

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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IN RE: Petition by Customers of )  
**ALOHA UTILITIES, INC.**, for deletion of )  
portion of territory in Seven Springs ) Docket No. 020896-WS  
Area in Pasco County, Florida. )

IN RE: Application for increase in water )  
rates for Seven Springs System in Pasco )  
County by **ALOHA UTILITIES, INC.** ) Docket No. 010503-WU

**ALOHA UTILITIES, INC.'S RESPONSE TO MOTION TO  
COMPEL AND TO SHORTEN TIME**

Aloha Utilities, Inc. ("Aloha"), by and through undersigned counsel, hereby files this Response to Motion to Compel and Shorten Time, and in support thereof would state and allege as follows:

1. On the afternoon of October 14, 2004, staff filed its Motion to Compel and to Shorten Time. The Motion to Compel and to Shorten Time is actually two separate motions. One is a preemptive strike, in the form of a motion to compel responses to certain discovery tendered to Aloha by the staff as to which the objections are not due until November 9, 2004. The second is a motion to shorten the time in which Aloha must make its objections,

requiring the same by Tuesday, October 19, 2004. Under the Rules of Procedure, Aloha is under no duty to respond to these two motions before today's date, October 21, 2004, and is under no duty to object to staff's discovery until November 9, 2004. Despite these

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time frames, in less than one full business day, the Prehearing Officer had granted the Motion to Shorten Time.<sup>1</sup>

2. This sequence of events not only deprived Aloha of any opportunity to respond to the Motion to Shorten Time, but also encapsulates a striking example of staff's questionable dual role in this proceeding. Staff has sent discovery in this case despite the fact that the Uniform Rules of Procedure, as well as the Florida Rules of Civil Procedure cited by staff in the preamble to its discovery, expressly provide that only parties may utilize the rules of discovery. Staff is not a party to this case, nor is the Commission a party to this case. Staff, apparently mindful of this fact, apparently approached the Prehearing Officer and secured the expeditious granting of staff's Motion to Shorten Time, by a means and in a way which would be sanctionable if any party had engaged in the same sort of ex parte conduct. Staff apparently considered itself a party when it sent the discovery, something else when it approached the Prehearing Officer and secured the granting of the Motion to Shorten Time, ex parte, and apparently intends to advocate a position in this formal administrative hearing with the information gained from the discovery which staff seeks from Aloha and which is the subject of these motions. Staff's shifting role in this case, as an advocate, as a party, as the defacto judges' law clerk, and now as an adversary to Aloha (at least for the purposes of these two Motions) is contrary to the Administrative Procedure

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<sup>1</sup>While Order No. PSC-04-1001-PCO-WS never expressly states that it is granting staff's Motion to Shorten Time, it orders the relief requested by that Motion, and it is therefore logical to assume the Order resulted from the Motion.

Act, contrary to the Uniform Rules of Procedure, is violative of Aloha's due process rights, and is inconsistent with the basic tenets of Florida law and fundamental fairness.

3. Staff's Motion to Compel is premature and should be denied for that reason alone. Professor Trawick lists 10 reasons "a party" can file a motion to compel.<sup>2</sup> None of those reasons apply to the procedural status of the discovery which is the object of staff's motions. See, e.g., §16-13, *Trawick, Florida Practice and Procedure* (2004). Trawick describes the discovery procedure as one in which the "party to whom the request is directed must serve a response to it within 30 days after service of the request, and such response must state that inspection and the related activities will be permitted as requested unless the request is objected to or cannot occur for another valid reason". *Id*, at §16-10. If any objection is made, the reasons for it must be given. If the requesting party wants to pursue the requests **over the objection**, he may move to compel production inspection or entry. *Id* at §16-10. In this case, staff has chosen to skip the first two steps of the process contemplated by Professor Trawick and the Uniform Rules of Procedure (the allowance of the predetermined response time to the recipient of the discovery and the response to the discovery, whether in the form of objections or otherwise, by that recipient) and simply skip to the Motion To Compel stage. Staff's sense of urgency notwithstanding, it is inappropriate for staff to put the procedural cart before the horse, and to herein seek an order requiring Aloha to respond to a premature Motion to Compel before Aloha is even required by the applicable rules to file its objections. The way that discovery disputes are resolved, as set

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<sup>2</sup>Nothing in this Response should be read as Aloha's concession that staff either is a party or has the authority to "act as a party."

forth in the Florida Rules of Civil Procedure, in the Federal Courts, in State courts around the United States, in quasi-judicial proceedings in Florida, and traditionally by this Commission, are not mere niceties which should be dismissed at the whim of the staff.

4. On October 15, 2004, the Prehearing Officer entered the Order requiring Aloha's written objections to staff's request for production of documents to Aloha (Nos. 1-2) and Aloha's response to staff's Motion to Compel to be filed by Tuesday, October 19, 2004. Aloha has requested reconsideration from the Commission panel of that Order. The Motion to Compel is improper and premature because the response to the discovery are not even due until November 9, 2004, by staff's own reckoning. Staff's Motion candidly admits that this tortured and abbreviated process is necessary because "if Aloha files an objection to the discovery requests of November 9, 2004, more time will pass in order for the objection to be considered and ruled upon . . ." See Staff's Motion, paragraph 5. This passage of time (which the staff infers is an inconvenience to its plans) is nothing more than Aloha being given due process and responding to discovery in the normal time frames allowed by the Rules of Uniform Procedure, the Florida Rules of Civil Procedure and the Order Establishing Procedure in this case.

5. Staff has not stated good cause to shorten the time for Aloha to respond to staff discovery.<sup>3</sup> Nothing Aloha has done has caused staff to be in the bind which it has described that it finds itself in. Aloha should be allowed to respond to staff's discovery in

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<sup>3</sup>At least, staff has not stated good cause in the Motion to Shorten Time. Staff's argument to the Prehearing Officer, if any, in support of the Motion, may have been quite eloquent, but Aloha was not privy to that event.

the ordinary course of business, as contemplated by the Uniform Rules of Civil Procedure and the normal time frames for discovery in judicial and quasi-judicial proceedings in the State of Florida. If staff is thereafter dissatisfied with any response or objection of Aloha, it should move to compel responses to the same, as contemplated by those same rules and procedures. Only at that time will a motion to compel be appropriate. Forcing Aloha to respond to a Motion to Compel on a premature and preemptive basis deprives Aloha of due process of law by unduly and prejudicially shortening the time in which staff's discovery must be researched, responded to, and addressed.

6. Staff's motion does not establish good cause for Aloha's objections to the discovery requests to be expedited, nor good cause to allow the extraordinary step of the filing of a Motion to Compel by staff in advance of Aloha's timely objections to staff's discovery.

7. If expedited discovery is appropriate in this case, then it should have been ordered by the Prehearing Officer and that fact should have been known to all parties so that they could conduct their activities accordingly. There is a rebuttable presumption that discovery will proceed as contemplated by the Florida Rules of Civil Procedure, the Uniform Rules of Procedure, and routine Commission practice. Staff has not overcome that presumption, and its stated reasons for expediting this discovery are insufficient to allow summary disposition of procedural niceties such as timely objection, the opportunity to respond to motions, and the filing of pleadings that address past events, as opposed to anticipated events. This case has been pending through much of the summer, and the Final

Hearing is not until March of 2005. Staff has not established good cause for either of its Motions to be granted..

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests that the Prehearing Officer or Commission Panel decline to expedite the response time for Aloha to staff's discovery, decline to shorten any applicable time frames related to staff's outstanding discovery, and deny the Motion to Compel as premature.

Respectfully submitted this 21<sup>st</sup>  
day of October, 2004, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or via facsimile (indicated by \*) to the following on this 21<sup>st</sup> day of October, 2004:

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aloha\37\Response to Motion to Compel and to Shorten time