

ROSE, SUNDBSTROM & BENTLEY, LLP

2548 BLAIRSTONE PINES DRIVE
TALLAHASSEE, FLORIDA 32301

(850) 877-6555

CHRIS H. BENTLEY, P.A.
F. MARSHALL DETERDING
CAROL L. DUTRA
MARTIN S. FRIEDMAN, P.A.
JOHN R. JENKINS, P.A.
STEVEN T. MINDLIN, P.A.
DAREN L. SHIPPY
WILLIAM E. SUNDBSTROM, P.A.
DIANE D. TREMOR, P.A.
JOHN L. WHARTON

MAILING ADDRESS
POST OFFICE BOX 1567
TALLAHASSEE, FLORIDA 32302-1567

TELECOPIER (850) 656-4029

April 30, 1999

VIA HAND DELIVERY

ROBERT M. C. ROSE
OF COUNSEL

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Re: Aloha Utilities, Inc.; PSC Docket No. 960545-WS
Petition for Reconsideration in Water Investigation Docket
Our File No. 26038.17

RECEIVED-FPSC
RECORDS AND REPORTING
99 APR 30 PM 1:08

Dear Ms. Bayo:

Attached are the original and fifteen copies of Aloha Utilities, Inc.'s Motion to Establish the Burden which is being filed today and telecopied to all the parties with telecopiers. The identical legal issue in this proceeding is being heard by the Commission at Tuesday's agenda conference in the form of a Motion for Reconsideration. All parties have had an opportunity and have responded to the issues raised in this Motion through their responses to the Motion for Reconsideration to be argued Tuesday. Therefore, it is my intention as attorney for Aloha to ask that a ruling be entered on the attached Motion at Tuesday's agenda conference.

Should you have any questions in this regard, please let me know.

Sincerely,

ROSE, SUNDBSTROM & BENTLEY, LLP

RECEIVED & FILED

FPSO/BUREAU OF RECORDS

F. Marshall Deterding
For The Firm

- AFA _____
- APP _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- MAS _____
- OPC _____
- RRR _____
- SEC _____
- WAW _____
- OTH _____

FMD/tmg

- cc: Susan F. Clark, Commissioner/Prehearing Officer
- E. Leon Jacobs, Jr., Commissioner
- Julia L. Johnson, Commissioner
- Ralph Jaeger, Esq.
- Charles H. Hill, Director
- James Goldberg, Esq.
- Mike Fasano
- Harold McLean, Esq.
- Mr. Stephen Watford

DOCUMENT NUMBER-DATE

05495 APR 30 99

FPSO-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Investigation of utility)
 rates of Aloha Utilities, Inc. in) DOCKET NO. 960545-WS
 Pasco County)
 _____)

ALOHA UTILITIES, INC.'S MOTION TO ESTABLISH THE BURDEN

Aloha Utilities, Inc. ("Aloha"), by and through its undersigned counsel, and pursuant to Rule 25-22.037(2), Fla. Admin. Code, hereby files this Motion to Establish the Burden 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 scheduling of an administrative hearing on the Commission's PAA Order.

2. Aloha has filed no petition in this case and is not the petitioner. Aloha has filed no application in this case and is not an applicant. Aloha has filed no "protest" to the Commission's PAA Order and is therefore not a "Protestant" to that Order.

3. Aloha's posture in this case is that of a permissible respondent. In fact, Aloha is not an indispensable party in this case because the Commission is, in the classic sense, the "respondent" to the petitions of parties protesting a PAA Order on a case initiated by the Commission. It is the Commission which has proposed to take action to which certain allegedly substantially affected parties have objected.

It is incumbent upon the Commission to defend its Order. It is the position of Aloha in this case, and will

DOCUMENT NUMBER-DATE

05495 APR 30 88

FPSC-RECORDS/REPORTING

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. The controlling dates as referenced above appear to suggest that Aloha has the burden of going forward, or the burden of persuasion in this case. However, no specific ruling is included within the Order suggesting who has those burdens.

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 a determination that the Petitioners do have the burden of going forward and the burden of persuasion in this proceeding, and an Order specifically assigning that burden to Petitioner.

Respectfully submitted this 30th day of April, 1999.



F. Marshall Deterding, Esq.
ROSE, SUNDBSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555

CERTIFICATE OF SERVICE

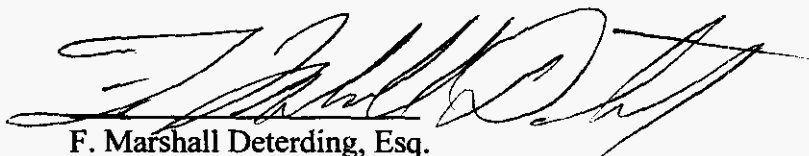
I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by
Telecopy (denoted by *) and by Regular U.S. Mail to the following on this 30th day of April, 1999:

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*
8217 Massachusetts Avenue
New Port Richey, FL 34653

Harold McLean, Esq.*
Office of Public Counsel
111 Madison Street, Room 812
Tallahassee, FL 32399-1400



F. Marshall Deterding, Esq.

aloha\17burden.mot