

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes.

DOCKET NO. 050018-WU
ORDER NO. PSC-05-0204-SC-WU
ISSUED: February 22, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

SHOW CAUSE ORDER

BY THE COMMISSION:

BACKGROUND

Aloha Utilities, Inc. (Aloha or utility) is a Class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas: Aloha Gardens and Seven Springs. Approximately 1,800 customers in the Seven Springs area filed petitions in Docket No. 020896-WS for deletion of territory from Aloha's certificate of authorization due to alleged poor quality of service. By Order No. PSC-05-0076-FOF-WS, issued January 21, 2005, in that docket, this Commission granted Aloha's Motion for Termination of Proceedings as They Relate to Deletion of Territory, and closed the docket.

The four deletion petitions related to the following areas included within Aloha's Certificate No. 136-W: Trinity (south of Mitchell Boulevard and east of Seven Springs Boulevard); Riviera Estates; Villa del Rio (also known as Riverside Villas); and Riverside Village Unit 4. This order addresses whether Aloha should be required to show cause as to why those portions of its certificated territory should not be deleted from its Certificate No. 136-W for failure to provide sufficient service consistent with the reasonable and proper operation of the utility system in the public interest, in apparent violation of section 367.111(2), Florida Statutes. We have jurisdiction pursuant to sections 367.045, 367.111 and 367.161, Florida Statutes.

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FINDINGS OF FACT

On or about September 9, 1996, testimony was first taken by this Commission of Aloha's customers in the Seven Springs area concerning poor quality of service provided by Aloha, due, in large part, to a "black water" problem. Hundreds of customers attended the hearing. By Order No. PSC-97-0280-FOF-WS, issued March 12, 1997, in Docket Nos. 950615-SU and 960545-WU, this Commission found that "it is obvious that the customers are dissatisfied with the quality of water which Aloha is providing, have been unhappy with the water for many years, and do not trust the utility." By that same order, we noted that even though Aloha is in compliance with state and federal drinking water standards, customers from many areas within Aloha's service territory have stated that their water is aesthetically objectionable, smells bad, tastes bad, and in some cases reacts with copper plumbing, turning the water black. We found Aloha's quality of water service to be unsatisfactory and required Aloha to evaluate the best available treatment technologies for removal of hydrogen sulfide from its water to address the "black water" problem.

On or about March 29, 2000, testimony was again taken by this Commission of Aloha's customers in the Seven Springs area concerning poor quality of service provided by Aloha. Again, hundreds of customers attended the hearing. Approximately 50 customers testified about black or discolored water, odor/taste problems, low pressure, and/or deposits/sediments in the water. By Order No. PSC-00-1285-FOF-WS, issued July 14, 2000, in Docket No. 960545-WS, we found the overall quality of Aloha's service to be marginal and required Aloha "to immediately implement a pilot project using the best available treatment alternative to enhance the water quality and to diminish the tendency of the water to produce copper sulfide in the customers' homes." By Order No. PSC-00-1628-FOF-WS, issued September 12, 2000, in Docket No. 960545-WS, we clarified that Aloha "shall immediately implement a pilot project using the best available treatment alternative to remove the hydrogen sulfide, thereby enhancing the water quality and diminishing the tendency of the water to produce copper sulfide in the customers' homes."

On or about January 9, 2002, testimony was again taken by this Commission of Aloha's customers in the Seven Springs area concerning poor quality of service provided by Aloha. Again customers testified about the "black water" problem, as well as about dissatisfaction with the taste and odor of the water, insufficient water pressure, and Aloha's poor attitude towards its customers. By Order No. PSC-02-0593-FOF-WU, issued April 30, 2002, in Docket No. 010503-WU and affirmed on appeal by the First District Court of Appeal (rate case order), we found that the methodology chosen by Aloha to alleviate the "black water" problem, including the use of a polyphosphate corrosion inhibitor along with the conversion of hydrogen sulfide to sulfate or elemental sulfur through chlorination, had not proven to be an adequate remedy, and required Aloha to take additional measures to correct the problem.

We also set Aloha's rates at the minimum of the range of return on equity "because of the overwhelming dissatisfaction of Aloha's customers due to the poor quality of the water service and their treatment by the utility in regards to their complaints and inquiries," and reduced the amount allowed for salaries and benefits of the Aloha's President and Vice-President by 50%

upon finding that “the continuing problems with ‘black water’ over at least the last six years, the customers’ dissatisfaction with the way they are treated, the poor service they receive from the utility, and the failure of the utility to aggressively and timely seek alternate sources of water supply reflect poor management of this utility.” Moreover, we found that had Aloha committed itself to a more proactive approach to the “black water” problem, it could have prevented the situation from becoming as bad as it is and possibly could have eliminated it entirely. We again found the overall quality of service provided by Aloha to be unsatisfactory, and required the utility to implement, within 20 months, a treatment process for all of its wells, starting with well nos. 8 and 9, that is designed to remove at least 98% of the hydrogen sulfide in the raw water. Because Aloha appealed the rate case order, the requirement to complete the improvements for removal of 98% of the hydrogen sulfide within 20 months was stayed. The new date to implement a solution to the “black water” problem became, and remains, February 12, 2005.

On April 8, 2004, this Commission conducted two more customer service hearings to obtain customer views on an independent audit report of Aloha’s processing plant and methodology that had been requested by the first deletion petition filed in Docket No. 020896-WS. Approximately 200 customers attended each session and numerous customers testified. Virtually all of the customers elected not to address the specifics of the audit report and the treatment options proposed therein, and instead stated that they wished to be deleted from Aloha’s service area in order to obtain service from Pasco County due to the continuing “black water” problem and the poor quality of service they receive. Many carried picket signs into the hearing room which read “Better Water Now!”

By Order No. PSC-04-0712-PAA-WS, issued July 20, 2004, in Docket Nos. 020896-WS and 010503-WU, we found that the removal of 98% of the hydrogen sulfide standard appears not to be attainable for all of Aloha’s wells, due to low concentration of hydrogen sulfide in some of the wells. We therefore proposed to modify that standard to require that Aloha “make improvements to its wells 8 and 9 and then to all of its wells as needed to meet a goal of 0.1 mg/L of sulfides in its finished water as that water leaves the treatment facilities of the utility,” and required the implementation of certain measures to assure compliance with this goal.

Aloha has chosen to implement a process involving the introduction of hydrogen peroxide (H₂O₂) to combat the “black water” problem, which is a process suggested in the audit report. However, while H₂O₂ has been used for the treatment of drinking water, it has not been used for the purpose of reducing hydrogen sulfides in drinking water. According to Aloha and the independent auditor, the science suggests that this methodology will be effective for that purpose, but the science has not been proven in a full-scale utility operation. Numerous customers have expressed concern about the experimental nature of the H₂O₂ treatment methodology, and certain customers have protested portions of our proposed modification of the rate case order as a result of those concerns. A hearing to resolve the protest is scheduled to commence on March 8, 2005.

Additionally, our staff has mailed a survey to the customers who reside, or own property, in the four areas that customers have petitioned for deletion of territory, asking whether those customers are in favor of the Commission approving the deletion petitions and whether they have

a black water problem at their premises. The survey response rate is approximately 49% to date. The results of the survey preliminarily show that 81% of the respondents favor deletion, 9% do not favor deletion, and 10% do not know whether they favor deletion or not. 64% of the respondents state that they have a black water problem at their premises. 59% of the respondents who indicated that they did not have a black water problem at their premises still favored deletion, indicating a more systemic problem with the utility than just a "black water" problem. 59% of the respondents provided additional comments. Of these, 63% complained of other quality of service issues, including the quality of the water, water pressure, and customer service, and 14% stated that they have found it necessary to purchase bottled water or filters, or they have abandoned the use of their saunas or bathtubs. Only 2% of the comments provided by Aloha's customers indicated that they had no problems with Aloha's service.

Nineteen customers who had petitioned for deletion of territory prefiled testimony in Docket No. 020896-WS on November 18, 2004, in accordance with the Order Establishing Procedure issued in that case. In their prefiled testimony, some customers stated that they have experienced pinhole leaks in their copper piping, and many stated that they believe the customer service from Aloha is not satisfactory. Many of these customers stated that they have water softeners and/or water filters. All nineteen customers who prefiled testimony in that case stated that they experience poor water quality and wish to receive water from another utility.

CONCLUSIONS OF LAW

Section 367.045(5)(a), Florida Statutes, provides, in relevant part, that

[t]he commission may grant or amend a certificate of authorization, in whole or in part or with modifications in the public interest, but may not grant authority greater than that requested in the application or amendment thereto and noticed under this section; or it may deny a certificate of authorization or an amendment to a certificate of authorization, if in the public interest.

Section 367.045(6), Florida Statutes, provides that "[t]he revocation, suspension, transfer, or amendment of a certificate of authorization is subject to the provisions of this section. The commission shall give 30 days' notice before it initiates any such action." Read together, these statutory provisions clearly provide that this Commission may amend a certificate of authorization to delete territory, if in the public interest, so long as it provides 30 days' notice before initiating the action. We have provided the requisite notice.

Section 367.111(2), Florida Statutes, provides, in relevant part, that each utility shall provide service that is not less sufficient than is consistent with the reasonable and proper operation of the utility in the public interest. The relevant inquiry is whether there are facts to show that Aloha has violated this statutory standard such that it is in the public interest for this Commission to delete the territory that is insufficiently served. Although it appears that Aloha is in compliance with the drinking water standards imposed by the Department of Environmental

Protection (DEP), the facts and findings set forth above support the initiation of a deletion proceeding against Aloha.

In determining whether it is in the public interest to amend a certificate of authorization, this Commission addresses, among other things, the financial and technical ability of the utility to provide adequate service. As discussed above, we have been plagued for many years with complaints from numerous of Aloha's customers concerning the quality of water that Aloha provides, and questioning Aloha's ability to provide adequate service.

Section 367.161, Florida Statutes, authorizes us to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or have willfully violated any Commission rule, order, or provision of Chapter 367, Florida Statutes, or the Commission may, for any such violation, amend, suspend, or revoke any certificate of authorization issued by it. In failing to provide service that is not less sufficient than is consistent with the reasonable and proper operation of the utility in the public interest, Aloha's act was "willful" within the meaning and intent of section 367.161, Florida Statutes. In Order No. 24306, issued April 1, 1991, in Docket No. 890216-TL, titled In Re: Investigation Into The Proper Application of Rule 25-14.003, Florida Administrative Code, Relating To Tax Savings Refund For 1988 and 1989 For GTE Florida, Inc., the Commission having found that the company had not intended to violate the rule, nevertheless found it appropriate to order it to show cause why it should not be fined, stating that "[i]n our view, 'willful' implies an intent to do an act, and this is distinct from an intent to violate a statute or rule." *Id.* at 6. Additionally, "[i]t is a common maxim, familiar to all minds that 'ignorance of the law' will not excuse any person, either civilly or criminally." Barlow v. United States, 32 U.S. 404, 411 (1833).

The findings of fact outlined above show that: 1) Aloha has violated its statutory obligation under section 367.111(2) to provide sufficient water service by providing water with unacceptable color, taste and odor, by failing for over eight years to take proactive steps to remedy the situation, and by failing to improve upon customer relations; and 2) it is in the public interest for this Commission to delete the following insufficiently served areas from Aloha's Certificate No. 136-W, contingent upon provisions being made for an alternative service provider to be in place: Trinity (south of Mitchell Boulevard and east of Seven Springs Boulevard); Riviera Estates; Villa del Rio (also known as Riverside Villas); and Riverside Village Unit 4. The Commission reserves the option to impose a monetary penalty in addition to or in lieu of revocation if it concludes after hearing that such action is in the public interest. Therefore, we find that a show cause proceeding is warranted at this time.

Pursuant to sections 367.161 and 120.60, Florida Statutes, Aloha is hereby ordered to show cause, in writing, within 21 days, why the areas encompassing Trinity (south of Mitchell Boulevard and east of Seven Springs Boulevard); Riviera Estates; Villa del Rio (also known as Riverside Villas); and Riverside Village Unit 4 should not be deleted from its Certificate No. 136-W for failure to provide service that is not less sufficient than is consistent with the reasonable and proper operation of the utility in the public interest, in apparent violation of section 367.111(2), Florida Statutes, and why a monetary penalty should not be imposed for such violation.

Aloha's response to the show cause order must contain specific allegations of fact and law and comply with the requirements of Rule 28-107.004(3), Florida Administrative Code. Should the utility file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, further proceedings will be scheduled in this matter before a final determination is made. A failure to file a timely written response shall constitute an admission of all facts herein alleged and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Aloha has the right to request a hearing to be conducted in accordance with sections 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses, and to have subpoena and subpoena duces tecum issued on its behalf if a hearing is requested.

It is, therefore,

ORDERED that Aloha Utilities, Inc., is hereby ordered to show cause, in writing, within 21 days, why the areas encompassing Trinity (south of Mitchell Boulevard and east of Seven Springs Boulevard); Riviera Estates; Villa del Rio (also known as Riverside Villas); and Riverside Village Unit 4 should not be deleted from its Certificate No. 136-W for failure to provide service that is not less sufficient than is consistent with the reasonable and proper operation of the utility in the public interest, in apparent violation of section 367.111(2), Florida Statutes, and why a monetary penalty should not be imposed for such violation. It is further

ORDERED that Aloha Utilities, Inc.'s, response to this show cause order must contain specific allegations of fact and law. Should Aloha file a timely written response that raises material questions of fact and makes a request for a hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, a further proceeding will be scheduled before a final determination of this matter is made. A failure to file a timely written response shall constitute an admission of all facts herein alleged and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. It is further

ORDERED that any response to this Order shall be filed with the Director, Division of the Commission Clerk and Administrative Services within 21 days of the date of issuance of this Order. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 22nd day of February, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any person whose substantial interests are affected by this show cause order may file a response within 21 days of issuance of the show cause order as set forth herein. This response must be received by the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on March 15, 2005.

Failure to respond within the time set forth above shall constitute an admission of all facts and a waiver of the right to a hearing and a default pursuant to Rule 28-106.111(4), Florida Administrative Code. Such default shall be effective on the day subsequent to the above date.

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If an adversely affected person fails to respond to this order within the time prescribed above, that party may request judicial review by the Florida Supreme Court in the case of any electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the effective date of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure.