

State of Florida



RECEIVED-FPSC
Public Service Commission

09 MAR 31 6:25 PM
CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: March 31, 2009
TO: Ann Cole, Clerk
FROM: Patrick L. "Booter" Imhof, General Counsel *BI*
RE: Aloha Utilities, Inc.

Please file the attached documents in:

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.

Thank you.

PLI:tf

cc: William Garner
Roberta Bass
Lorena Holley
Larry Harris
Bill McNulty
Mary Andrews Bane
Ryder Rudd
Tim Devlin
Marshall Willis
Mary Anne Helton
Jennifer Brubaker
Ralph Jaeger
Jean Hartman

DOCUMENT NUMBER-DATE

02840 MAR 31 09

FPSC-COMMISSION CLERK

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

ALOHA UTILITIES, INC.

PLAINTIFF,

vs.

CASE NO. 51-2009-CA-3011-WS

G

FLORIDA PUBLIC SERVICE COMMISSION,

DEFENDANT.

COMPLAINT FOR DECLARATORY RELIEF
AND INJUNCTIVE RELIEF

Plaintiff, ALOHA UTILITIES, INC., sues Defendant, FLORIDA PUBLIC SERVICE COMMISSION, and states:

1. This is an action for declaratory relief, pursuant to Chapter 86, Florida Statutes, and injunctive relief.

2. This court has jurisdiction over this action pursuant to § 26.012 and Chapter 86, Florida Statutes (2008) and Article V, Section 5 of the Constitution of the State of Florida.

GENERAL ALLEGATIONS

3. Plaintiff, Aloha Utilities, Inc. (sometimes referred to as "Aloha") is a Florida corporation incorporated under Florida law on March 10, 1970. In 1973, Aloha received Water Certificate Number 136-W and Wastewater Certificate Number 97-S from the Florida Public Service Commission ("PSC") to provide an area of Pasco County, Florida with water and wastewater service.

4. The PSC has exclusive jurisdiction over privately-owned utilities in Florida with respect to the utility's authority, service, and rates, pursuant to its authorization in Chapters 350 and 367, Florida Statutes (2008).

5. On February 27, 2009, Aloha's assets were acquired by a governmental entity. Pursuant to §367.071(4)(a), Florida Statutes (2008) the sale of a utility's facilities, in whole or part, to a governmental entity shall be approved by the PSC as a matter of right.

6. As of the moment the asset transfer occurred, Aloha was no longer a "utility" as defined in Chapter 367 and was no longer subject to the jurisdiction of the PSC, as Aloha no longer provided, or proposed to provide, water or wastewater services to the public.

7. On March 9, 2006, Aloha entered into a Settlement Agreement (Exhibit A) which was the culmination of a lengthy negotiation process whose participants

included the PSC's staff; certain customers and their representatives; and attorneys, consultants, and corporate representatives of Aloha. The Settlement Agreement established a way to resolve several pending issues related to Aloha's ongoing operations including, but not limited to, pending administrative proceedings at the PSC and an appeal pending before the First District Court of Appeal in which both Aloha and the PSC were parties. The Settlement Agreement was subject to, and only effective upon, PSC approval. The PSC approved the Settlement Agreement in its entirety, and incorporated the same by reference, in its Order Approving Settlement Agreement dated April 5, 2006 (the "Order") (Exhibit B).

8. A key facet of the Settlement Agreement was the recognition that a particular water treatment method (anion exchange) should be implemented by Aloha, and that the cost of design, permitting and implementing anion exchange would be recoverable by Aloha. The Settlement Agreement required that certain monies (hereafter "the monies here at issue") would be subsequently released to Aloha to defray Aloha's costs incurred in the implementation of anion exchange. The monies here at issue were in an escrow account in Pasco County until March 23, 2009. Since March 23, 2009, the monies here at issue are maintained in a separate and segregated account of Aloha in Pasco County.

9. Aloha dismissed legal proceedings, expended funds, incurred debts and obligations, and compromised or altered its legal, policy, and operational positions in various and sundry ways in order to achieve the compromise that was embodied in the Settlement Agreement.

10. Due to the fact that Aloha's assets were sold to a governmental entity before the completion of the anion exchange project, and thus prior to the rate increase contemplated by the Settlement Agreement, the specific triggering event for the release of the monies here at issue has not occurred and will not occur.

11. Prior to the sale of its assets Aloha, at the PSC's direction, expended significantly more on the implementation of the anion exchange project than the amount of the monies here at issue.

12. Aloha has provided sufficient documentation to the PSC to demonstrate that it has expended more money on the implementation of anion exchange than the monies here at issue.

13. The PSC has no continuing jurisdiction over Aloha; no continuing duty to regulate Aloha's activities; no continuing duty to protect the public or to perform any other of its essential agency functions with regard to the monies here at issue; nor the authority or jurisdiction to order or direct Aloha to release or surrender the monies here at issue. Despite this, upon information and belief, the PSC is now investigating, by

and through its staff, the means and method by which the monies here at issue should be "treated" or dispersed, and is entertaining a "motion" (filed by 6 of Aloha's approximately 25,000 former customers) which urges the PSC to take possession of the monies here at issue and transfer the monies here at issue to the governmental entity which purchased Aloha's assets "for the benefit of customers".

14. Aloha has a clear equitable and legal right to the monies here at issue. The actions and posture of the PSC manifest that there is a continuing doubt and controversy as to the ownership of the monies here at issue. The PSC has declined to acknowledge or recognize Aloha's ownership of the monies here at issue, despite requests and demands from Aloha for such acknowledgment or recognition. To the contrary, the PSC intends to attempt to exercise jurisdiction over the monies here at issue, in some form or fashion, and apparently to act on a perceived controversy or doubt as to the ownership of the monies here at issue. The PSC's present investigation, actions, and intent in this regard would be undertaken despite the PSC's lack of jurisdiction, authority, or power over the ownership or with regard to the ownership of the monies here at issue.

15. Aloha will maintain the monies here at issue in a separate, segregated account in Pasco County and, further, will actively seek an Order of this Court

directing it to pay the monies here at issue into the Court Registry, until such time as the Court has entered a Final Judgment in the instant Complaint.

COUNT I
DECLARATORY RELIEF

16. Plaintiff realleges paragraphs 1 through 15 above.

17. Plaintiff seeks a declaration of its rights with regard to the monies here at issue. A present controversy has arisen as set out in paragraphs 1 through 15 above. It is clear that Aloha and the PSC have significantly different views regarding the PSC's jurisdiction in regard to or over the monies here at issue, and the ownership of the monies here at issue. In view of the apparent intention of the PSC in this regard, a doubt has arisen concerning the proper disposition of the monies here at issue. Plaintiff is in need of the Court's resolution of these issues.

18. As of the asset sale which occurred on February 27, 2009, the PSC has no jurisdiction over Aloha or as to Aloha other than the completion of certain, inapplicable, ministerial acts. For that reason, Aloha seeks a declaration of rights that cannot be obtained administratively.

19. All necessary parties to a complete resolution of the questions raised herein are before this Court.

20. Plaintiff seeks this declaratory relief to resolve a bona fide controversy and not for satisfying a curiosity or merely to seek judicial advice.

21. Aloha seeks a declaration from this Court as necessary to resolve the controversy, including:

(a) that the PSC has no jurisdiction to decide ownership of the monies here at issue; and

(b) that Aloha is the owner of the monies here at issue.

WHEREFORE, Plaintiff requests this Court to conduct a non-jury trial on the controverted legal matters set out above, and to issue a Declaratory Judgment determining the rights and responsibilities of Aloha and the PSC; declaring the ownership of the monies here at issue; and for any other relief deemed appropriate by the Court in the exercise of its equitable powers.

COUNT II
TEMPORARY INJUNCTION

22. Plaintiff realleges paragraphs 1 through 15 above.

23. Aloha seeks an interim order of this Court directing it to deposit the monies here at issue in the registry of the Court until final resolution of the issues herein.

24. Aloha will be prejudiced if an adverse disposition as to the monies here at issue is ordered by the PSC, although Plaintiff denies that the PSC has any jurisdiction over the Plaintiff or the subject matter of this controversy. The burden of proof and standard of review will then have shifted substantially against Aloha in any subsequent appellate challenge of such a ruling by the PSC. Any "administrative proceeding" on the issue would be held before the PSC, who is under extreme political pressure as to the issue and who has no jurisdiction to determine the ownership of the monies here at issue. There is no adequate remedy at law to redress such an event. Aloha will thus suffer irreparable harm unless the PSC is enjoined from proceeding prior to resolution of the instance Complaint.

WHEREFORE, Plaintiff requests this Court to enter an Order directing Aloha to deposit the monies here at issue herein in the registry of the Court until further Order of this Court and enjoining the Public Service Commission from further action effecting, addressing, or adjudicating the ownership or status of the monies here at issue until such time as this Court enters a Final Judgment on Count I in the instant Complaint, and for such other relief as this Court deems appropriate in the interest of justice.

JOHN L. WHARTON, ESQ.
FL Bar ID No. 563099
WILLIAM E. SUNDSTROM, P.A.
FL Bar ID No. 225533
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555; (850) 656-4029 FAX

S.W. MOORE, ESQ.
FL Bar ID No.157268
BRIGHAM MOORE,LLP
3277E Fruitville Road
Sarasota, FL 34237
(941) 365-3800
(941) 952-1414 Fax

Attorneys for Plaintiff, Aloha Utilities, Inc.

By: 
John L. Wharton, Esq.

EXHIBIT "A"

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into this 9th day of March, 2006, by and among Aloha Utilities, Inc. (Aloha), the Office of Public Counsel on behalf of the citizens of the State of Florida (OPC), and Wayne T. Forehand, John H. Gaul, and Sandy Mitchell, Jr., Intervenor in Docket No. 050018-WU (Intervenors). Aloha, OPC and Intervenor are collectively referred to as the "Parties".

WHEREAS, the Florida Public Service Commission ("Commission") has initiated proceedings in Docket No. 050018-WU (Show Cause Docket) relating to the potential deletion of a portion of the territory to which Aloha is currently authorized to provide water service, as more fully set forth in Order No. PSC-05-0204-SC-WU, and Aloha is vigorously defending this case; and

WHEREAS, the Commission has opened an investigation in Docket No. 050183-WU (Investigation Docket) into whether there is probable cause to initiate additional deletion proceedings with respect to other portions of Aloha's water service territory; and

WHEREAS, Aloha has filed a notice of appeal of the order initiating the Investigation Docket in the First District Court of Appeal (Investigation Appeal); and

WHEREAS, the underlying issues in the Show Cause Docket and the Investigation Docket arise out of the presence of hydrogen sulfide in the water in the homes of some Aloha customers and various taste, odor and color issues that result from such presence (the "hydrogen sulfide issues"); and

WHEREAS, Aloha has filed an action against the Commission in Leon County Circuit Court Case No. 05-CA-01142 seeking declaratory and injunctive relief (Declaratory Judgment Action); and

WHEREAS, Aloha has appealed to the First District Court of Appeal in Case No. 04-5242 (Refund Appeal) a Commission order that requires Aloha to refund certain amounts previously collected from its customers; and

WHEREAS, the Commission has issued Order No. PSC-05-0709-FOF-WU (Water Quality Order) in Docket No. 010503-WU (Water Quality Proceeding) granting Aloha's request to replace the requirement in Order No. PSC-02-0593-FOF-WU that Aloha remove 98% of the hydrogen sulfide from its finished water with a goal that the level of hydrogen sulfide in its water should not exceed 0.1 mg/L, and has specified the locations and frequency of required testing; and

WHEREAS, Aloha has appealed the Water Quality Order to the First District Court of Appeal in Case No. 05-3662 (Water Quality Appeal); and

WHEREAS, on July 20, 2005, Aloha submitted to the Commission an Offer of Settlement that was intended to resolve the Show Cause Docket, the Investigation Docket, the Investigation Appeal, the Declaratory Judgment Action, the Refund Appeal, the Water Quality Proceeding, and the Water Quality Appeal; and

WHEREAS, after hearing public comments on August 15, 2005 on the Offer of Settlement, the Commission on August 17, 2005 deferred taking action on the Commission staff recommendation to accept the Offer of Settlement and instead directed the Commission staff to conduct further negotiations involving Aloha, appropriate customer representatives, the Office of Public Counsel, and other interested persons; and

WHEREAS, the pending Commission dockets and appeals were placed in abeyance to provide the parties an opportunity to negotiate; and

WHEREAS, Aloha's existing method of treatment converts hydrogen sulfide into other forms of sulfur; and

WHEREAS, prior to the first negotiation session, in order to facilitate a resolution of these issues, Aloha funded and produced a study by the University of South Florida (the "USF Study") that recommended anion exchange as the preferred treatment option to address the hydrogen sulfide issues; and

WHEREAS, anion exchange removes all forms of ionic sulfur; and

WHEREAS, after review of the USF Study and further consideration of various alternatives, an independent consultant retained by the Commission agrees that anion exchange is the water treatment option that has the best likelihood of eliminating or minimizing the hydrogen sulfide issues on a cost-effective basis; and

WHEREAS, in order to facilitate a settlement, Aloha has produced and submitted to the other Parties a non-binding, conceptual capital cost estimate ("Conceptual Cost Estimate") for implementing anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4), which estimate is based on the cost of facilities sized to treat the full current pumping capacity of the wells at those sites (i.e. 500 GPM for each well), and an independent consultant retained by the Commission has reviewed and verified the reasonableness of that estimate for its intended purpose; and

WHEREAS, Aloha is ready and willing to implement anion exchange as more fully set forth below upon approval by the Commission of such treatment method; and

WHEREAS, Aloha believes that due to the risk of future disallowance for cost recovery purposes, it will not have the ability to finance the anion exchange facilities in the absence of either (1) formal regulatory approval by the Commission of implementation of anion exchange, or (2) the existence of a legally enforceable water treatment standard that requires the implementation of anion exchange; and

WHEREAS, Aloha further believes it will not have the ability to finance the construction of anion exchange facilities while the Show Cause Docket is pending, due to the risk to lenders that a portion of Aloha's revenue-generating territory may be deleted; and

WHEREAS, in the event the Show Cause Docket and/or Investigation Docket were to result in an order deleting any portion of Aloha's territory, Aloha will exercise every legal right at its disposal to resist such deletion and to preserve or recover the full value of its assets; and

WHEREAS, the Parties agree that the public interest is better served by the prompt implementation of anion exchange than by prolonged administrative, judicial and appellate litigation.

NOW, THEREFORE, the Parties agree as follows:

1. The "Effective Date" is the date that a Commission order accepting and approving this Settlement Agreement becomes final and non-appealable.
2. (a) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that (i) it is prudent for Aloha to implement anion exchange at Plants 2, 6, 8, 9, and Mitchell (treating Wells 3 and 4) as if there were a legally enforceable water treatment standard that requires the implementation of such option and the cost of such treatment shall be considered an environmental compliance cost under Section 367.081(2), Florida Statutes, and (ii) the reasonable costs of anion exchange facilities sized to treat the full current pumping capacity of the wells at those sites (i.e. 500 GPM for each well) shall be recoverable through rates, and the anion exchange facilities will be considered 100% used and useful. The Parties further agree, and the Commission order approving this Settlement Agreement shall find, that no additional treatment facilities for hydrogen sulfide shall be required at this time at Plants 1 and 7.
- (b) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that this agreement will not preclude any substantially affected party from challenging, the Commission staff from auditing, or the Commission from reviewing, the reasonableness of the specific costs incurred in implementing anion exchange at the time Aloha seeks recovery of the related costs; however, the Commission's review shall not revisit for ratemaking purposes the fundamental agreement that anion exchange is a prudent option that should have been implemented. The Parties further agree that the Conceptual Cost Estimate provided by Aloha shall be admissible in such cost recovery proceeding only for the purpose of considering if the estimate was a reasonable, good faith estimate at the time it was performed. The estimate has been produced by Aloha only after qualification and explanation of the limited circumstances under which such estimate could be produced and the limited basis upon which such estimate could be relied upon.

- (c) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that Aloha may seek cost recovery for such anion exchange facilities through a three-phase limited proceeding, subject to true-up. The Parties agree that the Commission will process such application as a limited proceeding, will not expand the scope of the proceeding beyond issues related to the installation, operation and maintenance of the anion exchange facilities, and will issue its Phase I order within 90 days after receipt of the petition.
- (1) Phase I shall provide a temporary rate increase (subject to true-up) designed to recover the projected carrying cost (interest during construction) on the average of the projected monthly balances, over the projected Phase I period, of construction work in progress for the anion exchange facilities based on pre-construction detailed engineering cost estimates. Such rate increase shall take effect as soon as possible after the date that on-site construction for anion exchange facilities commences.
 - (2) Phase II shall provide a temporary rate increase (subject to true-up) designed to recover (A) the capital cost of the anion exchange facilities based on actual and/or contracted expenditures, and (B) the projected incremental operating cost of the anion exchange facilities. Such rate increase shall take effect as soon as possible after all of the anion exchange facilities contained herein have been constructed and have been placed in operation.
 - (3) Phase III rates shall provide a final rate increase based on actual audited costs of the anion exchange facilities and one year of actual incremental operating expense experience. Aloha shall file its application for Phase III rates no later than 120 days after it has one year of actual operating expense experience. To the extent that Phase I and Phase II rates have either over- or under-collected the actual costs of the anion exchange facilities, based on the average of the actual monthly costs during the Phase I and Phase II periods, those rates shall be trued-up via a credit or surcharge during the first twelve months the final Phase III rates are in effect.
 - (4) Because the Phase I and Phase II rates are subject to true-up, no opportunity for hearing will be provided at the time those rates are established and the Commission and its staff shall not hold customer meetings.
 - (5) The Phase I rates are designed to recover the carrying cost of the anion exchange facilities during construction. Under subsection (3) above, any over- or under-recovery of such Phase I carrying cost will be refunded through a credit or collected through a surcharge during the first twelve months the final Phase III rates are in effect. Therefore Aloha shall not be entitled to capitalize or recover any Allowance for Funds Used During Construction for these facilities.

- (6) The Phase I and Phase II rates are temporary rates subject to true-up as necessary to correct for any over- or under-collection. Therefore the incremental revenues produced by such rates are not required to be held in escrow and are fully and immediately available to Aloha to fund the related debt service, capital costs, or operating expenses associated with the installation and operation of the anion exchange facilities.

The Parties agree that the Phase I and II proceedings shall not address "repression" in gallons of usage. Such issue shall be addressed, if appropriate, only in the setting of Phase III rates.

- (7) Phase III rates shall be established by a PAA order issued within 6 months after Aloha's submission of actual capital cost data and one year of actual incremental operating expense data for the in-service anion exchange facilities. In the event the Phase III PAA Order is protested, the Commission will issue its Final Order within 8 months of the date of such protest.
- (8) Aloha intends to finance the construction of the anion exchange facilities through debt. Accordingly, the Phase I, II and III rate increases will contain no allowance for a return on equity and no corresponding gross-up for federal income tax expense.

3. On or immediately after the Effective Date:

- (a) The Commission will voluntarily dismiss both the Show Cause Docket and the Investigative Docket.
- (b) No further enforcement action will be requested by the Parties or taken by the Commission against Aloha, nor any further disallowances or penalties of any kind will be assessed against Aloha by the Commission in any future proceeding, based on action or inaction relating to water quality or customer service issues which have been raised in Docket Nos. 950615-SU, 960545-WS, 010503-WU, 020896-WS, 050018-WU or 050183-WU, which action or inaction occurred prior to the Effective Date.
- (c) Aloha will voluntarily dismiss the Declaratory Judgment Action, with prejudice, and will voluntarily dismiss the Investigation Appeal and the Water Quality Appeal.
- (d) Aloha will voluntarily dismiss the Refund Appeal. The amount to be refunded as required by Order No. PSC-04-1050-FOF-WU is currently approximately \$290,000. This amount ("Gross Refund") shall be updated to the Effective Date and shall include interest calculated in accordance with Rule 25-30.360(4), F.A.C. through that date. In order to determine the Net Refund, the Gross Refund shall be reduced by the documented costs of Aloha (up to \$45,000) to prepare the Conceptual Cost Estimate, and the amount of such documented costs shall

immediately be released from escrow. This reduction reflects the prior letter agreement between Aloha and OPC which has been approved by the Commission, that the cost (up to \$45,000) of preparing the Conceptual Cost Estimate for anion exchange shall be recovered from customers in this manner. After reimbursing Aloha for this documented cost, the Net Refund shall remain in the escrow account, accruing interest at the rate actually earned on that account. The Net Refund, plus interest earned thereon, shall be used to help pay for the anion exchange project. Aloha shall record an amount equal to the Net Refund, plus the interest earned thereon, as a contribution-in-aid-of-construction (CIAC) of the anion exchange facilities at the time the order establishing Phase III rates under Section 2(c) has become final and non-appealable. At that time, the balance in the escrow account shall be released to Aloha. Aloha acknowledges that it shall not be entitled to recover through rates, a return on, or return of, such portion of its investment either in the limited proceeding conducted under Section 2(c), or in any future rate proceeding.

(e) Aloha will proceed in good faith to implement anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4) as set forth in Section 4. No later than 30 days following the Effective Date, Aloha shall seek recognition by Pasco County that the implementation of anion exchange, as outlined herein, complies with the requirements of Pasco County Ordinance No. 05-2444 (the "Ordinance") or Aloha shall pursue such other course of action as Aloha deems necessary to allow the installation of anion exchange facilities in lieu of forced draft aeration facilities. The Parties agree that anion exchange constitutes an alternative technology that meets or exceeds the sulfide removal capacity of forced draft aeration and is economically, technologically and environmentally feasible within the meaning of the Ordinance. The Parties agree to support Aloha's efforts to gain County approval for the implementation of anion exchange in lieu of forced draft aeration. The time requirements outlined in Paragraph 4 below for various aspects of the implementation of anion exchange treatment shall be tolled from the Effective Date until such time as there is no impediment or prohibition to the implementation of anion exchange, as outlined herein, as a result of the Ordinance.

4. (a) Aloha will install anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4) in accordance with the following schedule. To the extent that staging of construction is necessary, facilities shall be installed first at Plants 8 and 9. The Parties agree that, based on current knowledge, an estimate of 24 months from the Effective Date is a reasonable timetable for completion of the project and that the following are reasonable estimates of the various activities required:

(i) design, including preliminary design and final engineering design: 6 months;

(ii) permitting: 4 months;

(iii) bidding, contract award, fabrication and construction: 14 months.

- (b) Aloha shall file with the Commission, with copies to the Parties, quarterly reports on the progress of implementation. The first such report shall be due 90 days after the Effective Date. Such reports shall detail the work completed during the preceding quarter and provide a timetable for future activities. After each quarterly filing, the Commission staff will arrange a meeting with Aloha and the Parties to review the progress report. In the event that staff concludes after such meeting that Aloha is not proceeding in good faith to attempt to complete the project within 24 months, the staff may, depending on the circumstances, recommend that the Commission take enforcement action for violation of the Commission order approving this settlement. Aloha and the other Parties shall have the right to participate in any such extension or enforcement proceeding. Such enforcement action shall be initiated in a manner that provides Aloha with the right to a hearing and complies with any other applicable requirements of Chapter 120. If the Commission initiates such enforcement action, nothing herein shall limit in any way Aloha's right to seek relief in Circuit Court from any procedural or substantive due process violation of Aloha's property rights by the Commission which is alleged to have occurred after the Effective Date. Nothing in this subsection precludes any Party from taking any action otherwise legally available to it.
- (c) In the event that compliance with the 24 month timetable is delayed by any cause beyond the control of Aloha, including but not limited to natural disasters or other events due to natural causes with or without the intervention of man, strikes, material or supply shortages, delays in the financing, fabrication or delivery of materials or supplies, or actions or inactions by any governmental authority, the Commission shall take no enforcement action against Aloha based on such delay, and the timetable for completion of the project shall be appropriately tolled and extended.
- (d) Within 30 days after the Department of Environmental Protection's approval of an operation and maintenance plan for the anion exchange facilities at a treatment site, Aloha shall provide an informational copy of the approved plan to the Commission and the Office of Public Counsel.

5. The Parties agree to implementation of the following testing for total sulfides in lieu of the testing for total sulfides required by Order No. PSC-05-0709-FOF-WU:

- (a) Beginning 30 days after the installation of anion exchange at a particular treatment site, Aloha shall begin testing for total sulfides at three locations for such site: (i) the raw water influent into the anion exchange facilities (ii) the treated water effluent from the anion exchange facilities, after the treated water effluent from the separate anion exchange reactors at the site has been combined, and (iii) the finished water after disinfection. The testing of raw water influent is for informational purposes only. Based on projected effectiveness of the anion

exchange treatment process, the goal is for the level of total sulfides in the combined treated water effluent to be at or below 0.3 mg/L, and in the finished water to be at or below 0.1 mg/L (compliance tests).

- (b) Beginning 30 days after the Effective Date, Aloha shall begin compliance testing for total sulfides in the finished water from Plants 1 and 7. The goal is for the level of total sulfides to be at or below 0.1 mg/L.
- (c) Beginning 30 days after Aloha starts to purchase water from Pasco County, Aloha shall begin testing for total sulfides in the purchased water at a point prior to the point at which the Pasco County water enters Aloha's distribution system. The testing of Pasco County water is for informational purposes only.
- (d) The compliance testing at each treatment site shall be performed on a monthly basis until the applicable goal for such site has been met for six consecutive months. Compliance testing at that site shall then be performed on a quarterly basis. If a quarterly test shows that the applicable goal has been exceeded, then monthly compliance testing at that site shall resume until the site achieves the goal for three consecutive months. A test of the purchased water shall be required in each month in which a compliance test is required at any of the treatment sites. Results of the tests outlined herein shall be submitted to the Commission within 30 days after the end of the month in which the test was performed.
- (e) In the event that the goal at any single treatment site is exceeded on any two compliance tests in a twelve month period, the Commission staff shall arrange a meeting with Aloha and the Parties to attempt to identify the root cause of the exceedance and to discuss what further action, if any, is appropriate.
- (f) All such testing shall end three years from initiation of such testing, unless any specific site has failed to achieve the goal for sulfide levels outlined herein on any compliance test during the third year of that three year period. In such case, testing shall continue at that site until there has been a twelve month period with no exceedances.

6. Aloha agrees to treat \$250,000 of the cost incurred in construction of the anion exchange facilities as a contribution-in-aid-of-construction. Aloha acknowledges that it shall not be entitled to recover through rates a return on, or return of, such portion of its investment either in the limited proceeding conducted under Section 2(c) or in any future rate proceeding. Aloha shall record this contribution at the time the order establishing the Phase III rates under Section 2(c) has become final and non-appealable.

7. Neither Aloha nor the Commission will seek recovery from the other of attorneys fees, costs, damages, or other compensation related to any action taken by the other on or prior to the Effective Date. Further, Aloha will not seek recovery from its ratepayers of any litigation costs, legal fees, consultant fees, and costs arising directly from or resulting from any judicial or quasi-judicial litigation in the Show Cause Docket, the Investigation Docket, the Declaratory Judgment

Action, the Refund Appeal, the Investigation Appeal, the Water Quality Proceeding, and the Water Quality Appeal. The Parties agree that Aloha may recover the portion of the cost of the USF Study that did not relate solely to the use of hydrogen peroxide. The recovery of the portion of the cost that did relate solely to the use of hydrogen peroxide may be litigated in Phase III of the limited proceeding described in Section 2(c). The provisions of this section will take effect on the Effective Date.

8. The Parties acknowledge that Aloha intends to finance the installation of anion exchange treatment facilities through the issuance of debt. The Parties agree to cooperate in good faith to explore the potential availability of governmental grant monies and/or low cost loans to finance or refinance such facilities.

9. In the event the Commission finds probable cause that Aloha has violated its obligations under Section 3(c), 3(d), 3(e), 4(a), 4(b), 4(d) or 5, as such obligations are incorporated without change in a Commission order approving the Settlement Agreement, nothing in this Settlement Agreement, or the Commission's acceptance thereof, shall limit in any way the Commission's authority to take enforcement action against Aloha for such alleged violation pursuant to Section 367.161, Florida Statutes. Such enforcement action shall be initiated in a manner that provides Aloha with the right to a hearing and complies with any other applicable requirements of Chapter 120. If the Commission initiates such enforcement action, nothing herein shall limit in any way Aloha's right to seek relief in Circuit Court from any procedural or substantive due process violation of Aloha's property rights by the Commission which is alleged to have occurred after the Effective Date.

10. This Settlement Agreement shall bind the Parties only if it is approved by the Commission, without change, and is incorporated by reference in a final Commission order.

11. If this Settlement Agreement is not approved by the Commission, without change, then neither the Settlement Agreement nor the staff recommendation that the Commission approve the Settlement Agreement will be admissible in any present or future judicial or administrative proceeding.

12. By entering into this Settlement Agreement, Aloha does not admit to any violation of any statute, rule or order, nor does such agreement constitute an admission of fault or liability on water quality or customer service issues which have been raised by the Commission or some of Aloha's customers. Conversely, by entering into this Settlement Agreement, OPC and the Intervenors do not concede that no such violations have occurred. In the event this Settlement Agreement is not accepted by the Commission, without change, neither Aloha nor any other party to any of the proceedings referenced herein (including the Commission) waives any legal, factual, policy or other position, or any legally available rights and remedies, otherwise available to it.

13. Nothing in this Settlement Agreement shall be read or interpreted to establish or imply any waiver by any Party of any right, privilege, or protection afforded said Party under Florida law, unless such waiver is set forth specifically herein.

14. Each Intervenor executing this Settlement Agreement, and each customer ratifying this Settlement Agreement, is doing so only on behalf of himself or herself, individually, and in no way is agreeing to the terms and conditions of this Settlement Agreement on behalf of any other customer or group of customers. No such Intervenor or customer shall be sued by Aloha, or any of its assigns, because of such person's execution or ratification of this Settlement Agreement. No such Intervenor or customer shall sue Aloha, or any of its assigns, because of Aloha's execution of this Settlement Agreement.

EXECUTED this 9th day of March, 2006.

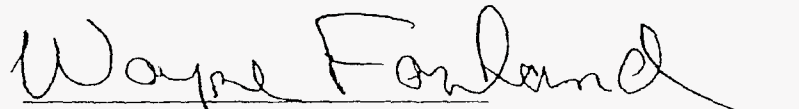
ALOHA UTILITIES, INC.

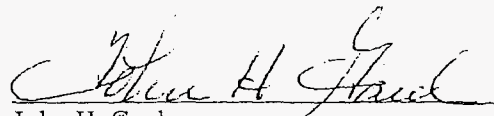
By: 

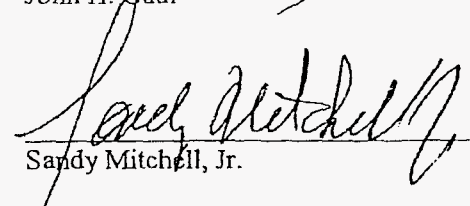
OFFICE OF PUBLIC COUNSEL

By: 

INTERVENORS


Wayne T. Forehand


John H. Gaul


Sandy Mitchell, Jr.

RATIFICATION BY CUSTOMERS

The undersigned customers of Aloha hereby ratify and support the foregoing Settlement Agreement between Aloha and the Office of Public Counsel.

Richard Letwin
Thomas B. Vaux
Joel A. Kutz

Richard Wittay
John P. Andrews

STATEMENT BY COMMISSION STAFF

The Commission staff have participated in settlement negotiations with the Parties and have reviewed the foregoing Settlement Agreement. Based on that participation and review, staff will recommend to the Commission that it issue a final order approving the Settlement Agreement, without change, and that the Commission undertake such actions and issue such orders as necessary or appropriate to facilitate implementation of this Settlement Agreement.

Dated: 3/9/06

Paul D. Pru
General Counsel

Joseph D. Jedd
For Director of Economic Regulation

EXHIBIT "B"

BEFORE THE PUBLIC SERVICE COMMISSION

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. 050018-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.

DOCKET NO. 050183-WU

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

DOCKET NO. 010503-WU
ORDER NO. PSC-06-0270-AS-WU
ISSUED: April 5, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE COMMISSION:

I. BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas: Aloha Gardens and Seven Springs. There are currently three active dockets,¹ three appeals in the First District Court of

¹ Docket No. 050018-WU (Show Cause Docket) is a proceeding to delete certain portions of Aloha's water service territory. Docket No. 050183-WU (Investigation Docket) is an investigation into whether this Commission should initiate deletion proceedings for additional portions of Aloha's water service territory. Docket No. 010503-WU (Water Quality Proceeding) is a continuation of Aloha's last rate case in which an interim rate refund is pending and in which this Commission entered an order establishing a water quality goal of 0.1 mg/L of total sulfides and specified testing locations and frequencies.

Appeal,² and one Circuit Court case in Leon County,³ involving Aloha's Seven Springs service area and this Commission.

In February 2005, this Commission initiated deletion proceedings in Docket No. 050018-WU for a portion of the Seven Springs service area based on a number of problems that ultimately stem from the presence of hydrogen sulfide in the water.

On August 17, 2005, we deferred consideration of our staff's recommendation to accept a comprehensive Offer of Settlement negotiated by staff and submitted by Aloha in an effort to resolve Docket Number 050018-WU and all other outstanding matters. At that time, we decided to hold the deletion proceeding in abeyance and directed staff to undertake negotiations with Aloha, the Office of Public Counsel (OPC), customer representatives, and other interested parties in an attempt to reach a resolution that is satisfactory to all parties.

On March 9, 2006, after several months of extensive negotiations in which staff participated, a Settlement Agreement ("Settlement") was executed by Aloha, OPC, and individual intervenors Wayne T. Forehand, John H. Gaul, and Sandy Mitchell, Jr. (Intervenors). Aloha, OPC and Intervenors are collectively referred to as the "Parties." The Settlement was also ratified by Richard Letvin, Donna B. Vaurio, Joel A. Kurtz, Richard E. Wiltsey, and John P. Andrews, non-intervenor customers of Aloha who are active members of the Committee For Better Water Now. Mr. Edward O. Wood, another individual intervenor in the deletion docket, did not sign the Settlement.

The Settlement, a copy of which is attached to this Order as Attachment A, is a comprehensive agreement that resolves all outstanding dockets and court proceedings between Aloha and this Commission. One key element of the Settlement 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.

Anion exchange was identified as the preferred water treatment option in a study performed for Aloha by the University of South Florida. Unlike the current treatment method that converts hydrogen sulfide into other forms of sulfur, anion exchange removes all forms of ionic sulfur from the water. After review of the USF study, and further consideration of various alternatives, Dr. James Taylor of the University of Central Florida, who was retained by this Commission as an independent consultant, agreed that anion exchange is the water treatment option that has the best likelihood of eliminating or minimizing the hydrogen sulfide issues on a cost-effective basis.

² Case No. 04-5242 (Refund Appeal) is Aloha's appeal of our order requiring a refund of previously collected interim rates. Case No. 05-3247 (Investigation Appeal) is Aloha's appeal of our order initiating the Investigation Docket. Case No. 05-3662 is Aloha's appeal of our order establishing the 0.1 mg/L water quality goal and specifying the testing locations and frequencies.

³ Case No. 05-CA-01142 (Declaratory Judgment Action) is a complaint that seeks declaratory and injunctive relief related to our prosecution of the Show Cause Docket.

In order to facilitate the settlement negotiations, Aloha provided a non-binding, conceptual capital cost estimate ("Conceptual Cost Estimate") for installing anion exchange facilities. That estimate showed an installed capital cost of \$6.13 million, plus or minus 30%. Dr. Taylor reviewed the Conceptual Cost Estimate and concluded that it is a reasonable estimate based on good faith assumptions at the time it was prepared.

The Settlement contains numerous provisions in addition to the identification of anion exchange as a prudent water treatment methodology to be implemented by Aloha. Other major elements of the Settlement are summarized below. By this Order, we approve the Settlement as being in the best interests of Aloha and its customers.

In a related matter, by Order No. PSC-06-0015-FOF-WU, issued January 4, 2006, we approved a letter agreement between Aloha and OPC that formalized their agreement regarding recovery of the cost of preparing the Conceptual Cost Estimate. On January 12, 2006, Mr. Edward O. Wood, a customer intervenor, timely filed a letter requesting reconsideration of that order. On January 23, 2006, Aloha filed a response in opposition to Mr. Wood's request. We find that Mr. Wood's request for reconsideration is moot, since the Settlement we approve contains a provision for the recovery of these costs that effectively supersedes the provisions of Order No. PSC-06-0015-FOF-WU.

We have jurisdiction over these matters pursuant to Chapters 120 and 367, Florida Statutes.

II. SETTLEMENT

The major elements of the Settlement are as follows:

Water Treatment Method (Paragraph 2a). The Parties agree that it is prudent for Aloha to implement anion exchange at five of its seven water treatment sites and that no additional treatment is required at this time at the remaining two sites where the level of hydrogen sulfide in the raw water is lower. This means that the reasonable cost of anion exchange facilities at the five sites will be recoverable through rates, and that anion exchange facilities sized to treat the full current pumping capacity at those sites will be 100% used and useful for ratemaking purposes.

Reasonable Costs (Paragraph 2b). The Parties agree that the Commission can review and audit, and any substantially affected party can challenge, the reasonableness of the specific costs incurred in implementing anion exchange. However, any rate review will not revisit the fundamental agreement and finding that anion exchange is a prudent option that should have been implemented. Further, the Conceptual Cost Estimate will be admissible in cost recovery proceedings only for the purpose of considering if it was a reasonable, good faith estimate at the time it was performed.

Aloha Recording of CIAC (Paragraph 6). Aloha agrees to record \$250,000 of the construction cost for the anion exchange facilities as a contribution-in-aid-of-construction.

Construction Schedule (Paragraph 4). Aloha will install the anion exchange facilities in accordance with the schedule set forth below. A current County ordinance (under challenge by Aloha) requires Aloha to install forced draft aeration facilities. The Parties agree to support Aloha's efforts to gain County approval for implementation of anion exchange in lieu of forced draft aeration. The 24-month construction schedule does not begin to run until any impediment to anion exchange created by the County ordinance has been removed. The construction schedule is also subject to tolling in the event of a force majeure.

- o Design: 6 months
- o Permitting: 4 months
- o Bidding, contract award, fabrication and construction: 14 months

If construction staging is required, anion exchange facilities will be installed first at Wells 8 and 9, which have the highest concentration of hydrogen sulfide in the raw water. Aloha will file quarterly progress reports during construction, and staff will arrange a meeting to review each progress report with the Parties. If staff concludes that Aloha is not proceeding in good faith to meet the schedule, it may recommend enforcement action. Aloha remains free to request any necessary extension of time, and the other Parties remain free to seek other relief in the event the schedule is not being met.

Testing for Sulfides (Paragraph 5). The Parties agree to a protocol of testing for sulfides to replace the testing requirements imposed by Order No. PSC-05-0709-FOF-WU. Under the agreed protocol, water at the plants equipped with anion exchange will be tested at three points on either a monthly or quarterly basis: raw water, water after anion exchange and before disinfection, water after disinfection. The raw water testing is for informational purposes. The compliance goal for water after anion exchange is for total sulfides to be at or below 0.3 mg/L, and after disinfection for total sulfides to be at or below 0.1 mg/L. Testing at each plant continues for a minimum of 3 years, or longer if necessary to demonstrate a 12-month period with no exceedances of the compliance goals. If any site fails two compliance tests in a 12-month period, staff will meet with Aloha and the parties to attempt to identify the root cause of the exceedance and discuss what further action, if any, is appropriate.

Limited Proceeding for Cost Recovery (Paragraph 2c). The Parties agree that Aloha may seek cost recovery for the anion exchange facilities in a three-phase limited proceeding. Because the Phase I and Phase II rates will be temporary rates subject to true-up: no opportunity for hearing is necessary; no customer meetings will be required; the incremental revenues will not have to be held in escrow; and repression will not be taken into account. Because Aloha intends to finance the construction through debt, the Phase I, II and III rate increases will contain no allowance for return on equity and no gross-up for federal income tax expense. The three phases are as follows:

- o Phase I: 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 are subject to true-up in Phase III and are in lieu of Aloha accruing an Allowance for Funds Used During Construction (AFUDC).

- Phase II: Temporary rates during the first twenty months (more or less) the anion exchange facilities are in operation. These temporary rates are subject to true-up in Phase III and will be designed to recover the actual or contracted cost of the anion exchange facilities and the projected incremental operating costs.
- Phase III: Final rates based on actual construction costs and one year of actual operating expense history, both of which are subject to audit and to review for reasonableness. If there is any over- or under- collection in Phases I or II, there will be an offsetting credit or surcharge during the first 12 months the Phase III rates are in effect. Phase III rates will be set via a PAA order within 6 months after Aloha's submission of actual cost data. In the event of a protest, the Commission will enter its final order within 8 months of the date of the protest. Any necessary repression adjustment will be considered in Phase III.

Dismissal of Litigation (Paragraph 3). On or immediately after the Effective Date (i.e., the date this Commission order approving the Settlement becomes final and non-appealable), Aloha and the Commission will terminate the pending proceedings as follows:

- The Commission will dismiss the Show Cause Docket (Docket No. 050018-WU) and the Investigation Docket (Docket No. 050183-WU).
- Aloha will dismiss the Declaratory Judgment Action in Circuit Court, the Investigation Appeal, the Water Quality Appeal, and the Refund Appeal. 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 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.

Fresh Start and Future Enforcement (Paragraphs 3b and 9). After the Effective Date, no further enforcement action against Aloha will be requested by the Parties or taken by this Commission (and no further disallowances or penalties will be assessed), based on Aloha's actions or inactions prior to the Effective Date relating to water quality or customer service issues which have been raised in prior dockets. This Commission may initiate a new enforcement proceeding based on actions or inactions after the Effective Date in the event that we find probable cause that Aloha has violated its obligations under the Settlement.

Prior Litigation Costs (Paragraph 7). Aloha agrees not to seek recovery from its ratepayers of any litigation costs, legal fees, consultant fees, and costs arising from litigation in the Show Cause Docket, the Investigation Docket, the Declaratory Judgment Action, the Refund Appeal, the Investigation Appeal, the Water Quality Proceeding, and the Water Quality Appeal.

III. FINDINGS AND CONCLUSIONS

Upon review and consideration, we find that the Settlement is in the public interest. The Settlement redirects the Parties' resources away from what has been protracted and expensive administrative litigation. It establishes a timetable for installing water treatment facilities that the Parties agree represent a prudent option for addressing the taste, odor and color problems that have been an issue for over a decade. It provides for water quality monitoring beyond that required by any existing environmental regulations. It offers a number of monetary benefits to customers that could not be obtained outside of a Settlement, including a \$250,000 contribution-in-aid-of-construction by Aloha, and Aloha's agreement to forego recovery from customers of what could be \$1 million or more in litigation costs. It also establishes procedures, which we find are appropriate, for this Commission to follow in future cost recovery proceedings.

By our approval, we hereby make the specific findings referred to in Paragraphs 2a, 2b, and 2c of the Settlement. Consistent with Paragraph 3a, upon the effective date of the Settlement, we will dismiss Docket Nos. 050018-WU and 050183-WU.

We note that one individual intervenor, Mr. Edward Wood, did not execute the Settlement⁴ and believes that the Commission should move forward with the proceeding in Docket No. 050018-WU to delete a portion of Aloha's territory. Under the applicable license revocation statute and case law, however, only the Commission can initiate and maintain a license revocation proceeding. We find that the Settlement executed by Aloha, OPC and the other individual intervenors, which includes the dismissal of Docket No. 050018-WU, provides a sufficient basis for our decision to dismiss that revocation proceeding. We also considered Mr. Wood's other objections to the Settlement and do not find them persuasive.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Settlement Agreement dated March 9, 2006, which is attached hereto as Attachment A and incorporated herein by reference, is approved. It is further

ORDERED that we hereby make the specific findings referred to in Paragraphs 2a, 2b and 2c of the Settlement Agreement. It is further

ORDERED that Docket Nos. 050018-WU and 050183-WU shall be closed immediately following the date this Order becomes final and non-appealable. It is further

ORDERED that Docket No. 010503-WU shall remain open until the interim rate monies being held in escrow are released to Aloha in accordance with Paragraph 3d of the Settlement Agreement, at which time the docket shall be closed administratively.

⁴ This Commission has the power to approve settlements among less than all the parties to a proceeding. See, South Florida Hospital and Healthcare Association v. Jaber, 887 So.2d 1210 (Fla. 2004).

By ORDER of the Florida Public Service Commission this 5th day of April, 2006.

/s/ Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the Commission's Web site,
<http://www.floridapsc.com> or fax a request to 1-850-413-
7118, for a copy of the order with signature.

(S E A L)

SOME (OR ALL) ATTACHMENT PAGES ARE NOT ON ELECTRONIC DOCUMENT.

RDM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into this 9th day of March, 2006, by and among Aloha Utilities, Inc. (Aloha), the Office of Public Counsel on behalf of the citizens of the State of Florida (OPC), and Wayne T. Forehand, John H. Gaul, and Sandy Mitchell, Jr., Interveners in Docket No. 050018-WU (Interveners). Aloha, OPC and Interveners are collectively referred to as the "Parties".

WHEREAS, the Florida Public Service Commission ("Commission") has initiated proceedings in Docket No. 050018-WU (Show Cause Docket) relating to the potential deletion of a portion of the territory to which Aloha is currently authorized to provide water service, as more fully set forth in Order No. PSC-05-0204-SC-WU, and Aloha is vigorously defending this case; and

WHEREAS, the Commission has opened an investigation in Docket No. 050183-WU (Investigation Docket) into whether there is probable cause to initiate additional deletion proceedings with respect to other portions of Aloha's water service territory; and

WHEREAS, Aloha has filed a notice of appeal of the order initiating the Investigation Docket in the First District Court of Appeal (Investigation Appeal); and

WHEREAS, the underlying issues in the Show Cause Docket and the Investigation Docket arise out of the presence of hydrogen sulfide in the water in the homes of some Aloha customers and various taste, odor and color issues that result from such presence (the "hydrogen sulfide issues"); and

WHEREAS, Aloha has filed an action against the Commission in Leon County Circuit Court Case No. 05-CA-01142 seeking declaratory and injunctive relief (Declaratory Judgment Action); and

WHEREAS, Aloha has appealed to the First District Court of Appeal in Case No. 04-5242 (Refund Appeal) a Commission order that requires Aloha to refund certain amounts previously collected from its customers; and

WHEREAS, the Commission has issued Order No. PSC-05-0709-FOF-WU (Water Quality Order) in Docket No. 010503-WU (Water Quality Proceeding) granting Aloha's request to replace the requirement in Order No. PSC-02-0593-FOF-WU that Aloha remove 98% of the hydrogen sulfide from its finished water with a goal that the level of hydrogen sulfide in its water should not exceed 0.1 mg/L, and has specified the locations and frequency of required testing; and

WHEREAS, Aloha has appealed the Water Quality Order to the First District Court of Appeal in Case No. 05-3662 (Water Quality Appeal); and

DOCUMENT NUMBER-DATE

02063 MAR 10 8

FPSC-COMMISSION CLERK

WHEREAS, on July 20, 2005, Aloha submitted to the Commission an Offer of Settlement that was intended to resolve the Show Cause Docket, the Investigation Docket, the Investigation Appeal, the Declaratory Judgment Action, the Refund Appeal, the Water Quality Proceeding, and the Water Quality Appeal; and

WHEREAS, after hearing public comments on August 15, 2005 on the Offer of Settlement, the Commission on August 17, 2005 deferred taking action on the Commission staff recommendation to accept the Offer of Settlement and instead directed the Commission staff to conduct further negotiations involving Aloha, appropriate customer representatives, the Office of Public Counsel, and other interested persons; and

WHEREAS, the pending Commission dockets and appeals were placed in abeyance to provide the parties an opportunity to negotiate; and

WHEREAS, Aloha's existing method of treatment converts hydrogen sulfide into other forms of sulfur; and

WHEREAS, prior to the first negotiation session, in order to facilitate a resolution of these issues, Aloha funded and produced a study by the University of South Florida (the "USF Study") that recommended anion exchange as the preferred treatment option to address the hydrogen sulfide issues; and

WHEREAS, anion exchange removes all forms of ionic sulfur; and

WHEREAS, after review of the USF Study and further consideration of various alternatives, an independent consultant retained by the Commission agrees that anion exchange is the water treatment option that has the best likelihood of eliminating or minimizing the hydrogen sulfide issues on a cost-effective basis; and

WHEREAS, in order to facilitate a settlement, Aloha has produced and submitted to the other Parties a non-binding, conceptual capital cost estimate ("Conceptual Cost Estimate") for implementing anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4), which estimate is based on the cost of facilities sized to treat the full current pumping capacity of the wells at those sites (i.e. 500 GPM for each well), and an independent consultant retained by the Commission has reviewed and verified the reasonableness of that estimate for its intended purpose; and

WHEREAS, Aloha is ready and willing to implement anion exchange as more fully set forth below upon approval by the Commission of such treatment method; and

WHEREAS, Aloha believes that due to the risk of future disallowance for cost recovery purposes, it will not have the ability to finance the anion exchange facilities in the absence of either (1) formal regulatory approval by the Commission of implementation of anion exchange, or (2) the existence of a legally enforceable water treatment standard that requires the implementation of anion exchange; and

WHEREAS, Aloha further believes it will not have the ability to finance the construction of anion exchange facilities while the Show Cause Docket is pending, due to the risk to lenders that a portion of Aloha's revenue-generating territory may be deleted; and

WHEREAS, in the event the Show Cause Docket and/or Investigation Docket were to result in an order deleting any portion of Aloha's territory, Aloha will exercise every legal right at its disposal to resist such deletion and to preserve or recover the full value of its assets; and

WHEREAS, the Parties agree that the public interest is better served by the prompt implementation of anion exchange than by prolonged administrative, judicial and appellate litigation.

NOW, THEREFORE, the Parties agree as follows:

1. The "Effective Date" is the date that a Commission order accepting and approving this Settlement Agreement becomes final and non-appealable.
2. (a) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that (i) it is prudent for Aloha to implement anion exchange at Plants 2, 6, 8, 9, and Mitchell (treating Wells 3 and 4) as if there were a legally enforceable water treatment standard that requires the implementation of such option and the cost of such treatment shall be considered an environmental compliance cost under Section 367.081(2), Florida Statutes, and (ii) the reasonable costs of anion exchange facilities sized to treat the full current pumping capacity of the wells at those sites (i.e. 500 GPM for each well) shall be recoverable through rates, and the anion exchange facilities will be considered 100% used and useful. The Parties further agree, and the Commission order approving this Settlement Agreement shall find, that no additional treatment facilities for hydrogen sulfide shall be required at this time at Plants 1 and 7.
- (b) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that this agreement will not preclude any substantially affected party from challenging, the Commission staff from auditing, or the Commission from reviewing, the reasonableness of the specific costs incurred in implementing anion exchange at the time Aloha seeks recovery of the related costs; however, the Commission's review shall not revisit for ratemaking purposes the fundamental agreement that anion exchange is a prudent option that should have been implemented. The Parties further agree that the Conceptual Cost Estimate provided by Aloha shall be admissible in such cost recovery proceeding only for the purpose of considering if the estimate was a reasonable, good faith estimate at the time it was performed. The estimate has been produced by Aloha only after qualification and explanation of the limited circumstances under which such estimate could be produced and the limited basis upon which such estimate could be relied upon.

- (c) The Parties agree, and the Commission order approving this Settlement Agreement shall find, that Aloha may seek cost recovery for such anion exchange facilities through a three-phase limited proceeding, subject to true-up. The Parties agree that the Commission will process such application as a limited proceeding, will not expand the scope of the proceeding beyond issues related to the installation, operation and maintenance of the anion exchange facilities, and will issue its Phase I order within 90 days after receipt of the petition.
- (1) Phase I shall provide a temporary rate increase (subject to true-up) designed to recover the projected carrying cost (interest during construction) on the average of the projected monthly balances, over the projected Phase I period, of construction work in progress for the anion exchange facilities based on pre-construction detailed engineering cost estimates. Such rate increase shall take effect as soon as possible after the date that on-site construction for anion exchange facilities commences.
 - (2) Phase II shall provide a temporary rate increase (subject to true-up) designed to recover (A) the capital cost of the anion exchange facilities based on actual and/or contracted expenditures, and (B) the projected incremental operating cost of the anion exchange facilities. Such rate increase shall take effect as soon as possible after all of the anion exchange facilities contained herein have been constructed and have been placed in operation.
 - (3) Phase III rates shall provide a final rate increase based on actual audited costs of the anion exchange facilities and one year of actual incremental operating expense experience. Aloha shall file its application for Phase III rates no later than 120 days after it has one year of actual operating expense experience. To the extent that Phase I and Phase II rates have either over- or under-collected the actual costs of the anion exchange facilities, based on the average of the actual monthly costs during the Phase I and Phase II periods, those rates shall be trued-up via a credit or surcharge during the first twelve months the final Phase III rates are in effect.
 - (4) Because the Phase I and Phase II rates are subject to true-up, no opportunity for hearing will be provided at the time those rates are established and the Commission and its staff shall not hold customer meetings.
 - (5) The Phase I rates are designed to recover the carrying cost of the anion exchange facilities during construction. Under subsection (3) above, any over- or under-recovery of such Phase I carrying cost will be refunded through a credit or collected through a surcharge during the first twelve months the final Phase III rates are in effect. Therefore Aloha shall not be entitled to capitalize or recover any Allowance for Funds Used During Construction for these facilities.

- (6) The Phase I and Phase II rates are temporary rates subject to true-up as necessary to correct for any over- or under-collection. Therefore the incremental revenues produced by such rates are not required to be held in escrow and are fully and immediately available to Aloha to fund the related debt service, capital costs, or operating expenses associated with the installation and operation of the anion exchange facilities.

The Parties agree that the Phase I and II proceedings shall not address "repression" in gallons of usage. Such issue shall be addressed, if appropriate, only in the setting of Phase III rates.

- (7) Phase III rates shall be established by a PAA order issued within 6 months after Aloha's submission of actual capital cost data and one year of actual incremental operating expense data for the in-service anion exchange facilities. In the event the Phase III PAA Order is protested, the Commission will issue its Final Order within 8 months of the date of such protest.
- (8) Aloha intends to finance the construction of the anion exchange facilities through debt. Accordingly, the Phase I, II and III rate increases will contain no allowance for a return on equity and no corresponding gross-up for federal income tax expense.

3. On or immediately after the Effective Date:

- (a) The Commission will voluntarily dismiss both the Show Cause Docket and the Investigative Docket.
- (b) No further enforcement action will be requested by the Parties or taken by the Commission against Aloha, nor any further disallowances or penalties of any kind will be assessed against Aloha by the Commission in any future proceeding, based on action or inaction relating to water quality or customer service issues which have been raised in Docket Nos. 950615-SU, 960545-WS, 010503-WU, 020896-WS, 050018-WU or 050183-WU, which action or inaction occurred prior to the Effective Date.
- (c) Aloha will voluntarily dismiss the Declaratory Judgment Action, with prejudice, and will voluntarily dismiss the Investigation Appeal and the Water Quality Appeal.
- (d) Aloha will voluntarily dismiss the Refund Appeal. The amount to be refunded as required by Order No. PSC-04-1050-FOF-WU is currently approximately \$290,000. This amount ("Gross Refund") shall be updated to the Effective Date and shall include interest calculated in accordance with Rule 25-30.360(4), F.A.C. through that date. In order to determine the Net Refund, the Gross Refund shall be reduced by the documented costs of Aloha (up to \$45,000) to prepare the Conceptual Cost Estimate, and the amount of such documented costs shall

immediately be released from escrow. This reduction reflects the prior letter agreement between Aloha and OPC which has been approved by the Commission, that the cost (up to \$45,000) of preparing the Conceptual Cost Estimate for anion exchange shall be recovered from customers in this manner. After reimbursing Aloha for this documented cost, the Net Refund shall remain in the escrow account, accruing interest at the rate actually earned on that account. The Net Refund, plus interest earned thereon, shall be used to help pay for the anion exchange project. Aloha shall record an amount equal to the Net Refund, plus the interest earned thereon, as a contribution-in-aid-of-construction (CIAC) of the anion exchange facilities at the time the order establishing Phase III rates under Section 2(c) has become final and non-appealable. At that time, the balance in the escrow account shall be released to Aloha. Aloha acknowledges that it shall not be entitled to recover through rates, a return on, or return of, such portion of its investment either in the limited proceeding conducted under Section 2(c), or in any future rate proceeding.

(e) Aloha will proceed in good faith to implement anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4) as set forth in Section 4. No later than 30 days following the Effective Date, Aloha shall seek recognition by Pasco County that the implementation of anion exchange, as outlined herein, complies with the requirements of Pasco County Ordinance No. 05-2444 (the "Ordinance") or Aloha shall pursue such other course of action as Aloha deems necessary to allow the installation of anion exchange facilities in lieu of forced draft aeration facilities. The Parties agree that anion exchange constitutes an alternative technology that meets or exceeds the sulfide removal capacity of forced draft aeration and is economically, technologically and environmentally feasible within the meaning of the Ordinance. The Parties agree to support Aloha's efforts to gain County approval for the implementation of anion exchange in lieu of forced draft aeration. The time requirements outlined in Paragraph 4 below for various aspects of the implementation of anion exchange treatment shall be tolled from the Effective Date until such time as there is no impediment or prohibition to the implementation of anion exchange, as outlined herein, as a result of the Ordinance.

4. (a) Aloha will install anion exchange at Plants 2, 6, 8, 9 and Mitchell (treating Wells 3 and 4) in accordance with the following schedule. To the extent that staging of construction is necessary, facilities shall be installed first at Plants 8 and 9. The Parties agree that, based on current knowledge, an estimate of 24 months from the Effective Date is a reasonable timetable for completion of the project and that the following are reasonable estimates of the various activities required:

- (i) design, including preliminary design and final engineering design: 6 months;
- (ii) permitting: 4 months;

(iii) bidding, contract award, fabrication and construction: 14 months.

- (b) Aloha shall file with the Commission, with copies to the Parties, quarterly reports on the progress of implementation. The first such report shall be due 90 days after the Effective Date. Such reports shall detail the work completed during the preceding quarter and provide a timetable for future activities. After each quarterly filing, the Commission staff will arrange a meeting with Aloha and the Parties to review the progress report. In the event that staff concludes after such meeting that Aloha is not proceeding in good faith to attempt to complete the project within 24 months, the staff may, depending on the circumstances, recommend that the Commission take enforcement action for violation of the Commission order approving this settlement. Aloha and the other Parties shall have the right to participate in any such extension or enforcement proceeding. Such enforcement action shall be initiated in a manner that provides Aloha with the right to a hearing and complies with any other applicable requirements of Chapter 120. If the Commission initiates such enforcement action, nothing herein shall limit in any way Aloha's right to seek relief in Circuit Court from any procedural or substantive due process violation of Aloha's property rights by the Commission which is alleged to have occurred after the Effective Date. Nothing in this subsection precludes any Party from taking any action otherwise legally available to it.
- (c) In the event that compliance with the 24 month timetable is delayed by any cause beyond the control of Aloha, including but not limited to natural disasters or other events due to natural causes with or without the intervention of man, strikes, material or supply shortages, delays in the financing, fabrication or delivery of materials or supplies, or actions or inactions by any governmental authority, the Commission shall take no enforcement action against Aloha based on such delay, and the timetable for completion of the project shall be appropriately tolled and extended.
- (d) Within 30 days after the Department of Environmental Protection's approval of an operation and maintenance plan for the anion exchange facilities at a treatment site, Aloha shall provide an informational copy of the approved plan to the Commission and the Office of Public Counsel.

5. The Parties agree to implementation of the following testing for total sulfides in lieu of the testing for total sulfides required by Order No. PSC-05-0709-FOF-WU:

- (a) Beginning 30 days after the installation of anion exchange at a particular treatment site, Aloha shall begin testing for total sulfides at three locations for such site: (i) the raw water influent into the anion exchange facilities (ii) the treated water effluent from the anion exchange facilities, after the treated water effluent from the separate anion exchange reactors at the site has been combined, and (iii) the finished water after disinfection. The testing of raw water influent is for informational purposes only. Based on projected effectiveness of the anion

exchange treatment process, the goal is for the level of total sulfides in the combined treated water effluent to be at or below 0.3 mg/L, and in the finished water to be at or below 0.1 mg/L (compliance tests).

- (b) Beginning 30 days after the Effective Date, Aloha shall begin compliance testing for total sulfides in the finished water from Plants 1 and 7. The goal is for the level of total sulfides to be at or below 0.1 mg/L.
- (c) Beginning 30 days after Aloha starts to purchase water from Pasco County, Aloha shall begin testing for total sulfides in the purchased water at a point prior to the point at which the Pasco County water enters Aloha's distribution system. The testing of Pasco County water is for informational purposes only.
- (d) The compliance testing at each treatment site shall be performed on a monthly basis until the applicable goal for such site has been met for six consecutive months. Compliance testing at that site shall then be performed on a quarterly basis. If a quarterly test shows that the applicable goal has been exceeded, then monthly compliance testing at that site shall resume until the site achieves the goal for three consecutive months. A test of the purchased water shall be required in each month in which a compliance test is required at any of the treatment sites. Results of the tests outlined herein shall be submitted to the Commission within 30 days after the end of the month in which the test was performed.
- (e) In the event that the goal at any single treatment site is exceeded on any two compliance tests in a twelve month period, the Commission staff shall arrange a meeting with Aloha and the Parties to attempt to identify the root cause of the exceedance and to discuss what further action, if any, is appropriate.
- (f) All such testing shall end three years from initiation of such testing, unless any specific site has failed to achieve the goal for sulfide levels outlined herein on any compliance test during the third year of that three year period. In such case, testing shall continue at that site until there has been a twelve month period with no exceedances.

6. Aloha agrees to treat \$250,000 of the cost incurred in construction of the anion exchange facilities as a contribution-in-aid-of-construction. Aloha acknowledges that it shall not be entitled to recover through rates a return on, or return of, such portion of its investment either in the limited proceeding conducted under Section 2(c) or in any future rate proceeding. Aloha shall record this contribution at the time the order establishing the Phase III rates under Section 2(c) has become final and non-appealable.

7. Neither Aloha nor the Commission will seek recovery from the other of attorneys fees, costs, damages, or other compensation related to any action taken by the other on or prior to the Effective Date. Further, Aloha will not seek recovery from its ratepayers of any litigation costs, legal fees, consultant fees, and costs arising directly from or resulting from any judicial or quasi-judicial litigation in the Show Cause Docket, the Investigation Docket, the Declaratory Judgment

Action, the Refund Appeal, the Investigation Appeal, the Water Quality Proceeding, and the Water Quality Appeal. The Parties agree that Aloha may recover the portion of the cost of the USF Study that did not relate solely to the use of hydrogen peroxide. The recovery of the portion of the cost that did relate solely to the use of hydrogen peroxide may be litigated in Phase III of the limited proceeding described in Section 2(c). The provisions of this section will take effect on the Effective Date.

8. The Parties acknowledge that Aloha intends to finance the installation of anion exchange treatment facilities through the issuance of debt. The Parties agree to cooperate in good faith to explore the potential availability of governmental grant monies and/or low cost loans to finance or refinance such facilities.

9. In the event the Commission finds probable cause that Aloha has violated its obligations under Section 3(c), 3(d), 3(e), 4(a), 4(b), 4(d) or 5, as such obligations are incorporated without change in a Commission order approving the Settlement Agreement, nothing in this Settlement Agreement, or the Commission's acceptance thereof, shall limit in any way the Commission's authority to take enforcement action against Aloha for such alleged violation pursuant to Section 367.161, Florida Statutes. Such enforcement action shall be initiated in a manner that provides Aloha with the right to a hearing and complies with any other applicable requirements of Chapter 120. If the Commission initiates such enforcement action, nothing herein shall limit in any way Aloha's right to seek relief in Circuit Court from any procedural or substantive due process violation of Aloha's property rights by the Commission which is alleged to have occurred after the Effective Date.

10. This Settlement Agreement shall bind the Parties only if it is approved by the Commission, without change, and is incorporated by reference in a final Commission order.

11. If this Settlement Agreement is not approved by the Commission, without change, then neither the Settlement Agreement nor the staff recommendation that the Commission approve the Settlement Agreement will be admissible in any present or future judicial or administrative proceeding.

12. By entering into this Settlement Agreement, Aloha does not admit to any violation of any statute, rule or order, nor does such agreement constitute an admission of fault or liability on water quality or customer service issues which have been raised by the Commission or some of Aloha's customers. Conversely, by entering into this Settlement Agreement, OPC and the Intervenors do not concede that no such violations have occurred. In the event this Settlement Agreement is not accepted by the Commission, without change, neither Aloha nor any other party to any of the proceedings referenced herein (including the Commission) waives any legal, factual, policy or other position, or any legally available rights and remedies, otherwise available to it.

13. Nothing in this Settlement Agreement shall be read or interpreted to establish or imply any waiver by any Party of any right, privilege, or protection afforded said Party under Florida law, unless such waiver is set forth specifically herein.

14. Each Intervenor executing this Settlement Agreement, and each customer ratifying this Settlement Agreement, is doing so only on behalf of himself or herself, individually, and in no way is agreeing to the terms and conditions of this Settlement Agreement on behalf of any other customer or group of customers. No such Intervenor or customer shall be sued by Aloha, or any of its assigns, because of such person's execution or ratification of this Settlement Agreement. No such Intervenor or customer shall sue Aloha, or any of its assigns, because of Aloha's execution of this Settlement Agreement.

EXECUTED this 9th day of March, 2006.

ALOHA UTILITIES, INC.

By: John J. Wharton

OFFICE OF PUBLIC COUNSEL

By: W.C. My

INTERVENORS

Wayne Forehand
Wayne T. Forehand

John H. Gaul
John H. Gaul

Sandy Mitchell, Jr.
Sandy Mitchell, Jr.

RATIFICATION BY CUSTOMERS

The undersigned customers of Aloha hereby ratify and support the foregoing Settlement Agreement between Aloha and the Office of Public Counsel.

Richard L. Linton
James B. Vause
Joel A. Kutz

Richard S. Wittig
John P. Andrews

STATEMENT BY COMMISSION STAFF

The Commission staff have participated in settlement negotiations with the Parties and have reviewed the foregoing Settlement Agreement. Based on that participation and review, staff will recommend to the Commission that it issue a final order approving the Settlement Agreement, without change, and that the Commission undertake such actions and issue such orders as necessary or appropriate to facilitate implementation of this Settlement Agreement.

Dated: 3/9/06

Paul D. ...
General Counsel

Joseph D. ...
Director of Economic Regulation

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

ALOHA UTILITIES, INC.

PLAINTIFF,

vs.

51-2009-CA
CASE NO.

3017 MS
G

FLORIDA PUBLIC SERVICE COMMISSION,

DEFENDANT.

SUMMONS

THE STATE OF FLORIDA:
TO EACH SHERIFF OF THE STATE:

YOU ARE COMMANDED to serve this Summons and a copy of the Complaint
in this action on:

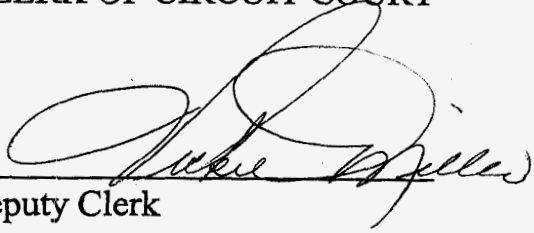
FLORIDA PUBLIC SERVICE COMMISSION
BY SERVING: Chairman Matthew M. Carter, II
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Defendant is required to serve written defenses to the Complaint on John L. Wharton, Esquire, and William E. Sundstrom, P.A., Rose, Sundstrom & Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301 and Bill Moore, Esquire, Brigham Moore, 3277E Fruitville Road, Sarasota, Florida 34237 within 20 days after service of this Summons on that Defendant, exclusive of the day of service, and to file

the original of the defenses with the Clerk of this Court either before service on Plaintiff's attorney or immediately thereafter. If a Defendant fails to do so, a default will be entered against that Defendant for the relief demanded in the Complaint.

MAR 27 2009
Dated on March __, 2009.

JED PITTMAN
AS CLERK OF CIRCUIT COURT

By: 
As Deputy Clerk

JOHN L. WHARTON, ESQ.
WILLIAM E. SUNDSTROM, P.A.
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blirstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555; (850) 656-4029 FAX
And
S.W. MOORE, ESQ.
BRIGHAM MOORE, LLP
3277E Fruitville Road
Sarasota, Florida 34237
(941) 365-3800; (941) 952-1414 FAX

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA
CIVIL DIVISION

ALOHA UTILITIES, INC.

PLAINTIFF,

vs.


CASE NO. 51-2009-CA-3011WS
DIVISION G

FLORIDA PUBLIC SERVICE COMMISSION,

DEFENDANT.

ACCEPTANCE OF SERVICE OF PROCESS

The undersigned, on behalf of the Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 represents that he/she is authorized to accept service of process on behalf of Defendant, Florida Public Service Commission, and does, in fact, accept service of process of the Complaint in the above-styled action on behalf of Defendant, Florida Public Service Commission, on this 30th day of March, 2009.


Florida Public Service Commission
2548 Blairstone Pines Drive
Tallahassee, Florida 32399-0850
FL Bar ID No. _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to William E. Sundstrom, P.A., Rose, Sundstrom & Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301, this 30th day of March, 2009.

