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November 30, 1999

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket No. 960545-WS

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Intervenors' Response to Aloha's Motion to Supplement Direct Testimony. A diskette in WordPerfect 6.1 is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

Harold McLean
Associate Public Counsel

HM:bsr

Enclosures

AFA
APP
CAF
CMU
CTR
EAG
LEG 2
MAS 2
OPC
PAI
SEC 1
WAW
OTH

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re Investigation of Utility rates of Aloha Utilities, Inc. In Pasco County, Florida.	)))	DOCKET NO. 960545-WS FILED: November 30, 1999

ORIGINAL

INTERVENORS' RESPONSE TO ALOHA'S MOTION TO SUPPLEMENT DIRECT TESTIMONY

The Intervenors in this docket, the Citizens of the State of Florida, and Mike Fasano, customer intervenor, respond to Aloha Utility Inc.'s (Aloha) motion to Supplement Direct Testimony and say:

The supplemental direct testimony tendered by Aloha in the instant motion advises the Commission that Aloha has incurred certain expenses, and suggests that the Commission should increase Aloha's rates in order to re-imburse Aloha for these alleged expenditures. The Intervenors object to the receipt of the supplemental direct testimony upon the following grounds:

Summary:

As Aloha has made clear in previous motions, it has neither a petition nor a request pending before the Commission; specifically, it has no petition for general rate relief under Section 367.081, Florida Statutes (1999) and it has no petition for a limited proceeding pending under Section 367.0822, Florida Statutes (1999). The Commission cannot provide relief where no injury is shown, i.e., neither Aloha's direct or rebuttal case shows that any expenditures it may have incurred caused it to earn outside its last authorized rate of return. Lastly, the Commission has found Aloha's quality of service unsatisfactory in this docket. Even if the expenses incurred

by Aloha in this docket had caused Aloha to earn outside its last authorized rate or return (and there is no allegation that it is so) those expenses should not be recovered because they were not prudently incurred. Aloha permitted its quality of service to become unsatisfactory. The lengthy quest to regain Commission approval by showing that its quality of service has improved to satisfactory ought not to be born by customers.

A. THERE IS NO PENDING REQUEST FOR RATE RELIEF

This docket finds its beginning upon the petition of a number of customers imploring the Commission to investigate the quality of service provided to the customers' homes. After lengthy proceedings, including an evidentiary hearing in the Aloha's service area, the Commission found in Order PSC-97-0280-FOF-WS, issued March 1977, that the quality of service provided by Aloha was unsatisfactory. Proceedings which followed in the docket may be characterized as attempts to explore by what means quality of service might be improved.

Although there are well recognized avenues by which Aloha might have sought rate relief, at no time has Aloha addressed its alleged expenses by means of a petition for general rate relief under Section 367.081, Florida Statutes (1999), or a petition for limited proceedings under Section 367.0822, Florida Statutes (1999). Aloha has simply tacked on to the investigation testimony alleging that it has spent some money. The Intervenors submit that the current docket -- an investigation of Aloha's rates -- does not form a basis or vehicle upon which the Commission may lawfully change the rates charged to customers.

The various filing requirements and subsequent procedures contemplated by Sections 367.081 and 367.0822, Florida Statutes (1999), many of which dictate the rights of affected parties, are entirely unaddressed and thus neglected in this docket.

Aloha incudes no allegation or explanation as to why it has not availed itself of oft-traveled paths to rate relief; it has instead, at the eleventh hour, offered up testimony that it has spent some money. That it has spent money does not dictate that this Commission must reimburse Aloha from customers' resources. If Aloha wishes to call upon the customers for reimbursement, the Intervenors submit that Aloha must do so by means of a petition for general rate relief, or by a petition for a limited proceedings supported by appropriate evidence -- not by bare testimony that it has spent money.

B. ALOHA HAS SHOWN NEITHER INJURY NOR ENTITLEMENT TO RELIEF

Aloha has filed no petition nor legally sufficient request for increased rates, its surrogate -- tendered supplemental direct testimony -- ought to be rejected on that basis alone. However, Aloha's testimony, even were it regarded as an appropriate petition for relief under Florida Statutes, falls well short of what is required before this Commission can provide rate relief, or indeed, any relief. There is nothing in Aloha's direct or rebuttal case which shows that Aloha is entitled to anything: Aloha neither alleges nor proves injury.

Aloha does not allege, much less show, that the alleged costs ever rendered its earnings to be other than fair and reasonable, and fully compensatory. The testimony contains absolutely no allegation that the expenditures, if made, ever placed the utility outside the range of its authorized

rate of return. The Intervenors submit that the commission can provide no relief to any utility which omits such an issue from its pleading and proof, with certain exceptions not applicable here.

The principle holds irrespective of whether it is the utility seeking an increase or whether it is the commission seeking to lower rates. The test prerequisite to commission action is whether the utility is earning outside its last authorized rate of return.[1]

Commission action in a rate case is judged by appellate courts on the basis of whether the Commission has provided the utility rates which will produce a reasonable rate of return, because

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[1] In the recent Sanlando case (Docket No. 980670-WS - INVESTIGATION OF POSSIBLE OVEREARNINGS BY SANLANDO UTILITIES CORPORATION IN SEMINOLE COUNTY) the staff analysis, which was adopted by the Commission, addresses the prerequisite finding which justifies the Commission's taking action in an overearning case. It provides in part:

> According to staff s review of Sanlando's 1997 annual report, the utility achieved an 18.76% return on equity for water, and achieved a 48.25% return on equity for wastewater. In the utility's last rate proceeding by Order No. 23809, issued November 27, 1990, in docket No. 900338-WS, the Commission approved an overall rate of return of 11.51% with a range of 11.27% to 11.75%, and established a rate of return on equity of 13.51% with a range of 12.51% to 14.51%.
>
> Using the upper boundary of 14.51% for equity, and appropriate interest rates for other components in the capital structure, a 9.05% overall cost of capital is indicated. Additionally, our preliminary review suggests that the utility achieved an overall 38.54% return on equity in 1997.

Thus upon a recommendation that Sandlando was earning outside its authorized rate of return, the Commission acted. Had the staff investigation shown that the utility was within its last authorized rate of return, no further action would have been necessary.

failure of the commission to do so is to take the utility's property in a constitutional sense.[2]

The principal that a utility must allege underearnings as a prerequisite to rate relief has been afforded full approval by this Commission. In the very early days of the Environmental Cost Recovery Clause (ECRC), Gulf Power Company petitioned the commission for a recovery of certain costs to which it believed the ECRC applied. The Office of Public Counsel argued before the Commission, as it argues here, that there should be no recovery unless it be shown that the utility was outside the range of its last authorized rate of return. The Commission accepted this argument in principle when, in order No. PSC-94-0044-FOF-EI; 94 F.P.S.C. 1:76, it said:

> Public Counsel argued that if a utility is earning within its allowed return on equity range, it is already being compensated for all environmental expenses, and it should not be allowed to recover any costs though the environmental cost recovery clause. Public counsel maintains that it does not matter whether the environmental activity was included in the test year of the utility's last rate case. The utility should only be allowed to recover costs through the clause if the utility is under-earning. OPC argued that to allow any recovery through the clause if the utility is not under-earning would amount to double recovery.

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[2] In Southern States Utilities v. Duval Co., 82 P.U.R. 3d 452 (4th Cir. 1969), the court observed that where the effect of a rate order would be a rate of return of some 2.8%, and there was no evidence in the record that supported setting rates at that level, "[t]he conclusion is inescapable that such [order] constitutes an unlawful confiscation of the utility's property." If an agency rate order does not provide sufficient compensation to the utility, then that agency has taken utility property without paying "just compensation" in contravention of the United States Constitution. Duquesne Light Co. v. Barasch, 488 U.S. 299, 308 (1989). A utility is entitled to an opportunity to earn a reasonable rate of return on its invested capital. City of Miami v. Florida Pub. Serv. Comm'n, 208 So. 2d 249 (Fla. 1968). "The rate of return which public utility companies may be allowed to earn is a question of vital importance to both rate payers and investors. An inadequate return may prevent satisfactory services to the public and concomitantly disappoint investors who will look for alternative sources of investment." United Tel. Co. v. Mayo, 345 So. 2d 648, 653-54 (Fla. 1977).

> *Although regulatory philosophy indicates that OPC is theoretically correct,* we must consider the legislation establishing the environmental cost recovery cost. (Italics supplied.)

Order at 4:78

Although the Commission then considered the special provisions of Section 366.8255(1)(d), Florida Statutes (1991), which permitted a recovery of conservation expenses outside the normal ratemaking process, it accepted the rate making principle that rate relief must be predicated on the utility's earning outside its authorized range, in the absence of a special statutory route. (Section 366.8255(1)(d), F.S, of course, has no application here.) The principle is consistent with a fundamental tenant of American Jurisprudence: relief is inappropriate where no harm is shown.

The principal rate-making statute by which the Commission is bound in water and wastewater cases is Section 367.081, Florida Statutes (1999), which provides that the commission shall establish rates which provide for a fair return on the investment of the utility in its property used and useful in the provision of utility service to the public. There is absolutely no allegation before the Commission that the existing rates approved for Aloha do not provide for that fair return.

The Intervenors submit that it is the Utility's burden to appear before the commission with allegation and proof that the existing rates of the utility are not compensatory, are thus confiscatory, and ought to be increased such that a fair return may be earned. In this the utility has failed.

The Intervenors note that there are exceptions to this principle, as the commission found in Gulf Power, concerning Environmental Cost Recovery Clause. In that case, the Commission found that the Legislature intended for utilities, such as Gulf, to recover these special costs, their earnings posture notwithstanding.

> Accordingly we find that if the utility is currently earning a fair rate of return that it should be able to recover, upon petition, prudently incurred environmental compliance costs through the ECRC. If such costs were incurred after the effective date of the environmental compliance cost legislation, and if such costs are not being recovered through any other cost recovery mechanism.

Order at 94:79

Thus the Commission implicitly, if not explicitly, recognized that in the absence of the ECRC, that were the utility earning within its range, it would not recover these expenses.

Water and wastewater has its own partial exceptions, but the exceptions are carefully crafted by the legislature to include the test of earnings the Intervenors urge here.

Section 367.081(4)(b) and (c) taken together provide for a yearly indexing and pass through by utilities which qualify under those sections. Yet subsection (c) provides that a utility must by affidavit certify that neither the index nor the pass through will cause the utility to earn outside its previously authorized rate of return. The penalty for violation of this section is a third degree felony and a refund of rates with interest.

Even in the sections establishing automatic pass through and indexing, strict attention is paid to the earnings posture of the utility. It is, of course, apparent that the index and pass through exceptions attempt to ensure that the utility is not earning *in excess* of its last authorized

range, rather than a requirement that the utility show as a prerequisite that the utility is underearning before the pass through and index is had. But it is incumbent on the utility to assure, and on the Commission to ensure, that the utility's earnings are considered even in automatic index and pass through cases.

Lastly, even if Aloha had availed itself of the limited proceedings provisions of Section 367.0822, F.S. -- which it has not -- that section provides no statutory exception to the necessity that the utility show that it is earning outside the range of its last rate of return. Section 367.0822, Florida Statutes (1997), provides in relevant part:

> The Commission shall determine the issues to be considered during such a proceeding and may grant or deny any request to expand the scope of the proceeding to include other related matters. However, unless the issue of rate of return is specifically addressed in the limited proceeding, the commission ***shall not adjust rates*** if the ***effect*** of the adjustment would be to change the last rate of return. (Emphasis added.)

Thus the Commission is under a unequivocal statutory mandate not to approve rates the *effect* of which (not necessarily the *intent* of which) would be to change the last rate of return. Yet no party in this proceeding can provide any assurance whatsoever to the Commission that the unspecified rates sought by Aloha would not have the *effect* of increasing its last rate of return. Aloha's testimony seeks higher rates, but provides the Commission with no assurance that approval of those rates would not cause Aloha to earn outside the range of its last authorized rate of return. The Commission and the parties are left to guess whether the alleged expenses caused Aloha to underearn, or whether the higher rates sought by Aloha would cause the utility to overearn. Aloha is inviting the Commission to take a blind shot into the dark.

The supplemental direct testimony tendered by Aloha, standing as it does as bare testimony -- even if it were deemed to be a petition for limited proceeding -- provides no extra-statutory right to rate relief. There is nothing in the testimony and there is nothing in the supporting accounting of expenses which shows the Commission that Aloha's existing rates are other than fully compensatory.

The Commission and affected parties are left only to wonder whether the alleged expenses have already been recovered through existing rates and whether the relief sought by the instant petition would provide a double recovery thereof.

Because Aloha alleges no harm, it is entitled to no relief.

C. EXPENSES DIRECTLY FLOWING FROM NON FEASANCE OR MISFEASANCE ARE NOT PRUDENTLY INCURRED

Exxon didn't charge Alaskans for cleaning up Prince Edward Sound. This Commission should not permit Aloha to charge customers for matters directly flowing from its unsatisfactory service.

Order PSC-97-0280-FOF-WS, issued March 1997, stands on Commission books unchallenged by Aloha. It is a final order which enters a finding that Aloha has provided quality of service that is unsatisfactory. What has followed that order, in lieu of challenge or remedy, is argument. The intervenors in this docket will show that Aloha's officers and advisors disagree with that finding and in place of improving the quality of service, have, if their testimony is to be taken as true, spent in excess of $400,000.00 arguing about it.

It was imprudent for Aloha to provide unsatisfactory service and it remains imprudent for Aloha to defend it. If Aloha did infact disagree with Order PSC-97-0280-FOF-WS, then the

prudent course would have dictated an appeal to higher authority. Instead Aloha customers have simply had to endure more of the same service found unsatisfactory by the Commission, and at this juncture, Aloha expects customers to incur their expenses arguing in lieu of fixing.

Aloha's expenses in this docket provide a close analog to a utility's incurring a fine or other penalty in the course of its business. It has long been established that such expenses are not recoverable from customers who, after all, have no voice in the management of the utility. Aloha customers would rather receive satisfactory quality of service from Aloha. To require customers to endure unsatisfactory quality of service and to pay the expenses of Aloha's subsequent disagreement with a Commission finding is simply not fair.

It must be noted that Aloha has made no material, incremental investment to cure the unsatisfactory quality of service identified by the Commission. Had it done so, it would have been in a different posture to seek increased rates as a result. The facts of this docket show -- and Aloha does not allege otherwise -- that there has been no material improvement in the quality of service since the entry of Order PSC-97-0280-FOF-WS in nearly three years which have passed since March of 1997. Customers are entitled to relief, not to higher bills.

The supplemental direct testimony tendered by Aloha ought to be rejected on this basis alone.

WHEREFORE, Intervenors oppose Aloha Utilities, Inc.'s Motion to Supplement Direct Testimony, and say that the testimony ought to be rejected by the Commission. The Intervenors renew their motion to strike similar testimony from Aloha's rebuttal testimony, and if for any reason the testimony is received by the Commission, because of the fundamentally different

subject matter, the Citizens will require at least ninety (90) days to retain expert counsel for evaluation of the testimony, examination of any Commission audit of same, and the casting of its own expert rebuttal testimony.

Respectfully submitted,

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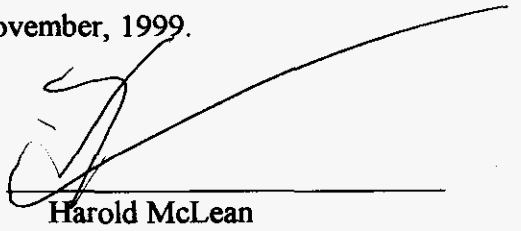
Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 960545-WS

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 30th day of November, 1999.



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