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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for a limited proceeding  
increase in water rates in Pasco County  
by Aloha Utilities, Inc.

Docket No. 060122-WU

Filed: July 21, 2008

**ALOHA UTILITIES, INC.'S RESPONSE TO  
CITIZENS' MOTION TO COMPEL**

ALOHA UTILITIES, INC. ("Aloha"), by and through its undersigned  
attorneys, pursuant to Chapter 28-106.204, Florida Administrative Code, hereby  
files this response to the Citizens' Motion to Compel, and would state as follows:

1. Initially, it must be noted clearly and affirmatively that OPC's Motion  
is not a true "motion to compel", because OPC has never actually tendered a  
discovery request for the documents which it now requests the Prehearing Officer  
order Aloha to "provide". Rather, the motion seeks an order from the Prehearing  
Officer which would, *de facto*, require Aloha to create documents which do not  
exist; which OPC has been told repeatedly do not exist; and which OPC has never  
properly requested in any case. For these reasons, and for all of the reasons stated

hereafter, the motion should be denied.

- COM \_\_\_\_\_
- ECR \_\_\_\_\_
- GCL \_\_\_\_\_
- OPC   1
- RCP \_\_\_\_\_
- SSC \_\_\_\_\_
- SGA \_\_\_\_\_
- ADM \_\_\_\_\_
- CLK \_\_\_\_\_

2. What OPC really seeks is not an order compelling Aloha to *produce*  
documents, but rather an order compelling that Aloha *create* documents. This fact

could not be made more clear by contrasting Document Request No. 39 (see paragraph #2 of OPC's Motion) with OPC's e-mail request (see Exhibit "A" to OPC's Motion) to OPC's request for relief in the "WHEREFORE" paragraph of its Motion. Document Request No. 39 asks for an accurate, to scale, up to date, system map, with the exact diameter and length of all water pipes, which depicts all water transmission and distribution pipes which connect each of the wells, water treatment plants, and all of the connections that make up the service territory of Aloha. Thereafter, OPC's attached e-mail requested any document or documents which identify the length and location of all water lines eight inches or greater in diameter currently serving the Seven Springs service territory. Finally, OPC's request for relief in this Motion asks for a map or maps (no more than four) which accurately depict the size and location of all water lines currently serving the Seven Springs service territory. The strawman which OPC has constructed from Document Request No. 39 is quickly forgotten in OPC's ultimate and actual request. Neither OPC, the staff, nor the Prehearing Officer has any idea how long it would take Aloha to create the requested maps; how much it would cost to create the requested maps; nor even the exact use the maps OPC intends for the maps.

3. Be all that as it may, OPC's Motion should fail *for this reason alone*: OPC has never properly tendered a discovery request for the documents which it

now requests the Prehearing Officer order Aloha to "provide" (read: create) "on an expedited basis". The Florida Administrative Procedure Act, the Uniform Rules under which the Commission conducts its litigations, and the Florida Rules of Civil Procedure (which are incorporated by the Uniform Rules for the purposes of accomplishing discovery) are not trivial matters to be ignored at OPC's convenience. While OPC may find following the rules when conducting discovery to be a hinderance or confining, the rules exist so that discovery is conducted and carried out in a uniform way that affords all parties due process. Additionally, an overwhelming truth (which in no way should trivialize the aforementioned concept) shows how ridiculous this entire exercise really is: *Even if OPC had tendered the request which it now asks the Prehearing Officer to reduce to an Order, the documents would not have to be produced under the rules because they do not exist.*

4. This principle could not be more clearly set out than in the case of *In Re: Application For Rate Increase In (Various Counties) By Southern States Utilities*, Docket No. 920199-WS; Order No. PSC-92-0819-PCO-WS (1992). In that case, Commissioner Easley held that:

. . . I cannot agree that the utility should be required to produce information or answer questions based on information which is not presently in existence . . . . Therefore, if an interrogatory or document

requests or solicits a projection or estimate and the projection or estimate has already been prepared by the utility for its own purposes, the utility shall answer the discovery. However, if the discovery solicits a projection or estimate and the projection or estimate does not exist, the utility need not answer the discovery.

5. Just as a party cannot require another party to create a non-existent document, see, e.g., *Allstate Insurance Company vs. Nelson, Wardell, Pinder, et al*, 746 So.2d 1255 (4th DCA 1999), a party cannot be required to require another party, through the vehicle of discovery, to create, calculate, project, or accumulate information not in existence. OPC has every right to ask for base documents (in existence) from which it may create the maps it seeks. These base documents are precisely what Aloha provided to OPC, as described hereinbelow. However, it is obvious that OPC's real agenda is to require Aloha to expend the time, money and effort to help OPC prepare its case. To order Aloha to do so would be improper and to order Aloha to engage in this type of document creation is well beyond the proper scope of discovery.

6. The picture OPC attempts to paint by the tenor and spirit of its Motion, one of ostensible recalcitrance on the part of Aloha to be cooperative in this endeavor, could not be more contrary to what has actually occurred. When Aloha received Document Request No. 39 (along with voluminous other discovery from OPC) it investigated whether such a map existed. Having determined that no

such document existed, Aloha properly responded to that effect. OPC then began to inquire about what maps did exist and Aloha, mindful that it was in litigation with OPC and that it had no obligation whatsoever to voluntarily provide discovery to OPC or to respond to informal inquiries about documents, nevertheless informed OPC what documents did exist and ultimately invited OPC to review the maps on file in Aloha's offices.<sup>1</sup> When counsel for OPC and its expert engineer showed up at Aloha's offices, and were shown the exact same maps and documents which Aloha would have to utilize to create the maps that OPC now seeks, they immediately threw up their hands and determined that endeavor was simply too much work and made no real effort to actually obtain the information.<sup>2</sup> Thereafter, on June 26, OPC tendered (in the form of a e-mail) a completely different request for documents, with entirely different parameters than Document Request No. 39 (while attempting to present the same as a "clarification" to Document Request No. 39 so as to avoid the time frames which would attach to the tendering of any new

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<sup>1</sup> Again, Aloha made clear at all times relevant to this voluntary production that it was not doing so in response to Document Request No. 39, nor any other requirement of the Civil Rules or Uniform Rules or any applicable order in this litigation.

<sup>2</sup> It is important to note at this point that even if the maps which were being voluntarily produced to OPC were being produced pursuant to a proper request for production (*and they were not being so produced*), Aloha had every right to produce the documents "as they are kept in the usual course of business." Rule 1.350(b), Florida Rules of Civil Procedure.

discovery).<sup>3</sup> OPC was informed that the request was improper and, at least as importantly, OPC was also clearly informed that even if the request was not improper (which it clearly was), *the documents did not exist*. What followed was OPC's Motion To "Compel".

7. OPC's superfluous argument about Commission Rule 25-30.125 is a complete red herring. Initially, it is not up to OPC to decide whether Aloha is in compliance with any applicable administrative code rule. Neither the staff nor the Commission is in any position to determine whether or not Aloha is in compliance with any particular rule without independent investigation. In this case, Aloha does maintain on file at its principal office suitable maps, drawings, and/or records of its system and facilities which show the size, location, character, date of installation, and installed cost of major items of plant and extension of facilities. These are the very documents that were presented to OPC, as to which OPC threw up its hands and did not even bother to try to glean the information it ostensibly seeks. OPC cries crocodile tears when it maintains that the maps, drawings, and/or records of Aloha's system and facilities are even inadequate to "enable Utility personnel" to reasonably ascertain the size and location of all lines serving the

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<sup>3</sup> The e-mail itself acknowledges that the new request would require Aloha to provide "alternative documents", which reveals OPC's own belief that the e-mail request is not the same as Document Request No. 39.

service territory. Aloha has worked with these same sets of maps and documents, maintained in this way, throughout its existence, and has experienced no operational problems with that arrangement. It is a notable contrast that the Rule only requires Aloha to maintain

*Suitable maps, drawings, and/or records of its system and facilities . . .*

while OPC (when its Motion is stripped to its essence) apparently maintains that Aloha should have or had

*A map or maps (no more than four . . . ) which accurately depicts the size and location of all water lines currently serving the Seven Springs service territory of Aloha.*

A comparison of what the Rule actually requires to OPC's requested relief demonstrates the apples and oranges nature of OPC's faulty attempt to implicate the Rule and its requirements in this issue.

8. Even if every assertion in OPC's motion is taken as true (which is not the proper standard which the Prehearing Officer should apply for a motion such as this), it is apparent that Aloha does maintain the maps, drawings, and/or records of its system required by rule; that OPC has never formally requested the documents that it now requests the Prehearing Officer order be "produced"; that OPC has been informed repeatedly that even if a proper request were tendered that the documents do not exist; and that this Prehearing Officer should not undertake to order (under


the guise of a discovery order) Aloha to create documents which do not exist and which Aloha has not previously needed for any of its past litigations or its day to day operations.

9. Finally, it is notable that this particular issue, as described in paragraph 6 of OPC's Motion, is unrelated to any way, shape, or form to the single narrow issue raised in OPC's Petition.<sup>4</sup>

WHEREFORE, in consideration of the above, Aloha respectfully requests the Commission deny OPC's Motion to Compel

Respectfully submitted this 21st day of July, 2008.

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<sup>4</sup> The only relief sought in OPC's Petition was that the Commission reduce the revenue requirement and resulting rates after reducing the rate per 1,000 gallons to be charged by Pasco County to \$3.43.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via electronic mail and U.S. Mail\* to the following this 21st day of July, 2008:

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