

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-**

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**DATE:** April 9, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Economic Regulation (Fletcher, Bulecza-Banks, Clapp, Daniel, Marsh)  
Office of the General Counsel (Hartman, Jaeger, Cowdery)

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

Docket No. 060606-WS – Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

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

Docket No. 090120-WS – Joint notice by Aloha Utilities, Inc. and the Florida Governmental Utility Authority of transfer of water and wastewater assets to the Florida Governmental Utility Authority, in Pasco County, and cancellation of Certificate Nos. 136-W and 97-S.

**AGENDA:** 04/21/09 – Regular Agenda – Proposed Agency Action for Issues 1 and 6 – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar (010503-WU)  
Argenziano (060606-WS)  
Skop (060122-WU)  
Administrative (090120-WS)

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\010503.RCM.DOC

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### Case Background

Aloha Utilities, Inc. (Aloha or Utility) is a Class A water and wastewater utility located in Pasco County. Aloha consists of two distinct service areas: Aloha Gardens and Seven Springs. The Utility provides water and wastewater service to approximately 15,365 water and 16,688 wastewater equivalent residential connections (ERC). Aloha's 2007 annual report indicates that the Utility had gross water revenue of \$3,352,825 and net operating loss of \$283,036, and gross wastewater revenue of \$6,756,597 and net operating revenue of \$928,212. The Utility's water and wastewater systems were originally issued Certificate Nos. 136-W and 97-S in 1973.<sup>1</sup> Aloha's certificates were amended five times.<sup>2</sup>

On August 10, 2001, Aloha completed its filing for a rate increase in Docket No. 010503-WU. By Order No. PSC-01-2199-FOF-WU (Interim Rate Order), issued November 13, 2001,<sup>3</sup> the Commission granted Aloha a 15.95 percent interim rate increase subject to refund with interest. These interim rates were placed in an escrow account. By Order No. PSC-02-0593-FOF-WU (First Final Order),<sup>4</sup> the Commission found no increase was warranted, and ordered that 4.87% of the interim rates be refunded with interest. Aloha appealed this Order, and a stay was granted. Based on this appeal and stay, the final rates approved by the Commission were not implemented until August 1, 2003, some 15 months, after the final rates were initially approved.

Based upon the First DCA's affirmance of the First Final Order, Aloha refunded 4.87 percent of all interim rates collected. Because Aloha refunded \$153,510, the Commission, through Order No. PSC-03-1410-FOF-WU, issued December 5, 2003, released that amount from the escrow account. However, the Commission determined that Aloha should not be allowed to benefit from its appeal and the stay of the final rates, which was a 15-month period. For this 15-month appeal period, May 1, 2002 through July, 2003, the Commission found that the full 15.95 percent of interim rates that were collected should be refunded. Because Aloha had already refunded 4.87 percent, the Commission determined that an additional 11.08 percent<sup>5</sup> should be refunded for the appeals period. Aloha appealed that decision.

In February 2005, the Commission initiated deletion proceedings in Docket No. 050018-WU to delete a portion of the Seven Springs service area based on poor customer relations and a

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<sup>1</sup> See Order No. 5741, issued May 4, 1973, in Docket Nos. C-73054-W and C-73055-S, In re: Application of Aloha Utilities, Inc., for certificates to operate an existing water and sewer system in Pasco County.

<sup>2</sup> See Order No. 6182, issued June 21, 1974, in Docket No. 74316-WS, In re: Joint Application of Tahitian Utilities, Inc., and Aloha Utilities, Inc., for transfer of Certificates Nos. 135-W and 96-S from the former to the latter.; Order No. 14100, issued February 15, 1985, in Docket No. 830554-WS, In re: Application of Aloha Utilities, Inc. to extend water and sewer service and petition for revocation of certificated service area and declaratory statement.; Order No. 15373, issued November 19, 1985, in Docket No. 830554-WS, In re: Application of Aloha Utilities, Inc., to extend water and sewer service and Petition for Revocation of Certificated area., Order No. PSC-99-1911-FOF-WS, issued September 27, 1999, in Docket No. 990940-WS, In re: Application for amendment of Certificates Nos. 136-W and 97-S to add and delete territory in Pasco County by Aloha Utilities, Inc., and Order No. PSC-00-0581-SOS-WS, issued March 22, 2000, in Docket No. 991699-WS, In re: Application for amendment of Certificates 136-W and 97-S to add territory in Pasco County by Aloha Utilities, Inc.

<sup>3</sup> Docket No. 010503-WU, In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

<sup>4</sup> Issued April 30, 2002, in Docket No. 010503-WU

<sup>5</sup> See Order No. PSC-04-1050-FOF-WU (Second Final Order), issued October 26, 2004.

Date: April 9, 2009

number of problems that ultimately stem from the presence of hydrogen sulfide in the water. On March 9, 2006, after several months of extensive negotiations in which Commission staff participated, a Settlement Agreement was executed by Aloha, the Office of Public Counsel (OPC), and individual customer intervenors. The Settlement Agreement resolved all outstanding dockets and court proceedings between Aloha and the Commission, and was approved by Order No. PSC-06-0270-AS-WU.<sup>6</sup> A key element of the Settlement Agreement is the agreement by the parties that it is prudent for Aloha to implement a new water treatment method – anion exchange – to address the current problems that stem from the presence of hydrogen sulfide in the water.

Another major component of the Settlement Agreement was that after Aloha dismissed its appeal of Commission Order No. PSC-04-1050-FOF-WU,<sup>7</sup> which directed the Utility to make refunds to customers, the funds would remain in escrow and be used to help pay for the anion exchange project. Pursuant to the order approving the Settlement Agreement, “The amount that would ordinarily be refunded (approximately \$290,000) will be reduced by the documented cost (up to \$45,000) of preparing the Conceptual Cost Estimate. The balance will remain in escrow, earning interest, until Phase III [of the anion exchange project] rates take effect. At that time, the funds in escrow, including accrued interest, will be released to Aloha and Aloha will record a corresponding amount as a contribution-in-aid-of-construction.”

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

There are currently two dockets open to address issues associated with the purchase of bulk water from Pasco County and associated interconnection, and to track Aloha’s progress to design and install the plant necessary to implement anion exchange: Docket Nos. 060606-WU, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU (the anion exchange docket) and 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc. (the limited proceeding docket).<sup>8</sup>

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<sup>6</sup> Issued April 5, 2006, in Docket No. 050018-WU, In Re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; Docket No. 050183-WU, In Re: Request by homeowners for the Commission to initiate deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; and Docket No. 010503-WU, In Re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

<sup>7</sup> Order No. PSC-04-1050-FOF-WU, Final Order Requiring Additional Refunds, was issued October 26, 2004, in Docket 010503-WU.

<sup>8</sup> In the limited proceeding docket, the Commission issued proposed agency action (PAA) Order No. PSC-08-0137-PAA-WU, on March 3, 2008. In this PAA order, the Commission voted to allow the Utility, after it has completed the construction of a fully operating interconnection with Pasco County, to recover phase one costs associated with the interconnection and with the Utility’s purchase of bulk water from Pasco County. On March 24, 2008, Aloha, OPC, and certain members of the Better Water Now Committee petitioned for a hearing concerning this PAA order.

Date: April 9, 2009

On March 14, 2008, the Florida Governmental Utility Authority (FGUA), which is not a party to either Aloha docket, filed a “Suggestion of Abatement.”<sup>9</sup> In its filing, FGUA suggested “an abatement of the anion exchange project currently being implemented by Aloha Utilities pursuant to Commission Order . . . .” while it negotiated to purchase the Utility. FGUA indicated that if it acquired the utility, FGUA would not implement anion exchange because its preliminary analysis showed it could purchase enough bulk water from Pasco County so that “an anion exchange system may not be required.” FGUA’s suggestion was corrected by letter dated March 18, 2008, to clarify that the FGUA suggested an abatement period of 120 days.

The Commission approved a 120-day abatement, and also directed that Aloha should not be penalized for the 120-day abatement period for purposes of implementation of the Settlement Agreement approved by Order No. PSC-06-0270-AS-WU.<sup>10</sup> In addition, the Commission ordered Aloha to show cause, in writing, within 21 days, why it should not be fined for its apparent violation of Section 367.081(1), Florida Statutes (F.S.), for knowingly failing to comply with Order No. PSC-06-0270-AS-WU, by failing to report delays of the anion exchange treatment facilities in its quarterly report.<sup>11</sup>

Following the FGUA’s second request for an abatement, the Commission issued Order No. PSC-08-0665-PCO-WS, Order Granting Abatement, on October 8, 2008.<sup>12</sup> The Order established a 45-day abatement period for all actions associated with implementing anion exchange and all actions necessary for Aloha to interconnect with Pasco County, except for the litigation to resolve the protests of Order No. PSC-08-0137-PAA-WU, and the show cause proceeding initiated by Order No. PSC-08-0266-SC-WS. This second abatement expired November 24, 2008.

Also, Aloha and OPC asked that the litigation resulting from the protest of Order No. PSC-08-0137-PAA-WU be abated in concurrence with Order No. PSC-08-0665-PCO-WS. The Commission granted the request pursuant to Order No. PSC-08-0694-PCO-WU, issued October 20, 2008, in Docket No. 060122-WU.

On November 6, 2008, Aloha and OPC filed a second Joint Request for Abatement to extend the abatement of all activities in the two dockets, including the abatement of the show cause litigation, until January 9, 2009. By Order PSC-08-0832-PCO-WS, issued December 23,

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<sup>9</sup> A “suggestion” is not a pleading contemplated by the Florida Administrative Procedures Act, the Uniform Rules, or any Commission rule or statute.

<sup>10</sup> See Order No. PSC-08-0267-PCO-WS, issued April 30, 2008, in Docket No. 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc., and In re: Docket No. 060606-WS – Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

<sup>11</sup> See Order No. PSC-08-0266-SC-WS, issued April 30, 2008, in Docket No. 060606-WS, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

<sup>12</sup> See Order No. PSC-08-0665-PCO-WS, issued in Docket No. 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc., and in Docket No. 060606-WS, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

Date: April 9, 2009

2008, the Commission approved the second Joint Request for Abatement. The abatement expired January 9, 2009.

On January 9, 2009, Aloha filed a Request for Abatement, requesting that all activities in the two dockets be abated until January 30, 2009, and that Aloha be directed to report to the Commission and its staff, no later than January 30, 2009, the posture and status of its sale to FGUA. On January 13, 2009, OPC filed a response to the Utility's Request for Abatement. OPC also sought an extension of the abatement of all activities in the two dockets, but asked that the abatement term extend until March 2, 2009. By Order PSC-09-0094-PCO-WS, issued February 13, 2009, the Commission granted an abatement of both dockets until March 2, 2009, and directed Aloha to file a report in Docket Nos. 060122-WU and 060606-WS upon the closing of the sale of the Utility or March 2, 2009, whichever came first. The report was to address the status of the acquisition of the utility by FGUA.

By letter dated January 26, 2009, Aloha requested the release of the escrowed funds being held pursuant to Order Nos. PSC-01-2199-FOF-WU and PSC-06-0270-AS-WU. By letter dated January 27, 2009, Commission staff advised Aloha that the Order contemplated that the release of the escrowed funds could occur only after Phase III rates took effect, and that action by the full Commission would be required to release the escrowed funds prior to the implementation of Phase III rates. Staff indicated that after the sale was completed, a recommendation would be brought to the Commission regarding the appropriate disposition of the escrowed funds.

On February 19, 2009, Aloha filed its Motion for Contingent Release of Escrow Monies, and requested the Commission to release the escrowed funds upon receipt of sufficient documentation that the pending acquisition of Aloha's assets was closed. On February 26, 2009, OPC filed a response objecting to the release of monies to Aloha. OPC stated that the monies should be refunded to customers and that unclaimed refunds should be given to FGUA to provide a pro rata credit to all existing water accounts that were in existence as of July 30, 2003. Aloha filed a reply to the response. OPC subsequently filed a motion to strike the reply. On March 11, 2009, Aloha filed a withdrawal of its request for release of escrow monies.

On March 4, 2009, Aloha sent a letter to staff advising that the acquisition of Aloha's assets by FGUA was closed on February 27, 2009. On March 11, 2009, a joint application was filed by Aloha and the FGUA for the transfer of utility assets to FGUA and cancellation of Certificate Nos. 136-W and 97-S in Docket No. 090120-WS.

On March 13, 2009, Aloha sent a letter to staff and indicated that the letter was a request and demand that the Commission release the escrowed monies to Aloha. The Utility asked to be contacted if staff did not intend to release the monies by the week of March 16. Staff let Aloha know that a decision would not be made by that time.

On March 19, 2009, certain Aloha customers filed Customer Intervenors' and Petitioners' Motion to Establish a Rate Stabilization Escrow Account asking the Commission issue an order requiring the transfer of funds to FGUA for the purpose of establishing a rate stabilization escrow account for the benefit of the customers. Aloha responded on March 26, 2009, and stated that the Commission lacked the jurisdiction over the monies and to entertain the relief requested.

Date: April 9, 2009

Although Aloha initially requested a hearing on the show cause matter, on March 25, 2009, the Utility remitted a check for \$15,000 to satisfy the requirements of the show cause order in Docket No. 060606-WS.

On March 30, 2009, Aloha served the Commission with a Complaint for Declaratory Relief and Injunctive Relief.<sup>13</sup> The Complaint, which was filed in Pasco County, indicates that the monies at issue are now in a separate, segregated account in Pasco County. Aloha asked the court to order it to pay the monies into the court registry until such time as the court enter a final judgment. Aloha also requests the court conduct a non-jury trial to determine the rights and responsibilities of Aloha and the Commission; and declare the ownership of the monies here at issue. Aloha has also asked for an order enjoining the Commission from “further action effecting, addressing, or adjudicating the ownership of status of the monies here at issue” until the court enters a final judgment.

Moreover, it is staff’s understanding that on April 3, 2009, the monies (approximately \$373,803) have been wired back to the escrow account initially established to secure the interim rates collected from the customers.

The Commission filed its Motion to Dismiss for Lack of Venue and its responses in opposition to Aloha’s other two motions. On April 6, 2009, Aloha filed a withdrawal of its motion that the court to order it to pay the monies into the court registry until such time as the court enter a final judgment.

This recommendation addresses the Commission’s jurisdiction over the escrow account funds, the appropriate disposition of those escrowed funds, the acknowledgement of the sale of Aloha’s assets to FGUA, and the disposition of all outstanding Aloha dockets. The Commission has jurisdiction pursuant to Chapters 120 and 367, F.S.

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<sup>13</sup> Circuit Court of the Sixth Judicial Circuit – Case No. 51-2009-CA-3011-WS, Division G.

### Discussion of Issues

**Issue 1:** Does the Commission have continuing jurisdiction over the interim revenues collected subject to refund and originally on deposit in an escrow account pursuant to Order Nos. PSC-01-2199-FOF-WU, issued November 13, 2001, PSC-06-0270-AS-WU, issued April 5, 2006, in Docket No. 010503-WU, and, if so, what is the appropriate disposition of the escrowed funds which are currently being held pursuant to Order No. PSC-06-0270-AS-WU?

**Recommendation:** Yes, because these funds were deposited and came under the control of the Commission prior to the sale of Aloha Utilities, Inc., to the Florida Governmental Utility Authority, they remain under Commission jurisdiction. Based on the principles of administrative finality, the Commission should order the release of \$74,239 to the Utility. In order to mitigate any future rate increase by the FGUA for the benefit of the customers, the Customer Intervenors' and Petitioners' Motion to Establish a Rate Stabilization Escrow Account should be approved. The amount to be transferred to the Rate Stabilization Escrow Account should be the current outstanding balance in the escrow account less the \$74,239 associated with the rate case period. In addition, the Commission should order Aloha to work with staff to transfer the interim rate funds from the Regions Bank escrow account to an independent financial institution, consistent with the terms and conditions contemplated by Order No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. If an independent alternative escrow agent is not selected and the funds not transferred to a new escrow account by April 28, 2009, the Commission should authorize staff to take such steps as are necessary to secure a new escrow agent to maintain the interim funds pending resolution of this matter, including, if necessary, enforcing the Commission's order in a court of competent jurisdiction. (Fletcher, Jaeger)

**Staff Analysis:** As set forth below, staff addresses the Commission's jurisdiction over the escrow funds and their appropriate disposition.

#### Jurisdiction Over Escrow Account Funds

Pursuant to Order No. PSC-01-2199-FOF-WU (Interim Order), issued November 13, 2001, in Docket No. 010503-WU, Aloha was authorized to collect interim rates subject to refund with interest, pending a determination of whether a refund would be required. Pursuant to that Order, Aloha was granted a 15.95 percent interim increase, and required to either provide a bond or letter of credit, or deposit the full amount of the 15.95 percent interim increase in an escrow account. Aloha chose to create an escrow account, and began collecting the interim rates in January 2002, and depositing 15.95 percent of monthly revenues in the account. As required by Order No. PSC-01-2199-FOF-WU, the escrow account specified "that no withdrawals of funds shall occur without the prior approval of the Commission through the director of the Division of the Commission Clerk . . . ."

Final Rates were set by Order No. PSC-02-0593-FOF-WU (First Final Order), issued April 30, 2002. In the First Final Order, the Commission determined that no rate increase whatsoever was warranted, but that only 4.87 percent of the Interim Rates should be refunded.<sup>14</sup>

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<sup>14</sup> Because the interim test year was different from the test year for final rates, and there were some expenses for the interim test year that were not in the test year for final rates, the Commission determined that the full 15.95 percent increase would not have to be refunded for the period the interim rates were in effect.

Date: April 9, 2009

Aloha appealed that Order, and after being granted a stay of that Order, continued to collect the full 15.95 percent interim rate increase.

The First Final Order was affirmed by the First District Court of Appeals on May 6, 2003.<sup>15</sup> Aloha continued to collect the full 15.95 percent increase through July 31, 2003. Aloha refunded 4.87 percent of interim revenues plus interest, totaling \$153,510, for the period January 2002 through July 2003.<sup>16</sup> However, a dispute arose over what was the appropriate amount of the refund from May 1, 2002, through July 31, 2003.

By Proposed Agency Action Order No. PSC-04-0122-PAA-WU (PAA Refund Order), issued February 5, 2004, the Commission determined that for the period January 1, 2002, through April 30, 2002, the appropriate amount of the refund was 4.87 percent as stated in the First Final Order. However, for the appeal period, May 1, 2002 through July 31, 2003, the Commission determined that the full 15.95 percent should be refunded, including the 4.87 percent. Aloha protested this PAA Order.

Upon review, the Commission determined that there were no disputed issues of material fact, and the protest could be handled without a hearing. After considering the briefs, the Commission issued Order No. PSC-04-1050-FOF-WU (Second Final Order), on October 26, 2004, in which it reaffirmed that the full 15.95 percent collected for the period May 1, 2002, through July 31, 2003 (the appeal period), should be refunded with interest. Aloha appealed that Order.

During the pendency of that appeal, the Commission accepted a comprehensive settlement (Settlement Agreement) negotiated by staff, and signed by Aloha, OPC, individual customer intervenors Forehand, Gaul, and Mitchell, and non-intervenor customers who were members of the Committee for Better Water Now. Pursuant to the Settlement Agreement, the escrowed funds were to be released only upon the implementation of Phase III rates with such amount, being recorded by Aloha as a contribution-in-aid-of construction.

The Settlement Agreement was approved by Order No. PSC-06-0270-AS-WU, issued on April 5, 2006.<sup>17</sup>

However, before Phase I rates could be implemented, the Utility was sold to the FGUA, and the closing took place on February 27, 2009. With the occurrence of the sale, Aloha has not and cannot comply with the terms of the Settlement Agreement. Aloha argues that a sale to a governmental authority must be approved as a matter of right pursuant to Section 367.071(4)(a),

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<sup>15</sup> See Aloha Utilities, Inc. v. Florida Public Service Commission, 848 So. 2d 307 (Fla. 1st DCA 2003).

<sup>16</sup> Because Aloha had made these refunds without using the funds from the escrow account, by Order No. PSC-03-1410-FOF-WU, the Commission released \$153,510 from the escrow account to Aloha.

<sup>17</sup> The Order approving the Settlement Agreement was issued in three dockets: Docket No. 050018-WU, In re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; Docket No. 050183-WU, In re: Request by homeowners for the Commission to initiate deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; and Docket No. 010503-WU, In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.



Date: April 9, 2009

F.S. Therefore, Aloha argues that the Commission has lost jurisdiction of the escrow agreement and that the only remaining action for the Commission to take is to release the escrow funds to Aloha.

OPC argues that because the terms of the Settlement Agreement have not been satisfied, the funds should not be released to Aloha. Moreover, because the funds were derived from the 15.95 percent interim rate increase which the Commission found to be unwarranted, OPC argues that the Commission should grant the customers' Motion to Establish a Rate Stabilization Escrow Account. In that Motion, the customers request the Commission to transfer control of the refund escrow account to the FGUA, to be held by it or its successor in trust for the benefit of the customers to offset a future rate increase.

Staff acknowledges that a transfer to a governmental authority must be approved as a matter of right pursuant to Section 367.071(4)(a), F.S. However, that does not mean that the Commission necessarily loses control over the escrow account. Section 367.071(2), F.S., concerning sales or transfers of utilities, states: "The transferor remains liable for any outstanding regulatory assessment fees, fines, or refunds of the utility."

Also, staff believes that the situation in this case is analogous to Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081 (Fla. 1st DCA 1995)(Charlotte County); Order No. PSC-01-0945-FOF-SU, issued April 16, 2001, in Docket No. 950387-SU, In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company – Lee County Division (Florida Cities Order); and Order No. 18714, issued January 21, 1988, in Docket 861627-WS, In re: Application for approval of the purchase of Du-Lay Company, Inc. by the City of Jacksonville in Duval County, Florida (Du-Lay Order).<sup>18</sup> In the Charlotte County case, Charlotte County, a bulk-water purchaser from General Development Utilities, Inc. (GDU), initially filed its complaint against GDU in Circuit Court after Charlotte County acquired GDU's North Port facility through eminent domain and the sale had been acknowledged by the Commission. The complaint alleged that Charlotte County was seeking damages for water service overcharges that occurred over an 18-month period when GDU was subject to the regulatory jurisdiction of the Commission. GDU filed a Motion to Abate, and the Circuit Court granted the Motion to Abate to allow the Commission to determine whether it had jurisdiction of the cause. The Commission determined that it did have jurisdiction, and Charlotte County appealed. The First District Court of Appeals affirmed the Commission's decision.

In the Florida Cities Order, after remand and a second hearing, the Commission determined that the rates implemented by Florida Cities, subject to refund, were higher than the final approved rates. By its Final Order on Remand, issued on April 8, 1999, the Commission ordered Florida Cities to refund with interest the difference between the implemented rates and the final rates. One week later, Florida Cities filed its application to transfer all of its facilities to FGUA, which transfer was finalized on April 15, 1999. In the Order approving the transfer issued on December 7, 2000, the Commission noted that the wastewater rate case was still open

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<sup>18</sup> See also, Order No. PSC-05-0953-FOF-WU, issued October 6, 2005, in Docket No. 050314-WU, In re: Application for transfer of facilities operated under Certificate 434-W in Highlands County from Sebring Ridge Utilities, Inc. to City of Avon Park. In this Order, the Commission approved the transfer as a matter of right, but noted that it would continue to have jurisdiction over a billing dispute which arose before the transfer and had not yet been resolved.

Date: April 9, 2009

and that Florida Cities remained responsible for the completion of the refund. Moreover, the Commission noted:

[B]oth the Final Order on Remand and Rule 25-30.360(8), Florida Administrative Code, state that any unclaimed refunds are to be treated as CIAC. Nevertheless, circumstances have changed since the Final Order on remand. When we issued that Order, the utility was still in existence and providing service to customers. Therefore crediting the unclaimed refunds to the CIAC account would have reduced the utility rate base and benefitted the general body of rate payers. We find that both the Final Order on Remand and the Rule contemplate that the utility would be in existence after the unclaimed refunds have been addressed. We further find that the rule was drafted so that the customers of the utility would receive the maximum benefit of any refunds to include the unclaimed refunds. Moreover, Section 367.081(6), Florida Statutes, provides that we “shall provide by rule for the disposition of any funds not refunded, but in no event shall such funds accrue to the benefit of the utility.” However, with the subsequent sale of the utility, and under the terms of the sale agreement, any funds deposited in the CIAC account would go directly to the shareholders and thus ensure to the benefit of the utility.

See Order No. PSC-01-0945-FOF-SU, p. 5.

Finally, in the Du-Lay Order, the Commission noted that the utility had been acquired by the City of Jacksonville on December 29, 1986, but at that time a docket was pending on whether certain customers were entitled to a refund for service rendered from September 23, 1985, through December 31, 1986. The Commission concluded that acknowledgement of the sale of the utility in no way relieved the utility of its responsibilities to perform the refund determined appropriate for that period.

Staff recommends that the Commission find that, because these funds that were collected from the customers were deposited in the escrow account and came under the control of the Commission prior to the sale of Aloha to the FGUA, they remain under the Commission’s jurisdiction. The Commission’s appropriate action in each of the remaining open dockets -- Dockets Nos. 060122-WU, 060606-WS, and 090120-WS -- will be addressed separately in the remaining issues.

Disposition of Escrow Account Funds

Pursuant to the Interim Order, Aloha was authorized to collect interim rates subject to refund with interest, pending a determination of whether a refund would be required. In accordance with the Interim Order, Aloha chose to create an escrow account, and began collecting the interim rates in January 2002, and depositing 15.95 percent of monthly revenues in the account.

Section 367.082, F.S., governs the setting of interim rates for water and wastewater utilities. According to paragraph (2)(a), interim rates must be designed to bring the utility up to the minimum of its last authorized rate of return. Section 367.082(4), F.S., sets forth guidelines for the determination of any interim refund, which include the following:

Any refund ordered by the commission shall be calculated to reduce the rate of return of the utility or regulated company during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis . . . .

In the First Final Order, the Commission required Aloha to make a 4.87 percent refund of the interim rates it had collected. In doing so, the Commission stated the following:

According to Section 367.082(4), Florida Statutes, any refund must be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect should be removed.

In this proceeding, the test period for establishment of interim rates was the twelve months ended June 30, 2001. The test year for final rates purposes was the projected year ended December 31, 2001. The approved interim rates did not include any provisions or consideration of pro forma adjustments in operating expenses or plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings. Included in the interim test year were three months of expenses for purchased water from Pasco County.

To establish the proper refund amount, we calculated a revised interim revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded, because it was not an actual expense during the interim collection period. Aloha did not purchase water from Pasco County during the interim collection period. The interim collection period is from November 13, 2001 to the date that Aloha implements the final rates approved.

Using the principles discussed above, we calculated the interim revenue requirement from rates for the interim collection period to be \$1,914,375. This revenue level is less than the interim revenue of \$2,009,292, which was granted in Order No. PSC-01-2199-FOF-WU. This results in a 4.87% refund of interim rates, after miscellaneous revenues have been removed.

Date: April 9, 2009

First Final Order, pps. 90-91. Staff notes that neither the above methodology nor the 4.87 percent refund was raised as an issue on appeal.

Aloha collected interim rates for 19 months from January 2002 through July 2003. The First Final Order established the methodology for the interim refund for the first four months, when the Utility collected interim rates while the rate case was pending before the Commission (January 2002 - April 2002)(the rate case period). However, at that time, the Commission did not address the refund amount for the interim rates collected while the appeal was pending (May 2002 - July 2003)(the appeal period).

#### Rate Case Period Refunds

Because Aloha had made these refunds without using the funds from the escrow account, by Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, the Commission released \$153,510 from the escrow account to Aloha. The \$153,510 amount consisted of \$31,527 for the rate case period and \$121,983 for the appeal period.

The Commission first addressed the issue of additional refunds in the PAA Refund Order, issued February 5, 2004. In that PAA Refund Order, the Commission found that, because the First Final Order addressed the interim refund for the rate case period, no further refunds would be required for that period. No party challenged the interim refund provisions in the First Final Order which was affirmed on appeal. Under the doctrine of administrative finality, the Commission declined in the PAA Refund Order to revisit the refund for the rate case period. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966). Accordingly, the Commission found that Aloha would not be required to make any further refunds for the rate case period beyond the \$31,527 Aloha had already refunded to its customers. Further, the Commission ordered that the excess \$74,239 associated with the rate case period in the escrow account may be released to Aloha.

The PAA Refund Order was protested, but for refunds for the appeals period. Pursuant to Section 120.80(13), F.S., “[i]ssues in the proposed action which are not in dispute are deemed stipulated.” There was no partial consummating order ever issued regarding the Commission’s PAA decision to release the \$74,239 amount to Aloha. However, in accordance with the Second Final Order, p. 17, the Commission found that, based on the principles of administrative finality, the disposition of interim rates collected during the rate case period is now closed. Staff notes that the Utility has never requested the specific release of the \$74,239 amount. Based on the above, staff recommends that the \$74,239 amount should be released to the Utility consistent with the Commission’s ruling in the PAA Refund Order and the Second Final Order.

#### Appeal Period Refunds

Pursuant to the PAA Refund Order, the Commission proposed to require Aloha to make additional refunds of approximately \$278,000 for the appeal period. This amount represented the additional revenues from the interim rates collected during the appeal period, less the 4.87 percent already refunded by the Utility. This decision never became final because, on February 26, 2004, Aloha protested the PAA Refund Order, requested a formal evidentiary proceeding, and requested that the petition be transferred to the Division of Administrative Hearings (DOAH). The Utility raised five issues concerning the Commission’s decision to require

Date: April 9, 2009

additional refunds. Because there appeared to be no disputed issues of material fact, the Commission denied Aloha's request for a Section 120.57(1), F.S., formal evidentiary proceeding in Order No. PSC-04-0614-PCO-WU, issued June 21, 2004. The Commission instead directed the matter be set for an informal proceeding pursuant to Section 120.57(2), F.S., and required briefs to be filed by July 1, 2004, on the issues raised by Aloha. As a result, the Utility's request for the case to be transferred to DOAH became moot. Aloha and OPC filed briefs on July 1, 2004.

Pursuant to the Second Final Order, pp. 17-18, the Commission concluded the following:

The intent behind our Final Order is clear. We did not intend for the utility to collect any increased revenues when we issued our Final Order on April 30, 2002. Aloha's request for a rate increase was denied because the utility failed to meet its ultimate burden of proof. See Final Order, pps. 52, 68, 70, 72. Moreover, we found that Aloha should receive neither a rate increase nor a decrease. See Final Order, pages 80 and 85. Based on the interim statute, we determined that Aloha could keep 11.08% of the 15.95% interim increase for the rate case period. When Aloha appealed the Final Order and we ruled on the utility's request for a stay, we noted that the Final Order set rates such that Aloha would no longer collect the interim increase allowed by Order No. PSC-01-2199-FOF-WU. However, with the stay, Aloha continued to collect the full 15.95% interim increase for the 15-month appeal period. Subsequent to the First DCA's mandate, Aloha refunded 4.87% of the interim increase collected during the appeal period. The ultimate question that must be answered here is: "Whether an additional refund, if any, is required for the period May 1, 2002, through July 31, 2003?"

For the reasons discussed above, we find that Aloha shall refund to its customers the entire interim increase of 15.95% collected during the appeal period, including interest. In the Final Order, when we addressed whether interim rates should be refunded, we addressed only the refund for the rate case period. Thus, based on the principles of administrative finality, the disposition of interim rates collected during the rate case period is now closed. That is not the case for any remaining refunds for the interim rates collected during the appeal period. When reaching a decision on whether to require additional refunds for this period, we must keep in mind the principles of fairness set out in GTE. There the Supreme Court made it clear that it views "ratemaking as a matter of fairness." 668 So. 3d at 973. Our decision herein is based on the principle of fairness that Aloha's customers should be refunded the interim increase collected during the appeal period. We did not intend for Aloha to receive any increase after we entered our Final Order. The only reason that Aloha was allowed to collect higher rates after we entered our Final Order was because it sought a stay while the order was on appeal, which resulted in the customers paying higher rates for an additional 15 months. Aloha could not have reasonably relied on the use of this money, however, because it has always been held subject to refund. It would be to the customers' detriment if Aloha was allowed to keep those additional revenues that were collected during the appeal period. On the other hand, Aloha remains in the same position it would have been in had it not appealed our Final Order. Accordingly, Aloha shall be required to refund the additional revenues that have not been refunded for the

Date: April 9, 2009

appeal period. Our decision conforms with our finding in the Final Order that Aloha was entitled to no revenue increase.

Because Aloha has already refunded 4.87% or \$121,983 (including \$530 of interest) for the appeal period, and because the total refund for the appeal period is \$397,519 without interest, an additional \$276,066 without interest shall be refunded. The additional refund shall be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility shall submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code, and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. The entire amount remaining in the escrow account shall be released to the utility upon our staff's verification that the utility has made the additional refund.

The additional required refunds for the appeal period were appealed by Aloha to the First DCA, and this appeal was dismissed. Pursuant to the Settlement Agreement between Aloha, OPC, individual customer intervenors, and non-intervenor customers of the Better Water Now Committee, the Utility agreed to dismiss its refund appeal. Moreover, pursuant to the Settlement Agreement, the escrowed funds for the appeal period were to be disposed of as follows:

The amount that would ordinarily be refunded (approximately \$290,000) will be reduced by the documented cost (up to \$45,000) of preparing the Conceptual Cost Estimate. The balance will remain in escrow, earning interest, until the Phase III rates<sup>19</sup> take effect. At that time, the funds in escrow, including accrued interest, will be released to Aloha and Aloha will record a corresponding amount as a contribution-in-aid-of construction.

By Order No. PSC-06-0270-AS-WU, issued April 5, 2006, the Commission approved the Settlement Agreement. Since that date, the Utility has not specifically requested reimbursement of any cost associated with preparing the Conceptual Cost Estimate nor has it provided any support documentation for such costs. On March 24, 2009, staff requested that Aloha provide such support documentation by the close of business on Monday, March 30, 2009. On March 25, 2009, the Utility's attorney responded as follows: "I have passed your request on to the Representatives of my client. They are currently considering your request. However it will take until at least mid next week for us to respond to you. I will get back to you then." On April 5, 2009, counsel of Aloha responded as follows: "[w]e have considered your request below as

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<sup>19</sup> Phase I rates were to be temporary rates during construction designed to recover the carrying cost (interest during construction) on the projected average balance of construction work in progress. These temporary rates were subject to true-up in Phase III and were to be in lieu of Aloha accruing an Allowance for Funds Used During Construction. Phase II rates were to be temporary rates during the first twenty months (more or less) the anion exchange facilities were in operation. The Phase II were also subject to true-up in Phase III and were to be designed to recover the actual or contracted cost of the anion exchange facilities. Phase III rates were to be final rates based on actual construction costs and one year of operating expense history, both of which were subject to audit and to review for reasonableness. Any over- or under-collection for Phase I and II were to be used as an offset in the first 12 months of Phase III, and Phase III rates were to be set by a proposed agency action (PAA) order within six months after Aloha's submission of actual cost data. In the event of a protest of the PAA Order, a final order was to have been entered within eight months of the protest.

Date: April 9, 2009

promised last week. However it is Aloha's position that the Florida Public Service Commission has no Jurisdiction over the monies previously held in escrow including any authority to dispense or allocate any part of those monies. We had hoped this matter would be resolved simply in accord with the clear intent of the Settlement Agreement. However the matter is now before the Circuit Court where it belongs and where these issues will be resolved."

To date, staff has not received any support documentation for the Conceptual Cost Estimate. Therefore, due to lack of support documentation, staff recommends that the appropriate refund for the appeal period is the current outstanding balance in the escrow account, less the \$74,239 associated with the rate case period which was discussed above.

*Rate Stabilization Escrow Account*

On March 19, 2009, Aloha customers filed Customer Intervenors' and Petitioners' Motion to Establish a Rate Stabilization Escrow Account asking the Commission issue an order requiring the transfer of funds to FGUA for the purpose of establishing a rate stabilization escrow account for the benefit of the customers. Aloha responded on March 26, 2009, and stated that the Commission lacked the jurisdiction over the monies and to entertain the relief requested. By letter dated March 30, 2009, a FGUA representative stated that, while the FGUA is not a party to the Commission proceeding at issue and does not take any position with respect to such proceeding, the FGUA would accept the transfer of the escrow funds if so ordered by the Commission and commit to use these funds to offset a commensurate amount of revenue which would be recovered through an increase in customer rates.

As discussed earlier, the Settlement Agreement called for the amount to be refunded to customers to be offset against a future increase as a contribution-in-aid-of construction. In the spirit of the Settlement Agreement, staff believes that the appeal period refund amount should be used to mitigate any future rate increase by the FGUA for the benefit of the customers. Staff further believes this is consistent with Section 367.081(6), F.S., which provides that any funds not refunded shall not accrue to the benefit of the utility. Thus, staff recommends that the Commission grant the Customer Intervenors' and Petitioners' Motion to Establish a Rate Stabilization Escrow Account requiring the transfer of funds to FGUA for the purpose of establishing such an account for the benefit of the customers. As discussed above, the amount to be transferred would be the current outstanding balance in the escrow account, less the \$74,239 associated with the rate case period.

*Establishment of New Escrow Account for Interim Funds*

As discussed previously, on or around March 23, 2009, the escrowed monies were removed from the escrow account initially established to secure the interim rates collected from the customers; however, on April 3, 2009, the monies (approximately \$373,803) were wired back to the account. On April 7, 2009, the Commission received a letter from Regions Bank, the escrow agent, stating that it did not wish to continue to hold these funds, and setting certain conditions which the Commission was required to meet by Friday, April 17, in order to avoid the Bank's filing a complaint for interpleader, which essentially requests that the court determine the appropriate disposition of the funds (see Attachment B). Staff notes that pursuant to the Escrow Agreement, the Bank may, without reason withdraw from the agreement upon thirty days written notice to the FPSC and to the Utility.

In light of Regions Bank's unwillingness to maintain the current escrow account, Aloha was consulted regarding whether it would be willing to select a new agent to maintain the escrowed funds pending resolution of this matter. It is staff's understanding that Aloha is not willing to select a new escrow agent.

Section 367.082, F.S., requires that interim funds must be collected under bond, escrow, letter of credit, or corporate undertaking, subject to refund with interest at a rate ordered by the Commission. Because of the above circumstances, Staff believes that it is incumbent upon the Commission in the discharge of its statutory duties to order the interim rate funds to be transferred from the current escrow account into a different escrow account. Given Regions Bank's intent take action to withdraw from the agreement, the Commission should order Aloha to work with staff to transfer the interim rate funds from the Regions Bank escrow account to an independent financial institution, consistent with the terms and conditions contemplated by Order No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. If an independent alternative escrow agent is not selected and the funds not transferred to a new escrow account by April 28, 2009, the Commission should authorize staff to take such steps as are necessary to secure a new escrow agent to maintain the interim funds pending resolution of this matter, including, if necessary, enforcing the Commission's order in a court of competent jurisdiction.



Date: April 9, 2009

**Issue 2:** Should Docket No. 010503-WU be closed?

**Recommendation:** No. This docket should remain open pending staff's verification of the establishment of the rate stabilization escrow account in accordance with the Commission's decision. Once the rate stabilization escrow account has been established, this docket should be closed administratively. (Jaeger, Fletcher)

**Staff Analysis:** This docket should remain open pending staff's verification of the establishment of the rate stabilization escrow account in accordance with the Commission's decision. Once the rate stabilization escrow account has been established, this docket should be closed administratively.

Date: April 9, 2009

**Issue 3:** Should Docket No. 060606-WS be closed?

**Recommendation:** Yes. Docket No. 060606-WS should be closed if the Commission acknowledges FGUA's purchase of Aloha's facilities. This docket was established to track Aloha's progress of designing and installing the plant necessary to implement anion exchange. However, FGUA has recently purchased Aloha's facilities and does not intend to implement anion exchange. Additionally, Aloha has complied with the outstanding show cause order issued in this docket by paying the fine of \$15,000. (Hartman, Fletcher)

**Staff Analysis:** Docket No. 060606-WS was established to track Aloha's progress of designing and installing the plant necessary to implement anion exchange. Order PSC-06-0270-AS-WU, the order approving the Settlement Agreement, directed Aloha to file quarterly progress reports which detailed the work it had completed during the preceding quarter and to provide a timetable for future activities.

As noted earlier, the Commission has previously determined that the "FGUA is an interlocal entity created pursuant to Chapter 163, Florida Statutes, by political subdivisions of the state."<sup>20</sup> The Commission has approved, as a matter of right, transfers of investor-owned water and wastewater utilities to FGUA.<sup>21</sup> Pursuant to Section 367.022, F.S., systems owned, operated, managed, or controlled by governmental authorities are exempt from Commission jurisdiction. The Commission does not have jurisdiction over utilities owned by the FGUA. Staff also notes that FGUA does not plan to implement anion exchange, but rather hopes to resolve the black water problem by purchasing greater amounts of bulk water from Pasco County.

The Commission voted at the April 8, 2008, Agenda Conference to order Aloha to show cause, in writing, within 21 days, why it should not be fined a total of \$15,000 for its apparent violation of Section 367.081(1), F.S., for knowingly failing to comply with Order No. PSC-06-0270-AS-WU, by failing to report delays of the anion exchange treatment facilities in its quarterly report.<sup>22</sup> The order states in part that "if the utility responds to the show cause order by remitting the fine, this show cause matter shall be considered resolved." Although Aloha initially requested a hearing on the show cause matter, on March 25, 2009, Aloha remitted a check for \$15,000 to satisfy the requirements of the show cause order. For these reasons, staff recommends Docket No. 060606-WS should be closed.

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<sup>20</sup> Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: Joint application for acknowledgement of sale of land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 306-W and 255-S.

<sup>21</sup> Order No. PSC-00-2351-FOF-WS, issued December 7, 2000, in Docket No. 990489-WS, In re: Application by Florida Cities Water Company, holder of Certificate Nos. 027-W and 024-S in Lee County and 007-W and 003-S in Brevard County, and Poinciana Utilities, Inc., holder of Certificate Nos. 146-W and 103-S in Polk and Osceola Counties, for transfer of facilities to Florida Governmental Utility Authority and cancellation of Certificate Nos. 027-W, 024-S, 007-W, 003-S, 146-W, and 103-S; and Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: Joint application for acknowledgement of sale of land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 306-W and 255-S.

<sup>22</sup> Order No. PSC-08-0266-SC-WS, issued April 30, 2008, in Docket No. 060606-WS, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU.

Date: April 9, 2009

**Issue 4:** Should Docket No. 060122-WU be closed?

**Recommendation:** Yes, Docket No. 060122-WU should be closed if the Commission acknowledges FGUA's purchase of Aloha's facilities. (Hartman, Fletcher)

**Staff Analysis:** At the time this docket was opened, Aloha had been exceeding its Southwest Florida Water Management District water use permit (WUP) limits. It appeared that Aloha needed to purchase approximately 1.5 million gallons of water per day in order to meet the needs of current and future customers. Aloha had contracted to purchase this water from Pasco County, and expected there would be significant costs associated with the purchase of this water and the installation and operation of related chloramination facilities.

As part of the negotiations between the parties, on February 13, 2006, OPC and Aloha filed a Joint Petition to Approve Stipulation on Procedure. The Stipulation on Procedure formalized an agreement between Aloha and OPC regarding the procedure to be followed and the issues to be addressed in the event Aloha filed a future limited proceeding to recover the costs of purchasing water from Pasco County, and the cost of installing and operating related chloramination facilities. The Joint Petition was approved pursuant to order no. PSC-06-0169-s-wu, issued March 1, 2006.

To address Aloha's excess withdrawals, on October 26, 2004, Aloha entered into a Bulk Water Agreement with Pasco County (County), wherein it contracted to purchase water from the County in order to meet the needs of current and future customers and eliminate excess withdrawals from its wells. On September 28, 2007, Aloha filed its application for a limited proceeding to recover the costs for the chloramination and purchased water from the County.

The Commission considered this application at its February 12, 2008, Agenda Conference, where it heard from the Utility, OPC, and interested customers. Subsequently, it issued PAA Order No. PSC-08-0137-PAA-WU on March 3, 2008. The order allows the Utility, after it has completed the construction of a fully operating interconnection with Pasco County, to recover phase one costs associated with the interconnection and with the Utility's purchase of bulk water from Pasco County. On March 24, 2008, Aloha, OPC, and certain members of the Better Water Now Committee protested the order and requested a hearing on the matter.

As indicated in the background, this docket has been abated several times while FGUA and Aloha negotiated over the sale of Aloha's assets. With the sale of the facilities to FGUA, a governmental authority, Aloha's application for a limited proceeding is deemed withdrawn by law. Section 367.071(4)(a), F.S., directs that a request for rate relief pending before the commission at the time of sale is deemed to have been withdrawn. Further, with the transfer of the facilities to FGUA, the stipulation is moot. Accordingly, if the Commission acknowledges FGUA's purchase of Aloha's facilities, this docket should be closed.

**Issue 5:** Should the transfer of Aloha Utilities, Inc. water and wastewater facilities to Florida Governmental Utility Authority be approved and ~~the cancellation of~~ Certificate Nos. 136-W and 97-S be ~~cancelled~~ approved?

**Recommendation:** Yes. The transfer of the Aloha's water and wastewater facilities to the FGUA should be approved as a matter of right, pursuant to Section 367.071(4)(a), F.S., ~~and Certificate Nos. 136-W and 97-S should be cancelled~~ effective February 27, 2009. Consistent with Rule 25-30.037, F.A.C., upon the disposition of any outstanding regulatory assessment fees, fines or refunds owed, and the completion of all pending proceedings before the Commission, Certificate Nos. 136-W and 97-S should be cancelled. (Clapp, Marsh, Hartman)

**Staff Analysis:** On March 11, 2009, Aloha and FGUA filed a joint application to transfer the Utility's service territory and facilities to FGUA pursuant to Section 367.071(4)(a), F.S., and Rule 25-30.037(4), Florida Administrative Code (F.A.C.), and to cancel Certificate Nos. 136-W and 97-S. The FGUA has been determined to be a governmental authority in previous dockets.<sup>23</sup> The actual closing of the transfer took place on February 27, 2009. Therefore, February 27, 2009, is the effective date of the transfer. Pursuant to Section 367.071(4), F.S., the transfer of facilities to a governmental authority shall be approved as a matter of right. As such, no notice of the transfer is required and no filing fees apply.

The application contains a statement that the Utility has credited customer deposits to final bills or refunded excess deposits to the customers. Therefore, no customer deposits or accumulated interest will be transferred to FGUA. The application also stated that the buyer obtained the Utility's most recent available income and expense statement, balance sheet, statement of rate base for regulatory purposes, and contributions-in-aid-of-construction.

Pursuant to Rule 25-30.120, F.A.C., the Utility's RAFs for 2008 and all prior years have been paid. On April 6, 2009, Aloha paid \$48,057 in RAFs for the period from January 1, 2009 through the February 27, 2009, closing date. The Utility filed its annual reports for 2007 and prior years. As discussed in Issue 6, Aloha has not filed its 2008 annual report.

Based on the above, staff recommends that the transfer of the Aloha water and wastewater facilities to the FGUA should be approved as a matter of right, pursuant to Section 367.071(4)(a), F.S., ~~and Certificate Nos. 136-W and 97-S should be cancelled~~ effective February 27, 2009. Consistent with Rule 25-30.037, F.A.C., upon the disposition of any outstanding regulatory assessment fees, fines or refunds owed, and the completion of all pending proceedings before the Commission, Certificate Nos. 136-W and 97-S should be cancelled.

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<sup>23</sup> See Order No. PSC-03-1284-FOF-WS, issued November 10, 2003, in Docket No. 030932-WS, In re: Joint application for acknowledgement of sale of land and facilities of Florida Water Services Corporation in Lee County to Florida Governmental Utility Authority, and for cancellation of Certificate Nos. 306-W and 255-S, and Order No. PSC-00-2351-FOF-WS, issued December 7, 2000, in Docket No. 990489-WS, In re: Application by Florida Cities Water Company, holder of Certificate Nos. 027-W and 024-S in Lee County and 0007-W and 0003-S in Brevard County, and Poinciana Utilities, Inc., holder of Certificate Nos. 146-W and 103-S in Polk and Osceola Counties, for transfer of facilities to Florida Governmental Utility Authority and Cancellation of Certificate Nos. 027-W, 024-S, 007-W, 003-S, 146-W, and 103-S.

Date: April 9, 2009

**Issue 6:** Should Aloha Utilities, Inc. be required to file its 2008 annual report?

**Recommendation:** Yes. Aloha should be required to file its 2008 annual report by May 21, 2009. If the report is not filed by that date, a penalty should accrue beginning with the due date, March 31, 2009, with interest to accrue beginning June 20, 2009. (Marsh, Hartman)

**Staff Analysis:** Water and wastewater utilities under this Commission's jurisdiction are required to file an annual report in accordance with Rule 25-30.110(3), F.A.C., which states that "[t]he obligation to file an annual report for any year shall apply to any utility which is subject to this Commission's jurisdiction as of December 31 of that year. . . ." Rule 25-30.110(3)(a), F.A.C. requires the annual report to be filed by March 31 of the following year.

One of the ways in which staff uses the annual report is to verify that the revenue on which a company's RAF was based is accurate. Staff notes that Aloha paid its RAFs for 2008, but the amount is less than that paid in 2007. Staff believes it is important to have additional verification of the 2008 revenue. The 2008 wastewater RAF paid was \$301,478, and the 2008 water RAF paid was \$146,368. The 2007 wastewater RAF paid was \$304,047, and the 2007 water RAF paid was \$150,877. The total difference for water and wastewater is \$7,078, or a decrease of 1.56 percent overall from 2007 to 2008.

Aloha has not requested a rule waiver for the filing of an annual report. On March 27, 2009, staff advised Aloha that it would either need to file its 2008 annual report by March 31, or request an extension by sending a letter to the Commission. No extension was requested. On March 31, 2009, counsel for Aloha indicated the Utility did not intend to file an annual report for 2008.

Rule 25-30.110(6), F.A.C., provides for a penalty to be assessed if a utility does not file an annual report or request an extension. The rule states that:

[t]he Commission may, in its discretion, impose penalties for noncompliance that are greater or lesser than provided herein; such as in cases involving a flagrant disregard for the requirements of this rule or repeated violations of this rule. No final determination of noncompliance or assessment of penalty shall be made by the Commission except after notice and an opportunity to be heard, as provided by applicable law. (Rule 25-30.110(6)(c), F.A.C.)

The penalty for a Class A utility is \$25 per day. (Rule 25-30.110(7)(b)3., F.A.C.) The rule also provides for interest to be charged if a penalty is not paid within 30 days after its assessment. (Rule 25-30.110(6)(d), F.A.C.)

Aloha has filed its annual reports in a timely manner in the past. Thus, there is no evidence of flagrant disregard or repeated violations. Staff believes that the Utility should be given an opportunity to file the annual report no less than 30 days from the Commission vote on this issue, or by May 21, 2009. If Aloha does so, no penalty should be assessed. However, if the report is not filed by that date, the penalty should accrue beginning with the due date, March 31, 2009. Interest should accrue 30 days after May 21, or beginning June 20, 2009.

Docket Nos. 010503-WU, 060122-WU, 060606-WS, 090120-WS  
Date: April 9, 2009

**Issue 7:** Should Docket No. 090120-WS be closed?

**Recommendation:** No. This docket should remain open pending final disposition of all issues in Docket No. 010503-WU and the filing of its 2008 annual report. Upon closure of that docket, this docket should be closed administratively. (Hartman, Fletcher)

**Staff Analysis:** This docket should remain open pending final disposition of all issues in Docket No. 010503-WU and the filing of its 2008 annual report. Upon closure of that docket, this docket should be closed administratively.