

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 27, 2008

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Hartman)
Division of Economic Regulation (Willis)

RE: Docket No. 060606-WS – Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

A handwritten signature in black ink, appearing to be "JEB" with a flourish, and another smaller signature below it.

AGENDA: 04/8/08 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Argenziano

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060606.RCM.DOC

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Case Background

Aloha Utilities, Inc. (“Aloha” or “utility”) is a Class A water and wastewater utility located in Pasco County (“County”). The utility consists of two distinct service areas: Aloha Gardens and Seven Springs.

In February 2005, the Commission initiated deletion proceedings in Docket No. 050018-WU for a portion of the Seven Springs service area based on a number of “black water” problems that ultimately resulted from the presence of hydrogen sulfide in the water in copper piping systems.

On March 9, 2006, after several months of extensive negotiations in which staff participated, a Settlement Agreement was executed by Aloha, the Office of Public Counsel

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("OPC"), and individual intervenors Wayne T. Forehand, John H. Gaul, and Sandy Mitchell, Jr. ("Intervenors"). Aloha, OPC and the Intervenors are collectively referred to as the "Parties." The Settlement Agreement was also ratified by Richard Letvin, Donna B. Vaurio, Joel A. Kurtz, Richard E. Wiltsey, and John P. Andrews, non-intervenor customers of Aloha who were active members of the Committee For Better Water Now. Mr. Edward O. Wood, another individual intervenor in the deletion docket, did not sign the Settlement Agreement.

Commission staff recommended the Settlement Agreement because it put a stop to lengthy and expensive litigation, and because it was believed to be the quickest solution to solving the customers' black water problems.

The Settlement Agreement resolved all outstanding dockets and court proceedings between Aloha and the Commission, and was approved by the Commission by Order No. PSC-06-0270-AS-WU.¹ The critical element of the Settlement Agreement is the acknowledgement of the parties that it is prudent for Aloha to implement a new water treatment method – anion exchange – to address the current problems that stem from the presence of hydrogen sulfide in the water, thereby addressing the related taste, odor and color problems.

Another key element of the Settlement Agreement was that after the effective date² no further enforcement action against Aloha would be requested by the Parties or taken by the Commission (and no further disallowances or penalties would be assessed), based on Aloha's actions or inactions prior to the effective date relating to water quality or customer service issues which have been raised in prior dockets. However, the Settlement Agreement explicitly states that the Commission may initiate a new enforcement action based on actions or inactions after the effective date in the event the Commission finds probable cause that Aloha has violated its obligations under the Settlement Agreement.

The parties to the Settlement Agreement agreed to an estimate of 24 months as being a reasonable timetable for completion of this anion exchange project. Project design was estimated to take 6 months; permitting was estimated to take 4 months; and bidding, contract award, fabrication and construction was estimated to take 14 months. This schedule would have resulted in completion of the overall project by approximately July 2008. Aloha agreed to file quarterly progress reports during the implementation of the project, and staff agreed to meet to review each progress report with the Parties. Pursuant to the Settlement Agreement, if staff concludes that Aloha is not proceeding in good faith to meet the schedule, staff may recommend

¹ Issued April 5, 2006, in Docket No. 050018-WU, In Re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; Docket No. 050183-WU, In Re: Request by homeowners for the Commission to initiate deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; and Docket No. 010503-WU, In Re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

² By its terms, the effective date of the Settlement Agreement was the date the Commission Order approving the Settlement Agreement became final and non-appealable (May 5, 2006). The implementation schedule for design and construction of the anion exchange system, however, was tolled until a potential impediment presented by Pasco County Ordinance No. 05-2444, which required use of a different form of treatment technology, was removed. This occurred when the ordinance was repealed by the County on June 27, 2006.

enforcement action. Aloha remains free to request any necessary extension of time, and the other parties remain free to seek other relief in the event the schedule is not being met.

On September 12, 2006, staff opened Docket No. 060606-WS, Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU, to monitor the settlement implementation.

The 24-month project time line has not been met. Initially, the project was stalled in the design phase until April 11, 2007, due to delays in working out the bulk water purchases with Pasco County. Aloha was not able to obtain all of the necessary bulk water engineering information until that time. In its April 4, 2007, quarterly report, Aloha estimated that, as a result of uncertainty about the availability of bulk water service, the overall project had been delayed by at least 180 days—that is, the overall project completion date would be no sooner than the end of December 2008. The parties discussed during that time period the need to expedite completion of the project, by making up the time in other phases.³

Once the bulk water supply issues were resolved, Aloha proceeded to complete the final design phase of the project. Aloha apparently had difficulty getting a crucial technical report from the University of South Florida (“USF”), specifically from Dr. Audrey Levine (“Levine”), an engineering professor. *With the utility’s knowledge, Dr. Levine had left employment with USF in December 2006. Based upon copies that staff has received of communications between Aloha, USF and Dr. Levine, it appears that Aloha was aware for several months that project completion was threatened by its failure to receive data and design reports in timely fashion. Aloha, however, failed to report these difficulties in its quarterly progress reports. By letter dated September 5, 2007, the utility notified Commission staff that it could not be assured it would receive Dr. Levine’s final design report in the near future and that, as a result, the already delayed completion schedule would be further impaired.*⁴ Dr. Levine finally submitted her report in two parts in October and November of 2007, after Commission staff intervened in the matter. Aloha claims that the holdup in receiving the report is attributable to delay by USF.

Analysis of the final design report has identified additional permitting issues as a result of the concentration of brine generated from the anion exchange process. Since the issues were first identified, the parties have met on numerous occasions to discuss and assess options for resolving this matter. Staff continues to closely monitor the utility’s compliance with the Settlement Agreement and will continue to review compliance and other issues relative to the Settlement Agreement in Docket No. 060606-WS.

The Commission has jurisdiction pursuant to Chapters 120 and 367, Florida Statutes.

³ For example, in its July 3, 2007, quarterly report, Aloha stated that its science and engineering teams “explored ways to compress the schedule to minimize the time needed to complete the project.”

⁴ In the July 3, 2007, quarterly report, Aloha estimated that, as a result of the delay in obtaining certainty regarding bulk water service availability, overall completion of the project would be delayed until mid-February 2009. The September 5, 2007, letter indicated the delay would be even longer as a result of not obtaining the report from Dr. Levine.

Discussion of Issues

Issue 1: Should Aloha Utilities, Inc. be ordered to show cause, in writing, within 21 days, why it should not be fined for its apparent violation of Section 367.081(1), F.S., for knowingly failing to comply with Order No. PSC-06-0270-AS-WU, by failing to report delays of the anion exchange treatment facilities in its quarterly report?

Recommendation: Yes. Aloha Utilities, Inc. should be ordered to show cause, in writing, within 21 days why it should not be fined a total of \$5,000 for its apparent violation of Public Service Commission Order No. PSC-06-0270-AS-WU, by failing to report delays in the completion of the anion exchange treatment facilities in its quarterly report.

Staff Analysis: As discussed above, Order No. PSC-06-0270-AS-WU contains a milestone timeline for the utility to implement the anion exchange system and directs the utility to proceed in good faith to complete the project within 24 months. The order also directs Aloha to file quarterly progress reports which detail the work completed during the preceding quarter and to provide a timetable for future activities.

Based on delays in working out bulk water purchases with Pasco County, the project was stalled in the design phase until April 11, 2007, when the County provided Aloha all the needed bulk water information. With this information in hand, Aloha had all information necessary to complete final engineering design.

To complete the design, Aloha had contracted with the University of South Florida (USF or University) for the engineering services of Dr. Audrey Levine (Dr. Levine or Levine). With the utility's knowledge, Levine left employment with USF in December 2006. Dr. Levine has been described in correspondence from Aloha as an "instrumental part of Aloha's team in the design and implementation of anion exchange" with her support being "invaluable in seeing to it that this project is implemented in the most efficient and technically appropriate manner" and her data and other information as "being absolutely essential in order for Aloha to proceed." See letter dated September 5, 2007, from Aloha counsel to Commission staff. It appears that Dr. Levine made promises to the utility that she would provide the design even though she was leaving the University.⁵ It is not clear why the utility did not thereafter contract directly with Dr. Levine or whether it took other steps to formalize the commitment.

It appears that well before the end of June 2007 Aloha was experiencing difficulty obtaining data and/or reports required under the contract in a timely manner. For example, by letter dated June 22, 2007, Aloha counsel wrote to Mr. de Cormarmond at USF concerning Dr. Levine's failure to supply Aloha with the contracted for report "or any of the data that was produced during [the] . . . lengthy and detailed studies" that Dr. Levine had performed. Aloha counsel wrote at that time that representatives of Aloha had spoken to Dr. Levine on several

⁵ The contract between USF and Aloha identifies Dr. Levine as "Project Director." It is clear that her services were viewed as necessary to completion of the project. For example, the contract provides that the required study would be performed by Dr. Levine and that "[i]n the event the University's project director becomes unable or unwilling to continue the project activities . . . , and a mutually agreeable substitute is not available, [the company] . . . shall have the option to cancel this Agreement." Fixed Price Agreement by and Between Aloha Utilities, Inc., and the University of South Florida, "Conduct of Study" and section VI. TERMINATION.

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occasions in the last six months and that “most recently” promises to supply these materials on June 18, 2007, and June 22, 2007, had not been met. The June 22, 2007, correspondence states that the “reports are prerequisite to the scheduling, analysis, planning, design, permitting and construction of . . . [the anion exchange] treatment [system].”

Additional correspondence was sent by Aloha’s counsel directly to Dr. Levine on July 20, 2007. In that correspondence, Aloha asserted that Dr. Levine’s “input, and the data and other information which form the basis for . . . [her] conclusions . . . are absolutely essential in order for Aloha to proceed” It further states that “failure to produce . . . underlying data and conclusions, in a form which Aloha could reasonably expect to utilize in the design, permitting and implementation phases of this project, has impaired Aloha’s ability to meet . . . [it’s] schedule and places Aloha in a position where it may be exposed to . . . penalties or other sanctions and/or a loss of faith on the part of the Commission” and others. In the July 20, 2007, letter, Aloha indicated it had been requesting the data from Dr. Levine for over ten months. Hence, Aloha stated that it had been unable to obtain not only the final design reports (which could not be completed until after bulk water service information was obtained in April 2007) but also the underlying data that formed the basis for the reports. Both the June 22, 2007, and July 20, 2007, letters indicate that Aloha had been attempting unsuccessfully to obtain the underlying data for several months.

The fact that essential project information was not forthcoming for several months was not disclosed in quarterly progress reports required to be filed during the relevant time period, however. For example, the quarterly report filed on July 3, 2007, in which Aloha was required to provide details of the progress of implementation for the period of March 31, 2007, to June 30, 2007, failed to report that Levine’s data and report were overdue. That quarterly report, in fact, stated in several places, without reference to any difficulties, that the “entire project team” or the “science and engineering teams” had participated in assessing the bulk water information obtained and the impact of the information on the status of the project and its completion schedule. It states specifically that the science and engineering teams “began the development of necessary project design and permitting task definitions to accommodate the changes which have occurred . . . due to the changes in the anticipated conditions of supply of bulk water from Pasco County.” (pp 1-2)

By letter dated September 5, 2007, the utility notified staff that it could not be assured it would receive Levine’s final design report in the near future and that, as a result, the completion schedule would be impaired. Dr. Levine finally submitted her report in two parts in October and November of 2007. The late report has further contributed to delay in the design phase. Aloha claims that the holdup in receiving the report is attributable to delay by USF.

Aloha’s failure to report the project delay in its quarterly reports to the Commission appears to be a violation of its obligations under Order No. PSC-06-0270-AS-WU. Under the circumstances, staff believes that more than just a warning is warranted. Moreover, Aloha’s reliance on verbal assurances by Dr. Levine, particularly in light of the continuing delays they observed in her failure to provide requested information, appears to have contributed to additional unnecessary delays.

Section 367.161 (1), Florida Statutes, expressly authorizes the Commission to assess a penalty of not more than \$5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Each day that such refusal or violation continues constitutes a separate offense. Staff notes that the Settlement Agreement expressly authorizes the Commission to seek enforcement action against Aloha in the event the utility violates the Settlement Agreement.

Staff believes that the utility has not provided circumstances or justification which satisfactorily mitigate the utility's apparent violation. Based on the above, staff recommends that Aloha be made to show cause, in writing, within 21 days, why it should not be fined a total of \$5,000 for its apparent violation noted above. Staff recommends that the show cause order incorporate the following conditions:

1. The utility's response to the show cause order should contain specific allegations of fact and law;
2. Should Aloha file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made;
3. A failure to file a timely written response to the show cause order should constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue;
4. In the event that Aloha fails to file a timely response to the show cause order, the fine should be deemed assessed with no further action required by the Commission;
5. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order; and
6. If the utility responds to the show cause order by remitting the fine, this show cause matter should be considered resolved.

Further, the utility should be put on notice that failure to comply with Commission orders, rules, or statutes will again subject the utility to show cause proceedings and fines of up to \$5,000 per day per violation for each day the violation continues as set forth in Section 367.161, Florida Statutes.

A Timeline of Relevant Events in the Anion Exchange Construction Project is attached to this recommendation for reference.

Docket No. 060606-WS

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Issue 2: Should this docket be closed?

Recommendation: No. If Aloha pays the \$5,000 in fines, this show cause matter should be considered resolved. If the utility timely responds in writing to the Order to show cause, the dockets should remain open to allow for the appropriate processing of the response.

This docket should also remain open to monitor the progress of the anion exchange treatment facility.

**Timeline of Relevant Events
 Aloha Anion Exchange (AE) Construction Project**

Settlement Agreement Approved	April 5, 2006
24 month timeframe begins with Pasco County Ordinance requiring Aloha to install forced draft aeration facilities being repealed.	June 27, 2006
Letter from Aloha to Pasco County confirming that Pasco will send information regarding flow rates and pressure at the two interconnection points by August 4, 2006.	July 28, 2006
1st quarterly progress report , Aloha states that project is delayed 90 days because of Pasco County's failure to provide necessary definitive information.	October 2, 2006
Dr. Levine leaves the University of South Florida to work with the US Environmental Protection Agency.	December, 2006
2nd quarterly progress report , Aloha reports that County still has not provided all necessary information but may be able to work around the problem such that a 90 day delay still seemed reasonable.	January 10, 2007
3rd quarterly progress report , Aloha estimated that the overall anion exchange water treatment project has been delayed by at least 180 days due to certain bulk water issues remaining unresolved with the County.	April 4, 2007
Letter from the County providing the necessary information requested by Aloha's letters.	April 11, 2007
4th quarterly progress report , Aloha states that the County provided the necessary data and the project completion date has been revised accordingly to February 18, 2009. The project is now delayed approximately 9 1/2 months	July 3, 2007
Letter from Aloha to staff formally informing all parties that delays have now occurred due to the failure to receive Dr. Levine's report.	September 5, 2007
5th quarterly progress report , Aloha reports that a number of tasks have been delayed due to not receiving Dr. Levine's report. Aloha states that the project delays caused by the failure to receive Dr. Levine's report is totally outside Aloha's control.	October 3, 2007
Dr. Levine's draft report which concentrated on AE waste generation and disposal was received by Aloha.	October 5, 2007
Dr. Gomberg's report was received by Aloha. Dr. Gomberg is Aloha's hydrogeologist who was hired to analyze the potential impacts to groundwater, plants and soils in areas where reuse water is applied which contains the brine waste from the AE treatment plants.	October 14, 2007
Dr. Levine's final report received providing detailed information concerning Dr. Levine's work in total was received by Aloha.	November 15, 2007
6th quarterly progress report , Aloha states that there will be further delays due to the results of Dr. Gomberg's report. The progress report also lists the different AE brine disposal methods being reviewed. Aloha states that a new completion date can not be determined until the brine issue is resolved.	January 7, 2008