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September 25, 2000

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

Re: Docket No. 991643-WU

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response to Aloha's Motion to Strike Rebuttal Testimony. A diskette in Word format 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,

Stephen C. Burgess
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application of Aloha)
Utilities, Inc. for Increase)
in Wastewater Rates in its)
Seven Springs System in)
Pasco County, Florida)
_____)

DOCKET NO. 991643-SU

FILED: September 25, 2000

CITIZENS' RESPONSE TO ALOHA'S MOTION
TO STRIKE REBUTTAL TESTIMONY

The Citizens of the State of Florida through their attorney, the Public Counsel, hereby file this response to Aloha's motion to strike, as follows:

1. On August 28, 2000, David G. MacColeman, appearing on behalf of the Staff of the Public Service Commission, filed testimony in this docket. On September 11, 2000, Ted Bidy, on behalf of the office of the Public Counsel (OPC), filed testimony in rebuttal to Mr. MacColman. On September 18, 2000, Aloha Utilities (Aloha) filed a motion to strike Mr. Bidy's testimony. The OPC was served by facsimile and U.S. mail.

2. Aloha objects to Mr. Bidy's testimony on two grounds. First, Aloha asserts that the Citizens are not entitled to rebuttal testimony because rebuttal testimony is available only to Aloha. Aloha argues that OPC should not be entitled to rebut Staff because Staff and OPC are "similarly aligned" rather than "adverse". Secondly, Aloha asserts that Mr. Bidy's testimony makes no attempt to actually rebut Mr. MacColman. Aloha is wrong on both counts.

3. On the issues raised in Mr. Bidy's rebuttal testimony, OPC and Staff are not aligned but rather are clearly adverse to one another. On page 4, Mr. MacColeman answers a question as follows:

Q. Does DEP consider 150 gallons per day (GPD) per equivalent residential connection (ERC) normal for Aloha?

A. Yes.

Mr. Bidy had used the actual historical 134 GPD per ERC as the "normal" amount for his used and useful calculation. After Mr. Bidy had filed his testimony, Mr. MacColeman followed by stating that another regulatory agency (DEP) considers 150 per day per ERC to be normal for Aloha. This is an adverse statement, and should entitle Mr. Bidy to rebuttal.

4. On the second issue, Mr. Bidy's initial direct testimony stated that Aloha has excessive infiltration and inflow (I/I). Mr. MacColman followed by saying that DEP has no opinion as to whether I/I is excessive. Mr. Bidy's rebuttal states that the engineering standard which DEP is on record as adopting, in fact, contains a standard for I/I which has been exceeded by Aloha. Again, Mr. MacColeman has given a statement adverse to Mr. Bidy's initial testimony, which should entitle Mr. Bidy to rebuttal testimony.

5. To demonstrate its claim that Mr. Bidy is not actually attempting to rebut Mr. MacColman, Aloha relies on the non-inflammatory language that Mr. Bidy has chosen to describe his specific disagreements with Mr. MacColeman's statements (see

paragraphs 1-3 of Aloha's Motion to Strike). The fact of the matter is that Mr. Bidy has dealt with Mr. MacColeman, he respects Mr. MacColeman, and he intentionally chose non-inflammatory language to point out his disagreements. It would certainly be a sad day if a party is punished for attempting to be civil in bringing out the disagreements that need to be resolved in an administrative forum.

6. Given Aloha's strident condemnation of Mr. Bidy's verbiage as being too conciliatory, it is curious to note Aloha's own engineering rebuttal testimony as it addressed a staff witness:

I agree with Staff Witness Merchant that it [sic] imputation of revenues is not the proper mechanism to be used to induce Aloha to locate and sign-up [sic] new reused customers. I also agree with witness Merchant that the proper mechanism is to monitor the number of customers Aloha signs-up and the revenue that generates. [p. 24; lines 9-14 of Mr. Porter's "Rebuttal" testimony.]

If, as Aloha claims, Mr. Bidy's description that he would "offer comments" proves that his testimony cannot be rebuttal (paragraph 1 of motion), then how much more is that same point proven by Mr. Porter's description that he would "agree with Staff Witness Merchant."

7. Aloha's other argument is that it is the only party entitled to file rebuttal testimony. In fact, Aloha has availed itself of that entitlement quite liberally, filing extensive rebuttal to both OPC and the Staff. Aloha contends, however, that

OPC should not be allowed to file rebuttal to the Staff because the two parties are "similarly aligned". Aloha's statement is incorrect: the Staff is not aligned with OPC; neither is it aligned with Aloha. On some issues Staff is aligned with the utility, on some it is aligned with OPC, on some it is aligned with neither. On the issues where Staff testimony is adverse to Aloha, the utility has filed rebuttal. On the issues where Staff testimony is adverse to OPC, OPC has filed rebuttal. This does not present any disadvantage to Aloha.

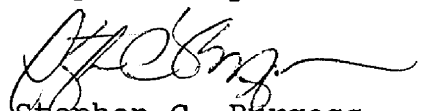
8. As the trier of fact the Commission is like a trial court which, "has broad discretion regarding the admissibility of rebuttal testimony...." Griefer v. DiPietro, 708 So.2d 666, 672 (Fla. 4th DCA 1998). Nevertheless in some cases, Florida Courts have found reversible error when rebuttal testimony has been excluded improperly. In Griefer, the Fourth DCA reversed the trial court for excluding expert rebuttal, and stated: "Rebuttal to challenge the calculations of a defense expert is permissible rebuttal evidence." Id. In Zanoletti v. Norle Properties Corp., 688 So.2d 952, 954, (Fla. 3d DCA 1997), the trial court was also reversed for excluding rebuttal testimony because "a plaintiff has no obligation to anticipate the defendant's theory of the case and present evidence during the case in chief to disprove that theory." Id. OPC did not anticipate a DEP employee opining that Aloha's "normal" flow is different from its historic flow. Likewise, OPC did not anticipate the opinion that DEP has no opinion on excessive I/I.

9. The Citizens simply seek that as a matter of fairness, they be entitled to the same procedural right for which the utility has taken full advantage. Aloha has offered extensive rebuttal testimony on numerous issues in response to several staff witnesses. The Citizens seek to file rebuttal to one staff witness or two issues.

10. Finally, in its WHEREFORE clause, Aloha requests an opportunity to file responsive testimony and depose Mr. Bidy on the points raised in his rebuttal testimony. Aloha's request is entirely specious. Aloha already has questioned Mr. Bidy on both of these subjects at considerable length in a deposition in which Mr. Bidy answered several hours' of questions from Aloha's counsel. The deposition took place prior to Aloha's rebuttal testimony. Aloha has received ample opportunity to address both of these issues.

WHEREFORE, the Citizens of the State of Florida respectfully request the Commission to deny Aloha's motion to strike the rebuttal testimony filed by Mr. Bidy on behalf of the Citizens.

Respectfully Submitted,


Stephen C. Burgess
Deputy Public Counsel

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Attorney for the Citizens
of the State of Florida

CERTIFICATE OF SERVICE
DOCKET NO. 991643-SU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or hand-delivery to the following parties on this 25th day of September, 2000.


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Jason Fudge, Esquire
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