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November 10, 1999

Ms. Blanca S. Bayó, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 960545-WS

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of Motion of Intervenors to Strike Certain Testimony and Exhibits for filing in the above-referenced docket.

Also enclosed is a 3.5 inch diskette containing Motion of Intervenors to Strike Certain Testimony and Exhibits in WordPerfect for Windows 6.1. Please indicate receipt of filing by date-stamping the attached copy of this letter and returning it to this office. Thank you for your assistance in this matter.

Sincerely,

Harold McLean
Associate Public Counsel

- AFA _____
- APP _____
- CAF _____
- CMU _____
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FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re Investigation of Utility)
rates of Aloha Utilities, Inc.)
In Pasco County, Florida.)
_____ /

DOCKET NO. 960545-WS

FILED: November 10, 1999

MOTION OF INTERVENORS TO STRIKE
CERTAIN TESTIMONY AND EXHIBITS

The Citizens of the State of Florida, by and through JACK SHREVE, Public Counsel, (Citizens) and Aloha Customer Mike Fasano (Intervenors), move the Florida Public Service Commission (Commission) to strike certain testimony and exhibits filed by Aloha Utilities, Inc., (Aloha), and as grounds therefor, say:

Summary:

Certain rebuttal testimony and exhibits filed by Aloha should be stricken by the Commission because they don't rebut anything. In other words, Aloha has presented a direct case; the Citizens have answered with a direct case criticizing Aloha's direct case, and Aloha has properly responded in rebuttal to the Citizens' case. However, Aloha has taken the matter one impermissible step further. In purported rebuttal testimony, Aloha attempts to expand its case in chief by tendering purported rebuttal testimony, available to Aloha when it fashioned its case-in-chief, and utterly beyond the scope of the Intervenor's direct case.. That practice, if accepted by the Commission, represent an improper use of rebuttal testimony and ought to be rejected

Discussion:

In Order PSC-97-0280-FOF-WS, issued March 12, 1997, the Commission found that Aloha's quality of service was unsatisfactory. On June 30, 1999, Aloha prefiled the direct testimony of Messrs. Porter, Watford, and Nixon. The gist of Aloha's direct testimony provided by Messrs. Porter

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and Watford is that Aloha's water quality meets state standards, that any problems associated therewith are aesthetic, and that the cost of curing any aesthetic shortcomings would be substantial. Mr. Nixon, in his direct testimony, offers the Commission his opinion as to the financial impact upon Aloha were certain construction undertaken.

On August 30, 1999, The Citizens filed the direct testimony of Mr. Biddy. The gist of Mr. Biddy's testimony is that the quality of service provided by Aloha is still unsatisfactory and that the improvements suggested by Aloha are excessive.

On September 29, 1999, the Staff of the Commission filed testimony of two FDEP witnesses, the gist of which addresses quality of service, specifically Aloha's adherence to applicable state standards.

Also on September 29, 1999, Aloha filed the rebuttal testimony by Mr. Porter and Mr. Watford, addressing the positions taken in the Citizens' direct case. Neither Mr. Porter nor Mr. Watford left it at that, however. Both Mr. Porter and Mr. Watford also included additional testimony, and in this endeavor, they were joined by Mr. Deterding and Mr. Nixon. The gist of this additional testimony is that Aloha has incurred expenses in dealing with the investigation of its quality of water and ought to recover those expenses in this proceeding. In support of that testimony, exhibits are offered by three of the four witnesses. Hereinafter, those expenses are referred to as regulatory commission expenses¹.

Aloha filed its direct case on June 30, 1999. Neither Aloha's testimony nor exhibits request of the Commission any recovery of regulatory commission expense. The Citizens filed their direct

¹ In so designating these expenses, the Citizens do not waive or in anyway concede that these expenses are allowable in the regulatory contest. The term is simply offered as a descriptive one.

case on August 30, 1999. Neither testimony nor exhibits filed by the Citizens address any issue of rate case expense. The regulatory commission expense issue is in no way cumulative to Aloha's direct case; to the contrary, it dramatically expands Aloha's direct case. The issue thus raised is fundamentally dissimilar to quality of water issues; it would require analyses with an entirely different focus than water quality issues require; and were expert testimony tendered, it would be developed by an entirely different discipline than water quality issues.

Aloha was authorized by commission custom and procedure to file rebuttal testimony on September 29, 1999. Rebuttal evidence is simply defined in Black's Law Dictionary as:

Evidence given to explain, repel, counteract, or disprove facts given in evidence by the adverse party.

Florida case law embraces that notion completely. Driscoll v. Morris, 114 So.2d 314, 315 (3rd DCA 1959). 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. (Citations omitted)

Applied to the instant docket, Aloha, which occupies the position analogous to the plaintiff in the above-cited case, has presented a direct case; the Citizens have answered with a direct case criticizing Aloha's direct case, and Aloha has properly responded in rebuttal to the Citizens' case. However, Aloha has taken the matter one impermissible step further, and in purported rebuttal

testimony, attempts to expand its case in chief. That practice would represent an improper use of rebuttal testimony and ought to be rejected by the Commission.² There is an exception noted in Driscoll which clearly does not apply here. If Aloha's "rebuttal" testimony simply added to -- i.e., was cumulative with -- the same subject matter asserted in its case in chief, it might be within the discretion of the Commission to receive it. However, the purported rebuttal testimony brings to the case matters totally omitted or perhaps neglected from the case in chief, and must be rejected.

This exception is apparently relied upon by the Commission when it occasionally receives a petition for general or limited rate relief from regulated utilities. On those occasions, it is customary for the affected utility to request full rate relief, including rate case expense. Because the full measure of rate case expense cannot be known at the time the utility's case-in-chief is filed, it is normally calculated by the utility and received by the commission in the rebuttal stage of the proceeding -- a time when the expenses are more certain. The rate case expense sought through rebuttal is not only cumulative, and thus within the discretion of the Commission to accept, but is invariably received in the absence of an objection from opposing parties. Indeed, opposing parties are free to introduce

² See Davidson v. State, 734 So. 2d 252 (Miss. App. 1999) quoting from Williams v. State, 539 So. 2d 1049, 1051 (Miss. 1989) ("The purpose of rebuttal testimony is to explain, repel, counteract or disprove evidence by the adverse party"); and Faigin v. Kelly, 1999 WL 498565 (C.A.1 (N.H.) 1999) ("The principal objective of rebuttal is to permit a litigant to counter new, unforeseen facts brought out in the other side's case.") Also see La Esperanza De P.R., Inc. v. Perez Y Cia. De Puerto Rico, Inc., 124 F.3d 10, 22 (1st Cir. (Puerto Rico) 1997) quoting from United States v. Tejada, 956 F.2d 1256, 1266-67 (2d Cir. 1992): ("The purpose of rebuttal testimony is to meet and reply to any new evidence offered by an opponent."); and Lubanski v. Coleco Industries, Inc., 929 F.2d 42, 47 (1st. Cir. (Mass.) 1991) quoting from Morgan v. Commercial Union Assurance Cos., 606 F.2d 554, 555 (5th Cir.1979) ("Rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in [the] opponent's case in chief.") Finally, see: Mersel v. United States, 420 F.2d 517, 520 (5th Cir. 1969); and McVey v. Phillips Petroleum Co., 288 F.2d 53, 54 (5th Cir. 1961).

evidence concerning rate case expense in their direct cases, in contrast with the scenario presented in the instant docket.

This docket presents a dissimilar scenario. As already noted, the matter of regulatory commission expense was not sought until the purported rebuttal testimony was filed. It amounts to an impermissible expansion of Aloha's case-in-chief; there is simply nothing in Aloha's purported rebuttal testimony, dealing with regulatory commission expense, that in any way tends to explain, repel, counteract, or disprove facts given in evidence by the adverse party, i.e. the Citizens.

Commission acceptance of this regulatory commission expense evidence would deny the Intervenors due process rights, and diminish the meaningfulness of the Intervenors' point of entry into the administrative process. The Intervenors have no vehicle, other than mere cross-examination, to weigh, accept, test, or controvert this aspect of Aloha's case, and at this -- if not the eleventh, certainly the tenth -- hour, none can be provided. There has been no opportunity for the Intervenors to address this issue in their direct case, and there is to be no opportunity for the Intervenors to obtain the counsel of expert witness on the subject matter.

Specific material addressed by this motion:

As noted above, the Intervenors lodge no objection to rebuttal testimony and supporting exhibits which address matters raised in the Citizens' direct case. Both Mr. Watford's testimony and Mr. Porter's testimony present such evidence. However the testimony of both witnesses includes testimony and exhibits intended to seek and support an award of regulatory commission expenses allegedly incurred in this docket. That material is described as: Mr. Porter's Rebuttal Testimony: Pages 32 and 33; and exhibits DWP-5, pp. 1-37 inclusive. With respect to Mr. Watford: Rebuttal Testimony p. 1, beginning at line 18, and continuing to p. 2, line 16; and all of SGW-1.

The Intervenor object to the entirety of Mr. Nixon's testimony and exhibits, and to Mr. Deterding's testimony in its entirety.

By this motion, the Intervenor waive no substantive objection to any recovery of regulatory commission expenses which may arise at any consideration of the matter.

WHEREFORE, the Citizens of the State of Florida, by and through JACK SHREVE, Public Counsel, and Mike Fasano, intervenors in this docket, move the Commission to strike the identified portions of the prefiled purported rebuttal testimony filed by Aloha Utilities, Inc. on or about October 29, 1999.

Respectfully submitted,

JACK SHREVE
PUBLIC COUNSEL



Harold McLean
Associate Public Counsel
111 W. Madison St.
Tallahassee, Florida 32399

Attorney for the Citizens of the
State of Florida

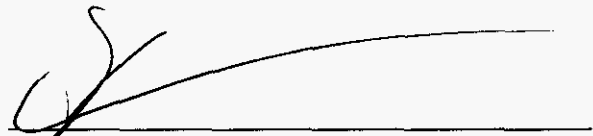
CERTIFICATE OF SERVICE
DOCKET NO. 960545-WS

I HEREBY CERTIFY that a true copy of the foregoing MOTION OF INTERVENORS TO STRIKE CERTAIN TESTIMONY AND EXHIBITS has been served by United States Mail or (*) by hand delivery upon the following parties on this the 10th day of November, 1999:

Ralph Jaeger, Esquire(*)
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Harold McLean
Assistant Public Counsel