

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ALOHA UTILITIES, INC.,)
)
 Petitioner,) PSC DOCKET NO. 010503-WU
) Filed: February 26, 2004
 v.)
)
 FLORIDA PUBLIC SERVICE COMMISSION,)
)
 Respondent.)
 _____)

**PETITION FOR FORMAL ADMINISTRATIVE HEARING AND
REQUEST THAT PETITION BE TRANSFERRED TO DOAH**

COMES NOW, Aloha Utilities, Inc. (hereinafter "Petitioner," "Aloha," or the "Utility") by and through its undersigned counsel and files this Petition for Formal Administrative Hearing, pursuant to Sections 120.569, 120.57(1), and 120.80 Florida Statutes, and Rule 28-106.201, Florida Administrative Code, concerning the Notice of Proposed Agency Action entitled "Order Requiring Interim Refunds." Petitioner hereby objects to certain portions of Order No. PSC-04-0122-PAA-WU (the "PAA Order") and places into dispute the issues specified in this pleading, stating as grounds therefore the following:

1. The name and address of Petitioner is:

Mr. Stephen Watford
Aloha Utilities, Inc.
6915 Perrine Ranch Road
New Port Richey, FL 34655

2. The name and address of the person authorized to received notices:

F. Marshall Deterding, Esq.
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301

DOCUMENT NUMBER-DATE

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3. The name and address of the agency is the Florida Public Service Commission (hereinafter "Commission" or "PSC"):

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

The PSC has assigned this PAA Order to the same Docket No. (010503-WU) as the Commission's Final Order issued in April of 2002. It is the Petitioner's position that this docket closed at this issuance of the Mandate in mid 2003, with regard to all matters except for verification that a few ministerial tasks outlined in the Final Order had been completed. The last of those tasks was verification that the required interim refunds had been made in accordance with the terms of that Final Order. The Final Order required a refund of 4.87% of revenues collected during the "interim collection period" and both the PAA Order and the previously issued Order No. PSC-03-1410-FOF-WS verified that this had been done. As such, it is also the Petitioner's position that this PAA Order is not properly issued in this finalized rate case docket, which has been the subject of a final, appealed and upheld order.

4. Petitioner received the Commission's Notice of Proposed Agency Action Order No. PSC-04-0122-PAA-WU by U.S. Mail to their attorneys on February 9, 2004. That Notice informed Petitioner of its right to file a petition on or before February 26, 2004.

5. The Proposed Agency Action requires Aloha to refund to its customers the additional amount of \$278,113. Aloha's substantial interests are adversely affected by that proposed agency determination, in that such requirement is in violation of the

requirements of Section 367.081(2) and 367.082, Florida Statutes; long established Commission precedent; and the clear and unequivocal terms of Final Order No. PSC-02-0593-FOF-WU, issued in April of 2002 and upheld on appeal.

6. The following disputed issues of material fact, as well as mixed issues of fact and law, are raised by Aloha, and include specific facts that require modification of the Proposed Agency Action Order (hereinafter “PAA Order”):

A. Whether the PSC’s Final Order is binding and conclusive on the issue of refunds.

The PAA Order alleges that Order No. PSC-02-0593-FOF-WU (the “Final Order”), issued on April 20, 2002 “...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).” Such a statement is clearly contrary to the unambiguous wording of Final Order No. 04-0122-PAA-WU which 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.” Aloha implemented the “final rates” approved in August of 2003, after exhaustion of appeals.

B. Whether the PSC Order granting a stay along with its Final Orders, estops the PSC from changing its positions regarding refunds.

The Final Order specifically dealt with the issue of refunds for all monies collected “during the interim collection period” which is defined as being from November 3, 2001 to the date Aloha implements the final rates approved. No party sought reconsideration of this refund issue; sought

appeal of this refund issue; sought cross appeal of this refund issue; or sought any action on this refund issue in the Stay Order entered related to the rates to be accessed and the monies to be held subject to refund under the terms of the Final Order during the pendency of the appeal. Aloha therefore relied on the Commission's decisions related to this refund issue throughout the stay and appeal proceeding and thereafter.

- C. 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."

The Refund Order concludes with its finding that:

"...by appealing the decision in collecting interim rates during the 15 month appeal period, Aloha had the benefit of the higher interim rates during this time period to which we found, and the First DCA ultimately agreed, that no revenue increase was justified. We find that it is blatantly unfair to allow Aloha to benefit from the higher interim rates collected during the appeal period."

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. The Utility has demonstrated through detailed billing information filed and verified by the Commission staff 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 and no appeal had been taken at all.

- D. Whether the PAA Order results in a windfall to Aloha’s customers to the extreme detriment of Aloha.**

The Refund Order also finds that Aloha “...should not benefit and receive a windfall from its unsuccessful appeal of our Final Order.” That finding assumes that the refund of 4.87% of revenues collected under interim rates results in some sort of windfall to Aloha. There is no foundation for such an allegation and in fact, the facts provided by the Utility to the Commission staff which were audited and verified by the Commission staff, show that no such windfall occurred and that, to the contrary, the Commission’s Final Order requiring a refund of all monies held in escrow during the “appeal period” in fact results in a windfall to the customers.

- E. Whether the directives and statements contained within the PAA conflict with and are contrary to the PSC’s prior agency practices, procedures, and policies.**

In prior cases, the PSC has allowed utilities to maintain interim rates during the pendency of an appeal and to refund any excessive interim rates at the conclusion of that appeal, based upon the requirements of the original order and a methodology as proposed by Aloha in this case. That procedure has been implemented in all prior cases.

In spite of the fact that this was brought to the attention of the Commission, the PSC 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.

7. The ultimate facts alleged by the Petitioner are as outlined in Paragraph 6 hereof and are generally that Aloha is entitled to retain all but 4.87% of the monies collected under interim rates for the entire period from the issuance of Interim Order No. PSC-01-2199-FOF-WU up through implementation of final rates in July of 2003, and the refunds as completed in August of 2003 are not only all that is required by the Commission's Final Order which specifically addresses this issue, but are all that are reasonably appropriate without granting to the customers a windfall based upon a punitive lower revenue requirement during the appeal period. Since Aloha has already refunded to its customers the total amount required by the Final Order, Aloha is entitled to the release of all additional funds in the escrow account.

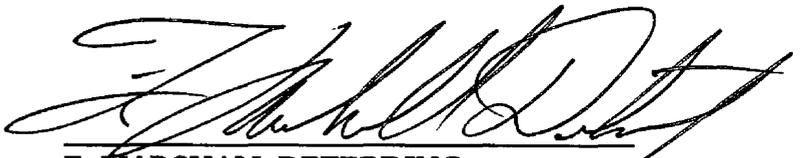
8. The statutes and rules which entitle Aloha to relief include the provisions of Section 367.081(2), 367.082, Florida Statutes, and Rule 25-30.360, Florida Administrative Code.

9. Based upon knowledge of the practice and procedure of the PSC with regard to the length of time required for the scheduling and conclusion of administrative hearings and the need for a disinterested finder of fact to immediately address the issues raised herein, Petitioner respectfully requests that this Petition be transmitted to the Division of Administrative Hearings for the assignment of an impartial Administrative Law Judge to conduct the hearing and render a recommended order on these issues.

WHEREFORE, based upon the above, Aloha Utilities, Inc. requests that:

- A. The Commission grant this Petition for Formal Administrative Hearing pursuant to the provisions of Section 120.57(1), Florida Statutes on each of the factual, legal, and policy issues outlined herein;
- B. The Commission forward this matter to the Florida Division of Administrative Hearings for assignment to an Administrative Law Judge to expeditiously conduct a formal administrative hearing on the issues raised herein;
- C. Recommended and Final Orders be entered finding that Aloha has completed all refunds in accordance with the requirements of the Commission's Final Order and that no further refunds are appropriate and requiring the PSC to release all monies held in escrow; and
- D. Petitioner be granted such other further relief as deemed just and proper.

Respectfully submitted this 26th day of February, 2004.

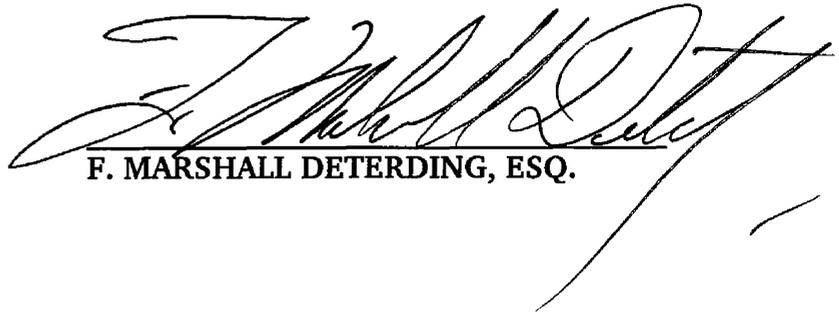


F. MARSHALL DETERDING
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to the following on this 26th day of February, 2004:

Ralph Jaeger, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850



F. MARSHALL DETERDING, ESQ.

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