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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 991643-SU

MOTION FOR RECONSIDERATION

Aloha Utilities, Inc. ("Aloha"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, hereby moves for reconsideration of the Order of the Public Service Commission ("PSC") panel assigned to this case granting the *ore tenus* motion of the Office of Public Counsel ("OPC") to strike portions of the supplemental rebuttal testimony and exhibits of Aloha's witnesses Robert C Nixon and Stephen G. Watford and, as grounds therefore, states:

1. Upon the filing of the supplemental direct testimony of PSC staff witness Patricia W. Merchant (which filing occurred subsequent to the filing of Aloha's supplemental direct testimony on the same issue), Aloha learned for the first time that the PSC staff required a "cost-benefit analysis" to justify the "prudence" of Aloha's decision to purchase a building for office use.

2. This "requirement," as well as the manner of conducting such a cost-benefit analysis, announced by Ms. Merchant is not found in any promulgated rule of the PSC (TR.

741). Ms. Merchant, who has no experience in the commercial real estate market (TR. 734), was unaware of any written prior policy statement or Order of the PSC which sets forth the "requirement" of a documented cost-benefit analysis in connection with a utility's

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decision to lease or purchase property for office use. (TR. 740-42) Likewise, the manner in which such a cost-benefit analysis for the purchase of office space is to be performed, as announced by Ms. Merchant for the first time in her supplemental direct testimony, is not set forth in any promulgated rule or Order of the PSC.

3. In portions of Mr. Watford's supplemental rebuttal testimony which were NOT the subject of the OPC's Motion to Strike, Mr. Watford testified that:

. . . this is the first I have ever heard that the Commission believes it is appropriate, as Ms. Merchant suggests, that a Utility perform a "cost benefit analysis" (without even telling us what that is), in order to justify the purchase of a needed office building in an arms length transaction. I know of no business owner the size of Aloha who goes out to buy an office building and performs a "cost benefit analysis." Perhaps if it was somehow provided for or defined in Commission Rules, or even in prior Commission Orders, I could have a better understanding of what is required. It is my opinion though, as someone with actual business experience and as an experienced utility operator and manager, that Aloha undertook all the tasks which were prudent and necessary for it to take in order to relocate its offices under the circumstances I have described. (Supplemental Rebuttal, pages 29-30)

. . . I know of no utility that has ever been told it had to perform a "written cost benefit analysis" as justification for the purchase of an office building in an arms length transaction. (Supplemental Rebuttal, page 38, lines 6-8)

Mr. Watford states that he was "surprised" by the testimony of Ms. Merchant (Supplemental Rebuttal, page 1, line 18; TR. 1061, lines 4 and 5), and that Aloha's supplemental rebuttal constitutes an attempt to supply information based upon inquiries that Ms. Merchant seemed to be making in her direct testimony. (TR. 1061, lines 15-18) Neither the PSC nor the OPC cross-examined Mr. Watford regarding this supplemental rebuttal testimony.

Also, it is important to note that neither the PSC nor the OPC requested the opportunity to present surrebuttal evidence.

4. An agency statement that implements, interprets or prescribes law or policy or describes the procedure and practice requirements of an agency constitutes a rule. Section 120.52(15), Florida Statutes. Agencies are required to adopt and promulgate their rules by the rulemaking procedures prescribed in Section 120.54, Florida Statutes. When agency action which affects a party's substantial interests is based upon an unadopted rule, it is not presumed valid or invalid, and it is incumbent upon the agency to demonstrate compliance with the criteria set forth in Section 120.57(1)(e)2, Florida Statutes. All parties in an administrative proceeding have the right "to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence." Section 120.57(1)(b), Florida Statutes.

5. Applying the above specific requirements of Florida law to the facts herein, it is clear that the statements of Ms. Merchant setting forth the requirement of a cost-benefit analysis and delineating the manner in which such analysis must be performed interpret and prescribe law or policy and purport to describe the procedure or practice requirements of the PSC with regard to the purchase and/or lease of office space. It is clear that such statements have not been promulgated as rules, nor do they appear in prior PSC Final Orders. It is clear that any attempt by Ms. Merchant to demonstrate that the unadopted rule constitutes a valid exercise of delegated legislative authority, as required by Florida's Administrative Procedure Act, Section 120.57, was subject to scrutiny by Aloha in this proceeding. As stated in Gulf Coast Home Health Services v. Dept. of HRS, 513 So.2d

704 (Fla. 1st DCA 1987), an “agency’s non-rule policy is fair game for a party’s challenge” in Section 120.57 proceedings. When an agency relies upon non-rule policy, other parties must be given an opportunity to provide contrary evidence. Florida Power & Light Co. v. State of Florida, Siting Board, etc., 693 So.2d 1025 (Fla. 1st DCA 1997). In addition to clear principles of administrative law, principles of due process demand such a result when the non-agency party first learns of the non-rule policy after it has presented its case-in-chief. Prior to the presentation of its direct case, Aloha clearly had no notice of any need to try to prove the cost-benefit analysis “requirements” for the purchase of new office space first announced by Ms. Merchant during her testimony. Here, the only manner in which Aloha could scrutinize and challenge Ms. Merchant’s newly announced cost-benefit analysis “requirements” was to offer rebuttal testimony and exhibits.

6. In summary, Aloha submits that the PSC, in granting the OPC’s *ore tenus* Motions to Strike portions of the supplemental rebuttal evidence of Mr. Watford and Mr. Nixon, overlooked or failed to consider clear and material principles of administrative law set forth by statute and judicial opinions. Likewise, concepts of due process of law were overlooked or disregarded when Aloha was deprived of the opportunity to respond, through rebuttal evidence, to an unadopted rule announced subsequent to the presentation of Aloha’s direct evidence.

7. As an additional ground for reconsideration, Aloha submits that the PSC failed to consider and/or overlooked (possibly due to the breadth of the OPC’s *ore tenus* motion and the lack of adequate time to consider the substance of the testimony sought to be stricken) the fact that the stricken supplemental rebuttal did, indeed, constitute proper

rebuttal.

8. The PSC itself has described rebuttal as testimony offered by the plaintiff which is directed to new matter brought out by evidence of the defendant, or as additional facts required by new matter developed by the defendant. In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County, 00 FPSC 1:102 (January 10, 2000). Black's Law Dictionary, 4th Edition, defines "rebuttal," in part, as "the showing that statement of witnesses as to what occurred is not true." As discussed above, the testimony stricken by the PSC was directed both to new matter (i.e., a newly announced unadopted requirement concerning the purchase of office space) and to show that certain statements of Ms. Merchant were untrue.

9. For example, in her supplemental direct, Ms. Merchant expressed concern that "Aloha should have documented the minimum requirements for its new office location. . ." (TR. 663 and 664). In his supplemental rebuttal, Mr. Watford was asked whether it was correct that he did not develop criteria for the new building and submit it to the realtor. Mr. Watford stated that such was not correct, and stated that Aloha did, in fact, provide the realtor with a list of its needs for new offices and did, in fact, discuss with the realtor at length the criteria deemed necessary in its office space search. (Supplemental Rebuttal, pages 4 and 5) Mr. Watford then continued to explain the list of criteria furnished to the realtor. (Supplemental Rebuttal, pages 5-7) During his summary of supplemental rebuttal testimony at the hearing, Mr. Watford explained that it was puzzling to Aloha that Ms. Merchant would think that Aloha would call a realtor on the phone and say, "Go get us a building." (TR. 1062) In other words, Mr. Watford was explaining why the statements

made by Ms. Merchant were not true.

10. As another example, Ms. Merchant specified the kind of analysis which she believed Aloha should have done before purchasing the office building. Among her criteria were a listing of all available properties, a documented comparison of each alternative and a detailed listing of the attributes of the acceptable locations. (TR. 663 and 664) In response to this newly announced criteria, Mr. Watford provided a detailed description of each of the properties which Aloha reviewed as alternatives, as well as their attributes and disadvantages. (Supplemental Rebuttal, pages 7 through 22) This testimony was directly responsive to new matter brought forth by the PSC through the direct testimony of Ms. Merchant.

11. As a final ground for reconsideration, Aloha submits that the PSC, in granting the OPC's Motion to Strike, overlooked the bounds of its discretion and, in fact, abused its discretion to the prejudice of Aloha. It is well-established that a trial judge or a presiding officer of an administrative hearing has broad discretion to vary or permit departures from customary procedures regarding the order of proof and the examination of witnesses. This discretion should be exercised on the basis of fair play and to facilitate the discovery of the truth. Rules of presentation of evidence should be relaxed when there is no prejudice to the adverse parties other than having the evidence in the case. Here, after the submission of its case-in-chief, Aloha learned of a PSC requirement that a detailed, written cost-benefit analysis be submitted to justify its purchase of office space. It is grossly unfair to strike Aloha's attempt to comply with that newly announced requirement. At worse, Aloha's rebuttal testimony was simply cumulative to that presented during Aloha's supplemental

direct. The PSC has recognized its discretion to allow such cumulative evidence when such allowance will not prejudice the result of the proceedings. Aloha, 00 FPSC 1:102. Neither the OPC nor the PSC are prejudiced by allowing Aloha to respond to evidence which was discovered for the first time subsequent to the presentation of Aloha's case on direct, particularly when that evidence constitutes a rule within the meaning of the Administrative Procedure Act. Had it been properly promulgated, Aloha would have been on notice that it needed to present such evidence during its direct case. The OPC did not offer any evidence whatsoever on the issue concerning Aloha's purchase of office space. Neither the OPC nor the PSC conducted cross-examination on that portion of Aloha's supplemental rebuttal evidence which was not stricken. And, neither the OPC nor the PSC requested the opportunity to provide surrebuttal evidence on the issue of Aloha's purchase of office space. Accordingly, the other parties to this proceeding cannot demonstrate any prejudice from the receipt into evidence of the supplemental rebuttal testimony and exhibits offered by Aloha. The allowance of such evidence will afford the PSC more complete information upon which to base its ultimate decision. On the other hand, if this evidence is excluded, Aloha's rights under the APA, as well as its rights to due process of law, will be violated.

12. In conclusion, Aloha asserts that the PSC should reconsider its Order granting the OPC's Motion to Strike on the grounds that:


a. it overlooked and/or failed to consider the requirements of the Administrative Procedure Act regarding rulemaking and a party's right to respond to non-rule policies which affect its substantial interests;

b. it overlooked and/or failed to consider that the supplemental rebuttal evidence offered through witnesses Nixon and Watford constitutes proper rebuttal both to new matter offered by Ms. Merchant and to her statements as to what occurred regarding Aloha's analysis of the purchase of office space; and/or

c. it overlooked and/or failed to consider the resulting prejudice to Aloha if the evidence is stricken as opposed to the lack of any prejudice to the PSC or the OPC if such evidence is admitted.

WHEREFORE, Aloha moves for reconsideration of the Order granting OPC's Motion to Strike portions of Aloha's supplemental rebuttal evidence, and requests that the Motion to Strike be DENIED.

Respectfully submitted this 15th day of November, 2000.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail or hand delivery (*) to the following on this 15 day of November, 2000:

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