State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: OCTOBER 24, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI)
DIVISION OF ECONOMIC REGULATION (FLETCHER, MERCHANT, WILLIS)

RE: DOCKET NO. 020413-SU - 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.
COUNTY: PASCO

AGENDA: 11/05/02 - REGULAR AGENDA - PARTY PARTICIPATION IS DEPENDENT ON THE COMMISSION'S DECISION ON ISSUE 1

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020413.RCM

CASE BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas, Aloha Gardens and Seven Springs. On February 9, 2000, Aloha filed an application for an increase in rates for its Seven Springs wastewater system. By Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, the Commission approved increased rates and charges for Aloha. The Commission also directed Aloha to increase its wastewater service availability charges for its Seven Springs wastewater system from $206.75 per equivalent residential connection (ERC) to $1,650 per residential ERC and $12.79 per gallon for all other connections. The Commission required Aloha to

file an appropriate revised tariff sheet reflecting the approved service availability charges within 20 days of the date of the order.[1]

Aloha should have submitted revised tariff sheets on wastewater service availability charges and had them approved at the same time as the wastewater rate tariffs, on May 23, 2001. However, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, the utility did not submit the tariff sheets until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until almost 11 months later, on April 12, 2002.

By Order No. PSC-02-1250-SC-SU, issued September 11, 2002, among other things, the Commission granted in part and denied in part SRK Partnership Holdings, LLC and Benchmark Manmen Corp.'s (Limited Partners) Petition to Intervene in this docket. Moreover, by proposed agency action (PAA), the Commission rejected a proposed Settlement Agreement between Aloha and several developers, ordered the effective date of the service availability tariff to be April 16, 2002, authorized Aloha to backbill developers for the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers, and ordered that regardless of whether Aloha is successful in collecting the full backbilled amounts from the developers or any portion thereof, 100% of the amount of these charges, or $659,547 shall be recognized as contributions-in-aid-of-construction (CIAC). The Commission also ordered Aloha to show cause as to why it should not be fined in the amount of $10,000 for failure to timely file a revised tariff sheet on service availability charges and charge its approved service availability charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.

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[1]Both Aloha and the Office of Public Counsel (OPC) filed petitions for reconsideration of Order No. PSC-01-0326-FOF-SU. Those petitions were disposed of by Order No. PSC-01-0961-FOF-SU, issued April 18, 2001, by which the Commission granted Aloha's motion in part and denied OPC's motion. Order No. PSC-01-0961-FOF-SU reaffirmed the wastewater service availability charges approved by Order No. PSC-01-0326-FOF-SU.

Protests to the PAA portion of the Order concerning backbilling were timely filed by three developers: Windward Homes, Greene Builders, Inc. (Greene Builders), and Adam Smith Enterprises, Inc. (Adam Smith). In addition, Aloha timely filed a Request for Hearing on the PAA portion of the Order concerning the imputation of CIAC.[2] Therefore, this docket has been scheduled for a formal hearing to be conducted on April 11, 2003.

On September 24, 2002, Aloha timely filed a Motion for Clarification and Motion for Reconsideration of Order No. PSC-02-1250-SC-SU, and an Amended Motion for Clarification and Motion for Reconsideration and Request for Oral Argument on September 26, 2002. On September 30, 2002, Windward Homes and Greene Builders timely filed their Responses thereto, and on October 11, 2002, Adam Smith timely filed a Motion to Strike Aloha's Motions for Clarification. Moreover, on October 2, 2002, Aloha filed its Response to Show Cause Order No. PSC-02-1250-SC-SU (Response to Show Cause Order), along with a Request for Oral Argument on its Response to Show Cause Order. Finally, on October 7, 2002, Aloha filed a Motion for Emergency Relief. On October 16, 2002, Adam Smith timely filed its Response thereto and on October 17, 2002, Windward Homes and Greene Builders timely filed their Responses thereto.

This recommendation addresses the motions and responses identified above. The Commission has jurisdiction pursuant to Sections 367.081, 367.121, and 367.161, Florida Statutes, and Rules 25-22.058 and 25-22.060, Florida Administrative Code.

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[2]Aloha filed its Request for Hearing in order to preserve its right to backbill developers and builders who connected to its system from May 23, 2001 until April 16, 2002 should Aloha's Motion for Reconsideration and Clarification not be granted.

DISCUSSION OF ISSUES

ISSUE 1: Should Aloha's Requests for Oral Argument on its Motion for Clarification, Motion for Reconsideration, and Response to Show Cause Order be granted?

RECOMMENDATION: No. The Requests for Oral Argument should be denied. As such, it is unnecessary for the parties to participate on Issues 2 and 4. Adam Smith's Motion to Strike Aloha's Request for Oral Argument should be considered as a Response but need not be ruled upon. Moreover, because no request for oral argument was filed regarding Aloha's Motion for Emergency Relief, oral argument should not be permitted on Issue 3. Nor should oral argument be permitted on this issue, as there is no right to oral argument on a request for oral argument. In sum, it is unnecessary for the parties to participate on this staff recommendation at the agenda conference. (GERVASI)

STAFF ANALYSIS:

ALOHA'S REQUEST FOR ORAL ARGUMENT ON MOTION FOR CLARIFICATION AND MOTION FOR RECONSIDERATION

On September 26, 2002, Aloha timely filed an Amended Motion for Clarification and Motion for Reconsideration (Amended Motion), to concurrently file a Request for Oral Argument on the Motion for Clarification and Motion for Reconsideration (Motion) filed on September 24, 2002. Aloha incorporated the entirety of the Motion in the Amended Motion. The purpose of the Amended Motion is to allow Aloha to concurrently file its Request for Oral Argument pursuant to Rule 25-22.058, Florida Administrative Code.

In its Request for Oral Argument, Aloha states that with regard to the details of implementing the backbilling issue and numerous other implementation issues, Order No. PSC-02-1250-SC-SU is in places contradictory and confusing. Oral argument would greatly facilitate the Commission's understanding of these contradictory implementation issues and their effects on the utility.

ADAM SMITH'S MOTION TO STRIKE REQUEST FOR ORAL ARGUMENT

In its Motion to Strike Aloha's Motions for Clarification (Motion to Strike), Adam Smith argues that the only difference

between Aloha's Amended Motion and its original Motion is that the Amended Motion includes a request for oral argument. When it filed its Motion on September 24, Aloha did not accompany its pleading with a request for oral argument. According to Adam Smith, Aloha should not be permitted to circumvent Rule 25-22.058(1), Florida Administrative Code, through the expedient of filing an amended pleading which is amended only to request oral argument. Adam Smith argues that the Amended Motion should be stricken.

ANALYSIS AND RECOMMENDATION

Rule 25-22.058(1), Florida Administrative Code, states that "[a] request for oral argument must accompany the pleading upon which argument is requested. The request shall state with particularity why oral argument would aid the Commission in comprehending and evaluating the issues before it. Failure to file a timely request for oral argument shall constitute waiver thereof."

In the Notice of Further Proceedings or Judicial Review attached to Order No. PSC-02-1250-SC-SU, parties were notified that with respect to the decision to grant in part and deny in part the Limited Partners' Petition to Intervene, any adversely affected party could request reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code. The Motion and Amended Motion address, among other things, the Limited Partners' Petition to Intervene. Aloha's original Motion was timely filed two days before the 15-day deadline. Its Amended Motion and accompanying Request for Oral Argument were also timely filed, on the 15th day. Staff recommends that the Request for Oral Argument should be considered because it was timely filed, and because it accompanied a timely filed, albeit amended motion, as required by Rule 25-22.058(1), Florida Administrative Code.

Nevertheless, staff does not believe that oral argument on the Amended Motion for Reconsideration would aid the Commission in comprehending and evaluating the issues before it. Aloha's Amended Motion is clear on its face with respect to the Petition to Intervene, and does not require further explanation by way of oral argument.

Moreover, in the Amended Motion for Clarification, Aloha primarily requests clarification of certain portions of the PAA decision, which decision has been protested and is therefore a

nullity. Therefore, as further explained in Issue 2, there is no need to clarify the language of the PAA portions of the order. Finally, Aloha's Amended Motion is clear on its face, and does not require further explanation by way of oral argument.

For the foregoing reasons, staff recommends that Aloha's Request for Oral Argument on its Amended Motion should be denied. The Amended Motion is the subject of Issue 2 of this recommendation. Adam Smith's Motion to Strike Aloha's Request for Oral Argument is in the nature of a Response, and was timely filed as such pursuant to Rule 28-106.204(1), Florida Administrative Code. Therefore, it should be considered but need not be ruled upon.

ALOHA'S REQUEST FOR ORAL ARGUMENT ON RESPONSE TO SHOW CAUSE ORDER

This Request for Oral Argument accompanies Aloha's timely filed Response to Show Cause Order. By this filing, Aloha states that this case appears to be the first time that the Commission has addressed a show cause order in which the utility under-collected service availability charges. According to Aloha, for this reason, and because of the associated issues of backbilling and full CIAC imputation which were ordered by the Commission in Order No. PSC-02-1250-SC-SU, oral argument would assist the Commission in reaching a just and reasonable decision in this matter.

No responses to this Request for Oral Argument were filed. Staff believes that Aloha's Response to Show Cause Order is clear on its face and that therefore, oral argument is not necessary to aid the Commission in comprehending and evaluating the issues before it. Staff recommends that the Request for Oral Argument on Aloha's Response to Show Cause Order should be denied. Aloha's Response to Show Cause Order is the subject of Issue 4 of this recommendation.

ORAL ARGUMENT CONCERNING OTHER ISSUES

Staff notes that no party has requested oral argument on Aloha's Motion for Emergency Relief which is the subject of Issue 3 of this recommendation. As previously noted, Rule 25-22.058(1), Florida Administrative Code, states that "[f]ailure to file a timely request for oral argument shall constitute waiver thereof." Although the Commission often allows parties to address the Commission on motions which pertain to matters that have not yet

gone to hearing, there is no automatic right of a party to orally argue a motion. Moreover, staff believes that the Motion for Emergency Relief is clear on its face and that oral argument on the Motion would be unnecessary to assist the Commission in comprehending and evaluating it. Therefore, staff recommends that oral argument should not be permitted on Issue 3. Nor should oral argument be permitted on this issue, as there is no right to oral argument on a request for oral argument. In sum, staff recommends that it is unnecessary for the parties to participate on this staff recommendation at the agenda conference.

ISSUE 2: Should Aloha's Amended Motion for Clarification and Motion for Reconsideration of Order No. PSC-02-1250-SC-SU be granted?

RECOMMENDATION: No, Aloha's Amended Motion for Clarification and Motion for Reconsideration should be denied. Moreover, Adam Smith's Motion to Strike Aloha's Motions for Clarification should be considered as a Response to Aloha's Amended Motion but need not be ruled upon. (GERVASI)

STAFF ANALYSIS:

ALOHA'S AMENDED MOTION

Motion for Reconsideration

With respect to the Motion for Reconsideration, Aloha states that in Order No. PSC-02-1250-SC-SU, the Commission granted the Limited Partners intervention in this docket but limited the intervention to Issues 3 and 6 (of the staff recommendation filed August 8, 2002). Issue 3 concerned the ability of Aloha to backbill developers who connected to its wastewater system between May 23, 2001 and April 16, 2002, and Issue 6 concerned the effective date of Aloha's wastewater service availability tariff increasing rates to $1,650 per equivalent residential connection (ERC) and $12.79 per gallon for all other connections.

Aloha argues that the Limited Partners do not have a substantial interest in the backbilling issue (Issue 3 of the staff recommendation). As stated in the Limited Partners' Petition to Intervene and repeated in Order No. PSC-02-1250-SC-SU, the Limited Partners did not formally request to be connected to Aloha's system until June 14, 2002 and did not actually connect to the system until July 18, 2002. Therefore, under the undisputed facts presented to the Commission by the Limited Partners, upon which the Commission relied, there can be no backbilling with regard to the Limited partners because they neither formally requested nor connected to Aloha's system prior to April 16, 2002. The Limited Partners do not meet the first prong of the Agrico[3] two-pronged test for intervention on the backbilling issue. Reconsideration is

[3]Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

appropriate when an agency has overlooked or failed to consider some point of fact or law in its initial decision. Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). According to Aloha, the Commission misapplied the facts in this case to the Agrico standing test, and the intervention of the Limited Partners should be limited to Issue 6, the effective date of the wastewater service availability tariff.

Motion for Clarification

In its Motion for Clarification, Aloha requests that various portions of Order No. PSC-02-1250-SC-SU should be clarified because there are several instances in which the language used in one section might be interpreted as contrary to that found in other sections of the Order. Staff notes that the requested clarifications primarily concern the PAA portions of the Order. Those portions of the Order no longer stand due to the fact that those issues have been protested. Therefore, discussion will be limited to Aloha's request for clarification of certain language contained within the show cause portion of the Order.

Aloha requests that language contained on page 21 of the Order in the discussion on the show cause issue be clarified as follows:

> Aloha's failure to timely file its service availability tariff and charge its approved service availability charges ~~has~~ would have put its customers at risk of subsidizing future connections had the revenues associated with the undercollection of CIAC not been fully imputed.

According to Aloha, this modification should be made to recognize the full imputation by the Commission of all service availability revenues that Aloha should have collected from developers and builders who connected to Aloha's system between May 23, 2001 and April 16, 2002.

ADAM SMITH'S MOTION TO STRIKE

In its Motion to Strike Aloha's Motions for Clarification (Motion to Strike), Adam Smith argues that neither clarification nor reconsideration of a PAA order is countenanced or permitted by the Commission's rules and practice, and that under the guise of a

request for clarification, Aloha improperly seeks not clarification, but reconsideration of the PAA.

Adam Smith cites to Orders Nos. PSC-99-2393-FOF-TP, issued December 7, 1999, and PSC-00-2190-PCO-TP, issued November 17, 2000, in Docket No. 981834-TP (finding that clarification of a PAA order is not recognized under the Commission's rules, and that reconsideration of a PAA order is contrary to Rule 25-22.060(1)(a), Florida Administrative Code). According to Adam Smith, because the Commission's rules do not permit clarification of a PAA Order under these circumstances, Aloha's motion must be stricken because it is an impermissible pleading that the Commission should not consider. Moreover, Adam Smith points out that its timely protest addressed the PAA as it was issued by the Commission. To modify the PAA now, in response to a request for clarification by an adverse party, would prejudice the protest process.

Adam Smith also states that Aloha's request for clarification does not actually seek to clarify language in the PAA order. Rather, Aloha seeks to insert self-serving language into the PAA Order which conflicts with, and would have the effect of altering, the Commission's decision. According to Adam Smith, Aloha is attempting to have the Commission reconsider aspects of its PAA, which is impermissible.

RESPONSES OF WINDWARD HOMES AND GREENE BUILDERS

Windward Homes and Greene Builders also filed responses to Aloha's Motion. These developers state that they have filed petitions for formal hearing, in which they contend that the Commission violated the law by permitting Aloha to backbill developers for increased service availability charges that were not in effect, nor lawful, for the period of time from May 23, 2001 to April 16, 2002. Windward Homes and Greene Builders object to any clarification or reconsideration of the Order prior to addressing their petitions for formal hearing. At that time, Aloha's Motion may be moot.

ANALYSIS AND RECOMMENDATION

Motion for Reconsideration

The Commission's decision with respect to the Limited Partners' Petition to Intervene was preliminary, procedural, or

intermediate in nature. See Notice of Further Proceedings or Judicial Review, attached to Order No. PSC-02-1250-SC-SU. As previously noted in Issue 1, also in the Notice of Further Proceedings or Judicial Review, parties were notified that with respect to the decision to grant in part and deny in part the Limited Partners' Petition to Intervene, any adversely affected party could request reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code. Therefore, Aloha's Motion for Reconsideration with respect to the Petition to Intervene was appropriately filed.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

In the Order, the Commission clearly explained why it found that the Limited Partners have a substantial interest in the backbilling issue, as well as in the tariff effective date issue. The Commission stated that:

> [w]ith respect to the backbilling issue, we find later in this Order that H. Miller & Sons, 373 So. 2d at 916, dictates that persons who prepaid the erroneous $206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, should be charged Aloha's approved service availability charge of $1,650 provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code. . . . Should [this] proposed decision[] become final, the petitioners will not be refunded the substantial additional amounts that they paid under protest to Aloha.

Order No. PSC-02-1250-SC-SU at 9-10. The Commission made no mistake of fact or law in its decision regarding the Limited Partners Petition to Intervene. Therefore, Aloha's Motion for Reconsideration should be denied.

Motion for Clarification

As previously noted in Issue 1, in the Amended Motion for Clarification, Aloha primarily requests clarification of certain language contained in the PAA portions of Order No. PSC-02-1250-SC-SU. The PAA decision has been protested and is therefore a nullity. Pursuant to Section 120.57(1)(k), Florida Statutes, all proceedings conducted under Section 120.57(1) are de novo. Because a final order will be issued after hearing on those issues, it is unnecessary to clarify the language of the PAA portions of Order No. PSC-02-1250-SC-SU.

Moreover, Adam Smith's Motion to Strike Aloha's Motions for Clarification is in the nature of a Response, and was timely filed as such pursuant to Rule 28-106.204(1), Florida Administrative Code. Therefore, it should be considered but need not be ruled upon.

Staff agrees with Adam Smith that Orders Nos. PSC-99-2393-FOF-TP and PSC-00-2190-PCO-TP show that clarification of a PAA order is not permitted by the Commission's rules and practice, and that it would prejudice the protest process to modify the PAA now. For the foregoing reasons, Aloha's request for clarification of certain PAA portions of the Order should be denied.

In its Motion to Strike, Adam Smith also argues that Aloha does not seek to clarify language in the Order, but instead, seeks to insert self-serving language into the Order which would alter the Commission's decision. Staff believes that Aloha's request for clarification of the show cause language on page 21 of the Order, identified above, does exactly that. Aloha's failure to timely file its service availability tariff and charge its approved service availability charges put its customers at risk of subsidizing future connections regardless of whether the Commission decides, in its final order after the hearing, to allow the revenues associated with the undercollection of CIAC to be fully imputed. Therefore, Aloha's request for clarification of the language contained in the show cause portion of the Order should be denied.

In sum, Aloha's Amended Motion for Clarification and Motion for Reconsideration should be denied. Adam Smith's Motion to Strike Aloha's Motions for Clarification should be considered as a Response to Aloha's Amended Motion, but need not be ruled upon.

ISSUE 3: Should Aloha's Motion for Emergency Relief be granted?

RECOMMENDATION: Yes, the Motion for Emergency Relief should be granted. Aloha should be required to establish an escrow agreement with an independent financial institution, under the terms as set forth in staff analysis. Should a refund be required, the refund should be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code. Aloha should not attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount subject to refund pending resolution of the protests. (GERVASI, FLETCHER)

STAFF ANALYSIS:

ALOHA'S MOTION FOR EMERGENCY RELIEF

By this Motion, Aloha states that by PAA, the Commission authorized Aloha to backbill developers and builders who connected to Aloha's system between May 23, 2001 and April 16, 2002. That PAA decision has been protested. In light of these protests, and because disputed issues of material fact have been raised, the Commission is required by Chapter 120, Florida Statutes, to set this matter for an evidentiary hearing. Should the Commission affirm its decision to allow backbilling, a period of up to approximately 24 months will have passed between the Commission's vote and May 23, 2001. Should the Commission's final decision post-hearing be appealed, this 24 month period will be extended for another 12-18 months as the appeal works its way to completion. Thus, Aloha could, by operation of legal procedures, be estopped from even attempting to collect the undercollected service availability charges at issue in this case for up to 3-1/2 years.

Aloha argues that developers are by nature peripatetic (migratory). Often in the process of a development, the developer encounters financial difficulties and folds, leaving an empty corporate shell stripped of any unencumbered assets. According to Aloha, its ability to actually collect the undercollected service availability fees in question is compromised with every day that passes.

Aloha requests that it be allowed to immediately backbill developers who connected to its system from May 23, 2001 until April 16, 2002 and to retain those monies in an escrow account subject to refund at the interest rate borne by the escrow account,

in accordance with standard Commission refund procedures, at the ultimate conclusion of this proceeding, including any judicial appeal. Aloha states that this process does not place the developers at greater risk because if they prevail, they will recover their money with interest.

RESPONSES

Adam Smith

In its Response, Adam Smith argues that in Order No. PSC-02-1250-SC-SU, the Commission established the effective date of Aloha's higher service availability charge as April 16, 2002, and that it is fundamental that rates approved for regulated utilities apply prospectively. Aloha applied and collected the service availability charge that was approved and in effect during the period May 23, 2001 to April 16, 2002. By definition, unless it collected less that $206.75 per ERC, which was the approved rate in effect during the period, Aloha did not undercollect. The developers are entitled to the requirement of an approved tariff and prior notice of the increase. Therefore, they cannot legally be required to bear the consequences of Aloha's omission.

Moreover, Adam Smith argues that the relief requested by Aloha is unwarranted because by operation of law, the protests to the PAA portions of Order No. PSC-02-1250-SC-SU have rendered the PAA decision to apply the April 16, 2002 tariff retroactively a nullity. Any such approval terminated with the filing of protests, and the Commission is undertaking a proceeding de novo. Therefore, the PAA affords no basis for the relief requested by Aloha.

Adam Smith further argues that even if there were some basis of authority to support the motion, Aloha has failed to show an emergency. Aloha failed to file the tariff and the required notice to customers and operated without apparent financial hardship for almost a year without the incremental revenues associated with the tariff. Moreover, Aloha's description of "peripatetic" developers and "empty corporate shells" is an abstract construct so devoid of factual support as to be meaningless.

Finally, Adam Smith argues that the real purpose of Aloha's Motion for Emergency Relief is to try again to persuade the Commission to place its complete imprimatur on Aloha's efforts to require developers who received no notice of an increase to

nonetheless carry the burden of Aloha's mismanagement. For these reasons, Adam Smith argues that the Motion for Emergency Relief should be denied.

Windward Homes and Greene Builders

In their Response, Windward Homes and Greene Builders take great exception to Aloha's statements that "developers by nature are peripatetic," and that they will not be injured should the Commission permit Aloha to collect the monies and place them in an interest bearing escrow account. Windward Homes and Greene Builders are established, well-respected, financially secure builders in Pasco County who have hired counsel to vigorously pursue this matter to the full extent of the law. Additionally, they vehemently object to paying Aloha any monies until this matter is resolved. It is Windward Homes and Greene Builders' position that the Commission did not have the authority to permit Aloha to backbill, or, in reality, retroactively charge developers for a fee that was not lawfully in effect during that particular time period. Moreover, in light of these developers' active participation in this matter, Aloha's risk of not receiving its monies in the event that it should prevail is minimal.

Finally, Windward Homes and Greene Builders argue that from an equitable perspective, who is better to bear the risk of loss than Aloha. Aloha created this matter through its procrastination and failure to abide by a previous order of the Commission. Ironically, it is now Aloha petitioning the Commission to act with great haste in order to protect itself from the result of its own lack of urgency. For these reasons, Windward Homes and Greene Builders request that the Commission deny Aloha's Motion for Emergency Relief.

ANALYSIS AND RECOMMENDATION

On page 22 of Order No. PSC-02-1250-SC-SU, in the section of the Order titled "Docket Closure," the Commission ordered that "[i]n the event of a protest, the tariff shall remain in effect, held subject to refund, pending resolution of the protest." That decision was not issued as PAA. Therefore, it has not been rendered a nullity by virtue of the protests filed to the PAA portions of the Order. Aloha's Motion for Emergency Relief appears to request that the Commission provide greater detail concerning the implementation of that requirement.

The Commission has granted emergency relief in certain circumstances under its general ratemaking powers. See, e.g., Order No. PSC-97-0207-FOF-SU, issued February 21, 1997, in Docket No. 961475-SU, In re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. (granting tariff request for emergency rates and finding that although Chapter 367, Florida Statutes, does not expressly authorize emergency rates, Section 367.011, Florida Statutes, provides that this Commission has exclusive jurisdiction over a utility's rates). Moreover, pursuant to Section 367.121, Florida Statutes, the Commission's general powers include the power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each utility. In all such instances when the Commission has granted emergency relief, it has required the utility to hold the monies collected subject to refund pending a final decision.

Staff notes that in past rulings on emergency rates, the Commission has approved a new rate or charge to apply prospectively on a temporary basis, subject to refund, pending a final decision. The circumstances of this case differ in that Aloha failed to prospectively charge its already approved service availability charge from May 23, 2001, to April 16, 2002, pursuant to Order No. PSC-01-0326-FOF-SU. Aloha is now requesting approval to backbill developers on a temporary basis, not in the amount of a new charge, but rather, in the amount of its already-approved service availability charge, less the amounts developers have already paid, for connections made during that time period. These are approved charges which Aloha should have been charging since May 23, 2001.

Adam Smith correctly argues that in Order No. PSC-02-1250-SC-SU, the Commission proposed to establish the effective date of Aloha's higher service availability charge as April 16, 2002. Although PAA portions of the Order have been protested, the Order required the tariff to become effective, held subject to refund, pending resolution of the protests. However, by that Order, the Commission also proposed to allow Aloha to backbill developers to May 23, 2001, for Aloha's approved charges which the utility failed to collect during the time period in question. Adam Smith's argument that Aloha's request for emergency relief must fail because rates approved for regulated utilities must apply prospectively, is flawed because Aloha's approved service availability charges are not new charges which the Commission has proposed to allow Aloha to charge retroactively. And, as the

Commission pointed out in Order No. PSC-02-1250-SC-SU, upon finding that Aloha's service availability tariff sheet on file with the Commission from May 23, 2001, to March 11, 2002, did not correctly reflect Aloha's authorized service availability charge,

> no act or order of this Commission has altered the utility's service availability charge approved by Order No. PSC-01-0326-FOF-SU. Therefore, the utility should have timely charged the amount approved by that order for service availability. See U.S. Sprint Communications Co. v. Nichols, 534 So. 2d 698 (Fla. 1988) (finding that once a tariff sheet error is discovered, the Commission has the power and the duty to order compliance with its original decision). See also Order No. PSC-95-0045-FOF-WS, issued January 10, 1995, in Docket No. 941137-WS (finding that, although certain tariff sheets reflecting the utility's gross-up authority were missing from the utility's tariff, the utility had the authority to collect the gross-up charges pursuant to Commission orders, given that the missing tariff sheets were never cancelled by an order).

Moreover, staff believes that Aloha's argument that it will become more difficult to collect the uncollected service availability charges from developers as time passes has merit. Aloha has failed to collect its approved service availability charges from numerous developers, not just from those who have protested the Order.

Staff also agrees with Aloha that allowing the utility to immediately backbill developers who connected to its system from May 23, 2001 until April 16, 2002, and to retain those monies in an escrow account, held subject to refund with interest, does not place the developers at greater risk. If the developers prevail, they will recover their money with interest. The arguments of Adam Smith, Windward Homes, and Greene Builders in their Responses to Aloha's Motion largely concern the merits of whether, in its final decision in this matter, the Commission should ultimately allow the utility to backbill for the service availability charges at issue.

In the meantime, Aloha's Motion for Emergency Relief should be granted. In accordance with Order No. PSC-02-1250-SC-SU, Aloha should be authorized to collect, and should be required to hold subject to refund with interest, its service availability charges

that it should have collected from May 23, 2001 to April 16, 2002, had the utility correctly implemented these charges pursuant to Order No. PSC-01-0326-FOF-SU in the first place.

As security to guarantee the amount collected subject to refund, Aloha should establish an escrow agreement with an independent financial institution. The following conditions should be part of the escrow agreement:

1) No funds in the escrow account may be withdrawn by the utility without the express approval of the Commission.

2) The escrow account shall be an interest bearing account.

3) If a refund is required, all interest earned by the escrow account shall be distributed to the appropriate developers.

4) If a refund is not required, the interest earned by the escrow account shall revert to the utility.

5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.

6) The monies collected subject to refund shall be deposited in the escrow account within seven days of receipt.

7) This escrow account is established by the direction of the Florida Public Service Commission for the purpose(s) set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.

8) The Director of the Commission Clerk and Administrative Services must be a signatory to the escrow agreement.

In no instance should the maintenance and administrative costs associated with any refund be borne by the utility's customers. These costs are the responsibility of, and should be borne by, the utility. Should a refund be required, the refund should be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code.

Moreover, by Order No. PSC-02-1250-SC-SU at page 14, the Commission ordered, by PAA, that "Aloha shall in no instance attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount." Similarly, the Commission should order Aloha not to attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount subject to refund pending resolution of the protests.

ISSUE 4: Should the relief requested by Aloha's Response to Show Cause Order No. PSC-02-1250-SC-SU be granted?

RECOMMENDATION: No, the relief requested in Aloha's Response to Show Cause Order No. PSC-02-1250-SC-SU, including the alternative relief that the fine be lowered to $2,500, should be denied and the $10,000 fine should be deemed assessed with no further action required by the Commission. Aloha should be required to remit the full amount of the fine within 90 days from the issuance date of the Order arising from this recommendation. (GERVASI)

STAFF ANALYSIS: In its Response to Show Cause Order No. PSC-02-1250-SU-SU (Response to Show Cause), Aloha correctly states that the Commission required the utility to show cause, in writing within 21 days of the date of the Order, why it should not be fined $10,000 for its apparent violations of Section 367.091, Florida Statutes, and Order No. PSC-01-0326-FOF-SU, for failure to file a revised service availability tariff and proposed customer notice regarding its service availability charge increase in May, 2001.

Aloha argues that should the Commission impose a fine of $10,000 on Aloha in the present circumstances, the Commission will thereby exceed its discretionary authority. Article I, Section 18, of the Florida Constitution, states that "[n]o administrative agency . . . shall impose a sentence of imprisonment, nor shall impose any other penalty except as provided by law."

Moreover, Aloha argues that when an administrative agency is imposing a penalty, this constitutional prohibition is coupled with two maxims of administrative law. First, that agencies, as "mere creatures of statutes," have only those powers as are conferred 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). 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." Any ambiguities must be construed against the agency. Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

Aloha also argues that since administrative fines deprive the person fined of substantial rights, the proper standard of proof is the clear and convincing evidence standard, a higher standard than

the competent substantial evidence standard which will normally support an agency's finding of fact. Further, Section 120.68(7)(e), Florida Statutes, requires the reviewing court to remand a case to the agency for further proceedings or set aside agency action when it finds that 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.

Aloha argues that the Commission has considered issuing show cause orders when utilities improperly collected service availability charges in four recent cases.[4] In each of these cases, for varying reasons explained by Aloha, the Commission either declined to show cause those utilities (Mad Hatter and Burkim), or show caused them but later approved a settlement offer reducing the fine (Forest Hills), or show caused them but later waived the fine (Southlake). In each of these cases, findings were made that the utilities had in fact violated an Order or rule.

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[4]Aloha cites to the four cases as follows: 93 FPSC 2:695, 698, 734-39 (1993), in re: Application for a rate increase in Pasco County by Mad Hatter Utility, Inc. (Mad Hatter); 01 FPSC 12:533, 576-7 (2001), in re: Application for staff assisted rate case in Brevard County by Burkim Enterprises, Inc. (Burkim); 97 FPSC 11:270, 282-3 (1997), in re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. in Pasco County (Forest Hills); and 00 FPSC 5:200, 216, 218-9 (2000), 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 (Southlake).

Aloha states that although the Commission authorized Aloha to backbill developers for the entire amount that it failed to collect in service availability charges during the period of time in question, Aloha will not be able to collect the entire amount if for no other reason than developer attrition. Moreover, Aloha has agreed to take the full risk of uncollectibility. If even 10% of the imputed CIAC cannot be collected, Aloha will lose approximately $65,955 in rate base which equals a decrease in revenues of roughly $13,101 per 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.

Moreover, Aloha argues that like each of the four cases cited in its Response to Show Cause, Aloha's ratepayers have been made whole by imputation of $100 of the undercollected CIAC. To the extent that Aloha fails to collect the amounts it backbills, the utility's shareholder, not its customers, will be harmed. And unlike the Mad Hatter case, Aloha did not knowingly undercollect its approved service availability charges. 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.

Finally, Aloha states that its management has received the Commission's message loud and clear. Aloha has fully cooperated with 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 the Order. Aloha pledges to continue to fulfill its responsibilities under Order No. PSC-02-1250-SC-SU in a comprehensive and timely fashion.

Aloha argues that in light of the above-cited case law and mitigating circumstances, the Commission should not issue a show cause order against it. However, Aloha has previously offered, and continues to be willing, to pay a $2,500 fine for its unknowing violation of Order No. PSC-02-1250-SC-SU and Section 367.091, Florida Statutes, in addition to whatever revenue losses it will suffer due to uncollectible backbilled service availability charges. Aloha requests that the Commission not issue a show cause order in this proceeding, or in the alternative, impose a fine of $2,500.

ANALYSIS AND RECOMMENDATION

Aloha timely responded to the show cause order but did not request a hearing on the show cause issue. By Order No. PSC-02-1250-SC-SU, the Commission ordered that if Aloha timely responds to the show cause order but does not request a hearing, a recommendation will be presented to the Commission regarding the disposition of the show cause order. Therefore, this recommendation concerns the final disposition of the show cause order.

Staff disagrees that if the Commission imposes a fine of $10,000 on Aloha in the present circumstances, the Commission will exceed its discretionary authority. Aloha argues that Article I, Section 18, of the Florida Constitution requires administrative agencies not to impose a penalty except as provided by law. Section 367.161, Florida Statutes, expressly provides the Commission with the authority to impose the penalty at issue here. As specified in the show cause order, Section 367.161 expressly authorizes the Commission to assess a penalty of not more than $5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes. Each day that such refusal or violation continues constitutes a separate offense. Staff has calculated that Aloha's full exposure to being fined under this statute far exceeds $10,000.

With respect to Aloha's argument that agencies have only those powers as are conferred by statute, with any reasonable doubt as to the lawful existence of a particular power resolved against its exercise, there is no reasonable doubt about the Commission's express authority to impose the $10,000 fine upon Aloha under Section 367.161, Florida Statutes. The statute is clear and unambiguous.

Aloha's argument that the proper standard of proof is the clear and convincing evidence standard lacks merit. There has been no standard of proof with respect to this matter because there has been no evidentiary hearing regarding the show cause order. Nor will an evidentiary hearing be held on this issue because Aloha did not protest the Commission's requirement that it show cause as to why it should not be fined in the specified amount. The Commission did not abuse its discretion in any way with respect to that decision.

Nor is staff persuaded by Aloha's argument that the Commission recently either declined to fine, or reduced the assessed fine, for four other utilities that improperly collected service availability charges. It is no coincidence that the reasons for those decisions varied. The Commission bases its decision on whether to show cause a utility on the particular aggravating or mitigating circumstances of each case. In this case, upon careful consideration of the circumstances as outlined in the show cause order, the Commission concluded that the circumstances of this case were such to warrant a fine of $10,000.

Staff agrees that Aloha has fully cooperated with staff in promptly complying with each staff data request filed in this docket, and that Aloha has timely filed both its revised service availability tariff and customer notice in accord with Order No. PSC-02-1250-SC-SU. Moreover, staff is pleased to know that Aloha's management has received the Commission's message loud and clear. Nevertheless, staff recommends that the relief requested in Aloha's Response to Show Cause order, including the alternative relief that the fine be lowered to $2,500, should be denied and the $10,000 fine should be deemed assessed with no further action required by the Commission. Aloha should be required to remit the full amount of the fine within 90 days from the issuance date of the Order arising from this recommendation.

ISSUE 5: Should this docket be closed?

RECOMMENDATION: No, this docket should remain open pending final resolution of the protests filed to the PAA portions of Order No. PSC-02-1250-SC-SU. (GERVASI)

STAFF ANALYSIS: This docket should remain open pending final resolution of the protests filed to the PAA portions of Order No. PSC-02-1250-SC-SU.