

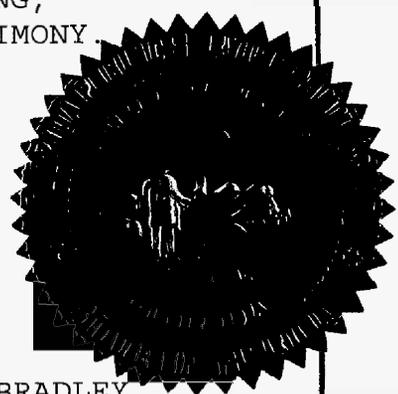
BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY CUSTOMERS OF ALOHA UTILITIES, INC. FOR DELETION OF PORTION OF TERRITORY IN SEVEN SPRINGS AREA IN PASCO COUNTY. DOCKET NO. 020896-WS

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

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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 3

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON

DATE: Tuesday, November 2, 2004

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736

1 PARTICIPATING:

2 JOHN L. WHARTON, ESQUIRE, representing Aloha
3 Utilities, Inc.

4 CHARLES BECK, ESQUIRE, representing the Citizens of
5 the State of Florida.

6 ROSANNE GERVASI, ESQUIRE; RICK MELSON, ESQUIRE,
7 representing the Florida Public Service Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN BAEZ: We are on Item 3.

3 MS. GERVASI: Commissioners, Item 3 is staff's
4 recommendation to deny two motions for reconsideration filed by
5 Aloha Utilities, Inc., of two procedural orders issued by the
6 Prehearing Officer in Docket Numbers 020896-WS and 010503-WU.

7 Issue 1 concerns a request for oral argument on Issue
8 2. Staff is recommending that oral argument should be granted
9 on Issue 2 if the Commission finds that it would be helpful to
10 the Commission's comprehension and evaluation of Issue 2.

11 Staff recommends that if oral argument is granted on
12 Issue 2, that it be limited to five minutes for Aloha and five
13 minutes for Public Counsel. No request for oral argument was
14 filed on Issue 3; therefore, oral argument on that issue is
15 solely within the Commission's discretion.

16 Mr. John Wharton is present on behalf of Aloha
17 Utilities as is Mr. Charlie Beck on behalf of the Citizens.
18 Staff is available to answer any questions, or we can take up
19 the item issue by issue after a ruling on Issue 1 at your
20 pleasure.

21 CHAIRMAN BAEZ: Commissioners, we do have a
22 particular (phonetic) ruling on Issue 1, so is there a motion?

23 COMMISSIONER DAVIDSON: Move staff to grant oral
24 argument on the subject of Issue 2 only.

25 CHAIRMAN BAEZ: Is there a second?

1 COMMISSIONER DEASON: Second.

2 CHAIRMAN BAEZ: A motion and a second. All those in
3 favor say, "aye."

4 (Unanimous affirmative vote.)

5 CHAIRMAN BAEZ: Okay. Ms. Gervasi, can you -- it's
6 Mr. Wharton's motion; correct?

7 MS. GERVASI: Yes, sir.

8 CHAIRMAN BAEZ: Very well. And, Commissioner
9 Davidson, did your motion include staff's suggestion -- it was
10 five minutes, Ms. Gervasi?

11 MS. GERVASI: Yes, sir.

12 CHAIRMAN BAEZ: Five minutes a side; correct?

13 COMMISSIONER DAVIDSON: Yes.

14 CHAIRMAN BAEZ: Mr. Wharton, five minutes.

15 MR. WHARTON: Thank you, Mr. Chairman. John Wharton
16 on behalf of Aloha Utilities. Commissioners, we request that
17 the cases that have been bifurcated, which are the subject of
18 staff's recommendation, be separated again. **This consolidation**
19 occurred upon an order of the Prehearing Officer and was not
20 requested by any party and is not supported by any party.

21 On the one hand, we have the customer petition
22 docket. Arguably no litigation has ever had higher stakes for
23 the regulated company than does the customer petition docket
24 for Aloha which is set for hearing in March. The case which
25 has been consolidated with that case involves the compliance

1 point in the distribution system for a water constituency
2 parameter that Aloha is going to introduce and a standard that
3 it is going to attempt to meet.

4 In that case Aloha requested that the compliance
5 point, the testing point for that particular proposed fix be
6 tested at a certain point. The staff recommendation was
7 consistent with that, and the Commission's proposed action was
8 consistent with that. Three customers have filed a petition to
9 challenge where that point of compliance should be located. We
10 suggest to you, Commissioners, that there is no commonality of
11 the issues. The larger proceeding addresses the deletion of an
12 unknown and at this point unestablished portion of Aloha's
13 water and/or wastewater territory while the other really
14 addresses a nuance in a proposed fix determined to improve
15 water quality in those exact same areas that are the subject of
16 the deletion petitions. So really, in that regard, they are
17 inconsistent.

18 It appears from the order of presentation that was
19 established by the Prehearing Officer in the procedure order
20 that the customers have the burden in the customer petition
21 cases. In the compliance case, I'm not so sure. And yet the
22 procedure order has not been modified. Now that case has just
23 been put into the customer petition case. There's customer
24 testimony due at the end of the month. I think that issue is a
25 bit nebulous.

1 OPC in this case has also suggested that they support
2 our motion, but we would suggest to you that what OPC is
3 suggesting is that we be taken out of the frying pan and put
4 into the fire. They say that, yes, these cases shouldn't be
5 consolidated, but because it will be difficult for Aloha to
6 implement the particular fix that was the subject of your
7 summer order, you need to go ahead and do that as quickly as
8 possible. Well, that's absolutely true, and that's what we
9 told you in the summer. It's going to be tough to change this
10 water chemistry and to try to meet this standard when we don't
11 know whether it's going to be tested at this point in the
12 system or this point or perhaps the end user, as has been
13 suggested in the petitions. However, expediting that
14 particular hearing not only is going to lay it right on top of
15 this other proceeding in which there's already testimony due
16 this month, it's not going to help because it takes time for
17 staff recommendations to be issued, for parties to prefile.
18 This deadline is falling at the beginning of next year. So
19 Aloha is already in that fix. All that expediting that
20 particular portion of the hearing if you choose to bifurcate it
21 will be -- I think it's going to complicate the issues.

22 Commissioners, we request that the proceedings be
23 bifurcated, that we proceed to the March hearing, that we set
24 up the other hearing, the hearing on the compliance testing
25 point issue, after the March hearing, that will be placing

1 these matters back in the sequence in which the petitions were
2 filed and in which they actually occurred. And we think that
3 that will allow all of the parties, who are admittedly many of
4 the same parties, to concentrate on the customer petition
5 docket. I think it will obviate confusion at the hearing about
6 whether a particular witness is addressing one case or the
7 other. I think that it will make it easier for you to issue a
8 cleaner order which will only be addressing one petition that
9 is really addressing a certain subject as opposed to the other
10 petitions. And we do request that these cases be, for lack of
11 a better phrase, unconsolidated. Thank you.

12 CHAIRMAN BAEZ: Thank you, Mr. Wharton.

13 Mr. Beck.

14 MR. BECK: Thank you, Mr. Chairman. Charlie Beck
15 with the Office of Public Counsel. Commissioners, we agree
16 with the result that Aloha seeks but not for the same reasons
17 that they're seeking to separate the two proceedings.

18 The issue of the water quality standards has been
19 outstanding since June with regard to the specific test and the
20 specific standards that the company is going to be required to
21 meet. The company filed its motion to modify the final order
22 on the rate case on June 9th, and the Office of Public Counsel
23 responded on June 16th.

24 What is at issue is, first, where to measure the
25 amount of sulfides that -- or the maximum amount of sulfides

1 that should be allowed in the water. Should it be measured at
2 the plant where the treatment occurs, or should it be measured
3 where the water is delivered to customers? We've specifically
4 protested that item.

5 The second item is whether the sulfides should be
6 removed or just treated because we believe there's some science
7 behind that that if it's just treated and you test it at the
8 plant, then those sulfides can reform into hydrogen sulfide as
9 it goes through the company's pipes before it's delivered to
10 customers. And after all, that's what really matters, is
11 what's delivered to the customers.

12 Finally, we've contested how often their tests should
13 be made and where the test should be made to test the
14 compliance. We need the resolution of these items. I think
15 logically you have to set the standards before the company can
16 put in the plant that will meet the standards. Right now, the
17 standards have been protested. The Commission has to decide
18 what they are. And we're afraid that the company is going
19 forward with facilities and treatment processes without having
20 the standards set. So how do they do that? How do they build
21 a plant when they don't know what standards have to be met?

22 We suggest that they be separated and that the PAA
23 protest be done as quickly as possible. There's customer
24 hearings set for the end of January. That might be one
25 possibility of looking for the evidentiary hearing on the PAA

1 protest. Right now, the evidentiary hearing on the deletion
2 proceeding is set for March of 2005.

3 The staff advises you that there's similarity in the
4 cases because they both deal with water quality. And whereas
5 there's some truth to that, that's not the whole story.
6 Setting the standards of the water quality, obviously it deals
7 directly with what standards should be met by the company. But
8 the deletion proceeding, the water quality is more the symptom
9 of the problem rather than the actual problem itself. You
10 know, customers are going to present testimony in the deletion
11 proceeding about the company, about the management, what the
12 company knew, what they knew, when they knew, what did they do
13 with what they knew. So the focus of the deletion proceeding
14 is going to be in company management, not so much the actual
15 standards as is the other proceeding. So we agree with the
16 company that they should be separated. We'd ask you to move
17 forward on the PAA protest as quickly as possible.

18 CHAIRMAN BAEZ: Thank you, Mr. Beck.

19 Commissioners, questions? I have one, I guess, if no
20 one is going to speak up. Mr. Beck, Mr. Wharton stated a
21 preferred sequence as to the dockets; namely, that the
22 so-called deletion petitions or the customer petitions be taken
23 up in due course and that the water standards docket, if you
24 will, or the implementation docket take place, the hearings
25 take place after. Do you agree with that sequence?

1 MR. BECK: Our concern is doing the PAA protest
2 quickly and that would suggest doing it first. So it would be
3 the opposite of what Mr. Wharton is recommending.

4 CHAIRMAN BAEZ: And I sense that there's a logistics
5 issue wrapped up or folded into all of this. And I know from,
6 I guess, personal -- I have personal knowledge as to how tough
7 the logistics have been even to set up the hearing dates and
8 the customer hearing dates as they are now. Is there any
9 consideration or have the customers given any consideration
10 towards -- in order to serve the sequence that you are in favor
11 of, to hold the deletion petitions out a little in order to be
12 able to substitute the current scheduling? And I don't want to
13 put you in the -- I recognize that I'm putting you in a hard
14 spot, but do you understand logistically what a tough situation
15 the Commission is in?

16 MR. BECK: Right. And we'll work with whatever you
17 do, Commissioner. I don't think there's any sentiment on the
18 customers' side favoring delay of anything.

19 CHAIRMAN BAEZ: And I recognize that, but I think
20 dealing with realities, I think that everyone acknowledges. Is
21 that even a possibility?

22 MR. BECK: I haven't specifically discussed delaying
23 the case, but I clearly believe that from talking to them
24 numerous times that they would like all of the cases resolved
25 as quickly as possible.

1 CHAIRMAN BAEZ: And I would tend to agree with you on
2 that.

3 MR. BECK: And the only suggestion I have is to look
4 perhaps at the end of January where there is already customer
5 hearings set for the deletion proceeding and see if it would be
6 possible to have the evidentiary hearing on the PAA protest
7 then. I think the PAA protest will be a more focussed, you
8 know, narrower type of proceeding than will be the deletion
9 proceeding. It might be easier to do it then. That's the one
10 possibility I could come up with, but I understand scheduling
11 problems.

12 MR. WHARTON: Briefly, Mr. Chairman?

13 CHAIRMAN BAEZ: Go ahead, Mr. Wharton.

14 MR. WHARTON: I think that your suggestion is a
15 logical one because from an engineering standpoint the
16 implementation date of this is February 12th. We're already
17 working on that. How quickly could a proceeding be set up such
18 that an unchallenged final order was issued that perhaps either
19 told us to go in the direction that we're currently going now
20 or in a different direction such that that deadline could be
21 achieved? I think that there was discussion several months ago
22 about allowing this process to occur in advance of intense work
23 on the other proceeding. And I just think that the question --
24 I understand you're not making a suggestion, you're asking a
25 question, but that question, I think, raises a logical issue.

1 CHAIRMAN BAEZ: Commissioners, questions?

2 COMMISSIONER DEASON: Mr. Chairman, I have a
3 question.

4 CHAIRMAN BAEZ: Go ahead, Commissioner Deason.

5 COMMISSIONER DEASON: Staff, this is a
6 reconsideration of a Prehearing Officer's decision; correct?

7 MS. GERVASI: Yes, sir.

8 COMMISSIONER DEASON: And the standard of review is a
9 mistake of fact or law that the Prehearing Officer overlooked
10 or misunderstood.

11 MS. GERVASI: Yes, sir, that's correct.

12 COMMISSIONER DEASON: And I have not heard either of
13 the presenter's arguments that this standard has been met. So
14 I guess I'll ask the -- what mistake of fact or law did the
15 Prehearing Officer make that would require this Commission
16 to --

17 MR. WHARTON: Respectfully, Commissioner Deason, this
18 was a joint -- it was a dual motion. It was a motion for
19 reconsideration and a motion to bifurcate. I don't know
20 whether that responds to your -- but it's two animals. I
21 understand that if it were only the motion for reconsideration,
22 that would be the issue. It was also a motion to bifurcate.

23 COMMISSIONER DEASON: But, in essence, though, it was
24 the Prehearing Officer's decision to consolidate, so your
25 motion to bifurcate is, in essence, a reconsideration of that

1 decision, is it not?

2 MR. WHARTON: I don't know that it is a
3 reconsideration. First of all, I believe that procedurally I
4 could file that motion at any time, and perhaps it would not be
5 well-taken. But also, Commissioner Deason, and it's not my
6 intention to tilt at windmills, and I know that you don't want
7 me to do that, but I believe that reconsideration from a
8 Prehearing Officer to a full panel should be subjected to a
9 different standard than when someone is reconsidering one of
10 your final orders back to the exact same five Commissioners who
11 made it. And I just think the fact that it is a motion for
12 bifurcation and that it did come from a Prehearing Officer
13 again means that it is something that you could consider with a
14 bit more discretion.

15 But to address your point, Commissioner Deason, I
16 believe that some of the points we've raised today were not
17 reflected in the order consolidating. Some of the problems
18 about burden, some of the problems about the engineering and
19 timing impossibilities of doing these things at once were not
20 reflected in the order.

21 MR. BECK: Commissioner Deason, if I might add. You
22 know, we've only simply filed the response to the company's
23 motions, but I don't believe that standard is appropriate when
24 the motion asked to reconsider an order to which we had no
25 input. There was never any opportunity for either party to

1 have any input into the procedural order, and in that instance,
2 to demand that a mistake of fact or law be the only basis for
3 reconsidering I don't think it's proper because we never had an
4 opportunity for input. This is the first opportunity to
5 provide any input at all.

6 COMMISSIONER DEASON: To what standard exists,
7 Ms. Gervasi?

8 MS. GERVASI: The standard of reconsideration is as
9 you said, Commissioner, that if the Commission were to
10 reconsider the order, it should find that there was a mistake
11 of fact or law made within the order.

12 COMMISSIONER DEASON: Does it make any difference
13 that this was a decision made without the input of the parties?

14 MS. GERVASI: No, sir. The Prehearing Officer has
15 the discretion on his own motion to make a finding that the
16 cases are sufficiently related such that it would promote the
17 just, speedy, and inexpensive resolution of the proceedings to
18 consolidate them.

19 COMMISSIONER DEASON: And is there any merit to the
20 argument there should be a different standard if it's a
21 reconsideration of a Prehearing Officer as opposed to a
22 reconsideration of the full Commission decision back to the
23 full Commission?

24 MS. GERVASI: No, sir, not in my opinion. The
25 standard is the same.

1 COMMISSIONER DEASON: Mr. Melson, do you agree with
2 that?

3 MR. MELSON: Yes, sir. You've always applied the
4 same standard.

5 CHAIRMAN BAEZ: Thank you, Commissioner. Any other
6 questions, Commissioners? If not, we can entertain a motion on
7 Issue 2.

8 COMMISSIONER DAVIDSON: I will move staff to deny the
9 motion for reconsideration or, in their alternative, the motion
10 to bifurcate, noting that this does appear to be an area where
11 the Prehearing Officer has ruled, and I haven't heard anything
12 in response to Commissioner Deason's questions to note that the
13 legal standard applicable to our consideration of this motion
14 has been met. So with that, I move staff on Issue 2.

15 CHAIRMAN BAEZ: There's a motion. Is there a second?

16 COMMISSIONER DEASON: Second.

17 CHAIRMAN BAEZ: A motion and a second. All those in
18 favor say, "aye."

19 (Unanimous affirmative vote.)

20 CHAIRMAN BAEZ: Thank you, Commissioners.

21 COMMISSIONER DAVIDSON: Move staff on Issue 3.

22 CHAIRMAN BAEZ: There's a motion. Is there a second?

23 COMMISSIONER DEASON: Second.

24 CHAIRMAN BAEZ: A motion and a second. All those in
25 favor say, "aye."

1 (Unanimous affirmative vote.)

2 CHAIRMAN BAEZ: And we need Issue 4.

3 MR. WHARTON: Thank you, Commissioners.

4 COMMISSIONER JABER: Issue 4.

5 COMMISSIONER DAVIDSON: Move it.

6 CHAIRMAN BAEZ: Move staff on Issue 4. Is there a

7 second?

8 COMMISSIONER DEASON: Second.

9 CHAIRMAN BAEZ: All those in favor say, "aye."

10 (Unanimous affirmative vote.)

11 CHAIRMAN BAEZ: Thank you. Thank you, parties.

12 (Agenda Item Number 3 concluded.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

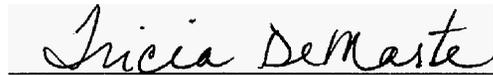
CERTIFICATE OF REPORTER

3
4 I, TRICIA DeMARTE, RPR, Official Commission Reporter,
do hereby certify that the foregoing proceeding was heard at
5 the time and place herein stated.

6 IT IS FURTHER CERTIFIED that I stenographically
reported the said proceedings; that the same has been
7 transcribed under my direct supervision; and that this
transcript constitutes a true transcription of my notes of said
8 proceedings.

9 I FURTHER CERTIFY that I am not a relative, employee,
attorney or counsel of any of the parties, nor am I a relative
10 or employee of any of the parties' attorneys or counsel
connected with the action, nor am I financially interested in
11 the action.

12 DATED THIS 8th DAY OF NOVEMBER, 2004.

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