

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: May 23, 2007

TO: Commission Clerk (Cole)

FROM: Division of Economic Regulation (Fletcher, Rendell)
Office of the General Counsel (Gervasi, Holley)

RE: Docket No. 070146-WS – Emergency complaint of Pasco Health Investors, LLC against Aloha Utilities for apparent violation of Sections 367.081 and 367.101, F.S.

AGENDA: 06/05/07 – Regular Agenda – Proposed Agency Action Except on Issue 2– Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: McMurrian

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\070146.RCM.DOC

Case Background

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

On March 6, 2007, Pasco Health Investors, LLC (Pasco Health) filed an Emergency Complaint against the utility for violation of Sections 367.081 and 367.101, Florida Statutes. Pasco Health is a developer of nursing home facilities in Florida. In the Emergency Complaint, Pasco Health asserts that Aloha's requested amount of impact fees are excessive. On March 16,

2007, the utility filed its answer to the Emergency Complaint. On April 26, 2007, Pasco Health filed a Notice of Voluntary Dismissal of its Emergency Complaint without prejudice.

On April 26, 2007, Aloha filed a Special Service Availability Agreement (Agreement), dated April 23, 2007, between the utility and Pasco Health for the Commission's approval, pursuant to Rule 25-30.550, Florida Administrative Code. Aloha stated that the filing of this Agreement was conditioned upon Pasco Health's withdrawal of its Emergency Complaint and asserted that the Agreement does not constitute a commitment for service until approved by the Commission in its entirety. On May 3, 2007, Aloha and Pasco Health provided the Commission staff with an executed copy of an addendum to their Agreement. The addendum was filed on May 21, 2007.

For administrative efficiency, this recommendation addresses both the Pasco Health's Notice of Withdrawal and the Agreement. The Commission has jurisdiction pursuant to Sections 367.081 and 367.101, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission acknowledge Pasco Health Investors, LLC's Notice of Voluntary Dismissal?

Recommendation: Yes. The Commission should acknowledge Pasco Health Investors, LLC's Notice of Voluntary Dismissal. (Gervasi, Holley)

Staff Analysis: As stated in the Case Background, Pasco Health filed a Notice of Voluntary Dismissal of its Emergency Complaint without prejudice on April 26, 2007.

The law is clear that a plaintiff's right to take a voluntary dismissal is absolute. Fears v. Lunsford, 314 So. 2d 578, 579 (Fla. 1975). It is also established civil law that once a timely voluntary dismissal is taken, the trial court loses its jurisdiction to act and cannot revive the original action for any reason. Randle-Eastern Ambulance Service, Inc. v. Vasta, 360 So. 2d 68, 69 (Fla. 1978).¹

Staff recommends that the Commission find Pasco Health's Notice of Voluntary Dismissal of its Emergency Complaint divests the Commission of further jurisdiction over the complaint. The only additional action the Commission should take is to acknowledge Pasco Health's Notice of Voluntary Dismissal.

¹ The Commission has previously cited to these cases in acknowledging notices of voluntary dismissal. See, e.g., Order No. PSC-04-0070-FOF-WS, issued January 26, 2004, in Docket No. 020554-WS, In Re: Petition by Florida Water Services Corporation (FWSC) for determination of exclusive jurisdiction over FWSC's water and wastewater land and facilities in Hernando County, and application for certificate of authorization for existing utility currently charging for service (in acknowledging a notice of dismissal of a petition and withdrawal of an application for original certificates for an existing utility currently charging for service).

Issue 2: Should the Commission approve the Special Service Availability Agreement between Aloha Utilities, Inc. and Pasco Health Investors, LLC?

Recommendation: Yes, the Commission should approve the Special Service Availability Agreement between Aloha Utilities, Inc. and Pasco Health Investors, LLC. The Special Service Availability Agreement should become effective upon the date of the Commission's vote. (Fletcher, Gervasi, Rendell)

Staff Analysis: As stated in the Case Background, Aloha filed a Special Service Availability Agreement (Agreement), dated April 23, 2007, between the utility and Pasco Health for the Commission's approval, pursuant to Rule 25-30.550, Florida Administrative Code.

Rule 25-30.550 (2) and (3), Florida Administrative Code, states:

(2) Each special service availability contract shall be approved by the Commission prior to becoming effective.

(3) Each special service availability contract and developer's agreement shall be accompanied by a statement from the utility affirming the current treatment plant connected load, the current treatment plant capacity, and the amount of capacity reserved under the agreement or contract. In lieu of this information, the utility may file a copy of its Department of Environmental Protection permit application.

Upon staff's review, the Agreement only differs in the amount of demand from the utility's current tariffs. Pursuant to Aloha's Tariff Sheet No. 26.26, the daily-rated gallonage for a nursing home is estimated to be 150 gallons per day (gpd) per 100 square foot. This results in an estimated demand for Pasco Health of 81,776 gpd. According to the Agreement, the utility and Pasco Health have agreed to a water demand of 14,700 gpd. The 14,700 gpd demand is based upon numerous facts and circumstances for Pasco Health including: (1) professional engineering estimates; (2) prior experience of both Aloha and Pasco Health of similar-type customers; and (3) the flow estimates in Pasco Health's applications to the Florida Department of Environmental Protection (DEP).

Aloha's Tariff Sheet No. 26.26 reflects the daily-rated gallonage for various occupancies. These daily-rated gallonages were developed using available literature and information including publications from the Florida Department of Health (DOH), the DEP, and several treatment plant manufacturers. Those daily-rated gallonages should be used for general use purposes because those gallonages are estimated flows.

Staff believes that historical data for similar-type customers should be used whenever possible. Similarly, on this point, Rule 64E-6.008(1), Florida Administrative Code, states that the minimum design flows for systems serving any structure, building or group of buildings shall be based on the estimated daily sewage flow as determined from Table I. However, Rule 64E-6.008(1)(a), Florida Administrative Code, states:

The DOH county health department shall accept, for other than residences and food operations, metered water use data in lieu of the estimated sewage flows set

forth in Table I. For metered flow consideration, the applicant shall provide authenticated monthly water use data documenting water consumption for the most recent 12 month period for at least six similar establishments. Similar establishments are those like size operations engaged in the same type of business or service, which are located in the same type of geographic environment, and which have approximately the same operating hours. Metered flow values will not be considered to be a reliable indicator of typical water use where one or more of the establishments utilized in the sample has exceeded the monthly flow average for all six establishments by more than 25 percent or where the different establishments demonstrate wide variations in monthly flow totals. When metered flow data is accepted in lieu of estimated flows found in Table I, the highest flow which occurred in any month for any of the six similar establishments shall be used for system sizing purposes. (Emphasis added)

Thus, staff agrees with the 14,700 gpd demand reached by the utility and Pasco Health.

Moreover, the Commission approved a stipulation² between Aloha and the Office of Public Counsel (OPC) on February 9, 2007, which proposed that Aloha's water service availability capacity charges for its Seven Springs system should be increased to \$3,000 per ERC. Using the proposed \$3,000 per ERC charge and a 300 gpd demand per ERC, the non-residential water service availability capacity charge was increased to \$10.00 per gallon. When applying the currently authorized charge of \$10.00 per gallon to the agreed upon demand of 14,700 gpd, the water impact fees should be \$147,000, rather than the \$48,995 contained in the Agreement dated April 23, 2007.

Before Pasco Health can receive water and wastewater service, it must complete a water main extension and collection system. According to Pasco Health's applications to the DEP, the water main extension and collection system will take approximately six months to complete. Pursuant to H. Miller & Sons v. Hawkins, 373 So. 2d 913 (Fla. 1979), future customers must pay the applicable service availability charges at the time of connection for service.

On May 3, 2007, Aloha and Pasco Health provided staff with an executed copy of an addendum to their Agreement. The addendum recognizes the case law cited above and states that the total water service availability capacity charges will be \$147,000 instead of the \$48,995 outlined in Paragraph 5 of the Agreement.

Based on the above, staff recommends that the Commission should approve the Special Service Availability Agreement between Aloha Utilities, Inc. and Pasco Health Investors, LLC. The Special Service Availability Agreement should become effective upon the date of the Commission's vote.

² See Order No. PSC-07-0281-S-WU, issued April 2, 2007, in Docket No. 060122-WU, In re: Joint petition for approval of stipulation on procedure by Aloha Utilities, Inc. and Office of Public Counsel.

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Issue 3: Should this docket be closed?

Recommendation: Yes. If no timely protest is filed, the docket should be closed upon the issuance of a Consummating Order because no further action is required. If a protest is filed within 21 days of the issuance of the Commission's Order regarding the Agreement, another docket should be opened to address that protest. (Fletcher, Gervasi, Holley)

Staff Analysis: As stated in the Case Background, for administrative efficiency, this recommendation addresses both the Pasco Health's Notice of Withdrawal and the Agreement. If no timely protest is filed, this docket should be closed upon the issuance of a Consummating Order because no further action is required. If a protest is filed within 21 days of the issuance of the Commission's Order regarding the Agreement, another docket should be opened to address that protest.