

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 010503-WU

**ALOHA UTILITIES, INC.'S
MOTION TO STRIKE**

Aloha Utilities, Inc. ("Aloha" or "Utility"), by and through undersigned counsel, hereby files this Motion to Strike certain portions of the Post Hearing Statement of Customers Harry Hawcroft and Ed Wood, filed on April 7, 2005, and in support thereof would state and allege as follows:

1. On April 7, 2005, the only two Petitioners in this case, Harry Hawcroft and Ed Wood, filed their Post Hearing Statement. That Post Hearing Statement contains numerous allegations and factual representations which are not supported by the record and which constitute improper, *ex post facto*, and uncrossexamined and unsworn testimony.

2. The Petitioners in this case have the burden of proof. That burden of proof requires the Petitioners 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).

In this case, the Petitioners have, in their Post Hearing Statement, offered several statements of “fact” which are not supported by any evidence, much less substantial evidence, and/or which are not supported by such relevant evidence as a reasonable mind would accept as adequate to support the conclusions made.

3. This Motion is not directed at unsupported arguments or mere mischaracterizations of actual evidence, however inappropriate the inclusion of the same in the Post Hearing Statement of the customers may be. It is incumbent upon the Commissioners themselves to give the appropriate weight to such specious characterizations. Rather, this Motion is limited to outright allegations of fact that have no support in the record and/or which are not made upon evidence that a reasonable mind could accept as adequate to support the allegation. The Post Hearing Statement is not an opportunity to offer additional evidence or to engage in further testimony. Rather, it is an opportunity to summarize the evidence and to argue its relevance to the positions supported by a given party. The numerous statements of fact or “expert opinion” made in the Post Hearing Statement of Mr. Wood and Mr. Hawcroft which are

not supported by the record do a disservice to the Commission and constitute an unnecessary expense for all parties concerned.

4. In its Motion To Quash Subpoenas And For A Protective Order filed February 17, 2005, the Commission's staff stated, at paragraph 25 thereof, that "[t]he final decision must be based solely upon the record adduced at hearing, and will be upheld or overturned on its own merits". Staff's statement is correct. The Commission's final decision on this case must be based solely upon the record adduced at hearing. An attempt to offer additional testimony or to make statements ostensibly based upon exhibits (which in reality constitute further opinion testimony regarding such exhibits) is an attempt to introduce uncrossexamined and unsworn evidence after the close of the record. Such attempts should be stricken by the Commission.

5. The following allegations are not supported by any evidence adduced at the hearing and/or constitute additional opinion evidence about exhibits introduced at the hearing which are opinions which were not made on the record at the hearing¹:

- p. 1: "Contrary to the oft repeated claims of Aloha that the water delivered at the domestic meter is 'clean, clear and safe', records from Aloha's own flushing program show (Exhibit VAK-19 in rebuttal testimony) that intermittently the water quality is seriously impaired in the distribution system by discoloration, odor and the presence of gas (of undetermined nature)."
- p. 1: "The persistence of discoloration after flushing of thousands of gallons of water indicates that what is found in the flushed water is truly representative of what occurs in the distribution system."

¹The mere fact that an allegation in the customers' Post Hearing Statement purports to refer to an exhibit or a transcript page does not establish record support for the allegation made. A comparison, in each such instance, of the allegation in the Post Hearing Statement to the record establishes that the allegation should be stricken.

- p. 2 : “Chlorine residual levels that were done prior to the flushing have frequently demonstrated levels below the mandated FDEP minimum of 0.2mg/l and on many occasions and at a number of different sites have been documented to be zero (VAK-19).”
- p. 2 : “In spite of being aware of these deficiencies within its water processing and delivery system Aloha, contrary to facts from its own records, has represented to the regulatory agencies and customers that it has met the primary and secondary standards for water it delivers to the customers and that the requirements of FDEP disinfection threshold for chlorine residuals have been met (Mr. Porter’s testimony, page 11 lines 1-7).”
- p. 2 : “Mr. Porter, Aloha’s expert, is willing to admit that there is no correlation between a test done at the treatment plant and at a customer’s home (Transcript page 316, lines 2-6) but is unwilling to admit that such a lack of correlation could be due to the changes that occur in the distribution systems, especially since ‘the water essentially could be as much as two to three days’ old’ (Transcript page 317, line 23-24).”
- p. 2 : “On the basic scientific principle that reactions take place when and where conditions are appropriate, Aloha must admit that conditions existed within its processing, storage or distribution system that caused serious deterioration of water quality resulting in the observations described in the flushing records.”
- p. 3 : “Unless appropriate tests are carried out beyond the routine testing locations at points of entry into the distribution system, it is very easy to miss significant and relevant findings concerning what happens in the distribution system.”
- p. 3 : “. . . demonstrates that such deterioration can occur and does occur even in the transmission system.”
- p. 3 : “Try to explain away this fact, Aloha expert Mr. Porter has created a new explanation of Aloha’s water processing. The theory is that some wells produce ‘partially treated’ water (Direct testimony Mr. Porter, page 8, line 23) and that others presumably produce ‘fully treated’ water!”
- p. 3 : “. . . which Mr. Porter now claims was only ‘partially treated’.”
- p. 3 : “Further, Aloha would have to explain how it can control chlorination at wells in such a way that water is only ‘partially treated’ and indicate that such a technique is being deliberately employed by Aloha at wells 3 and 4.”

- p. 4 : “However, ‘partial (or more accurately incomplete) treatment’ can occur when stoichiometrically inadequate amounts of chlorine are added to the raw water, when the amount of total organic carbon is large or when pH is not adequately high such that the oxidation of hydrogen sulfide does not proceed all the way to sulfate.”
- p. 4 : “If the claim of Aloha is that such a method of ‘partial treatment’ is being deliberately used by the Utility at well 3 and 4 from which water is pumped into the storage tank and subsequently large additional amounts of chlorine are added as a ‘final treatment’, then Aloha must also concede that when hydrogen sulfide levels are very high in well 9 and only stoichiometrically inadequate amount of chlorine can be added water from well 9 is only ‘partially treated’ because of the limitation of the maximum capacity of the chlorinator at that well (Dr. Levine’s audit, Phase I report, page 20).”
- p. 4 : “The processed water from well 9 does not receive a second, final treatment before it is delivered to customers.”
- p. 4 : “Therefore, customers must be receiving ‘partially treated’ water from that well on a large number of occasions.”
- p. 4 : “Since the flushing data shows that intermittently water in the distribution system of Aloha is discolored, is odorous and contains gas and therefore is not stable, even if ‘adequately’ treated at the treatment facilities . . .”
- p. 5 : “If the way Aloha has been practicing the technical implementation of these methods result in the findings as reported in Aloha’s flushing records, then the totality of the processing and delivery system must be held to be inadequate to deliver stable water of good quality.”
- p. 5 : “Such deterioration of water quality could have occurred anywhere between the treatment facility and the domestic plumbing and the evidence provided by Aloha’s own flushing records is that it does occur in Aloha’s distribution system, even though Aloha has avoided reporting such events to regulatory agencies and is unwilling to admit that such events do take place.”
- p. 5 : “So the observation of the customers that the delivered water intermittently is not ‘clean, clear and safe’ is not a hypothesis, but a proven fact.”

- p. 6 : “Even a layperson would know that the naked eye appearance of water as ‘clear’ is no guarantee that it is ‘clean or safe’; how much more likely is water not clean and not safe when water is discolored and smelly as reported by Aloha technicians.”
- p. 6 : “In this context it is not only illogical, but also negligent to postulate a theory of causation for black water and rotten egg smell exclusively confined to domestic plumbing as Aloha has done for almost a decade and claim it as fact. A more robust method of processing and a commitment to remove causative antecedent factors such as elemental sulfur and regenerated hydrogen sulfide become a more appropriate and mandatory response under these circumstances.”
- p. 7 : “Aloha has responded to these statistics by ignoring them or underreporting them and by claiming that deterioration of water quality is exclusively confined to domestic plumbing.”
- p. 7 : “. . . but the Pasco County Black Water study conducted by FDEP and cited by Dr. Kurien in his rebuttal testimony (Rebuttal Testimony VAK-20) showed that there is no validity to this hypothesis because the frequency of black water was similar irrespective of the presence or absence of water softeners.”
- p. 7 : “Such a situation can be associated with black water and production of rotten egg smell due to the activity of sulfur reducing bacteria, an anaerobic organism present in delivered water. Dr. Levine and Mr. Porter have conceded that elemental sulfur is formed in Aloha’s wells . . . “
- p. 8 : “All of Aloha’s wells contain more hydrogen sulfide than this threshold level of 0.3mg/l at least intermittently and some of the wells always contain hydrogen sulfide levels much higher than this threshold (Dr. Levine’s Phase II report, page 18). Therefore removal of almost all hydrogen sulfide (cf. the 98% removal standard in the PSC order of 2002) or removal of elemental sulfur produced during processing is an essential necessity for control of copper corrosion and black water as stated in FDEP guidelines. The experience of nearby utilities show that along with appropriate adjustment of pH and the removal of hydrogen sulfide by the use of aeration methods or by the removal of elemental sulfur as recommended by the F.A.C. Rule 62-555.355(5) (Mr. Sowerby, Transcript Page 253, lines 10-14), ‘finished water’ can be made more stable.”

- p. 9 : “When these 9 sources of processed water are introduced into a common manifold without appropriate and adequate blending in a centralized tank, further significant variability and instability can occur.”
- p. 10 : “The history of Aloha’s unwillingness to address these responsibilities (VAK-19) so that delivered water remains stable in domestic plumbing will always remain a red flag for its customers to remain vigilant about compliance certification.”
- p. 10 : “This is necessary because of Aloha’s consistent refusal to share information with its customers. The FDEP and the PSC are remote and have not been effective in their supervision of the utility’s day-to-day performance in relation to water quality during the last ten years.”

WHEREFORE, and in consideration of the above, Aloha respectfully requests that the above statements be stricken because they do not constitute competent, substantial evidence and because they are improper attempts to render factual or opinion testimony after the close of the record, rather to sum up the facts and testimony which were adduced at hearing.

Respectfully submitted this 27th
day of April, 2005, by:



JOHN L. WHARTON
FL BAR ID NO. 563099
F. MARSHALL DETERDING
FL BAR ID NO. 515876
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555
(850) 656-4029 FAX

CERTIFICATE OF SERVICE

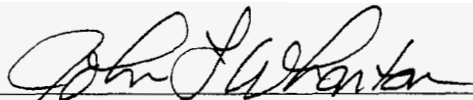
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax (*) and U.S. Mail this 27th day of April, 2005, to:

Ralph Jaeger, Esquire*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0873

Charles Beck, Esquire*
Office of Public Counsel
111 Madison Street
Tallahassee, FL 32399-1400

Edward O. Wood
1043 Daleside Lane
New Port Richey, FL 34655-4293

Harry Hawcroft
1612 Boswell Avenue
New Port Richey, FL 34655



JOHN L. WHARTON

motion to strike.mot.wpd