

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of:

PETITION BY CUSTOMERS OF ALOHA UTILITIES, INC. FOR DELETION OF PORTION OF TERRITORY IN SEVEN SPRINGS AREA IN PASCO COUNTY. DOCKET NO. 020896-WS

APPLICATION FOR INCREASE IN WATER RATES FOR SEVEN SPRINGS SYSTEM IN PASCO COUNTY BY ALOHA UTILITIES, INC. DOCKET NO. 010503-WU

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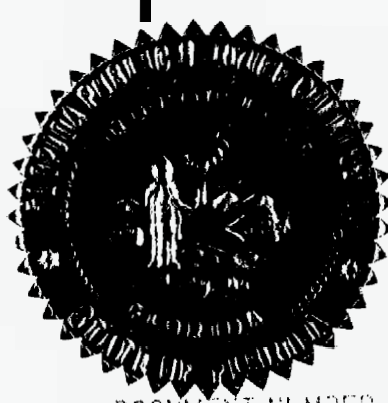
PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON
COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, January 4, 2005

PLACE: Betty Easley Conference Center
Room 148
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: LINDA BOLES, RPR
Official FPSC Reporter
(850) 413-6734



PARTICIPATING:

1 JOHN L. WHARTON, ESQUIRE, representing Aloha
2 Utilities, Inc.

3 CHARLES BECK, ESQUIRE, representing the Office of
4 Public Counsel.

5 SAMANTHA CIBULA, ESQUIRE, representing the Florida
6 Public Service Commission Staff

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CHAIRMAN BAEZ: We are on Item 5 now.

COMMISSIONER DAVIDSON: Chairman, I would move that the Commission grant Aloha's request for oral argument on its motion.

COMMISSIONER DEASON: Second.

CHAIRMAN BAEZ: Commissioners, there is a motion on Item -- on Issue 1 of Item 5. All those in favor, say aye.

(Unanimous affirmative vote.)

CHAIRMAN BAEZ: Very well. And, well, Commissioner Davidson, did you have a time in mind when you made the motion?

COMMISSIONER DAVIDSON: I would recommend ten minutes for each side.

CHAIRMAN BAEZ: Okay. If that's all right with everyone, we'll go with that, Commissioners, ten minutes per side. Mr. Wharton, it's your motion.

MR. WHARTON: Thank you, Mr. Chairman. And I don't believe that I'll, I'll need ten minutes in this case because I really believe that the staff recommendation has done a very thorough job of discussing these issues and that the issues are straightforward.

I don't -- I believe that the staff recommendation has correctly analyzed that there can be little doubt that in this case what is commonly referred to at the Commission as a

1 certificate is a license under the Florida Administrative
2 Procedure Act, and that the deletion of a portion of Aloha's
3 service area is a license revocation also under the Florida
4 Administrative Procedure Act. Accordingly, Section
5 120.60(5) of the Administrative Procedure Act is applicable to
6 this proceeding.

7 While one may presume that any time one violates a
8 statute they are in violation of law, the Legislature saw fit
9 in this case to expressly proclaim that no revocation,
10 suspension, annulment or withdrawal of any license is lawful
11 unless the agency follows certain procedures. In this case
12 those procedures have not been followed.

13 The staff recommendation very thoroughly discusses
14 whether, A, this law is applicable to this fact scenario and
15 determines that it is, and, B, whether the procedures that have
16 been followed in this case, the orders that have been issued
17 and the things that have been done are sufficient to satisfy
18 the procedure mandated by Section 120.60(5) and determines that
19 they are not, and we support the staff recommendation in, in
20 that regard.

21 Here the Commission has never proposed action.
22 Rather, they issued an order sending the case straight to
23 hearing when, in fact, there is a notice provision. And the
24 Commission must be the party, the Commission must file the
25 action, the Commission must prosecute the action.

1 We also agree with the staff recommendation that
2 there is a higher burden in this case, an extraordinary burden.
3 And when I say in this case, I mean the case as our motion
4 suggests this case should be recast as. The Commission will
5 have an elevated standard of proof. It is the highest burden
6 of proof in administrative law, which I think is a clear
7 indication from the Legislature that when a regulatory agency
8 is revoking a license or is withdrawing part of the authority
9 that it has bestowed through the vehicle of a license, that it
10 must meet a very high burden and that it should do so with
11 great hesitation.

12 Here, Commissioners, I think our motion spells it
13 out. I think the staff recommendation very thoroughly
14 discusses the issue that you have a very plain, very
15 straightforward language in the Administrative Procedure Act
16 which says that in this case, because Aloha's certificate is a
17 license, that there must be specific procedures followed and
18 that they have not been followed in this case. We support the
19 staff recommendation and believe that the motion to terminate
20 should be granted.

21 CHAIRMAN BAEZ: Thank you, Mr. Wharton.

22 Senator, I'm sorry, I fragged for a moment. I know
23 that you wanted to address us. I don't know if Mr. Beck is
24 going to go ahead first.

25 MR. BECK: Thank you, Chairman Baez. Senator Fasano

1 and Dr. Kurien will also be here, but on Item 6.

2 My name is Charlie Beck with the Office of Public
3 Counsel. Commissioners, with respect to Item 5, I just briefly
4 want to say that we agree that the prudent course of action for
5 the Commission to follow is to follow the provisions of the
6 Administrative Procedures Act that govern revocation of a
7 license.

8 CHAIRMAN BAEZ: And I'm, and I'm sorry, Mr. Beck.
9 Did you say that the senator -- or maybe I should just ask the
10 senator. Senator, you're not addressing us on this issue, but
11 rather the following issue; is that correct?

12 SENATOR FASANO: Yes.

13 CHAIRMAN BAEZ: I apologize. I'm sorry.

14 Commissioners, questions.

15 COMMISSIONER DAVIDSON: One question for, for Public
16 Counsel.

17 CHAIRMAN BAEZ: Go ahead, Commissioner Davidson.

18 COMMISSIONER DAVIDSON: Just so I can be clear then,
19 would you agree with staff on Issue 2 that the Commission
20 should grant Aloha's motion for deletion of the proceedings as
21 they relate to the deletion of territory docket?

22 MR. BECK: I don't necessarily believe that you need
23 to terminate the proceeding as Aloha has, has asked. I think
24 there's a number of ways you could proceed and follow the
25 Administrative Procedures Act: That you could keep this docket

1 open and proceed with a complaint filed or you could go in
2 another docket, as the staff recommends. You don't need to
3 terminate the proceeding.

4 COMMISSIONER DAVIDSON: Does, does the sort of gist
5 of your position though relate to Item 6, how the Commission
6 might proceed, as opposed to the, the, the merits, so to speak,
7 of Aloha's argument on Item 5?

8 MR. BECK: Right. On Item 5 we believe the
9 Commission, the prudent course is to follow the APA on license
10 revocation. How you do that is what we're talking about.

11 COMMISSIONER DAVIDSON: Okay. Well, let me, let me
12 ask again. So I just -- because I think I'm hearing agreement.
13 So you agree with the substance of Aloha's position that the
14 deletion of proceedings docket, the deletion of proceedings as
15 we've proceeded is not the proper course of action; that the
16 license revocation proceeding is the proper course.

17 MR. BECK: Right. Procedurally you need to go
18 through the licensing provisions. Yes.

19 COMMISSIONER DAVIDSON: Thank you, Mr. Chairman.

20 CHAIRMAN BAEZ: Commissioners, any other questions?

21 COMMISSIONER DEASON: I have a question.

22 CHAIRMAN BAEZ: Commissioner Deason.

23 COMMISSIONER DEASON: And I'll direct this to our
24 legal staff. I understand the rationale and very thorough
25 analysis that have been done here on this, this sticky legal

1 question.

2 My question is, is more focused, and that is -- has
3 to do with the timing. The proceeding that has been, that the
4 motion to terminate has been filed upon, it's been ongoing for
5 quite some time. And I'm troubled that we find ourselves on
6 the eve of hearing trying to litigate this case that we get
7 this at this point. Is this the type pleading that can be
8 filed this late in a proceeding, or have they acquiesced that
9 the Commission has the authority to proceed based upon the
10 customers' filings and the customers' request since they've
11 waited so long to file their, their motion to delete -- motion
12 to abate the proceedings or delete the proceedings or whatever?

13 MS. CIBULA: Commissioner, I don't believe that they
14 have waived their right to raise this at this point. It, it
15 appears to be a jurisdictional glitch. And the statute is very
16 clear that the Commission needs to follow a certain procedure
17 if they're going to revoke a license. And if the Commission
18 doesn't follow that procedure, it will be unlawful. So in the
19 end it seems like if we proceed forward the way we are now, it
20 could go to hearing. Then if it's appealed, it might be
21 reversed on appeal, and then we'd be in the same position we
22 are now.

23 COMMISSIONER DEASON: Thank you.

24 CHAIRMAN BAEZ: Any other questions, Commissioners?

25 COMMISSIONER DAVIDSON: One more question, Chairman.

1 CHAIRMAN BAEZ: Go ahead, sir.

2 COMMISSIONER DAVIDSON: Following up to Commissioner
3 Deason's question, is this jurisdictional issue akin to subject
4 matter jurisdiction which can't be waived or is it a type of
5 jurisdiction, jurisdictional argument that could be waived, if
6 not made?

7 MS. CIBULA: It's akin to subject matter
8 jurisdiction. But I guess it's not exactly subject matter
9 jurisdiction because I believe we have the jurisdiction over
10 the subject matter. It's just that there is a certain
11 procedure that is set up, and it is a jurisdictional glitch, I
12 would say, and that you need to follow a certain procedure.
13 And if you don't follow that procedure, the statute is very
14 clear that it would be unlawful in the end.

15 COMMISSIONER DAVIDSON: Just one follow-up on that.
16 So there's -- is, is it fair to state that the case law would
17 conclude, if a court concluded there was error, that it was
18 clearly harmful and reversible error as opposed to something
19 that could have been waived by a party?

20 MS. CIBULA: Correct. In the Associated Health Care
21 case that's cited here, that same exact thing happened. It
22 went all the way through the hearing and in the end the court
23 said, you followed the wrong procedure. We're going to reverse
24 your decision to revoke the license. We're going to send it
25 back to the agency without prejudice to start a new proceeding

1 to revoke the license in the proper manner. But that's exactly
2 what happened in that case.

3 COMMISSIONER DAVIDSON: Thank you. Thank you,
4 Chairman.

5 MR. WHARTON: May I address that point briefly,
6 Mr. Chairman?

7 CHAIRMAN BAEZ: Go ahead, Mr. Wharton, briefly.

8 MR. WHARTON: Okay. And very briefly. It is just
9 that, respectfully, Commissioner Deason and Commissioner
10 Davidson, I believe clearly that this is an argument that could
11 have been raised for the first time on appeal. **While I think**
12 casting it in a jurisdictional framework is not improper, it
13 perhaps does not encompass the entire subject matter. I don't
14 believe anything that Aloha did or did not do could make an
15 otherwise unlawful action by the Commission lawful. And here
16 you have a statute that says these are the flaming hoops you
17 must jump through in order for your action to be lawful.

18 CHAIRMAN BAEZ: I have, I just have a couple of, of
19 questions. First -- and I may be going off track here. I
20 don't want to open up a can of worms, but here goes anyway.

21 Some of the implications of, of, of us entertaining
22 this, this motion, although everyone, at least on that side,
23 seems to agree that it's appropriate technically speaking, this
24 implies to me that there are some limitations in terms of what
25 customers, what kind of redress customers can seek, at least

1 those customers that, that are subject to a franchise service.
2 Is that, is that -- does this sort of clear that up for
3 everyone? Does it set up in your opinion a bright line of --

4 MS. CIBULA: I believe it does. I guess it all
5 relates back to a customer can't choose its utility, but if
6 there are problems, it's up to the agency who issued the
7 license to revoke the license. And if there are problems, then
8 they should bring the facts to the agency and the agency has to
9 decide whether to go forward with the certificate revocation.

10 CHAIRMAN BAEZ: And, and just one last question on
11 that. So then exactly what is -- say I'm a customer and I'm
12 unhappy with the service, now it's not a billing issue, so
13 we're not talking refunds or bill adjustments and so on, but
14 I'm just not happy with the service. My question would be
15 what, what kind of, you know, what kind of solution is
16 available to me? There has to be some, something I can seek
17 more than just calling up and griping about it.

18 MS. CIBULA: Yeah. There are -- we do have solutions
19 for customer complaint -- to resolve customer complaints. This
20 is like the bigger issue of actually revoking a license. And
21 say you have so many complaints against the utility that the
22 Commission starts to notice that there's just too many
23 complaints and, therefore, we want to take away their license,
24 and that would be up to the Commission to initiate the license
25 revocation compared to just resolving the complaint.

1 CHAIRMAN BAEZ: We have an interesting -- you just
2 said something very interesting. Although this is a procedural
3 issue, I agree, it does, it does stand, it does stand to weigh
4 as something. I mean, it's a, it's a sign of something, I
5 mean, improper as it may be procedurally.

6 Anyway, Commissioner Davidson, you were going to say
7 something? I'm done. Thank you.

8 COMMISSIONER DAVIDSON: Well, and my question for
9 staff, and I guess it's after a comment, it's -- we haven't
10 brought this up for a vote yet, but there is a lot of legal
11 merit to the argument that's been presented. And in ideal
12 circumstances we would have discovered, we would have sort of
13 known this issue at the outset and not proceeded so far in this
14 case, and the parties too. I mean, so we're all sort of in
15 this mess together. It's late in coming to the table. But at
16 the end of the game, I mean, the one thing that we want to have
17 is a sustainable order, whatever that is, and we want to engage
18 in lawful action. It certainly benefits no one, including the
19 customers, the agency, the parties, to sort of go through a
20 course of action that would ultimately be held to be improper
21 and reversed.

22 To the Chairman's point, I mean, is there -- what
23 type of guidance, I mean, what type of guidance does this sort
24 of give? I mean, what is -- what would be the scope of this
25 ramification? I mean, is it -- is this something that's going

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recognize it off the bat.

I believe in the telecommunications industry they do already, to revoke certificates, issue show cause orders and give people an opportunity to protest those orders when they revoke the license or their certificate.

COMMISSIONER DAVIDSON: Is this the first, is this the first instance that you're aware of in which customers have sought deletion and it's proceeded forward or have there been other cases?

MS. CIBULA: This is the first one that I've found.

COMMISSIONER DAVIDSON: Okay. Thank you.

CHAIRMAN BAEZ: Commissioner Deason, you had one follow-up?

COMMISSIONER DEASON: Yeah. Just one follow-up.

CHAIRMAN BAEZ: And then Commissioner Bradley.

COMMISSIONER DEASON: This proceeding that, that we're contemplating terminating, it was -- we acted upon a

1 petition that was filed by customers.

2 MS. CIBULA: Correct.

3 COMMISSIONER DEASON: Correct? And it's been staff's
4 position, Public Counsel agrees, that the better course of
5 action for the integrity of the proceeding is to, is to change
6 that and essentially the Commission to initiate that, and
7 there'd be certain procedures under the APA that has to be
8 followed.

9 Now even though we would be terminating the
10 proceeding that was filed by the customers, they would still
11 have standing to actively pursue their interest, even though it
12 becomes a PSC-initiated proceeding; isn't that correct?

13 MS. CIBULA: I believe that they could participate.
14 But it would be the Commission staff that would be prosecuting
15 the case, and I guess they can use the evidence that is
16 presented by the customers in support.

17 COMMISSIONER DEASON: But the customers have standing
18 to present evidence, to present argument, do they not?

19 MS. CIBULA: I think that the, the Commission staff,
20 as the prosecutor, would decide what evidence to put on in the
21 case.

22 COMMISSIONER DEASON: Now that's troubling to me,
23 okay, because, because -- and this kind of goes back to, I
24 think, a question that the Chairman had about the status that
25 customers have because it's basically their service that is at

1 stake, their interest is at stake, and that's what we're trying
2 to protect. And it seems to me that they need to have full
3 opportunity to present their viewpoints in some manner or
4 another, either through testimony or argument or both. And,
5 and I need some type of assurance before I terminate this
6 proceeding. Even if this is the wrong proceeding, I mean,
7 there's got to be an avenue for customers to fully participate.
8 I need some assurance that that's going to take place.

9 MS. CIBULA: I believe that they would participate,
10 but I believe that the ultimate burden of proof would be on the
11 Commission staff as the prosecutor.

12 CHAIRMAN BAEZ: And the two notions, just so that I'm
13 clear -- I think that's a good question. But the two notions
14 can, are, are, can exist independent of each other; is that, is
15 that fair to say? I mean, Public Counsel, and, again, we're
16 seeking hypothetically, that's for another issue, for another
17 item obviously, but hypothetically speaking, Public Counsel, I
18 think to Commissioner Deason's question, Public Counsel would,
19 would and could have standing to, to be involved. They would
20 have a right to cross-examine witnesses as part, as part of the
21 process. It's only rather that the, that the Commission staff
22 or the prosecution staff has the burden.

23 MR. MELSON: Commissioner, I think you're correct.
24 The statute gives Public Counsel a right to participate in any
25 Commission proceeding as a matter of right. I think the -- if

1 you have petitions to intervene by individual customers, I
2 would suspect that they have standing. I'd encourage you not
3 to try to cross that bridge today because if we get a petition
4 to intervene and an objection by the utility, we don't want to
5 prejudge without hearing all the arguments. But at least
6 through the Office of Public Counsel the customers do have a
7 right to be represented in any, in any Commission proceeding.

8 COMMISSIONER DEASON: Commissioner Bradley,
9 Commissioner Bradley had a question, and I'm sorry for
10 interrupting. I got in ahead of you.

11 COMMISSIONER BRADLEY: Right. And maybe I just
12 missed the answer to my question, but I'd like for staff to
13 explain to me again what the customer recourse is, and
14 Commissioner Deason somewhat alluded to this at the beginning.

15 What -- in this instance, based on what we're -- the
16 particular situation that we're dealing with here today, what
17 is the customer recourse as it relates to having their issue
18 addressed by, by this Commission? And I heard what you said
19 about the legality of the situation, and that is that the
20 Commission itself needs to be the petitioner. But -- and in
21 this instance, I mean, this is a situation that has been
22 ongoing for a long time, so we were quite aware of the issue or
23 the issues that exist in Pasco County or in this particular
24 area of Aloha's service territory. But what is the customer
25 recourse if they are dissatisfied and, and they want to bring

1 this to our attention? Is it that they have to go through OPC
2 or can they -- are you saying that they can't file a petition
3 or petition us?

4 MS. CIBULA: Well, I, I think we don't want to get
5 confused with, like, the customers can file complaints against
6 the utility and the, those complaints can be resolved.
7 However, it's the bigger issue of actually the big step of if
8 there's so many complaints that we think that your license
9 needs to be taken away because of the service you're providing,
10 that's a higher standard, that is something that the Commission
11 needs to initiate so they could, based on all the complaints
12 that the Commission gets, they can look at it and decide there
13 are a number of complaints, investigate the complaints and then
14 decide whether to move forward with actually revoking the
15 utility's license to provide service any longer. And that's,
16 you know, much bigger than just, you know, complaints against
17 the utility and the action that can be taken based on just
18 complaints against the utility.

19 CHAIRMAN BAEZ: And just to clear up, Commissioner, I
20 don't, I don't think any of the statements here are trying --
21 are aimed at minimizing the idea of the customer complaint.

22 MS. CIBULA: Yeah. I don't want to do that. Yeah.

23 CHAIRMAN BAEZ: It's not, it's not really the way
24 that it's meant. But I think I understand what you say when,
25 when, when you're talking about revocation, that the stakes are

certainly a little, a little higher and the nature of the
2 discussion kind of takes on a different, a different nature.
3 I'm sorry, Commissioner Bradley.

4 COMMISSIONER BRADLEY: Well, we've arrived at this,
5 this juncture because of the fact that the customers are
6 dissatisfied with basically the black water that exists in this
7 part of Aloha's service territory. And one motive behind my
8 question is we have Senator Fasano here -- there may need to be
9 a legislative remedy that needs to be put forth because, you
10 know, I just am having a very difficult time dealing with the
11 legality of this matter and to allow for this proceeding to
12 terminate because of a legality or a legal issue that exists or
13 a legal precedent. And the customers still have issues that
14 are going to go unaddressed if we terminate this proceeding.

15 And I have to tell you, I'm very disappointed that we
16 are discussing the legal technicality and not the resolution of
17 the bigger issue, which is black water. So I'm putting someone
18 on notice as to where my mind is or where my heart is. I don't
19 know how long they figure they're going to run and hide behind
20 legal technicalities or legal precedents and not deal with what
21 the real issue is, and that is to provide drinking water or
22 water to their customers that can be used to drink or to bathe
23 in and to, water that they will not have a concern with. So I
24 think that we need to go ahead and, and make a decision as it
25 relates to this particular issue and, and move on to what we

1 really need to deal with, and that is the real issue of doing
2 that needs to be done by this Commission to ensure that the
3 customers have water that's acceptable.

4 COMMISSIONER DEASON: Is that a motion to approve
5 staff on Issue 2?

6 COMMISSIONER BRADLEY: Yes, it is.

7 COMMISSIONER DEASON: Second the motion.

8 CHAIRMAN BAEZ: A motion and a second. All those in
9 favor, say aye.

10 (Unanimous affirmative vote.)

11 CHAIRMAN BAEZ: Staff, can you help me out? You
12 know, walk me through this.

13 MS. CIBULA: Issues -- based on my recommendation,
14 Issues 3 and 4 would then be moot since the proceeding is
15 terminated.

16 CHAIRMAN BAEZ: Do we have to vote on mootness?

17 MS. CIBULA: No.

18 CHAIRMAN BAEZ: No? Okay.

19 MS. CIBULA: And then we can go to Issue 5 in regard
20 to the dockets.

21 CHAIRMAN BAEZ: Okay. Commissioners, as a result of
22 our decision on Issue 2, Issues 3 and 4 have been rendered
moot, no further action is necessary on them, and we are now on
Issue 5.

25 COMMISSIONER DAVIDSON: I would move that the docket

1 be closed.

2 CHAIRMAN BAEZ: There's a motion. Is there a second?

3 COMMISSIONER DEASON: Second.

4 CHAIRMAN BAEZ: A motion and a second. All those in
5 favor, say aye.

6 (Unanimous affirmative vote.)

7 CHAIRMAN BAEZ: All right. Thank you, staff. And I
8 just have one question. There's a -- just for clarification
9 purposes, there is a mention in the staff analysis on
10 Issue 5 as to the 503, the 0503 docket. The hearing dates on
11 that are -- does anyone have them handy?

12 MS. CIBULA: I believe they're March 8th through
13 10th.

14 CHAIRMAN BAEZ: Those are the March dates; right?

15 MS. CIBULA: Yeah.

16 CHAIRMAN BAEZ: Okay. Thank you.

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

CERTIFICATE OF REPORTER

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I, LINDA BOLES, RPR, Official Commission Reporter, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 14th day of January, 2005.

Linda Boles
LINDA BOLES, RPR
FPSC Official Commission Reporter
(850) 413-6734