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September 27, 2002

ORIGINAL

Blanca Bayo, Clerk and Director
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

**RE: Docket Number 020413-SU
Windward Homes' Motion for Formal Hearing
Windward Homes' Response to Aloha Utilities, Inc.'s Motion for
Clarification and Motion for Reconsideration
Greene Builders, Inc.'s Motion for Formal Hearing
Greene Builders, Inc.'s Response to Aloha Utilities, Inc.'s Motion for
Clarification and Motion for Reconsideration**

AUS Dear Ms. Bayo:
CAF _____
CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
SEC _____
OTH _____

I have enclosed the following original documents, along with the appropriate number of copies, to be filed in the above referenced docket. Please stamp and return to our office the additional copy of these motions that are enclosed.

- (1) Windward Homes' Motion for Formal Hearing
 - (2) Windward Homes' Response to Aloha Utilities, Inc.'s Motion for Clarification and Motion for Reconsideration
 - (3) Greene Builders, Inc.'s Motion for Formal Hearing
 - (4) Greene Builders, Inc.'s Response to Aloha Utilities, Inc.'s Motion for Clarification and Motion for Reconsideration
- original to Hong*

Please feel free to contact me if I may answer any questions or provide you with additional information.

Sincerely,

FIGURSKI & HARRILL

Lauralee G. Westine, Esq.

Enclosure

cc: Windward Homes
Green Builders

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DISTRIBUTION CENTER

10435 SEP 30 02

FPSO-COMMUNICATIONS CLERK

DOCUMENT NUMBER - DATE

10436 SEP 30 02

FPSO-COMMUNICATIONS CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceeding
against Aloha Utilities, Inc. in Pasco County
for failure to charge approved service
availability charges, in violation of
Order No. PSC-01-0326-FOF-SU
and Section 367.091, *Florida Statutes*.

DOCKET NUMBER 020413-SU
ORDER NUMBER PSC-02-1250-SC-SU
SUBMITTED FOR FILING
SEPTEMBER 27, 2002.

WINDWARD HOMES PETITION FOR FORMAL HEARING

Windward Homes, by and through its undersigned attorney, pursuant to the provisions of Order Number PSC-02-1250-SC-SU (Show Cause Order); Rule 28.106.201, Florida Administrative Code (FAC); Chapter 120 and Chapter 367, Florida Statutes, petitions the Florida Public Service Commission (FPSC) as follows:

This Petition is intended to conform to the provisions of Rule 28-106.201(2), FAC, the specific provisions of which are set forth below in italics:

- (a) *The name and address of each agency affected and each agency's file or identification number, if known;*

The agency affected is:

Florida Public Service Commission

Capital Circle Office Center

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399-0850

DOCUMENT NUMBER

1

10435 SEP 30 2002

FPSC-COMMISSION CLERK

The Agency Files and Identification Numbers are:

Show Cause Docket Number **020413-SU**

Show Cause Order Number **PSC-02-1250-SC-SU**

Original Order Docket Number **991643-SU**

Original Order Number **PSC-01-0326-FOF-SU**

(b) The name, address, and telephone number of the petitioner; the name, address and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interest will be affected by the agency determination.

The Petitioner is:

Windward Homes

5402 Beaumont Center Boulevard, Suite 108

Tampa, Florida 33634

(813) 885-7744

Windward Homes' Representative is:

J. Ben Harrill

Figurski & Harrill

2435 U.S. Highway 19, Suite 350

Holiday, Florida 34691

(727) 942-0733

Statement of Affected Substantial Interests

Windward Homes' substantial interests would be affected by Order Number PSC-02-1250-SC-SU (Show Cause Order), in that the FPSC issued an order that permitted Aloha Utilities, Inc. (Aloha) to backbill developers, such as Windward Homes, for increased service availability fees for a period of time in which the increased fees were not lawfully in effect pursuant to PSC-01-0326-FOF-SU (Original Order), due to the fact that Aloha had not satisfied the filing and notice requirements set forth in the Original Order. The FPSC, by allowing Aloha to seek these illegal increased fees from developers, such as Windward Homes, has acted in flagrant disregard for the notice and filing requirements it set forth in its Original Order, and those filing and notice requirements set forth in the Florida Statutes and the Florida Administrative Code. Furthermore, the FPSC failed to consider and apply criteria it had previously established in determining whether a utility has made a "mistake", thus allowing the utility to backbill customers. Windward Homes relied upon the information that it had been previously provided regarding Aloha's service availability charges in making financial and development decisions. Should this order stand, Windward Homes will sustain substantial financial losses.

Additionally, the FPSC, by allowing Aloha to collect the imputed CIAC fees from developers, such as Windward Homes, for the period of time from May 23, 2001 to April 16, 2002, is acting outside the scope of its statutory authority and violating the Contract Clause of the United States Constitution. The FPSC may not modify or abrogate private contracts unless such action was necessary to protect the public interest. The FPSC

protected the public interest when it prohibited Aloha from backbilling customers for the imputed CIAC. The effect of the FPSC Show Cause Order impairs the contracts that Windward Homes entered into prior to receiving notice of the increased service availability fees on April 16, 2002, to sell lots and build homes at a specified price in reliance upon the erroneous fee information on file with the FPSC and the information provided by Aloha. With the only plausible public interest protected by the provision in its Show Cause Order prohibiting the backbilling of existing customers, the FPSC cannot justify its actions.

(c) A statement of when and how the petitioners received notice of the agency decision.

The Petitioner received notice of the FPSC's final order on September 11, 2002 via the Florida Public Service Commission Website and facsimile.

(d) A statement of all disputed issues of material fact. If there are none, the petition must indicate.

The Petitioner disputes the FPSC's Show Cause Order allowing Aloha to backbill developers for increased service availability fees that were not lawfully effective from May 23, 2001 to April 16, 2002 due to Aloha's failure to comply with the notice and filing requirements of the FPSC's Original Order.

(e) A concise statement of the ultimate facts alleged, including the specific facts the Petitioner contends warrant reversal or modification of the agency's proposed action.

See Paragraph (f).

(f) A statement of the specific rules or statutes the Petitioner contends require reversal or modification of the agency's proposed action.

By permitting Aloha to backbill developers, such as Windward Homes, the FPSC has flagrantly disregarded the Florida Statutes, the Florida Administrative Code, the precedent of its past orders, the scope of its authority as granted by the Florida Legislature, and the Contract Clause of the United States Constitution.

Order Number PSC-01-0326-FOF-SU (Original Order)

The FPSC issued Order PSC-01-0326-FOF-SU (Original Order) on February 6, 2001, which allowed Aloha to increase its service availability charges, but required Aloha to file an “appropriate revised tariff sheet within twenty days of the date of this Order.” (Original Order Page 80)

The Original Order further stated “...*prior to the implementation of the rates and charges approved herein* (emphasis added), Aloha Utilities, Inc., shall submit, and have approved, revised tariff sheets. The revised tariff sheets will be approved upon staff’s verification that they are consistent with this decision and that the proposed customer notice is adequate.” (Original Order Page 81)

As to the effective date of the increased rates, the FPSC stated, “...that the increased rates approved herein shall be effective for service rendered on or after the stamped approval

date of the revised tariff sheets in accordance with Rule 25-30.475, Florida Administrative Code, provided the customers have received notice.” (Original Order Page 81)

Rule 25-30.475(2), Florida Administrative Code, states “[n]on-recurring charges (such as service availability, guaranteed revenue charges, allowance for funds prudently invested, miscellaneous services) shall be effective for services rendered or connections made on or after the stamped approval date on the tariff sheets provided customers have received notice. The tariff sheets will be approved upon staff’s verification that the tariffs are consistent with the Commission’s decision and that the proposed customer notice is adequate. *In no event shall the rates be effective for services rendered prior to the stamped approval date.*” (Emphasis added.)

The FPSC further stated regarding the implementation of the increased fee “that *prior to the implementation of the rates and charges approved herein* (emphasis added), Aloha Utilities, Inc., shall submit a proposed customer notice pursuant to Rule 25-22.0407(10), Florida Administrative Code, reflecting the appropriate rates, and explaining the increased rates and charges and the reasons therefore.” (Original Order Page 81)

Rule 25-22.0407(10), Florida Administrative Code, states “[a]fter the Commission issues an order granting or denying a rate change, the utility shall notify its customers of the order and any revised rates. The customer notification shall be approved by the Commission staff and be distributed no later than with the first bill containing any revised rates.”

Furthermore, the FPSC ruled that "...Aloha Utilities, Inc., shall provide proof of the date notice was given within 10 days after the date of the notice." (Original Order Page 81) Aloha did not abide by the Original Order and the FPSC initiated show cause proceedings against Aloha. As a result of that show cause proceeding, the FPSC issued Order Number PSC-02-1250-SC-SU (Show Cause Order).

Order Number PSC-02-1250-SC-SU (Show Cause Order)

In the Show Cause Order, the FPSC, again, required Aloha to "file a replacement tariff sheet within 10 days of the issuance date of this Order, reflecting its approved service availability charges. The tariff sheet will be stamped effective for connections made on or after April 16, 2002." (Show Cause Order Page 18)

The FPSC further ordered that "Aloha Utilities, Inc., shall provide notice of this Order to all developers whom it sent a backbilling letter and to any person who have either requested service or inquired about service with the utility in the past 12 months. Aloha shall submit the proposed notice for our staff's approval within 10 days of the effective date of this Order." (Show Cause Order Page 19)

In the Show Cause Order, the FPSC imputed \$659,547 as CIAC to Aloha, and stated "[i]n no instance shall any portion of the uncollected service availability charges be borne by the existing ratepayer." (Show Cause Order Page 19) However, the FPSC continued and stated "...pursuant to Order Number PSC-01-0326-FOF-SU (Original Order), Aloha

Utilities, Inc. is hereby authorized to backbill the developers in question and to try to collect from those developers the uncollected amounts of service availability charges that it failed to collect from May 23, 2001 to April 16, 2002, or any portion thereof as negotiated between Aloha and the developers.” (Show Cause Order Page 14, 19)

Legal Argument

Backbilling

Windward Homes does not question whether the FPSC has the authority to impute the \$659,547 as CIAC to Aloha. The Florida Legislature gave the FPSC that authority in Florida Statute 367.101(1) which states, in part, that “[t]he commission shall set just and reasonable charges and conditions for service availability.” Rather, Windward Homes strongly contests that the FPSC had the authority to permit Aloha to backbill developers, such as Windward Homes, for an ineffective and illegal service availability fee increase. Windward Homes respectfully agrees with Chairman Jaber’s dissent which states that Rule 25-30.350(1) does not apply in this situation.

Rule 25-30.350(1), Florida Administrative Code, states “[a] utility may not backbill customers for any period greater than 12 months for any undercharge in billing which is the result of the utility’s mistake. The utility shall allow the customer to pay for the unbilled service over the same time period as the time period during which the underbilling occurred or some other mutually agreeable time period. The utility shall not recover in a

ratemaking proceeding, any lost revenues which inure to the utility's detriment on account of this provision."

The use of the term "undercharge" in Rule 25-30.350 presupposes the requisite legal authority on the part of a utility to properly charge the fee. In the case at bar, because Aloha had not complied with the notice and filing conditions required by the Original Order to properly charge the fee, the fee was not lawfully authorized. Thus, Aloha may not "backbill" for a fee that it could not lawfully collect in the first instance.

Clearly, a distinction may be drawn between a situation, such as the one at bar, where Aloha flagrantly disobeyed the FPSC's Original Order to such an extent that FPSC staff initiated a show cause proceeding, and an unintentional billing error or meter reading error on the part of a utility abiding by the rules and regulations governing their industry.

In the past, the FPSC had drawn a distinction between allowing a utility to correct an error made in the ordinary course of business and factual scenarios, such as the Aloha matter, that present a more complex picture. In Order No. PSC 93-1173-FOF-WU, issued August 10, 1993, in Docket No. 93-0168-WS, In re: Gulf Utility Company (Gulf), the FPSC found, in part, that Gulf could not backbill a customer for the utility's error where (1) the utility had multiple opportunities to find and correct its error; (2) the charges for which the utility was attempting to backbill the customer were not available for review in its filed tariff sheet; (3) the customer had relied upon the charges quoted to him by the utility in making other financial and development decisions; (4) these mistake were not discovered until both

parties performed in accordance with their agreement. Id. at 4. Furthermore, in Order No. PSC-96-1229-FOF-WS, issued September 30, 1996, in Docket No. 950828-WS, In re: Rainbow Springs Utilities, L.C. (Rainbow Springs), the FPSC declined to allow Rainbow Springs to backbill their customers where the FPSC found that (1) Rainbow Springs had the opportunity to discover their error through review of their own tariff sheet and (2) that the customers did not have notice from the utility of the charges. Id. at 29.

Upon applying the criteria from either, or both, aforementioned cases, the FPSC should have followed staff's recommendation and not permitted Aloha to backbill the developers for the period of time in question, May 23, 2001 to April 16, 2002. Certainly, Aloha was aware of the FPSC's earlier order increasing their rates and had numerous opportunities to discover their failure to file the new tariff sheets. It was only as a result of Aloha's failure to file the new tariff sheets that the new rates were not available for customer review. Ironically, in the Show Cause Order, the FPSC found that the developers did not have knowledge of the rate increase until April 16, 2002. Finally, there can be no doubt that developers, such as Windward Homes, relied, to their financial detriment, upon the previously disclosed rate information in making financial and development decisions. Windward Homes respectfully requests the FPSC to reevaluate its decision in the Aloha matter in accordance with its previous orders that address permissible backbilling and its learned staff's recommendation.

Notice Requirements

Clearly, the intent of the notice provisions in the Florida Administrative Code and the Florida Statutes is to protect utility customers, including developer customers. The Florida Legislature documented its intent to ensure that utility customers receive notice of rates approved by the FPSC in Rule 25-30.135, Florida Administrative Code. That rule requires utilities to adopt and file tariffs and maintain them for customer inspection. Furthermore, Rule 25-30.135(2), Florida Administrative Code, specifically states, “ [n]o utility may modify or revise its rules or regulations or its schedules of rates and charges until the utility files and receives approval from the Commission for any such modification or revision.”

The Legislature further memorialized its intent to provide notice to utility customers in Rule 25-9.001(3), Florida Administrative Code, which states, “[n]o rules and regulations, or schedules of rates and charges, or modifications or revisions of the same, shall be effective until filed with and approved by the Commission as provided by law.”

Even the FPSC, in its Original Order, cited Rule 25-30.475(2), Florida Administrative Code, and Rule 25-22.0407(10), Florida Administrative Code, when delineating the filing and notice requirements that were a condition precedent to the increased fees becoming effective. Specifically, the FPSC, in the Original Order, required Aloha to file the new tariff sheet that reflected the new service availability charge of \$1,650 and meet statutory notice requirements as a condition precedent to the increased rate becoming effective. Aloha failed to perform the conditions precedent; thus, the only lawful and reviewable tariff sheet filed with the FPSC during the period of time between May 23, 2001 and April 16, 2002, stated that the service availability charge was \$206.75.

FPSC's Scope of Authority

In the past, upon reviewing the actions of the Florida Public Service Commission, the Florida Supreme Court has clearly stated that it is not within the FPSC's authority to right perceived wrongs, whether or not they are connected to water and sewer service. The Deltona Corporation v. Mayo, 342 So.2d 510 (Fla. 1977); Aloha Utilities, Inc. v. Florida Public Service Commission, 376 So.2d 850 (Fla. 1979). Windward Homes does not question the FPSC's frustration in situations such as these. The FPSC and its staff saw the need for Aloha to increase its service availability fees in order to protect utility customers in the future and acted on it. They performed their part of the bargain; Aloha did not. In order to punish Aloha, in part, the FPSC imputed over \$600,000 to Aloha in CIAC. The FPSC, however, realized that the lack of those fees would have a negative effect upon Aloha's current ratepayers. Thus, in order to right a perceived wrong, the FPSC permitted Aloha to backbill the developers for those fees. That result is neither fair nor just, and no matter how pure the FPSC's intentions, that action is unlawful and beyond the scope of their authority.

Impairment of Contract

Additionally, the FPSC, by allowing Aloha to collect the imputed CIAC fees from developers, such as Windward Homes, for the period of time from May 23, 2001 to April 16, 2002, is acting outside its statutory authority by modifying a private contract between non-utility parties, thus, violating the Contract Clause of the United States Constitution. Although the Florida Supreme Court held in H. Miller and Sons, Inc. v. Hawkins, 373

So.2d 913 (Fla. 1979), that an order of the FPSC modifying a private contract between a utility and a developer was a valid exercise of police power and was not unconstitutional, the Court did not address whether the FPSC may, through the effect of a FPSC order, impair a contract between a developer and a non-utility private party. In United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116 (Fla. 1986), the Florida Supreme Court held that the FPSC did not have the statutory authority to interfere with a contract between private companies by ordering the modification of the terms of the contract. Further, the Court, citing Arkansas Natural Gas Co. v. Arkansas Railroad Commission, 261 U.S. 379, 43 S.Ct. 387, 67 L.Ed. 705 (1923) stated

“[t]hat a state regulatory agency could not modify or abrogate private contracts unless such action was necessary to protect the public interest. To modify private contracts in the absence of such a public necessity constitutes a violation of the impairment of contracts clause of the United States Constitution.” United Telephone at 119.

In the present case, Windward Homes entered into numerous contracts to sell lots and build homes at a specified price prior to receiving notice of the increased service availability fees. In negotiating these contracts with buyers, Windward Homes relied upon the erroneous fee information on file with the FPSC and the erroneous information provided by Aloha prior to April 16, 2002. Windward Homes' reliance on this erroneous information created two distinct groups of contracts that the FPSC Show Cause Order threatens to impair:

- (1) contracts entered into prior to the April 16, 2002, in which the new home was connected to Aloha's service between May 23, 2001 and April 16, 2002;
- (2) contracts entered into prior to April 16, 2002, in which the new home was connected or will be connected subsequent to April 16, 2002.

Although H. Miller and Sons, Inc. v. Hawkins, 373 So.2d 913 (Fla. 1979), established that the connection date is the critical juncture in determining when an increased fee may become effective, it fails to address that the impairment of private contracts between non-utility parties, as a result of a FPSC order, is an issue separate and apart from permitting increased fees to be charged as of the date of connection. Simply because an increased fee *may* be charged by a utility, does not negate or allow the FPSC, or a court, to disregard the fact that the effect of FPSC order is to impair a private contract between non-utility parties, without the necessity of serving the public interest.

In order to interfere with, modify, or abrogate those contracts, the FPSC must demonstrate that the interference is a necessity to serve the public interest. The FPSC sufficiently protected the public interest when it ordered that Aloha could not seek financial redress from existing ratepayers for the fees that it imputed to Aloha as a result of their failure to abide by the notice and filing requirements established by the FPSC in the Original Order. In light of the fact that the FPSC has already addressed and protected the only plausible public interest, the interference with these private contracts cannot withhold scrutiny and is in violation of the Contracts Clause of the United States Constitution. Clearly, the public interest will not be served if, as a result of not being able to trust and rely on the

information on file with the FPSC and the information provided by the utilities, developers increase their lot and home prices in order to protect themselves from future, unforeseen, backbilled rate increases. Allowing Aloha to backbill developers, such as Windward Homes, for the increase in the service availability fees from May 23, 2001 to April 16, 2002, is not only bad policy and precedent, but most important, it violates the Florida Statutes and the United States Constitution.

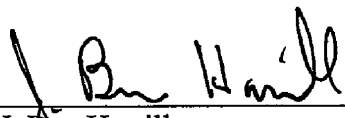
*(g) A statement of relief sought by the petitioner, stating precisely the action
Petitioner wishes the agency to take with respect to the agency's proposed action.*

The Petitioner respectfully request a formal, evidentiary hearing on the petition upon the grounds specifically stated above and prohibiting Aloha from backbilling developers, such as Windward Homes, for increased service availability fees that were not lawfully effective during the period of time in question.

WHEREFORE, Petitioner, Windward Homes, respectfully request a formal hearing under Sections 120.569 and 120.57(1), Florida Statutes, upon the matters raised herein, and request such other relief as may be appropriate.


Respectfully Submitted,

J. Ben Harrill, Esq.
Figurski & Harrill
2435 U. S. Highway 19, Suite 350
Holiday, Florida 34691

By: 

J. Ben Harrill
Florida Bar Number 275557

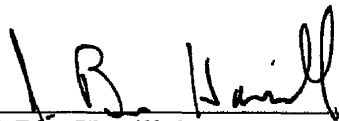
Lauralee G. Westine, Esq.
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By: 

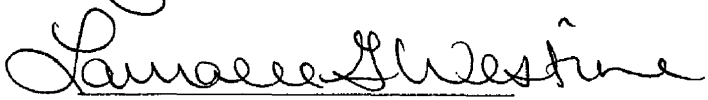
Lauralee G. Westine
Florida Bar Number 0055964

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and ^{fifteen} ~~seven~~ copies of the foregoing Windward Homes Petition for Formal Hearing has been furnished to Ms. Blanca Bayo, Director, Department of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Betty Easley Building, Room 110, Tallahassee, Florida 32399-0850, by U.S. Mail this ^{27th} day of September, 2002, and that copies of the foregoing have been furnished to Rosanne Gervasi, Esquire, Florida Public Service Commission, Legal Division, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and Suzanne Brownless, Esquire, Suzanne Brownless, P.A., 1975 Buford Boulevard, Tallahassee, Florida 32308 by United States Mail this ^{27th} day of September, 2002.



J. Ben Harrill, Esq.
Florida Bar Number 275557



Lauralee G. Westine, Esq.
Florida Bar Number 0055964