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Charles J. Beck
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November 16, 2004

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

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COMMISSION
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Re: Docket Nos. 020896-WS & 010503-WU

Dear Ms. Bayo:

Enclosed for filing in the above-referenced docket are the original and 15 copies of Citizens' Response to Aloha's "Motion for Termination of Proceedings as They Relate to Deletion of Territory." A diskette in Word format is also submitted.

Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

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Sincerely,

Charles J. Beck
Deputy Public Counsel

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County)	Docket no. 020896-WS
-----)	
In re: Application for Increase in Water Rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.)	Docket no. 010503-WU
-----)	Date filed: November 16, 2004

**CITIZENS' RESPONSE TO ALOHA'S
"MOTION FOR TERMINATION OF PROCEEDINGS
AS THEY RELATE TO DELETION OF TERRITORY"**

Florida's Citizens ("Citizens") file this response to the motion entitled "Motion for Termination of Proceedings as They Relate to Deletion of Territory" filed by Aloha Utilities, Inc. ("Aloha") on November 9, 2004.

ALOHA'S MOTION FOR TERMINATION IS BARRED BY §28-106.204(2), FLORIDA ADMINISTRATIVE CODE

Despite the innovative name of Aloha's motion, the motion for termination is simply a motion to dismiss the petitions in docket 020896-WS. The true nature of a motion must be determined by its content and not by the label the moving party has used to describe it. *Fire & Cas. Ins. Co. of Connecticut v. Sealey*, 810 So.2d 988, 992 (Fla. 1st DCA 2002).

According to §28-106.204(2), Florida Administrative Code, unless otherwise provided by law, motions to dismiss the petition must be filed no later than 20 days after service of the petition on the party.

That time period passed long ago. Aloha, in fact, filed a motion to dismiss on September 5, 2002 -- more than 2 years ago -- and filed a supplemental motion to dismiss on January 20, 2004. The Commission granted the motions in part and denied the motions in part by order no. PSC-04-0712-PAA-WS issued July 20, 2004. Aloha cannot try again to dismiss the petitions more than 3 months after the Commission ruled on its previous motions to dismiss.

THE ISSUE OF WHETHER THE CERTIFICATE OF AUTHORITY GRANTED BY THE FLORIDA PUBLIC SERVICE COMMISSION TO ALOHA IS A LICENSE

In order for the provisions of §120.60, Florida Statutes, to apply to this case as Aloha claims, the certificate of authority granted to Aloha by the Florida Public Service Commission must be a license. Aloha cites the 1991 Fifth District Court of Appeal case of *City of Mount Dora v. JJ's Mobile Homes*, 579 So.2d 219 (Fla. 5th DCA 1991) for the proposition that a certificate of authority issued by the Florida Public Service is a license which confers property rights upon the holder.

Aloha does not mention, however, that the First District Court of Appeal reached the opposite conclusion in the case of *Alterman Transport Lines, Inc., v. State*, 405 So.2d 456 (Fla. 1st DCA 1981). The Commission has considered both of these cases and appears to side with the decision reached by the First District Court of Appeal in *Alterman*. See *In re: Application for Amendment of Certificates Nos. 359-W and 290-S*

to Add Territory in Broward County by South Broward Utility, Inc., 1996 WL 745667 (Fla. P.S.C.).

The Florida Supreme Court has also looked at this issue. In the case of *Florida Interexchange Carriers Association v. Beard*, 624 So.2d 248 (Fla. 1993), the Florida Supreme Court reviewed a claim by the Florida Interexchange Carriers Association (FIXCA) that the Commission effected a de facto cancellation of its members' certificates when it changed interexchange routes between Tampa and the St. Petersburg / Clearwater area into local routes which FIXCA's members could not serve. The Court stated:

"Long-distance carriers' certificates for statewide long-distance service do not entitle the carriers to compete over any specific routes, but rather are general in nature. Fla.Admin.Code R. 25-24.47(4)(a) (1992). Because of the general nature of FIXCA members' certificates, the members neither have licenses to compete over specific routes nor do they have a vested interest in providing service in the areas affected by Order No. 25708. Therefore, the Commission was not obligated to follow the administrative procedures required to revoke a license. See § 120.60(7), Florida Statutes (1991). The exclusive jurisdiction in section 364.01 gives the Commission the authority to determine local calling routes based on the needs of the community." *Florida Interexchange Carriers Association* at 252.

While the decision in *Florida Interexchange Carriers Association* rejected the claim that the Commission's actions effected a *de facto* cancellation of the certificates held by FIXCA's members, it appears to be based on the rationale that the interexchange carrier certificates were general and did not give a specific grant of authority over specific routes. Here, the petitions for deletion relate to specific areas

encompassed by Aloha's certificate to provide service in a clearly delineated area. Whether the Florida Supreme Court would find that Aloha's certificate of authority amounts to a license is at least a debatable issue.

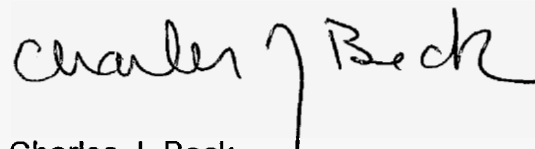
RECOMMENDED COURSE OF ACTION

Given the split of authority at the District Court of Appeal level and the decision of the Florida Supreme Court in the *Florida Interexchange Carriers Association* case, Citizens believe the prudent course of action for the Commission at this time is to comply with the provisions of the Administrative Procedures Act relating to licensing. Dismissal of the proceeding (or "termination," as Aloha calls it) is not necessary in order to accomplish this. §120.60(5), Florida Statutes, requires the Commission, prior to the entry of a final order, to serve an administrative complaint on Aloha which affords the company reasonable notice of the facts or conduct which warrant deletion. Petitioners will be filing testimony in two days, and the facts and conduct described in that testimony provides the facts and conduct which could be used in an administrative complaint by the Commission. Aloha would then be given the opportunity to respond after being served with the complaint. There is no reason why that could not be

accomplished in sufficient time so that the evidentiary hearings can still be held as scheduled on March 8-10, 2005.

Respectfully submitted,

HAROLD MCLEAN
PUBLIC COUNSEL

A handwritten signature in black ink that reads "Charles J. Beck". The signature is written in a cursive style with a large, stylized "C" and "B".

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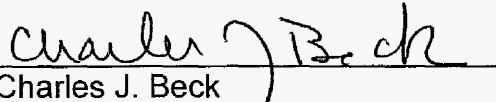
(850) 488-9330

Attorney for Florida's Citizens

**DOCKET NOS. 001503-TP and 020896-WU
CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S.

Mail or hand-delivery to the following parties on this 16th day of November, 2004.


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