

State of Florida



Public Service Commission

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

DATE: June 17, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Gervasi, Jaeger)
Division of Economic Regulation (Walden, Daniel, Kummer, Willis)
Office of Standards Control & Reporting (Lowery)

RE: Docket No. 020896-WS – Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

Docket No. 010503-WU – Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.
County: Pasco

AGENDA: 06/29/04 - Regular Agenda - Proposed Agency Action on Issue 4 - Oral Argument Requested on Issue 3 - Interested Persons May Participate on Issues 4 – 7

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\ECR\WP\020896.RCM.DOC

Case Background

Aloha Utilities, Inc. (Aloha or utility) is a water and wastewater utility providing service to approximately 14,000 customers in Pasco County, including approximately 11,000 customers in the Seven Springs area. The Seven Springs area, which includes Riverside Villas, has a continuing problem with odor and black water caused by the presence of hydrogen sulfide.

This recommendation involves both (a) the implementation of potential solutions to the odor and black water problem in light of an independent audit financed by the Office of Public Counsel, and (b) the handling of two petitions for deletion of territory and other relief (the “deletion petitions”) filed by customers in Seven Springs. The parties to the deletion docket,

Docket No. 020896-WS, include Aloha, the Office of Public Counsel (OPC), and Aloha customers Dr. Kurien, Mr. Wood, Mr. Hawcroft, and Dr. Gaul.¹

Black Water Problem and the Rate Case Order

The Commission addressed Aloha's black water problem in Order No. PSC-02-0593-FOF-WU (the "rate case order") issued on April 30, 2002 in Docket No. 010503-WU, Aloha's most recent rate case docket. The rate case order contained an extensive discussion of the black water issue and ordered Aloha to take specific steps to address the problem²:

- Hydrogen sulfide naturally occurs in much of the source water for Florida's utilities. The black water problem is not unique to the customers of Aloha and does occur in other areas of Florida.
- Hydrogen sulfide in Aloha's source water is converted to sulfates by chlorination.
- Copper sulfide (black water) occurs when elemental sulfur or sulfate in the water is converted biochemically in the customer's home from harmless sulfate and elemental sulfur back into hydrogen sulfide.
- Aloha's water contains very small quantities of sulfate as it is delivered to the customer – at most one-tenth of the national limit.
- Aloha meets the drinking water standards set forth by the Department of Environmental Protection (DEP) for water quality, and the black water is created beyond the meter. Therefore the quality of Aloha's product is satisfactory.
- The method that Aloha has chosen to comply with DEP's water quality rules – the conversion of sulfides to sulfates through chlorination – has not proven to be an adequate remedy. Aloha should take a more proactive approach to dealing with the black water problem.
- For those customers experiencing black water, the only absolute fix appears to be to replace existing copper pipe with chlorinated polyvinyl chloride (CPVC) piping.
- Another possible solution to address the black water problem is the removal of almost all hydrogen sulfide.
- Aloha is required by December 31, 2003 to implement a treatment process for all its wells that is designed to remove at least 98% of the hydrogen sulfide in the

¹ Dr. Kurien caused the first deletion petition to be filed. The Commission granted intervention to the other parties by Order Nos. PSC-02-1274-PCO-WS (Office of Public Counsel), PSC-02-1504-PSC-WS (Mr. Wood), PSC-04-0308-PCO-WS (Mr. Hawcroft) and PSC-04-0309-PSC-WS (Dr. Gaul).

² **Attachment A** contains the full text of Section III and Section IV.A.1 of the rate case order, which deal with the black water issue.

raw water. The improvements must start with Wells No. 8 and 9, which have the highest hydrogen sulfide concentration in the raw water.

- Aloha is required to submit an action plan by July 30, 2002 showing how it intends to comply with this requirement (the “action plan”).

Aloha appealed the rate case order and, on August 5, 2002, the Commission granted a partial stay pending appeal.³ The requirement to complete the improvements for removal of 98% of the hydrogen sulfide within 20 months was stayed. The First District Court of Appeal affirmed the rate case order. The Court subsequently denied Aloha’s request for reconsideration on June 12, 2003. The new date to implement the 98%-reduction solution thus became February 12, 2005.⁴ The Court’s mandate issued on June 30, 2003.

The Deletion Petitions

On July 18, 2002 – after the rate case order was appealed, before the partial stay was granted, and almost a year before the Court’s mandate issued – Dr. Kurien filed a petition signed by 1,491 residents from 1,314 households located in Seven Springs. That petition asked that:

- The required action plan be approved (i) only after an independent audit of Aloha’s processing plant and methodology, (ii) only if the action plan contains the minimum requirements imposed by neighboring utilities for raw water processing, and (iii) only if a Citizens’ Advisory Committee is created to monitor the effectiveness of the plan.
- The implementation date for treatment improvements be accelerated from December 31, 2003 to April 30, 2003.
- If significant resolution of the problems does not occur by June 30, 2003, the Commission “sequester the Seven Springs Area from Aloha Utilities and make it part of the service area of Pasco County water utility system.”

The Commission held action on this petition (the “first deletion petition”) in abeyance from December 9, 2002 to March 8, 2004.⁵ On December 11, 2003, while the docket was in abeyance, a separate petition was filed by 218 customers in the Riverside Villas portion of Seven Springs (the “second deletion petition”). The second deletion petition asked the Commission to alleviate the water quality problem by “allowing us another choice of a water provider.”

³ Order No. PSC-02-1056-PCO-WU.

⁴ On July 29, 2003, Aloha requested a 100-day extension to the new February 12, 2005 deadline. The Commission denied that request as premature by Order No. PSC-03-1157-PCO-WU, issued October 20, 2003.

⁵ Order No. PSC-02-1722-PCO-WS (issued December 9, 2002) held the case in abeyance pending conclusion of the appeal. Order No. PSC-03-0325-FOF-WS (issued March 6, 2003) denied requests by Dr. Kurien and Mr. Wood for reconsideration of the abeyance order. Order No. PSC-04-0254-PCO-WS (issued March 8, 2004) removed the docket from abeyance.

June 17, 2004

Aloha filed timely motions to dismiss both deletion petitions. OPC and Dr. Kurien filed timely responses to the motion to dismiss the first petition. Dr. Kurien later filed a supplemental response to the motion to dismiss that Aloha has moved to strike. The motions to dismiss and motion to strike are still pending.

On June 9, 2004, Aloha filed a motion to modify the requirements of the rate case order in the rate case docket, requesting that the requirement to remove 98% of hydrogen sulfide from the raw water should be replaced with a requirement that Aloha make improvements to meet a goal of 0.1 mg/L (milligrams per liter) of sulfides in its finished water as that water leaves the treatment facilities of the utility, and that this standard be implemented no later than February 12, 2005.

The Independent Audit

While the deletion docket was in abeyance, the Office of Public Counsel volunteered to conduct and finance the independent audit of Aloha's processing plant and methodology that had been requested by the first deletion petition. This audit was conducted by Dr. Audrey Levine of the University of South Florida. Dr. Levine's findings and conclusions are contained in a two-phased audit report. Phase I of the report was issued in August 2003 and Phase II was issued in February 2004. Phase II of the report identifies several potential treatment options, each of which may be effective in resolving the odor problem and the formation of copper sulfide in homes that do not already exhibit a black water problem. The report indicates that there is no guarantee that the use of either packed tower aeration or alternative disinfection can completely alleviate the black water problem.

The Customer Service Hearings

In its March 8, 2004 order removing the deletion docket from abeyance, the Commission scheduled customer service hearings to obtain the customers' views on Dr. Levine's audit report and the implications of its findings. Two customer service hearings were held in New Port Richey on April 8, 2004. Approximately 200 customers attended each session, and numerous customers testified at both sessions. The customers generally did not address the specifics of the audit report and the proposed treatment options. Instead, virtually all of the customers stated that they wished to be deleted from Aloha's service area in order to obtain service from Pasco County. Subsequent to the service hearings, approximately 365 customers have submitted comments stating that they wish to be deleted from Aloha's service territory and allowed to obtain service from Pasco County, including 88 customers who reside in Riverside Village Estates, Unit 4.

Staff's Investigation

The order removing the deletion docket from abeyance directed the staff to fully analyze the findings of the audit report and the information gathered at the customer service hearing and to thereafter file a recommendation concerning the disposition of the deletion petitions and the pending motions to dismiss those petitions. Pursuant to this direction, staff has reviewed the audit report in detail, obtained additional information through data requests to Aloha, met with representatives of Pasco County, met with representatives of the SWFWMD, met with

representatives of DEP, and participated in two meetings with the parties. The following is a summary of the key results of that investigation.

A. Potential Treatment Technologies

Dr. Levine's report identified several potential options to modify the existing treatment system:

1. Packed tower aeration. Removal of hydrogen sulfide can be accomplished using packed tower aeration. Packed tower aeration is a physical/chemical treatment system in which a chemical is added to the water to reduce the pH (carbon dioxide or a mineral acid) and the hydrogen sulfide is transferred from the water to air. This process needs to be coupled with a gas scrubber to control the release of odorous compounds into the air. In addition, due to the potential for the packing material to become clogged from biological growth, there is a need for frequent maintenance and/or filtration.

2. Alternative oxidants. Alternative oxidants can be used to improve the consistency of hydrogen sulfide conversion reactions. The most likely candidate oxidants are hydrogen peroxide (H₂O₂) or ozone. The presence of iron in the source water can serve as a catalyst for this process. Supplemental control of pH may be necessary to ensure that the hydrogen sulfide is converted to sulfate. Another advantage of using alternative oxidants is that the chlorine demand of the water will be reduced allowing for more effective use of chloramination. In addition, the supplemental oxygen in the treated water will improve the taste of the water and help reduce the growth of anaerobic microorganisms in the distribution system.

3. Membrane technologies. Membrane technologies can be coupled with chemical oxidation to remove particulate forms of sulfur and improve water quality. The use of membrane processes requires a reliable energy source and a means for treatment/disposal of the rejected water.

It should be noted that while H₂O₂ has been used for the treatment of drinking water, it has not been used for the purpose of reducing hydrogen sulfides in drinking water. The science suggests that it will be effective for that purpose; but the science has not been proven in a full-scale utility application.

B. Utility Analysis of Treatment Alternatives

Aloha's estimated capital and O&M costs for the various treatment options identified in Dr. Levine's report are listed below, along with an estimate of the associated rate impact. All of the costs are conceptual in nature and are subject to change as design and permitting occurs.

Treatment Option	Conceptual Capital Cost	Conceptual O&M Cost	Estimated Rate Impact
Packed Tower Aeration	\$14,500,000	\$3,100,000	261.95%
H2O2 Oxidation – Rental	\$3,500,000	\$390,000	43.85%
H2O2 Oxidation – Purchase	\$4,000,000	\$340,000	44.40%
Ozone Oxidation	\$6,900,000	\$520,000	72.99%
H2O2 Oxidation/Membrane – Rental	\$11,800,000	\$580,000	108.09%
H2O2 Oxidation/Membrane – Purchase	\$12,300,000	\$530,000	108.64%

NOTE: The reason for the small difference in the cost between leasing or purchasing equipment is due to the small amount of equipment that could be leased. The leased equipment would be two chemical feed pumps and two storage tanks at each treatment plant site. The company would have to perform its own site work (including slabs and containment structures for tanks), and install its own on-site piping, instrumentation, switches and controls, and electrical modifications at each treatment plant.

Attachment B is Aloha's response to a staff data request, in which Aloha describes the advantages and disadvantages and associated costs of each of the treatment methods identified by Dr. Levine.

C. Other Factors

Aloha is currently withdrawing more raw water than is allowed under its consumptive use permits from the Southwest Florida Water Management District. In an effort to settle this matter, Aloha is in negotiations with Pasco County for a contract to purchase up to 1.5 million gallons per day (MGD) of treated water from the County.

Pasco County obtains water from its own wells and treatment facilities, as well as from purchases from the Tampa Bay Water Authority (Authority). Effective January 1, 2005, the Authority will change its disinfection treatment from the addition of chlorine to the addition of chloramines. Because these two disinfection processes are incompatible, Pasco County will also begin using chloramines effective January 1, 2005. In order to be in a position to purchase treated water from the County, Aloha must likewise change from chlorine to chloramines.

The forthcoming change to chloramines has two consequences:

- Given limited space at Aloha's well sites for additional treatment facilities, if H2O2 oxidation is chosen to address the removal of hydrogen sulfide, it is more efficient and cost-effective to design and construct the facilities for use of

chloramines and H₂O₂ at the same time. In order to meet a January 1, 2005 in-service date, design and engineering needs to start immediately.

- Without the simultaneous installation of a treatment process, the problem of black water creation may worsen.

Organization of Recommendation

This recommendation organizes the issues as follows:

- Issue 1: Should the Commission grant Aloha's Request for Oral Argument on its Motion to Dismiss (Issue 3)?
- Issue 2: Should the Commission grant Aloha's Motion to Strike the supplemental response filed by Dr. Kurien to Aloha's motion to dismiss?
- Issue 3: What action should the Commission take on Aloha's Motion to Dismiss the First Deletion Petition and its Supplemental Motion to Dismiss the Second Deletion Petition?
- Issue 4: Should the Commission grant Aloha's motion to modify the rate case order, to change the 98% standard for removal of hydrogen sulfide contained therein to agree with the Tampa Bay Water Standard of 0.1 mg/L?
- Issue 5: What additional steps should Aloha take to address the black water problem occurring in customers' homes?
- Issue 6: What further action should the Commission take at this time on the deletion petitions?
- Issue 7: Should the dockets be closed?

The Commission has jurisdiction pursuant to Sections 367.011, 367.045, 367.111, 367.121, and 367.161, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Aloha's Request for Oral Argument on its Motion to Dismiss (Issue 3)?

Recommendation: Yes. Because oral argument may aid the Commission in comprehending and evaluating Issue 3, staff recommends that oral argument be granted. Staff notes that interested persons are permitted to participate on Issues 4-7 in any event. Combined presentations on all issues should be limited to fifteen minutes per side. (Gervasi)

Staff Analysis: Aloha timely filed its Request for Oral Argument on September 5, 2002, concurrent with its Motion to Dismiss the first deletion Petition. Aloha states that oral argument will assist the Commission and the parties in understanding Aloha's arguments regarding the Commission's jurisdiction and the petitioners' standing in the deletion docket, and the interrelationship of the deletion docket with other pending matters, including the appeal of the rate case order and Aloha's Motion to Stay pending action by the First District Court of Appeal.

Aloha's Request for Oral Argument complies with Rule 25-22.058(1), Florida Administrative Code, which states that "[a] request for oral argument must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof."

Aloha's reason for oral argument concerning the interrelationship of the deletion docket with other pending matters is outdated given that the rate case order is no longer pending on appeal. Nevertheless, the issues surrounding the deletion petition are complex and staff believes that they merit oral argument. Because oral argument may aid the Commission in comprehending and evaluating the motions to dismiss, and because parties are permitted to participate on Issues 4-7 in any event, staff recommends that oral argument be granted. Combined presentations on all issues should be limited to fifteen minutes per side.

Staff notes that oral argument was not requested on Aloha's Supplemental Motion to Dismiss the second deletion petition. Because the issues raised in the Supplemental Motion to Dismiss also concern the Commission's jurisdiction and the petitioners' standing, oral argument would likely be relevant to the Supplemental Motion to Dismiss, as well.

Issue 2: Should the Commission grant Aloha's Motion to Strike the supplemental response filed by Dr. Kurien to Aloha's motion to dismiss?

Recommendation: Yes. The Commission should grant Aloha's Motion to Strike. (Gervasi)

Staff Analysis: On September 5, 2002, Aloha filed a timely motion to dismiss the first deletion petition. On September 17, 2002, OPC and Dr. Kurien filed timely responses to that motion. Subsequently, on November 4, 2002, Dr. Kurien filed a supplemental response to the motion to dismiss.

Aloha moved to strike Dr. Kurien's supplemental response on two grounds: first, Rule 28-106.204(1), Florida Administrative Code, requires any response to a motion to be filed within seven days of the service of the motion; second, there is no provision in that rule for the filing of supplemental or second responses.⁶

Staff agrees with Aloha that Dr. Kurien's supplemental response is untimely and is not permitted under the applicable rules. Staff therefore recommends that the Commission grant Aloha's motion to strike.

⁶ Aloha further requested that the Commission admonish Dr. Kurien that he represents only himself and that he should refrain from alleging otherwise or engaging in the unauthorized practice of law. By letter dated November 14, 2002, the Commission's then General Counsel advised Dr. Kurien of Rule 28-106.10, Florida Administrative Code (the "qualified representative" rule) and that he is in no way barred from continuing to actively represent himself in the docket. Since that time, Dr. Kurien has clarified that he represents only himself in this proceeding.

Issue 3: What action should the Commission take on Aloha's Motion to Dismiss the First Deletion Petition and its Supplemental Motion to Dismiss the Second Deletion Petition?

Recommendation: The Commission should dismiss for lack of jurisdiction the portion of the First Deletion Petition that requests that the Seven Springs territory be made part of the service area of the Pasco County water utility system. The Commission should deny the motions to dismiss the remaining portions of the two deletion petitions. (Gervasi)

Staff Analysis:

As stated in the Case Background, Aloha timely filed a motion to dismiss the first deletion petition and a supplemental motion to dismiss the second deletion petition. OPC and Dr. Kurien timely filed responses to the motion to dismiss. No party filed a response to the supplemental motion to dismiss.

Staff's analysis first identifies the three items of relief requested by the deletion petitions. Next, it discusses the appropriate standard of review for the motions to dismiss. Staff then addresses the motions to dismiss in the context of each of the three items of relief. These recommendations take into account the current posture of the case, which has changed significantly since the petitions and motions to dismiss were filed.

A. The Deletion Petitions

The two deletion petitions allege generally that the potable water provided by Aloha continues to experience problems with black water and rotten egg odor and that Aloha has failed to take adequate steps to address these problems in a timely manner.

The two deletion petitions ask for three items of relief:

- (1) Timing of and Conditions for Implementation of Treatment Improvements. (First Petition) The Commission should approve the action plan that the rate case order originally required Aloha to submit by July 30, 2002 and to implement by December 31, 2003:
 - only after an independent audit of Aloha's processing plant and methodology,
 - only if the action plan contains the minimum requirements imposed by neighboring utilities for raw water processing, and
 - only if a Citizens' Advisory Committee is created to monitor the effectiveness of the plan.
 - Further, the first petition asks that the implementation date for the improvements be accelerated from December 31, 2003 to April 30, 2003.⁷

⁷ The original December 31, 2003 implementation date has become February 12, 2005 as a result of the stay granted by the Commission pending the appeal of the rate case order.

- (2) Deletion of Territory. (Both Petitions) If significant resolution of the problems does not occur in a timely manner – originally identified in the first petition as June 30, 2003 – the Commission should amend Aloha’s certificate to delete the entire Seven Springs territory (first petition) and the Riverside Villas area (second petition).
- (3) Transfer of Territory to Pasco County Water System. (First Petition) Upon deletion from Aloha’s service territory, the Commission should make the Seven Springs area part of the service area of the Pasco County water utility system.

B. Standard of Review

The purpose of a motion to dismiss is to raise a question of law regarding the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioners. Id. Moreover, a petition must be dismissed for lack of jurisdiction if the tribunal does not have jurisdiction over the subject matter of the petition. Lee County Elec. Coop., Inc. v. Jacobs, 820 So. 2d 297, 299 (Fla. 2002).

C. Recommended Ruling on Motions to Dismiss

Because the deletion petitions were submitted by customers of the utility in the form of citizen petitions, staff recommends that the Commission should interpret those petitions liberally in ruling on the motions to dismiss. Both petitions fundamentally allege that Aloha is not providing its customers with water of the quality which they are entitled from a monopoly provider of service and request that the Commission take specific actions to remedy that situation. Each of these requests will be discussed in turn.

1. Timing of and Conditions for Implementation of Treatment Improvements

Aloha’s Position. Aloha argues that the portion of the first petition asking for the imposition of conditions on approval of an action plan and for a change in the date for implementation of an improved treatment process amounts to an untimely motion for reconsideration of the rate case order.

OPC’s Response. OPC responds that the customers’ requests for relief are distinct from any issue resolved in the rate case docket. OPC points out that the rate case order is a valid pronouncement requiring the establishment of a Citizens Advisory Committee and that the petition simply seeks an acceleration of the requirement for Aloha to implement an improved treatment process.

Dr. Kurien’s Response. Dr. Kurien’s response does not specifically address the motion to dismiss this portion of the petition.

Analysis and Recommendation. Staff recommends that the Commission reject Aloha's contention that the petitions should be dismissed as amounting to an untimely request for reconsideration of the rate case order. Chapter 367 clearly gives the Commission subject matter jurisdiction over Aloha's quality of service. This includes the authority under Section 367.121(1)(a) to prescribe standards of quality and measurements, and under Section 367.121(1)(d) to require facility improvements necessary to provide the prescribed quality of service:

367.121 Powers of commission.—

(1) In the exercise of its jurisdiction, the commission shall have power:

(a) To prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements ... to be observed by each utility, except to the extent such authority is expressly given to another state agency. ...

(d) To require repairs, improvements, additions, and extensions to any facility, or to require the construction of a new facility, if reasonably necessary to provide adequate and proper service to any person entitled to service or if reasonably necessary to provide any prescribed quality of service... .

Moreover, by affirming the rate case order that directed creation of a Citizens' Advisory Committee, the court upheld the Commission's jurisdiction to give such a body a role in evaluating and monitoring water treatment and water quality.

Aloha's argument that the first petition amounts to an untimely motion for reconsideration of the rate case order raises matters outside the four corners of the petition, and therefore is not a proper basis for dismissal. For that reason, staff recommends that the Commission deny the Motion to Dismiss the portion of the first deletion petition that requests establishment of a timetable and conditions for implementation of improvements to the water treatment process.

Staff believes that a Commission decision not to dismiss based on this ground should not preclude Aloha from raising this argument as an issue in the deletion docket. Staff notes, however, that the posture of the case has changed significantly since the first deletion petition was filed:

- The rate case order was affirmed on appeal and the Court's mandate issued on June 30, 2003. The Court's ruling upheld the requirement for Aloha to implement treatment improvements, but the timing of that ruling made it impossible for the Commission to accelerate the implementation date to April 30, 2003, as requested by the petition.

- The deadline for implementation of improvements has been delayed from December 31, 2003 to February 12, 2005, as the result of the stay that was granted pending appeal.
- The independent audit requested by the petition has been conducted by Dr. Audrey Levine in conjunction with OPC without the necessity for a Commission order.
- A Citizens Advisory Committee has been formed pursuant to the rate case order.
- Aloha is seeking relief from the 98% hydrogen sulfide removal standard required by the rate case order, and the parties appear to agree that it would be too costly to attempt to achieve this standard.

In light of these developments, the petition's request for an independent audit is now moot and the request for an April 30, 2003 implementation date is impossible to grant. Moreover, Aloha's argument that the request for modifications to the water treatment requirements and timetable should be treated as an untimely motion for reconsideration of the rate case order is less persuasive, since Aloha itself is now seeking a change in those requirements.

If the motion to dismiss is denied, Staff's recommendation on what action the Commission should take at this time regarding modification of the treatment requirements and timetables in the rate case order is discussed in Issue 4, below.

2. Deletion of Territory

Aloha's Position. Aloha argues that the Commission does not have the jurisdiction to sequester the Seven Springs area from Aloha and make it a part of the County's water service area. The Legislature has never conferred upon the Commission a general authority to regulate public utilities. The Commission has "only those powers granted by statute expressly or by necessary implication." Deltona Corp. v. Mayo, 342 So. 2d 510 (Fla. 1977). Any reasonable doubt as to the lawful existence of a particular power must be resolved against the exercise thereof. Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493 (Fla. 1973).

Aloha argues that it is statutorily required to provide service to the area described in its certificate of authorization within a reasonable time. Section 367.111(1), Florida Statutes, provides that:

[i]f the Commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization.

According to Aloha, this is a far cry from deleting territory of a utility consistently found to be in compliance with all environmental standards promulgated by the Florida Department of

Environmental Protection (DEP), on the basis of a failure to implement a water treatment standard imposed by the PSC, and transferring such territory to the County, a nonjurisdictional service provider. Aloha argues that the Commission lacks such jurisdiction.

Finally, Aloha argues that the customers do not have standing to seek to delete a portion of Aloha's service area to be made part of the County's service area. The Florida Supreme Court has held that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968).

OPC's Response. OPC argues that Aloha's reliance on Storey v. Mayo to oppose the customers' deletion request is misplaced. In Storey, a group of customers challenged the Commission's approval of a territorial agreement between Florida Power Corp. and the City of Homestead. The Court found that the Commission had the authority to approve the agreement, and that by so doing, the Commission, in effect, informed the electric company that it would not have to serve the particular area because under the circumstances, it would not be reasonable to require it to do so. 217 So. 2d at 307-308. On the other hand, in the instant case, the customers are asking the Commission to exercise its authority over a service territory in a particular fashion. Contrary to Aloha's misinterpretation, the Storey ruling actually supports the Commission's authority to grant the Petition, should the Commission deem it proper.

Dr. Kurien's Response. Dr. Kurien points out that the petitioners have not rushed to seek deletion of Aloha's territory. Rather, they have recognized Aloha's responsibility in this matter and have demonstrated "the patience of Job" in their search for solutions. The customers have recognized in the petition the need to give Aloha time to remedy the problems through an independent scientific audit of the adequacy of its processing methods and physical plant. However, Aloha's continued denial of its responsibility to deal with the "black water" and associated problems leaves the customers with no choice but to seek solutions.

Dr. Kurien argues that Chapter 367, Florida Statutes, gives the Commission exclusive jurisdiction over each utility with respect to its authority, service and rates. That includes granting a certificate and setting a utility's service territory. If the Commission were not empowered to also amend or rescind such grants of authority, the Commission would become merely the agent of a government serving the interests of the monopoly instead of its citizens, by delivering them to the monopoly as captive customers. Aloha itself points out in its Motion to Dismiss that Section 367.111(1), Florida Statutes, authorizes the Commission to "amend the certificate of authorization to delete an area not served or not properly served by the utility or it may rescind the certificate of authorization." In the rate case order, the Commission already concluded that the Seven Springs area has not been properly served by Aloha.

Analysis and Recommendation. Staff recommends that the Commission reject Aloha's contention that the petitions should be dismissed on the grounds that the Commission lacks jurisdiction to order a deletion of territory and that the petitioners lack standing to seek such a deletion.

The Commission has subject matter jurisdiction to grant, deny, amend, revoke, suspend or rescind certificates of authorization. See Sections 367.045(5), 367.045(6), 367.111(1) and

367.161(2), Fla. Stat. Staff recognizes that there may be limitations on the Commission's exercise of the power to delete service territory depending on the circumstances of a particular case. Those potential limitations, however, do not detract from the Commission's subject matter jurisdiction to consider a complaint seeking such relief. This is particularly true since the Commission is charged under Section 367.011(3) to construe its powers under Chapter 367 liberally in order to protect the public health, safety and welfare.

This is nevertheless a case of first impression regarding whether the Commission can or should delete territory based on concerns about finished water quality when that water appears to meet all of DEP's standards for drinking water quality.⁸ Thus, staff believes that a Commission decision not to dismiss based on this ground should not preclude Aloha from raising an issue in the case regarding the extent of the Commission's territory deletion authority.

Staff also recommends that the Commission reject Aloha's contention that the petitioners lack standing under Storey v. Mayo. That case held that an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. The petitioners have not alleged that they are requesting to be deleted from Aloha's service territory merely because they deem it advantageous to themselves. Rather, they allege that the service provided by Aloha is inadequate and provides a statutory basis for deletion.

For these reasons, the Commission should deny Aloha's motion to dismiss based on the Commission's asserted lack of jurisdiction to order territorial deletion and petitioners' asserted lack of standing to request such relief. If the motion to dismiss is denied, staff's recommendation on what action the Commission should take at this time regarding the deletion request is discussed in Issue 6, below.

3. Transfer of Territory to Pasco County Water System

Parties' Arguments. Most of the parties' arguments regarding the Commission's jurisdiction over territorial deletion and the petitioners' standing to seek such relief are also applicable to the request to transfer the Seven Springs service area to the Pasco County water system.

Analysis and Recommendation. Staff recommends that the Commission dismiss the portion of the first petition that asks the Commission to transfer the Seven Springs service area to the Pasco County water utility system. The Commission does not have subject matter jurisdiction over the Pasco County water utility system. That system is exempt from Commission regulation as a governmental authority pursuant to Section 367.022(2), Florida Statutes. Therefore, the Commission does not have the authority to make any portion of Aloha's service territory a part of the County's water system.

⁸ **Attachment C** contains a summary of previous cases involving the exercise, or requested exercise, of the Commission's deletion authority. None of these cases involve the type of factual situation at issue in this docket.

D. Summary

The motions to dismiss should be granted in part and denied in part. The Commission should dismiss for lack of jurisdiction the portion of the first petition that requests that the Seven Springs service territory be made a part of the service area of the Pasco County water utility system. The remainder of the motions to dismiss both petitions, which address the timing and conditions for implementation of treatment improvements and the deletion of territory, should be denied.

ISSUE 4: Should the Commission grant Aloha's motion to modify the rate case order, to change the 98% standard for removal of hydrogen sulfide contained therein to agree with the Tampa Bay Water Standard of 0.1 mg/L?

RECOMMENDATION: Aloha's motion to modify the rate case order should be granted in part and denied in part. The fourth ordering paragraph of the rate case order should be modified to read that "Aloha shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water at the point of delivery with the customers' piping. Compliance with such requirement shall be determined based upon samples taken monthly at a minimum of two sites at domestic meters most distant from the multiple treatment facilities. Such sites shall be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted. Aloha shall implement this standard no later than February 12, 2005." The Commission should direct Aloha to use the treatment process that Aloha concludes will achieve this level of treatment in the most cost-effective manner. Finally, the Commission should require monthly progress reports, as set forth in the staff analysis. (Walden, Daniel, Gervasi)

STAFF ANALYSIS:

Modification of Rate Case Order

In the fourth ordering paragraph of Order No. PSC-02-0593-FOF-WU (the rate case order), the Commission ordered Aloha to, by no later than December 31, 2003, "make improvements to wells 8 and 9, and then to all of its wells, to implement a treatment process designed to remove at least 98% of the hydrogen sulfide in the finished water." In the fifth ordering paragraph of the order, the Commission required Aloha to submit a plan within 90 days showing how it intends to comply with that requirement.

In its motion to modify the rate case order, Aloha states that it submitted the requisite report on October 18, 2002, and noted therein that achieving the 98% removal standard was at best very expensive, and at worst, impossible. Attached to the motion as Exhibit A is a letter dated July 23, 2003, from OPC to the Commission, stating that the Citizens agree that the 98% removal standard should be replaced with other standards. The letter notes that the Tampa Bay Water Authority (TBW) uses a maximum total level of 0.1 mg/L standard, and that additional standards may also be appropriate, depending on the final audit report findings.

Aloha states that it continues to work with Dr. Levine, who was originally hired by the Citizens to review possible additional treatment alternatives, and intends to move forward with the recommendation of Dr. Levine to implement one of the appropriate treatment options. The utility believes that the Commission should modify the rate case order to eliminate the 98% removal requirement as unreasonable and/or inappropriate, and that the standard provided by TBW should be adopted in its place, including the testing requirements to maintain such compliance. Finally, Aloha states that all such modified requirements should be effective by the revised deadline imposed by Order No. PSC-03-1157-PCO-WU, such that the language of the fourth ordering paragraph of the rate case order be revised to read as follows:

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Ordered that Aloha Utilities, Inc. shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment facilities of the utility. Compliance with such requirement shall be determined based upon samples taken at least annually from a point of connection just after all treatment systems and before entry of such water into the transmission and distribution system of the utility. Aloha should implement this standard no later than February 12, 2005.

On June 16, 2004, OPC filed a letter written by Dr. Kurien dated June 13, 2004 on behalf of the CAC, which OPC adopts by reference as its response to Aloha's motion. The letter states that any modification to the rate case order should be qualified to include the following language:

1. The reference to sulfide in "finished water" should be stated as a maximum contaminant level for total sulfides of 0.1 mg per liter of delivered water at the point of its entry into the domestic system at the domestic meter;
2. The improvements should be such that sulfide present in raw water or generated during treatment and transmission will be removed, not converted, to a level not to exceed 0.1 mg/L in finished water delivered at the point of entry into the domestic system; and
3. Compliance with such requirements shall be determined based upon samples taken at least once a month at a minimum of two sites at domestic meters most distant from each of the multiple treatment facilities. Such sites shall be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted.

It appears to staff that the 98% removal standard required by the rate case order is not attainable for all of Aloha's wells, due to low concentration of hydrogen sulfide in some of the wells. For example, concentrations ranged between 0.61 mg/L to 2.43 mg/L in November, 2003. Removing 98% of 0.61 mg/L (.5978 mg/L) is thus not feasible. TBW is a wholesale water supplier in the area and has voluntarily imposed a standard for hydrogen sulfide not to exceed 0.1 mg/L for its finished water. Staff recommends that this standard be applied by Aloha because it appears to be reasonable and attainable, and will diminish the occurrences of black water.

Staff notes that TBW has already begun using this standard, and Aloha will be blending its water with TBW water when water is purchased through Pasco County. Regarding water blending, it is significant to note that beginning in January, 2005, TBW will be using chloramines for disinfection. Pasco County will also convert to the use of chloramines at that same time. In order for Aloha's water to be compatible then with purchased water, Aloha will have to convert from chlorination to the use of chloramines. Staff has been informed by both the utility's engineering consultant and Dr. Levine that treatment for hydrogen sulfide is necessary in conjunction with converting to chloramines so that the black water problem is not exacerbated. This modification will have the added benefit of allowing Aloha to produce water that is

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compatible with purchased water, which will further enhance the water quality provided to Aloha's customers.

It appears to staff that qualifiers nos. 1 and 3, as outlined by Dr. Kurien in response to Aloha's motion to modify the rate case order, are reasonable and should be included in the modification. However, qualifier no. 2, the requirement that the improvements must result in removal, as opposed to conversion, of sulfides not to exceed the 0.1 mg/L standard, would have the effect of eliminating any treatment process which oxidizes, rather than removes, hydrogen sulfide. As discussed further below, staff does not recommend that the Commission prescribe the treatment methodology that Aloha should use in order to comply with the requisite treatment standard. This is a business decision that should be made by Aloha's engineering experts. Therefore, staff does not recommend the inclusion of that qualifier in modifying the rate case order.

For the foregoing reasons, staff recommends that Aloha's motion to modify the rate case order be granted in part and denied in part. The fourth ordering paragraph of the rate case order should be modified to read that:

Aloha shall make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water at the point of delivery with the customers' piping. Compliance with such requirement shall be determined based upon samples taken monthly at a minimum of two sites at domestic meters most distant from the multiple treatment facilities. Such sites shall be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted. Aloha shall implement this standard no later than February 12, 2005.

In so recommending, staff recognizes that the Florida Supreme Court has found that:

orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to modification. This rule assures that there will be a terminal point in every proceeding at which the parties and the public may rely on a decision of such an agency as being final and dispositive of the rights and issues involved therein. This is, of course, the same rule that governs the finality of decisions of courts. It is as essential with respect to orders of administrative bodies as with those of courts.⁹

Nevertheless, the Court continued by stating that:

We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated. For one thing, although courts seldom, if ever, initiate proceedings on

⁹ Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966).

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their own motion, regulatory agencies such as the commission often do so. Further, whereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies and also against inadvertently precluding agency-initiated action concerning the subject matter dealt with in an earlier order.¹⁰

With the passage of time, the parties and staff have come to realize that the 98% standard is unattainable on a system-wide basis. Therefore, staff believes that the public interest warrants modification of the standard to a more realistic standard which has been adopted by TBW, and that this action fits squarely within the reasoning of the Peoples Gas Court.

Other Options

1. Direct Aloha to implement a specific treatment. Rather than specifying a standard for the amount of hydrogen sulfide allowed in the finished water, the Commission could order the utility to implement a new, specific treatment process to reduce the hydrogen sulfide concentrations in the finished water. This could be any one of the treatment methods included in Dr. Levine's report, including aeration, oxidants, and membrane technology. According to Aloha, H₂O₂ oxidation is the least cost alternative recommended by Dr. Levine in her study. Aeration, which is the method used by Pasco County coupled with storage, is not a feasible alternative for Aloha due to the compact size of the well sites.

Aloha's consultant has stated that H₂O₂ could be implemented simultaneously with the chloramine process by January, 2005. However, representatives of the CAC have expressed reservations over using H₂O₂ due to the lack of statistical performance data for hydrogen sulfide removal in drinking water. While H₂O₂ has been used for the treatment of drinking water, it has not been used for the purpose of reducing hydrogen sulfides in drinking water. Scientific review suggests that it will be effective for that purpose, but results have not been proven in a full scale utility application. As discussed in the Case Background, Attachment B is the response by Aloha to staff's data request concerning the costs for implementation of treatment options contained in Dr. Levine's report.

Commission practice has been not to micro-manage the business decisions of regulated companies, but to instead focus on the end-product goal. In keeping with this established practice, staff does not recommend that the Commission prescribe the specific treatment process to be used in this case. Prudency reviews in general rate cases provide more than ample protections for the public interest. The Commission's involvement in the determination of which treatment alternative that Aloha implements should take the form of a prudency review during the rate proceeding wherein Aloha requests, and carries the burden to prove, that the costs of the treatment process should be included in rates. This is the tool the Commission now uses to

¹⁰ Id.

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protect the public interest while avoiding the direct management by the Commission of utility operations.¹¹

2. Purchase all water from Pasco County for Seven Springs. Staff considered an alternative that would involve the purchase of all of Aloha's water from Pasco County. Aloha is currently in negotiations with the County for a new bulk water agreement, which will potentially result in the utility coming into compliance with its WUP. However, in conversations with staff, County officials have indicated that the County cannot provide sufficient bulk water supply to the entire Seven Springs area on a going-forward basis without investing in substantial infrastructure to assure that its supply is not compromised for its own customers. The County has offered to provide up to 45,000,000 gallons per month (1.5 MGD), but Aloha's 2003 annual report shows 103,016,000 gallons was provided to the Seven Springs customers in June, 2003. Thus, the demand exceeds the supply. For this reason, purchasing all of its water from the County does not appear to be a viable alternative.

Monthly Reports to Staff

Aloha is now in the process of planning its strategy for the installation of treatment equipment to include design, permit application to the DEP, pilot testing of the process, and installation of the equipment at each of the treatment plant sites, such that the treatment process will be operational by no later than January, 2005. Timelines have not yet been established for any of the steps. In light of this, staff recommends that Aloha provide the staff with monthly updates of the progress made each month and the events planned for each upcoming month. If tests were conducted during the past month, Aloha should provide a summary of the test results. Updates should be provided to staff by the tenth of each month beginning July 10, 2004 through August, 2005.

Summary

Considering the alternatives and approaches noted above, staff believes that the utility and its consultants should decide the treatment method to be chosen to attain the goal of hydrogen sulfide reduction to 0.1 mg/L. Aloha is already meeting standards set forth by the DEP, and has achieved a reduced level of monitoring for lead and copper due to past compliance with the lead and copper rule. Additionally, Commission practice is not to specify a method of treatment for a regulated utility, but rather to set a goal or standard to be reached. Staff notes that any change requested in the water treatment process must be approved by the DEP, so Aloha will rely upon the expertise of that agency's district office in Tampa in addition to the opinion of its consulting engineer. Moreover, staff believes that two of the three qualifiers suggested by Dr. Kurien are reasonable and should be included in the modification of the rate case order.

Based upon the foregoing, staff recommends that the Commission grant in part and deny in part Aloha's motion to modify the rate case order. The fourth ordering paragraph of the rate case order should be modified to read that "Aloha shall make improvements to its wells 8 and 9

¹¹ See, e.g., Order No. PSC-94-0296-PHO-EI, issued March 15, 1994, in Docket No. 930676-EI, In Re: Petition of Florida Power Corporation to open investigation into Tampa Electric Company's proposed construction of 69 kV transmission line to serve the Cities of Wauchula and Fort Meade.

and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water at the point of delivery with the customers' piping. Compliance with such requirement shall be determined based upon samples taken monthly at a minimum of two sites at domestic meters most distant from the multiple treatment facilities. Such sites shall be rotated to provide the greatest likelihood of detecting any departure from the maximum levels permitted. Aloha shall implement this standard no later than February 12, 2005." The Commission should direct Aloha to use the treatment process that Aloha concludes will achieve this level of treatment in the most cost-effective manner. Finally, the Commission should require monthly progress reports, as set forth above.

Issue 5: What additional steps should Aloha take to address the black water problem occurring in customers' homes?

Recommendation: To assist customers who have experienced damage due to the water's high hydrogen sulfide content, staff recommends that Aloha should be strongly encouraged to implement a low interest loan or a rebate program to assist customers in the Seven Springs service territory who wish to replace their existing copper pipes. The details of two such program proposals are discussed in the staff analysis for the utility's consideration. (Kummer, Gervasi)

Staff Analysis: There have been multiple complaints by Aloha customers of copper pipe corrosion on the customers' side of the meter for many years. As discussed above, black water is caused by the reaction of copper pipes to the hydrogen sulfide in the water. This corrosion eventually will result not only in discolored water but in physical damage to the integrity of the pipes. There is little scientific evidence to support the belief that less corrosive water in the future will reverse the damage, although it may slow the deterioration. Therefore, customers with damaged pipes will likely continue to experience discolored water and damage even if the number or severity of incidents is reduced. One method to minimize both the discolored water and the damage is to replace the existing copper pipes with CPVC. This, however, can be a costly undertaking. Staff also notes that so long as there is metal in the hot water heater or in plumbing fixtures, there could still be incidences of black water even after repiping with CPVC.¹²

In a prior order relative to the black water problem in Aloha's service area, the Commission found that because the utility's responsibility ends at the meter, the Commission could not require the utility to offer low cost loans or rebates for the purpose of repiping customers' homes.¹³ In making that finding, the Commission cited to Rules 25-30.225(5) and 25-30.210(7), Florida Administrative Code. Rule 25-30.225(5) requires each water utility to operate and maintain all of its facilities and equipment in safe, efficient, and proper condition, up to and including the point of delivery into the piping owned by the customer. Rule 25-30.210(7) defines "point of delivery" to mean "the outlet connection of the meter for metered service or the point at which the utility's piping connects with the customer's piping for non-metered service." Staff believes that Rule 25-30.225(5) recognizes that neither the utility nor the Commission has authority over, or responsibility for, what sort of plumbing a customer or builder may choose to use. Further, a customer's interior plumbing is not covered under Section 367.011, Florida Statutes, and therefore it is not within the Commission's purview to order a utility to finance such investment.

¹² Pasco County uses tray aeration coupled with storage to minimize incidences of black water in customers' homes. Even so, the County still has a few black water complaints. The County generally counsels its customers to turn off their hot water heaters if they are away for an extended period, to flush them upon their return, and that this may be necessary even if their pipes are plastic.

¹³ Order No. PSC-00-1285-FOF-WS, issued July 14, 2000, in Docket No. 960545-WS, In Re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County, at page 24.

Before reaching the conclusion that the Commission lacked the statutory authority to require the utility to implement a low interest loan or rebate program through a cost recovery clause to assist customers in financing the replacement of copper pipes, staff considered the mechanics of how such a program would be administered, similar to the cost recovery clauses used in the electric and gas industries. Attachment F contains that information. Nevertheless, we do not believe that the Commission should authorize such recovery for expenses incurred beyond the meter absent clear statutory authority. Moreover, there is no instrument by which to analyze the cost-effectiveness of a rebate program clause, such as the Rate Impact Measure (RIM) used in the electric industry to measure the cost-effectiveness of conservation programs. The cost-effectiveness of the program would largely depend on the number of customers who participate in it, and there is no accurate way to measure the probability of participation. Total costs from the rebate could result in a doubling of the current revenue requirement if 3,000 Seven Springs customers choose to participate. If the recovery factor were assessed on a per customer basis, depending on the participation rate, staff estimates that the monthly charge could range from \$2.00 at a participation level of 500 customers, to \$12.00 if participation rose to 3000 customers. Assuming that at least the households requesting deletion would take immediate advantage of the rebate, the per customer cost of the rebate would be approximately \$6.00 per month. The maximum revenue impact of implementing such a rebate program is not known. It is important to note that the recovery clause assessment would be in addition to any increase in revenue requirements necessary to meet the additional treatment addressed in Issue 4 and the cost to purchase water from Pasco County.

To financially assist customers who have experienced damage due to the water's high hydrogen sulfide content, staff recommends that Aloha should be strongly encouraged to implement a program in the Seven Springs service territory for customers who wish to replace their existing copper pipes with CPVC. The following is a discussion of two potential proposals for implementation of such a program, which staff offers for Aloha's consideration.

Proposals

1. Low Interest Loan Program. Aloha would secure a low interest loan for the purpose of lending to its customers, at cost, a sum of money to assist customers in financing the replacement of copper piping in their homes with PCVC. Aloha would allow the customers to pay the loan back over a period of five years. The monthly amount would appear as a line-item surcharge on the customer's water bill. Any customer who currently experiences black water problems would be eligible for the loan program for the replacement of all interior copper water pipes with CPVC, equal to 50% of the total cost of the replacement, up to a maximum total loan of \$2,500. This option would be available to any customer in Aloha's Seven Springs service territory on a prospective basis, and would not be dependent on the treatment option selected by the utility. Only customers with copper pipes would be eligible for the loan. The customer would have to show evidence of black water or damage due to corrosion, and would have to apply for the loan within six months of the program's initial availability. If the utility were to find the program to be successful, it could extend the loan qualification time period.

To take advantage of the loan program, customers would have to submit an invoice from a licensed plumber detailing the work performed, including a signed statement from the plumber

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that the damage being repaired was due to corrosion by hydrogen sulfide in the water. Within ten days of the receipt of the invoice and statement by Aloha, Aloha would submit payment of one-half of the invoice amount, up to \$2,500, directly to the plumber performing the work. No less than one full billing cycle prior to the effective date of the loan program, Aloha would notify all customers in writing of the availability of the program.

2. Rebate Program. Aloha would finance a rebate program whereby any customer who currently experiences black water problems would be eligible for a rebate from the utility for the replacement of all interior copper water pipes with CPVC, equal to 50% of the total cost of the replacement, up to a maximum total rebate of \$2,500. This option would be available to any customer in Aloha's Seven Springs service territory on a prospective basis, and would not be dependent on the treatment option selected by the utility. Only customers with copper pipes would be eligible for the rebate. The customer would have to show evidence of black water or damage due to corrosion, and would have to apply for the rebate within six months of the program's initial availability. Only customers with copper pipes would be eligible for the rebate. If the utility were to find the program to be successful, it could extend the rebate qualification time period.

To take advantage of the rebate program, customers would have to submit an invoice from a licensed plumber detailing the work performed, including a signed statement from the plumber that the damage being repaired was due to corrosion by hydrogen sulfide in the water. Within ten days of the receipt of the invoice and statement by Aloha, Aloha would submit payment of one-half of the invoice amount, up to \$2,500, directly to the plumber performing the work. No less than one full billing cycle prior to the effective date of the rebate program, Aloha would notify all customers in writing of the availability of the program.

Impact on Customers

The obvious benefits of a low interest loan or rebate program would accrue to customers who have lived with the black water problem for a number of years and for whom pipe replacement is the best or only option. Many customers have complained about the need to run large quantities of water in order to get usable water. Cleaner water would result in less waste, and help conserve a precious natural resource. As indicated above, Aloha is currently exceeding its permitted water withdrawal and has been instructed to implement conservation programs by the Southwest Florida Water Management District. It is, however, unlikely that all customers would take advantage of the program. Some customers in older sections of the service territory, like Veterans Village, apparently have no problem with black water. Most new homes are being built with CPVC pipe and therefore should not have many incidences of black water.

Summary

Pursuant to the findings of Order No. PSC-00-1285-FOF-WS, the Commission does not have the statutory authority to require the utility to offer low cost loans or rebates for the purpose of repiping customers' homes because the utility's responsibility ends at the meter. Nevertheless, staff believes that such a loan or rebate program would be a big step in the direction of regaining customer confidence. As evidenced by the deletion petitions, Aloha's

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customer relations are in a state of serious disrepair. Offering to help with replacement of damaged pipes could be seen as a positive step by the utility to mend relations with its customers and prevent such disputes in the future. Staff therefore recommends that the Commission strongly encourage the utility to adopt a low interest loan or rebate program, such as the ones outlined above.

Issue 6: What further action should the Commission take at this time on the deletion petitions?

Recommendation: The Commission should decline to take further action on the customers' requests to delete the Seven Springs area until after Aloha has had an opportunity to implement the new treatment process required by Issue 4. Staff will bring a recommendation for further action on the deletion petitions as soon as practicable after the February 12, 2005 implementation deadline. (Gervasi, Walden, Daniel)

Staff Analysis: As stated in the case background, the first deletion petition requests approval of the action plan only: 1) after an independent audit of Aloha's processing plant and methodology; 2) if it contains the minimum requirements imposed by neighboring utilities for raw water processing; and 3) if a Citizens' Advisory Committee is created to monitor the effectiveness of the plan. The petition requests that the implementation date for treatment improvements be accelerated to April 30, 2003, and that the Commission delete the Seven Springs area from Aloha's certificate if significant resolution of the problems does not occur by that date. The petition thus recognizes that Aloha ought to be given an opportunity to resolve the black water problem prior to the Commission taking any action to delete territory. However, because the April 30, 2003 date has passed, these customers now express a desire for deletion of territory, as strongly evidenced by the testimony taken at the April 8, 2004 service hearings and in numerous letters received subsequent to the service hearings.

Aloha timely filed its action plan on October 18, 2002, in accordance with Order No. PSC-02-1056-PCO-WU, the partial stay of the rate case order. An independent audit was financed by OPC and performed by Dr. Levine. Dr. Levine's report was completed in two phases, the second of which was issued in February 2004 and contains the various black water treatment options as discussed in Issue 4. By Order No. PSC-04-0254-PCO-WS, the Commission removed the deletion docket from abeyance in order for parties and staff to fully consider the audit report. The Commission found that "because the results of the audit report may directly impact the Petitions, we shall defer ruling on the two customer Petitions . . . until after all parties and staff have fully analyzed the audit report and a customer service hearing is conducted on its findings and recommendations." *Id.* at 4. As discussed in Issue 4, Aloha has requested that it be held to the same standard for raw water processing as the Tampa Bay Water Authority. A Citizens' Advisory Committee has been created and has been actively engaged in exploring solutions to the black water problem.

The remaining request contained in the petition, that the implementation date for treatment improvements be accelerated to April 30, 2003, is obviously not possible now, nor was it possible from the date the petition was filed. On April 30, 2003, the rate case order was still pending on appeal. The First District Court of Appeal's mandate did not issue until June 30, 2003, and the new date to implement the 98%-reduction solution thus became, and still remains, February 12, 2005. Therefore, Aloha is not out of compliance with Commission directives relative to the implementation deadline. However, if Aloha fails to implement the treatment methodology as required in Issue 4 by February 12, 2005, it will be out of compliance with the rate case order and the stay order. And pursuant to Section 367.161(2), Florida Statutes, the

Commission may amend, suspend, or revoke a utility's certificate of authorization when it is found to have refused to comply with, or to have willfully violated, a lawful Commission order.

Staff notes that the Commission has found that revocation proceedings are reserved for cases of severe violations of Commission orders or rules, and that revocation is only sought after all other efforts to bring the utility into compliance have failed. See Attachment C. Staff recommends that Aloha should continue to be held to the February 12, 2005 deadline for implementation of the requisite treatment improvements, as requested by Aloha in its motion to modify the rate case order (Issue 4). To hold Aloha to the accelerated deadline of April 30, 2003, as requested by the petition, would prejudice Aloha because Aloha has been mandated by prior Commission order to implement the treatment improvements by February 12, 2005, and because Aloha waited to initiate the implementation of a treatment option until after the independent audit report was issued, at the request of the customers. Phase II of the audit report concerning treatment options was not issued until February 2004. Finally, it would be premature to set this matter for hearing prior to the expiration of the February 12, 2005 implementation deadline because if Aloha implements a solution to the black water problem, there will be no need for a deletion proceeding to take place. This should be viewed as Aloha's window of opportunity to resolve the black water problem prior to any Commission action to delete territory. Staff will bring a recommendation for further action on the deletion petitions as soon as practicable after the February 12, 2005 implementation deadline.

Staff considered the idea of recommending that the Commission set the deletion petitions directly for hearing. However, aside from the prejudicial nature of moving up the deadline for Aloha to implement a solution to the black water problem, much of the information that would need to be obtained in order to determine whether deletion would be in the public interest is as yet unknown and may not be ascertainable by the date of the hearing if it were to be scheduled immediately. Nor do we know exactly how long it will take to gather such information. For example, it will be necessary for the County to perform a hydraulic analysis in order to estimate the costs involved in the provision of service to the Seven Springs territory by the County. The County has advised that it will take two months at the very least, and probably longer, to perform the hydraulic analysis.

Staff will continue to work with the County to gather the necessary information regarding the feasibility of obtaining service to the Seven Springs territory from the County. In response to a staff letter, the County has advised that if the Aloha system were for sale, the County is ready, willing and able to pursue a purchase. See Attachment D. As a point of information, staff has also attached, as Attachment E, a comparison of rates currently charged by the County to those currently charged by Aloha. It is important to note that these rate comparisons do not contain the increased bulk water costs that the County may charge to Aloha as a result of a bulk water agreement, the hydrogen sulfide treatment costs that Aloha will incur, or the connection charges that the County would charge to Aloha customers who would receive direct service from the County as a result of a Commission action to delete territory. Those costs are, as yet, undetermined. Moreover, staff notes that a total of approximately 11,000 households would be affected by the deletion of the Seven Springs territory from Aloha's certificate. To date, approximately 2,000 of the 11,000 customers in the Seven Springs service territory have expressed a desire for territory deletion. The interests of the other 9,000 customers, who

represent the vast majority of the Seven Springs customers, are as yet unknown. These issues merit exploration and will be addressed, as appropriate, in the next staff recommendation concerning what further action should be taken on the deletion petitions.

For the foregoing reasons, the Commission should decline to take further action on the customers' requests to delete the Seven Springs area until after Aloha has had an opportunity to implement the new treatment process required by Issue 4. Staff will bring a recommendation for further action on the deletion petitions as soon as practicable after the February 12, 2005 implementation deadline.

Issue 7: Should the dockets be closed?

Recommendation: No. Docket No. 010503-WU should remain open to further address the interim rate refund issue. Docket No. 020896-WS should remain open to monitor compliance with the applicable treatment and reporting requirements and to take further action on the request to delete the Seven Springs area from Aloha's certificated territory. (Gervasi)

Staff Analysis: Docket No. 010503-WU should remain open to further address the interim rate refund issue. Docket No. 020896-WS should remain open to monitor compliance with the applicable treatment and reporting requirements and to take further action on the request to delete the Seven Springs area from Aloha's certificated territory.