

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In Re: Investigation of utility)
rates of Aloha Utilities, Inc. in)
Pasco County)
_____)

DOCKET NO. 960545-WS

RECORDS AND REPORTING

ALOHA UTILITIES, INC.'S MOTION FOR RECONSIDERATION OF ORDER NO. PSC-99-0514-PCO-WS

Aloha Utilities, Inc. ("Aloha"), by and through undersigned counsel, and pursuant to Rule 25-22.0376, Fla. Admin. Code, hereby files this Motion For Reconsideration by the Commission panel assigned to the case, of Pre-hearing Procedure Order No. PSC-99-0514-PCO-WS, issued by the Prehearing Officer on march 12, 1999 and in support thereof would state and allege as follows:

1. On January 7, 1999, the Florida Public Service Commission ("Commission") issued PAA Order No. PSC-99-0061-FOF-WS which proposed that the Commission take no further action with regard to an investigation of the quality of service provided by the Seven Springs Division of Aloha Utilities which has been ongoing for approximately 3 years now. Letters and pleadings received by the Commission "protesting" this proposed action (or lack thereof) resulted in the

ACK _____ scheduling of an administrative hearing on the Commission's PAA Order.

AFA _____

APP _____ 2. Aloha has filed no petition in this case and is not the petitioner. Aloha has filed no

CAF _____ application in this case and is not an applicant. Aloha has filed no "protest" to the Commission's

CMU _____

CTR _____ PAA Order and is therefore not a "Protestant" to that Order.

EAG _____

LEG 1 _____ 3. Aloha's posture in this case is that of a permissible respondent. In fact, Aloha is not

LIN 3 _____ an indispensable party in this case because the Commission is, in the classic sense, the "respondent"

OFF _____

REP _____ to the petitions of parties protesting a PAA Order on a case initiated by the Commission. It is the

SEC _____

WAS _____ Commission which has proposed to take action to which certain allegedly substantially affected

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parties have objected. It is incumbent upon the Commission to defend its Order. It is the position of Aloha in this case, and will remain the position of Aloha, that Order No. PSC-99-0061-FOF-WS is proper and appropriate. But the attack in this case brought by the Petitioners is on the proposed agency action of the Commission with regard to whether the Commission should or should not take further actions.

4. The Order Establishing Procedure, Order No. PSC-99-0514-PCO-WS, issued March 12, 1999, contemplates an order of presentation which would require Aloha to file "direct testimony and exhibits" on June 30, 1999; "Petitioners" to file direct testimony and exhibits on July 13, 1999; the staff to file direct testimony and exhibits on July 27, 1999; and rebuttal testimony and exhibits to be filed on August 10, 1999.

5. Aloha does not object to nor seek reconsideration, *per se*, for those dates as established in the Order Establishing Procedure unless and except if the establishment of those particular dates in that particular order stands for the proposition that Aloha somehow has the burden of proof in this case. To the extent the Controlling Dates as referenced above stand for the proposition that it is the position of the Commission or the Prehearing Officer that Aloha has the burden of going forward or the burden of possession in this case, Aloha seeks reconsideration of that Order, as such Order would not be in compliance with the basic tenets of due process and the appropriate and fundamental procedure in administrative cases such as this.

6. The "burden of proof" is upon the Petitioners to go forward with evidence to prove the truth of the facts asserted in their "petitions." *Florida DOT v. JWC Company, Inc.*, 396 So.2d 778, 788 (1st DCA 1981). While it is axiomatic that an applicant must first present a "*prima facie* case," Aloha is not an applicant in this case in any way, shape or form. Without the testimony of

the Petitioners, who have taken the position that the Agency's proposed agency action should not become final agency action, the filing of any testimony by Aloha would necessarily be a very basic statement of Aloha's basis for its willingness to accept rather than protest the Commission's PAA Order. Attempting to include anything further within direct testimony by Aloha would require anticipatory guesswork by the Utility. Such testimony would not aid the Commission, as the finder of fact, in the resolution of this case and would, in fact, as argued herein above, make it appear that a party, who is not aggrieved by the proposed agency action of the Commission, has somehow had the initial burden of going forward placed upon it. The lack of specificity with the "petitions" of the Petitioners merely compounds this problem. The orderly way for this case to proceed is for the Petitioners to file testimony attacking the proposed agency order which has aggrieved them and for Aloha and the Commission to then appropriately respond.

7. The simple fact is that Aloha has no issue on which it can file any initial "direct testimony." Aloha is not aggrieved by the Commission's proposed agency action. Apparently, the Petitioners are, since they have ostensibly requested a hearing on the same. The Petitioners apparently have positions they would like to present regarding the Commission's proposed agency action in the form of direct testimony or assumably they would not have requested a hearing in this matter. If Petitioners' ostensible request for a formal hearing on this matter are withdrawn, then the PAA Order would become final agency action. It is the Petitioners, and not Aloha, who have the burden of going forward and the burden of persuasion in this proceeding. It is then appropriate for Aloha, as a respondent, to respond appropriately to Petitioners' efforts to satisfy that initial burden. Any testimony initially filed by Aloha, before any other party in this case had filed its testimony, would be very basic at best.

WHEREFORE, and in consideration of the above, Aloha seeks either a determination by the Prehearing Officer that it does not have the burden in this case and that the Petitioners do have such a burden, and if deemed necessary as a result of such ruling, a modification of the Order Establishing Procedure to reflect that the petitioners must file direct testimony first to which Aloha and/or the Commission may respond.

DATED this 22nd day of March, 1999.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by regular U.S. Mail to Ralph Jaeger, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850; James Goldberg, Esq., 1251 Trafalger Drive, New Port Richey, FL 34655; Mike Fasano, Esq., 8217 Massachusetts Avenue, New Port Richey, FL 34653; and Harold McLean, Esq., Office of Public Counsel, 111 Madison Street, Room 812, Tallahassee, FL 32399-1400 on this 22nd day of March, 1999.



F. Marshall Deterding, Esq.

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