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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALOHA UTILITIES, INC., and)
FLORIDA WATERWORKS ASSOCIATION, INC.,)
)
Petitioners,)
)
vs.)
)
STATE OF FLORIDA)
PUBLIC SERVICE COMMISSION,)
)
Respondent.)

CASE NO.

ORIGINAL
FILE COPY

PETITION FOR ADMINISTRATIVE DETERMINATION
OF INVALIDITY OF AGENCY NON-RULE
POLICIES AND EXISTING RULES

Petitioners, ALOHA UTILITIES, INC. ("ALOHA"), and FLORIDA WATERWORKS ASSOCIATION, INC. ("FWA"), by and through their under- signed counsel and pursuant to Sections 120.54(1), 120.56(3), and 120.56(4), Florida Statutes ("F.S.") (1996 Supp.), hereby petition the Division of Administrative Hearings for an administrative determination that (a) certain statements of the State of Florida, Public Service Commission ("PSC" or "Commission") are unpromulgated rules which violate section 120.54(1), Florida Statutes, (b) that these unpromulgated rules change the prior practice of the Commis- sion and cannot be utilized without prior rulemaking; and (c) that existing rule 25-30.145, Florida Administrative Code, is an invalid exercise of delegated legislative authority. In support of this Petition, ALOHA and FWA (hereinafter sometimes referred to jointly as "Petitioners") state as follows:

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A. SUMMARY STATEMENT: NATURE AND PURPOSE OF PETITION

1. Distilled to its essence, this Petition is about the PSC's March 5, 1997, letter to ALOHA, stating:

The Florida Public Service Commission will compile and audit rate base, capital structure, and net operating income for the test year ended December 31, 1996, in accordance with Commission audit procedures.

This statement gives no reason for the audit and fails to properly define the scope of the audit. However, it refers to "Commission audit procedures," known only to the PSC, that provide the basis for and scope of such an audit.

2. The PSC has not promulgated any rules setting forth the "Commission audit procedures" that are utilized by the PSC to determine when and how an audit will be conducted. Because these policy statements violate Section 120.54(1)(a), F.S. (1996 Supp.), ALOHA maintains that the PSC may not lawfully rely upon these statements or any substantially similar statements in order to conduct an audit of ALOHA or any other water or wastewater utility.

3. The PSC has no lawfully adopted rules that define the nature of such an audit or the circumstances under which the PSC may audit a utility like ALOHA. Because existing Rule 25-30.145, Florida Administrative Code, is deficient in these and other areas, it is an invalid delegation of legislative authority.

B. THE PARTIES

4. The name and address of the Petitioner, ALOHA, is Aloha Utilities, Inc., 2512 Aloha Place, Holiday, Florida 34691. For the

purposes of this litigation, ALOHA's address is that of its undersigned counsel.

5. The name and address of the Petitioner, FWA, is Florida Waterworks Association, Inc., P.O. Box 4268, Tallahassee, Florida 32315. For the purposes of this litigation, FWA's address is that of its undersigned counsel.

6. The name and address of the Respondent is State of Florida, Public Service Commission, Capital Circle Office Center, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

C. BACKGROUND

7. In all of Florida's counties, except those exempted by Section 367.171, F.S., (1996 Supp.), investor-owned water and wastewater utilities are subject to the regulatory authority of the PSC as authorized by Chapter 367, F.S. Entities wishing to provide water or wastewater utility services in those Florida counties subject to Chapter 367, F.S., must obtain a certificate of authorization from the Commission. The Commission's regulatory authority over water and wastewater utility providers in Florida extends to the authority, service, and rates of each regulated entity. These PSC-regulated utilities may not change their rates without PSC authorization, with only two exceptions not directly relevant to this Petition.

8. The Commission is not a constitutional agency, but rather was created by act of the Florida Legislature. See, Section 350.011, F.S. As a creature of statute, the Commission has no

inherent authority, but only those powers which are expressly or impliedly delegated to it by the Legislature. *Citrus County v. Southern State Utilities, Inc.*, 656 So.2d 1307 (Fla. 1st DCA 1995); *Florida Bridge Co. v. Bevis*, 363 So.2d 799 (Fla. 1978); *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 495 (Fla. 1973); *Southern Armored Service v. Mason*, 167 So.2d 848 (Fla. 1964). Any reasonable doubt about the exercise of a power by a regulatory agency must be resolved against the exercise of the disputed power. *Florida Bridge Co. v. Bevis*, 363 So.2d 799 (Fla. 1978); *City of Cape Coral*, 281 So.2d at 496; *Southern Armored Service v. Mason*, 167 So.2d 848 (Fla. 1964).

9. The Commission oversees and operates a complex, comprehensive and detailed regulatory program which includes the regulation of water and wastewater utilities. Among the powers granted to the Commission by the Legislature are the power to prescribe utility rates and charges, standards of quality and measurements, and service rules.

10. In furtherance of its responsibilities, the Commission has been given by the Legislature certain authority to require regular and emergency reports from a utility. § 367.121(1)(c), F.S. (1995). The Commission is also given the authority to adopt those rules which are reasonably necessary and appropriate for the administration and enforcement of its regulatory program governing water and wastewater utilities. See, § 367.121(1)(f), F.S. (1995).

11. Under applicable rules, the Commission requires that each utility file an annual report of its financial operations on

forms established as rules of the Commission. The process governing the submission, review and use of annual reports is contained generally in Rule 25-30.110, et. seq., Florida Administrative Code ("F.A.C.").

12. In addition to requiring the filing and review of annual financial reports, the Commission has in the past conducted audits of certain utilities. There is no provision in Chapter 367, F.S., governing water and wastewater utility regulation that specifically grants to the Commission the authority to conduct an audit of any such utility. Petitioners presume that the Commission has interpreted the language in Section 367.156(1), F.S. (1996 Supp.), addressing reasonable access to records of water and wastewater utilities as the statutory authority for audits of such utilities.

13. By letter dated March 5, 1997, the Commission notified ALOHA of an undocketed audit which it intends to conduct of ALOHA's 1996 year. A copy of the Commission's letter of March 5 is attached hereto as Exhibit "A." The Commission authorized ALOHA to file its annual report by May 30, 1997 and plans to initiate its audit in June, 1997, with an estimated completion date in mid-August. A copy of the Commission's letter of April 21, announcing the start and planned completion of its audit is attached hereto as Exhibit "B." An intervening letter on the subject of the audit of ALOHA dated March 27, 1997 is attached hereto and made a part hereof as Exhibit "C." These three letters are the only correspon-

dence which ALOHA and its attorneys have received concerning this planned audit up to the date of the filing of this Petition.

14. In describing the audit of Aloha in question, Exhibit "A" states the following:

The Florida Public Service Commission will compile and audit the rate base, capital structure, and net operating income for the test year ended December 31, 1996, in accordance with Commission audit procedures.

The PSC has used the same or substantially similar language in letters that it has sent to other utilities on numerous prior occasions.

15. While the above statement, on its face, appears to require nothing of ALOHA, if ALOHA does not comply with the announced audit, the audit cannot proceed. Unless the PSC solicits information from ALOHA's personnel, which may be found within ALOHA's books and records, the audit cannot proceed. Thus, the inescapable inference which must be drawn from the PSC's statement is that the PSC both expects and intends to require compliance and solicit information pursuant to its letter.

16. The Commission's three letters contain no further indication regarding the scope or purpose of the audit and no identification of the persons responsible for ordering that an audit be performed. In addition, the letters are silent as to any factors utilized in determining either that an audit was to be performed or what the audit would entail, other than the statement that the audit would be conducted "in accordance with Commission audit procedures." These procedures remain a mystery to ALOHA.

17. The Commission's March 5 letter and subsequent letters contain no statement of rights to contest any aspect of the substance, procedure, timing or ultimate use of the audit. ALOHA was not informed, by these letters, of any rights it may have to either contest the audit or have input into the audit during the audit process. The purpose, scope and procedure of the audit are known only by the Commission.

D. THE CHALLENGED POLICY STATEMENTS AND RULES

18. Petitioners challenge the Commission's reliance upon the "Commission audit procedures" that are referred to in its March 5 letter to Aloha (hereinafter "Challenged Statements"). These procedures presumably define the standards governing when and how the Commission audits a water or wastewater utility. These procedures are unknown to Petitioners, have not been promulgated as rules in accordance with the Administrative Procedure Act, and are not authorized by law in their current form. Petitioners seek an administrative determination that the PSC's continuing use of and reliance upon the Challenged Statements is in violation of Section 120.54(1)(a), F.S. (1996 Supp.).

19. The Commission has promulgated only one rule dealing with audits of water and wastewater utilities -- Rule 25-30.145, F.A.C., entitled "audit access to records" (hereinafter "Challenged Rule"). However, the Challenged Rule contains no definitions, is devoid of any guidance as to how or under what circumstances the Commission may choose to conduct an audit, contains no guidance as

to the terms and conditions of any such audit once commenced, and is devoid of anything that could reasonably be considered a statement of process governing the substance or procedure of audits or the rights of the audited party.

20. To the extent that the Commission may maintain that the Challenged Statements are supported by Rule 25-30.145, F.A.C., Petitioners maintain that this rule is an invalid exercise of delegated authority and contrary to the Florida and United States Constitutions. A copy of the Challenged Rule is attached hereto as Exhibit "D."

E. PETITIONERS' SUBSTANTIAL INTERESTS

21. The FWA is a Florida non-profit corporation which is organized and maintained for the benefit of the investor-owned water and wastewater utility companies in the State of Florida which comprise its membership. One of the primary purposes of the FWA is to represent the common interests of its members before various administrative, legislative, and judicial forums in the State of Florida, and to assist its members on regulatory, technical, and operational matters. The water and wastewater utilities that comprise FWA's membership own and operate water and wastewater utility companies that are subject to the Commission's utility regulatory authority conferred by Chapter 367, F.S. As such, the members of FWA are substantially affected by the rules and regulations governing the substance of the regulatory relationship between the utilities and the Commission. A copy of the list

of FWA's Commission-regulated utilities is attached hereto as Exhibit "E." Aloha Utilities, Inc. is a member of the FWA.

22. Substantially all of FWA's members, and FWA as their representative, are substantially affected by the Challenged Statements and Rules which define the regulatory relationship between the Commission and these regulated utilities. The subject matter of the Challenged Statements and Challenged Rule, which is the procedure and authority governing Commission audits of water and wastewater utilities, is squarely within the FWA's general scope of interest and activity. *Florida Home Builders Ass'n v. Dept. of Labor and Employment Security*, 412 So.2d 351, 353-4 (Fla. 1982); *Farmworkers Rights Organization, Inc. v. HRS*, 417 So.2d 753 (Fla. 1st DCA 1982). Substantially all of FWA's members are affected by the Commissions' unpromulgated rules governing how, when, and under what circumstances audits may be commenced, and once commenced, the procedures and standards which will be utilized by the Commission in conducting audits of water and wastewater utilities. The invalidation of non-rule policy statements and rules relied upon by an administrative agency is an appropriate type of relief for an association such as the FWA to seek on behalf of its members. *Home Builders*, 412 So.2d at 353-4. FWA's Board of Directors authorized FWA to participate in this Petition on May 5, 1997.

23. Petitioner ALOHA is a Florida for-profit corporation which provides water and wastewater service to approximately 12,000 homes, offices, public schools and other structures in Pasco

County, Florida. Pasco County is not included among the counties exempted from PSC jurisdiction by Section 367.171(3), F.S. ALOHA's rates, service territory, and the quality of its service are subject to regulation by the Commission under relevant provisions of Chapters 367 and 120 of the Florida Statutes.

24. On March 10, ALOHA received the Commission's letter as shown in Exhibit "A," in which the Commission notified ALOHA that it intends to conduct an audit of ALOHA's 1996 financial experience in accordance with the Challenged Statements. Section 367.121(2), F.S., provides that each utility has the right to be represented throughout an inspection of its books and records. The planned audit cannot take place without the assistance of ALOHA in making data available to auditors, preparing information and responding to questions from the auditors.

25. A review of ALOHA's past experience with the Commission reveals that ALOHA has, for approximately a quarter century, relied upon outside accounting and legal consultants to assist ALOHA in virtually all matters pertaining to the Commission's regulatory requirements. Although the lack of enunciated standards and procedures governing the proposed audit renders a full estimate of compliance costs impossible, ALOHA estimates that its costs in complying with the audit would exceed \$100,000. In addition, the results of the audit would evidently be used by the Commission as a basis for other regulatory actions including potential rate decreases or other actions which would directly and substantially affect ALOHA. To subject ALOHA to these costs without first going

thorough the appropriate procedures required by law is inappropriate, confiscatory, and unlawful. ALOHA is a substantially affected party in this proceeding.

F. THE COMMISSION'S NON-RULE POLICIES ARE INVALID

26. The Challenged Statements constitute unpromulgated "rules" of the Commission in that they are statements of general applicability which either implement, interpret, or prescribe law or policy or describe procedure or practice requirements of the Commission. See, Section 120.52(15), F.S. (1996 Supp.) In addition, the Challenged Statements impose requirements and standards of regulatory compliance which are mandatory and which will govern the Commission's regulatory audit relationship with regulated entities such as ALOHA and members of FWA. As such, the non-rule policy statements have the force and affect of law.

27. The fact that the ALOHA audit is to be conducted "in accordance with Commission audit procedures" shows that the terms employed are of general applicability. By merely substituting the name and address of any other water or wastewater utility, the Commission's March 5, 1997 letter would apply to any or all of these regulated utilities. In addition, Petitioners, based upon their years of experience with PSC audits, understand and believe that the PSC has, and uses, a manual or guide book containing these audit procedures, but which manual or guide book has not been adopted as a rule.

28. The Commission's letter of March 5 (Exhibit "A") shows on its face that rulemaking of the above-referenced Challenged Statements is feasible and practicable, in that the Commission has existing, generally-applicable "audit procedures" that it intends to utilize. The Commission has had more than sufficient time to acquire the knowledge and experience reasonably necessary to develop audit standards and to address these issues through rulemaking.¹ Related matters are sufficiently resolved to enable the Commission to address these policies through rulemaking. The Commission is not currently utilizing the rulemaking procedure expeditiously and in good faith to adopt rules which would address these statements.

29. The specifics governing Commission audits of regulated utilities is not knowledge which is the Commission's to jealously horde or hide. Rather, the standards and procedures must be made public and shared with affected parties to ensure that arbitrary, capricious, and despotic agency action is avoided. A regulated party should not be kept in the dark regarding the standards and procedures governing a regulatory audit. Nor should a regulated party be left to speculate as to why the Commission has determined that an audit would be conducted. It is reasonable to require that the Commission promulgate its standards as rules, as required by the Administrative Procedure Act.

¹The PSC has regulated Aloha's rates for a quarter century and the rates of other water and wastewater utilities for nearly forty years.

30. Rulemaking is not a matter of agency discretion. Section 120.54(1)(a), Fla. Stat. (1996 Supp.) Rulemaking in this matter is not simply a regulatory nicety which can be addressed at some future point in time. Rather, rulemaking is necessary and practicable in this matter to provide fair notice to persons affected by the policies embodied in the Challenged Statements. Sufficient detail or precision in the establishment, initiation and utilization of audit procedures is not given by the Challenged Statements to put Petitioners, or any similarly situated party, on fair notice of what the audit procedure will entail. The particular questions addressed in the non-rule policies are not so narrow in scope that a more specific resolution of the material contained would be impractical outside of individual cases.

31. The PSC is subject to the provisions of the Florida Administrative Procedure Act. *See, General Development Utilities, Inc. v. Hawkins*, 357 So.2d 408, 409 (Fla. 1978). Under the Florida APA, each rule "shall" be adopted by the agency involved as soon as feasible and practicable. §120.54(1)(a), F.S. (1996 Supp.). The Challenged Statements have never been adopted by the Commission as rules. The Challenged Statements are invalid for failure of the Commission to follow the rulemaking procedures required under the Florida Administrative Procedure Act, Section 120.54(1)(4), F.S. (1996 Supp.).

**G. THE COMMISSION'S EXISTING RULES CANNOT BE
RELIED UPON AS AUTHORITY FOR THE CHALLENGED STATEMENTS**

32. To the extent that the Commission may rely upon existing rules as a grounds for not having adopted the Challenged Statements as rules, such reliance is misplaced. Existing rules do not address the scope of any audit, the procedures to be utilized in a Commission audit, the circumstances under which an audit may be required by the Commission, or the rights of affected parties to challenge or contest an audit. The absence of such details in the Commission's only rule which addresses audits of water and wastewater utilities (Rule 28-30.145) renders this rule an invalid exercise of delegated legislative authority.

33. Rule 28-30.145, F.A.C., enlarges, modifies, and contravenes the Commission's statutory authority because the rule, both on its face and as apparently applied, purports to grant the Commission authority to conduct a full-scale audit of all the records of a water or wastewater utility. Such an audit would enlarge the scope of the statute authorizing reasonable access to records for defined purposes. Rule 28-30.145, F.A.C. states that it is based upon Section 367.156, F.S. (1996 Supp.). However, section 367.156(1) states the following:

The Commission shall continue to have reasonable access to all utility records and records of affiliated companies, including its parent company, regarding transactions or cost allocations involving the utility and such affiliated companies, and such records necessary to ensure that a utility's ratepayers do not subsidize nonutility activities.

The provisions of the statute quoted above would appear to limit the audit authority of the Commission to a review of intercompany

transactions or cost allocations between companies to determine whether ratepayers are subsidizing nonutility activities.

34. While the statutory audit provisions contain a scope limitation, the Challenged Rule does not limit the scope of audits to such matters. The only provision in the rule addressing the scope of such an audit defines only the minimum scope of such audit while apparently leaving the maximum breadth of an audit to the discretion of the PSC. According to subsection (1)(a) of rule 28-30.145, "[t]he audit scope, audit program and objectives, and audit requests are not constrained by relevancy standards narrower than those provided by Section 367.156(1)." See, Exhibit "D." The rule provides only that the scope of the audit shall be no "narrower" than the relevancy standards contained in statute, while seemingly allowing the PSC total discretion to determine how "broad" the audit may be. This is both unreasonable and illegal.

35. In the only section of its legislation granting it the expressed power to audit utilities, the Legislature has dealt only with management and operational audits. Such audits have a defined scope. Utilities "shall not be denied due process" as a result of any audit. § 350.117, F.S. (1995). Rule 25-30.145, F.A.C., does not purport to implement the authority of the commission under Section 350.117, F.S. (1995). A financial audit such as the one contemplated in this case is neither a management nor an operational audit.

36. The Commission cannot point to any act of the Florida Legislature authorizing it to conduct a financial audit of any

water or wastewater utility whenever and for whatever reason the PSC may at its whim decide. The statute authorizes the PSC to require reports in compliance with a uniform accounting system. However, the statute nowhere requires that a utility maintain the source of such reports. Petitioners submit that while keeping records to form the basis of such reports is reasonably inferred, the specific power to audit such records must be specifically implemented by proper rulemaking. Even assuming arguendo that the power to audit were to be inferred from Section 367.156(1), F.S. (Supp. 1996), the power to audit without established standards governing the scope of such audits cannot be inferred and, instead, is contrary to statute and law.

37. The absence of an adequate limitation on the scope of an audit in the Challenged Rule also indicates that this rule lacks adequate standards for agency decisions and vests unbridled discretion in the PSC. Because the rule gives the PSC unlimited discretion to determine the breadth of an audit (as long it is no narrower than the relevancy standards described in statute), the rule is an invalid exercise of delegated legislative authority.

38. In addition, the Challenged Rule is wholly lacking in any description of the circumstances under which the PSC is authorized to conduct an audit of a water or wastewater utility. The Rule neither provides reasonable notice to water and wastewater utilities as the reasons that the PSC might conduct an audit, nor requires that the PSC give any such reasons when it initiates an audit. As a result, the challenged rule is arbitrary and capri-

cious and lacking in adequate standards to guide agency decision-making. There is no reasonable, legitimate basis in fact or reason for the PSC to omit from rule its basis for conducting an audit. The absence of such grounds gives the agency unbridled discretion to conduct an audit for any reason, and does not require the agency to identify its reason.

39. Furthermore, the Challenged Rule fails to adequately define the procedures to be followed by PSC when it conducts such an audit. The absence of such procedures in the rule renders the rule arbitrary and capricious. There is no basis in fact or reason for the rule not to delineate the procedures that the PSC should follow when it conducts an audit. Obviously such procedures are necessary because the PSC has developed the unpromulgated "audit procedures" that are challenged in prior portions of this petition. The absence of detailed procedures for the manner in which an audit is to be conducted also renders the rule lacking in adequate standards for agency decisions. The absence of such standards gives the Commission unbridled discretion to conduct audits under any procedure that it may elect to utilize.

40. The Challenged Rule is also totally devoid both of any information which would enable ALOHA to know what its rights are to challenge an audit or the scope of an audit. The absence of a provision addressing these issues makes the rule arbitrary and capricious, and unconstitutional.

41. The Challenged Rule is also an invalid exercise of delegated legislative authority in that it "impose[s] regulatory

costs on the regulated person which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives." Section 120.52(8)(g), F.S. (1996 Supp.). The Commission has an existing standard procedure for the review of annual financial reports filed by each regulated utility. See, Rule 25-30.110, F.A.C. Presumably, this procedure enables the Commission to conduct its ongoing business.

42. This existing process, which occurs without the necessity of audits, allows the Commission sufficient information to conduct its normal regulatory business. Audits of a given year's activity, if deemed necessary, are typically and historically done only **after** the Commission has reviewed the utility's annual report. This enables the Commission to review the relevant information and to determine if issues exist which would indicate the potential need for additional inquiry.

43. In the proposed audit of ALOHA described above, the Commission evidently has decided that it wants to conduct an audit of ALOHA's 1996 experience **even before ALOHA's 1996 annual report is filed with the Commission.**² In so doing, the Commission is forcing ALOHA to bear regulatory costs which may be unnecessary after the Commission has reviewed ALOHA's 1996 annual report.

² Note that the letter shown in Exhibit "A" appears to announce the immediate commencement of the audit even though, at that time, ALOHA's Annual Report was not due to be filed until the end of March, or upon ALOHA's request, automatically extended until the end of April. (See, Rule 25-30.110(3)(b)(c), F.A.C.) The Commission had clearly decided to audit ALOHA prior to reviewing ALOHA's 1996 Annual Report and prior to promulgating rules governing the audit process.

Conducting the audit contemplated in the March 5 letter is a more costly alternative than allowing the Commission to review the 1996 annual report of ALOHA in the normal course of business. Issues raised by such review which require further agency action can then be taken up by the Commission, if and when any such issues should arise. By authorizing the PSC to conduct such an audit before ALOHA has submitted its annual report, the rule forces ALOHA and similarly-situated utilities to bear unnecessary regulatory costs where less costly alternatives could be employed if the rule were to require that such audits be conducted only after a report has been filed and reviewed by the Commission.

44. The failure of the rule to require that audits be conducted after the submission of an annual report is also arbitrary and capricious. There is no basis in fact or reason to allow the PSC to conduct such an audit before an annual report is filed by a regulated utility.

H. THE CHALLENGED STATEMENTS CONSTITUTE A CHANGE FROM PRIOR PSC PRACTICE

45. Other than in response to filed applications, Petitioners know of no other incidence in which the Commission has determined that it will audit a water or wastewater utility before the utility's annual report for the period under audit has been filed by the utility and reviewed by the Commission. To the extent that the PSC maintains that its contemplated audit of ALOHA is justified under the provisions of existing rules, such rules have not in the past been utilized to force an audit in a case where a

utility's annual report had not already been reviewed by the PSC or where the utility had not requested PSC approval of a change in rates or charges.

46. The statutory definition of a "rule" includes the repeal or amendment of a rule. An agency cannot change an existing longstanding rule interpretation of a rule without first going through rulemaking.

47. The PSC's attempt to audit ALOHA's 1996 experience before reviewing ALOHA's 1996 annual report is contrary to prior practice and constitutes a change in rule interpretation which itself requires rulemaking.

I. UNCONSTITUTIONALITY OF CHALLENGED STATEMENTS AND RULES

48. The Challenged Statements which would allow the Commission to audit a regulated entity based upon unspecified and unpromulgated "audit procedures" violates the due process and equal protection rights of water and wastewater utilities in the State of Florida. Art. I, §2, Fla. Const.; Art. I, §9, Fla. Const.

49. The PSC is not exempted from the equal protection and due process clauses of the Florida and United States Constitutions. The PSC cannot, by audit, take action which would deny the procedural or substantive due process rights of the entity being audited.

J. ADDITIONAL ALLEGATIONS

50. Disputed issues of material fact include, but are not limited to the following: 1) Whether the Challenged Statements are agency policy statements of general applicability that are violative of section 120.54(1)(a), F.S. (1996 Supp.) and 2) Whether the Challenged Rule is an invalid exercise of delegated legislative authority.

51. Petitioners maintain as ultimate facts that the Challenged Statements and the Challenged Rule are invalid on the basis of the foregoing allegations, and that relief is appropriate under Chapter 120, F.S. (1996 Supp.)

WHEREFORE, Petitioners ALOHA and FWA respectfully request:

A. That the Division of Administrative Hearings assign an Administrative Law Judge to conduct a formal rule challenge proceeding in accordance with Section 120.56, F.S. (1996 Supp.);

B. That the Administrative Law Judge determine that the Challenged Statements fall within the definition of a rule specified in Section 120.52(15), F.S. (1996 Supp.), and are generally applicable to water and wastewater utilities regulated by the Commission pursuant to Chapter 367, F.S., (1995 & 1996 Supp.);

C. That the Administrative Law Judge determine that the PSC's use of and reliance upon the Challenged Statements is in violation of section 120.54(1)(a), F.S. (1996 Supp.);

D. That the Administrative Law Judge determine that the Commission's Challenged Rule, Rule 25-30.145, F.A.C., is an invalid exercise of delegated legislative authority;

E. That the Administrative Law Judge determine that the Challenged Statements and Challenged Rule are illegal and unconstitutional;

F. That the Administrative Law Judge determine that the Challenged Statements and Challenged Rule are invalid and that the PSC must immediately cease reliance thereon;

G. That Petitioners be awarded their reasonable costs and attorney fees for pursuit of this action pursuant to the provisions of section 120.595, F.S. (1996 Supp.); and

H. That the Administrative Law Judge grant such other and further relief to Petitioners as may be deemed just and proper.

Respectfully submitted this 23rd day of May, 1997.

ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(904) 877-6555



STEVEN T. MINDLIN, P.A.
Florida Bar #378534
BRIAN L. DOSTER, ESQUIRE
Florida Bar #0069124
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to the following on this 23rd day of May, 1997:

Blanca Bayo
Director of Records & Reporting
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Rob Vandiver, General Counsel
Division of Legal Services
Florida Public Service Commission
Capital Circle Office Center
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



STEVEN T. MINDLIN, P.A.

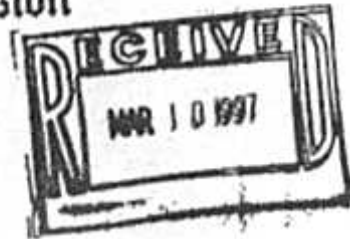
State of Florida

Commissioners:
 JULIA L. JOHNSON, CHAIRMAN
 SUSAN F. CLARK
 J. TERRY DEASON
 JOE GARCIA
 DIANE K. KIESLING



TIMOTHY DEVLIN, Director
 Auditing & Financial Analysis
 (904) 413-6480

Public Service Commission



March 5, 1997

Aloha Utilities, Inc.
 Stephen G. Watford
 2514 Aloha Place
 Holiday, FL 34691-3499

Dear Mr. Watford:

Undocketed - Aloha Utilities, Inc.
Audit Request - Establish Rate Base

The Florida Public Service Commission will compile and audit the rate base, capital structure, and net operating income for the test year ended December 31, 1996 in accordance with Commission audit procedures. Jim McPherson, the district office supervisor, (813) 542-6638, will coordinate this audit.

Rule 25-30.110(b), F.A.C., states that, "Unless otherwise authorized by the Commission, each utility shall maintain its records at the office or offices of the utility within this state and shall keep those records open for inspection during business hours by Commission staff".

Rule 25-22.006, F.A.C., promulgates the procedure to exempt confidential and proprietary business information from Public Records Law 119.07(1), Florida Statutes. Excerpts from this rule are attached to this letter however, the rule should be read in its entirety when an exemption is claimed. Write or call the Florida Public Service Commission's Office of the General Counsel for additional information, (904) 413-6248.

EXHIBIT "A"

(page 1 of 3)

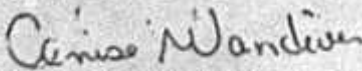
Aloha Utilities, Inc.
March 5, 1997

- 2 -

A formal report will be issued for internal official use only by the Commission on or about May 30, 1997. A copy of the final report will be mailed to the company liaison officer listed in the Commission Mailing Directory. Comments should be mailed to the Bureau Chief of Auditing within ten days after receipt.

Questions regarding the audit or staff conduct should be directed to Jim McPherson or myself at (904) 413-6487.

Sincerely,



Denise N. Vandiver

DNV/sp

Enclosure: (1) Excerpts from Rule 25-22.006, F.A.C. and
366.093, F.S.

cc: Mary Andrews Bane, Deputy Executive Director/Tech. (w/o enclosure)
Field Audit Supervisor
Legal Services (w/o enclosure)
Public Counsel

Ex. "A"

(page 2 of 3)

Attachment 1

EXCERPTS FROM RULE 25-22.006, F.A.C. AND 366.093, F.S.

These excerpts do not provide complete information necessary for a utility to safeguard confidential material from public disclosure. See the complete text of Rule 25-22.006, F.A.C.

If the utility ... believes information requested by staff is confidential, the utility may require that the staff request be in writing. Prior to staff obtaining any material (See definition) a utility ... may receive temporary exception from Section 119.07 (1), F.S., by filing a notice of intent to request confidential classification. The notice of intent ... shall be filed with the Division of Records and Reporting and shall have appended to it a copy of any written request for the material to which it relates. To maintain continued confidential handling ... the utility ... must, within 21 days after staff has obtained the material, (or ... after the field audit exit conference), file a request for confidential classification with the Division of Records and Reporting. Rule 25-22.006 (3) (a), F.A.C.

The burden of proof shall be on the utility A request ... that fails to identify the material for which confidential classification is sought in sufficient detail to permit a reasoned analysis or which fails to provide the required justification for classification may be denied Rule 25-22.006 (4) (a), F.A.C.

Proprietary confidential business information includes, but is not limited to: (a) Trade secrets, (b) Internal auditing controls and reports of internal auditors, (c) Security measures, systems or procedures, (d) Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods and services on favorable terms, (e) Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information, (f) Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities. 366.093 (3), F.S.

Requests for confidential classification ... shall be ruled upon expeditiously by the prehearing officer Rule 25-22.006 (3) (c), F.A.C.

Definition: "Obtaining Material" means receiving material pursuant to filing or taking physical control of material by removing the original material or a copy of it from the utility or other person's premises. Obtaining material also means the extraction of data from material for inclusion in working papers or memoranda. Rule 25-22.006 (1) (e), F.A.C.

State of Florida

Commissioners:
JULIA L. JOHNSON, CHAIRMAN
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING



TIMOTHY DEVLIN, Director
Auditing & Financial Analysis
(904) 413-6480

Public Service Commission

April 21, 1997

F. Marshall Deterding
Rose, Sundstrum & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301

Dear Mr. Deterding:

Undocketed Audit of Aloha Utilities, Inc.
Earnings Audit
Audit Control Number 97-064-2-1/File Number 26038.22

Your letter, dated April 10, 1997, was the first I knew that Aloha was granted another extension to file the 1996 Annual Report. In light of the fact that the Annual Report is not due until May 30, 1997, I will postpone the scheduled audit. Therefore, we plan to initiate our audit in June 1997 with an estimated completion in mid-August.

Sincerely,

A handwritten signature in cursive script that reads "Denise N. Vandiver".

Denise N. Vandiver
Bureau Chief - Auditing

DNV/sp

cc: Trish Merchant, Division of Water and Wastewater
Jim McPherson, Tampa District Office Supervisor

Stephen G. Watford
Aloha Utilities, Inc.
2514 Aloha Place
Holiday, FL 34691-3499

EXHIBIT "B"

State of Florida

Commissioners:
JULIA L. JOHNSON, CHAIRMAN
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING



TIMOTHY DEVLIN, Director
Auditing & Financial Analysis
(904) 413-6480

Public Service Commission

March 27, 1997

F. Marshall Deterding
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301

Dear Mr. Deterding:

Undocketed Audit of Aloha Utilities, Inc.
Establish Rate Base
Audit Control Number 97-064-2-1/File Number 26038.22

In response to your letter, dated March 11, 1997, I talked with staff in the Division of Water and Wastewater (WAW) regarding your concerns. As WAW has granted a 30-day extension for Aloha to file the 1996 Annual Report, I believe postponing the audit until that time is reasonable. Therefore, we plan to initiate our audit in May 1997 with an estimated completion in mid-July.

Your letter also expressed concern regarding the purpose of our audit. Commission Order PSC-97-0280-FOF-WS, dated March 12, 1997, states "We believe that, in order to make a determination of overearnings, a full, thorough analysis of the test-year books and records is necessary." I agree with WAW that this implies an audit. In addition, the Commissioners at the Agenda Conference mentioned a Commission audit several times.

If you should have any further questions or concerns, please let me know.

Sincerely,

A handwritten signature in cursive script that reads "Denise N. Vandiver".

Denise N. Vandiver
Bureau Chief - Auditing

DNV/sp

cc: Trish Merchant, Division of Water and Wastewater
Jim McPherson, Tampa District Office Supervisor

Stephen G. Watford
Aloha Utilities, Inc.
2514 Aloha Place
Holiday, FL 34691-3499

EXHIBIT "C"

(c) For the purposes of paragraphs (2)(a) and (b), the following apply:

1. Denotes composite life.
2. Plastic pipe footnote — assumes use of AWWA standard pipe only. Assumes AWWA DR18 used for all mains of 6" or more.
3. To be used only when acceptable company plant balances are not available for developing composites using account lives.
4. Net Salvage zero except as indicated.

(3) Except as listed in subsections (5) and (6) of this rule average service life depreciation rates based on the guideline lives and salvages shall be used in any proceeding before this Commission that involves the setting of rates. A utility shall also implement the applicable guideline rates for any new plant to be placed in service.

(4)(a) All Class A and B utilities shall maintain depreciation rates and reserve activity by account as prescribed by this Commission.

(b) All Class C utilities shall maintain depreciation rates and reserve activity data by total depreciable plant, function or account as prescribed by this Commission.

(5)(a) At the time a utility applies for a change in its revenue rates and charges, it may also petition for average service life depreciation rates different from those in the above schedule if it can justify the service lives that the utility is proposing in lieu of the guideline lives. That justification should be in the form of historic data, technical information or utility planning for the affected accounts or sub-accounts. Common causes of need for different depreciation rates include composition of account, adverse environmental conditions, high growth or regulatory changes.

(b) A utility filing for such a revision of depreciation rates shall submit ten copies of the filing to the office of the Commission Clerk.

(c) For each account or function of depreciable plant addressed in the filing, the following shall be included:

1. A comparison of current and proposed depreciation rates and service lives. The proposed effective date of the new rates shall be identified.
2. A comparison of depreciation expenses resulting from current rates with those produced by the proposed rates. Plant balances used in this calculation shall be those as of the effective date of the proposed rates.
3. A general narrative defining the service environment of the applicant utility and the factors (e.g., composition of account, growth, environmental conditions, regulatory changes) leading to the present application for a revision in rates in the affected accounts.
4. Any statistics, data, analyses or calculations used in the development of the proposed average service lives.

(6) A utility may apply for guidelines for a proposal for implementation of remaining life depreciation rates under the following conditions:

- (a) A Class A or B utility has maintained both plant activity data by account and accumulated provision for depreciation (reserve) data by

account, function or total depreciable plant generally in accord with the Uniform System of Accounts for either at least ten years or since the inception of the utility, whichever is less.

(b) A Class C utility has maintained both plant activity data and accumulated provision for depreciation (reserve) data by account, function or total depreciable plant generally in accord with the Uniform System of Accounts for either at least ten years or since the inception of the utility, whichever is less.

(c) To provide time for study development, any application for remaining life guidelines should be submitted at least six months before the filing for a test year in connection with a request for a revenue rate increase.

(7) Prior to the date of retirement of major installations, the Commission may approve capital recovery schedules to correct associated calculated deficiencies in recovery where a utility demonstrates that retirement of the installation or group of installations is prudent and the associated investment will not be recovered by the time of retirement through the normal depreciation process.

(8)(a) Contributions in Aid of Construction — Adequate records to account for CIAC must be maintained by the utility. Where adequate records separating CIAC from utility investments are maintained by account, depreciation rates shall be applied separately to contributed and non-contributed plant with the resulting amortization of contributed plant not considered an expense for ratemaking purposes. Where CIAC records are not kept by account, the depreciation rates shall be applied to the entire depreciable plant. The CIAC plant shall then be amortized either by account, function or bottom line depending on availability of supporting information. The amortization rate shall be that of the appropriate account or function where supporting documentation is available to identify the account or function of the related CIAC plant. Otherwise, the composite plant amortization rate shall be used. The depreciation expense then is the net of depreciation expense for total plant less the amortization of CIAC plant. The non-CIAC depreciation reserve is the net of depreciation reserve for total plant less the accumulated amortization of CIAC plant.

Specific Authority 330.127(2) FS. Law Implemented 330.113, 367.131(1)(c) FS. History—New 3-22-84, Formerly 25-10.22, 25-10.012, Amended 11-10-86, 5-8-88, 11-21-93.

ANNOTATIONS

Depreciation rates
Applicant in rate increase case was ordered to use the guideline depreciation rates embodied in FAC 25-30.140, and was not allowed to use the depreciation rates it had previously used. In *Re Ortega Utility Co.*, 90 FPSC 4-343, 4-407 (1990).

25-30.145 Audit Access to Records.

(1) This rule addresses the reasonable access to utility and affiliate records provided for in

§ 367.156(1) for the purposes of management and financial audits.

(a) The audit scope, audit program and objectives, and audit requests are not constrained by relevancy standards narrower than those provided by § 367.156(1).

(b) Reasonable access means that company responses to audit requests for access to records shall be fully provided within the time frame established by the auditor. In establishing a due date, the auditor shall consider the location of the records, the volume of information requested, the number of pending requests, the amount of independent analysis required, and reasonable time for the utility to review its response for possible claims of confidentiality or privilege.

(c) In those instances where the utility disagrees with the auditor's assessment of a reasonable response time to the request, the utility shall first attempt to discuss the disagreement with the auditor and reach an acceptable revised date. If agreement cannot be reached, the utility shall discuss the issue with successive levels of supervisors at the Commission until an agreement is reached. If necessary, a final decision shall be made by the Prehearing Officer. If the audit is related to an undocketed case, the Chairman shall make the decision.

(d) The utility and its affiliates shall have the opportunity to safeguard their records by copying them or logging them out, provided, however, that safeguard measures shall not be used to prevent reasonable access by Commission auditors to utility or affiliate records.

(e) Reasonable access to records includes reasonable access to personnel to obtain testimonial evidence in response to inquiries or through interviews.

(f) Nothing in this rule shall preclude Commission auditors from making copies or taking notes. In the event these notes relate to documents for which the company has asserted confidential status, such notes shall also be given confidential status.

(g) Form PSC/AFA 6 (2/95), entitled "Audit Document and Record Request/Notice of Intent" is incorporated by reference into this rule. This form is used by auditors when requests are formalized. This form documents audit requests, the due dates for responses, and all Notices of Intent to Seek Confidential Classification.

Specific Authority 350.137(2) FS. Law Implemented 367.156(1) FS. History—New 2-28-93.

PART III SERVICE PROVISIONS

25-30.210 Definitions. For the purpose of this part, the following definitions apply:

(1) "Customer" shall mean any person, firm, association, corporation, governmental agency, or similar organization who has an agreement to receive service from the utility;

(2) "Main" shall mean a pipe, conduit or facility which conveys utility service to individual services or to other mains;

(3) "Meter" shall mean any device used to measure service rendered to a customer by a utility;

(4) "Service Pipe" shall mean the pipe between the utility's mains and the point of delivery and shall include all of the pipe, fittings and valves necessary to make the connection excluding the meter.

(5) "Service Connection" shall mean the point of connection of the customer's piping with the meter or service pipe owned by the utility.

(6) "Point of Delivery" shall mean where the service pipe is connected to the utility company's main.

(7) "Point of Delivery" for water systems shall mean the outlet connection of the meter for metered service or the point at which the utility's piping connects with the customer's piping for non-metered service.

Specific Authority 367.121 FS. Law Implemented 367.121 FS. History—Amended 9-12-74, Formerly 25-10.15, 25-10.015, Amended 11-10-86.

25-30.225 Plant and Facilities.

(1) Each utility shall design, construct, and install its plant in accordance with accepted engineering practices to ensure reasonably adequate and safe service to its customers.

(2) Each utility shall maintain and operate its plant and facilities by employing qualified operators in accordance with the rules of the Department of Environmental Regulation.

(3) Each utility shall exercise due care to reduce the hazards to which employees, customers, and the public may be exposed by reason of the utility's equipment or facilities.

(4) Each utility shall make reasonable effort to warn and protect the public from any danger which exists or arises on account of the utility's equipment or facilities.

(5) Each water utility shall operate and maintain in safe, efficient, and proper condition, all of its facilities and equipment used to distribute, regulate, measure or deliver service up to and including the point of delivery into the piping owned by the customer.

(6) Each wastewater utility shall operate and maintain in safe, efficient, and proper condition, all of its facilities and equipment used to collect and regulate the flow of wastewater in the sewer mains. The wastewater utility may require that each customer be responsible for cleaning and maintaining sewer laterals to the point of delivery.

(7) Each utility which provides both water and wastewater service shall operate and maintain in safe, efficient, and proper condition, all of its facilities to the point of delivery.

(8) Each utility shall maintain on file at its principal office located within the state, suitable maps, drawings, and records of its system and facilities to show size, location, character, date of installation and installed cost of major items of plant and extension of facilities.

(9) Each utility shall inspect its plant and facilities in such a manner and with such frequency as may be necessary to ensure that the plant and

Ex. "D"

EXHIBIT "E"

FLORIDA WATERWORKS ASSOCIATION

MEMBERS REGULATED BY FLORIDA PUBLIC SERVICE COMMISSION

Aloha Utilities, Inc.
Attn: Stephen G. Watford
2514 Aloha Place
Holiday, Florida 34691
(813) 937-4275

Florida Cities Water Company
Attn: Gerald Allen
4837 Swift Road, #100
Sarasota, Florida 34231
(941) 925-3088

Florida Water Services, Inc.
Attn: John Cirello
P.O. Box 609520
Orlando, Florida 32860-9520
(407) 880-0058

Gulf Utility Company
Attn: James W. Moore
P.O. Box 350
Estero, Florida 33928-0350
(941) 498-1000

North Fort Myers Utility, Inc.
Attn: A.A. Reeves
P.O. Box 2547
Fort Myers, Florida 33902
(941) 543-4000

Palm Coast Utility Corporation
Attn: James Perry
2 Utility Drive
Palm Coast, Florida 32137
(904) 446-6115

Park Manor Waterworks, Inc.
Attn: Bernice Goetz
1527 Park Manor Drive
Orlando, Florida 32825
(407) 277-1204

Rotonda West Utility Corporation
Attn: Hugh Sumrall
9494 Placida Road
Cape Haze, Florida 33946
(813) 697-1588

United Water Florida
Attn: M. Sambamurthi
P.O. Box 8004
Jacksonville, Florida 32239
(904) 725-2865

Utilities, Inc. of Florida
Attn: Don Rasmussen
200 Weathersfield Avenue
Altamonte Springs, Florida
(407) 869-1919