

BEFORE THE PUBLIC SERVICE COMMISSION

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

DOCKET NO. 010503-WU
ORDER NO. PSC-05-0547-PCO-WU
ISSUED: May 19, 2005

ORDER GRANTING IN PART AND DENYING IN PART ALOHA'S MOTION TO STRIKE

An administrative hearing was held on March 8, 2005. As required by the Commission, all parties filed Post-Hearing Briefs on April 7, 2005. On April 27, 2005, Aloha Utilities, Inc. (Aloha) filed its Motion to Strike certain portions of the Customers' Post Hearing Statement.

In its Motion to Strike, Aloha requests that 28 separate portions of the Customers' Post Hearing Statement filed by Mr. Hawcroft and Mr. Edward Wood be stricken. Aloha argues that the Petitioners (customers) have the burden of proof, and that they "have 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," as required by the Florida Supreme Court in DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Aloha argues that its motion "is not directed at unsupported arguments or mere mischaracterizations of actual evidence," but that it "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." Aloha alleges that the 28 listed portions of the Customers' Post Hearing Statement should be stricken because they were "not supported by any evidence adduced at 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 hearing."

On May 3, 2005, the Customers filed their Response to Aloha's Motion to Strike (Customers' Response), and the Office of Public Counsel (OPC) filed its response in Opposition to Aloha's Motion to Strike (OPC's response). In the Customers' Response, the customers argue that Aloha's objections and "motion to strike relate almost entirely to an exposition of the significance of Exhibit VAK-19" which was admitted as a part of Exhibit 23. The customers argue that the 60 pages of Exhibit VAK-19 came from Aloha's own flushing records, that they could only be considered hearsay in the purest sense, and that they "are indeed 'relevant evidence as a reasonable mind would accept as adequate to support the conclusion' drawn in the rebuttal testimony and emphasized in the post hearing statement." The customers conclude their argument that none of the Post Hearing Statement should be stricken and that an analysis of Exhibit VAK-19, which comes from Aloha's own flushing records, demonstrates that "intermittently water quality is seriously impaired in the distribution system by color, odor and presence of gas."

In OPC's response, OPC states that the characterization of certain portions of the Customers' Post Hearing Statement "as 'opinion testimony regarding such exhibits' does not

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make those portions improper,” and “in fact, providing argument and opinion about the meaning of record evidence is exactly what a party is supposed to do in its post-hearing statement.” OPC concluded its argument by noting that the Commission typically gives customers greater leeway and that any “ultimate decision in this proceeding must be based on competent, substantial evidence in the record.”

A review of Aloha’s Motion to Strike shows that 16 of the objections relate to the customers’ interpretations of Aloha’s flushing reports found in Exhibit 23, VAK-19. Exhibit 23, VAK-19, shows that there were points in time and location where the chlorine residual was zero and the flushed water had bad odor and color. Also, in his rebuttal testimony, Witness Kurien noted that the flushing reports showed that there was black and discolored water in the distribution system. (TR 344) Although these flushing reports showed a zero level at times, both Aloha Witness Porter and Staff DEP Witness Sowerby indicated that pursuant to the reports submitted by Aloha and records of DEP, Aloha had at all times maintained the free chlorine residual of 0.2 mg/L required by DEP. (TR 246-247, 364) The customers argue on page 5 and 7 of their Post Hearing Statement that Aloha “has avoided reporting such events to regulatory agencies,” and “has responded to these statistics by ignoring them or underreporting them,” and Aloha has moved to strike these sentences. There is nothing in the record that shows that Aloha has “underreported,” failed to make required reports, or made inadequate reports. The statements made by the customers do not appear to be factual statements, but arguments made by the customers. Because the use of the term “underreporting” could be misleading, the phrase “or underreporting them” on page 7 of the Customers’ Post Hearing Statement shall be stricken. As regards all other sections interpreting Exhibit 23, VAK-19, the customers have stated their interpretations, arguments, and conclusions concerning the exhibit, and Aloha’s disagreement with these interpretations does not mean they should be stricken. The first eight objections listed by Aloha, starting on page one of the Customers’ Post Hearing Statement through the first two objections for page three, and the next seven objections starting at the bottom of page 4 of the Customers’ Post Hearing Statement through the first objection for page 7, and the last objection at the beginning of page 10 of the Customers’ Post Hearing Statement, are arguments and conclusions of the customers concerning Exhibit 23, VAK-19 and related testimony. Therefore, these statements shall not be stricken, except as noted in the one instance.

Concerning Aloha’s third objection for page three of the Customers’ Post Hearing Statement through the first four objections for page 4, Aloha has moved to strike seven different sections that relate to the finding by Dr. Levine of a level of 0.12 mg/L of sulfide in the inflow to the main tank discussed by Witnesses Kurien (TR 342), Porter (TR 291-292), and Levine (TR 193). The customers argue in each of the seven sections that because the water that goes to a storage tank receives a second treatment and is considered only partially treated by the first treatment, then the water from the wells where there is only one treatment must also be only partially treated. In the last two of these seven sections, Aloha objects to the customers arguments that Well 9 can only receive a “stoichiometrically inadequate amount of chlorine” and must be considered to be only partially treated, and that “the processed water from well 9 does not receive a second, final treatment before it is delivered to customers.” Witness Kurien testified at length about the inadequacy of the chlorinator at Well 9 and how it could provide only an inadequate amount of chlorine to fully reduce hydrogen sulfide to sulfate. (TR 350-351)

Although Witness Kurien never exactly said that this was the only treatment, he indicated that there was only one inadequate chlorinator. Based on the above, it appears that these seven sections involve argument and conclusions reached by the customers based on Dr. Levine having found 0.12 mg/L of sulfide in the inflow to the main tank and Witness Kurien's testimony on the inadequacy of the chlorinator at Well 9. Therefore, Aloha's Motion to Strike these portions shall be denied.

Aloha has also moved to strike the following statement from page seven of the Customers' Post Hearing Statement: "but the Pasco 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." Aloha did not move to strike the first portion of the statement: "that deterioration in domestic plumbing is due to removal of chlorine by water softeners." In Exhibit 23, VAK-20, page 5 of 10, in the Conclusions section of the Pasco County Black Water Study, the author of the study stated as follows: "the presence or absence of water conditioning units in the homes appeared to have no effect on the generation of the hydrogen sulfide and the subsequent reaction with the copper pipes." It appears that the customers have paraphrased this statement in the record, and, therefore, Aloha's motion to strike this section shall be denied.

Aloha has also moved to strike the following from page eight of the Customers' Post Hearing Statement: "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" In the preceding sentence, the customers stated that Witnesses Levine and Porter, as well as other experts, concur "that presence of elemental sulfur in finished water can diminish its disinfection capability." This argument appears to have been taken from Witness Kurien's direct testimony, Exhibit 6, VAK-6, Exhibit 7, VAK-7, and Witness Kurien's rebuttal testimony found on TR 347. The customers are arguing that sulfur reducing bacteria found in Aloha's finished water can work on elemental sulfur and convert it to hydrogen sulfide, with its attendant rotten-egg smell and the proclivity to react with the copper pipes to form black water. Therefore, the customers' conclusions and arguments in the first full sentence protested by Aloha in this section shall not be stricken because it was taken from testimony. Also, as regards the second portion of a sentence protested by Aloha for this section, both Witnesses Levine (TR 194-195) and Porter (TR 294) admit that the hydrogen peroxide process would produce some sulfur, though it might not be appreciable. Although the customers state that "the elemental sulfur is formed in Aloha's wells," from the full context of their argument, they are talking about the well sites and after use of an oxidizing treatment. Therefore, the second portion of the aforementioned sentence shall also not be stricken because it is argument and conclusions based on the record.

Aloha has also moved to strike the following three sentences found at the bottom of page eight of the Customers' Post Hearing Statement:

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 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.

The citation to the first sentence is not in the record, and therefore this sentence shall be stricken. However, Witness Kurien testified that Aloha had to remove almost all the hydrogen sulfide, or, if it used oxidation, then there was need to do more, such as remove elemental sulfur and adjust pH to prevent deterioration of the water and make it more stable, and nearby utilities had been successful in treating water to alleviate the black water problem and the rotten-egg smell. (TR 162-167, 353) Because the last two sentences are based on record testimony, they shall not be stricken.

Aloha has also moved to strike the following sentence found on page nine of the Customers' Post Hearing Statement:

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.

This sentence is a conclusion based on Witness Kurien's testimony found at TR 160-161, where he discusses the nine sources of water and the common manifold from which water would be drawn in a very unpredictable manner. Therefore, this sentence shall not be stricken.

Finally, Aloha has moved to strike the last two sentences found on page ten of the Customers' Post Hearing Statement:

This is necessary because 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.

Immediately before the statements, the customers argued: "Customer complaints in this area will have to be monitored by customer representatives with powers to examine Aloha's operating records." Although there is no direct testimony about Aloha having refused to share information, in his rebuttal testimony, Witness Kurien alluded to the fact that Aloha's experts who came into the customers' homes or addressed customers at an Aloha Customer Workshop gave out nonscientific or absurd statements offered as facts, which were used for a long time to "prevent an adequate scientific investigation of black water and rotten egg smell in customers' plumbing."

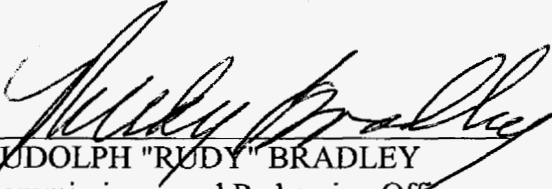
(TR 357) Based on this testimony and the fact that the problem has persisted approximately ten years, the customers might infer that Aloha has consistently refused to share information, or everyone would have been enlightened years ago when the problems were first noted. Also, the second sentence about the remoteness and ineffectiveness of the DEP and PSC may be another conclusion reached by the customers based on the fact that the problem has persisted for such a long time. Therefore, neither of these sentences shall be stricken.

In summary, except for the two instances where Aloha's Motion to Strike has been granted, Aloha has directed its Motion to Strike at arguments, opinions, or conclusions with which it disagrees, and not at outright allegations of fact that have no support in the record. These arguments, opinions, or conclusions are not evidence but merely the customers' interpretation of the evidence. Any findings of fact made by the Commission will be based upon the record, as required by Section 120.68(7)(b), Florida Statutes.

It is therefore,

ORDERED by Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, that the Motion to Strike of Aloha Utilities, Inc., is granted in part and denied in part as set forth in the body of this Order.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this
19th day of May, 2005.



RUDOLPH "RUDY" BRADLEY
Commissioner and Prehearing Officer

(SEAL)

RRJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and

time limits that apply. **This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.**

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.