any state or federal law or regulation applicable to Aloha or anyone else.

Finally, this PSC should recognize that it lacks the expertise to establish and enforce water quality standards. The PSC employs no hydrologists, chemists, or engineers who are experts in water quality and water parameters, and does not have such similar or analogous expertise at its disposal. The PSC has acknowledged that it made a mistake in its first attempt to impose water quality standards on Aloha. On July 20, 2004, the PSC issued Order No. PSC-04-0712-PAA-WS. In that Order, the PSC noted that it "appears that the 98% removal standard required by the rate case

order is not attainable for all of Aloha's wells, due to low concentration of hydrogen sulfide in some of the wells". The Proposed Agency Action also opined that the PSC would "decline to prescribe the treatment methodology that Aloha should use in order to comply with the requisite treatment standard." The PSC should not, again, attempt to extend its jurisdiction into areas beyond its expertise, as it did in its 2002 Order to Aloha.

CONCLUSION

For all of the reasons set forth herein, the PSC should reject the contentions and recommendations of the Petitioners and should determine that it does not have the authority or jurisdiction to regulate, impose, or establish drinking water standards, maximum contaminant levels, action levels, or treatment technique requirements, and issue a Final Order which reflects these holdings.

Respectfully submitted this 7th day of April, 2005.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing and the Post-Hearing Statement of Issues and Positions have been furnished by U. S. Mail to the following, this 7th day of April, 2005:

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aloha\46 show cause\answer brief