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October 2, 2002

VIA HAND DELIVERY

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COMMISSION
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Blanca S. Bayo, Director
Division of Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0800

Re: Docket No. 020413-SU - Initiation of Show Cause Proceedings against Aloha Utilities, Inc. for failure to charge approved service availability charges in violation of Order PSC-01-0326-FOF-SU and Section 367.091, F.S.

Dear Ms. Bayo:

Attached please find the original and fifteen copies of Aloha Utilities, Inc.'s Response To Show Cause Order No. PSC-02-1250-SC-SU to be filed in the above-styled docket. Also attached is a copy to be stamped and returned to our office.

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Should you have questions or need any additional information, please contact me.

Thank you for your assistance in this matter.

Very truly yours,

Suzanne Brownless
Attorney for Aloha Utilities, Inc.

SB:smh
Bayo-ltr(l) wpd

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.	)	DOCKET NO. 020413-SU

ALOHA UTILITIES, INC.'S RESPONSE TO
SHOW CAUSE ORDER NO. PSC-02-1250-SC-SU

Pursuant to Order No. PSC-02-1250-SC-SU (Order 02-1250), issued on September 11, 2002, Aloha Utilities, Inc. (Aloha) files this Response to Show Cause Order PSC-02-1250-SC-SU and in support thereof states as follows:

1. Order 02-1250 ordered Aloha to show cause in writing within 21 days of the date of the order, September 11, 2002, why it should not be fined $10,000 for its apparent violations of Section 367.091, F.S.[1], i.e., failure to file a revised service availability tariff and proposed customer notice regarding its service availability charge increase in May, 2001 in violation of Commission Order PSC-01-0326-FOF-SU. [Order 02-1250 at 16-7, 20-1.]

2. The Commission cites §367.161, F.S., as authority for its ability to assess a penalty of not more than $5,000 per day for each "knowing" violation of a Commission rule or order, with each

[1] Specifically, Section 367.091(3), F.S., requiring that "[e]ach utility's rates, charges, and customer service policies must be contained in a tariff approved by and on file with the commission" and Section 367.091(4), F.S., which states that: "[a] utility may only impose and collect those rates and charges approved by the commission for the particular class of service involved."

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FPSC-COMMISSION CLERK

day constituting a separate offense. [Order 02-1250 at 19-20; §367.161(1), F.S.] Under the Commission's interpretation of §367.161, F.S., "any intentional act, such as charging an unauthorized service availability charge, would meet the standard for a 'willful violation'." [Order 02-1250 at 20.] The Commission further found no "mitigating circumstances which contributed to Aloha's apparent violation of Order No. PSC-01-0326-FOF-SU and §367.091, Florida Statutes." [Order 02-1250 at 20]

3. In the absence of such mitigating circumstances and taking into account Aloha's previous failure to file for an extension of the "Mitchell agreement" as required by Order PSC-97-0280-FOF-WS for which Aloha was fined $250, the Commission proposes to impose a fine of $10,000. [Order 02-1250 at 20, 21.]

4. Should the Commission impose a fine of $10,000 on Aloha in the present circumstances the Commission will thereby exceed its discretionary authority as set forth in more detail below.

CASE LAW

5. Article I, s. 18, Florida Constitution, states as follows:

> **Section 18: Administrative Penalties. No administrative agency**, except the Department of Military Affairs in an appropriately convened court-martial action as provided by law, **shall impose** a sentence of imprisonment, nor shall impose **any other penalty except as provided by law.**
>
> [Emphasis added.]

6. When an administrative agency is imposing a penalty, this constitutional prohibition is coupled with two maximums of

administrative law. First, that agencies, as a "mere creatures of statutes". have only those powers, duties and authority as is conferred expressly or impliedly by statute with any reasonable doubt as to the lawful existence of a particular power resolved against its exercise. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So.2d 493, 495-6 (Fla. 1973). This maximum applied to penalties has been restated by the First District as follows: "an agency possesses no inherent power to impose sanctions, and . . . any such power must be expressly delegated by statute." State Department of Environmental Regulation v. Puckett Oil Co., 577 So.2d 988, 992 (Fla. 1st DCA 1991). See also: Willner v. Department of Professional Regulation, Board of Medicine, 563 So.2d 805, 806 (Fla. 1st DCA 1990)("We agree that the $60,000 payment is a penalty. As a penalty, it can only be upheld if the legislative authority relied upon by the agency is sufficiently specific to indicate a clear legislative intent that the agency have authority to exact the penalty prescribed.")

7. Second, that penal statutes which impose sanctions and penalties "must be strictly construed and no conduct is to be regarded as included within it that is not reasonably prescribed by it". Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So.2d 923, 925 (Fla. 1st DCA 1977). Further, any ambiguities must be construed against the agency. Id.

8. Since administrative fines deprive the person fined of substantial rights in property, the proper standard of proof is the

clear and convincing evidence standard, a higher standard than competent substantial evidence standard which will normally support an agency's finding of fact. Section 120.57(1)(j), F.S.; Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So.2d 932, 935 (Fla. 1996); Agency For Health Care Administration v. A Doctor's Office For Women, Inc., 1997 Fla.Div.Adm.Hear. Lexis 5643.

9. Further, §120.68(7)(e), F.S., states as follows:

> (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:
>
> (e) The agency's exercise of discretion was:
>
> 1. Outside of the range of discretion delegated to the agency by law;
>
> 2. Inconsistent with agency rule;
>
> 3. Inconsistent with officially stated agency policy or a **prior agency practice, if deviation therefrom is not explained by the agency**; or
>
> 4. Otherwise in violation of a constitutional or statutory provision.
>
> [Emphasis added.]

10. In four recent cases, the Commission has considered issuing show cause orders when utilities improperly collected service availability charges. In the process of reviewing the utility's request for a water and wastewater rate increase, the Commission determined that Mad Hatter Utility, Inc. (MHU), a Class "B" utility, had failed to return customer deposits in a timely fashion and pay interest as required by Rules 25-30.311(4),(5) and

(6), F.A.C., and for years knowingly[2] had charged higher than allowed service availability and guaranteed revenue charges. [In re: Application for a rate increase in Pasco County by Mad Hatter Utility, Inc. (Mad Hatter), 93 FPSC 2:695, 698, 734-39 (1993).] The result of these overcharges amounting to $585,585 in unauthorized plant capacity charges, $72,115 in unauthorized or over-stated meter installation fees and $879,925 in unauthorized guaranteed revenues. [93 FPSC 2:737.] In Mad Hatter, the Commission did not issue a show cause order or impose a fine on the utility although it made findings that the utility had in fact violated Rules 25-30.311(4), (5) and (6), F.A.C., and §367.091(2), F.S. [93 FPSC 2:738.] In declining to show cause the utility, the Commission reasoned that because the overcollected service availability charges were all properly treated as CIAC, ratepayers had not been harmed, in fact they had benefitted from the overcharges. [93 FPSC 2:739] Further, the Commission did not require that the developers who had been overcharged receive any refund since many of the developers were no longer in business and requiring a refund of such magnitude would drive the utility into bankruptcy. [93 FPSC 2:738-9.] Finally, the Commission noted that it had already reduced the salary of the president by 23% for mismanagement. [93 FPSC 2:738.]

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[2] The utility's witness testified that the utility knowingly had charged higher plant capacity charges than its approved amount because of the cost of expansion of a wastewater treatment plant. The utility intended to file an application for an increase in its service availability charges to cover this expansion cost, but never did so. [1993 FPSC 2:737.]

11. In In re: Application for staff assisted rate casein Brevard County by Burkim Enterprises, Inc., 01 FPSC 12:533, 576-7 (2001), the Commission also failed to show cause a utility for failure to discontinue the collection of service availability charges for a period of approximately four years in violation of §§367.081(1) and 367.091(3), F.S. As in the Mad Hatter case, the Commission did not require refunds to the developer and cited the fact that ratepayers were not harmed but benefitted from a reduction in the utility's ratebase. [01 FPSC 12:576.]

12. In In re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. in Pasco County (Forest Hills), a Class "B" utility had failed to refund $28,375 in customer deposits in a timely fashion[3] in violation of both Rule 25-30.311(5), F.A.C., and a stipulated agreement with the Commission that it would refund these deposits within 90 days. [97 FPSC 11:270,282-3 (1997).] Further, Forest Hills had collected a 200% higher deposit than allowed by its tariff from renters in violation of its approved service availability tariff and commingled its water and wastewater service deposits with those for garbage collection and street lights in violation of Rules 25-30.115 and 25-30.311(3), F.A.C. [97 FPSC 11:282, 284.] Based on these facts, the Commission issued a show cause as to why the utility should not be fined $15,000. [97 FPSC 11:285.]

13. However, the Commission ultimately approved a settlement

[3] Some of these deposits were held for a period of over 25 years. [97 FPSC 11:285.]

offer from Forest Hills which reduced the fine to $4,000 for violations of Rule 25-30.311(5) and §367.091, F.S. [98 FPSC 11:269 (1998).] In approving the settlement offer the Commission cited the fact that all refunds had been appropriately made, that the utility was appropriately accounting for water and wastewater deposits and that the Commission-approved service availability fees were being charged. [98 FPSC 11:268-9.]

14. In In re: Emergency petition by D.R. Horton Custom Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake County and In re: Complaint by D. R. Horton Custom Homes, Inc. against Southlake Utilities, Inc., in Lake County regarding collection of certain AFPI charges (Southlake), 00 FPSC 5:200, 216, 218-9 (2000), Southlake, a Class "C" utility, collected 186 ERCs in excess of the 375 ERC limit imposed by its tariff for AFPI charges resulting in an overcollection from D. R. Horton Custom Homes, Inc. of $88,932 in violation of Order No. PSC-96-1082-FOF-WS. For this violation, the Commission issued a show cause order proposing to fine the utility $5,000. [00 FPSC 5:219]

15. In response to the show cause order, Southlake requested a formal §120.57,F.S., administrative hearing. However, prior to hearing, a settlement was reached and approved by the Commission in which the utility acknowledged an AFPI refund to all developers of $403,614.79, discontinued all AFPI charges and canceled its AFPI tariff sheets. [01 FPSC 6:264-5] No refunds were made to either developers or ratepayers, however, it does appear that excess

service availability charges were to be credited against plant capacity charges owed by developers. [Id.]

16. Finally, the Commission waived fining Southlake citing the fact that the utility had incurred extensive costs in preparing the AFPI and service availability studies, reimbursed the developer $66,500 in attorney's fees and costs, and cooperated with both the developer and Commission staff in calculating the correct amount of AFPI overcharges. [01 FPSC 6:267.]

ANALYSIS

17. In the instant case, the Commission has imputed as CIAC 100% of the service availability charges which should have been collected from May 23, 2001 to April 16, 2002, an amount of $659,547. [Order 02-1250 at 23] The imputation of this amount results in a revenue impact of $130,760 annually. As agreed to by Aloha, the Commission has authorized Aloha to backbill developers for the entire $659,547. However, all parties acknowledge that Aloha will not, in fact, be able to collect the entire backbilled amount if for no other reason than developer attrition. The Commission has specifically ordered that to the extent that Aloha cannot, for whatever reason, collect the backbilled service availability charges, "[i]n no instance shall any portion of the uncollected service availability charges be borne by the existing ratepayers." [Id.] Aloha has agreed to take the full risk of uncollectiblity. Thus, while the amount of uncollectible backbilled service availability charges cannot now be established, that uncollectibles will exist is a certainty which increases with the

passage of every day.

18. .If even 10% of the imputed CIAC cannot be collected, Aloha will lose approximately $65,955 in rate base which will translates roughly into a $13,101 per year decrease in revenues **each and every year.** This amount alone far exceeds even the $15,000 fine proposed by the Commission for Mad Hatter's **knowing** violation of its service availability tariffs.

19. Like each of the cases cited above, Aloha's ratepayers have been made whole by imputation of 100% of the undercollected CIAC. Under Order 02-1250 the ratepayers can suffer no detrimental effects at all. To the extent that Aloha fails to collect the amounts it backbills, the utility's shareholder, not its customers, will be harmed.

20. Unlike Mad Hatter case, Aloha did not **knowingly** undercollect its approved service availability charges. There was and continues to be absolutely no benefit whatsoever which can accrue to either the utility or its shareholder by failing to fully collect its approved service availability charge. This is a clear example of a mistake. Further, as in the Mad Hatter case, Aloha's president has also had his salary decreased as a penalty for poor management. Rest assured that Aloha's management has received the Commission's message loud and clear. Aloha has fully cooperated with the Commission staff in promptly complying with each staff data request in order to accurately calculate the amount of service availability undercollection and has timely filed both its revised service availability tariff and customer notice in accord with

Order 02-1250. Aloha pledges to continue to fulfill its responsibilities under Order 02-1250 in a comprehensive and timely fashion.

22. In light of the above case law and mitigating circumstances, a show cause order should not be issued against Aloha. However, Aloha has previously offered, and continues to be willing, to pay a $2,500 fine for its unknowing violation of Order No. PSC-01-0326-FOF-SU and §367.091, F.S., in addition to whatever revenue losses it will suffer due to uncollectible backbilled service availability charges.

WHEREFORE, for the reasons stated above, Aloha requests that this Commission not issue a show cause order in this proceeding, or in the alternative, impose a fine of $2,500.

Respectfully submitted this 2d day of October, 2002 by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been provided to the persons listed below by U.S. Mail or (*)Hand Delivery this 2d day of ~~September~~ October, 2002:

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