State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 23, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Jaeger)
Division of Economic Regulation (Merchant, Fletcher, Willis)

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: 10/5/04 – Regular Agenda – Decision on Protest of Proposed Agency Action Order - Participation on Issue 2 Dependent on Commission Vote on Issue 1, and Participation on Issue 4 Dependent on Commission Vote on Issue 3

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\010503.RCM.DOC

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. At issue here is the refund of interim rates collected in the Seven Springs service area while the Commission's Final Order was on appeal. The Commission approved a 15.95% interim increase, subject to refund with interest, by Order No. PSC-01-2199-FOF-WU (Interim Rate Order), issued November 13, 2001. Aloha began collecting interim rates as of January 2002, and the 15.95% interim increase was secured by the utility's deposit of all monthly interim revenues in an escrow account through July 31, 2003.

Final rates were set 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, and required certain plant improvements.

The Commission also established the interim refund methodology and required the utility to make an interim refund of 4.87%:

> 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.
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> 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.
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> 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.
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> 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.

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. Neither the above methodology nor the 4.87% refund was raised as an issue on appeal. 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. Pending the outcome of the appeal, 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 Commission's 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.

The Final Order established the interim refund methodology for interim rates collected between the time the interim and final orders were entered (rate case period). However, the parties dispute whether the Final Order specifically addressed the appropriate refund amount for the interim rates collected while the Final Order was on appeal (May 2002 – July 2003) (the appeal period). The utility collected interim rates for a 19-month period, from January 2002 through July 2003. The first four months were during the rate case period, and the remaining 15 months were during the appeal period. On or about September 10, 2003, the utility completed the 4.87% interim refunds required by the Final Order for the rate case period, and also refunded 4.87% for the appeal period. Recognizing that Aloha had made this 4.87% refund without using funds from the escrow account, the Commission released $153,510 from the escrow account to Aloha by Order No. PSC-03-1410-FOF-WU, issued December 15, 2003.

By Proposed Agency Action Order PSC-04-0122-PAA-WU (PAA Refund Order), issued February 5, 2004, the Commission required Aloha to make additional refunds of $278,000 for the appeal period. This amount represented the additional revenues from the interim rates collected during the appeal period, less the 4.87% already refunded by Aloha. This decision never became final because on February 26, 2004, Aloha protested the PAA Refund Order, requested a formal evidentiary proceeding, and requested that the petition be transferred to DOAH (Aloha's Petition). Aloha raised five issues concerning the Commission's decision to require additional refunds. Because there appeared to be no disputed issues of material fact, the Commission denied Aloha's request for a Section 120.57(1) formal evidentiary proceeding in Order No. PSC-04-0614-PCO-WU, issued June 21, 2004. The Commission instead directed the matter be set for an informal proceeding pursuant to Section 120.57(2), Florida Statutes, and required briefs to be filed by July 1, 2004, on the five issues raised by Aloha. As a result, Aloha's request for the case to be transferred to DOAH became moot.

Aloha and the Office of Public Counsel (OPC) filed briefs on July 1, 2004. Aloha also requested oral argument on the issues raised in its brief. In addition, on July 12, 2004, Aloha filed a motion requesting the Commission to convert the informal proceeding into a formal evidentiary hearing because Aloha thought that OPC's brief raised raised disputed issues of material fact. Aloha also renewed its request that the matter be transferred to DOAH. Aloha did not request oral argument on this motion.

This recommendation addresses Aloha's July 12, 2004, motion for a formal hearing, and whether oral argument should be allowed on that motion. If the Commission denies Aloha's motion as recommended by staff, this recommendation also addresses the substantive issues raised in the parties' briefs, and whether oral argument should be permitted thereon. The Commission has jurisdiction pursuant to Sections 367.081 and 367.082, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission allow oral argument on Aloha's Motion to Terminate Informal Proceeding?

Recommendation: No. Because oral argument was not requested and would not appear to aid the Commission in comprehending and evaluating the issue on whether the informal proceeding should be terminated, staff recommends that oral argument not be allowed. (Jaeger)

Staff Analysis: On July 12, 2004, Aloha filed its Motion to Terminate Informal Proceeding, but did not contemporaneously file a request for oral argument as required by Rule 25-22.058(1), Florida Administrative Code. Staff believes that the Commission has already addressed the arguments raised by Aloha in its motion, and that oral argument would not assist the Commission in comprehending and evaluating the issues before it. Therefore, staff recommends that the Commission not allow oral argument on Aloha's motion.

Issue 2: Should the Commission grant Aloha's Motion to Terminate Informal Proceeding and transfer this proceeding to DOAH for a formal proceeding?

Recommendation: No. Aloha has raised no new points in its motion that show there are disputed issues of material fact, but merely reiterates the points it has previously made. Having already decided that the issues raised by Aloha did not involve disputed issues of material fact, the Commission should proceed with the informal proceeding, and find that Aloha's request for the matter to be transferred to DOAH is still moot. (Jaeger)

Staff Analysis: By Order No. PSC-04-0614-PCO-WU, the Commission found that Aloha's Petition did not demonstrate disputed issues of material fact and set the matter for an informal proceeding. Aloha claims that the arguments raised in the briefs demonstrate the existence of disputed issues of material fact. Aloha also argues that Rule 28-106.305(2), Florida Administrative Code, requires the termination of an informal proceeding when disputed issues of material fact arise so that a formal proceeding can be conducted, unless waived by the parties. Aloha states that it does not waive its right to a formal administrative hearing, and requests that the Commission terminate the informal proceeding, convene a formal proceeding, and transfer the matter to DOAH.

According to Aloha, OPC's brief shows that there are the following disputed issues of material fact:

1. Aloha states that in Section C of its brief, OPC disputes the factual assertions made in Aloha's petition regarding the revenues collected during the appeal period and the revenues which would have been collected under the approved rate structure;
2. Aloha states that in Section D of its brief, OPC disputes Aloha's claim that there was only a 4.08% difference between interim rates and final rates. Also, Aloha argues that OPC's statement that Aloha did not need any increase to make it whole is a disputed issue of material fact; and
3. Aloha states that in Section E of OPC's brief, OPC disputes Aloha's statement that in all prior cases the Commission has allowed a utility to continue collecting the interim rates and any ultimate refund was based upon the requirements of the original order.

On page five of its motion, Aloha states:

> Two of the prime material issues in this case are whether and to what extent, if any, Aloha received more revenues from the collection of interim rates during the appeal period than authorized by the PSC's Final Order dated April 30, 2002, and whether the PSC's proposed agency action constitutes a shift or change in established PSC policy, practice and procedure.

For the first issue, Aloha alleges that in Section C, on pages 4 and 5 of OPC's brief, OPC disputes the "factual assertions made in Aloha's Petition regarding the relationship between the revenues collected during the appeal period and the revenues which would have been collected under the rate structure approved in the" Final Order. Also, Aloha alleges that the statement in

Section D of OPC's Brief, which states "Aloha did not need any increase to make it whole," raises a disputed issue of material fact.

As regards Section C, pages 4 and 5, OPC states that it has not "disputed the factual accuracy of those calculations," but, instead, "has presented arguments about the relevance of that information." Staff has reviewed Section C of OPC's brief found on pages 4 and 5 and agrees that OPC does not take issue with Aloha's claim that the difference in revenues collected under interim rates as opposed to those revenues collected under the approved final rates was 4.09%. However, OPC states that one possible explanation may be that because the final rates were designed to reduce consumption, but were not implemented, then consumption remained higher than anticipated by the Final Order, i.e., the repression of usage was not realized and higher revenues than anticipated were collected. OPC notes that "a revenue-neutral rate design shift cannot be achieved with absolute perfection," and concludes that "Aloha's application of the new rate structure to actual usage that occurred under the old rate structure does not provide any meaningful analysis."

Also, in that section, OPC notes that the Final Order took two distinct actions: first, the Commission found that Aloha was not entitled to any rate increase, and, secondly, to encourage conservation, the Commission imposed a revenue neutral rate structure shift. OPC then reaches the legal conclusion that Aloha was already "whole" before the implementation of any interim rates, and, therefore, even with the refund of the entire interim rates, the utility would remain "whole."

In Section D of OPC's brief, OPC notes that the Final Order determined that Aloha did not need any revenue increase over what was being produced by the original rates to make it whole. OPC adds that because "Aloha was never entitled to any interim rate increase," "equity would have dictated that the 15.95% should have been refunded for the entire time that it was collected." OPC further notes that in the Final Order, based on administrative finality, the Commission required no further refunds for the rate case period. Because that part of the decision was final, staff believes that further discussion concerning the disposition of refunds for the rate case period is closed.

Aloha argues that OPC's statement that "Aloha did not need any increase to make it whole" shows that there is a disputed issue of material fact. However, staff notes that on page 80 of the Final Order, under the section entitled VIII. Revenue Requirement, the Commission specifically noted that the revenue requirement represented "neither an increase nor a decrease." Also, on page 85 of the Final Order, the Commission again noted that the revenue requirement had not increased. Therefore, it appears that OPC has merely reached a legal conclusion in accordance with the Final Order that "Aloha did not need any revenue increase" to make it whole. This is not a disputed issue of material fact, but a legal conclusion based on the Final Order.

Finally, Aloha states that it "disputes the factual allegation that this case is so factually distinguishable from prior cases pertaining to refunds of interim rates as to render the PSC's prior established policy, practice and procedures inapplicable."[1] Aloha also notes that in its

[1] Quoted language is found in Aloha's Motion to Terminate Informal Proceeding and not in OPC's brief.

brief, OPC disputes "Aloha's central contention that the procedure which Aloha seeks 'has been implemented in all prior cases.'" Aloha characterizes this dispute as a factual dispute.

OPC disagrees and argues that "to properly apply precedent, one must examine only those prior cases which have identical or analogous relevant circumstances." Moreover, OPC notes that Aloha has made "a blanket assertion about the PSC's precedent," and that as in any appellate brief, the assertions about applicable precedent do not require factual testimony, but are legal arguments appropriate for briefing.

Staff notes that in Aloha's original Petition requesting a formal hearing, Aloha alleged in Paragraph 6.E. that the PAA Refund Order requiring additional refunds conflicted with and was "contrary to the PSC's prior agency practices, procedures, and policies," and that the Commission "had not explained or justified its abrupt change in this procedure or policy." Now, in its Motion to Terminate Informal Proceeding, Aloha argues that "the PSC is required to explain that policy and Aloha is entitled to present countervailing evidence in a trial-type hearing. McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977)." Staff's understanding of McDonald, however, is that trial type hearings should be provided only when disputed issues of material fact are present.

McDonald did state that the Administrative Procedures Act (APA) requires proof of incipient policy, permits countervailing evidence and argument, and requires an agency to explain the exercise of its discretion. In its original petition on proposed agency action, Aloha argued that the alleged change in policy required a formal hearing. The Commission rejected this argument and found that all the issues raised by Aloha, including Issue 6.E., raised no disputed issues of material fact, but were mixed questions of policy and law. Therefore, the Commission concluded that any claimed change in policy could be addressed in an informal proceeding. Staff's review of the briefs shows that nothing has changed since the Commission reached this conclusion. Aloha has failed to show that there is a disputed issue of material fact -- all issues remain mixed issues of policy or law.

Based on the above, staff believes that Aloha merely reiterates the points it has previously made in its original petition, and has raised no new points in its Motion to Terminate Informal Proceeding which show the existence of any disputed issues of material fact. Accordingly, staff recommends that the Commission deny Aloha's Motion to Terminate Informal Proceeding, and proceed with the informal proceeding. If the Commission denies Aloha's motion to terminate, then Aloha's request that the matter be transferred to DOAH continues to be moot. However, if the Commission should decide to grant Aloha's motion and convene a formal hearing, staff notes that the assignment of formal proceedings resides with the Chairman.

Issue 3: Should the Commission grant Aloha's Request for Oral Argument on its brief?

Recommendation: Yes. Because oral argument may aid the Commission in comprehending and evaluating the issues, staff recommends that oral argument be granted. Combined presentations on all issues raised in the briefs should be limited to fifteen minutes per side. (Jaeger)

Staff Analysis: Aloha timely filed its Request for Oral Argument on July 1, 2004, concurrent with its brief. Although Aloha requested oral argument on the issues raised in this proceeding, it did not "state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues" as required in Rule 25-22.058(1), Florida Administrative Code. While Aloha's Request for Oral Argument does not comply with Rule 25-22.058(1), Florida Administrative Code, staff believes that the Commission has the discretion to allow all parties to participate in this informal proceeding. Moreover, staff believes that oral argument will "aid the Commission in comprehending and evaluating the issues" raised by Aloha and addressed by both Aloha and OPC.

Aloha's five issues concerning the additional refund requirement are sufficiently complex to warrant oral argument. Therefore, staff recommends that oral argument be allowed, with combined presentations on all issues being limited to fifteen minutes per side.

Issue 4: What is the appropriate calculation of refunds for the period May 1, 2002 through July 31, 2003 (the appeal period)?

Recommendation: Because the Final Order was upheld on appeal and did not allow for any increase, the total 15.95% increase for interim rates collected after April 30, 2002, should be refunded with interest. This amounts to a total of $397,519 without interest for the appeal period. Because the utility has already refunded $121,983 (includes $530 of interest) for the appeal period, an additional $276,066 without interest should be refunded. The balance remaining in 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, and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. (Jaeger, Fletcher)

Position of the Parties

Aloha: The utility has already made the refunds required by Order No. PSC-02-0593-FOF-WU (Final Order) and no further refunds are required or appropriate. The language in the Final Order is clear and unambiguous, stating that Aloha should refund, with interest, 4.87% of interim rates collected from November 13, 2001 to the date Aloha implements the final rates approved in the Final Order. That particular provision of the Final Order was not appealed. At the time of rendition of its Final Order and the subsequent Stay Order, the Commission, through its own rules and past experience, was aware that appeals delay the immediate implementation of approved rates. Neither the Final Order nor the Stay Order contain any language or other suggestion that the 4.87% refund requirement would be subsequently revisited or modified. Final Rates were implemented in August of 2003, and, in early September, 2003, Aloha had completed the 4.87% refund to its customers.

Principles of administrative finality, *res judicata*, estoppel by judgment, "law of the case" and equitable estoppel prohibit the Commission from modifying the Final Order and imposing a greater refund amount. Any additional refund would result in a windfall to customers. Aloha's customers have already received as refunds in excess of $19,000 more than the refunds authorized by the Final Order. The undisputed facts are that the actual difference between the interim rates collected during the appeal period and the final rates approved by the Final Order is only 4.09%, while Aloha's completed refunds were based upon the 4.87% rate. Any additional refund results in allowed revenues less than those authorized in the Final Order. Finally, any additional refund requirement would conflict with and be contrary to the Commission's established agency practices, procedures and policies, without proper explanation or justification supported by appropriate evidence, to which Aloha is entitled to respond and present countervailing testimony and evidence.

To the extent that the OPC, PSC staff or the Commission itself disputes the facts set forth in Aloha's Brief, Aloha renews its request for a formal evidentiary administrative proceeding. In fact, the OPC's Brief does dispute the underlying facts alleged by Aloha and further alleges facts

which Aloha disputes. Accordingly, Aloha has filed a Motion to Terminate Informal Proceeding and Convene a Formal Proceeding.

OPC: 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 with interest. The Commission must only recognize that Aloha has already refunded 4.87% with interest, and require the difference to be refunded with interest in accordance with Rule 25-30.360(4), Florida Administrative Code. The utility's interpretation of the Final Order, arguments on estoppel, and whether there has been a change in Commission policy are not correct. Moreover, allowing Aloha to keep the 15.95% interim increase during the appeal period less the 4.87% already refunded would result in a windfall to Aloha and reward Aloha for an unsuccessful appeal.

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 . . . .

In its protest of the PAA Refund Order, Aloha raised the following five issues concerning whether additional refunds were required:

1. Whether the PSC's Final Order is binding and conclusive on the issue of refunds;

2. Whether the PSC Order granting a stay along with its Final Order, estops the PSC from changing its positions concerning refunds;

3. Whether Aloha 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;"

4. Whether the PAA Refund Order results in a windfall to Aloha's customers to the extreme detriment of Aloha; and

5. Whether 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.

By Order No. PSC-04-0614-PCO-WU, issued June 21, 2004, the Commission required the parties to address the above issues in their briefs.[2]

Each of the original five issues and Aloha's and OPC's positions are discussed in turn below.

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[2] Although Aloha appears to have addressed each issue of the five issues listed above, it based its brief upon the following five Conclusions of Law shown below:

> A. The PSC's proposed agency action requiring a refund of all interim rate increases collected by Aloha during the appeal period constitutes a modification of the Final Order entered by the PSC on April 30, 2002.
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> B. The doctrines of administrative finality, res judicata and estoppel by judgment preclude the PSC from modifying the refund requirements and the final rates approved in the PSC's Final Order dated April 30, 2002.
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> C. Aloha received no benefit from the interim rates it collected during the appeal period. Indeed, the uncontroverted evidence demonstrates Aloha's customers benefited by over $19,000 during the appeal period.
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> D. It has been the long-standing, established policy, practice and procedure of the PSC to calculate refunds of interim rates in the manner established in the Final Order, allow utilities to maintain interim rates during the pendency of an appeal, and then require a refund of any excessive interim rates at the conclusion of that appeal based upon the requirements and methodology of the original final order. The PSC presented no evidence, subject to countervailing evidence, to explain or justify the abrupt change in policy and procedures expressed in the Proposed Agency Action.
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> E. The PSC is estopped from changing its position regarding the appropriate amount of refund of interim rates.

In the following analysis, Staff has addressed Aloha's Conclusions of Law as if each corresponds to the original five issues as follows: Conclusion of Law A. corresponds to Aloha's original Issue 1.; Conclusions of Law B. and E. correspond to Aloha's original Issue 2.; Conclusion of Law C. corresponds to Aloha's original Issues 3. and 4.; and Conclusion of Law D. corresponds to Aloha's original Issue 5.

1. Whether the PSC's Final Order is Binding and Conclusive on the Issue of Refunds

In the PAA Refund Order, the Commission concluded that the Final Order "did not address the refund amount for the interim rates collected while the appeal was pending (May of 2002 through July of 2003)(the appeal period)." Aloha argues that this conclusion is contrary to the wording of the Final Order, which determined an appropriate refund amount of 4.87% for the "interim collection period" which was defined as the "period from November 3, 2001 to the date Aloha implements the final rates approved." Aloha argues that final rates were not implemented until August 2003, when the stay was lifted and the First DCA issued its mandate. According to Aloha, "a stay simply maintains the status quo pending appellate proceedings," and "does not interfere with what has already been done." Upon the issuance of the First DCA's mandate, Aloha argues that the Final Order became effective and set forth the amount to be refunded. Aloha concludes that separating out the 15-month appeal period and establishing "a new and different methodology and rate of refund" constituted "an unlawful modification of the Final Order."

Aloha also argues that the Final Order's new revenue requirement required a 4.87% refund. According to Aloha, there is nothing in the Final or Stay Orders that provide for one revenue requirement for the rate case period, a lower revenue requirement for the appeal period, and a different revenue requirement for the time the final rates are collected prospectively after the mandate was issued. Aloha further notes that while it refunded 4.87%, there was actually a 4.09% difference between what was collected under the interim rates and what would have been collected under the final rates.

OPC states that it is "astonished" that Aloha took the position that the Final Order could not be modified in light of Aloha's request, which the Commission granted, that the Final Order be modified to eliminate the requirement to remove 98% of the hydrogen sulfide in Aloha's water provided to customers. OPC states that it brings out this point not because it believes that the PAA Refund Order actually modifies the Final Order, but to "highlight Aloha's diametrically inconsistent positions" and the "disingenuousness of Aloha's current position." OPC argues that the PAA Refund Order "identifies the appeal period as a different time frame than the rate case period identified in the" Final Order.

It is undisputed that the Final Order states: "The interim collection period is from November 13, 2001 to the date that Aloha implements the final rates approved." In addition, the calculation of the correct refund amount was not the subject of any appeal. Nevertheless, when the Commission set final rates, it neither contemplated nor made any provision for what would happen in the event of an appeal. Section 367.082(1), Florida Statutes, provides that "[t]he commission may, during any proceeding for a change of rates, . . . authorize the collection of interim rates until the effective date of the final order." The statute contemplates that interim rates would be collected only through the date of the issuance of a final order. This subsection also provides that "interim rates may be based upon a test period different from the test period used in the request for permanent rate relief."

In this case, the interim test period was the historical test year ending June 30, 2001, and the permanent test period was the projected test year ending December 31, 2002. Based on the

different test periods, certain expenses such as rate case expense (not allowed in interim) and purchased water costs (in the interim period but not in the period for permanent rate relief) could make the revenue requirements for the two periods diverge, as happened here. Even though the Commission granted no permanent rate increase, using the formula set out in the Final Order, the Commission determined that there was a 4.87% refund requirement for interim rates. The Commission entered its Final Order on April 30, 2002, and it was Aloha's actions that delayed implementation of the final rates for an additional 15 months.

When the Commission sets final rates that are affirmed on appeal, instruction concerning the disposition of any refunds can be found in GTE Florida v. Clark, 668 So. 2d 971, 973 (Fla. 1996) and Village of North Palm Beach v. Mason, 188 So. 2d 778, 781 (Fla. 1966). Although, Aloha argues that these cases only pertain to erroneous Commission orders, staff disagrees. Staff believes that both GTE and Mason are applicable when for whatever reason the charging of the appropriate rates has been delayed. 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's decision that Aloha was not entitled to a revenue increase was upheld on appeal. Therefore, the decision that no revenue increase was warranted was correct as of the date of that Final Order – April 30, 2002. It would be inappropriate and inequitable to allow Aloha to keep any of the 15.95% increase it collected over the 15-month appeal period.

Aloha has calculated a 4.09% difference between the interim and final rates. It is unclear why the difference would be 4.09% versus the expected 15.95% interim increase amount. However, ratemaking is not perfect, and there are a multitude of variables, including repression, that could have changed the expectant resulting revenue. The cause of any difference or the existence of any difference is irrelevant here, because if Aloha had implemented the approved final rates during the appeal period, no one could argue that any further refund would be due today. However, Aloha did not implement the final rates affirmed by the court during the appeal period; instead, it continued to collect the 15.95% interim increase. By appealing the Final Order, Aloha caused the delay in collecting final rates. Staff believes that Aloha should be required to refund the 15.95% interim increase that was collected during the appeal period. Such a 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 relief as intended by the interim statute while the case was pending before the Commission. Aloha should not be allowed to benefit from its appeal when the court unequivocally affirmed the Commission's finding that Aloha was not entitled to any prospective increase.

Staff believes that this analysis is similar to the same analysis used in awarding post judgment interest after a judgment has been appealed and any monetary award has been stayed pending the appeal. If the monetary award is upheld on appeal, then the courts note that the

award was due on the date of the judgment, and award interest for the duration of the appeal. See Amerace Corporation v. Stallings, 823 So. 2d 110 (Fla. 2002). Similarly, the finding that no rate increase was warranted was effective on April 30, 2002, the date of the Final Order, and the full amount of the 15.95% interim increase which Aloha continued to collect from that date forward was not authorized and should be refunded.

The facts of this case are similar to the Commission's decision in Order No. 16462, which was issued on August 12, 1986, in Docket No. 830059-WS, In Re: Application of Spring Hill Utilities, a division of Deltona Utilities, Inc., for increased water and sewer rates and charges to its customers in Hernando County, Florida. In Spring Hill, the Commission granted interim revenue increases designed to produce annual operating revenues of $1,081,084 (a $202,270 increase) for water, and $957,752 (a $397,943 increase) for wastewater. The final rates set post-hearing, however, were designed to produce less water revenues than the original water rates. The final order established a $856,901 revenue requirement for water, which represented a $21,913 decrease for water over adjusted test year revenues. The utility appealed and requested a stay. In fashioning the stay, the Commission determined that the final revenue requirement for water was $224,183 less than what the utility was currently collecting in interim rates, and yet only $202,270 was subject to refund. The Commission determined that the $202,270 amount "was the maximum amount that the utility could be ordered to refund through the effective date of" the final order. While the Commission allowed the utility to continue collecting interim rates, it determined that on a going forward basis from the date of the final order, the amount held subject to refund for water should be the higher $224,183 figure. Similarly, in this case, the Commission has determined that the amount to be refunded prior to issuance of the Final Order was only 4.87%. However, after issuance of the Final Order, the Commission determined that the utility was not entitled to any of the 15.95% increase, and yet the utility continued to collect the full 15.95% interim increase. Therefore, as in Spring Hill, staff believes that the full 15.95% of interim rates subsequent to the issuance of the Final Order should be refunded.

Until the Commission issued its Final Order, staff believes that the Commission was correct when it determined that the refund for interim rates collected prior to the Final Order should be calculated on the refund methodology set out in the Final Order. However, after it issued its Final Order, although it allowed Aloha to continue collecting the interim rates, the Commission had made a final determination that as of the effective date of the Final Order, no revenue increase whatsoever was warranted. Therefore, the full 15.95% interim increase remained subject to refund from that date on. The Final Order neither contemplated nor made a provision for what would happen in the event of an appeal. The Stay Order noted that the Final Order did require Aloha to modify its rate structure such that it would no longer collect the interim increase allowed by the Interim Rate Order. Because the First DCA upheld the finding that Aloha was not entitled to any rate increase, staff believes that Aloha should not be allowed to receive a windfall by its continued collection of the 15.95% interim rate increase. Because the Commission did not specifically address the refund methodology for interim rates collected during the appeal period, staff believes that the Final Order is not binding and conclusive on the issue of refunds for this period.

2. Whether the PSC Order Granting a Stay Along With Its Final Order, Estops the PSC From Changing Its Positions Concerning Refunds

In its Conclusions of Law B. and E., Aloha argues that the doctrines of administrative finality, res judicata, estoppel by judgment (collateral estoppel), and equitable estoppel preclude the Commission from modifying the refund requirements set forth in the Final Order. Aloha relies on the statement in the Final Order that the refund should be 4.87% for all monies collected "during the interim collection period," which was defined as November 3, 2001, to the date Aloha implements the approved final rates. Aloha emphasizes that no party sought reconsideration or appealed any refund issue from the final or stay orders. According to Aloha, the Final Order specifically dealt with this issue of the appropriate amount of the refund, and Aloha relied on the Commission's decision related to this refund issue throughout the stay and appeal proceeding and thereafter.

Aloha argues that under the doctrine of administrative finality, the Commission is precluded from considering the issue of interim refunds further. According to Aloha, the interim rates refund issue was addressed and determined in the Final Order, and "any contrary theories of refund" could have and should have been pursued in the initial proceeding. In support of its argument, Aloha relies on People's Gas System v. Mason, 187 So. 2d 335 (Fla. 1966), which provides that there must "be a terminal point in every proceeding, both administrative and judicial, at which the parties and the public may rely on a decision as being final and dispositive of the rights and issues involved therein." Aloha concludes that the "terminal point" in this proceeding was the date of the First DCA's mandate, or even the date the Final Order was rendered because no party sought further review of the interim refund issue.

Aloha argues that the "principle of law, *res judicata*, holds that a Final Order bars subsequent litigation between the same parties based upon the same cause of action and is conclusive as to all matters germane thereto that were or could have been raised." Moreover, Aloha states that "estoppel by judgment [collateral estoppel] is applicable where the two causes of action are different, but the issue common to both causes of action were actually adjudicated in the prior proceeding." Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952), *cert. denied*, 344 U.S. 878, 73 S. Ct. 165, 97 L. Ed. 680 (1952).

In addition, Aloha argues that the Commission's reliance on GTE and Mason is misplaced because those cases involved "defective and erroneous" orders of the Commission. Because the Final Order was upheld on appeal, the dictum in Mason "is simply not applicable," and the Commission may only implement the provisions of the Final Order.

Finally, Aloha argues that based on the above arguments and prior Commission policy and procedure, the Commission is also equitably estopped from now requiring a 15.95% refund for the appeal period. Reedy Creek Improvement District v. Department of Environmental Regulation and Central Florida Utilities, 486 So. 2d 642 (Fla. 1st DCA 1986). According to the utility, it made "business and financial decisions" on its justifiable reliance that the refund would not exceed 4.87%. For the reasons discussed above, Aloha claims that the Commission may not now change the amount to be refunded for the appeal period.

In its brief, OPC states that it does "not know what issue Aloha is raising here," but notes that Aloha "complains that it 'relied on the Commission's decision related to this refund issue throughout the stay and appeal proceeding and thereafter.'" OPC then notes that it is not reliance but "detrimental reliance" that is relevant. OPC concludes that it cannot see how Aloha has suffered any detriment based on this reliance.

Staff believes that Aloha's reliance on the principles of administrative finality, res judicata, collateral estoppel, and equitable estoppel to show that the Commission is precluded from requiring a refund of all monies collected during the appeal period is unfounded. Under res judicata, "a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated issue." Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984). Administrative orders are also subject to finality. Mason, at 339. In the Final Order, the Commission never addressed what would happen in the event of an appeal or stay of the final rates. Although the Commission allowed the interim rates to remain in effect during the stay, on April 30, 2002, the date the Final Order was rendered, the Commission fixed what it believed to be the final rates. Staff agrees that the Commission is bound by the Final Order with respect to the interim refund for the rate case period. However, the Commission never made any pronouncement in the Final Order concerning the methodology for refunding interim rates collected during the appeal period. Therefore, the principles of res judicata and administrative finality are inapplicable to this case.

Collateral estoppel is a judicial doctrine that "prevents identical parties from relitigating the same issues that have already been decided." Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906, 910 (Fla. 1995). For collateral estoppel to apply, the parties and issues must be identical, and the particular matter must have been "fully litigated and determined in a contest which results in a final decision of a court of competent jurisdiction." Id. Because the question of what amount of interim rates collected during the appeal period should be refunded was never litigated in the evidentiary proceeding or addressed by the Commission in its Final Order, collateral estoppel is not appropriate here. When determining what amount, if any, of the interim rates should be refunded for the rate case period, the Commission looks backward to determine what adjustments should be made. The setting of final rates, however, must be prospective. Citizens v. Public Service Commission, 435 So. 2d 784, 786 (Fla. 1983). When the Commission entered its Final Order, it set the rates that it believed the utility should have collected on a going forward basis. Despite the arguments Aloha raised on appeal, the First DCA agreed with the Commission that it had set lawful final rates. Despite the stay, the Commission did not set any methodology for refunding the interim rates collected during the appeal period, because it had already set what it believed to be the fair and reasonable final rates to be applied in the future. Because the issue of what refund, if any, would be appropriate for the appeal period was not addressed in the rate proceeding, the doctrine of collateral estoppel does not apply here. The appeal of the Final Order was an unanticipated event which created a new legal situation, and makes collateral estoppel inapplicable. See University Hospital, Ltd. v. Agency for Health Care Administration, 697 SO. 2D 909 (Fla. 1st DCA 1997).

Equitable estoppel is another judicial doctrine which is applied in situations "where, because of something which a party has done or omitted to do, the party is denied the right to plead or prove an otherwise important fact." 22 Fla. Jur. 2d Estoppel and Waiver § 26.

Equitable estoppel may be applied to a state agency, but only upon a showing of exceptional circumstances. Reedy Creek, at 647; North American Co. v. Green, 120 So. 2d 603, 610 (Fla. 1959). In Watson Clinic, LLP v. Verzosa, 816 So. 2d 832, 834 (Fla. 2d DCA 2002), the 2d DCA noted that equitable estoppel must be applied with great caution, and that the following three elements must be present:

> (1) the party against whom estoppel is sought must have made a representation about a material fact that is contrary to a position it later asserts; (2) the party claiming estoppel must have relied on that representation; and (3) the party seeking estoppel must have changed his position to his detriment based on the representation and his reliance on it.

In Watson Clinic, a doctor had spent money to which he was not entitled. The court found that "no detrimental change in position can occur where the only claimed harm is the inability to retain money that should have never been received in the first place." Id. at 835. In this case, the money needed for the additional interim refund on monies collected during the appeal period is still in an escrow account and Aloha never had access to these funds. Aloha cannot have reasonably relied on obtaining those funds without them being released by the Commission. Like the doctor in Watson Clinic, Aloha cannot have detrimentally changed its position based on a claim to money which has never lawfully been in its control. Also, staff believes that the Commission in its Stay Order advised Aloha that it was not entitled to keep any of the interim increase. Therefore, staff believes that none of the elements of equitable estoppel are present, and equitable estoppel is also not applicable to the facts of this case.

Contrary to Aloha's arguments, the Final Order did not address what would happen to the interim rates collected during the pendency of an appeal. Moreover, in its Stay Order, 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." Pps 8-9. Thus, when making its decision on the stay, the Commission acknowledged that the interim rates it set after hearing the evidence in the case, were no longer appropriate. Therefore, staff does not believe that the language quoted by Aloha was a representation as to a disputed issue of material fact that was contrary to the Commission's decision regarding potential refunds if the Final Order was appealed and a stay granted. Moreover, if Aloha relied on the language in the Final Order as placing a 4.87% cap on the refund, staff does not believe that Aloha was justified in that reliance. In sum, the money has always been held subject to refund with interest, has been maintained in an escrow account, and Aloha has not had access to those revenues. Until the court upheld the Commission's decision that no rate increase was warranted and approved the final rates on appeal, there could have been no calculation of the final refund for the appeal period. Based on the above discussion, staff believes that neither administrative finality, res judicata, collateral estoppel, nor equitable estoppel are applicable here.

3. Whether Aloha 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"

and

4. Whether the PAA Refund Order Results in a Windfall to Aloha's Customers to the Extreme Detriment of Aloha

Aloha's Issues 3 and 4 are sufficiently similar such that they may be considered together. Under Issue 3, Aloha argues that the premise behind the PAA Refund Order is that if the final rates were implemented immediately after issuance of the Final Order instead of interim rates, then those rates would have produced revenues at least 15% less than those produced by the interim rates collected during the appeal period. The utility argues that it has demonstrated through detailed billing information, filed by it and verified by the Commission staff, that the interim rates produced only 4.09% more revenue than would have been produced had the final rates been implemented immediately after the Final Order and no appeal was taken.

OPC takes a different approach. It believes the Commission took two distinct actions in the Final Order: (1) the Commission found that Aloha was not entitled to any rate increase, and (2) to encourage conservation, the Commission imposed a revenue-neutral rate structure shift. According to OPC, a "revenue-neutral rate design shift cannot be achieved with absolute perfection," and "if the conservation-causing rate structure had actually been in effect during the appeal period, the usage would have been lower than it was with the old rate design."[3] OPC thus argues that "Aloha's application of the new rate structure to actual usage that occurred under the old rate structure does not provide any meaningful analysis."

In Issue 4, Aloha argues that Aloha did not receive a windfall when it continued to collect interim rates in the appeal period for which it refund 4.87%, but the customers will receive a windfall if the utility is required to make the additional refund. Aloha's argument is based on the premise that there was a 4.09% difference between the interim and final rates, and Aloha has already refunded 4.87% which is more than was required.

In contrast, OPC argues that "in hindsight, it is clear that Aloha did not need any increase to make it 'whole' during a case that determined that its rates were already adequate." Therefore, OPC claims that "the fact that the doctrine of administrative finality" which allowed Aloha to keep some portion of the interim increase during the rate case period could in no way be "characterized as a 'windfall to customers to the extreme detriment of Aloha.'" OPC argues that it is Aloha who actually will receive a windfall because it was allowed to keep over 11% of the interim revenues during the rate case period.

As stated previously, staff notes that the refund requirement for the rate case period has been finalized and is no longer subject to change. However, staff agrees with OPC that ratemaking is not a science, and seldom does ratemaking produce the exact revenue required. Staff does not dispute Aloha's calculations that the difference between interim and final rates was 4.09%. However, the intent of the Commission's Order was clear. The Commission found that no revenue increase was warranted, and the final rates, while restructured, were designed to keep Aloha in the same position that it was prior to the filing of its case. The rate restructuring was designed to cause customers to use less water, but give Aloha the same amount of total

[3] Staff notes that the Final Order made no allowance for repression in setting the final rates, and that, despite the conservation rate structure, no repression of consumption was expected.

revenues. Any latent rate increase the utility may have received was clearly not the intent of the Commission. When the Commission entered its Final Order, it did not intend for Aloha to keep any part of the 15.95% interim increase on a going forward basis, and advised Aloha of this in the Stay Order. Staff believes that under Mason and GTE, the Commission was correct when it required all of the 15.95% interim increase collected during the appeal period to be refunded.

5. Whether 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 argues that in every prior case, based on the same methodology stated in the Final Order, the Commission has allowed utilities to maintain interim rates during the pendency of an appeal, and any excessive interim rates were refunded at the appeals' conclusion. Citing North Miami General Hospital, In. v. Office of Community Medical Facilities, Dep't of Health and Rehabilitative Services, 355 So. 2d 1272 (Fla. 1st DCA 1978), Aloha states that "it is a long-established principle of administrative law that agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper." Aloha argues that "when agencies change their established policies and practices and procedures, they must, by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved, give a reasonable explanation of the change supported by record evidence which all parties must have an opportunity to address." See Manasota-88, Inc. v. Gardinier, Inc., 481 So. 2d 948 (Fla. 1st DCA 1986); Florida Cities Water Company v. Florida Public Service Commission, 705 So. 2d 620 (Fla. 1st DCA 1998); and Section 120.68(7)(e)3., Florida Statutes. Aloha argues that the requirement for additional refunds over and above that required by the Final Order constitutes a change in policy, which has been neither explained nor justified. Aloha also alleges that this change is unsupported by record evidence and denies "Aloha the right to offer countervailing evidence or otherwise address any potential or claimed reason for a deviation from established precedent and policy."

OPC disputes "Aloha's central contention that the procedure which Aloha seeks 'has been implemented in all prior cases.'" OPC argues that "to properly apply precedent, one must examine only those prior cases which have identical or analogous relevant circumstances." OPC concludes by stating that it was

> Unaware of prior cases in which the Commission: (1) first allowed a utility interim rates to keep it whole during the pendency of the rate case; (2) then determined the utility was already financially whole without any rate increase; (3) and yet allowed the utility to keep some of the customers' money that was never necessary to make it financially whole in the first place.

Staff believes that a decision to require additional refunds would be consistent with Order No. 16462, issued in the Spring Hill rate case which was discussed above. In the Spring Hill decision, the Commission determined that one refund was appropriate for the interim rates granted prior to the issuance of the final order, and another refund was appropriate while that order was on appeal and stayed.

Also, staff believes that such a decision would be consistent with the Commission's prior decision in In re: Application for a rate increase for North Ft. Myers Division in Lee County by

Florida Cities Water Company – Lee County Division, Order No. PSC-95-1360-FOF-SU (PAA Order), issued November 2, 1995, in Docket No. 950387-SU, whereby the Commission treated the disposition of interim rates differently in the appeal period. Although Florida Cities did not involve the implementation of interim rates pursuant to Section 367.082, Florida Statutes, it did implement the proposed agency action rates subject to refund after the PAA Order was issued pursuant to Section 367.081(6), Florida Statutes. During the course of two hearings and two appeals, the Commission determined that different revenue requirements and different refund amounts were required.

In calculating the appropriate amount of refund for the time the PAA rates were in effect, the Commission took into account that rate case expense from a previous rate case was completely amortized during the time the PAA rates had been implemented, and Florida Cities had issued credits for the amortization of this previous expense. Also, the Commission took into account that approximately three years of the rate case expense approved in the PAA Order had been amortized and the utility had incurred additional rate case expense subsequent to the issuance of the First Final Order. In the Second Final Order, the Commission stated "we have, therefore, calculated the refund by taking the difference between the revenue requirement, with rate case expense, and the PAA revenue requirement, with rate case expense, excluding the $21,001 credit for rate case expense which expired from Docket No. 910756-SU." This was calculated to be 10.92% for the calendar year 1996, and 10.50% from January 1, 1997, through implementation of the final approved rates. This Second Final Order was also appealed, but was ultimately upheld by the First DCA.

In comparing Florida Cities with this case, staff notes that there are both differences and similarities. Staff believes that the main difference is that, in Florida Cities, the Commission did determine that a rate increase was warranted. Therefore, the Commission had to determine what was the difference in revenues between the PAA rates implemented by the utility and the final rates approved by the Commission. In the case at hand, the Commission does not have to do any such calculation. The Commission knows it approved a 15.95% interim increase, but then found no increase whatsoever was warranted, and this decision was upheld by the First DCA. Therefore, there is no need to make any further comparisons and the Commission properly found that the full 15.95% interim increase, which Aloha continued to collect after issuance of the Final Order, should be refunded for the appeal period. Staff believes that the process used in this case is similar to the process used in Florida Cities, but is much simpler because no rate increase whatsoever was found to be appropriate.

Moreover, staff disagrees with Aloha's contention that this change is unsupported by record evidence and denies "Aloha the right to offer countervailing evidence or otherwise address any potential or claimed reason for a deviation from established precedent and policy." The PAA Refund Order set forth the reasons for the deviation from prior Commission practice based on the findings in the Final Order itself and the holdings in GTE and Mason. The findings in the Final Order were made after a full evidentiary hearing and concluded that Aloha was entitled to no rate increase. Moreover, in this informal proceeding, Aloha has been given the opportunity to offer countervailing evidence or cite any case or order which it believes may be appropriate. Aloha has not shown that there is a dispute of material fact justifying a formal proceeding pursuant to Section 120.57(1), Florida Statutes. Moreover, Aloha has failed in its

brief to cite any specific orders of the Commission which might be applicable or explain the Commission's policies and procedures in this type of situation. Aloha did cite Florida Cities, but this was for the principle "that agency action which yields inconsistent results based upon similar facts, without reasonable explanation, is improper." Staff believes that the Commission in both Florida Cities, Spring Hill, and this case was comparing the revenue requirement found to be appropriate with the actual revenue collected through the utility's continued collection of either the implemented PAA rates or interim rates after issuance of a final order.

Conclusion

The intent behind the Commission's Final Order is clear. The Commission did not intend for the utility to collect any increased revenues when it issued its Final Order on April 30, 2002. Aloha's request for a rate increase was denied because the utility failed to meet its ultimate burden of proof. See Final Order, pps. 52, 68, 70, 72. Moreover, the Commission found that Aloha should receive neither a rate increase nor a decrease. **See** Final Order, pages 80 and 85. However, based on the interim statute, the Commission determined that Aloha could keep 11.08% of the 15.95% interim increase for the rate case period. When Aloha appealed the Final Order and the Commission ruled on the utility's request for a stay, the Commission noted that the Final Order set rates such that Aloha would no longer collect the interim increase allowed by Order No. PSC-01-2199-FOF-WU. However, with the stay, Aloha continued to collect the 15.95% interim increase for the 15-month appeal period.

Subsequent to the First DCA's mandate, Aloha refunded 4.87% of the interim increase collected during the appeal period. The ultimate question is: "What additional refund, if any, is required for the period May 1, 2002, through July 31, 2003?"

In determining whether Aloha should be allowed to keep the remaining 11.08% interim increase, staff believes GTE and Mason govern. In GTE, at 973, the Florida Supreme Court viewed ratemaking as a matter of fairness between the utility and its ratepayers. The Supreme Court had 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 Mason. 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." Mason, at 781 (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. It would be equally inequitable to allow Aloha to keep the increased interim revenues that it continued to collect between the issuance of the Final Order and the First DCA's ultimate affirmance of that order in which the Commission found that no increase was warranted. If Aloha is allowed to keep 11.08% of these interim revenues, staff believes that Aloha would benefit and receive a windfall from its unsuccessful appeal of the Final Order. Staff believes this is patently unfair. The Commission lawfully found that Aloha was not entitled to a revenue increase. Aloha should not be allowed to

benefit from the 15-month lag in implementing final rates caused by its appeal of the case, and its continued collection of higher interim rates during the appeal period, when it did not ultimately meet its burden to justify a rate increase. In this case, Aloha has not justified any rate increase whatsoever, and yet unquestionably was granted a 15.95% interim rate increase.

While the rate case was pending, Aloha received the immediate relief as was intended by the procedure. Thus, its award of interim rates was 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. No provision of the interim statute requires the Commission to allow the award of interim rates while an appeal is pending if the ultimate determination is that the utility failed to meet its burden to prove that a rate increase was warranted.

Aloha's arguments concerning administrative finality, res judicata, collateral estoppel, and equitable estoppel are without merit. Because the Commission did not know an appeal would be filed, the Final Order did not address the appropriate refund methodology for the appeal period. The issue was simply not litigated in the rate proceeding. Moreover, because the interim increase was deposited in an escrow account, Aloha cannot have reasonably relied on the use of those funds. The appeal and subsequent stay of the final rates delayed the implementation of the appropriate final rates so that the utility continued to collect a 15.95% increase to which the Final Order said it was not entitled. Aloha should be required to refund the additional 11.08% with interest.

Staff believes that a decision to require additional refunds is consistent with past Commission policy and practice. However, even if this additional refund over and above the 4.87% found in the Final Order 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, at 626 (the Commission must adequately explain policy changes).

For the reasons discussed above, staff recommends that the Commission require Aloha to refund to its customers the entire interim increase of 15.95% collected during the appeal period, including interest. Staff has verified that Aloha has already refunded 4.87% or $121,983 (includes $530 of interest) for the appeal period. Because the total refund for the appeal period is $397,519 without interest, an additional $276,066 without interest should be refunded. 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, and treat any unclaimed refunds as contributions-in-aid-of-construction (CIAC) pursuant to Rule 25-30.360(8), Florida Administrative Code. The entire amount remaining in the escrow account should be released to the utility upon staff's verification that the utility has made the additional refund.

Issue 5: Should this docket be closed?

Recommendation: No. This docket should remain open to allow staff to verify that Aloha has complied with the Final Order to improve its quality of service as subsequently modified, and that Aloha has made the additional refunds with interest and treated any unclaimed refunds as contributions in aid of construction (CIAC). (Jaeger)

Staff Analysis: This docket should remain open to allow staff to verify that Aloha has complied with the Final Order to improve its quality of service as subsequently modified, and that Aloha has made the additional refunds with interest and treated any unclaimed refunds as CIAC.