

ORIGINAL

MEMORANDUM

May 9, 2005

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COMMISSION
CLERK
FPSC

TO: DIVISION OF THE COMMISSION CLERK AND ADMINISTRATIVE SERVICES
FROM: OFFICE OF THE GENERAL COUNSEL (GERVASI) *RG*
RE: DOCKET NO. 050018-WU Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes.

Please file the attached document in the above-referenced docket.

DATE DOCUMENT SENT TO CCA 5/9/05

RG
Attachment
I:050018-LetterShowCause.rg.doc

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TELECOPY COVER SHEET

DATE: May 6, 2005 OUR FILE NO.: 26038.35 PAGES: 4

TO: Braulio Baez TELECOPY NUMBER: 413-6043

Rosanne Gervasi TELECOPY NUMBER: 413-6225

Samatha Cibula TELECOPY NUMBER: 413-6203

FROM: John Wharton CONTACT PERSON: Bronwyn

MESSAGE:

Please notify us immediately if not received properly:
(850) 877-6555

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May 6, 2005

VIA FAX & U.S. MAIL

Chairman Braulio Baez
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850Re: Aloha Utilities, Inc.; Show Cause Proceeding; PSC Docket No. 050018-WU
Our File No. 26038.46

Dear Chairman Baez:

On Tuesday, May 3, 2005, the Commission denied, over the recommendation of staff counsel and advisory staff counsel, a Motion for Abatement which Aloha had filed 49 days prior. Today, by email, we received word that the Commission, unilaterally and with no input from the parties, will set this case for a 5-day hearing commencing on August 15, 2005. This intent to thusly schedule the hearing disregards the concerns of Aloha made known to the Commission by letter hand-delivered yesterday, May 5, 2005.

The unilateral setting of the hearing in this matter is unlike the procedure which would routinely occur before the professional Administrative Law Judges of the Division of Administrative Hearings, or in Circuit or Federal court. Based on the extreme and unprecedented nature of this proceeding, and our combined 41 years experience working before the Public Service Commission, the relatively brief time this schedule allows for pretrial preparation, discovery, and appropriate motion practice will effectively deprive Aloha of due process. Whether this decision has been made to accommodate political concerns or to accommodate the only available dates on which all Commissioners are available within a time frame "acceptable" to the Commission (the utilization of the entire Commission on this case is, in fact, an unnecessary and unusual process in water and wastewater cases), it is completely improper and is a decision made for reasons which should never control the due process which a party in a quasi-judicial administrative hearing should receive.

While the Commission may seek to engage in convenient and comfortable fictions, such as the creation of "advisory staff counsel", Aloha remains mindful that the judge in this case is also the prosecutor and that the prosecutor in this case is also the judge. Despite certain proclamations in recent Commission orders, this concept is one on which the Commission appears to remain confused. For instance, in "advisory staff's" April 21, 2005 recommendation, it states that "[a]dvisory staff agrees with Aloha that staff has the burden of proof in this proceeding". In fact, Aloha has never made such a suggestion and this statement itself is incorrect. It is the Commission who has the burden of proof in this proceeding, and one may reasonably assume that its professional staff (whether "advisory" or "prosecutorial"), many of whom serve at its pleasure, will assist it in attempting to carry this burden. That is why this case should have been transferred to the Division of Administrative Hearing, as requested in Aloha's Request for Formal Hearing, so that the factual

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findings in this case, as well as the procedural decisions (such as the setting of the hearing) would not be made by an interested party with a publicly stated agenda, but rather by a fair and neutral finder of fact. It is within this context that Aloha views the unilateral setting of this proceeding as described above. Indeed, it would be irrational for Aloha to ignore the inherent conflict between the Commission's agenda and the Commission's power and ability as the "judge" to manipulate the evidence, the hearing process, the record, and therefore the outcome of this proceeding.

No interim schedule can accommodate the due process needs of Aloha if this case proceeds as suggested. For instance (and this is a singular example among many) minimal due process demands that Aloha have adequate time, after the receipt of the Commission's direct testimony, to engage in and complete discovery, to direct motions at that testimony, to hire witnesses of unknown expertise responsive to that testimony, and to fashion its responsive case. In fact, Aloha will not even know what discovery it should undertake, who it should hire to provide testimony or technical or expert assistance, or how to otherwise respond to the Commission's direct testimony until it is in possession of that testimony. No interim dates established between now and August 15 can allow this process to occur in a reasonable and orderly fashion, even if counsel did not have major conflicting scheduling concerns, which in fact is the case.

The present schedule of this case entirely conflicts with the schedule of counsel for Aloha, conflicts with the schedule of at least one of the expert witnesses for Aloha (to the extent the identity of such expert witnesses is known to Aloha at this time), entirely fails to allow adequate time for discovery (which is likely to be more intensive in this case than in any water and wastewater case in Commission history) and does not allow for proper discovery times between the filing of various testimonies or appropriate motion practice directed to this proceeding or those testimonies. Additionally, 5 days will be completely inadequate to handle this hearing.

Any suggestion that this matter should be scheduled under such an extraordinarily short time frame because the issues at the core of the controversy "have gone on long enough" demands that the Commission itself, the Petitioners in this case, shoulder some of the blame for delay, if such blame is in fact appropriate. On July 20, 2004, the Commission set for hearing 3 customer petitions requesting that the Commission delete territory from Aloha's Seven Springs service area. Over 6 months later, and only in response to a motion filed by Aloha, the Commission acknowledged that this proceeding was procedurally and lawfully improper and that it should be dismissed, which it was. A potential treatment methodology, which was the subject of a 2002 Commission Order, is still in administrative litigation (a case in which Aloha is the Respondent, not the Petitioner) because the Commission acknowledged, in a July, 2004 Order, that its original directive was "unattainable".

To assume that this entire matter, in which the Commission, sitting as judge, jury, and prosecutor seeks to take millions of dollars of Aloha's property, can be completed in little more than twice the time the Commission recently took to dispose of a 4-page Motion to Abate is unreasonable, irrational, and deprives Aloha of constitutional due process.

Aloha suggests that a minimum of six months between this date and the hearing will be necessary to afford due process to Aloha and a reasonable time to prepare for a hearing of this nature. Such a schedule should allow a minimum of 10 weeks between the time the Commission files its direct testimony and the time for Aloha to file its direct testimony. In addition, Aloha believes at least two weeks will be necessary for this hearing. Aloha respectfully suggests that a Case

Braulio L. Baez, Chairman

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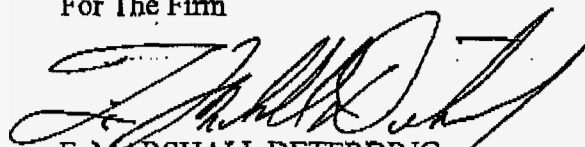
Management Conference would be the reasonable forum to establish a schedule acceptable to the parties and consistent with the requirements of due process.

By this letter, Aloha declines the request of "advisory counsel" to submit interim dates for an August 15, 2005 hearing. The submittal of such dates would be the procedural equivalent of rearranging the deck chairs on the Titanic.

Sincerely,



JOHN L. WHARTON
For The Firm



F. MARSHALL DETERDING
For The Firm

JLW/brm

cc: Commissioner J. Terry Deason
Commissioner Lisa P. Edgar
Commissioner Rudolph "Rudy" Bradley
Commissioner Charles M. Davidson
Rosanne Gervasi, Esquire
Samantha Cibula, Esquire
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