

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: January 15, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Economic Regulation (Fletcher, Bulecza-Banks)
Office of the General Counsel (Hartman, Cowdery)

Bo *CSB*
W. J. K. S. B. A.M.C. *M* *108*

RE: Docket No. 060122-WU – Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc.

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.

AGENDA: 01/26/09 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Skop (060122-WU)
Argenziano (060606-WS)

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\060122.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. The utility consists of two distinct service areas: Aloha Gardens and Seven Springs.

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In February 2005, the Commission initiated deletion proceedings in Docket No. 050018-WU to delete a portion of the Seven Springs service area based on a number of problems that ultimately stem from the presence of hydrogen sulfide in the water. On March 9, 2006, after several months of extensive negotiations in which Commission staff participated, a Settlement Agreement was executed by Aloha, the Office of Public Counsel (OPC), and individual intervenors. The Settlement Agreement resolved all outstanding dockets and court proceedings between Aloha and the Commission, and was approved by Order No. PSC-06-0270-AS-WU.¹ A key element of the Settlement Agreement is the agreement by 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.

In addition, on October 26, 2004, Aloha entered into a Bulk Water Agreement with Pasco County (County), wherein it contracted to purchase approximately 3.1 million gallons of water per day from the County in order to meet the needs of current and future customers. Significant costs are expected to be associated with the interconnection and purchase of this water, and the installation and operation of related chloramination facilities.

There are currently two dockets open to address the ripe issues associated with the purchase of bulk water from Pasco County and associated interconnection, and to track Aloha's progress to design and install the plant necessary to implement anion exchange: Docket Nos. 060606-WU, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU (the anion exchange docket) and 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc. (the limited proceeding docket).²

On March 14, 2008, the Florida Governmental Utility Authority (FGUA), which is not a party to either Aloha docket, filed a "Suggestion of Abatement."³ In its filing, FGUA suggested "an abatement of the anion exchange project currently being implemented by Aloha Utilities pursuant to Commission Order" while it negotiated to purchase the utility. FGUA's suggestion was corrected by letter dated March 18, 2008, to clarify that the FGUA suggested an abatement period of 120-days.

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 In the limited proceeding docket, the Commission issued proposed agency action (PAA) Order No. PSC-08-0137-PAA-WU, on March 3, 2008. In this PAA order, the Commission voted to allow the utility, after it has completed the construction of a fully operating interconnection with Pasco County, to recover phase one costs associated with the interconnection and with the utility's purchase of bulk water from Pasco County. On March 24, 2008, Aloha, OPC, and certain members of the Better Water Now Committee petitioned for a hearing concerning this PAA order.

³ A "suggestion" is not a pleading contemplated by the Florida Administrative Procedures Act, the Uniform Rules, or any Commission rule or statute.

At the April 8, 2008, Agenda Conference, the Commission considered FGUA's request and agreed to "abate for 120 days, any and all actions directed towards Aloha implementing anion exchange and all actions necessary for Aloha to interconnect with Pasco County, except for the litigation to resolve the protests of Order No. PSC-08-0137-PAA-WU." The Commission also directed that Aloha should not be penalized for the 120-day abatement period for purposes of implementation of the settlement agreement approved by Order No. PSC-06-0270-AS-WU.⁴

In addition, in a separate vote, the Commission voted at the April 8, 2008, Agenda Conference to order Aloha to show cause, in writing, within 21 days, why it should not be fined for its apparent violation of Section 367.081(1), Florida Statutes, 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.⁵ This matter is currently pending and has been set for hearing in April 2009.

On August 19, 2008, FGUA filed "FGUA's Request for Extension of Abatement." In its filing, FGUA requested that the Commission extend the abatement period established by Order No. PSC-08-0267-PCO-WS for an additional 45-days while it continued to negotiate to purchase the utility. On August 29, 2008, FGUA's counsel filed a letter clarifying that its request for an extension of the abatement period does not include a request to abate the show cause matter. On September 2, 2008, FGUA's counsel filed another letter further clarifying that it was requesting that the 45-day abatement run from the date of the Commission order approving the 45-day abatement. The 120-day abatement period the Commission approved by Order No. PSC-08-0267-PCO-WS ended on August 28, 2008.

Following the FGUA's second request for an abatement, the Commission issued Order No. PSC-08-0665-PCO-WS, Order Granting Abatement, on October 8, 2008.⁶ The Order established a 45-day abatement period for all actions associated with implementing anion exchange and all actions necessary for Aloha to interconnect with Pasco County, except for the litigation to resolve the protests of Order No. PSC-08-0137-PAA-WU, and the show cause proceeding initiated by Order No. PSC 08-0266-SC-WS. This second abatement expired November 24, 2008.

On September 23, 2008, Aloha and OPC filed a Joint Request for Abatement. Aloha and OPC asked that the litigation resulting from the protest of Order No. PSC-08-0137-PAA-WU be abated in concurrence with Order No. PSC-08-0665-PCO-WS. The Commission granted the

⁴ Order No. PSC-08-0267-PCO-WS, issued April 30, 2008, in Docket No. 060122-WU, Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc., and 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.

⁵ Order No. PSC-08-0266-SC-WS, issued April 30, 2008, in Docket No. 060606-WS, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

⁶ Order No. PSC-08-0665-PCO-WS, issued in Docket No. 060122-WU, Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc., and in 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.

request pursuant to Order No. PSC-08-0694-PCO-WU, issued October 20, 2008, in Docket No. 060122-WU.

On November 6, 2008, Aloha and OPC filed a second Joint Request for Abatement. The parties requested an extension of the abatement of all activities in the two dockets, including the abatement of the show cause litigation, until January 9, 2009. On November 13, 2008, staff received an email from a member of the customer group Better Water Now, confirming the group's support of the request. By Order PSC-08-0832-PCO-WS, issued December 23, 2008, the Commission approved the second Joint Request for Abatement. The abatement expired January 9, 2009.

On January 9, 2009, Aloha filed a Request for Abatement, requesting that all activities in the two dockets be abated until January 30, 2009, and that Aloha be directed to report to the Commission and its staff, no later than January 30, 2009, the posture and status of its sale to FGUA.

On January 13, 2009, OPC filed a response to the utility's Request for Abatement. OPC also seeks an extension of the abatement of all activities in the two dockets, but asks that the abatement term extend until March 2, 2009. OPC represents that the customer petitioners concur with OPC's response and agree that the additional abatement should run until March 2, 2009.

This recommendation addresses Aloha's Request for Abatement filed January 9, 2009, and OPC's response filed January 13, 2009. The recommendation addresses the abatement of the show cause matter as a separate issue in Issue 2 since Commission staff have separated into two distinct groups for this matter: advisory staff and hearing staff.⁷

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

⁷ See Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla.1995).

Discussion of Issues

Issue 1: Should the Commission grant Aloha's Request to Abate the implementation of anion exchange pursuant to Order No. PSC-06-0270-AS-WU in Docket 060606-WS and all actions necessary for Aloha to interconnect with Pasco County, including the litigation to resolve the protest of Order No. PSC-08-0137-PAA-WU, in Docket 060122-WU, until January 30, 2009?

Recommendation: Aloha's Request for Abatement should be granted in part and denied in part. The request to abate should be granted, but the abatement's length should extend beyond the requested term. The Commission should abate the implementation of anion exchange pursuant to Order No. PSC-06-0270-AS-WU in Docket 060606-WS and all actions necessary for Aloha to interconnect with Pasco County, including the litigation to resolve the protest of Order No. PSC-08-0137-PAA-WU, in Docket 060122-WU, until March 2, 2009. In addition, hearing staff recommends that Aloha should be directed to file a report with the Commission upon the closing of the sale of the utility or March 2, 2009, whichever comes first. The report should address the status of the acquisition of the utility by FGUA. (Hartman, Willis)

Staff Analysis: In support of its request, Aloha states that Aloha and FGUA have extended the time in which the acquisition of Aloha could close until and including February 27, 2009. Aloha also advises that by the terms of said extension, FGUA shall advise Aloha by January 27, 2009, whether or not it will close on or before the closing date. Aloha requests that the Abatement run until January 30, 2009.⁸ The utility further states that, "it is in the best interest of Aloha, OPC, the public, the Commission, and its staff that all activities in these two dockets be abated as requested herein."⁹ Aloha requests that it be directed to report to the Commission and its staff, no later than January 30, 2009, the posture and status of its sale.

In OPC's response of January 13, 2009, it requests that the Commission extend the abatement beyond the term requested by Aloha. OPC states that the Commission should extend the abatement until March 2, 2009. OPC states, "In light of the extended closing date of February 27, 2009, the Citizens believe that March 2, 2009 would be a more appropriate date to

⁸ OPC points out that although Aloha states that the purpose of its motion is to request an extension of the abatement until January 30, 2009, Aloha does not restate this request in its expressed prayer for relief at the end of its motion. Instead, Aloha requests an abatement for an unspecified time, and only requests that it be directed to report to the Commission and its staff no later than January 30, 2009. Irrespective of this, hearing staff has interpreted the pleading as a request to abate only until January 30, 2009.

⁹ Staff notes that in its Request for Abatement, Aloha indicates that it will demand a refund from Pasco County of funds paid to Pasco County pursuant to the Bulk Water Agreement to reserve 3.1 mgd of bulk treated water as needed to serve Aloha's present and future customers, if financing for its sale has not been secured and a final closing date on the transaction has not been set by January 27, 2009: "If financing for the sale has not been secured and a final closing date on the transaction with the FGUA has not been set by January 27, 2009, Aloha will be compelled, by sound business practices and its particular capital requirements, to demand a refund from Pasco County of \$4,924, 571.10 unless the Commission approves, and Aloha is able to assess, a rate prior to April 1, 2009, which allows recovery of a reasonable return on and amortization of the full amount invested by Aloha in those Pasco County reservation fees plus all accrued AFUDC up through April 1, 2009." Request for Abatement, p. 3-4. Staff also notes that Aloha has not requested relief or action from the Commission regarding this matter in the Request for Abatement. Accordingly, hearing staff's recommendation does not address the prudence or reasonableness of this potential action.

end the additional abatement....” The customer group also supports an abatement extending until March 2, 2009.

Hearing staff believes that an abatement of all actions associated with anion exchange implementation and all actions necessary for Aloha to interconnect with Pasco County, including the limited proceeding litigation, is reasonable, as Aloha and FGUA have entered into a contract for the sale of the utility, and by the contract’s extended terms, the sale is anticipated to close by February 27, 2009. The abatement of these proceedings may prevent an unnecessary expenditure of time and resources. Accordingly, hearing staff recommends that the Commission abate all activities related to anion exchange implementation and all actions necessary for Aloha to interconnect with Pasco County, including the limited proceeding litigation, until March 2, 2009. As this matter will be heard at the January 26, 2009, Agenda Conference, it seems administratively inefficient to abate for a term of only four days, especially in light of the parties’ past repeated requests for extensions of abatement. The abatement period should not count against Aloha for purposes of the implementation of the Settlement Agreement approved by Order No. PSC-06-0270-AS-WU. In addition, hearing staff recommends that Aloha should be directed to file a report with the Commission upon the closing of the sale of the utility or March 2, 2009, whichever comes first. The report should address the status of the acquisition of the utility by FGUA.

Date: January 15, 2009

Issue 2: Should the Commission grant Aloha Utilities, Inc.'s Request for Abatement of the show cause proceeding?

Recommendation: Aloha's Request for Abatement should be granted in part and denied in part. Advisory staff recommends that Aloha's request for abatement of the show cause proceeding be granted, but not until January 30, 2009, as requested by Aloha. Instead, advisory staff recommends that the show cause proceeding be abated until March 2, 2009, as requested by the Office of Public Counsel. Advisory staff recommends that Aloha should be directed to file a report with the Commission upon the closing of the sale of the utility or March 2, 2009, whichever comes first. The report should address the status of the acquisition of the utility by FGUA. (Cowdery)

Staff Analysis: The show cause proceeding in Docket No. 060606-WS was initiated by Order No. PSC-08-0266-SC-WS. As discussed in the Case Background, on November 6, 2008, Aloha and OPC filed a Joint Request for Abatement of all activities in Docket Nos. 060122-WU and 060606-WS, including the show cause proceeding. The Commission granted this joint request by Order No. PSC-08-0832-PCO-WS, and all activities in the show cause proceeding were abated until January 9, 2009.

On January 9, 2009, Aloha filed a Request for Abatement of all activities in Docket Nos. 060122-WU and 060606-WS, including the show cause proceeding, until January 30, 2009. Further, Aloha requests that it be directed to report to the Commission, no later than January 30, 2009, the posture and status of the acquisition of Aloha by FGUA. In support of its request, Aloha states that on or about December 12, 2008, Aloha and FGUA extended the time in which the acquisition of Aloha could close until February 27, 2009. FGUA is required to advise Aloha by January 27, 2009, whether the closing will occur by February 27, 2009. Aloha states that it is in the interest of Aloha, OPC, the public, and the Commission and its staff that all activities in Docket 060606-WS be abated as requested.

On January 13, 2009, OPC filed a Response to Request for Abatement. In its response, OPC states that, in light of the February 27, 2009, closing date, OPC believes that March 2, 2009, would be a more appropriate date to end the additional abatement. OPC further states that the customer petitioners in Docket No. 060122-WU concur with OPC's response and agree to the additional abatement until March 2, 2009.

Advisory staff recommends that Aloha's Request for Abatement of the show cause proceeding should be granted in part and denied in part. Advisory staff believes that because the closing date for the acquisition of Aloha by FGUA has been extended from December 17, 2008, to February 27, 2009, and because FGUA is required to notify Aloha by January 27, 2009, as to whether the closing will occur by February 27, 2009, an abatement of this proceeding may prevent an unnecessary expenditure of time and resources. Advisory staff agrees with OPC that, under these circumstances, the show cause proceeding should be abated until March 2, 2009. In addition, advisory staff recommends that Aloha should be directed to file a report with the Commission upon the closing of the sale of the utility or March 2, 2009, whichever comes first. The report should address the status of the acquisition of the utility by FGUA.

Docket Nos. 060122-WU, 060606-WS
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Advisory staff notes that the show cause proceeding in Docket No. 060606-WS is currently set for hearing on April 28 and 29, 2009, and prosecutorial staff's and intervenor's direct testimony is due on February 2, 2009. Advisory staff believes that any abatement of this proceeding will necessitate the rescheduling of the hearing dates and other controlling dates. Advisory staff will work with the Prehearing Officer and the Chairman's Office to reschedule the hearing dates and other controlling dates in the show cause proceeding in Docket No. 060606-WS.

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Issue 3: Should this docket be closed?

Recommendation: No, these dockets should remain open pending the resolution of the issues associated with Aloha's interconnection with Pasco County and the implementation of anion exchange. (Hartman)

Staff Analysis: These dockets should remain open pending the resolution of the issues associated with Aloha's interconnection with Pasco County and the implementation of anion exchange.