

STATE OF FLORIDA

Commissioners:  
E. LEON JACOBS, JR., CHAIRMAN  
J. TERRY DEASON  
LILA A. JABER  
BRAULIO L. BAEZ  
MICHAEL A. PALECKI



DIVISION OF LEGAL SERVICES  
NOREEN S. DAVIS  
DIRECTOR  
(850) 413-6199

**Public Service Commission**

February 14, 2001

The Honorable Mike Fasano  
8217 Massachusetts Avenue  
New Port Richey, Florida 34653

RE: Your letter dated February 2, 2001 to Chairman Jacobs concerning Docket No. 991643-SU - Aloha Utilities, Inc.

Dear Representative Fasano:

Because the Chairman is assigned to this case, and there is a possibility of an appeal, the Chairman's Office directed the Division of Legal Services to respond to your letter.

In your letter, you express concern about a specific sentence contained in a letter from the President of Aloha Utilities, Inc., to the customers. Specifically, you took issue with the following sentence:

If Representative Fasano files an appeal of the FPSC's order, the process will potentially take many months and require Aloha to expend hundreds of thousands of your dollars to comply with the appeals process, all of which costs will ultimately have to be incorporated in further increases in customer rates.

In regards to this sentence you stated various concerns and asked the following three questions:

1. Is there any truth to this statement, or is it so exaggerated as to be a prevarication?
2. If Aloha's statement is inaccurate or so exaggerated as to be of questionable veracity, is the PSC concerned when a regulated utility distributes such misinformation?
3. Are there any ethical concerns to be considered?

I will attempt to respond to your concerns and answer the above-noted questions in the order that they appear in your letter.

DOCUMENT NUMBER - DATE  
02149 FEB 15 01  
FPSC-RECORDS/REPORTING

With regard to your first question, you had several concerns. First, you appear to question whether the Commission could possibly allow hundreds of thousands of dollars in appellate rate case expense. In Order No. PSC-94-0738-FOF-WU, issued June 15, 1994, in Docket No. 900386-WU, the Commission found that Sections 367.081(2)(b) and (7), Florida Statutes, implicitly authorize "that the Commission award reasonable appellate rate case expense." In that case, Sunshine Utilities had requested appellate rate case expense of \$36,579, and the Commission approved 60% of the request, or \$21,947. The Commission applied the "lodestar" test in approving that amount, noting that the utility had prevailed on three of its five issues on appeal.

An important distinction that must be noted is that it was the utility that filed that appeal, i.e., the utility chose to bring these further proceedings. When a utility files an appeal, the Commission uses the "lodestar" test to determine the reasonableness of the requested appellate rate case expense. However, when an intervenor files the appeal, the Commission generally allows those costs that it deems reasonable and prudent, and the costs are not solely dependent on the utility prevailing on appeal.

As for the costs incurred by a utility for an appeal, this varies greatly from case to case. In an appeal involving 127 systems of Florida Water Services Corporation, in Dockets Nos. 920199-WS and 950495-WS, the utility requested that it be awarded \$459,231 in appellate rate case expense. This was a very large rate case, and the appeal involved very complex issues. Because of evidentiary problems, the Commission determined that the utility had only justified \$100,000 of that expense, and that amount was approved by the Commission. In the rate case of Florida Cities Water Company, North Ft. Myers Division (a wastewater rate case), in Docket No. 950387-SU, the Commission approved a total of \$154,117 for expenses incurred for the appeal and subsequent remand proceedings. However, this expense did not even include the appellate attorneys' fees of \$74,648.14, because those fees were awarded directly against the Commission and were paid by the Commission. The North Ft. Myers Division served 2,559 customers, which equated to 4,590 equivalent residential connections. Thus, that system was a little smaller than the Seven Springs wastewater division of Aloha.

As to whether appellate rate case expense will be approved herein and incorporated into a utility's rates, the utility must first request approval of the expense and then show that the expense was reasonable and prudently incurred. The utility can do this in the same proceeding in which the expenses arise, or the utility can make the request in a subsequent rate case or limited proceeding. Depending on the complexity and magnitude of the case, appellate rate case expense and costs subsequent to an appeal can range from a few thousand dollars to a few hundred thousand dollars, and can ultimately be incorporated into the customers' rates. Pursuant to Section 367.0816, Florida Statutes, rate case expense to be recovered through rates "shall be apportioned for recovery over a period of 4 years."

The Honorable Mike Fasano  
Page 3  
February 14, 2001

Based on the above and in response to your first question, I do not believe that the utility's claim "is so exaggerated as to be a prevarication." As to your second question, the Commission is always concerned about a utility's customer relations and always strives to keep the customers fully and correctly informed.

With respect to your second question, you seem to have two primary concerns. First, you appear to be concerned that the customers are being misled as to the process that will be followed in determining how or if the utility will recover any appellate rate case expense. I do not believe that the utility actually addresses the process one way or the other. However, Mr. Watford was not entirely correct when he stated "all of which costs will ultimately have to be incorporated in further increases in customer rates." As you note, a utility's rates are not immediately and automatically increased for appellate rate case expense. The utility must first request them and then demonstrate that they have been reasonably and prudently incurred. However, that can be done in the same rate case and all the costs may ultimately be allowed.

Your second concern was the utility's "'estimate' of hundreds of thousands of dollars for an appeal appears so exaggerated as to be nothing more than a thinly veiled scare tactic." You state that you "hope the PSC is concerned enough about utility customers to protect them from such scare tactics," and that "the PSC will impose some sanctions and require the utility to issue a correction and an apology." As noted above, the appellate process can cause the utility to spend well over a hundred thousand dollars, and the utility may be able to recover its reasonable and prudent expenditures in its rates. Therefore, in my opinion, this portion of the utility's statement does not rise to the level of requiring some sort of Commission sanction.

As I stated above, the utility's statement: "[A]ll of which costs will ultimately have to be incorporated in further increases in customer rates," is not entirely correct. Nevertheless, I do not believe that this statement rises to the level requiring sanctions or remedial actions. The Office of Public Counsel (OPC) is representing the customers, and can make an informed decision and confer with the customers as to whether an appeal is warranted. However, if you wish, you could either file a formal complaint with our Consumer Affairs or I can take the issue before the Commission panel assigned to the wastewater case as to whether any sanctions or remedial actions are needed. Please advise me if you wish for me to take this before the panel.

Finally, in your third question, you question the propriety of the utility giving "unsolicited legal advice to clients who are represented by counsel, particularly in such an intimidating fashion." I have reviewed a United States Supreme Court case, Pacific Gas and Electric Company v. Public Utilities Commission of California, 475 U.S. 1, 89 L. Ed. 2d 1, 106 S. Ct. 903 (1986), which I believe is pertinent to your concern. In the Pacific Gas case, the California Public Utilities Commission attempted to require the utility to allow a consumer group to place its opposing point of view in a utility bill stuffer. While the United States Supreme Court was divided in its views, the majority opinion stated:

The Honorable Mike Fasano

Page 4

February 14, 2001

The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information. . . . The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster. . . . Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum.

Similarly, in *Consolidated Edison Co. v. Public Service Comm'n of NY*, 447 US 530, 544, 65 L Ed 2d 319, 100 S Ct 2326 (1980), we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.

Further, in *State v. Globe Communications Corporation*, 622 So. 2d 1066, 1077 (Fla. 4th DCA 1993), the Fourth District Court of Appeal discussed the First Amendment and the rights of free speech, and specifically said:

Because of the obvious importance of the free exchange of information in a democratic society, the First Amendment strictly limits any government activity that might impede that exchange. While the right of free speech is not absolute, the United States Supreme Court has permitted restrictions on its exercise only to the extent that the restrictions are narrowly tailored to serve identifiable and compelling state interests. In other words, the state must have a very good reason to restrict speech of any kind, and even then must be careful that its restriction is narrowly crafted and contains only those provisions necessary to serve its limited purpose.

Pursuant to the above cases, it appears that Aloha has a constitutional right to discuss controversial issues with its customers. However, as you note, there is a colorable issue of whether the utility should send out letters of this nature, when there is a rate case pending, and the customers are represented by OPC. I am sending a copy of my response letter to OPC, and I believe they should be the ones to decide whether the letter sent out by Mr. Watford improperly interferes with their representation of the customers, and whether OPC should file an appropriate motion with this Commission. You may wish to contact OPC and discuss appropriate actions with them.

The Honorable Mike Fasano

Page 5

February 14, 2001

Again, please advise me if you wish for me to take the issue of the apparent misstatement of Mr. Watford in his letter to the customers before the Commission panel assigned to the wastewater case as to whether any sanctions or remedial actions are warranted. As always, the opinions expressed in this letter represent my own opinions and in no way bind the Commission.

Sincerely,



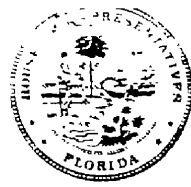
Ralph R. Jaeger

Senior Attorney

RRJ/lw

Enclosure

cc: Division of Economic Regulation (Crouch, Fletcher, Lingo, Willis, Wetherington)  
Division of Regulatory Oversight (Vandiver)  
Division of Legal Services (Davis, Gervasi)  
F. Marshall Deterding, Esquire (with enclosure)  
Office of Public Counsel (with enclosure)



RECEIVED

FEB 05 2001

FLORIDA PUBLIC SERVICE COMMISSION  
Chairman Jacobs

**Florida House of Representatives**  
Majority Leader

Mike Fasano  
Representative, 45th District

Reply to:

8217 Massachusetts Avenue  
New Port Richey, FL 34653-3111  
(727) 848-5885  
fasano.mike@leg.state.fl.us

322 The Capitol  
402 South Monroe Street  
Tallahassee, FL 32399-1300  
(850) 488-8528

February 2, 2001

The Honorable E. Leon Jacobs, Jr., Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Dear Chairman Jacobs:

As a customer of Aloha Utilities, and as the State Representative from District 45, I would like to be informed of any PSC policy concerning a regulated utility's communications with its customers. I am aware that the PSC closely monitors bill stuffers and other communications electric utilities send their customers, and wonder if water and wastewater utilities are likewise monitored. My inquiry stems from the enclosed letter sent by the president of Aloha Utilities to all its customers. I was personally offended by certain sections of the letter, as were a number of the Aloha customers to whom I have spoken. Specifically, I take issue with Aloha's claim that:

If Representative Fasano files an appeal of the FPSC's order, the process will potentially take many months and require Aloha to expend hundreds of thousands of your dollars to comply with the appeal process, all of which costs will ultimately have to be incorporated in further increases in customer rates.

Aloha's inflammatory statement to its customers raises several concerns, which I will address in turn.

1. Is there any truth to this statement, or is it so exaggerated as to be a prevarication? Surely Aloha's figure ("hundreds of thousands of your dollars") is not an accurate reflection of what the PSC would consider reasonable for an appeal. The customers have already absorbed the ultimate sticker shock by your allowance of over \$400,000 for Aloha to present its original case. To threaten additional "hundreds of thousands" of dollars for appeal is tantamount to intimidation.

# Florida House of Representatives

## Majority Leader

Mike Fasano  
Representative, 45th District

Reply to:

- 8217 Massachusetts Avenue  
New Port Richey, FL 34653-3111  
(727) 848-5885  
fasano.mike@leg.state.fl.us
- 322 The Capitol  
402 South Monroe Street  
Tallahassee, FL 32399-1300  
(850) 488-8528

In addition to the outrageous amount claimed by Aloha, I am also very concerned by the principle involved. Do you really allow a utility to charge the customers for exercising their legal rights, even if the customers' challenge is valid? If, for example, the customers win a \$200,000 issue on appellate review, would you allow Aloha \$300,000 in costs, for a net loss to customers? I certainly hope not, because such a result would give the clear message: "We do not allow customers to exercise their legal rights." I know of no other situation where an unsuccessful party can pass on its legal cost to the successful party. This is not allowed in any area of jurisprudence because it's fundamentally unfair. Surely, the PSC does not ignore the customers' rights to that degree. Please let me know your policy on these issues.

2. If Aloha's statement is inaccurate or so exaggerated as to be of questionable veracity, is the PSC concerned when a regulated utility distributes such misinformation? It is my understanding that Aloha's statements are inaccurate on a number of points. First, I understand that the legal costs associated with an appeal are not considered in the rate case being appealed. In fact, they may not be considered at all. If they are to be considered, I assume the expenses are recorded in the proper account and amortized. If any unamortized balance remains at the next rate case, it would be evaluated under conventional standards (reasonableness of magnitude and purpose, etc.). This is a vastly different process than that described in Aloha's letter, which implies an immediate and automatic pass-through.

Second, Aloha's "estimate" of hundreds of thousands of dollars for an appeal appears so exaggerated as to be nothing more than a thinly veiled scare tactic. I realize that a set of circumstances could be imagined that "potentially" could cost hundreds of thousands of dollars, but the likelihood is so remote as to be preposterous. I hope the PSC is concerned enough about utility customers to protect them from such scare tactics. I certainly hope the PSC will impose some sanctions and require the utility to issue a correction and an apology. Aloha's customers are legally prevented from going to a competitor for any other alternative service. They are totally captive customers who can look only to the PSC to provide the satisfaction that could otherwise be obtained in an open marketplace. They should not be the target of Aloha's scare tactics. I hope the PSC will consider this in evaluating its response.

**Florida House of Representatives**  
**Majority Leader**

Mike Fasano  
Representative, 45th District

Reply to:

8217 Massachusetts Avenue  
New Port Richey, FL 34653-3111  
(727) 848-5885  
fasano.mike@leg.state.fl.us

322 The Capitol  
402 South Monroe Street  
Tallahassee, FL 32399-1300  
(850) 488-8528

3. Are there any ethical concerns to be considered? It is my understanding that the customers are legally represented by the Public Counsel, and thus should not be approached about the case by a legal adversary. I realize Aloha must communicate with its customers about the utility service, but the paragraph I have questioned bears directly on the legal proceedings. It is entirely improper for Aloha to attempt to give unsolicited legal advice to clients who are represented by counsel, particularly in such an intimidating fashion. I believe Aloha should be held accountable for any ethical breach. I hope the PSC will look into this, and take any steps necessary to prevent future improprieties.

Thank you for your attention to these matters. I look forward to a prompt reply.

Yours truly,



Mike Fasano  
State Representative, District 45  
Majority Leader

Attachment

Your prompt Reply  
is greatly appreciated.  
Thank you &  
God Bless  
Mike



# *Aloha Utilities, Inc.*

*6915 Perrine Ranch Road*

*New Port Richey, FL 34655*

---

*(727) 372-0115 Fax (727) 372-2677*

Dear Customer:

We would like to take this opportunity to update you on many changes that have taken place at our utility in the past few months.

In late December, we moved our offices to 6915 Perrine Ranch Road in New Port Richey. This location is in the center of our two service areas, thereby providing all of our customers easy access to our office. The new facilities provide the work space needed for our staff to efficiently conduct our business affairs and provide you with high quality customer service.

As you are aware, the State of Florida has had severe drought conditions which have resulted in water restrictions imposed by the Southwest Florida Water Management District. Drinking water supplies are very limited in Florida and other sources of water must be used for irrigation purposes. The Florida Department of Environmental Protection has required all utilities with large wastewater treatment plants to upgrade their facilities to produce "reclaimed water." Reclaimed water is very highly treated wastewater plant effluent that may be used for irrigation; saving the drinking water supplies for household use.

Beginning in 1995, the Florida Department of Environmental Protection (FDEP) ordered our utility to begin the process of upgrading our Seven Springs Wastewater Treatment Plant (SSWWTP) to allow it to produce reuse water. We worked with the FDEP to develop a multi-step upgrade program to gradually (over eight to ten years) to be able to produce reclaimed water that could be utilized for home and business irrigation needs.

You may recall, the first upgrade step was completed on December 31, 1996. We began constructing the facilities needed to comply with the second step in the FDEP required plant upgrade process in 1999 and completed in late 2000 at a cost in excess of \$5,000,000. These upgrades allow the wastewater plant to produce reclaimed water that can be used in many more places than it was after the first plant upgrade. The reclaimed water now produced may be used by homeowners in new residential areas, on golf course fairways and greens, on commercial property lawns and along roadways and similar areas. This will allow us to increase our supply of reuse water to over one million gallons per day. This means that each year over 365,000,000 gallons of water used for irrigation will now not be withdrawn from the Floridan Aquifer. The Florida Public Service Commission (FPSC) Commissioners have ordered their FPSC staff to investigate the feasibility of this method of irrigation being made available to existing areas. Even though only new areas are receiving reuse service immediately, each and every customer benefits from the upgrades to the wastewater plant as it actually protects our drinking water source.

The FPSC has recently approved raising our wastewater rates to pay for the FDEP required plant improvements. After very detailed and careful study by the FPSC staff and the Commissioners, new rates were set by the FPSC. This process took over eight months. A formal order reflecting that final decision will be issued by the FPSC in the next two weeks. The Commissioners and

---

Encl: (2)

their staff were very diligent in reviewing the information that our rate increase request was based. Their staff also met with and discussed the need for these facilities with the FDEP staff. The Commissioners held three hearings concerning this rate request. They heard from a large number of technical and financial experts about the need for the upgrades and the prudence of the costs associated with the construction. After all this effort and study, the Commissioners set the new wastewater rates based on the actual evidence presented. In your bill this month, you will see the increased cost for wastewater service to pay for the plant modifications as required.

You may have read in the newspaper that Representative Fasano planned to appeal the FPSC decision, even before it was rendered. While Mr. Fasano was not a party to this proceeding, and we do not know what issues he might raise on appeal, the FPSC made its decision based on the many experts from the FDEP and the FPSC who have spent months researching the appropriate rates needed to pay for the FDEP ordered plant improvements. Aloha's wastewater rates have historically been substantially below those of other utilities in the area. This rate increase brings Aloha's wastewater rates in line with those in the area who also provide this level of treatment. If Representative Fasano files an appeal of the FPSC's order, the process will potentially take many months and require Aloha to expend hundreds of thousands of your dollars to comply with the appeal process, all of which costs will ultimately have to be incorporated in further increases in customer rates.

Your bill this month will also reflect a small one-time wastewater credit with interest related to a 1996 rate case.

We hope that this information has provided you an adequate explanation of the necessity for the wastewater rate increase that is reflected in the enclosed bill. Our goal is to provide you with high quality water and wastewater services at the least cost possible. We value your business and appreciate the opportunity to serve you.

Sincerely,



Stephen G. Watford  
President