



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

**DATE:** JANUARY 8, 2004

**TO:** DIRECTOR, DIVISION OF THE COMMISSION ADMINISTRATIVE SERVICES (BAYÓ)

**FROM:** OFFICE OF THE GENERAL COUNSEL (JAEGER, HOLLEY, HELTON) DIVISION OF ECONOMIC REGULATION (FLETCHER, MERCHANT WILLIS, JENKINS, DEVLIN)

**RE:** DOCKET NO. 010503-WU - APPLICATION FOR INCREASE IN WATER RATES FOR SEVEN SPRINGS SYSTEM IN PASCO COUNTY BY ALOHA UTILITIES, INC.  
COUNTY: PASCO

**AGENDA:** 1/20/04 - REGULAR AGENDA - POST HEARING DECISION - ONLY ISSUE 3 IS PROPOSED AGENCY ACTION - PARTICIPATION DEPENDENT ON VOTE ON ISSUE 1

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** THIS RECOMMENDATION COMPLETELY REPLACES THE NOVEMBER 20, 2003 RECOMMENDATION

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\010503.RCM

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### CASE 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. On August 10, 2001, Aloha filed an application for an increase in rates for its Seven Springs water system. By Order No. PSC-01-2199-FOF-WU, issued November 13, 2001, the Commission approved interim rates subject to refund with interest, which increased rates by 15.95%. This 15.95% interim increase was secured by the utility's deposit of those funds in an escrow account.

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The Commission set final rates by Order No. PSC-02-0593-FOF-WU (Final Order), issued April 30, 2002. Among other things, the Commission denied a revenue increase, set a two-tiered inclining block rate structure, increased plant capacity charges, required certain plant improvements, and set the methodology that required a 4.87% interim refund. The utility appealed the Final Order to the First District Court of Appeal (First DCA), and sought a stay while the decision was under appellate review.

By Order No. PSC-02-1056-PCO-WU (Stay Order), issued August 5, 2002, the Commission granted in part and denied in part the utility's Motion for Stay. The Commission stayed the setting of the new rate structure, as well as the interim refund and certain plant improvement requirements. The First DCA affirmed the Final Order on May 6, 2003, Aloha Utilities v. Florida Public Service Commission, 848 So. 2d 307 (Fla. 1st DCA 2003), and subsequently denied the utility's Motion for Rehearing on June 12, 2003. The First DCA issued its mandate on June 30, 2003. As a result, the appellate review process is complete and all provisions of the Final Order are now final and effective.

By letter dated June 30, 2003, Aloha requested the release of the escrow funds above the amount required for the 4.87% refunds. Due to billing cycle constraints, the utility was unable to cease its collection of interim rates and begin collecting the final rates affirmed by the First DCA until August of this year. The utility completed the 4.87% interim refunds required by the Final Order on or about September 10, 2003.

Staff filed its original recommendation to address Aloha's request to release escrow funds for consideration at the Commission's August 5, 2003, Agenda Conference. This recommendation was deferred. A revised recommendation was filed for the December 2, 2003, Agenda Conference, but consideration on this recommendation was also deferred.

Subsequent to the utility's request for partial release of escrowed funds, the utility completed making all refunds at the 4.87% rate set forth in the Final Order. By Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, the Commission recognized that Aloha had refunded \$153,510 to its customers without withdrawing any funds from the escrow account. By that Order, the Commission directed that \$153,510 of escrowed funds could be released to Aloha. That Order further recognized that the issue of additional

refunds and release of the remaining escrowed funds would be addressed at a later date. Staff's recommendations concerning the appropriate amount of any additional refunds and disposition of the remaining escrowed funds are set out below.

The period through the issuance of the Final Order shall be referred to by staff as the rate case period. The period after the issuance of the Final Order through the utility's implementation of the final rates shall be referred to by staff as the appeal period. For the rate case period, staff is in agreement that the appropriate refund has been made. For the appeal period, staff is not in agreement, and there are a primary and two alternative recommendations.

In the process of preparing this recommendation, staff learned that the utility failed to make the required escrow deposit of \$25,866 for July 2003. When this problem was brought to the utility's attention, it subsequently deposited the required amount.

The Commission has jurisdiction pursuant to Sections 367.081 and 367.082, Florida Statutes.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should interested persons be allowed to participate?

**RECOMMENDATION:** Yes, pursuant to Rule 25-22.021, Florida Administrative Code, when "the Commission is considering new matters related to but not addressed at hearing," interested persons are not barred from participating. Interested persons should be given ten minutes each to discuss the appropriate calculation of the refunds and the appropriate amount and timing of the release of the remaining escrowed funds. (JAEGER)

**STAFF ANALYSIS:** Aloha collected interim rates prior to the issuance of the Final Order and continued to collect the interim rates during the time of appellate review. Aloha has already refunded 4.87% of the 15.95% interim increase. At issue here is what additional amount of the interim rates that were collected, if any, should be refunded to customers. Because the Commission did not address the disposition of the interim rates collected during the time the appeal was pending, staff recommends that the parties be allowed to participate at Agenda Conference pursuant to Rule 25-22.021(2), Florida Administrative Code. This rule provides that the Commission may allow participation when "considering new matters related to but not addressed at hearing." Staff further recommends that interested persons should be given ten minutes each to discuss the appropriate amount of the refund and disposition of the remaining escrowed funds.

**ISSUE 2:** Has Aloha made the appropriate refund of interim rates for the period January 1, 2002, through April 30, 2002 (the rate case period)?

**RECOMMENDATION:** Yes. Aloha has made the 4.87% refund for the rate case period required by the Final Order. (FLETCHER, DEVLIN, MERCHANT, WILLIS, JAEGER, HOLLEY, JENKINS, HELTON)

**STAFF ANALYSIS:** Staff recommends that the Commission find that it has already addressed the disposition of interim refunds for the rate case period. The utility has already made the 4.87% refund required by the Final Order for the rate case period. No party challenged the interim refund provisions in the Final Order and that order was affirmed on appeal. Under the doctrine of administrative finality, the refund for this period should not be revisited. See Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966)

The utility collected \$102,152 in increased rates during the interim period and has previously refunded the portion of those interim rates (\$31,527) required by the Final Order. By Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, the Commission ordered that \$31,527 of escrowed funds collected during the rate case period be released to the utility. The remaining \$70,625 (\$102,152 less \$31,527) will be addressed in Issue 3.

**ISSUE 3:** What is the appropriate calculation of refunds for the period May 1, 2002 through July 31, 2003 (the appeal period)?

**PRIMARY STAFF RECOMMENDATION:** In addition to the refunds set forth in Order No. PSC-02-0593-FOF-WU, i.e. 4.87%, the utility should be required to make an additional refund of \$73,696 which includes interest. As a result, the total refund would be 7.85% which includes the 4.87% amount already refunded by the utility. The additional refund amount represents the adjustment needed to bring Aloha's earned return on equity (ROE) for the appeal period (May 1, 2002 through July 31, 2003) to its newly authorized midpoint of 11.34%. Of the total balance of \$352,352 held in escrow, the additional amount that should be released to Aloha is \$278,656. The remaining \$73,696 amount should be released to the utility upon staff's verification that Aloha has made the additional refund. The additional refund should be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility should submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as contributions in aid of construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. (DEVLIN, HOLLEY)

**ALTERNATIVE ONE STAFF RECOMMENDATION:** The refunds for interim rates collected during the appeal period should be as set forth in Order No. PSC-02-0593-FOF-WU. Aloha has completed the required 4.87% refunds, and an analysis of its earnings during the appeal period shows that no further refund is required. As such, all funds in the escrow account should be released to Aloha and the escrow account should be closed. The utility should treat any unclaimed refunds as contributions in aid of construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. (FLETCHER, MERCHANT, WILLIS, JAEGER)

**ALTERNATIVE TWO STAFF RECOMMENDATION:** As discussed in Issue 2, no additional refund above the \$31,527 amount is necessary for the rate case period. Because the Final Order was upheld on appeal, and did not allow for any increase whatsoever, the total 15.95% increase for interim rates collected after April 30, 2002, should be refunded. This amounts to a total of \$397,519 without interest, or \$400,096 with interest, for the appeal period. Because the utility has already refunded \$121,983 for the appeal period, an additional \$278,113 remains to be refunded (\$400,096 less \$121,983). As security for this additional refund, Aloha should maintain \$278,113 in the escrow account. Therefore, of the total

balance of \$352,352 held in escrow, the additional amount that should be released to Aloha is \$74,239 (\$352,352 less \$278,113). The remaining \$278,113 amount of the escrow account should be released to the utility upon staff's verification that the utility has made the additional refund. The additional refund should be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility should submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as contributions in aid of construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. (JENKINS, HELTON)

**STAFF ANALYSIS:** The file and suspend law "was designed to provide accelerated [rate] relief without sacrificing the protections inherent in the overall regulatory scheme." Florida Power Corporation v. Hawkins, 367 So. 2d 1011, 1013 (Fla. 1979). Interim rates, which are one aspect of this scheme, were designed "to make a utility whole during the pendency of the proceeding without the interjection of any opinion testimony." Citizens v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983). Thus, the provision of interim rates is a quick and dirty means by which a utility can obtain immediate financial relief. Citizens v. Mayo, 333 So. 2d 1, 5 (Fla. 1976).

Section 367.082, Florida Statutes, governs the setting of interim rates for water and wastewater utilities. According to paragraph (2)(a), interim rates must be designed to bring the utility up to the minimum of its last authorized rate of return. Subsection (4) sets forth guidelines for the determination of any interim refund, which include the following:

Any refund ordered by the commission shall be calculated to reduce the rate of return of the utility or regulated company during the pendency of the proceeding to the same level within the range of the newly authorized rate of return which is found fair and reasonable on a prospective basis . . . .

By Order No. PSC-01-2199-FOF-WU, issued November 13, 2001 in this docket, the Commission approved a 15.95% interim increase, subject to refund with interest. In response, Aloha opened an escrow account on October 31, 2001, to secure the funds collected subject to refund, and subsequently began depositing 15.95% of all

monthly interim revenues in the escrow account through June 30, 2003.

In its Final Order in this docket, Order No. PSC-02-0593-FOF-WU, issued April 30, 2002, the Commission set final rates for the utility. The Commission determined that Aloha was entitled to no revenue increase and modified the rate structure to a two-tiered inclining block. The Commission also established the interim refund methodology and required the utility to make an interim refund of 4.87%. In arriving at the 4.87% refund, the Commission stated:

According to Section 367.082(4), Florida Statutes, any refund must be calculated to reduce the rate of return of the utility during the pendency of the proceeding to the same level within the range of the newly authorized rate of return. Adjustments made in the rate case test period that do not relate to the period interim rates are in effect should be removed.

In this proceeding, the test period for establishment of interim rates was the twelve months ended June 30, 2001. The test year for final rates purposes was the projected year ended December 31, 2001. The approved interim rates did not include any provisions or consideration of pro forma adjustments in operating expenses or plant. The interim increase was designed to allow recovery of actual interest costs, and the floor of the last authorized range for equity earnings. Included in the interim test year were three months of expenses for purchased water from Pasco County.

To establish the proper refund amount, we calculated a revised interim revenue requirement utilizing the same data used to establish final rates. Rate case expense was excluded, because it was not an actual expense during the interim collection period. Aloha did not purchase water from Pasco County during the interim collection period. The interim collection period is from November 13, 2001 to the date that Aloha implements the final rates approved.

Using the principles discussed above, we calculated the interim revenue requirement from rates for the interim

collection period to be \$1,914,375. This revenue level is less than the interim revenue of \$2,009,292, which was granted in Order No. PSC-01-2199-FOF-WU. This results in a 4.87% refund of interim rates, after miscellaneous revenues have been removed.

Final Order, pps. 90-91. Neither the above methodology nor the 4.87% refund was raised as an issue on appeal.

Aloha began collecting interim rates in January of 2002, and the utility continued to collect interim rates while both the rate case and appeal were pending. Final rates were not implemented until August 2003, after the First DCA had affirmed the Commission's decision denying a revenue increase. Thus, the utility collected interim rates for a period of 19 months. The Final Order established the methodology for the interim refund for the first four months, when the utility collected interim rates while the rate case was pending before the Commission (January 2002 - April 2002) (the rate case period). The Commission, however, did not specifically address the appropriate refund amount for the time the interim rates continued to be collected during the appeal to the First DCA (May 2002 - July 2003) (the appeal period). Therefore, staff believes further analysis is required to determine the appropriate methodology or amount of refund that should be made for the interim rates collected during the 15-month appeal period.

The utility has already refunded 4.87% of the interim rates collected and has been allowed to withdraw a corresponding amount from escrow. This refund covers both the rate case and appeal periods. Because the utility believes that it has refunded the full amount required by the Final Order, Aloha now believes that all escrowed funds should be released.

Staff originally recommended that the refund for the whole period of interim rates be at the 4.87% rate. Therefore, staff had recommended that all funds in the escrow account not needed to cover the 4.87% refund amount be released to the utility. The Office of Public Counsel (OPC) disagreed with staff's original calculation and opposed the release of the remaining escrow funds to Aloha. In a facsimile dated August 5, 2003, OPC argued that:

any refund should be based on the simple equation of:

(What was actually)                      (What should have )

(collected in a ) minus (been collected in)= Refund  
(Period ) (the same period )

OPC also argued that in calculating the required refund the Final Order properly used the revenue requirement from that interim collection period. However, in determining the amount that Aloha actually collected during the interim collection period, OPC argued that the Final "Order did not use the interim collection period at all," but rather "the revenue requirement from an earlier period (2000/2001 split year)." According to OPC, this was error and caused a mismatch.

Now, according to its refund report dated December 16, 2003, Aloha has refunded \$153,510 which is based on the 4.87% in the Final Order through the entire interim period. The utility stated that of the total \$153,510 refund, \$139,077 was issued through credits on existing customer accounts and \$14,433 was issued through checks. Aloha also stated that \$1,311 of the checks have not been cashed and that \$359 of the checks were returned as undeliverable. The utility further stated that it would wait another 30 days for more checks to be cashed and then cancel the checks in order to book all unclaimed refunds as CIAC. Based on staff's review of the utility's refund report, it appears that Aloha has completed \$153,510 in refunds for which \$31,527 was for the rate case period and \$121,983 was for the appeal period.

As stated in Issue 2 above, staff agrees that the \$31,527 refund amount is correct for the rate case period. However, for the appeal period, there are a primary and two alternative staff recommendations set forth below.

A table depicting all three staff recommendations for the appeal period is set forth below:

DOCKET NO. 010503-WU  
 DATE: January 8, 2004

COMPARISON OF STAFF POSITIONS ON APPROPRIATE REFUNDS

Different Positions for Staff Recommendation of Appropriate Refund	(1) Amount Already Refunded & Released to the Utility w/ Interest	(2) Recommended Add'l Refund (includes Interest) and Amount to be Maintained in Escrow Acct.	(3) Recommended Total Refund Amount	(4) Approximate Escrow Acct. Balance as of 1/6/04 (1)	(5) Excess Security To Be Released Immediately [4 - 2]
Primary (7.85%)	\$ 153,510	\$ 73,696	\$ 227,206	\$ 352,352	\$ 278,656
Alternate 1 (4.87%)	\$ 153,510	\$ 0	\$ 153,510	\$ 352,352	\$ 352,352
Alternate 2 (15.95%)	\$ 153,510	\$ 278,113	\$ 431,623	\$ 352,352	\$ 74,239

(1) The calculation of the escrow account balance as of 12/18/03 is reflected in the following table.

Escrow Account Balance as of 12/18/03 and Commission-Ordered Escrow Balance	\$ 102,152
Amount Deposited during Rate Case Period	\$ 371,653
Amount Deposited during Appeal Period	<u>6,191</u>
Interest Earned on Escrow Account	\$ 479,996
Total Amount Before Release of Refunded Amount (Per utility on 12/18/03)	<u>153,510</u>
Amount Released to Aloha, per Order No. PSC-03-1410-FOF-WS.	\$ 326,486
Escrow Account Balance as of 12/18/03	<u>25,866</u>
Under-Escrowed Amount subsequently deposited (See Issue 4)	<u>\$ 352,352</u>
Approximate Escrow Account Balance as of 1/6/04	

**PRIMARY STAFF ANALYSIS:** This recommendation is based on the reasonableness of the interim rates during the appeal period. Calendar year 2002 is used as a proxy for this period because the utility's annual report is based on this period. Adjustments are then made consistent with the final order in the rate case. The calculation of the recommended refund is as follows:

		<u>Calendar Year 2002</u>
Rate Base (1)		\$814,092
ROR @ 11.34% ROE		8.78%
Allowed Net Operating Income (NOI)		\$71,479
Operating Revenue	\$1,698,615	
Adjustment:2002 Deferred Revenues(2)	<u>219,137</u>	
Adjusted Operating Revenue		\$1,917,752
Operating Expenses	\$1,861,218	
Adjustment:Remove Officer Salaries (3)	(29,350)	
Other Taxes (4)	9,861	
Income Taxes (5)	<u>(30,161)</u>	
Adjusted Operating Expenses		<u>1,811,568</u>
Achieved NOI		\$106,184
Excess NOI		\$34,706
Revenue Expansion Factor		<u>1.678885</u>
Excess Revenue on Annual Basis		\$58,267
Excess Revenue for Period 5/1/02 to 7/31/03		\$72,834
Interest		<u>862</u>
Total Interim Excess Revenue		<u>\$73,696</u>

Notes:

(1) Staff increased rate base by \$10,632, pursuant to Stipulation No.1 in Order No. PSC-02-0593-FOF-WU, p. 5.

(2) This amount represents the portion of escrowed funds after subtracting the initial refund of \$153,510 attributed to the calendar year 2002.

(3) Adjustment pursuant to Order No. PSC-02-0593-FOF-WU, p. 30.

(4) This represents the RAFs on the additional \$219,137 revenues.

(5) This figure represents the difference between staff's calculated income taxes and the amount reflected in the utility's annual report.

It would have been preferable to evaluate earnings during the appeal period (5/1/02 to 7/31/03). However, financial information for this period is not available. The 2002 annual report is the most reliable and time relevant document that can be used to gauge the reasonableness of interim rates, during the appeal period. This varies from the calendar 2001 rate case test period and the period used to evaluate the interim rates during the rate case period (January 1, 2002 through April 30, 2002).

This is consistent with Order No. PSC-92-0580-FOF-GU, In Re: Petition for a rate increase by West Florida Natural Gas Company, where the test period for evaluating interim rates (12 months ended 06/30/92) varied from the rate case test period (12 months ended 06/30/93).

Revenue requirements for interim rates may vary from final rates. This was evident in Order No. PSC-01-1274-PAA-GU, issued June 8, 2001, Docket No. 001447-GU, In Re: Request for rate increase by St. Joe Natural Gas Company, Inc. In this gas case, the interim revenue requirements were higher than final revenue requirements and the Commission found that no refund of interim was required. So, the fact that Aloha was not awarded an increase in final rates does not necessarily mean that a full refund of interim rates is warranted.

Certain adjustments were made to the 2002 annual report to be consistent with the rate case order and provide a better picture of actual 2002 results. These are footnoted above. One adjustment that was not taken into account relates to the Commission ordered conservation programs whose costs were projected to be \$120,000. Although there is some evidence that some costs have been incurred, such as the hiring of the water auditor, it is uncertain as to what extent because there was no implementation deadline. Also, it would be inappropriate to pro forma these costs when other changes would affect Aloha's earnings in 2003, such as revenue growth.

A refund of \$73,696 would bring Aloha's return on equity down to 11.34%, the newly authorized midpoint. This is consistent with Section 367.082(4), Florida Statutes, which provides:

Any refund ordered by the Commission shall be calculated to reduce the rate of return of the utility or regulated company during the pendency of the proceeding to the same level within the range of the newly authorized rate of

return which is found fair and reasonable on a prospective basis.

In addition to the refunds set forth in Order No. PSC-02-0593-FOF-WU, i.e. 4.87%, primary staff recommends that the utility should be required to make an additional refund, with interest, of \$73,696. As a result, the total refund would be 7.85% which includes the 4.87% amount already refunded by the utility. Of the total balance of \$352,352 held in escrow, the additional amount that should be released to Aloha is \$278,656. The remaining \$73,696 amount should be released to the utility upon staff's verification that Aloha has made the additional refund.

The additional refund should be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility should submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code.

**ALTERNATIVE ONE STAFF ANALYSIS:** Alternative one staff believes the central issue regarding the appropriate refund should be did the utility improperly benefit from its appeal of the Commission's Final Order, and, if so, by what amount. See GTE Florida v. Clark, 668 So. 2d 971 (Fla. 1996). To determine whether the utility was unduly enriched, alternative one staff has performed a comparative analysis of total revenue collected under interim rates and total revenue that would have been collected under the Final Order rate structure.

By letter dated August 19, 2003, Aloha provided such an analysis which shows that for the period May 2002, through the end of the refund period, July 2003 (the appeal period), the total revenue billed under interim rates was \$2,492,285. The utility's analysis also reflected that the revenue that could have been billed under the final rates would have been \$2,390,364. This represents a difference between the interim and final revenues of \$101,921, or 4.09%, which is less than the 4.87% already refunded.

On September 9, 2003, the Commission staff completed its audit of Aloha's billing analysis for the fifteen months ended July 31, 2003. The staff auditors reviewed the utility's billing analysis for the number of bills, dollars billed and gallonage for the period of May 2002 to July 2003. The staff auditors were able to

reconcile the total gallons and dollars billed that were reported in Aloha's billing analysis with the utility's billing registers for this 15-month period. Alternative one staff recalculated the revenues collected under the interim and final rates and agrees with the utility's calculation of revenues.

Section 367.081(2)(a), Florida Statutes, states that the Commission shall fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. Since the Final Order rates were set pursuant to that statute, alternative one staff believes that only those revenues in excess of the revenues that would have been generated by the Final Order should be refunded, unless it is shown that Aloha is earning above its authorized range of return during the appeal period. To determine the utility's achieved rate of return for this period, alternative one staff performed a prima facie earnings review of the utility's 2002 annual report and made adjustments consistent with those required by the Final Order.

Our analysis is consistent with the analysis performed by the primary staff with one exception. In the Final Order, the Commission allowed the recovery of \$120,000 on an annual basis for conservation measures. Pursuant to the Stay Order, the Commission ordered that implementation of the conservation programs described in the Final Order shall not be stayed. Based on status reports filed by Aloha, the utility stated it had hired an individual, in the last quarter of 2002, to develop and implement a conservation program for the utility. Further, staff is aware that the utility has incurred additional costs for: 1) sponsoring a rain barrel water conservation workshop; 2) distributing conservation kits to customers, including low-flow shower heads, adjustable kitchen faucets, aerators, and dye tablet leak detectors; 3) conducting irrigation audits for customers; and 4) expanding its website to address conservation measures. Alternative one staff is not aware of the actual amount expensed during the appeal period. However, this staff believes that it is reasonable to assume that no more than \$30,000 was spent in 2002, given the estimated time frames. Accordingly, alternative one staff believes that 3/4 of the \$120,000 should be added to 2002 expense to reflect the full year allowed by the Commission in the Final Order. Thus, alternative one staff made a \$90,000 adjustment in our earnings review to increase O&M expenses for conservation measures. According to our review, Aloha is earning below its authorized range of return.

Further, alternative one staff notes that a utility is afforded the opportunity to earn a fair rate of return. This principle is set forth in Bluefield Co. v. Public Service Commission, 262 U.S. 679 (1923). In that case, the United States Supreme Court held:

The just compensation safeguarded to the utility by the Fourteenth Amendment is a reasonable return on the property used at the time that it is being used for the public service. And rates not sufficient to yield that return are confiscatory.

Bluefield at 692. Thus, alternative one staff further believes that to make Aloha refund any revenues above the calculated 4.09% would be confiscatory, unless the utility were to agree to refund a greater amount.

In its August 19, 2003 letter, Aloha had also agreed that the 4.87% refund during the entire time the interim rates were in effect was appropriate. However, Aloha also stated that if the Commission is going to change the refund percentage for the period after the final rates should have been in effect, then the percentage should actually be decreased from 4.87% to 4.09%. As stated earlier, Aloha has already refunded \$153,510 which is based on the 4.87% in the Final Order through the entire interim period. Aloha stated that \$121,006 of the total refunds are from revenues collected subsequent to the issuance of the Final Order. This represents a difference of \$19,085 (\$121,006 less \$101,921) from the calculated 4.09% refund.

In conclusion, alternative one staff recommends that the refunds for interim rates collected during the appeal period should be as set forth in the Final Order. Further, because the utility has already completed the required 4.87% refunds, alternative one staff also recommends that all funds in the escrow account be released to Aloha and the escrow account be closed.

**ALTERNATIVE TWO STAFF ANALYSIS:** For the reasons set out below, alternative two staff recommends that the Commission find that all interim rates collected during the appeal period be refunded to Aloha's customers.

The intent behind the Commission's final order is clear. The Commission did not intend for the utility to collect any increased

revenues. Aloha's request for a rate increase was denied because the utility failed to meet its ultimate burden of proof. See Order No. PSC-02-0593-FOF-WU, pps. 52, 68, 70, 72. Moreover, the Commission found that Aloha should receive neither a rate increase nor a decrease. See Order No. PSC-02-0593-FOF-WU, pps. 80, 85. However, by appealing the decision and collecting interim rates during the 15-month appeal period, Aloha had the benefit of the higher interim rates during this time. Since the Commission found, and the First DCA ultimately agreed, that no revenue increase was justified, it is patently unfair to allow Aloha to benefit from the higher interim rates it collected during the appeal period.

The Florida Supreme Court views ratemaking as a matter of fairness between the utility and its ratepayers. GTE Florida v. Clark, 668 So. 2d 971, 973 (Fla. 1996). In GTE, the Supreme Court reversed a Commission order that denied GTE's request to surcharge ratepayers to recover costs that the Court had previously determined had been improperly disallowed by the Commission. In making its decision, the Supreme Court relied on Village of North Palm Beach v. Mason, 188 So. 2d 778, 781 (Fla. 1966). In Mason, when deciding whether to allow the utility to collect higher rates that it was entitled to under a defective order that had been entered two years earlier, the Supreme Court stated that if the

case had involved an order decreasing rates it would be equally inequitable to allow the utility to continue to collect the old and greater rates for the period between the entry of the first and second orders.

Id. (Quoted in GTE at 973.) The Supreme Court concluded in GTE that the company's customers should not benefit and receive a windfall from an erroneous Commission order. Similarly, Aloha should not benefit and receive a windfall from its unsuccessful appeal of the Final Order. The Commission lawfully found that Aloha was not entitled to a revenue increase. Aloha's appeal of this decision was without merit. It would be unfair to require Aloha's customers to pay the higher interim rates for the 15-month period that the appeal was pending. Accordingly, Aloha should be required to refund the 15.95% interim increase that was collected during the appeal period.

This refund is consistent with the purpose of interim rates, which is to provide utilities with a "quick and dirty" means to obtain immediate financial relief while a rate case is pending.

Aloha received the immediate rate relief as was intended by the procedure. As discussed above, based on the interim statute, the Commission determined that Aloha should keep 11.08% of the interim increase for the rate case period. However, when the Commission stayed certain provisions of the Final Order and allowed Aloha to continue to collect interim rates, the Commission stated:

The Final Order on Appeal specifically requires Aloha to make refunds and modify its rate structure such that it will no longer collect the interim increase allowed by Order No. PSC-01-2199-FOF-WU.

Order No. PSC-02-1056-PCO-WU, pps. 8-9. The Commission stayed the refund and allowed Aloha to continue collecting interim rates. Because the Commission did not know if an appeal would be filed, the Final Order did not address the appropriate refund methodology for the appeal period. Further, because the appeal and subsequent stay of the final rates delayed the implementation of the appropriate final rates, the utility continued to collect a 15.95% increase to which the Final Order said it was not entitled.

Because the appeals court upheld the finding that Aloha was not entitled to any rate increase, Aloha should not be allowed to receive a windfall by its continued collection of the 15.95% interim rate increase. Although this could be interpreted as a change in policy, staff believes that, if in fact there is a change, the change has been fully justified and explained as required by Section 120.68(7)(e)3., Florida Statutes. See also Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620, 626 (Fla. 1<sup>st</sup> DCA 1998), (the Commission must adequately explain policy changes). Aloha should not be authorized to benefit from the continued collection of higher interim rates during the appeal period, when it did not ultimately meet its burden to justify a rate increase. In previous cases, the Commission has allowed the utilities to keep interim increases during an appeal period because the utility had at least partially justified a rate increase. That is not the case here.

For the reasons discussed above, alternative two staff recommends that the Commission require Aloha to refund to its customers the entire interim increase collected during the appeal period, including interest. As discussed in Issue 2, no additional refund above the \$31,527 amount is necessary for the rate case period. Staff has verified that Aloha has made \$121,983 in refunds

for the appeal period. Therefore, if the Commission agrees that a refund, with interest, of \$400,096 (\$431,623 less \$31,527) is appropriate for the appeal period, then only \$278,113 (\$400,096 less \$121,983) in additional refunds is required. Therefore, the utility should be required to maintain \$278,113 in the escrow account to secure the remaining amount to be refunded. Of the total balance of \$352,352 held in escrow, the additional amount that should be released to Aloha is \$74,239 (\$352,352 less \$278,113). The \$278,113 required to be maintained in the escrow account should be released upon staff's verification that the utility has made the additional refund.

The additional refund should be made with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility should submit proper refund reports pursuant to Rule 25-30.360(7), Florida Administrative Code. The utility should treat any unclaimed refunds as CIAC pursuant to Rule 25-30.360(8), Florida Administrative Code.

**ISSUE 4:** Should Aloha Utilities, Inc., be ordered to show cause, in writing within 21 days, why it should not be fined for its failure to escrow 15.95% of all revenues collected for the month of July 2003 in apparent violation of Orders Nos. PSC-01-2199-FOF-WU and PSC-02-1056-PCO-WU?

**RECOMMENDATION:** Yes. Aloha should be ordered to show cause, in writing within 21 days, why it should not be fined \$200 for the apparent violation of Orders Nos. PSC-01-2199-FOF-WU and PSC-02-1056-PCO-WU. The order to show cause should incorporate the conditions stated below in the staff analysis. (JAEGER, FLETCHER)

**STAFF ANALYSIS:** Pursuant to Order No. PSC-01-2199-FOF-WU (Interim Rate Order), Aloha began collecting interim rates designed to increase rates by 15.95%. That Order required the interim rates to be protected by either a bond, letter of credit, or escrow account. Aloha chose to use an escrow account and, pursuant to that Interim Rate Order began depositing 15.95% of all monthly revenues in that escrow account.

By the Final Order, Aloha was directed to cease charging the interim rates and begin charging new rates based on a two-tiered inclining block rate structure and designed to give Aloha no revenue increase over its original rates. However, Aloha appealed this Order and requested a stay of both the newly approved rates (i.e., allow the utility to continue charging the interim rates) and any refund requirement. By Order No. PSC-02-1056-PCO-WU (Stay Order), issued August 5, 2002, the Commission approved this portion of the request for a stay, and ordered that Aloha "shall be allowed to continue collecting the interim rates and escrowing the amounts subject to refund and making monthly reports as required by Order No. PSC-01-2199-FOF-WU."

As stated above, the First District Court of Appeal affirmed the Final Order of the Commission on May 6, 2003, denied rehearing on June 12, 2003, and issued its mandate on June 30, 2003. Because the Final Order called for a 4.87% refund and the appeal process was now finalized, the utility by letter dated June 30, 2003, requested that it be allowed to withdraw all but \$136,000 (total estimated amount of refund at the 4.87% rate) from the escrow account. In that letter, the utility further stated: "We will then escrow from this point forward, 4.87% of any monies collected under the old rates."

Although Aloha continued to collect the interim rates for July 2003, Aloha did not escrow any revenues for that month. Staff calculates that \$25,866 should have been escrowed for that month. This failure to escrow any funds for that month appears to be in direct contravention of Orders Nos. PSC-01-2199-FOF-WU and PSC-02-1056-PCO-WU, which required Aloha to escrow 15.95% of all interim revenues.

However, it should be noted that on July 23, 2003, staff filed its recommendation, recommending that "\$328,209 should be released to Aloha," and that "consistent with the Final Order, the utility should prospectively deposit 4.87% of any revenues collected under the interim rate structure." Action on this recommendation was deferred at the August 5, 2003, Agenda Conference.

By letter dated January 6, 2004, Aloha acknowledges that it did not escrow any of the July 2003 revenues, and states that it has now placed \$25,866 in the escrow account to correct this oversight. Therefore, the amount in the escrow account, except for a minimum amount of interest that would have accrued, is now correct. However, staff believes that Aloha did violate the above-noted orders, and notes that, in the past, Aloha has been put on notice that future violations would not be tolerated.<sup>1</sup>

Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Each day that such refusal or violation continues constitutes a separate offense.

Utilities are charged with the knowledge of the Commission's orders, rules, and statutes. Additionally, "it is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833). Thus, any intentional act, such as failing to escrow 15.95% of interim revenues, would meet the standard for a "willful violation." In Order No. 24306, issued

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<sup>1</sup> See, Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, In Re: Application for increase in wastewater rates in Seven Springs System in Pasco County by Aloha Utilities, Inc.

April 1, 1991, in Docket No. 890216-TL titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund for 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." Id. at 6.

Although the utility initially failed to escrow approximately \$25,866 of interim revenues for July 2003, staff notes that pursuant to the Final Order, Aloha had escrowed \$102,152 for the rate case period and that the Final Order only required \$31,527 in refunds for the rate case period. Therefore, if the Commission agrees with staff that no additional refunds are due for the rate case period, then there is an excess of approximately \$70,625 (\$102,152 less \$31,527 = \$70,625) remaining in the escrow account for this period. These additional revenues have not yet been released to the utility. Therefore, even without the utility having deposited the additional \$25,866 in revenues into the escrow account for the appeals period, it appears that the customers were fully protected and there was over \$40,000 in excess security remaining in the escrow account to cover any additional refunds required for the appeals period.

Despite the failure to escrow the July 2003 interim revenues, staff agrees that there was more than enough in the escrow to cover any potential refund, but this does not excuse the utility from complying with an Order of this Commission. Staff notes that upon being notified of this failure, Aloha agreed to immediately deposit the required amount. Therefore, staff recommends that Aloha should be ordered to show cause, in writing, within 21 days, why it should not be fined \$200 for the apparent violation of the requirement to escrow 15.95% of interim revenues for the month of July 2003.

Although \$200 may not appear to be a significant fine, staff notes that the customers appear to be fully protected, and the violation only happened for the one month in question following the issuance of the First District Court of Appeal's mandate. Moreover, staff believes that the utility showed good faith by depositing the correct amount upon being advised by staff of the discrepancy, and believes the fine is enough to put the utility on notice that it must comply with all rules, statutes and orders of this Commission.

Staff recommends that the show cause order incorporate the following conditions: Aloha's response to the show cause order must contain specific allegations of fact and law. Should Aloha file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made. If a protest is also filed and a request for a formal hearing is made on other issues in this docket, the issues will be addressed in a single hearing to be scheduled in this docket. A failure to file a timely written response to the show cause order shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing on this issue. In the event that Aloha fails to file a timely response to the show cause order, the fine is deemed assessed with no further action required by the Commission. If the utility responds timely but does not request a hearing, a recommendation should be presented to the Commission regarding the disposition of the show cause order. If the utility responds to the show cause by remitting the fine, the show cause matter should be considered resolved.

DOCKET NO. 010503-WU  
DATE: January 8, 2004

**ISSUE 5:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should remain open to verify the completion of additional refunds, if any, as well as the construction of pro forma plant as required in the Final Order. (JAEGER, HOLLEY, FLETCHER)

**STAFF ANALYSIS:** This docket should remain open to verify the completion of additional refunds, if any, as well as the construction of pro forma plant as required in the Final Order.