

BEFORE THE PUBLIC SERVICE COMMISSION

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-04-0614-PCO-WU |
ISSUED: June 21, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING OPC'S MOTION TO DISMISS AND DENYING ALOHA'S PETITION FOR A FORMAL HEARING, AND SETTING MATTER FOR INFORMAL PROCEEDING IN ACCORDANCE WITH SECTION 120.57(2), FLORIDA STATUTES

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. 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 (Interim Rate Order), issued November 13, 2001, we 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.

After a formal hearing, we set final rates by Order No. PSC-02-0593-FOF-WU (Final Order), issued April 30, 2002. Among other things, we 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, we granted in part and denied in part the utility's Motion for Stay. We stayed the setting of the new rate structure, as well as the interim refund and certain plant improvement requirements. The First DCA affirmed our 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

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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 our 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 collected interim rates through July 2003 and implemented the final rates affirmed by the First DCA starting in August 2003. The utility completed the 4.87% interim refunds required by the Final Order on or about September 10, 2003.

By Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, we recognized that Aloha had refunded \$153,510 to its customers without withdrawing any funds from the escrow account and authorized the release of that amount 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.

At our January 20, 2004 Agenda Conference, we voted to require additional refunds of \$278,000 for the period subsequent to the issuance of the Final Order and prior to the implementation of the approved final rates -- May 1, 2002 through July 31, 2003 (the appellate period). The \$278,000 represented revenues from the interim rates collected during the appellate period less the 4.87% already refunded by Aloha. This decision was issued as proposed agency action (PAA), and was commemorated by the issuance of PAA Order No. PSC-04-0122-PAA-WU (PAA Refund Order) on February 5, 2004.

On February 26, 2004, Aloha protested the PAA Refund Order by filing its Petition for Formal Administrative Hearing and Request That Petition Be Transferred to DOAH (Aloha's Petition). On March 5, 2004, the Office of Public Counsel (OPC) filed the Citizens Response to Aloha's Petition for Formal Administrative Hearing and Request That Petition Be Transferred to DOAH (OPC's Motion to Dismiss and Response). In its Response, OPC requests that the Commission dismiss Aloha's Petition, or, in the alternative, not assign the case to DOAH. On March 17, 2004, Aloha filed its Motion to Strike Citizen's "Response" or, in the Alternative, Response to Citizen's Motion to Dismiss and Citizen's Objection to Transfer Petition to DOAH (Aloha's Motion to Strike and Response). Neither Aloha nor OPC requested oral argument on their respective petitions, motions, and responses.

We have jurisdiction pursuant to Sections 367.081 and 367.082, Florida Statutes.

OPC'S MOTION TO DISMISS AND ALOHA'S MOTION TO STRIKE

When Aloha filed its Petition on February 26, 2004, it did not serve the petition on any of the other parties to this docket. Shortly after that, OPC obtained a copy of the Petition, and filed its Response and Motion to Dismiss, which Aloha subsequently moved to strike.

OPC relies on Rule 28-106.104(4), Florida Administrative Code, which requires that "whenever a party files a pleading or other document with the agency, that party shall serve copies of the pleading or other document upon all other parties to the proceeding." OPC argues that "because Aloha failed to meet this fundamental requirement, the Commission should dismiss the pleading."

Aloha points to the Notice of Further Proceedings ending language found in the PAA Refund Order which states that any former objection or protest filed prior to the issuance of the Order is deemed abandoned unless a petition was filed by February 26, 2004. It also argues in its Petition that this docket closed at the issuance of the court's mandate in mid-2003, and styled its Petition as Aloha Utilities, Inc., Petitioner v. Florida Public Service Commission, Respondent.

Based on the above, Aloha argues that at the time of the filing of its Petition, there were no other parties to be served within the meaning of Rule 28-106.104(4), Florida Administrative Code. Therefore, under Aloha's interpretation, that rule was inapplicable. Moreover, Aloha alleges that because OPC was not a party and has not complied with Rules 25-22.039 or 28-106.205, Florida Administrative Code, OPC has no status or standing in this proceeding and is not entitled to respond and file motions.

Aloha also disputes OPC's allegation that this is not a new case, but a continuation of a rate case filed by Aloha on August 10, 2001. Aloha argues that the language in the PAA Refund Order specifically noted that all provisions of the Final Order entered in this rate case are now final and effective.

Finally, if these arguments are not accepted, Aloha states that there has been no prejudice to OPC, that dismissal is too harsh a remedy, and that OPC has clearly received notice and did not request an extension of time to respond to Aloha's Petition. Therefore, Aloha concludes that OPC's Motion to Dismiss should be denied.

This case is unusual in that a PAA Order was issued after a final order was issued in the same docket. We find that Aloha has misinterpreted the notice language found at the end of the PAA Refund Order, the above-noted rules, the meaning and effect of the language in the Final Order, and the result of only one party objecting to a PAA Order.

The notice language required by Section 120.569, Florida Statutes, provides that "any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it . . . is renewed within the specified protest period." This language does not

mean that those parties who had party status lose party status if they fail to file a petition on the PAA Order.

Aloha alleges that OPC has failed to comply with the rules governing intervention, Rules 25-22.039 and 28-106.205, Florida Administrative Code. We disagree. By Order No. PSC-01-1750-PCO-WU, issued August 28, 2001, in this docket, we acknowledged that OPC had exercised its statutory right to intervene in this docket pursuant to Section 350.0611, Florida Statutes. The PAA Refund Order was issued in this docket, and Aloha's Petition was filed in this docket. It is incongruous to argue that a party must refile for party status if the party filed no protest to the proposed agency action. Therefore, we find that OPC and all other parties continue to have party status for any proceeding in this docket.

As noted above, Aloha has styled its Petition as a new proceeding. Although Aloha has attempted to change the style, OPC notes that this is not a new case, but a continuation of the case filed by Aloha on August 10, 2001. We agree. The interim rates are part of Aloha's rate case in this docket, and their final disposition is part of this proceeding. It does not matter how Aloha styled its Petition, the interim refund issue is still a part of this docket. Based on the above, Aloha's Motion to Strike is denied.

However, this does not mean that OPC's Motion to Dismiss for Aloha's failure to properly serve the petition should be granted. Rule 28-106.104(4), states that "[w]henever a party files a pleading or other document with the agency, the party shall serve copies of the pleading or other document upon all other parties to the proceeding." Aloha's Petition is filed in Docket No. 010503-WU, and protests Order No. PSC-04-0122-PAA-WU which was issued in Docket No. 010503-WU. Senator Mike Fasano, Mr. Edward Wood, the Southwest Florida Water Management District (SWFWMD), and OPC have long been recognized as parties in this docket. Also, by Order No. PSC-04-0108-PCO-WU, issued January 30, 2004, we granted intervenor status to the Office of the Attorney General. Therefore, Aloha should have filed its protest and objection to the PAA Refund Order on all parties.

However, OPC was aware of the Petition no later than March 1, 2004 (a Monday), and either obtained a copy that day or the next. The Petition was not filed with this Commission until February 26, 2004 (a Thursday). Therefore, the delay appears to have been no more than two-working-days. This is probably no longer a delay than if Aloha had mailed a copy of the Petition to OPC. Also, all parties have now been advised of Aloha's Petition. Moreover, pursuant to Rule 28-106.201(4), Florida Administrative Code, any dismissal would be without prejudice, and would only further delay the processing of this case. Therefore, we find that OPC's Motion to Dismiss shall be denied.

ALOHA'S PETITION FOR FORMAL ADMINISTRATIVE HEARING

In its Petition, Aloha seeks a formal administrative proceeding pursuant to Section 120.57(1), Florida Statutes, which governs administrative proceedings that involve disputed

issues of material fact. Aloha raises five issues in Paragraph Six of its Petition. In its Response, OPC addresses each of those subparagraphs.

For subparagraph 6.A. (Issue A), Aloha takes issue with the statement in the PAA Refund Order that said the Final Order did not address the refund amount for the interim rates collected while the appeal was pending. Aloha argues that the language in the Final Order was unambiguous, and “specifically determined an appropriate refund for ‘the interim collection period’ which was defined as the ‘period from November 3, 2001 to the date Aloha implements the final rates approved.’” OPC responds that “[i]ssue A raises the question of proper interpretation of the refund language contained in [the Final Order].” We find that Issue A is a legal issue involving an interpretation of the refund language contained in the Final Order and does not involve a disputed issue of material fact warranting an evidentiary hearing.

In subparagraph 6.B. (Issue B), Aloha raises the issue whether this Commission is estopped from changing its position regarding refunds because no one contested this portion of the Final Order determining interim refunds, and that Aloha had relied on the Commission’s decisions related to the refund issue. OPC notes that Issue B “raises the legal issue of estoppel as it would apply to the refund language contained in” the Final Order. We find that Issue B is a legal issue involving estoppel and does not involve a disputed issue of material fact warranting an evidentiary hearing.

In subparagraph 6.C. (Issue C), Aloha raises the issue whether it “has already refunded more money to its customers than was necessary to bring its revenue requirement to the level established in the Final Order, adjusted in accordance with standard Commission practice during the ‘interim collection period.’” Aloha then points to the PAA Refund Order, which concludes with the finding that:

... 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 we found, and the First DCA ultimately agreed, that no revenue increase was justified, we find that it is patently unfair to allow Aloha to benefit from the higher interim rates collected during the appeal period.

Aloha argues that “underlying this finding is a belief that the final rates authorized by the Commission if implemented immediately after issuance of the Final Order in place of interim rates, would have produced revenues over 15.00% less than those that were produced by the interim rates which were charged during that appeal period.” According to Aloha, the utility has shown “that the interim rates produced only 4.08% more revenue than would have been produced had the final rates been implemented immediately after the Final Order” with no appeal and stay.

OPC notes that “Aloha’s Issue C purports to raise a factual question about the relationship between total refunds and the final revenue requirement.” However, OPC argues

that though “couched as a factual dispute, in reality the parties have no dispute about the underlying facts. The only question here is the proper amount of refunds that are required under the facts on which all parties are in accord.”

We agree with OPC. The PAA Refund Order acknowledges that the Final Order changed the rate structure, and found no rate increase was warranted. However, it is undisputed that the Interim Rate Order granted a 15.95% interim rate increase across the board, which Aloha was allowed to continue to charge during the appeal period. Clearly, the interim rates were 15.95% higher than the original rates, and there can be no dispute of material fact in this regard.

We find that it is a mixed issue of policy and law with respect to what this Commission should consider when an order specifically provides no increase is warranted, but changes the rate structure. Aloha argues that the actual revenues collected under interim rates should be compared against the revenues that would have been collected under the newly approved rates, and that, with the change in rates and rate structure, you should not compare the interim revenues against the revenues that would have been collected under the original rates. If the Final Order was correct, and we note that the Final Order was upheld on appeal, then there should have been no difference. In the PAA Refund Order, we concluded that the Final Order said no rate increase over the original rates was warranted, and yet it was clear that the Interim Rate Order had increased the original rates by 15.95% across the board, and so we directed that the full 15.95% be refunded for the appeal period. Based on the above, we find that Aloha has failed to demonstrate a disputed issue of material fact in regards to Issue C warranting a formal hearing.

In subparagraph 6.D. (Issue D), Aloha argues that the PAA Refund Order “results in a windfall to Aloha’s customers to the extreme detriment of Aloha.” Aloha notes that the PAA Refund Order finds that Aloha “should not benefit and receive a windfall from its unsuccessful appeal of our Final Order.” Aloha argues “that finding assumes that a refund of 4.87% of revenues collected under interim rates results in some sort of windfall to Aloha.” Aloha further argues that the facts provided by the utility to our staff show that no such windfall occurred and that, to the contrary, there would be a windfall to the customers if the additional refunds were required.

OPC argues that “Aloha’s Issue D raises the issue of the proper characterization and usage of the term ‘windfall’ under the facts on which all parties are in accord.” We find that Aloha has again failed to show a disputed issue of material fact for Issue D.

In subparagraph 6.E. (Issue E), Aloha argues that the directives and statements contained within the PAA Refund Order “conflict with and are contrary to the PSC’s prior agency practices, procedures, and policies.” Aloha further argues that the Commission:

has not explained or justified its abrupt change in this procedure or policy as expressed in the PAA Order and indeed has admitted that the refunds previously provided by Aloha result in a revenue requirement for the appeal period which is

less than the revenues which would have been produced had the final rates approved in the Final Order been immediately implemented and no appeal taken.

According to OPC, Issue E raises the legal question of whether the PAA Refund Order conflicts with prior Commission practices, procedures, and policies, and that this is a legal question which this Commission "is clearly in the best position to reach a proper answer." We find Issue E is a legal issue involving whether the PAA Refund Order conflicts with our prior practices, procedures, and policies, and does not involve a disputed issue of material fact warranting a formal hearing.

We find that the situation in this case is similar to the situation in the remand proceeding following the reversal and remand by the Florida Supreme Court in GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996). In that remand proceeding, we issued a proposed agency action order requiring surcharges. OPC protested that Order and requested a Section 120.57(1) formal hearing. In considering this request, we issued Order No. PSC-96-1021-FOF-TL, on August 7, 1996, in Docket No. 920188-TL, In re: Application for a rate increase by GTE Florida Incorporated. In that Order, we found that of the five issues raised by OPC, two were issues of fact, and three were mixed issues of policy and law. For the two alleged factual issues, we found that there was really no dispute. Therefore, the only issues remaining were mixed issues of policy and law, and we denied OPC's request for a Section 120.57(1) hearing. While we found that a Section 120.57(1) proceeding was not appropriate, we did find that it was appropriate to set the matter for an informal proceeding under Section 120.57(2), Florida Statutes, and to require briefs.

As in the GTE case, we find that Aloha's issues are mixed issues of policy and law, which would be more appropriately handled through the process of an informal proceeding in accordance with Section 120.57(2), Florida Statutes.

Therefore, Aloha's request for a formal hearing pursuant to Section 120.57(1), Florida Statutes, is denied. Instead, an informal proceeding in accordance with Section 120.57(2), Florida Statutes, shall be conducted, and parties shall file briefs on the issues raised by Aloha within 30 days of our vote on June 1, 2004, which is July 1, 2004. Based on our decision to deny the utility's request for a formal proceeding, we find that the utility's request that the matter be transferred to DOAH is moot and no ruling is required.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion of Aloha Utilities, Inc. to Strike the Office of Public Counsel's Motion to Dismiss is denied. It is further

ORDERED that the Office of Public Counsel's Motion to Dismiss is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Petition for Formal Hearing pursuant to Section 120.57(1), Florida Statutes, is denied. It is further

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ORDERED that an informal proceeding pursuant to Section 120.57(2), Florida Statutes, shall be conducted, and the parties shall file briefs by no later than July 1, 2004, on the issues raised by Aloha in its Petition. It is further

ORDERED that this docket shall remain open to resolve the informal proceeding and pending disposition of the improvements required by Order No. PSC-02-0593-FOF-WU.

By ORDER of the Florida Public Service Commission this 21st day of June, 2004.

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

By: _____


Kay Flynn, Chief
Bureau of Records

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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; 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, 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.

