

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of utility  
rates of Aloha Utilities, Inc.  
in Pasco County.

DOCKET NO. 960545-WS  
ORDER NO. PSC-00-0087-PCO-WS  
ISSUED: January 10, 2000

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK  
E. LEON JACOBS, JR.

ORDER GRANTING INTERVENORS' MOTION TO CORRECT SCRIVENER'S  
ERROR AND MOTION TO STRIKE AND DENYING UTILITY'S  
MOTION TO SUPPLEMENT DIRECT TESTIMONY

BY THE COMMISSION:

BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a class A water and wastewater utility in Pasco County. The utility consists of two distinct service areas -- Aloha Gardens and Seven Springs. As of December 31, 1997, Aloha was serving approximately 8,457 water customers in its Seven Springs service area.

On April 30, 1996, Mr. James Goldberg, President of the Wyndtree Master Community Association, filed a petition, signed by 262 customers within Aloha's Seven Springs service area, requesting that the Commission investigate the utility's rates and water quality. The petition and request were assigned this docket.

For the purposes of hearing, this docket was consolidated with Docket No. 950615-SU (Aloha's reuse case). The hearing was held on September 9-10, 1996 in New Port Richey, and concluded on October 28, 1996 in Tallahassee.

After evaluation of the evidence taken during the hearing, we rendered our final decision by Order No. PSC-97-0280-FOF-WS (Final Order), issued on March 12, 1997. In that Order, we determined that the quality of service provided by Aloha's water system was unsatisfactory. Since the evidence indicated that the water quality problems were related to the presence of hydrogen sulfide

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in Aloha's source water and the cost of treatment might be expensive, we ordered that Aloha prepare a report that evaluated the costs and efficiencies of several different treatment options for the removal of hydrogen sulfide from its source water. In addition to finding the quality of the utility's water to be unsatisfactory, we found that the utility's attempts to address customer satisfaction and its responses to customer complaints were unsatisfactory.

In a June 5, 1998 letter, Aloha stated that in order to address customer quality of service concerns and to comply with future Environmental Protection Agency (EPA) regulations, it was willing to begin construction of three centrally located packed-tower aeration treatment facilities to remove hydrogen sulfide from the source water. However, before commencing construction of these water treatment facilities, Aloha requested that we issue an order declaring that it was prudent for Aloha to construct these facilities.

We considered this request at the December 15, 1998 agenda conference. Also, we considered whether there was still a water quality problem in Aloha's Seven Springs service area and, if so, what further actions were required.

Pursuant to the decisions at that agenda conference, on January 7, 1999, we issued our Notice of Proposed Agency Action Order Determining That the Commission Should Take No Further Actions in Regards to Quality of Service in this Docket and Closing Docket and Final Order Denying the Utility's Request That the Commission Issue an Order Declaring it to Be Prudent to Begin Construction of Three Central Water Treatment Facilities (Order No. PSC-99-0061-FOF-WS).

However, three customers -- Messrs. Edward O. Wood and James Goldberg, and Representative Mike Fasano, filed timely protests to the proposed agency action (PAA) portions of Order No. PSC-99-0061-FOF-WS, and requested a formal hearing. Based on these protests, a formal hearing was scheduled for September 30, and October 1, 1999. However, the hearing dates were later rescheduled for December 13 and 14, 1999.

With the scheduling of the formal hearing, several orders concerning procedure were issued. Pursuant to Order No. PSC-99-1499-PCO-WS, issued August 3, 1999, both the prehearing statements

and rebuttal testimony and exhibits were to be filed on October 29, 1999.

On October 29, 1999, the Office of Public Counsel (OPC) filed its Prehearing Statement. On November 1, 1999, Aloha filed both its Prehearing Statement and the rebuttal testimony of Messrs Stephen G. Watford, Robert C. Nixon, and David W. Porter, and F. Marshall Deterding, Esquire. Also, by letter dated November 8, 1999, and filed on November 9, 1999, Representative Mike Fasano, Intervenor, adopted the Prehearing Statement of OPC.

On November 10, 1999, OPC and Representative Mike Fasano (Intervenors), filed their Motion to Correct Scrivener's Error and their Motion to Strike Certain Testimony and Exhibits. In response to these motions, on November 22, 1999, Aloha filed its Response to Motion of Intervenors to Strike Certain Testimony and Exhibits and, also, a Motion to Supplement Direct Testimony.

On November 15, 1999, the hearing dates were changed from December 13 and 14 to December 16 and 17, 1999. With this change in hearing dates, the Intervenors filed a Motion for Continuance. With the approval of the Chairman's Office, this motion was granted by Order No. PSC-99-2285-PCO-WS, issued November 22, 1999. The hearing dates were tentatively rescheduled for March 1 and 2, 2000, but were then changed to March 29 and 30, 2000.

On November 29, 1999, the Intervenors filed their Motion for More Time to Respond to Aloha's Motion to Supplement Direct Testimony. In that motion, the Intervenors requested that they be given until 5:00 p.m. on December 2, 1999 to respond to the utility's motion. However, even before the order granting this request could be issued, the Intervenors filed their Response to Aloha's Motion to Supplement Direct Testimony on November 30, 1999. An Order granting the request was issued on December 6, 1999. This order addresses the above-noted motions and responses.

#### MOTION TO CORRECT SCRIVENER'S ERROR

In this motion, the Intervenors state that the prehearing statement filed by OPC on October 29, 1999, should have been styled Intervenors' Prehearing Statement and should have reflected Intervenor Mike Fasano's joinder therein. The utility did not respond to this motion. Also, by letter dated November 8, 1999, Representative Fasano notified the parties that he adopted OPC's prehearing statement. Therefore, we find that this correction does

not prejudice the utility and the Intervenors' Motion to Correct Scrivener's Error is granted.

MOTION TO STRIKE

In this motion, the Intervenors have moved to strike certain testimony that Aloha has styled as rebuttal testimony. Specifically, the Intervenors request that the following testimony and exhibits be stricken: pages 32 and 33, and Exhibit DWP-5 (pages 1-37) of Mr. Porter's rebuttal testimony; page 1, beginning at line 18, and continuing to page 2, line 16 and all of Exhibit SGW-1 of Mr. Watford's testimony; the entirety of Mr. Nixon's rebuttal testimony and exhibits; and the entirety of Mr. Deterding's rebuttal testimony and exhibits.

In support of this motion, the Intervenors note that nowhere in the direct testimony of Aloha's case nor in the testimony of the Intervenors or staff is there even a mention of regulatory expense or its recovery. However, for the first time in rebuttal, the Intervenors argue that Aloha presents evidence which does not rebut anything, but, rather, presents a direct case which is beyond the scope of the Intervenors' direct case. The Intervenors cite Driscoll v. Morris, 114 So. 2d 314, 315 (3d DCA 1959). In that case, the court held:

Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such additional facts are required by the new matter developed by the defendant. If the proffered evidence appears to be cumulative rather than rebuttal, it is within the sound discretion of the trial judge to allow its admission and the exercise of this discretion will not be disturbed on appeal unless it appears to so prejudice the result as to indicate an abuse of discretion.

The Intervenors do note that there is an exception for cumulative evidence and that we have allowed in a petition for general or limited rate relief the filing of rebuttal testimony on rate case expense. However, the Intervenors state that the

objectionable testimony in this instance is not cumulative and "amounts to an impermissible expansion of Aloha's case-in-chief."

In its Response to Motion of Intervenors to Strike Certain Testimony and Exhibits, Aloha states that whether the testimony and exhibits which are the subject of OPC's Motion fit the "technical definition of 'rebuttal,' it is in the public interest that those issues be placed before the Commission." Aloha further states that the testimony and exhibits relate directly to the case at hand and that, with the continuation of the hearing, it would be logical, expeditious, and economical to resolve the issue of regulatory expense in this docket. Aloha then refers to its Motion to Supplement Direct Testimony and requests oral argument.

The utility's request for oral argument does not comply with Rule 25-22.058, Florida Administrative Code (rule governing oral argument). However, because this action is prior to hearing, pursuant to Rule 25-22.0021(1), Florida Administrative Code, all parties were allowed to address the Commission on all motions. Therefore, we do not find it necessary for us to rule on this request.

Having reviewed the Intervenors' motion and the utility's response, we find that the testimony and exhibits that the Intervenors seek to strike do not rebut any parties' testimony, are not cumulative to any other testimony, and are, therefore, not proper rebuttal testimony and exhibits. Therefore, the Intervenors' Motion to Strike Certain Testimony and Exhibits is granted and the requested testimony and exhibits shall be stricken.

#### MOTION TO SUPPLEMENT DIRECT TESTIMONY

In its Motion to Supplement Direct Testimony, Aloha states that if the Intervenors' Motion to Strike is granted, then the utility should be allowed to file such testimony and exhibits as supplemental direct testimony. Aloha filed its proposed supplemental direct testimony with its motion.

Aloha claims that the allowance of such testimony would be in the public interest, "would not prejudice any party, and would be in furtherance of the principles of both fundamental fairness and judicial economy, particularly in light of the fact that this case has now been tentatively continued until" March 29 and 30, 2000. Aloha further states that all parties should be given an

opportunity to file additional testimony in response within 30 days of the date of its motion.

The Intervenors filed their Response to Aloha's Motion to Supplement Direct Testimony on November 30, 1999. In that response, they divided their argument into three main sections. In the first section, the Intervenors argue that there is no pending request for rate relief and that the current docket does not form a basis or vehicle upon which the Commission may lawfully change the rates charged to customers. The Intervenors further note that the utility has neither availed itself of nor complied with the provisions for obtaining general rate relief under Section 367.081, Florida Statutes, or a limited rate proceeding under Section 367.0822, Florida Statutes.

In the second section, the Intervenors state that Aloha has never alleged "that the alleged costs ever rendered its earnings to be other than fair and reasonable, and fully compensatory" and the "test prerequisite to commission action is whether the utility is earning outside its last authorized rate of return." The Intervenors note that even in a price-index or pass-through proceeding, the utility must by affidavit certify that such proceeding would not cause the utility to earn above its previously authorized rate of return, and, also, that it is the utility's burden to show that its rates are not compensatory. Because the utility has failed to do this, the Intervenors argue that the utility is not entitled to any rate relief.

Finally, the Intervenors state that Order No. PSC-97-0280-FOF-WS stands unchallenged that Aloha has provided quality of service that is unsatisfactory. They argue that it would be unfair to require customers to endure unsatisfactory quality of service and to pay the expenses of Aloha's subsequent disagreement with a Commission finding. They further argue that Aloha has made no material, incremental investment to cure the unsatisfactory quality of service, and that there has been no material improvement in the quality of service since the issuance of Order No. PSC-97-0280-FOF-WS. Based on all the above, the Intervenors state that Aloha's Motion to Supplement Direct Testimony should be rejected.

We note that Rule 25-22.0407, Florida Administrative Code, applicable to all requests for general rate increases, requires notice of any rate request be sent to all customers within the service areas included in the rate request. Such notice must be sent within 50 days after the official date of filing. We further

note that similar notice requirements are generally applied to limited rate proceedings and that the customers have a right to notice, not only under the Rule, but under due process principles of both the United States and the Florida Constitutions. In the case at hand, we find that the first time or place for notice of a request for increased rates should not come with the filing of rebuttal testimony.

We further note that in Order No. PSC-97-0280-FOF-WS, issued after the combined hearing in Docket No. 950615-SU and this docket, we only set wastewater rates for the Seven Springs Division of Aloha. We did not address the earnings situation for the water service provided by the Seven Springs Division or the water and wastewater service provided by the Aloha Gardens Division.

Therefore, there is no way to determine whether the utility is overearning or underearning, and the utility has submitted no allegations or proof of its earnings situation. Based on all of the above, it appears that, at this late stage of the proceeding, it is improper to convert this investigation into a "limited rate proceeding" and allow the testimony as requested by the utility. We find that it would be more appropriate for these expenses to be considered separate from this proceeding in either a limited proceeding or in a full rate case. Therefore, Aloha's Motion to Supplement Direct Testimony is denied.

This docket shall remain open to conduct the hearing now scheduled for March 29-30, 2000.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion to Correct Scrivener's Error filed by the Office of Public Counsel and Representative Mike Fasano, Intervenors, is granted. It is further

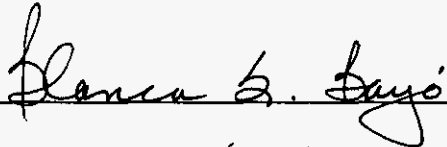
ORDERED that the Motion to Strike Certain Testimony and Exhibits filed by the Office of Public Counsel and Representative Mike Fasano, Intervenors, is granted. It is further

ORDERED that the Motion to Supplement Direct Testimony filed by Aloha Utilities, Inc., is denied. It is further

ORDERED that this docket shall remain open.

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By ORDER of the Florida Public Service Commission this 10th  
day of January, 2000.



BLANCA S. BAYÓ, Director  
Division of Records and Reporting

( S E A L )

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.