

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: April 21, 2005

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

FROM: Office of the General Counsel (Cibula)
Division of Economic Regulation (Devlin)

RE: Docket No. 050018-WU – 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.

AGENDA: 05/03/05 – Decision Prior to Hearing – Participation Dependent Upon Commission’s Vote on Issues 1 and 4.

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\050018.RCM.DOC

Case Background

On January 7, 2005, the Commission issued its notice of intent to amend Aloha’s Utilities, Inc.’s (Aloha or utility) certificate of authorization to delete certain areas from the utility’s service territory. On February 22, 2005, Aloha was served via certified mail Order No. PSC-05-0204-SC-WU (show cause order). The show cause order set forth, in accordance with section 120.60, Florida Statutes, and Rule 28-107.004, Florida Administrative Code, the statutory sections alleged to have been violated by Aloha which warrant the deletion of portions of its service area and the facts and conduct relied upon to establish the violations. On March 15, 2004, Aloha timely filed its response to the show cause order and requested a hearing.

On March 15, 2005, Aloha filed its Motion to Strike and Amend, in which it requested that the Commission strike certain portions of the show cause order and amend the order to

address whether mediation is available. Commission staff timely filed its Response to Aloha's Motion to Strike and Amend on March 21, 2005.

Also on March 15, 2005, Aloha filed its Motion for Abatement, requesting that the Commission abate the proceeding in this docket until the final order is issued in Docket No. 010503-WU. Docket No. 010503-WU pertains to the protest of Order No. PSC-04-0712-PAA-WS, addressing the measurement of the water quality at Aloha's facilities. A hearing in Docket No. 010503-WU was held on March 8, 2005. The Commission is scheduled to consider staff's recommendation on the matter at its May 31, 2005, agenda conference. The final order is scheduled to be issued on June 20, 2005.

Commission staff timely filed its Response to Aloha's Motion for Abatement on March 18, 2005, in which it took no position on Aloha's motion. On March 22, 2005, the Office of Public Counsel (OPC) timely filed Citizens' Response In Opposition to Aloha's Motion for Abatement. On March 29, 2005, the utility filed its Request for Oral Argument in regard to its Motion for Abatement.

By Order No. PSC-05-0300-PCO-WU, issued March 18, 2005, OPC's Notice of Intervention in this docket was acknowledged. On March 28, 2005, Aloha timely filed its Motion for Reconsideration of Order Acknowledging Intervention, in which it requested reconsideration of the order allowing OPC to intervene in this proceeding. Along with its Motion for Reconsideration, Aloha included a Request for Oral Argument. OPC timely filed Citizens' Response in Opposition to Aloha's Motion for Reconsideration of Order Acknowledging Intervention on March 30, 2005.

This recommendation addresses Aloha's Motion for Reconsideration of Order Acknowledging Intervention, Motion to Strike and Amend, and Motion for Abatement. The Commission has jurisdiction pursuant to sections 120.60, 367.045, 367.111 and 367.161, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Aloha's Request for Oral Argument in regard to Aloha's Motion for Reconsideration of Order Acknowledging Intervention?

Recommendation: No. Aloha's Request for Oral Argument in regard to its Motion for Reconsideration should be denied. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed a Request for Oral Argument along with its Motion for Reconsideration of Order Acknowledging Intervention. In support of its request, Aloha states that oral argument will help clarify the issues, ensure that the Commission is fully informed, and allow the parties to elaborate on their concerns or comments. Aloha further states that it is in the interest of the utility, the Commission, the customers, and the public in general that the proceedings at issue be conducted in accordance with the Florida Administrative Procedure Act and that Aloha is afforded due process of law.

Advisory staff recommends that Aloha's Request for Oral Argument in regard to its Motion for Reconsideration should be denied. Advisory staff believes that Aloha's arguments are adequately contained in its Motion for Reconsideration, and, thus, oral argument is unnecessary.

Issue 2: Should the Commission grant Aloha's Motion for Reconsideration of Order Acknowledging Intervention?

Recommendation: No. Aloha's Motion for Reconsideration of Order Acknowledging Intervention should be denied. (Cibula)

Staff Analysis: The following is a summary of Aloha's Motion for Reconsideration and OPC's response and advisory staff's recommendation.

Aloha's Motion for Reconsideration

Aloha requests that the Commission reconsider its decision allowing OPC to intervene in this proceeding. In support of its motion, Aloha states that the Prehearing Officer overlooked and/or failed to consider both critical facts and controlling law when he rendered his decision.

Aloha states that the Prehearing Officer overlooked and/or failed to consider the nature of this proceeding and the extreme prejudice to the utility caused by OPC's intervention in this penal action. Aloha asserts that, in any penal action, the only proper parties are the prosecuting authority and the person or entity charged. The utility states that this two party procedure is "well-established and logical" and that the prosecuting attorney cannot satisfy its initial burden of proof under section 120.60(5), Florida Statutes, and Rule 28-107.004(4), Florida Administrative Code, through evidence presented by a third party. Aloha further states that OPC has no authority to take action against Aloha or to raise new facts or issues in this proceeding, so "OPC can contribute nothing to this proceeding, and its participation deprives Aloha of due process of law."

Citing Associated Home Health Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104 (Fla. 1st DCA 1984), Aloha asserts that a third party has no standing in agency revocation proceedings. Aloha states that its research of orders of the Florida Division of Administrative Hearings did not turn up any orders from a disciplinary proceeding against a licensee where a third party was allowed to intervene. It further states that it found no license revocation proceeding before the Commission where OPC was a party.

Aloha states that, pursuant to Chapter 367, Florida Statutes, only the Commission is authorized to revoke a utility's certificate and that the Commission cannot delegate this authority to OPC. It further states that the Commission cannot rely on section 350.0611, Florida Statutes, which outlines the duties and powers of OPC, as authority for OPC's intervention in this case.

Aloha alleges that State v. General Development Corporation, 448 So. 2d 1074 (Fla. 2d DCA 1984), approved, 469 So. 2d 1381 (Fla. 1985), is directly on point with this case. Aloha states that in General Development Corporation the court found that the broad authority granted to the State Attorney to appear in courts and prosecute and defend civil and criminal actions did not give it standing to bring an action against an alleged violator of Chapter 403, Florida Statutes, which the court stated the Department of Environmental Protection had the sole authority to enforce. Aloha states that, likewise, OPC cannot participate in disciplinary actions initiated by the Commission based on the broad powers conferred on it by sections 350.061(1) and 350.0611(1).

The utility asserts that OPC “did not and could not allege any protectable interest in the instant proceeding, in which it seeks to intervene as a party.” It states that OPC was created to represent the general public before the Commission. Citing Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909, 23 L. Ed.2d 222, 89 S. Ct. 1751 (1969), and Lee County Electric Coop. v. Marks, 501 So. 2d 585 (Fla. 1987), the utility states that the public has no right to be served by a particular utility. Aloha states that it follows that OPC has “no right to party status for the purpose of advocating a position upon which particular utility will, or will not, provide service to a specified territorial area.”

Citing Charlotte County Development Commission v. Lord, 180 So. 2d 198 (Fla. 2d DCA 1965), Aloha contends that the public has no right to intervene in a proceeding based on a belief that one side or the other should prevail. The utility states that “[p]resumably, the PSC can adequately protect the OPC’s interest if, in fact, the OPC has a legally cognizable interest” and that there has been no allegation by OPC that the Commission will not do so.

Aloha states that the Commission may not rely upon conduct not alleged in the initial charging document. It states that, therefore, OPC cannot submit evidence in this proceeding outside the specific facts and law alleged in the show cause order. Aloha further states that the Commission may not meet its initial burden of proof through evidence produced by anyone other than itself and that it “cannot be required to defend itself from two prosecutors.” Aloha states that “[a]ccordingly, any ‘evidence’ adduced by the OPC, if allowed to intervene in this proceeding, would be immaterial, irrelevant or cumulative in this penal action.”

The utility alleges that OPC’s one sentence notice to intervene does not conform to the requirements of section 120.54(5), Florida Statutes, and Rule 28-106.201, Florida Administrative Code. It states that OPC is not exempt from the requirements of the Florida Administrative Procedure Act.

OPC’s Response

OPC states that Aloha’s Motion for Reconsideration should be denied. It asserts that Aloha has failed to meet its burden of showing that the Prehearing Officer made a mistake of fact or law when he acknowledged OPC’s intervention in this proceeding.

OPC states that it has the duty, pursuant to section 350.0611, to represent the people of Florida in proceedings before the Commission. It contends that section 350.0611 specifically states that OPC “shall have such powers as are necessary to carry out the duties of his or her office” and that OPC may appear in any proceeding or action before the Commission.

OPC states that Black’s law dictionary defines the term “proceeding” as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment” and as “any procedural means for seeking redress from a tribunal or agency.” It further states that “Docket No. 050018-WU easily satisfies this criteria, since the docket is a procedure used to carry out the will of the Commission, as expressed and voted upon at an agenda conference.”

OPC contends that Aloha's Motion for Reconsideration ignores the plain meaning of section 350.0611. It states that the plain language of section 350.0611 provides no exception barring OPC from intervening in a show cause proceeding or a license revocation proceeding, and that, in fact, this section states that OPC may intervene in any Commission proceeding or action. It further states that "Public Counsel's intervention does not change the burden of proof in the proceeding, nor does the fact that the Commission is 'prosecuting' the action have anything to do with Public Counsel's right to intervene."

OPC distinguishes the facts in General Development Corporation, 448 So. 2d at 1074, from the facts in this docket. OPC states that in General Development Corporation the State Attorney attempted to independently bring an action concerning violations of statutes that the Department of Environmental Protection was charged with enforcing. It states that the court found that the Department of Environmental Protection had to bring any such action. It states that, unlike General Development Corporation, the Commission has initiated this action against Aloha and that OPC is only intervening in the matter.

OPC argues that Aloha's reliance on Associated Home Health Agency, 453 So. 2d at 104, is misplaced. OPC states that in Associated Home Health Agency the court found that a third party did not have standing to request and initiate a section 120.57 hearing to revoke a competing service provider's license. It asserts that Associated Home Health Agency is not on point because in this case the correct entity, the Commission, initiated the partial license revocation proceeding against Aloha and that the utility, not OPC, requested the hearing in this docket.

Advisory Staff's Recommendation

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or not considered when the order was rendered. Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161, 162 (Fla. 1st DCA 1981). The motion for reconsideration should be based on specific facts set forth in the record and should not be based on an arbitrary feeling that a mistake may have been made. Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). Furthermore, it is not appropriate to reargue matters in a motion for reconsideration. Sherwood v. State, 111 So. 2d 96, 98 (Fla. 3d DCA 1959).

Aloha's arguments in regard to OPC's authority to intervene in this matter under section 350.0611, whether section 120.60 allows for intervention in license revocation proceedings, and whether OPC's request for intervention conforms to the requirements of Rule 28-106.201 are the same arguments Aloha made in its opposition to OPC's intervention and were effectively rejected by the Prehearing Officer when he allowed the intervention. Thus, this is merely reargument, which is not proper for a motion for reconsideration. See Sherwood, 111 So. 2d at 98.

Furthermore, advisory staff agrees with OPC that General Development Corporation, 448 So. 2d at 1074, and Associated Home Health Agency, 453 So. 2d at 104, are not on point. Unlike General Development Corporation and Associated Home Health Agency, the Commission initiated the license revocation proceeding against Aloha, in accordance with

Docket No. 050018-WU

Date: April 21, 2005

section 120.60. Advisory staff agrees with Aloha that staff has the burden of proof in this proceeding; however, allowing OPC to intervene in this matter does not change that fact.

Advisory staff believes that Aloha has failed to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider when he rendered the order acknowledging OPC's intervention in this matter. See Diamond Cab Co., 146 So. 2d at 891; see also Pingree, 394 So. 2d at 162. Accordingly, advisory staff recommends that Aloha's Motion for Reconsideration of Order Acknowledging Intervention should be denied.

Issue 3: Should the Commission grant Aloha's Motion to Strike and Amend?

Recommendation: Aloha's Motion to Strike should be granted. However, Aloha's Motion to Amend should be denied. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed its Motion to Strike and Amend on March 15, 2005. Commission staff timely filed its response on March 21, 2005. The following is a summary of Aloha's motion and Commission staff's response and advisory staff's recommendation.

Aloha's Motion to Strike and Amend

Aloha states that Rule 28-107.004(3), Florida Administrative Code, sets forth the sole requirements for a licensee's response to an initial charging document pertaining to an administrative agency's intent to revoke a license. Aloha states that Rule 28-107.004(3) only requires that the licensee timely request a hearing and that this request for hearing contain: 1) the name and address of the party making the request, for purposes of service; 2) a statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and 3) reference to the communication that the party has received from the agency.

Aloha contends that the show cause order issued by the Commission attempts to shift the burden of proof to Aloha to prove its innocence. Aloha states that in four separate places in the show cause order the Commission requires Aloha to respond by setting forth specific allegations of fact and law as to why the four service areas delineated in the order should not be deleted from Aloha's certificate of authorization. Aloha asserts that the utility has "no such preliminary or ultimate burden in this case, and it cannot be required to 'respond' or 'show cause' why its Certificate of Authority should not be suspended, revoked, annulled or withdrawn." Aloha, thus, requests that the Commission strike all statements in the show cause order requiring the utility to allege specific allegations of fact and law as to why the four areas delineated in the order should not be deleted from Aloha's certificate.

In addition to its Motion to Strike, Aloha also requests that the show cause order be amended to include language addressing the possibility of mediation in this case. Aloha states that section 120.573, Florida Statutes, and Rule 28-106.111(1), Florida Administrative Code, require agency orders that affect substantial interests include language on whether mediation of the administrative dispute is available and a statement that choosing mediation does not affect the right to an administrative hearing. Aloha states that the show cause order contains no such language.

Commission Staff's Response

Staff states that Aloha's Motion to Strike should be granted. Staff agrees with Aloha that Rule 28-107.004 is applicable in this instance and that the disputed language in the show cause order goes beyond what is required in that rule. Staff, however, states that the inclusion of the language was not an attempt to shift the burden of proof from the Commission to the utility.

In regard to Aloha's Motion to Amend, staff states that section 120.573, pertaining to a statement on the availability of mediation, does not apply to license revocation proceedings under section 120.60. Staff indicates that Rule 28-107.004 specifically states what must be included in an agency's show cause order and that this rule "makes no mention of the need for a statement regarding the availability of mediation."

Staff further states that, if the Commission does find that such a statement on mediation is applicable in this instance, the Commission should amend the show cause order to state that statutory mediation under section 120.573 is not available in this case. Pointing to language in section 120.573 indicating that any agreement arrived at from statutory mediation would be binding on the Commission, staff explains that this section is inconsistent with this proceeding because Commission staff does not have the authority to negotiate and sign an agreement that would bind the Commission.

Staff states, however, that it understands that OPC, certain customers, and the utility are currently involved in efforts to mediate issues surrounding Aloha's service and that staff would be willing to participate in any on-going mediation. Staff further asserts that they believe that "it would be an appropriate staff function to recommend that the Commission approve any reasonable settlement that results from the mediation."

Advisory Staff's Recommendation

Rule 28-107.004(3) sets forth the requirements for a response to an agency's show cause order for a license revocation. As Aloha states and Commission staff concedes, Rule 28-107.004(3) does not require a licensee to allege specific allegations of fact and law as to why its license should not be revoked. Accordingly, advisory staff recommends that Aloha's Motion to Strike be granted and that the Commission should strike from the show cause order all statements requiring Aloha to allege specific allegations of fact and law as to why the four areas delineated in the order should not be deleted from the utilities certificate.

As for Aloha's Motion to Amend, advisory staff agrees with Commission staff that neither section 120.60 nor Rule 28-107.004, the law setting forth what must be included in an administrative complaint/show cause order to revoke a utility's license, requires the Commission to include a statement on whether mediation is available in this proceeding. Advisory staff, thus, recommends that Aloha's Motion to Amend be denied.

It is important to stress, however, that advisory staff's recommendation should not be interpreted to mean that the parties are prohibited from mediating this matter. The recommendation addresses only whether a statement on the availability of mediation pursuant to section 120.573 and Rule 28-106.111(1) is required to appear in the show cause order. Advisory staff believes that mediation should be encouraged. Any settlement agreement that results from mediation will be brought before the Commission for its consideration.

Issue 4: Should the Commission grant Aloha's Request for Oral Argument in regard to Aloha's Motion for Abatement?

Recommendation: No. Aloha's Request for Oral Argument in regard to its Motion for Abatement should be denied. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed a Request for Oral Argument in regard to its Motion for Abatement. In support of its request, Aloha states that oral argument will help clarify the issues, ensure that the Commission is fully informed, and allow the parties to elaborate on their concerns or comments. Aloha further states that it is in the interest of the utility, the Commission, the customers, and the public in general that the proceedings at issue be conducted in accordance with the Florida Administrative Procedure Act and that Aloha is afforded due process of law.

Rule 25-22.058, Florida Administrative Code, states that "[a] request for oral argument shall be contained on a separate document and must accompany the pleading upon which it is requested." Aloha filed its Motion for Abatement on March 15, 2005. Its request for oral argument, however, was not filed until March 28, 2005. Thus, Aloha's Request for Oral Argument is untimely. Moreover, advisory staff believes that Aloha's arguments are adequately contained in its Motion for Abatement, and, thus, oral argument is unnecessary. For these reasons, advisory staff recommends that Aloha's Request for Oral Argument in regard to its Motion for Abatement should be denied.

Issue 5: Should the Commission grant Aloha's Motion for Abatement?

Recommendation: Yes. Aloha's Motion for Abatement should be granted. Within seven days of the issuance date of the final order in Docket No. 010503-WU, the parties should file a report indicating the status of Docket No. 010503-WU, which will be used by the Prehearing Officer to take appropriate action to proceed with the case in Docket No. 050018-WU. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed its Motion for Abatement on March 15, 2005. Commission staff timely filed its response on March 18, 2005. OPC timely filed its response on March 22, 2005. The following is a summary of Aloha's motion and Commission staff's and OPC's responses and advisory staff's recommendation.

Aloha's Motion for Abatement

Aloha requests that this proceeding be abated until the final order in Docket No. 010503-WU is issued. Aloha further requests that, once the final order is issued, the utility should be directed to confer with Commission staff and report to the Prehearing Officer the status of both Docket No. 010503-WU and this docket, so that the Prehearing Officer can determine whether continued abatement is appropriate or necessary.

In support of its Motion for Abatement, Aloha states that the neighborhoods that are subject to deletion from Aloha's service territory in this docket are the same neighborhoods that will benefit the most from the implementation of the processes at issue in Docket No. 010503-WU. Furthermore, the utility states that the petitioners in Docket No. 010503-WU live in one of the neighborhoods that is subject to deletion in this docket. The utility states that "the Commission may in Docket No. 010503-WU accept the cost intensive recommendations of the petitioners, only to shortly thereafter litigate whether those same petitioners should be removed from Aloha's service area."

Aloha states that, due to the way the dockets are interrelated, it is "unreasonable, illogical, and contradictory" to proceed with a hearing in this docket before the issuance of the final order in Docket No. 010503-WU, and that it would make no sense to rule on the issues in this docket without some consideration of the outcome or possible outcome of Docket No. 010503-WU. The utility asserts that the issues in this docket "may affect the number of Aloha's customers, the neighborhoods which Aloha serves, the facilities through which Aloha's customers receive service, and other chemical, hydraulic, engineering, rate, legal, and practical issues related to the issue of removal of hydrogen sulfide." It states that, consequently, if the Commission decides in Docket No. 010503-WU to order Aloha to remove the hydrogen sulfide from its water, "the pendency of the show cause proceeding will render the Commission unable to know the costs of such removal; the size, type, or design of any facilities necessary to accomplish such removal; and the rate impact of any such removal." The utility adds that, with the show cause proceeding pending, it may be impossible for Aloha to obtain financing for facilities to implement the removal of hydrogen sulfide.

Aloha states that abating the proceeding in this docket will allow the Commission to consider its decision in Docket No. 010503-WU when addressing the issues in this docket. The utility further states that abatement of the proceeding in this docket "will also allow Aloha and

the Commission and its staff an opportunity to address the issues, whether by mediation or otherwise, raised by the Show Cause Order with the hope of resolving the issues raised therein and the concerns of some of Aloha's customers without formal litigation."

Commission Staff's Response

Staff takes no position on whether the Motion for Abatement should be granted. Staff, however, offers the Commission some observations that it believes the Commission should consider in making its decision on the motion.

Staff states that abating the proceeding in this docket will provide Aloha with a strong incentive to work diligently to fully implement, on a system-wide basis, the treatment method chosen by the utility to deal with the black water issues before the abatement period ends. Staff further states that if Aloha's treatment method is successful, the proceeding in this docket may be found to be unnecessary and the time and expense of litigating this matter may be avoided.

Staff acknowledges that there is merit to the utility's argument regarding the negative effect the show cause proceeding may have on Aloha's ability to obtain financing for any improvements that the Commission might order in Docket No. 010503-WU. Staff states that, if this proceeding is inactive at the time the utility attempts to secure a loan, Aloha will presumably be in a more favorable posture than if the proceeding is active. Staff further observes, however, that holding this proceeding in abeyance may not make a difference as "the very fact that this proceeding exists, whether currently active or inactive, could cause a higher degree of financial risk for Aloha in its efforts to obtain a loan on favorable terms."

Staff agrees with Aloha that the final order in Docket No. 010503-WU could impact the proceeding in this docket and that abating this proceeding will allow the Commission to consider its decision in Docket No. 010503-WU when rendering its decision in this docket. However, recognizing that Aloha's customers have experienced problems for upwards of ten years, staff states that the customers want resolution of the matter sooner rather than later and abating this proceeding does not achieve this end.

OPC's Response

OPC opposes Aloha's Motion for Abatement. It states that, while the Commission opened a docket to revoke the Aloha's license on January 6, 2005, the subject matter of this proceeding has been pending for almost three years. OPC states that the subject matter of the proceeding in Docket No. 010503-WU has been pending for a number of years as well.

OPC asserts that the proceeding in this docket is based on past actions and inaction by the utility. It states that, although Aloha may raise actions the utility has taken after issuance of the show cause order to demonstrate mitigating circumstances, it is up to the utility to provide this information to the Commission. It contends that the proceeding in Docket No. 010503-WU "should have nothing to do with the Commission going forward to prove up the facts contained in the show cause order." It points out that the Commission is scheduled to vote on the matters in Docket No. 010503-WU on May 31, 2005, and that "Aloha is free to bring up those matters in its defense if it chooses to do so."

OPC states that the Commission is still receiving complaints from Aloha's customers in regard to black water issues. It states that the Commission should not allow these conditions to continue even longer. As for efforts to mediate this matter, OPC asserts that abatement is not necessary for the parties to continue to mediate this dispute.

Advisory Staff's Recommendation

Advisory staff believes that there is merit to Aloha's argument that the Commission's decision in Docket No. 010503-WU may potentially impact this proceeding. It is undisputed that Docket No. 010503-WU involves the same neighborhoods that are subject to potential deletion from Aloha's serve territory in this docket. Holding this docket in abeyance will allow the Commission to consider its final order in Docket No. 010503-WU when rendering its decision in this docket. The final order in Docket No. 010503-WU is scheduled to be issued on June 20, 2005.

Advisory staff empathizes with OPC's frustration that the issues in this docket have been pending for a number of years and that the customers want a quick resolution to this matter. Advisory staff, however, believes that waiting for the final order to be issued in Docket No. 010503-WU may prevent potential confusion in this docket. This may, in turn, enable the proceeding in this docket to progress more quickly once the abeyance period ends.

Advisory staff recommends that Aloha's Motion for Abatement be granted and that Docket No. 050018-WU be held in abeyance until the Commission issues its final order in Docket No. 010503-WU. Within seven days of the issuance date of the final order in Docket No. 010503-WU, the parties should file a report indicating the status of Docket No. 010503-WU, which will be used by the Prehearing Officer to take appropriate action to proceed with the case in Docket No. 050018-WU.

Docket No. 050018-WU

Date: April 21, 2005

Issue 6: Should this docket be closed?

Recommendation: No. This docket should remain open. (Cibula)

Staff Analysis: If the Commission approves staff's recommendation in Issue 5, the proceeding in this docket will only be temporarily suspended. Thus, this docket should remain open.