BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of show cause proceedings 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 NO. 020413-SU ORDER NO. PSC-02-1774-FOF-SU ISSUED: December 18, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING REQUESTS FOR ORAL ARGUMENT, DENYING MOTION FOR RECONSIDERATION, ACKNOWLEDGING WITHDRAWAL OF MOTION FOR CLARIFICATION, GRANTING MOTION FOR EMERGENCY RELIEF, AND DISPOSING OF SHOW CAUSE PROCEEDING

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. On February 9, 2000, Aloha filed an application for an increase in rates for its Seven Springs wastewater system. By Order No. PSC-01-0326-FOF-SU, issued February 6, 2001, in Docket No. 991643-SU, we approved increased rates and charges for Aloha. We also directed Aloha to increase its wastewater service availability charges for its Seven Springs wastewater system from $206.75 per equivalent residential connection (ERC) to $1,650 per residential ERC and $12.79 per gallon for all other connections. We required Aloha to file an appropriate revised tariff sheet

reflecting the approved service availability charges within 20 days of the date of the order.[1]

Aloha should have submitted revised tariff sheets on wastewater service availability charges and had them approved at the same time as the wastewater rate tariffs, on May 23, 2001. However, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes, the utility did not submit the tariff sheets until almost 10 months later, on March 11, 2002, and did not begin charging its approved service availability charges until almost 11 months later, on April 12, 2002.

By Order No. PSC-02-1250-SC-SU, issued September 11, 2002, among other things, we granted in part and denied in part SRK Partnership Holdings, LLC and Benchmark Manmen Corp.'s (Limited Partners) Petition to Intervene in this docket. Moreover, by proposed agency action (PAA), we rejected a proposed Settlement Agreement between Aloha and several developers, ordered the effective date of the service availability tariff to be April 16, 2002, authorized Aloha to backbill developers for 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, and ordered that regardless of whether Aloha is successful in collecting the full backbilled amounts from the developers or any portion thereof, 100% of the amount of these charges, or $659,547 shall be recognized as contributions-in-aid-of-construction (CIAC). We also ordered Aloha to show cause as to why it should not be fined in the amount of $10,000 for failure to timely file a revised tariff sheet on service availability charges and charge its approved service availability charges, in apparent violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes.

---

[1]Both Aloha and the Office of Public Counsel (OPC) filed petitions for reconsideration of Order No. PSC-01-0326-FOF-SU. Those petitions were disposed of by Order No. PSC-01-0961-FOF-SU, issued April 18, 2001, by which we granted Aloha's motion in part and denied OPC's motion. Order No. PSC-01-0961-FOF-SU reaffirmed the wastewater service availability charges approved by Order No. PSC-01-0326-FOF-SU.

Protests to the PAA portion of the Order concerning backbilling were timely filed by three developers: Windward Homes, Greene Builders, Inc. (Greene Builders), and Adam Smith Enterprises, Inc. (Adam Smith). In addition, Aloha timely filed a Request for Hearing on the PAA portion of the Order concerning the imputation of CIAC.[2] Therefore, this docket has been scheduled for a formal hearing to be conducted on April 11, 2003.

On September 24, 2002, Aloha timely filed a Motion for Clarification and Motion for Reconsideration of Order No. PSC-02-1250-SC-SU, and an Amended Motion for Clarification and Motion for Reconsideration and Request for Oral Argument on September 26, 2002. On September 30, 2002, Windward Homes and Greene Builders timely filed their Responses thereto, and on October 11, 2002, Adam Smith timely filed a Motion to Strike Aloha's Motions for Clarification. Moreover, on October 2, 2002, Aloha filed its Response to Show Cause Order No. PSC-02-1250-SC-SU (Response to Show Cause Order), along with a Request for Oral Argument on its Response to Show Cause Order. Finally, on October 7, 2002, Aloha filed a Motion for Emergency Relief. On October 16, 2002, Adam Smith timely filed its Response thereto and on October 17, 2002, Windward Homes and Greene Builders timely filed their Responses thereto.

A recommendation on these issues was originally filed on October 24, 2002, for the November 5, 2002, agenda conference. However, the item was deferred to the December 2, 2002, agenda conference, at which time the recommendation was considered and ruled upon. Also at the agenda conference, Aloha's Requests for Oral Argument were granted and oral argument was heard on all issues. This Order addresses the motions and responses identified above. We have jurisdiction pursuant to Sections 367.081, 367.121, and 367.161, Florida Statutes, and Rules 25-22.058 and 25-22.060, Florida Administrative Code.

---

[2]Aloha filed its Request for Hearing in order to preserve its right to backbill developers and builders who connected to its system from May 23, 2001 until April 16, 2002, should Aloha's Motion for Reconsideration and Clarification not be granted.

MOTIONS FOR CLARIFICATION AND RECONSIDERATION

Motion for Reconsideration

With respect to the Motion for Reconsideration, Aloha states that in Order No. PSC-02-1250-SC-SU, we granted the Limited Partners' Petition to Intervene in this docket, but limited the intervention to Issues 3 and 6 of the staff recommendation filed August 8, 2002. Issue 3 concerned the ability of Aloha to backbill developers who connected to its wastewater system between May 23, 2001 and April 16, 2002, and Issue 6 concerned the effective date of Aloha's wastewater service availability tariff increasing rates to $1,650 per equivalent residential connection (ERC) and $12.79 per gallon for all other connections.

Aloha argues that the Limited Partners do not have a substantial interest in the backbilling issue. As stated in the Limited Partners' Petition to Intervene and repeated in Order No. PSC-02-1250-SC-SU, the Limited Partners did not formally request to be connected to Aloha's system until June 14, 2002 and did not actually connect to the system until July 18, 2002. Therefore, under the undisputed facts presented by the Limited Partners, upon which this Commission relied, there can be no backbilling with regard to the Limited partners because they neither formally requested nor connected to Aloha's system prior to April 16, 2002. The Limited Partners do not meet the first prong of the two-pronged test for intervention. Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Reconsideration is appropriate when an agency has overlooked or failed to consider some point of fact or law in its initial decision. Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962). According to Aloha, we misapplied the facts in this case to the Agrico standing test, and the intervention of the Limited Partners should be limited to the effective date of the wastewater service availability tariff.

Our decision with respect to the Limited Partners' Petition to Intervene was preliminary, procedural, or intermediate in nature. See Notice of Further Proceedings or Judicial Review, attached to Order No. PSC-02-1250-SC-SU. As previously noted, also in the Notice of Further Proceedings or Judicial Review, parties were notified that with respect to the decision to grant in part and

deny in part the Limited Partners' Petition to Intervene, any adversely affected party could request reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code. Therefore, Aloha's Motion for Reconsideration with respect to the Petition to Intervene was appropriately filed.

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which we failed to consider in rendering our decision. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959); (citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse at 317.

We clearly explained why we found that the Limited Partners have a substantial interest in the backbilling issue, as well as in the tariff effective date issue. In Order No. PSC-02-1250-SC-SU at 9-10, we stated that:

> [w]ith respect to the backbilling issue, we find later in this Order that H. Miller & Sons, 373 So. 2d at 916, dictates that persons who prepaid the erroneous $206.75 charge in order to reserve capacity, but did not connect to Aloha's system prior to April 16, 2002, should be charged Aloha's approved service availability charge of $1,650 provided notice was received pursuant to Rule 25-30.475(2), Florida Administrative Code. . . . Should [this] proposed decision[] become final, the petitioners will not be refunded the substantial additional amounts that they paid under protest to Aloha.

We find that we made no mistake of fact or law in our decision regarding the Limited Partners Petition to Intervene. Therefore, Aloha's Motion for Reconsideration is denied.

Motion for Clarification

In its Motion for Clarification, Aloha requested that various portions of Order No. PSC-02-1250-SC-SU should be clarified because there are several instances in which the language used in one section might be interpreted as contrary to that found in other sections of the Order. The requested clarifications primarily concerned the PAA portions of the Order which no longer stand due to the fact that those issues have been protested. The remainder of the request for clarification concerned certain language contained within the show cause portion of the Order. Adam Smith moved to strike, and Windward Homes and Greene Builders filed responses to, the request for clarification.

Aloha orally withdrew its Amended Motion for Clarification at the December 2, 2002, agenda conference. Because we hereby acknowledge the withdrawal of the Motion, it need not be ruled upon. Nor is there a need to rule upon Adam Smith's Motion to Strike it.

MOTION FOR EMERGENCY RELIEF

Motion for Emergency Relief

By this Motion, Aloha states that by PAA, we authorized Aloha to backbill developers and builders who connected to its system between May 23, 2001 and April 16, 2002. That PAA decision has been protested. In light of these protests, and because disputed issues of material fact have been raised, we are required by Chapter 120, Florida Statutes, to set this matter for an evidentiary hearing. Should we affirm our decision to allow backbilling, a period of up to approximately 24 months will have passed between our and May 23, 2001. Should our final post-hearing decision be appealed, this 24 month period will be extended for another 12 to 18 months as the appeal works its way to completion. Thus, Aloha could, by operation of legal procedures, be estopped from even attempting to collect the undercollected service availability charges at issue in this case for up to 3-1/2 years.

Aloha argues that developers are by nature peripatetic (migratory). Often in the process of a development, the developer encounters financial difficulties and folds, leaving an empty

corporate shell stripped of any unencumbered assets. According to Aloha, its ability to actually collect the undercollected service availability fees in question is compromised with every day that passes.

Aloha requests that it be allowed to immediately backbill developers who connected to its system from May 23, 2001, until April 16, 2002 and to retain those monies in an escrow account subject to refund at the interest rate borne by the escrow account, in accordance with standard Commission refund procedures, at the ultimate conclusion of this proceeding, including any judicial appeal. Aloha states that this process does not place the developers at greater risk because if they prevail, they will recover their money with interest.

Responses

Adam Smith

In its Response, Adam Smith argues that in Order No. PSC-02-1250-SC-SU, we established the effective date of Aloha's higher service availability charge as April 16, 2002, and that it is fundamental that rates approved for regulated utilities apply prospectively. Aloha applied and collected the service availability charge that was approved and in effect during the period May 23, 2001 to April 16, 2002. By definition, unless it collected less that $206.75 per ERC, which was the approved rate in effect during the period, Aloha did not undercollect. The developers are entitled to the requirement of an approved tariff and prior notice of the increase. Therefore, they cannot legally be required to bear the consequences of Aloha's omission.

Moreover, Adam Smith argues that the relief requested by Aloha is unwarranted because by operation of law, the protests to the PAA portions of Order No. PSC-02-1250-SC-SU have rendered the PAA decision to apply the April 16, 2002 tariff retroactively a nullity. Any such approval terminated with the filing of protests, and this Commission is undertaking a proceeding de novo. Therefore, the PAA affords no basis for the relief requested by Aloha.

Adam Smith further argues that even if there were some basis of authority to support the motion, Aloha has failed to show an emergency. Aloha failed to file the tariff and the required notice to customers and operated without apparent financial hardship for almost a year without the incremental revenues associated with the tariff. Moreover, Aloha's description of "peripatetic" developers and "empty corporate shells" is an abstract construct so devoid of factual support as to be meaningless.

Finally, Adam Smith argues that the real purpose of Aloha's Motion for Emergency Relief is to try again to persuade this Commission to place its complete imprimatur on Aloha's efforts to require developers who received no notice of an increase to nonetheless carry the burden of Aloha's mismanagement. For these reasons, Adam Smith argues that the Motion for Emergency Relief should be denied.

Windward Homes and Greene Builders

In their Responses, Windward Homes and Greene Builders take great exception to Aloha's statements that "developers by nature are peripatetic," and that they will not be injured should this Commission permit Aloha to collect the monies and place them in an interest bearing escrow account. Windward Homes and Greene Builders are established, well-respected, financially secure builders in Pasco County who have hired counsel to vigorously pursue this matter to the full extent of the law. Additionally, they vehemently object to paying Aloha any monies until this matter is resolved. It is Windward Homes and Greene Builders' position that this Commission did not have the authority to permit Aloha to backbill, or, in reality, retroactively charge developers for a fee that was not lawfully in effect during that particular time period. Moreover, in light of these developers' active participation in this matter, Aloha's risk of not receiving its monies in the event that it should prevail is minimal.

Finally, Windward Homes and Greene Builders argue that from an equitable perspective, who is better to bear the risk of loss than Aloha. Aloha created this matter through its procrastination and failure to abide by a previous order of this Commission. Ironically, it is now Aloha petitioning the Commission to act with great haste in order to protect itself from the result of its own

lack of urgency. For these reasons, Windward Homes and Greene Builders request that we deny Aloha's Motion for Emergency Relief.

Analysis and Ruling

At page 22 of Order No. PSC-02-1250-SC-SU, in the section of the Order titled "Docket Closure," we ordered that "[i]n the event of a protest, the tariff shall remain in effect, held subject to refund, pending resolution of the protest." That decision was not issued as PAA. Therefore, it has not been rendered a nullity by virtue of the protests filed to the PAA portions of the Order. Aloha's Motion for Emergency Relief appears to request greater detail concerning the implementation of that requirement.

We have granted emergency relief in certain circumstances under our general ratemaking powers. See, e.g., Order No. PSC-97-0207-FOF-SU, issued February 21, 1997, in Docket No. 961475-SU, In re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. (granting tariff request for emergency rates and finding that although Chapter 367, Florida Statutes, does not expressly authorize emergency rates, Section 367.011, Florida Statutes, provides that this Commission has exclusive jurisdiction over a utility's rates). Moreover, pursuant to Section 367.121, Florida Statutes, our general powers include the power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each utility. In all such instances when this Commission has granted emergency relief, we have required the utility to hold the monies collected subject to refund pending a final decision.

We note that in past rulings on emergency rates, we have approved a new rate or charge to apply prospectively on a temporary basis, subject to refund, pending a final decision. The circumstances of this case differ in that Aloha failed to prospectively charge its already approved service availability charge from May 23, 2001, to April 16, 2002, pursuant to Order No. PSC-01-0326-FOF-SU. Aloha is now requesting approval to backbill developers on a temporary basis, not in the amount of a new charge, but rather, in the amount of its already-approved service availability charge, less the amounts developers have already paid,

for connections made during that time period. These are approved charges which Aloha should have been charging since May 23, 2001.

Adam Smith correctly argues that in Order No. PSC-02-1250-SC-SU, we proposed to establish the effective date of Aloha's higher service availability charge as April 16, 2002. Although PAA portions of the Order have been protested, we required the tariff to become effective, held subject to refund, pending resolution of the protests. However, by that Order, we also proposed to allow Aloha to backbill developers to May 23, 2001, for Aloha's approved charges which the utility failed to collect during the time period in question. Adam Smith's argument that Aloha's request for emergency relief must fail because rates approved for regulated utilities must apply prospectively, is flawed because Aloha's approved service availability charges are not new charges which we proposed to allow Aloha to charge retroactively. And, as we pointed out in Order No. PSC-02-1250-SC-SU, upon finding that Aloha's service availability tariff sheet on file with the Commission from May 23, 2001, to March 11, 2002, did not correctly reflect Aloha's authorized service availability charge,

> no act or order of this Commission has altered the utility's service availability charge approved by Order No. PSC-01-0326-FOF-SU. Therefore, the utility should have timely charged the amount approved by that order for service availability. See U.S. Sprint Communications Co. v. Nichols, 534 So. 2d 698 (Fla. 1988) (finding that once a tariff sheet error is discovered, the Commission has the power and the duty to order compliance with its original decision). See also Order No. PSC-95-0045-FOF-WS, issued January 10, 1995, in Docket No. 941137-WS (finding that, although certain tariff sheets reflecting the utility's gross-up authority were missing from the utility's tariff, the utility had the authority to collect the gross-up charges pursuant to Commission orders, given that the missing tariff sheets were never cancelled by an order).

Moreover, Aloha's argument that it will become more difficult to collect the uncollected service availability charges from developers as time passes has merit. Aloha has failed to collect

its approved service availability charges from numerous developers, not just from those who have protested the Order.

We agree with Aloha that allowing the utility to immediately backbill developers who connected to its system from May 23, 2001 until April 16, 2002, and to retain those monies in an escrow account, held subject to refund with interest, does not place the developers at greater risk. If the developers prevail, they will recover their money with interest. The arguments of Adam Smith, Windward Homes, and Greene Builders in their Responses to Aloha's Motion largely concern the merits of whether we should ultimately allow the utility to backbill for the service availability charges at issue.

In the meantime, Aloha's Motion for Emergency Relief shall be granted. In accordance with Order No. PSC-02-1250-SC-SU, Aloha is authorized to collect, and shall hold subject to refund with interest, its service availability charges that it should have collected from May 23, 2001 to April 16, 2002, had the utility correctly implemented these charges pursuant to Order No. PSC-01-0326-FOF-SU in the first place.

As security to guarantee the amount collected subject to refund, Aloha shall establish an escrow agreement with an independent financial institution. The following conditions shall be part of the escrow agreement:

1) No funds in the escrow account may be withdrawn by the utility without the express approval of the Commission.

2) The escrow account shall be an interest bearing account.

3) If a refund is required, all interest earned by the escrow account shall be distributed to the appropriate developers.

4) If a refund is not required, the interest earned by the escrow account shall revert to the utility.

5) All information on the escrow account shall be available from the holder of the escrow account to a Commission representative at all times.

6) The monies collected subject to refund shall be deposited in the escrow account within seven days of receipt.

7) This escrow account is established by the direction of the Florida Public Service Commission for the purpose(s) set forth in its order requiring such account. Pursuant to Cosentino v. Elson, 263 So. 2d 253 (Fla. 3d DCA 1972), escrow accounts are not subject to garnishments.

8) The Director of the Commission Clerk and Administrative Services must be a signatory to the escrow agreement.

In no instance shall the maintenance and administrative costs associated with any refund be borne by the utility's customers. These costs are the responsibility of, and shall be borne by, the utility. Should a refund be required, the refund shall be with interest and undertaken in accordance with Rule 25-30.360, Florida Administrative Code.

Moreover, by Order No. PSC-02-1250-SC-SU at page 14, we ordered, by PAA, that "Aloha shall in no instance attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount." Similarly, Aloha shall not attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount subject to refund pending resolution of the protests.

DISPOSITION OF SHOW CAUSE PROCEEDING

In its Response to Show Cause Order No. PSC-02-1250-SC-SU (Response to Show Cause), Aloha correctly states that this Commission required the utility to show cause, in writing within 21 days of the date of the Order, why it should not be fined $10,000 for its apparent violations of Section 367.091, Florida Statutes, and Order No. PSC-01-0326-FOF-SU, for failure to file a revised service availability tariff and proposed customer notice regarding its service availability charge increase in May, 2001.

Aloha argues that should the Commission impose a fine of $10,000 on Aloha in the present circumstances, the Commission will thereby exceed its discretionary authority. Article I, Section 18,

of the Florida Constitution, states that "[n]o administrative agency . . . shall impose a sentence of imprisonment, nor shall impose any other penalty except as provided by law."

Moreover, Aloha argues that when an administrative agency is imposing a penalty, this constitutional prohibition is coupled with two maxims of administrative law. First, that agencies, as "mere creatures of statutes," have only those powers as are conferred by statute, with any reasonable doubt as to the lawful existence of a particular power resolved against its exercise. City of Cape Coral v. GAC Utilities, Inc. of Florida, 281 So. 2d 493, 495-6 (Fla. 1973). Second, the utility argues that penal statutes which impose sanctions and penalties must be strictly construed and no conduct is to be regarded as included within them that is not reasonably prescribed by them. Any ambiguities must be construed against the agency. Lester v. Department of Professional and Occupational Regulations, State Board of Medical Examiners, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

Aloha also argues that since administrative fines deprive the person fined of substantial rights, the proper standard of proof is the clear and convincing evidence standard, a higher standard than the competent substantial evidence standard which will normally support an agency's finding of fact. Further, Section 120.68(7)(e), Florida Statutes, requires the reviewing court to remand a case to the agency for further proceedings or set aside agency action when it finds that the agency's exercise of discretion was:

1. Outside of the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision.

Aloha argues that this Commission has considered issuing show cause orders when utilities improperly collected service availability charges in four recent cases.[3] In each of those cases, for varying reasons explained by Aloha, this Commission either declined to show cause those utilities (Mad Hatter and Burkim), show caused them but later approved a settlement offer reducing the fine (Forest Hills), or show caused them but later waived the fine (Southlake). And in each of those cases, findings were made that the utilities had in fact violated an Order or rule.

Aloha states that although we authorized Aloha to backbill developers for the entire amount that it failed to collect in service availability charges during the period of time in question, Aloha will not be able to collect the entire amount if for no other reason than developer attrition. Moreover, Aloha has agreed to take the full risk of uncollectibility. If even 10% of the imputed CIAC cannot be collected, Aloha will lose approximately $65,955 in rate base which equals a decrease in revenues of roughly $13,101 per year. This amount alone far exceeds even the $15,000 fine proposed by this Commission for Mad Hatter's knowing violation of its service availability tariffs.

Moreover, Aloha argues that like each of the four cases cited in its Response to Show Cause, Aloha's ratepayers have been made whole by the imputation of 100% of the undercollected CIAC. To the extent that Aloha fails to collect the amounts it backbills, the utility's shareholder, not its customers, will be harmed. And unlike the Mad Hatter case, Aloha did not knowingly undercollect its approved service availability charges. This is a clear example

---

[3]Aloha cites to the four cases as follows: 93 FPSC 2:695, 698, 734-39 (1993), in re: Application for a rate increase in Pasco County by Mad Hatter Utility, Inc. (Mad Hatter); 01 FPSC 12:533, 576-7 (2001), in re: Application for staff assisted rate case in Brevard County by Burkim Enterprises, Inc. (Burkim); 97 FPSC 11:270, 282-3 (1997), in re: Application for limited proceeding increase in wastewater rates by Forest Hills Utilities, Inc. in Pasco County (Forest Hills); and 00 FPSC 5:200, 216, 218-9 (2000), in re: Emergency petition by D.R. Horton Custom Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake County (Southlake).

of a mistake. Further, as in the Mad Hatter case, Aloha's president has also had his salary decreased as a penalty for poor management.

Finally, Aloha states that its management has received this Commission's message loud and clear. Aloha has fully cooperated with our staff in promptly complying with each staff data request in order to accurately calculate the amount of service availability undercollection and has timely filed both its revised service availability tariff and customer notice in accord with the Order. Aloha pledges to continue to fulfill its responsibilities under Order No. PSC-02-1250-SC-SU in a comprehensive and timely fashion.

Aloha argues that in light of the above-cited case law and mitigating circumstances, this Commission should not issue a show cause order against it. However, Aloha has previously offered, and continues to be willing, to pay a $2,500 fine for its unknowing violation of Order No. PSC-02-1250-SC-SU and Section 367.091, Florida Statutes, in addition to whatever revenue losses it will suffer due to uncollectible backbilled service availability charges. Aloha requests that we not issue a show cause order in this proceeding, or in the alternative, impose a fine of $2,500.

Aloha timely responded to the show cause order but did not request a hearing on the show cause issue. By Order No. PSC-02-1250-SC-SU, we ordered that if Aloha timely responded to the show cause order but did not request a hearing, our staff would present a recommendation to us regarding the disposition of the show cause proceeding. A recommendation was so filed, and our final disposition of the show cause proceeding is as set forth below.

We disagree that to impose a fine of $10,000 on Aloha in the present circumstances would be to exceed our discretionary authority. Aloha argues that Article I, Section 18, of the Florida Constitution requires administrative agencies not to impose a penalty except as provided by law. Section 367.161, Florida Statutes, expressly provides this Commission with the authority to impose the penalty at issue here. As specified in the show cause order, Section 367.161 expressly authorizes this Commission to assess a penalty of not more than $5,000 per day for each offense, if a utility is found to have knowingly refused to comply with, or to have willfully violated any Commission rule, order, or provision

of Chapter 367, Florida Statutes. Each day that such refusal or violation continues constitutes a separate offense. We have calculated that Aloha's full exposure to being fined under this statute far exceeds $10,000.

With respect to Aloha's argument that agencies have only those powers as are conferred by statute, with any reasonable doubt as to the lawful existence of a particular power resolved against its exercise, there is no reasonable doubt about this Commission's express authority to impose the $10,000 fine upon Aloha under Section 367.161, Florida Statutes. The statute is clear and unambiguous.

Aloha's argument that the proper standard of proof is the clear and convincing evidence standard lacks merit. There has been no standard of proof with respect to this matter because there has been no evidentiary hearing regarding the show cause order. Nor will an evidentiary hearing be held on this issue because Aloha did not protest this Commission's requirement that it show cause as to why it should not be fined in the specified amount. We did not abuse our discretion in any way with respect to that decision.

Nor are we persuaded by Aloha's argument that this Commission recently either declined to fine, or reduced the assessed fine, for four other utilities that improperly collected service availability charges. It is no coincidence that the reasons for those decisions varied. This Commission bases its decision on whether to show cause a utility on the particular aggravating or mitigating circumstances of each case. In this case, upon careful consideration of the circumstances as outlined in the show cause order, we concluded that the circumstances of this case were such to warrant a fine of $10,000.

We agree that Aloha has fully cooperated with our staff in promptly complying with each staff data request filed in this docket, and that Aloha has timely filed both its revised service availability tariff and customer notice in accord with Order No. PSC-02-1250-SC-SU. Moreover, we are pleased to know that Aloha's management has received our message loud and clear. Nevertheless, for the foregoing reasons, we find it appropriate to deny the relief requested in Aloha's Response to Show Cause order, including the alternative relief that the fine be lowered to $2,500. The

$10,000 fine is hereby deemed assessed with no further action required by this Commission. Aloha shall remit the full amount of the fine within 90 days from the issuance date of this Order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Requests for Oral Argument on its Amended Motion for Clarification and Motion for Reconsideration, and on its Response to Show Cause Order No. PSC-02-1250-SC-SU, were granted. Oral argument was heard on all issues contained in this Order. It is further

ORDERED that Aloha Utilities, Inc.'s Amended Motion for Reconsideration is denied. It is further

ORDERED that the withdrawal of Aloha Utilities, Inc.'s, Amended Motion for Clarification is acknowledged. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Emergency Relief is granted. In accordance with Order No. PSC-02-1250-SC-SU, Aloha Utilities, Inc. is authorized to collect, and shall hold subject to refund with interest, its service availability charges that it should have collected from May 23, 2001 to April 16, 2002, had the utility correctly implemented these charges pursuant to Order No. PSC-01-0326-FOF-SU in the first place. It is further

ORDERED that as security to guarantee the amount collected subject to refund, Aloha Utilities, Inc. shall establish an escrow agreement with an independent financial institution to incorporate the conditions as set forth in the body of this Order. It is further

ORDERED that Aloha Utilities, Inc. shall not attempt to disconnect any existing customer from service as a result of any developer's failure to pay any backbilled amount subject to refund pending resolution of the protests. It is further

ORDERED that the relief requested in Aloha Utilities, Inc.'s Response to Show Cause Order No. PSC-02-1250-SC-SU is denied. The $10,000 fine is hereby deemed assessed with no further action required by this Commission. Aloha Utilities, Inc. shall remit the

full amount of the fine within 90 days from the issuance date of this Order, for transmittal to the Office of the Comptroller for deposit in the State General Revenue Fund, pursuant to Section 367.161, Florida Statutes. It is further

Ordered that this docket shall remain open pending final resolution of the protests filed to the proposed agency action portions of Order No. PSC-02-1250-SC-SU.

By ORDER of the Florida Public Service Commission this 18th day of December, 2002.

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

(S E A L)

RG

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by the portions of this order which are preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

Except with respect to the Commission's denial of the motion for reconsideration, any party adversely affected by the portions of this order which are final actions may request reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code. Any party adversely affected by the portions of this order which are final actions may also request judicial review by the First District Court of Appeal by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.