

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: December 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Cibula)
Division of Economic Regulation (Devlin)

RE: Docket No. 020896-WS – Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

Docket No. 010503-WU – Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

AGENDA: 01/04/05 – Regular Agenda – Participation Dependent on Commission’s Vote on Issues 1 and 3.

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020896.RCM.DOC

Case Background

By Order No. PSC-04-0712-PAA-WS, issued July 20, 2004, the Commission set for hearing three customer petitions requesting that the Commission delete territory from Aloha Utilities, Inc.’s (Aloha or utility) Seven Springs service area. The hearing to obtain customer testimony on the petitions is scheduled for January 27-28, 2005. The hearing to consider the merits of the deletion petitions is scheduled for March 8-10, 2005.

On November 9, 2004, Aloha filed a Motion for Termination of Proceedings as They Relate to Deletion of Territory (Motion for Termination).¹ Along with its motion, Aloha also

¹ Pursuant to Order No. PSC-04-0929-PCO-WS, Docket No. 020896-WS was consolidated with Docket No. 010503-WU. Docket No. 010503-WU pertains to the protest of Order No. PSC-04-0712-PAA-WS relating to the measurement of the water quality at Aloha’s facilities. Aloha’s Motion for Termination has no impact on Docket No. 010503-WU.

Date: December 21, 2004

filed a Request for Oral Argument. On November 10, 2004, Aloha filed a Notice of Supplemental Authority. On November 16, 2004, the Office of Public Counsel (OPC) timely filed its Response to Aloha's Motion for Termination.

On November 24, 2004, Aloha also timely filed a Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS. Order No. PSC-04-1152-PCO-WS (the Discovery Order) addressed a discovery dispute between Aloha and Commission staff. Commission staff requested that the Commission compel Aloha to provide a list of the names and addresses of all of its water and wastewater customers who reside within the Seven Springs area. Aloha requested that the Commission issue a protective order to prevent the discovery. In its response to Aloha's Motion for Protective Order, staff revised its discovery request to include only the names and addresses of the water customers located in the area for which deletion of territory has been requested.

The Discovery Order granted Commission staff's revised Motion to Compel and denied Aloha's Motion for Protective Order. Aloha was ordered to provide the revised information requested by staff within 5 days of the issuance of the Discovery Order.

Aloha's motion for reconsideration was accompanied by a Request for Oral Argument. Staff timely filed its Response to Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS on December 2, 2004.

This recommendation addresses both Aloha's Motion for Termination and Aloha's Motion for Reconsideration of the Discovery Order. The Commission has jurisdiction pursuant to sections 120.569 and 367.045, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Aloha's Request for Oral Argument on its Motion for Termination of Proceedings?

Recommendation: Yes. Aloha's Request for Oral Argument on its Motion for Termination of Proceedings should be granted. Each side should be given ten minutes to address the Commission. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed a Request for Oral Argument along with its Motion for Termination. In support of its request, Aloha states that oral argument will help clarify the issues, ensure that the Commission is fully informed, and allow the parties to elaborate on their concerns or comments. Aloha further states that it is in the interest of the utility, the Commission, the customers, and the public in general that the proceedings at issue be conducted in accordance with the Florida Administrative Procedure Act and that Aloha is afforded due process of law.

The Commission's decision on Aloha's Motion for Termination may impact the future progression of this proceeding. Advisory staff believes that, due to the potential effect on this proceeding, further discussion at the agenda conference could be beneficial to the Commission.

Advisory staff, thus, recommends that Aloha's Request for Oral Argument on its Motion for Termination should be granted. Advisory staff further recommends that each side should be given ten minutes to address the Commission.

Issue 2: Should the Commission grant Aloha's Motion for Deletion of Proceedings as They Relate to Deletion of Territory?

Recommendation: Yes. Aloha's motion should be granted. (Cibula)

Staff Analysis: Aloha filed its Motion for Termination on November 9, 2004. OPC timely filed its response to the Motion for Termination on November 16, 2004. The following is a summary of Aloha's motion and OPC's response, as well as advisory staff's analysis and recommendation.

I. Aloha's Motion

In support of its Motion for Termination, Aloha states that its certificate of authorization is a license or franchise as contemplated by section 120.52(9), Florida Statutes. The utility cites City of Mount Dora v. JJ's Mobile Homes, 579 So. 2d 219, 223-224 (Fla. 5th DCA 1991), for the proposition that its certificate or franchise constitutes a valuable property right that may not be abrogated without providing compensation and due process of law.

Aloha asserts that the license revocation provisions contained in section 120.60(5), Florida Statutes, and Rule 28-107.004, Florida Administrative Code, require the Commission to serve an administrative complaint on Aloha before the Commission can revoke part of its certificate. Aloha states that the administrative complaint must set forth the statutes or rules Aloha has allegedly violated, the facts or conduct relied upon to establish the violation, and a statement that Aloha has a right to a hearing. Aloha alleges that the Commission has failed in this proceeding to follow the requirements of section 120.60(5) and Rule 28-107.004.

Aloha cites Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996), for the proposition that courts require agencies to strictly adhere to the mandates of section 120.60(5) when revoking a license. Citing Phillips v. Department of Business and Professional Regulation, 737 So. 2d 553 (Fla. 1st DCA 1998), Aloha states that courts have found that an administrative complaint issued without specific allegations of facts specifying the conduct on which the disciplinary action is proposed violates section 120.60 of the Administrative Procedure Act and due process of law.

Aloha states that the Commission conducted a customer service hearing on April 8, 2004. Aloha asserts that virtually all the customers stated that they wished to be deleted from Aloha's service area in order to obtain service from Pasco County. The utility states that, although Aloha was barred from participating in the hearing through cross-examination of witnesses or presenting its own evidence, the Commission used this testimony, along with letters received after the hearing, as a basis for setting the Seven Springs customers' deletion petitions for formal hearing.

Aloha states that the Order Establishing Procedure for this proceedings shows that while the Commission is the "sole entity with authority to act upon Aloha's certificates, the Commission clearly is not assuming the burden of proving that grounds exist which warrant the undisclosed action proposed to be taken against Aloha." Aloha contends that Commission staff is attempting to shift the burden of proof to Aloha. Aloha cites Associated Home Health

Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104 (Fla. 1st DCA 1984), for the proposition that only the agency, not third parties, may initiate and prosecute license revocation proceedings and that the agency has the burden of proving that a license should be revoked.

Aloha further states that the preliminary list of factual and legal issues for the March hearing authored and distributed to the parties by Commission staff goes beyond the allegations in the Seven Springs customers' deletion petitions. The utility further asserts that it will not know of the allegations against it until the prehearing conference, which is scheduled only twelve days prior to the hearing. The utility states that, consequently, it is unable to properly defend itself in this proceeding.

II. OPC's Response

In its response, OPC argues that Aloha's Motion for Termination is actually a motion to dismiss. OPC states that, as such, the motion is barred by Rule 28-106.204(2), Florida Administrative Code, which states that motions to dismiss petitions must be filed within 20 days after service of the petition, unless otherwise provided by law. OPC states that, as the petitions were filed back in 2002, this 20-day deadline has long since passed.

OPC questions whether Aloha's certificate is a license which confers property rights on Aloha. Citing Alterman Transport Lines, Inc. v. State of Florida, 405 So. 2d 456 (1981), OPC points out that the court has found that an entity may hold a license, but the license is not property in a constitutional sense.

Citing Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248 (Fla. 1993), OPC states that the Florida Supreme Court found that the Commission did not have to follow the procedures set forth in section 120.60 to revoke a long distance carriers' certificate. OPC, however, also acknowledges that the court's rationale in the Beard case was based on the fact that the interchange carrier certificates were general and did not delineate a specific service area. OPC states that this is not the case with Aloha's certificate of authorization. Nevertheless, OPC states that it is at least debatable whether Aloha's certificate of authorization is a license.

Despite its initial objections, OPC concludes that "the prudent course of action at this time is to comply with the provisions of the Administrative Procedure Act relating to licensing." OPC states, however, that it is not necessary to terminate or dismiss the current proceeding as the Commission need only serve an administrative complaint on the utility and the Commission staff could use the prefiled testimony filed by the customers on November 18, 2004, to support its complaint. Aloha would then get an opportunity to respond to the complaint. OPC states that under this procedure there is no reason the parties and the Commission could not meet the March 8-10, 2005, hearing dates.

III. Advisory Staff's Analysis and Recommendation

Aloha's Motion for Termination raises the issue of whether the license revocation procedure set forth in section 120.60(5) is applicable to this proceeding. As noted above, OPC concedes in its response that the Commission should follow that procedure.

A. Applicability of Section 120.60(5), Florida Statutes, (license revocation) and Section 367.045(6), Florida Statutes, (certificate revocation) to this Proceeding

Aloha argues that the Commission must follow the procedures set forth in section 120.60(5) in this proceeding. The following is an analysis of section 120.60 and how this section relates to the Commission's revocation of certificates of authorization.

Section 120.60, Florida Statutes, provides a procedure for license revocation by an agency. Section 120.60(5) states, in pertinent part,

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57.

The Commission statute pertaining to the revocation of water or wastewater utilities' certificates of authorization is section 367.045(6), Florida Statutes. Section 367.045(6) states:

The revocation, suspension, transfer, or amendment of a certificate of authorization is subject to the provisions of this section. The Commission shall give 30 days' notice before it initiates any such action.

While section 367.045 sets forth the procedure a utility must follow to apply for an amendment of its certificate of authorization, this section is silent as to the procedure the Commission must follow when revoking a certificate of authorization without an application from the utility.

Section 120.80, Florida Statutes, which sets forth agency exceptions from Chapter 120, addresses section 120.60 in relation to the statutes the Commission is charged with enforcing. Specifically, section 120.80(13)(c) states that "[t]he Florida Public Service Commission is exempt from the time limitations in s. 120.60(1) when issuing a license." A plain reading of this section indicates that: 1) the Administrative Procedure Act contemplates that the Commission issues licenses, as this section grants the Commission an exemption from the time requirements set forth in section 120.60(1) when issuing a license; and 2) while this section specifically exempts the Commission from subsection (1) of section 120.60, the section does not exempt the Commission from the license revocation procedure set forth in subsection (5) of section 120.60.

Section 120.52, Florida Statutes, also bolsters the notion that the certificate of authorization granted to a water/wastewater utility by the Commission is a license as contemplated by section 120.60. Section 120.52(9) defines license to mean:

a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.

Thus, the plain language of the statute appears to cover a water or wastewater certificate of authorization. It also should be noted that there is persuasive authority, City of Mount Dora v. JJ's Mobile Home, Inc., 579 So. 2d 219, 223 (Fla. 5th DCA 1991), stating that the certificates issued by the Commission to utilities under its jurisdiction constitute franchises.

Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248, 251-252 (Fla. 1993), also provides some guidance on this issue. The Beard case involved a Commission order wherein certain long distance service areas were reclassified by the Commission as extended calling service areas. Id. at 249. The effect of this reclassification was to remove the interexchange carriers' right to compete on these routes. Id. The Florida Interexchange Carriers Association argued that the Commission's action was a de facto cancellation of the carriers' certificates and, thus, was invalid because the Commission failed to follow the license revocation procedure set forth in section 120.60. Id. at 251-252. The court found that the certificates issued by the Commission to the carriers were not licenses and, thus, the Commission was not required to follow the section 120.60 procedure for revoking a license. Id. at 252. The court's rationale for concluding that the carriers' certificates were not licenses was that the certificates did not entitle the carriers to compete over a specific route, but were general in nature. Id.

Applying the court's reasoning to the facts of this case would seem to indicate the opposite result. Aloha's certificate entitles the utility to exclusively serve a defined territory. Where the court found in Beard that the Commission was not required to follow the license revocation procedures in section 120.60 because the interexchange carriers' certificates did not authorize the companies to serve specific routes, it follows that the court may find that Aloha's certificate is a license and that the Commission is required to adhere to the license revocation procedure in this case because Aloha's certificate entitles the utility to exclusively serve a specific territory.

Another issue to consider is whether the deletion of a portion of Aloha's service area would amount to a license revocation. Associated Home Health Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104, 105 (Fla. 1st DCA 1984), involved a health care association that was authorized by the Department of Health and Rehabilitative Services (HRS) to operate in Broward and Palm Beach Counties. HRS revoked the health care association's authority to operate in Palm Beach County. Id. Although HRS only revoked a portion of the area in which the health care association could operate, the court still required HRS to follow the license revocation procedure set forth in section 120.60. Id. at 106.

Advisory staff believes that the same would hold true for a partial deletion of Aloha's service territory. Aloha's certificate of authorization sets forth the territory the utility is

authorized to serve. If the territory at issue is deleted from Aloha's service area, the Commission will amend Aloha's certificate of authorization to remove this territory. Advisory staff believes that this action would, in effect, amount to a partial license revocation.

B. Procedure for Revoking a Certificate Under Sections 120.60(5) and 367.045(6), Florida Statutes

Section 120.60(5) and Rule 28-107.004 require that an administrative complaint be provided to the licensee either via personal service or certified mail. Rule 28.107.004(2) states that an administrative complaint must include:

- 1) the statutory provisions or rules alleged to have been violated;
- 2) the facts and conduct relied on to establish the violation; and
- 3) a statement that the licensee has a right to request a hearing conducted in accordance with sections 120.569 and 120.57.

The information required in an administrative complaint is basically the same information placed in Commission show cause orders. In fact, Rule 28-107.004(c) implies that an order to show cause would suffice in lieu of an administrative complaint, as it states that requests for hearing in response to the complaint must reference "the notice, **order to show cause**, administrative complaint, or other communication the party has received from the agency." [emphasis added] Staff also notes that all Commission show cause orders are served via certified mail to the entity to which they are directed, which is another requirement of section 120.60(5).

Order No. PSC-04-0712-PAA-WS, which initiated this deletion proceeding, does not appear to comply with the requirements of an administrative complaint/order to show cause as set forth in section 120.60 and Rule 28-107.004(2). While the Commission cites to sections 367.121, 367.045, 367.111, and 367.161 in Order No. PSC-04-0712-PAA-WS as the basis for the Commission's jurisdiction to delete a utility's territory or revoke a utility's certificate, the order does not specifically state the statutes or rules alleged to have been violated by Aloha, nor does it specifically set forth the facts and conduct relied on to establish any such violations. Moreover, as Order No. PSC-04-0712-PAA-WS does not appear to constitute an administrative complaint, an administrative complaint has not been served to Aloha as required by section 120.60(5) and Rule 28-107.004.

In addition to the requirements of section 120.60(5), section 367.045(6) states that the Commission must provide 30 days notice before it initiates a revocation action. Although Order No. PSC-04-0712-PAA-WS states that the Commission set the deletion petitions directly for hearing, this order may not fulfill the requirements of section 367.045(6) as it does not specifically state that it is the Commission's notice to initiate a certificate revocation proceeding.

Staff notes that in a prior proceeding before the Commission to revoke a utility's certificate, the Commission appears to have complied with the noticing procedures set forth in section 367.045(6) and substantially complied with the noticing procedure set forth in section 120.60, even though the Commission did not cite to this section. In Order No. PSC-93-0542-

FOF-WS, issued April 9, 1993, the Commission initiated a certificate revocation proceeding against Shady Oaks utility. The Commission then opened Docket No. 930944-WS, In re: Revocation by Florida Public Service Commission of Certificates Nos. 451-W and 382-S Issued to Shady Oaks Mobile-Modular Estates, Inc. in Pasco County, Pursuant to Section 367.111(1), F.S., (Shady Oaks), in which it issued a notice to the customers and a certified notice to the utility of its intent to initiate the revocation of the utility's certificate and provided an opportunity to file objections.

C. Burden of Proof in License Revocation Proceedings

The Administrative Procedure Act is clear as to who has the burden of proof in license revocation proceedings. Rule 28-107.004(2) states that the agency shall have the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee. The Seven Springs customers appear to have the burden of proof in this proceeding, as it is currently constituted.

Associated Home Health Agency, 453 So. 2d at 104, addressed the situation where, as here, a third party initiated a license revocation proceeding and essentially prosecuted the case as well. The case involved a dispute between two home health care associations (herein referred to as "Association A" and "Association B") before the Department of Health and Rehabilitative Services (HRS). Id. at 104. Association A requested a section 120.57 hearing in regard to whether the license of Association B should be revoked. Id. HRS ultimately revoked Association B's license. Id. at 105.

Association B appealed the decision and argued that HRS had the burden to initiate the license revocation proceeding and that it was improper to allow Association A to initiate and prosecute the revocation proceeding. Id. at 105-106. The court agreed and stated that: 1) the agency has the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee; 2) an agency may not turn its burden of proof over to a third party; 3) Association A should not have been permitted to initiate the revocation proceeding; and 4) the proper course of action is for Association A to convey the facts supporting the license revocation to the agency, which has the power to institute proceedings to revoke a license. Id. As a result, the court reversed HRS's decision to revoke the license, but allowed the agency to conduct a proper proceeding under section 120.60 to revoke the license.

While the Associated Home Health Agency case indicates that Commission staff may use evidence provided by the Seven Springs customers to support the Commission's case against Aloha, the case is clear that the Commission is required to initiate and prosecute the license revocation. It should be noted that the Commission initiated the certificate revocation proceeding in the Shady Oaks case, and Commission staff had the burden of proof in that proceeding.

It is also important to note that there is an elevated standard of proof in license revocation proceedings. While ordinary section 120.569 proceedings apply the preponderance of the evidence standard, the clear and convincing evidence standard applies to license revocation

proceedings. See Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

D. Conclusion and Advisory Staff's Recommendation

The plain language of sections 120.52(9) and 120.80(13)(c) and the Florida Supreme Court's reasoning in Beard, 624 So. 2d at 251-252, indicate that Aloha's certificate of authorization is a license. Sections 120.60(5) and 367.045(6) set forth the procedure the Commission must follow to revoke a utility's certificate of authorization. It appears from a review of the procedure thus far in this case that the requirements of sections 120.60(5) and 367.045(6) have not been met. Section 120.60(5) specifically states that no license revocation is lawful unless the agency complies with the procedure set forth in that section.

As no notice of the initiation of a revocation proceeding has been issued pursuant to section 367.045(6) and this proceeding does not currently conform to the procedure set forth in section 120.60(5), advisory staff recommends that Aloha's Motion for Termination of Proceedings as They Relate to Deletion of Territory should be granted.

Issue 3: Should Aloha's Request for Oral Argument in regard to its Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS (the Discovery Order) be granted?

Recommendation: If the Commission votes to approve advisory staff's recommendation on Issue 2, Aloha's Request for Oral Argument would be moot. However, even if the Commission denies advisory staff's recommendation on Issue 2, Aloha's Request for Oral Argument should be denied. (Cibula)

Staff Analysis: As stated in the case background, Aloha's Motion for Reconsideration of the Discovery Order was accompanied by a Request for Oral Argument. In support of its request, Aloha states that oral argument is necessary to help clarify the issues, ensure that the Commission is fully informed, and allow the parties to further express their concerns and comments. Aloha further states that the Motion for Reconsideration is of great scope and scale and the outcome is critical to both Aloha and Aloha's customers.

If the Commission votes to approve advisory staff's recommendation on Issue 2, Aloha's Request for Oral Argument would be moot, as this proceeding will be terminated. Nevertheless, if the Commission denies advisory staff's recommendation on Issue 2, Aloha's Request for Oral Argument should be denied. Advisory staff believes that Aloha's arguments are adequately contained in its Motion for Reconsideration, and, thus, oral argument is unnecessary.

Issue 4: Should Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS (the Discovery Order) be granted?

Recommendation: If the Commission votes to approve advisory staff's recommendation on Issue 2, Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS would be moot. However, even if the Commission denies advisory staff's recommendation on Issue 2, the motion for reconsideration should be denied. Aloha should provide the information requested in POD No. 1, as set forth in Order No. PSC-04-1152-PCO-WS, within 5 days of the Commission's vote on this motion. (Cibula)

Staff Analysis: As stated in the case background, Aloha filed its Motion for Reconsideration of the Discovery Order on November 24, 2004. Staff timely filed its response to Aloha's motion on December 2, 2004.

The Discovery Order granted Commission staff's revised Motion to Compel Staff's First Request for Production of Documents to Aloha (POD No. 1). Staff's revised POD No. 1 requests that Aloha provide, in electronic format, a list of the names and addresses of its water customers who reside within the areas for which deletion of territory has been requested in this proceedings.

Aloha's Motion for Reconsideration

In support of its motion for reconsideration, Aloha states that the Commission should make a distinction between motions for reconsideration of orders issued by the full Commission and those issued by the Prehearing Officer. It states that review of orders of the full Commission should be analyzed based on the traditional standard of whether the Commission overlooked or failed to consider a point of fact or law when rendering the order. Aloha, however, states that a different standard of review for Prehearing Officer orders should apply. Aloha states that there is nothing in the Administrative Code or case law which would prevent the Commission from applying a different standard. The utility further states that a different standard of review for an order issued by a Prehearing Officer makes sense because four of the Commissioners reviewing the Prehearing Officer's order have not previously overlooked or failed to consider any points or issues in that order, as it would be the first time they have looked at those points or issues.

The utility further asserts that, although the Discovery Order states that staff can propound the discovery request, it fails to state how staff has the authority to do so. Aloha states that staff is not a party to this proceeding pursuant to the Rules of Civil Procedure and the Uniform Rules of Procedure.

Aloha also argues that the Discovery Order fails to discuss the Motion for Termination filed on November 9, 2004, and the ramifications of that motion. Aloha states that "[e]ven if staff is a proper party to tender the discovery, and even if the discovery is proper discovery, then the Protective Order should be granted because of the serious questions which have been raised about the legality of this proceeding and the results and effects of staff's intentions with regard to the requested documents."

Commission Staff's Response to Aloha's Motion

In its response to Aloha's motion for reconsideration, staff states that Aloha has failed to demonstrate that the Prehearing Officer has overlooked or failed to consider a point of fact or law in determining that revised POD No. 1 is discoverable. In regard to Aloha's argument that a different standard of review should be applied when the Commission reviews a Prehearing Officer order, staff states that Aloha fails to point to any rules or case law that requires the Commission to make such a distinction. Staff further states that Aloha also fails to state in its motion what that standard of review should be.

Citing Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962) and Pingree v. Quaintance, 394 So. 2d 161, 162 (Fla. 1st DCA 1981), staff states that the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider when rendering the order. Citing Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974), staff states that a motion for reconsideration should be based on specific facts set forth in the record and should not be based on "an arbitrary feeling that a mistake may have been made." Staff asserts that "[t]he suggestion that the Commission may have the discretion to alter the standard of review does not meet the standard of review."

In regard to Aloha's argument that the Discovery Order does not state a basis for staff's ability to propound the discovery request, staff asserts that it stated the basis or foundation for its role in this proceeding in its Response to Aloha's Motion for Protective Order and that the Prehearing Officer considered this response when rendering the Discovery Order. Staff states that Aloha made this same argument in its Motion for Protective Order and Response to Staff's Motion to Compel. Citing Sherwood v. State, 111 So. 2d 96, 98 (Fla. 3rd DCA 1959), staff states that it is not appropriate to reargue matters in a motion for reconsideration.

As for Aloha's argument that the Discovery Order does not discuss Aloha's Motion for Termination, staff states that the Prehearing Officer was not required to consider that motion in rendering his decision. Staff states that "[t]he Motion to Terminate is an entirely separate motion apart from the Motion to Compel which Aloha requests that the Commission deny upon reconsideration of the Order at issue" and that the case must proceed under the current case schedule unless and until the Commission rules otherwise. Staff points out that it was under no obligation to respond to Aloha's Motion for Termination in its Motion to Compel and that it would have been impossible to do so as the motion was filed on the same day that staff's response to Aloha's Motion for Protective Order was filed.

Staff states that the Commission should deny Aloha's motion for reconsideration. Staff further states that the Commission should require Aloha to produce revised POD No. 1 within 5 days of the Commission's vote on the motion for reconsideration.

Advisory Staff's Analysis and Recommendation

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or not considered when the order was rendered.

Diamond Cab Co., 146 So. 2d at 891; Pingree, 394 So. 2d at 162. Advisory staff believes that Aloha's assertion that a different standard of review should be applied to orders issued by a Prehearing Officer should be rejected, as there is no basis in law to apply a different standard of review and the Commission has consistently rejected this position.

As for Aloha's argument that the Discovery Order fails to consider staff's authority to propound the discovery request, this argument was raised by Aloha in its Motion for Protective Order and, in effect, rejected by the Prehearing Officer when he found that "staff, in its role of assisting in the development of the evidence to ensure a complete record, is authorized to request this information from Aloha." Id. at 5. In another portion of the Discovery Order, there is discussion of Commission staff's argument that the Commission's Statement of Agency Organization & Operations allows Commission staff to engage in the discovery process for this purpose. Id. at 4. Thus, Aloha's argument is merely a reargument of a matter considered by the Prehearing Officer, which is not proper for a motion for reconsideration. See Sherwood, 111 So. 2d at 98.

Aloha's argument that the Discovery Order fails to discuss Aloha's Motion for Termination is also without merit. The order recognizes that Aloha made an argument that a protective order should be issued because the Commission failed to follow the procedure set forth in section 120.60(5), Florida Statutes. Id. at 3. Thus, this is again reargument of an issue that was considered by the Prehearing Officer and is not proper for a motion for reconsideration. See Sherwood, 111 So. 2d at 98. Advisory staff notes that the merits of Aloha's Motion for Termination is the subject of Issue 2.

If the Commission votes to approve advisory staff's recommendation on Issue 2, this proceeding will be terminated and this pending motion will be moot. If the Commission votes to deny advisory staff's recommendation on Issue 2, advisory staff recommends that Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS should be denied. Advisory staff believes that Aloha has failed to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Discovery Order. See Diamond Cab Co., 146 So. 2d at 891; see also Pingree, 394 So. 2d at 162. Advisory staff further recommends that Aloha should provide the information requested in POD No. 1, as set forth in Order No. PSC-04-1152-PCO-WS, within 5 days of the Commission's vote on Aloha's motion for reconsideration.

Docket Nos. 020896-WS, 010503-WU

Date: December 21, 2004

Issue 5: Should these dockets be closed?

Recommendation: If the Commission approves advisory staff's recommendation on Issue 2, Docket No. 020896-WS should be closed and the customer hearing scheduled for January 27-28, 2005, should be cancelled. If the Commission denies advisory staff's recommendation on Issue 2, Docket No. 020896-WS should remain open. In either event, Docket No. 010503-WU should remain open to proceed to hearing on the protest to the order relating to the measurement of water quality. (Cibula)

Staff Analysis: If the Commission approves advisory staff's recommendation on Issue 2, advisory staff recommends that Docket No. 020896-WS, relating to the petitions of the customers to delete territory in Aloha's Seven Springs service area, should be closed and that the customer hearing scheduled for January 27-28, 2005, should be cancelled. If the Commission decides to initiate a license revocation proceeding, advisory staff recommends that a new docket be opened. If the Commission denies advisory staff's recommendation on Issue 2, Docket No. 020896-WS should remain open.

Docket No. 010503-WU, relating to the measurement of the water quality at Aloha's facilities, is not impacted by Aloha's Motion for Termination. Thus, Docket No. 010503-WU should remain open to proceed to hearing.