

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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COMMISSION  
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IN RE: Petition by Customers of )  
**ALOHA UTILITIES, INC.**, for deletion of )  
portion of territory in Seven Springs ) Docket No. 020896-WS  
Area in Pasco County, Florida. )

IN RE: Application for increase in water )  
rates for Seven Springs System in Pasco )  
County by **ALOHA UTILITIES, INC.** ) Docket No. 010503-WU

**MOTION FOR TERMINATION OF PROCEEDINGS  
AS THEY RELATE TO DELETION OF TERRITORY**

ALOHA UTILITIES, INC. ("Aloha"), by and through its undersigned counsel,  
hereby moves for an Order terminating that portion of the captioned proceeding  
relating to the issue of deletion of Aloha's service territory for which Aloha holds  
Certificates of Authorization Numbers 136-W and 097-S issued by the Florida Public  
Service Commission ("PSC"). The grounds for this Motion are that the PSC is acting

in complete violation of Florida's Administrative Procedure Act, specifically Sections  
120.60(5), 120.569 and 120.57(1), Florida Statutes, and Rule 28-107.044, Florida  
Administrative Code, and in complete derogation of Aloha's statutory and  
constitutional rights to due process of law. More specifically, the grounds for this

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Motion are that the PSC has made no record determination as to what action it proposes to take in this matter and yet is forcing Aloha to defend its valuable property rights against unknown charges, unknown facts, unknown applicable law, and an unknown result. In support of this Motion, Aloha states:

1. Aloha is the holder of Certificates of Authorization Numbers 136-W and 097-S authorizing Aloha to provide water and wastewater services in the geographical areas described in those Certificates.

2. Aloha's Certificates of Authorization Numbers 136-W and 097-S confer upon Aloha the exclusive right to provide water and wastewater services within its certificated territory. The Certificates constitute franchises and valuable fundamental property rights. "When granted, a franchise becomes a property right in the legal sense of the word." City of Mount Dora v. JJ's Mobile Homes, 579 So.2d 219, 223-224 (Fla. 5<sup>th</sup> DCA 1991). Just as such a vested franchise right may not be abrogated without providing for payment of full compensation, pursuant to Article X, Section 6 of the Florida Constitution (See Central Waterworks, Inc. v. Town of Century, Florida, 754 So.2d 814 (Fla. 1<sup>st</sup> DCA 2000)), neither may Aloha be deprived of such a property right without due process of law, pursuant to Article I, Section 9 of the Florida Constitution and Articles V and XIV of the United States Constitution. A violation of Florida's Administrative Procedure Act which results in a deprivation of

fundamental property rights constitutes both a procedural and substantive violation of due process of law.

3. Without informing Aloha of any specific violation of any statute or rule, without informing Aloha of any specific facts or conduct which would constitute a violation of any statute or rule, and without proposing any agency action at all, the PSC has ordered a formal administrative hearing on the merits of legally inadequate deletion petitions filed, NOT BY THE PSC, but by a relatively small percentage of Aloha's customers. Order No. PSC-04-0712-PAA-WS. The PSC has proposed no action with respect to those petitions. It is clear from the face of that Order, as well as from prior and subsequent events, that the PSC itself has allegedly not determined what action it proposes to take with regard to the deletion of territory from Aloha's constitutionally protected franchise rights. **Aloha submits that any formal administrative hearing in this matter is premature until such time as the PSC proposes agency action in accordance with Florida's APA. Aloha cannot be forced to be the subject of a formal administrative hearing without knowledge of the specific charges against it, the specific facts or conduct of which it is accused and the specific intended action proposed to be taken by the PSC. These elemental requirements of due process of law are fully embodied in Florida's APA, specifically Section 120.60(5), Florida Statutes, and any violation of those statutory requirements**

constitutes a violation of Aloha's constitutional right to due process of law.

4. Long before Florida's "modern" 1974 Administrative Procedure Act, which prescribes the minimal requirements for an agency to take action which affects a person's substantial interests, the Florida Supreme Court recognized that persons subject to disciplinary action by an administrative agency are entitled to a specific administrative pleading containing information clear enough to apprise the licensee of the proposed action and the facts upon which that proposed action is based. The purpose of that elemental requirement is to allow the accused a fair opportunity to prepare a defense against any attempted proof of the charges. Hickey v. Wells, 91 So.2d 206 (Fla. 1957); State ex rel. Sbordy v. Rowlett, 170 So. 311 (Fla. 1936). Such essential requirements of due process of law are totally lacking in the instant proceeding, and the failure of the PSC to afford Aloha even the most minimal of due process rights is both unlawful and highly prejudicial to Aloha.

5. Florida's Administrative Procedure Act codifies the essential requirements of due process of law and governs agency proceedings in which the substantial interests of a party are determined, including licensing. "Licensing" is defined in Section 120.52(10), Florida Statutes, as "the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license." A "license" is defined,

in part, as a “franchise, permit, certification, registration, charter, or similar form of authorization required by law.” Section 120.52(9), Florida Statutes. Thus, Aloha’s Certificates of Authorization constitute licenses within the meaning of the APA, and any agency action proposed or taken with respect to such Certificates must comply with the requirements of the APA. Like any other agency, the PSC is obligated to follow the administrative procedures required to revoke or amend Aloha’s Certificates of Authorization, under which it possesses vested property rights. See Florida Interexchange Carriers v. Beard, 624 So.2d 248 (Fla. 1993).

6. Section 120.60, Florida Statutes, specifically governs licensing by administrative agencies in Florida. Subsection (5) of Section 120.60, Florida Statutes, plainly and unequivocally provides:

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57. . . .

Any deletion of territory from Aloha’s certificated geographical service area constitutes a revocation, suspension, annulment or withdrawal of Aloha’s Certificate of Authorization, and the procedures mandated by Section 120.60(5) are applicable. Here, no administrative complaint from the PSC has been served upon Aloha. Here,

there has been no notice by the PSC of any specific facts, conduct, statutes or rules which would justify any action taken to delete territory from Aloha's Certificates. Indeed, here the "intended action" of the PSC has not been divulged. While a formal administrative "hearing" has been ordered by the PSC, Aloha has been afforded no notice of the facts, issues, or the intended agency action which, purportedly, would be the subject of such a hearing. In fact, the agency has not acted at all and has no jurisdiction to simply order a formal administrative hearing in this matter.

7. In implementation of Section 120.60, Florida Statutes, and particularly Section 120.60(5), the Administration Commission has adopted Rule 28-107.004 of the Uniform Rules of Procedure, which rule governs the PSC in licensing actions. (See Section 120.54(5)(a), Florida Statutes, and Chapter 25-40, Florida Administrative Code.) Rule 28-107.004(1), Florida Administrative Code, provides:

Prior to the entry of a final order to suspend, revoke, annul, or withdraw a license, the agency shall serve upon the licensee an administrative complaint in the manner set out in Section 120.60(5), F.S.

Subsection (2) of Rule 28-107.004 prescribes the contents of such an administrative complaint, which include:

- (a) The statutory provision(s) or sections(s) of the Florida Administrative Code alleged to have been violated.
  - (b) The facts or conduct relied on to establish the violation,
- and
- (c) A statement that the licensee has the right to request a

hearing . . .

Subsection (4) of Rule 28-107.004 provides:

The **agency complaint** shall be considered to be the petition, and the **agency** shall have the burden of proving that grounds exist which warrant the **action proposed to be taken against the licensee**.

(Emphasis supplied) Here, there has been no administrative complaint issued by the PSC against Aloha, there has been no allegation of a specific statute or rule alleged to have been violated by Aloha, there has been no statement of facts or conduct relied upon by the PSC to establish any violation of a statute or a rule, and there has been no notice of the action proposed to be taken against Aloha by the PSC. Moreover, the PSC has failed to assume its required burden of proof in this proceeding. In agency disciplinary proceedings, the agency itself is the petitioner/prosecutor and the licensee is the respondent. See Cherry Communications v. Deason, 652 So.2d 803 (Fla. 1995). Here, and as more fully described below, the PSC does not even consider itself a party in the proceeding ordered by it. Yet, the PSC's "staff," which is specifically **not** designated as a party, is allowed to "act" as a party and is directed to present its direct evidence one month **after** Aloha is required to present its case in chief. (Order No. PSC-04-0728-PCO-WS). It is neither fair nor permitted that a party be required to defend itself against unspecified charges and unspecified statutes and rules in this, or any, manner. The arbitrary and irregular procedure evidently



intended by the PSC is so lacking in fundamental due process that the procedure is fundamentally and fatally flawed.

8. Florida appellate decisions have required strict adherence to the mandates of Section 120.60(5) that licensees be afforded adequate notice, through an agency's administrative complaint, of the alleged violation, the facts or conduct constituting the violation and the intended agency action. In Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1<sup>st</sup> DCA 1996), an administrative agency's Final Order revoking an insurance agent's license was reversed because the administrative complaint, although containing reference to certain statutory provisions, did not allege any act or omission in violation of those provisions. The Court held that even though the evidence adduced at hearing might have supported a finding of a violation of those statutory provisions, the agency nevertheless violated the APA, as well as the state and federal constitutional requirements of adequate notice before property rights can be taken away. The Court concluded that an administrative complaint issued without specific allegations of fact specifying the conduct upon which disciplinary action is proposed violates the APA and due process of law. See also Phillips v. Department of Business and Professional Regulation, 737 So.2d 553 (Fla. 1<sup>st</sup> DCA 1998); United Insurance Company of America v. State, Department of Insurance, 793 So.2d 1182 (Fla. 1<sup>st</sup> DCA 2001); and Capeletti Bros., Inc. v. State, Department of Transportation,



362 So.2d 346 (Fla. 1<sup>st</sup> DCA 1978), *cert. denied*, 368 So.2d 1374 (Fla. 1979).

9. Again, here there is no administrative complaint, and consequently there is no notice of any statutes or rules alleged to have been violated, no notice of any facts or conduct which would allegedly constitute a violation of any statute or rule and no notice of what action is intended by the agency. Indeed, as discussed below, the agency itself does not know what action it intends to take. The PSC has simply “ORDERED that Docket No. 020896-WS will proceed directly to a formal hearing on the merits of the deletion petitions.” (Order No. PSC-04-0712-PAA-WS)

10. The instant Motion to Terminate Proceedings is predicated upon constitutional and APA-mandated rights of due process of law. This motion challenges the manner in which the PSC is proceeding to substantially and detrimentally affect Aloha’s franchise rights. Section 120.60(5), and its implementing Rule 28-107.004, informs agencies precisely of the manner and the procedures which must be followed in licensing actions, yet the PSC has failed to follow those mandates.

11. There is also a grave issue of the PSC’s jurisdictional authority to proceed at all in this case. Article I, Section 18 of the Florida Constitution provides that no administrative agency may impose any penalty except as provided by law. Without notice of the specific statutes or rules under which the PSC is purporting to act, the

facts or conduct alleged to have been violated by Aloha and/or the specific action intended to be taken by the PSC, Aloha is deprived of its right to challenge the PSC's substantive jurisdiction in this matter, as well as the PSC's authority to impose any particular sanction or penalty. See Willner v. Department of Professional Regulation, 563 So.2d 805 (Fla. 1<sup>st</sup> DCA 1990), *rev. denied*, 576 So.2d 295 (Fla. 1991) (a penalty can only be upheld if the legislative authority relied upon by the agency is sufficiently specific to indicate a clear legislative intent that the agency has authority to exact the penalty prescribed); Department of Environmental Protection v. Puckett Oil Co. 577 So.2d 988 (Fla. 1<sup>st</sup> DCA 1991) (agencies possess no inherent power to impose sanctions, and . . . any such power must be expressly delegated by statute). Furthermore, it is well established that any statute which authorizes a penalty, such as the deletion of territory granted by a Certificate of Authorization, is penal in nature and must be strictly construed. Jonas v. Florida Department of Business and Professional Regulation, 746 So.2d 1261 (Fla. 3d DCA 2000).

Here, the PSC's Order No. PSC-04-0712-PAA-WS, at page 12, acknowledges "that there may be limitations on this Commission's exercise of the power to delete service territory depending on the circumstances of a particular case." On the same page, the PSC states:

This is nevertheless a case of first impression regarding whether

the Commission can or should delete territory based on concerns about finished water quality when that water appears to meet all of DEP's standards for drinking water quality. Thus, we find that a Commission decision not to dismiss [the deletion petitions] based on this ground [subject matter jurisdiction] should not preclude Aloha from raising an issue in the case regarding the extent of the Commission's territory deletion authority.

(Bracketed language added.) However, without any notice of the specific statutes or rules alleged to have been violated, without any notice of the facts or conduct relied upon by the PSC to establish the alleged violation, and without any notice of the action intended to be taken by the PSC, it is impossible for Aloha meaningfully to challenge the extent of the PSC's territory deletion authority.

12. The PSC's utter failure to comply with the requirements of Section 120.60(5), Florida Statutes, and Rule 28-107.004, Florida Administrative Code, thereby depriving Aloha of basic, elemental concepts of due process of law guaranteed by the Florida and United States Constitutions, by itself requires a termination of the instant proceeding as it relates to any attempted deletion of the service areas designated in Aloha's Certificates of Authorization. The absolute lack of due process and illustrations of the moving target against which Aloha is being required to prepare and ultimately present its defenses and legal arguments is further and aptly demonstrated by events both preceding and following the PSC's order to proceed to formal hearing "on the merits of the petitions filed by customers for

deletion of territory.” It is clear that Aloha is being deprived of all semblance of fundamental principles of due process of law.

13. Prior to entry of the Order directing a formal hearing on the deletion petitions, the PSC scheduled and conducted a “customer service hearing,” the stated purpose of which was “to fully consider the audit report, **not in order to set the matter directly for a full evidentiary hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes.**” (Emphasis supplied) (Order No. PSC-04-0254-PSC-WS, page 4) At that hearing held on April 8, 2004, over Aloha’s stated objections (Transcript, April 8, 2004 hearing, pages 13-15), Aloha was not permitted an opportunity to engage in cross-examination, to present direct testimony, to object to sworn testimony or to offer exhibits. In fact, Aloha was not allowed to participate in the hearing in any manner whatsoever. The April 8, 2004 hearing was convened for the purpose of obtaining the customers’ views on the audit report and the implications of its findings. However, as pointed out by the PSC in its own July 20, 2004, Order No. PSC-04-0712-PAA-WS, “the customers generally did not address the specifics of the audit report and the proposed treatment options. Instead, virtually all of the customers stated that they wished to be deleted from Aloha’s service area in order to obtain service from Pasco County.” Although Aloha was refused the right to participate in that hearing, either through cross-examination or the presentation of its

own evidence, the PSC relied upon testimony taken at that April 8, 2004 hearing, as well as letters received after that hearing, as the basis for its order directing “a formal hearing on the merits of the deletion petitions.”

14. On July 27, 2004, the PSC entered an Order Establishing Procedure (Order No. PSC-04-0728-PCO-WS) for the “formal administrative hearing.” That Order fully demonstrates that the PSC is continuing to ignore the clear requirements of the APA and constitutional requirements of due process of law. After acknowledging its prior July 20, 2004 Order setting this case “for a formal administrative hearing on the merits of the petitions filed by customers of Aloha Utilities, Inc. (Aloha or utility) for deletion of territory,” the Order Establishing Procedure then states that “the scope of this proceeding shall be based upon the issues raised by the **parties and Commission staff (staff) up to and during the prehearing conference, unless modified by the Commission.**”<sup>1</sup> The fact that the PSC “staff” is not considered a “party,” but is allowed to fully participate as a “party,” is further demonstrated by the following statements: “All parties in this docket shall file a prehearing statement. Staff will also file a prehearing statement.” That Order dictates the following procedure:

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<sup>1</sup>The Commission’s reservation unto itself, of the right to “modify” the issues “raised by the parties and the Commission Staff” creates an even greater burden upon Aloha as it attempts to prepare and ultimately present its defenses and legal arguments in this case.

Petitioners' direct testimony & exhibits	Nov. 18, 2004
Company/Intervenors direct testimony & exhibits	Dec. 16, 2004
Staff's direct testimony & exhibits	Jan. 13, 2005
Customer Service Hearings	Jan. 27 & 28, 2005
Rebuttal testimony & exhibits	Feb. 3, 2005
Prehearing statements	Feb. 10, 2005
Discovery cut-off date	Feb. 22, 2005
Prehearing Conference	Feb. 24, 2005
Hearing	March 8-10, 2005
Briefs	April 7, 2005

As noted above, the “scope” (to wit: the issues) of this proceeding are not even to be identified until the Prehearing Conference, scheduled to occur only twelve days before the first day of the formal hearing, and long after the dates upon which the prefiled direct testimony and exhibits of the “petitioners” (who are not the PSC or its staff) and Aloha are due. Indeed, the “staff’s” direct testimony and exhibits are not due until one month after Aloha’s due date for the filing of its direct testimony and exhibits, and rebuttal testimony and prehearing statements are due weeks before the “scope of the proceeding” is determined at the prehearing conference. The discovery cut-off date occurs two days **prior to** the prehearing conference at which the issues of this proceeding will, for the first time, presumably be identified. It is also at this point, the prehearing conference scheduled after the close of discovery, that additional, “all other known” exhibits not attached to the prefiled direct testimony will be marked for identification. In between the filing of direct testimony and

exhibits, and only six days prior to the required filing of “rebuttal testimony and exhibits” is a “Customer Service Hearing.” The purpose of such a hearing, the effect of “testimony” offered at such a hearing and the extent to which Aloha will be permitted to participate in such a hearing are all unknown. Likewise, both the nature of and the “party” from whom rebuttal testimony will be allowed are unknown.

The Order Establishing Procedure, standing by itself, fully demonstrates that the PSC is ignoring Section 120.60(5) and Rule 28-107.004, and that Aloha is being deprived of due process of law. As noted above, there is no administrative complaint, or any other type of “charging” document, containing the statutes or rules alleged to have been violated by Aloha, the facts or conduct relied upon to establish any alleged violation or the action intended by the PSC. The Order Establishing Procedure confirms that Aloha is not to learn the basis of the “allegations” against it, or the intended action, until (if even then) twelve days prior to the scheduled hearing, long after Aloha has submitted its direct and rebuttal testimony and exhibits, and two days after discovery has closed. While the PSC is the sole entity with authority to act upon Aloha’s Certificates, the PSC clearly is not assuming the burden of proving that grounds exist which warrant the undisclosed action proposed to be taken against Aloha. Indeed, neither the PSC nor its “staff” is even considered a “party” in the formal proceeding convened to determine whether Aloha’s Certificates of



Authorization should be revoked, annulled or withdrawn. The customers, designated as “petitioners” in this proceeding, simply have no legally recognized role in this “formal proceeding” whatsoever (except, perhaps, as witnesses called by the PSC or Aloha, the only proper parties herein, to support their respective positions on clearly designated issues). A greater deprivation of due process of law can hardly be envisioned.

15. A further example of the utter lack of due process being foisted upon Aloha and the denial of notice, Aloha’s ability properly to defend and any specification of “intended agency action” occurred on September 30, 2004. On that date, a Senior Attorney from the PSC’s Office of General Counsel scheduled an informal meeting between Commission staff, Aloha and customers for October 13, 2004, for the purpose of discussing an attached “preliminary list of issues for the March 8 - 10, 2005 hearing on the petitions for deletion of territory.” Among the preliminary list of legal issues were the following: “Does the Commission have the authority to require Aloha to sell or lease its facilities used to provide service to the customers in the area at issue?” “Does the Commission have the statutory authority to delete the territory at issue based upon a finding of constructive abandonment?” Among the preliminary factual issues listed were: “What portions of Aloha’s Seven Springs service territory are included within the three requests for deletion of

territory?” “If a decision is made to delete any portion of the water service area at issue, should the corresponding wastewater service area also be deleted from Aloha’s service territory?” That list of legal and factual issues goes far beyond any issues raised in the “petitions” filed by customers, and raises for the first time issues concerning a potential PSC requirement that Aloha sell or lease (to an unknown entity) its facilities used to provide service to customers; whether Aloha has constructively abandoned its service territory (when no such authority to find “constructive” abandonment is vested in the PSC); and, even further out of the blue, whether Aloha’s wastewater service territory should also be deleted. Once again, it is clear that Aloha is being afforded no due process of law in this proceeding.


16. Final examples of the utter lack of due process of law being afforded to Aloha in this proceeding are found in discovery requests propounded by the PSC “staff,” which is expressly designated as a non-party in this proceeding (thus bringing into serious question “staff’s” authority even to engage in discovery or present evidence at all). In Interrogatories dated October 5, 2005, from the PSC “staff” to Aloha, Aloha was asked to provide a list of the names and addresses of all its **wastewater** customers in the Seven Springs service area. Wastewater has never been an issue during any phase of this “proceeding.” In the same set of interrogatories, Aloha was further requested to “plot, on a system map, the locations

of all customer addresses listed on the three deletion petitions at issue in this proceeding.” In other words, although the burden of proving its case and defining the action proposed to be taken is upon the PSC, the PSC “staff” is attempting to shift that burden to Aloha. The fact that the PSC itself does not know what violations may be at issue, what acts on the part of Aloha may be at issue and/or what action is proposed in this proceeding, in which Aloha is being afforded no proper opportunity to defend, is further evident from Interrogatories propounded by the PSC “staff” to the “Citizen Petitioners” by and through the Office of Public Counsel (“OPC”). The PSC “staff” has asked the OPC to describe the territory which the petitioners request be deleted from Aloha’s service area. The “staff” has asked the OPC whether the Petitioners are also seeking deletion of any portion of Aloha’s wastewater service area, and, if so and inexplicably, what utility in the area would be capable of providing wastewater service if the territory were deleted. Again, it is clear that the Agency, the only entity capable of taking action against Aloha’s valuable property rights, has not complied with the APA’s mandate to give adequate notice of the charges against Aloha, and has failed to provide any meaningful opportunity to Aloha to be heard or to defend itself in this constantly changing “proceeding” to revoke, annul or withdraw Aloha’s Certificates of Authorization. This constitutes a total violation of all essential elements of due process of law.

17. Aloha expressly reserves any and all rights and causes of action which may exist now or in the future under the federal Constitution and laws of the United States from resolution herein.

WHEREFORE, Aloha moves that those portions of the above-captioned docket relating to any deletion of the service territories authorized by Certificates of Authority Numbers 136-W and/or 097-S be immediately terminated.

Respectfully submitted this 9<sup>th</sup>  
day of November, 2004, by:

  
\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or via hand delivery (indicated by \*) to the following on this 9th day of November, 2004:

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