

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water rates  
for Seven Springs System in Pasco County by  
Aloha Utilities, Inc.

DOCKET NO. 010503-WU  
ORDER NO. PSC-09-0370-PCO-WU  
ISSUED: May 27, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
KATRINA J. McMURRIAN  
NANCY ARGENZIANO  
NATHAN A. SKOP

ORDER REQUIRING TRANSFER OF ESCROWED INTERIM FUNDS

BY THE COMMISSION:

BACKGROUND

Aloha Utilities, Inc. (Aloha or Utility) is a Class A water and wastewater utility located in Pasco County. Aloha consists of two distinct service areas: Aloha Gardens and Seven Springs. The Utility provides water and wastewater service to approximately 15,365 water and 16,688 wastewater equivalent residential connections (ERCs). Aloha's 2007 annual report indicates that the Utility had gross water revenue of \$3,352,825 and net operating loss of \$283,036, and gross wastewater revenue of \$6,756,597 and net operating revenue of \$928,212. The Utility's water and wastewater systems were originally issued Certificate Nos. 136-W and 97-S in 1973.<sup>1</sup> Aloha's certificates were amended five times.<sup>2</sup>

On August 10, 2001, Aloha completed its filing for a rate increase in Docket No. 010503-WU. By Order No. PSC-01-2199-FOF-WU (Interim Rate Order), issued November 13, 2001,<sup>3</sup>

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<sup>1</sup> See Order No. 5741, issued May 4, 1973, in Docket Nos. C-73054-W and C-73055-S, In re: Application of Aloha Utilities, Inc., for certificates to operate an existing water and sewer system in Pasco County.

<sup>2</sup> See Order No. 6182, issued June 21, 1974, in Docket No. 74316-WS, In re: Joint Application of Tahitian Utilities, Inc., and Aloha Utilities, Inc., for transfer of Certificates Nos. 135-W and 96-S from the former to the latter; Order No. 14100, issued February 15, 1985, in Docket No. 830554-WS, In re: Application of Aloha Utilities, Inc. to extend water and sewer service and petition for revocation of certificated service area and declaratory statement; Order No. 15373, issued November 19, 1985, in Docket No. 830554-WS, In re: Application of Aloha Utilities, Inc., to extend water and sewer service and Petition for Revocation of Certificated area, Order No. PSC-99-1911-FOF-WS, issued September 27, 1999, in Docket No. 990940-WS, In re: Application for amendment of Certificates Nos. 136-W and 97-S to add and delete territory in Pasco County by Aloha Utilities, Inc., and Order No. PSC-00-0581-SOS-WS, issued March 22, 2000, in Docket No. 991699-WS, In re: Application for amendment of Certificates 136-W and 97-S to add territory in Pasco County by Aloha Utilities, Inc.

<sup>3</sup> Docket No. 010503-WU, In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

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FPSC-COMMISSION CLERK

we granted Aloha a 15.95 percent interim rate increase subject to refund with interest. These interim rates were placed in an escrow account. By Order No. PSC-02-0593-FOF-WU (First Final Order),<sup>4</sup> we found no increase was warranted, and ordered that 4.87 percent of the interim rates be refunded with interest. Aloha appealed this Order, and a stay was granted. Based on this appeal and stay, the final rates we approved were not implemented until August 1, 2003, some 15 months after the final rates were initially approved.

Based upon the First District Court of Appeal's affirmance of the First Final Order, Aloha refunded 4.87 percent of all interim rates collected. Because Aloha refunded \$153,510, through Order No. PSC-03-1410-FOF-WU, issued December 15, 2003, we released that amount from the escrow account. However, we determined that Aloha should not be allowed to benefit from its appeal and the stay of the final rates, which was a 15-month period. For this 15-month appeal period, May 1, 2002, through July, 2003, we found that the full 15.95 percent of interim rates that were collected should be refunded. Because Aloha had already refunded 4.87 percent, we determined that an additional 11.08 percent<sup>5</sup> should be refunded for the appeals period. Aloha appealed that decision to the First District Court of Appeal.

In February 2005, we initiated deletion proceedings in Docket No. 050018-WU to delete a portion of the Seven Springs service area based on poor customer relations and a number of problems that ultimately stem from the presence of hydrogen sulfide in the water. On March 9, 2006, after several months of extensive negotiations in which Commission staff participated, a Settlement Agreement was executed by Aloha, the Office of Public Counsel (OPC), and individual customer intervenors.<sup>6</sup> A key element of the Settlement Agreement was the agreement by the parties that it was prudent for Aloha to implement a new water treatment method – anion exchange – to address the current problems that stem from the presence of hydrogen sulfide in the water.

Another major component of the Settlement Agreement was that after Aloha dismissed its appeal of Commission Order No. PSC-04-1050-FOF-WU,<sup>7</sup> which directed the Utility to make refunds to customers, the funds would remain in escrow and be used to help pay for the anion exchange project. Pursuant to the order approving the Settlement Agreement:

[t]he amount that would ordinarily be refunded (approximately \$290,000) will be reduced by the documented cost (up to \$45,000) of preparing the Conceptual Cost Estimate. The balance will remain in escrow, earning interest, until Phase III [of

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<sup>4</sup> Issued April 30, 2002, in Docket No. 010503-WU

<sup>5</sup> See Order No. PSC-04-1050-FOF-WU (Second Final Order), issued October 26, 2004.

<sup>6</sup> The Settlement Agreement was approved by Order No. PSC-06-0270-AS-WU, issued April 5, 2006, in Docket No. 050018-WU, In Re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; Docket No. 050183-WU, In Re: Request by homeowners for the Commission to initiate deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes; and Docket No. 010503-WU, In Re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

<sup>7</sup> Order No. PSC-04-1050-FOF-WU, Final Order Requiring Additional Refunds, was issued October 26, 2004, in Docket 010503-WU.

the anion exchange project] rates take effect. At that time, the funds in escrow, including accrued interest, will be released to Aloha and Aloha will record a corresponding amount as a contribution-in-aid-of-construction.

Order No. PSC-06-0270-AS-WU, at page 5.

In addition, on October 26, 2004, Aloha entered into a Bulk Water Agreement with Pasco County (County), wherein it contracted to purchase approximately 3.1 million gallons of water per day from the County in order to meet the needs of current and future customers. Significant costs were expected to be associated with the interconnection and purchase of this water, and the installation and operation of related chloramination facilities.

Two Commission dockets were opened to address issues associated with the purchase of bulk water from the County and associated interconnection, and to track Aloha's progress to design and install the plant necessary to implement anion exchange, Docket Nos. 060606-WU, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU (the anion exchange docket)<sup>8</sup> and 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc. (the limited proceeding docket).<sup>9</sup> These dockets were abated several times at the request of the parties or the Florida Governmental Utility Authority (FGUA), which was the entity that purchased Aloha.<sup>10</sup>

By letter dated January 26, 2009, Aloha requested the release of the escrowed funds being held pursuant to Order Nos. PSC-01-2199-FOF-WU and PSC-06-0270-AS-WU. By letter dated January 27, 2009, Commission staff advised Aloha that the Order contemplated that the release of the escrowed funds could occur only after Phase III rates took effect, and that action by the full Commission would be required to release the escrowed funds prior to the implementation of Phase III rates. Our staff indicated that after the sale was completed, a

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<sup>8</sup> In the anion exchange docket, we issued proposed agency action (PAA) Order No. PSC-08-0266-SC-WS, on April 30, 2008. In this PAA order, we required Aloha to show cause, in writing, within 21 days, why it should not be fined for its apparent violation of Section 367.081(1), Florida Statutes (F.S.), for knowingly failing to comply with Order No. PSC-06-0270-AS-WU, by failing to report delays of the anion exchange treatment facilities in its quarterly report. Aloha petitioned for a hearing concerning this PAA order.

<sup>9</sup> In the limited proceeding docket, we issued PAA Order No. PSC-08-0137-PAA-WU, on March 3, 2008. In this PAA order, we voted to allow the Utility, after it completed the construction of a fully operating interconnection with Pasco County, to recover phase one costs associated with the interconnection and with the Utility's purchase of bulk water from Pasco County. On March 24, 2008, Aloha, OPC, and certain members of the Better Water Now Committee petitioned for a hearing concerning this PAA order.

<sup>10</sup> See Order No. PSC-08-0267-PCO-WS, issued April 30, 2008, in Docket Nos. 060122-WU, In re: Joint petition for approval of stipulation on procedure with Office of Public Counsel, and application for limited proceeding increase in water rates in Pasco County, by Aloha Utilities, Inc., and 060606-WS, In re: Progress reports on implementation of Anion Exchange in Pasco County, filed by Aloha Utilities, Inc. pursuant to Order PSC-06-0270-AS-WU; Order No. PSC-08-0665-PCO-WS, issued October 8, 2008, in Docket Nos. 060122-WU and 060606-WS; Order No. PSC-08-0694-PCO-WU, issued October 20, 2008, in Docket No. 060122-WU; Order No. PSC-08-0832-PCO-WS, issued December 23, 2008, in Docket Nos. 060122-WU and 060606-WS; and Order No. PSC-09-0094-PCO-WS, issued February 13, 2009, in Docket Nos. 060122-WU and 060606-WS.

recommendation would be brought to us regarding the appropriate disposition of the escrowed funds.

On February 19, 2009, Aloha filed its Motion for Contingent Release of Escrow Monies, and requested that we release the escrowed funds upon receipt of sufficient documentation that the pending acquisition of Aloha's assets was closed. On February 26, 2009, OPC filed a response objecting to the release of monies to Aloha. OPC stated that the monies should be refunded to customers and that unclaimed refunds should be given to FGUA to provide a pro rata credit to all existing water accounts that were in existence as of July 30, 2003. Aloha filed a reply to the response. OPC subsequently filed a motion to strike the reply. On March 11, 2009, Aloha filed a withdrawal of its request for release of escrow monies.

On March 4, 2009, Aloha sent a letter to Commission staff advising that the acquisition of Aloha's assets by FGUA was closed on February 27, 2009. On March 11, 2009, a joint application was filed by Aloha and FGUA for the transfer of utility assets to FGUA and cancellation of Certificate Nos. 136-W and 97-S in Docket No. 090120-WS, pursuant to Section 367.071, F.S.

On March 13, 2009, Aloha sent a letter to Commission staff and indicated that its letter was a request and demand that we release the escrowed monies to Aloha. The Utility asked to be contacted if staff did not intend to release the monies by the week of March 16. Staff let Aloha know that a decision would not be made by that time.

On March 19, 2009, certain Aloha customers filed Customer Intervenors' and Petitioners' Motion to Establish a Rate Stabilization Escrow Account asking that we issue an order requiring the transfer of funds to FGUA for the purpose of establishing a rate stabilization escrow account for the benefit of the customers. Aloha responded on March 26, 2009, and stated that we lacked the jurisdiction over the monies and to entertain the relief requested.

Although Aloha initially requested a hearing on the show cause matter, on March 25, 2009, the Utility remitted a check for \$15,000 to satisfy the requirements of the show cause order in Docket No. 060606-WS.

On March 30, 2009, Aloha served this Commission with a Complaint for Declaratory Relief and Injunctive Relief.<sup>11</sup> On April 7, 2009, we received a letter from Regions Bank, the escrow agent holding the interim rate funds, stating that it did not wish to continue to hold these funds, and setting certain conditions which we were required to meet by Friday, April 17, 2009, in order to avoid the Bank's filing a complaint for interpleader, which would essentially request that the court determine the appropriate disposition of the funds. We note that pursuant to the Escrow Agreement, the Bank may, without reason, withdraw from the agreement upon thirty days written notice to this Commission and to the Utility. In response to Regions Bank's April 7, 2009, letter, Commission staff consulted Aloha regarding whether it would be willing to select a new agent to maintain the escrowed funds pending resolution of this matter. It was our staff's understanding that Aloha was not willing to select a new escrow agent.

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<sup>11</sup> Circuit Court of the Sixth Judicial Circuit in and for Pasco County – Case No. 51-2009-CA-3011-WS, Division G.

At our April 21, 2009, Agenda Conference, we considered staff's recommendation regarding the disposition of Docket Nos. 010503-WU, 060122-WU, 060606-WS, and 090120-WS.<sup>12</sup> We voted to close Docket Nos. 060122-WU and 060606-WS, approve the transfer to FGUA, and require Aloha to file relevant portions of Aloha's 2008 Annual Report. We also voted to transfer all remaining escrowed interim funds to FGUA for the establishment of a rate stabilization escrow account for the benefit of Aloha's former customers. Finally, in light of Regions Bank's expressed intent to withdraw as escrow agent, we ordered Aloha to work with Commission staff to transfer the interim rate funds from the Regions Bank escrow account to an independent financial institution, consistent with the terms and conditions contemplated by Order No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. If an independent alternative escrow agent was not selected and the funds not transferred to a new escrow account by April 28, 2009, we authorized our staff to take such steps as were necessary to secure a new escrow agent to maintain the interim funds pending resolution of the matter, including, if necessary, enforcing our order in a court of competent jurisdiction. Our decision was memorialized in Order No. PSC-09-0334-PAA-WS, issued on May 14, 2009, in Docket Nos. 010503-WU, 060122-WU, 060606-WS, and 090120-WS.

Subsequent to the April 21, 2009, Agenda Conference, Commission staff contacted counsel for Aloha on two separate occasions, asking whether the Utility would be willing to work with staff to select a new escrow agent. Aloha's counsel indicated that the Utility would prefer to examine the order issuing from our decision at the April 21 Agenda, and that Aloha would determine its course of action at that time.

On April 29, 2009, Regions Bank served this Commission with a Petition for Interpleader and Declaratory Relief, filed in Pasco County Circuit Court. The Petition names both Aloha and this Commission as defendants. In paragraph 17 of its petition, Regions Bank states: "Paragraph 6 of the Escrow Agreement grants Regions the absolute right, without reason, to withdraw from the Escrow Agreement upon thirty (30) days written notice to the FPSC and Aloha. Regions hereby gives notice to the Defendants that Regions is exercising its right of withdrawal."

This order addresses the selection of a new escrow agent and establishment of a new escrow account for the preservation of the interim funds, pending the transfer of the interim funds to FGUA for the establishment of a rate stabilization escrow account as ordered pursuant to Order No. PSC-09-0334-PAA-WS. We have jurisdiction pursuant to Chapters 120 and 367, F.S.

#### ORDERING TRANSFER OF ESCROWED INTERIM FUNDS

Section 367.082, F.S., requires that interim funds must be collected under bond, escrow, letter of credit, or corporate undertaking, subject to refund with interest at a rate ordered by this Commission. As discussed previously, at our April 21, 2009, Agenda Conference, as memorialized by Order No. PSC-09-0334-PAA-WS, we ordered Aloha to work with Commission staff to transfer the interim rate funds from the Regions Bank escrow account to an independent financial institution, consistent with the terms and conditions contemplated by Order

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<sup>12</sup> See Order No. PSC-09-0334-PAA-WS, issued May 14, 2009.

No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. If an independent alternative escrow agent was not selected and the funds not transferred to a new escrow account by April 28, 2009, we authorized our staff to take such steps as are necessary to secure a new escrow agent to maintain the interim funds pending resolution of the matter, including, if necessary, enforcing our order in a court of competent jurisdiction.

Subsequent to the April 21, 2009, Agenda Conference, Commission staff contacted counsel for Aloha on two separate occasions, asking whether the Utility would be willing to work with staff to select a new escrow agent. Aloha's counsel indicated instead that the Utility would prefer to examine the order issuing from the Commission's decision at the April 21 Agenda, and that Aloha would determine its course of action at that time. In its petition for interpleader, the current escrow agent, Regions Bank, provided its 30-day notice that it intends to withdraw as agent to the escrow agreement.

Given Aloha's apparent unwillingness to cooperate with Commission staff in selecting a new escrow agent, and in keeping with our vote on April 21, 2009, staff began taking such steps as it believed necessary to comport with our decision, and ensure that the escrowed interim funds are maintained in accordance with the relevant orders and statutes of this Commission.

Commission staff contacted six Tallahassee banks about serving as escrow agent for the interim funds; however, the banks all indicated that either they did not offer escrow services, or else they could open an escrow account, but a third party (i.e., a law firm) would have to serve as the escrow agent.

Staff also contacted the Florida Department of Financial Services, Division of Treasury, Bureau of Collateral Management (BCM). One of the services BCM offers is the management of cash deposit/escrow services. While some agencies have the ability to handle an escrow account within the agency (such as the Florida Office of the Attorney General), most agencies (including this Commission) do not, requiring that escrow accounts be established in the private sector. Financial institutions usually charge to establish an escrow account and impose a continuing maintenance fee during the required time period. Florida law allows the BCM to provide a centralized deposit location for the specialized handling of these deposits at no charge to either the state agency or the contracting entity (which would be, in this case, Aloha), other than an administrative fee authorized by Section 17.61(4)(b), F.S., in the amount of approximately .01 percent per month. The administrative fee would be assessed from the interest earned on the account, rather than from the corpus of the escrowed interim funds. An important benefit of using the BCM is that cash deposit and escrow accounts earn interest in the same manner as state trust funds. After discussion with our staff, the BCM agreed to act as escrow agent and to hold the interim funds in escrow until final disposition of those funds.

Under these circumstances, we find that the best course of action to preserve and maintain the escrowed interim funds is to order Aloha, in cooperation with staff, to move the escrowed funds from Regions Bank to an escrow account with the Florida Department of Financial Services, Division of Treasury, Bureau of Collateral Management, consistent with the terms and conditions contemplated by Order No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. It is our understanding that, upon Aloha and staff signing the

new escrow agreement, an account number will be created. We direct our staff to work with Aloha to provide the Utility with the specific account number so the funds can be deposited consistent with our decision herein. If Aloha does not comply with this order by May 26, 2009, we authorize Commission staff to seek enforcement of our order in a court of competent jurisdiction.

In anticipation that Commission staff may be compelled to seek enforcement of our order, we make the following findings:

1. The final disposition of the escrowed money is still pending; the protest and appeal periods have not yet expired.
2. The current escrow agent has filed notice of its intent to withdraw, and has filed an interpleader in circuit court. It is the position of this Commission that the circuit court lacks jurisdiction over the escrowed interim funds, and that we have sole jurisdiction over disposition of the funds.
3. After due diligence, Commission staff has been unable to find an alternate bank willing to act as the escrow agent.
4. The Department of Financial Services, Division of Treasury, Bureau of Collateral Management has agreed to provide an interest-bearing escrow account requiring two signatures (one from Aloha, one from the Commission), or a court order, for disbursement.
5. This Commission orders Aloha to move the escrowed interim funds to a BCM escrow account.

Based on the foregoing, it is


ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc., shall, in cooperation with Commission staff, move the escrowed interim funds from Regions Bank to an escrow account with the Florida Department of Financial Services, Division of Treasury, Bureau of Collateral Management as set forth herein, consistent with the terms and conditions contemplated by Order No. PSC-01-2199-FOF-WU, by which the escrow account was originally established. It is further

ORDERED that if Aloha Utilities, Inc., does not comply with the requirements of this order by May 26, 2009, our staff shall be authorized to seek enforcement of this order in a court of competent jurisdiction. It is further

ORDERED that this docket shall remain open pending final disposition of all pending matters in the docket.

By ORDER of the Florida Public Service Commission this 27th day of May, 2009.

ANN COLE  
Commission Clerk

By:   
Dorothy E. Menasco  
Chief Deputy Commission Clerk

(SEAL)

JSB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.