

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Florida Public Service Commission,)
Petitioner)
v.)
Aloha Utilities, Inc.,)
Respondent)

DOCKET No. 050018-WU

**ALOHA UTILITIES, INC.'S
MOTION FOR CONTINUANCE**

Aloha Utilities, Inc. ("Aloha"), by and through the undersigned counsel, and pursuant to Rule 28-106.210, Florida Administrative Code, hereby files this Motion for Continuance and in support thereof would state and allege as follows:

1. On May 3, 2005, the Commission rejected the recommendation of "advisory staff" and "prosecutorial staff" and elected not to abate this matter. Within three business days, the Prehearing Officer had established an August 15, 2005 trial date for this case without any input from, or consideration of, the schedule of Aloha, its counsel, its expert witnesses, or the due process considerations appropriate for a case in which a regulatory agency has noticed its intent to take millions of dollars worth of property from a regulated entity. It is apparent that the Prehearing Officer's decision was made only after consultation, *ex parte*, with "advisory staff" and with deference only to the Commission's own schedule.

2. It is entirely inappropriate to consult with one party in this case before setting this matter for trial and to totally ignore the other party in this case. In this case, the Commission is the party which has initiated this administrative proceeding. There can be no doubt, despite whatever fictions the Commission had constructed to make it appear otherwise, that the schedule of the Commission, as a party, was given full

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consideration by the Prehearing Officer before this matter was set for trial, but that Aloha was given no such consideration or consultation. Such a unilateral establishment of the hearing and other controlling dates in this case, with no consultation with Aloha but after consultation with the Commission, is improper, is a violation of Aloha's right to due process, and is an inherently unfair exercise of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

3. Undersigned counsel is scheduled to go to trial in the case of *Miami Corporation v. City of Titusville and St. Johns River Water Management District*, DOAH Case No. 05-0344, for two full weeks on June 20, 2005. Currently, the parties to that case are engaging in discussions which will result in the scheduling of 15 to 20 depositions being held in early June, in various locations, in that proceeding. The first day after that proceeding ends (after the fourth of July holiday) is July 5, 2005. That is a mere eight days before Aloha's direct testimony and exhibits are due. Additionally, of the personnel whose involvement in this case is absolutely necessary, of whom Aloha is presently aware, Aloha's consulting engineer, Dave Porter, is unavailable from July 23, 2005 to August 7, 2005. Co-counsel for Aloha, Marty Deterding, is unavailable from July 21, 2005 to August 3, 2005. The setting of the controlling dates in conflict with the preexisting schedules of counsel for Aloha and Aloha's expert witness is an inherently unfair exercise of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

4. The Procedure Order contemplates that the Commission and the intervenors will file their direct testimony on June 10, 2005. A little more than a month later on July 13, 2005, Aloha is directed to file its only responsive testimony in this case. It is unknown how the Commission, much less the multiple intervenors, will seek to

support its case against Aloha, assuming, arguendo, the intervenors can have a “case” for disciplinary action against Aloha. Indeed, the Order Establishing Procedure states that the scope of the proceeding will be based upon “issues raised by the parties’ and Commission staff up to and during the prehearing conference.” A myriad of activities involving the hiring of experts, the creation of exhibits, a motion practice directed at the Commission’s and intervenors’ direct testimony, and directed to matters unknown (again, because this testimony has not yet been seen) must be squeezed in to this approximately one month period. One month is a totally inadequate time for Aloha to defend itself against the Commission’s prosecutorial effort. The time frame allowed for Aloha’s direct testimony (set by the Prehearing Officer with due consideration of this schedule of only one party, the Commission) and with no consideration or consultation with Aloha, is a deprivation of due process and is an inherently unfair exercise of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

5. The one month period between the Commission’s and intervenors’ direct testimony and exhibits, and the established filing date for Aloha’s direct testimony and exhibits, not only does not leave enough time for all of the matters mentioned above, but leaves an inadequate time for discovery and deposition. No Interrogatories, Request to Produce, or Request for Admission could be served after review of the Commission’s and intervenors’ direct testimony in such a manner so that the responses thereto could be received in a timely fashion so as to be useful in the preparation of Aloha’s direct case. The establishment of the schedule in this matter, such that Aloha would be unable to engage in effective and useful discovery, and is an inherently unfair exercise of the

strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

6. Unlike the procedure routinely employed by the federal courts, the state courts, and the Division of Administrative Hearings, the Commission does not allow oral arguments on motions, does not allow motions to be heard in the ordinary course of business before the same finders of fact who will try the case and, in fact, seems to dispose of motions only upon time frames which suit the whim of the Commission (a party in this case), or the particular Prehearing Officer.¹

7. This process, combined with the restrictive controlling dates set forth in the Order Establishing Procedure, will deprive Aloha of the ability to engage in effective and timely motion practice directed to this proceeding, or to the Commission's testimony, or to the intervenors' testimony, or to discovery issues, or to the other normal matters which are routinely the subject of pretrial motions, and therefore effectively deprives Aloha of due process. The setting of the controlling dates in this proceeding, and the Commission's unusual way of handling motion practice, and is an inherently unfair exercise of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

8. The Order Establishing Procedure is replete with directives, declarations and holdings that may either become the subject of a motion practice by Aloha, or an appeal to the First District Court of Appeal. The Controlling Dates do not allow the time for effective motion practice directed to or appeal of the Order Establishing Procedure in this case. The establishment of the Controlling Dates, which effectively deny Aloha due

¹The disposition of the Motion to Abate in this case, which took 49 days, is an excellent example of this "procedure".

process and an ability to engage in such a motion practice or appeal, is a natural extension of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

9. This case, because of the long duration of this controversy, the millions of dollars at stake, and its unique nature under the Florida Administrative Procedure Act is likely to be one of the most intensely and aggressively litigated cases in the history of the Commission. Aloha is ready, willing and able to devote the substantial resources necessary to engage in aggressive litigation as is appropriate to preserve its certificated territory and to repel this attack on its business and property by a regulatory body playing the dual role of judge and prosecutor. The Controlling Dates, in that regard, clearly benefit the party who initiated this proceeding (the Commission), and clearly prejudice the party who is in a defensive posture in this proceeding (Aloha). It would be irrational, unreasonable and naive for Aloha to assume that these Controlling Dates, which reflect an extraordinarily tight schedule when compared to most Commission proceedings (much less comparable Commission proceedings), are anything other than an extension of the unfair advantage the Commission enjoys as both judge and prosecutor in this case. The Commission should not abuse its position as the finder of fact in this case, and the establishment of the Controlling Dates in the Order Establishing Procedure represents just such an abuse. It is no surprise, to anyone, that if a party to this case (the Commission) has the authority to establish Controlling Dates which place it in a better position to defeat the opposition than it would otherwise be in, that this party to the case will exercise such authority. What is surprising is that the Commission thinks it can engage in precisely that conduct under the Florida Administrative Procedure Act, the Florida Constitution, and the United States Constitution. The

Controlling Dates in the Order Establishing Procedure will not cause this case to proceed more quickly, but in fact will have the effect of delaying any final resolution of these matters, because of the clearly appealable issues presented by the Commission's abuse of its dual role in this proceeding.

10. Five days as the time set aside for this hearing will be entirely inadequate. However, the Commission's continuance of any unfinished portion of this proceeding until subsequent dates cannot remedy the denial of due process that the Controlling Dates represent. That is because no matter how long the proceeding is eventually strung out by such a continuation (which will assumably be set with deference only to the Commission's schedule), the prefiled testimony will control the evidence in the case and that prefiled testimony will still have been produced under the Controlling Dates. The establishment of five days for the hearing, and less than a month for the filing of briefs (with total disregard for how long transcripts take to be produced) is a deprivation of Aloha's due process, and is a natural extension of the strategic advantage the Commission enjoys in the dual role of judge and prosecutor in this case.

11. This matter should not be set until Controlling Dates can be established which allow Aloha at least 90 days to respond to the collective testimony of the Commission and the intervenors. Any time less than 90 days will deprive Aloha of the ability to engage in effective discovery, to hire the appropriate experts, to engage in the appropriate motion practice directed to the status of the case to properly respond to the Commission's and intervenors' testimony, and to adequately prepare its defense.

12. It has been reported in the Florida press that Commissioner Davidson is leaving the Commission. Commissioner Davidson's departure leaves an even number of Commissioners on the panel in this case. An even number of Commissioners on the

panel, which could result in a tie vote after hearing, is not in the interest of any party. For this reason alone, the matter should be continued until a fifth Commissioner has been duly placed into the position which Commissioner Davidson will vacate.

13. This Motion for Continuance should not be considered as a waiver of Aloha's objections to other portions of the Order Establishing Procedure, particularly those portions regarding the delineation of "issues."

WHEREFORE, and in consideration of the above, Aloha Utilities, Inc. respectfully requests that the Controlling Dates in the Order Establishing Procedure be continued, and that the Prehearing Officer, after consultation with the parties, reset this matter on a schedule that has due consideration for all of the parties, not just the schedule of one party, and which affords the appropriate due process to all parties in this case.

Respectfully submitted this 13th
day of May, 2005, by:



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and U.S. Mail this 13th day of May, 2005, to:

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