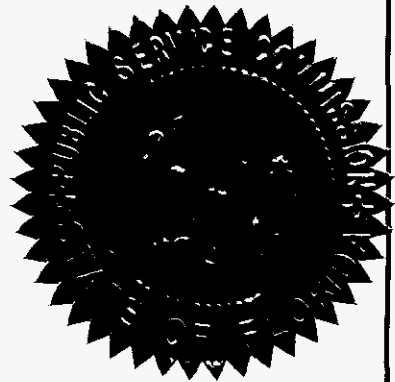


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 010503-WU

In the Matter of:

APPLICATION FOR INCREASE IN WATER
RATES FOR SEVEN SPRINGS SYSTEM IN
PASCO COUNTY BY ALOHA UTILITIES, INC.



PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 6A

COMMISSIONERS
PARTICIPATING: CHAIRMAN MATTHEW M. CARTER, II
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER KATRINA J. McMURRIAN
COMMISSIONER NANCY ARGENZIANO
COMMISSIONER NATHAN A. SKOP

DATE: Tuesday, May 19, 2009

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

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

DOCUMENT NUMBER-DATE
05454 JUN-28

FPSC-COMMISSION CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

* * * * *

COMMISSIONER EDGAR: We will be on Item 6A.

And, again, we'll give a moment to our staff to switch out.

(Pause.)

Go right ahead. Thank you.

MS. BRUBAKER: Commissioners, Jennifer Brubaker for legal staff. Item 6A is staff's recommendation that the Commission order Aloha Utilities to transfer the escrowed interim funds in this docket in cooperation with staff to an escrow account with the DFS, Bureau of Collateral Management.

Staff has two minor modifications to Page 7 of the recommendation which have been provided to the Commissioners and parties. In the first paragraph of Page 7, the sentence beginning, "Florida law allows the BCM to provide," please add to the end of that sentence, "other than an administrative fee authorized by Section 17.61(4)(b), *Florida Statutes*, in the amount of approximately .01 percent per month. The administrative fee would be assessed from the interest earned on the account rather than the corpus of the escrowed interim fund."

And also on Page 7, proposed finding number

1 four towards the bottom, the phrase "without maintenance
2 fees" should be stricken.

3 Representatives of the utility and OPC are
4 present to address the Commission, and staff is
5 available to answer any questions. Thank you.

6 **COMMISSIONER EDGAR:** Commissioner Skop.

7 **COMMISSIONER SKOP:** Thank you, Madam Chairman.
8 Just a quick question to staff on Page 7 of the staff
9 recommendation. It discusses "the Commission approve
10 the following findings," and I guess my question
11 pertains to finding five to the extent that should Aloha
12 fail to abide by a Commission order, that the Commission
13 will seek enforcement with a court of competent
14 jurisdiction.

15 But with respect to Issue 5, the Commission
16 orders Aloha to move interim funds to a BCM escrow
17 account. I would assume that upon the parties signing
18 that escrow agreement, the account number would be
19 created and staff would work with Aloha to provide it
20 with a specific account number so that those funds could
21 be deposited; is that correct?

22 **MS. BRUBAKER:** That is consistent with my
23 understanding.

24 **COMMISSIONER SKOP:** Okay. And that will be
25 reflected in the order per some language.

1 **MS. BRUBAKER:** We can add that to the order,
2 if you'd, if you'd like. Absolutely.

3 **COMMISSIONER SKOP:** I'd like to just make
4 things crystal clear so it doesn't provide a point of
5 entry for more litigation, if we could.

6 **MS. BRUBAKER:** Of course.

7 **COMMISSIONER SKOP:** Thank you. And, Madam
8 Chair, if there's no further questions, I'd move staff's
9 recommendation as to Issues 1 and 2.

10 **CHAIRMAN CARTER:** If appropriate, Madam Chair,
11 I would second it.

12 **COMMISSIONER EDGAR:** Thank you, Chairman
13 Carter. We have a motion and a second in favor of the
14 staff recommendation as modified for all issues for 6A.

15 **MR. WHARTON:** What about that -- am I not
16 going to get to address the Commission?

17 **COMMISSIONER EDGAR:** I didn't realize that you
18 wanted to.

19 **MR. WHARTON:** I do.

20 **COMMISSIONER EDGAR:** Okay. Sometimes people
21 approach just to respond to questions. You are
22 recognized.

23 **MR. WHARTON:** Okay. Thank you.

24 **COMMISSIONER EDGAR:** I'm sorry. And just a
25 moment. We do have a motion and a second that is

1 pending. Realizing that I thought you were just here to
2 answer questions, should there be any, we will go a
3 little bit out of form. And just bear with me, but we
4 do have a motion that is pending. And, Mr. Wharton, you
5 may go right ahead.

6 **MR. WHARTON:** Thank you, Madam Acting
7 Chairman.

8 **COMMISSIONER EDGAR:** You're welcome.

9 **MR. WHARTON:** I do actually -- I'm talking to,
10 unless I'm mistaken, three lawyers and someone who's
11 probably learned more law than she ever wanted to. I
12 want to stress a very fundamental point of law to you
13 all. I'm not even asking you to do something different.
14 I'm asking you to do it a different way.

15 I'm not sure if staff appreciates this, I
16 don't think there's some Machiavellian intent here, but
17 the way this has come down is you guys did something
18 very similar on the 21st. To my mind, whether I'm right
19 or I'm wrong, it was clearly labeled a PAA. That order
20 didn't come out until Friday. This thing only came up
21 last week, and so I haven't talked to anybody, to the
22 staff about what I'm about to talk to you about.

23 But I want you to think about what it means to
24 label this action procedural or preliminary. It means
25 under Section 120.68(1) of the Administrative Procedure

1 Act that there's only two things Aloha can do: We can
2 either move to reconsider or we can go directly to the
3 court of appeals and have to satisfy the extraordinary
4 burden that you have when you appeal an interlocutory
5 order, that we could not get relief upon the final order
6 if we are aggrieved by this, and that is a very high
7 burden. The court rarely accepts interlocutory appeals
8 from administrative action.

9 And the reason this is so critical and that I
10 don't think perhaps anyone has thought about is that you
11 have said in here and you have voted on the 21st that
12 the FGUA should get the money to set up a rate
13 stabilization account. You haven't taken that action.
14 You've proposed to take that action. It will become
15 final on June 4th if we don't ask for a hearing. But
16 here in a forum that is preliminary or procedural you
17 are ordering us to cooperate with you in a way that
18 undermines what we're going to do in that PAA. We don't
19 believe you have jurisdiction, whether we're right or
20 we're wrong. That's our position in the PAA. We don't
21 believe these are interim rate funds that fit under this
22 order. Whether we're right or we're wrong, we should
23 get due process on that.

24 My point is y'all want to do this? Do you
25 want to go to a court and put an order on Regions Bank

1 or whatever to get those funds out of there? Leave us
2 out of it. Don't issue an order that we'll be in
3 violation of seven days from now that in order to comply
4 with we would have to undermine some of the issues in
5 the PAA. I don't think that's what staff intended, but
6 that's the way we read this. I'm going to have to think
7 long and hard about how to advise my client if you order
8 us to do something in a preliminary or procedural
9 fashion and yet you've given us due process on the
10 larger issue. I just want that to be considered by the
11 Commission before the vote, and I'm not sure that that
12 perspective has been put out there and I just wanted to
13 communicate that to the Commissioners.

14 **COMMISSIONER EDGAR:** Thank you, Mr. Wharton.

15 Yes, Mr. Reilly.

16 **MR. REILLY:** Very briefly. The customers and
17 the Office of Public Counsel fully support staff's
18 recommendation. We think this is an extraordinary
19 circumstance because the bank, Regions Bank has actually
20 provided its notice. It is withdrawing. So we have no
21 escrow agent effective May 29th, so I think staff's
22 responding. I don't think it's dispositive in any way
23 of the ultimate case, but there has to be a place to put
24 this money safely and correctly until such time as this
25 has been finally resolved after Mr. -- after Aloha has

1 had its full opportunity to make its case and even take
2 it to appeal, if necessary. But we have to have a place
3 to put this, and I think this is appropriate and
4 necessary under the extraordinary circumstances of
5 Regions exercising its right to withdraw. Thank you.

6 **COMMISSIONER EDGAR:** Thank you, Mr. Reilly.

7 Ms. Brubaker, can you respond to points raised
8 by Mr. Wharton?

9 **MS. BRUBAKER:** Yes. Actually I would concur
10 with counsel for OPC. This is -- we discussed
11 internally what kind of action is this, is it PAA, is it
12 interim, is it, is it procedural, and we definitely came
13 to the conclusion that this is the procedural
14 preliminary type action. It's not dispositive of the
15 final case. There is process that's being afforded
16 regarding the disposition of the funds. That is clearly
17 a PAA and there is a clear point of entry to discuss
18 that disposition. In staff's view this is a procedural
19 matter and so staff has so recommended.

20 **MR. WHARTON:** If I may briefly, Madam
21 Chairman.

22 **COMMISSIONER EDGAR:** Mr. Wharton.

23 **MR. WHARTON:** My, my point is the action
24 probably would be or could, you know, reasonably be
25 construed to be preliminary or procedural, given the

1 cases on what is a final order and what it fits under.
2 My point is you know what our position is. You know
3 what our position is on jurisdiction. You know what our
4 position is on the quality of the funds. Do it without
5 issuing an order that you know that we would have to
6 give up those positions in order to comply with. I
7 think you can accomplish the same thing without creating
8 another sideshow that while keeping our eye on the ball
9 of who should get the funds, whether Aloha is right on
10 the issues of jurisdiction, go ahead, go to a court. I
11 mean, these funds are going to remain in Regions Bank.
12 They're not going to be thrown out on the street until
13 either the court takes them in in the pending
14 interpleader action or you guys get an order somewhere
15 else. Those are the two things that are out there right
16 now.

17 My point is that don't issue an order today
18 that in order to comply with that order we'd have to
19 give up some of our due process rights that you
20 yourselves afforded us on April the 21st.

21 **COMMISSIONER EDGAR:** Ms. Brubaker.

22 **MS. BRUBAKER:** I understand Mr. Wharton's
23 perspective. But where I'm coming from is we have a
24 notice from the bank that they wish to withdraw as
25 escrow agent. We also know that they have filed for

1 interpleader. My concern is to preserve and maintain
2 what this Commission has ordered, and that is the
3 disposition of the funds in order to protect and
4 maintain those interim escrow funds during the pendency
5 of that final disposition. Staff believes the best
6 protection of those funds is the course that we've
7 recommended in this recommendation.

8 **COMMISSIONER EDGAR:** Thank you.

9 Commissioners, we do have a motion and a
10 second that is pending before us. We have had further
11 discussion and points raised for our consideration. Is
12 there any further, any further discussion or questions?

13 **COMMISSIONER ARGENZIANO:** Just one, Madam
14 Chair.

15 **COMMISSIONER EDGAR:** Commissioner Argenziano.

16 **COMMISSIONER ARGENZIANO:** As to the, and I
17 understand staff 100 percent, we're trying to protect
18 those funds. And since the bank says we don't want to
19 be bothered with this anymore, I'm not sure what the
20 outcome would be if we just left them there. And, but I
21 do have a concern regarding -- I'd like staff to address
22 the due process issue that has been raised. Is there a
23 due process issue in just moving the funds over and are
24 we doing that?

25 **COMMISSIONER EDGAR:** Ms. Brubaker.

1 **MS. BRUBAKER:** I appreciate Commissioner
2 Argenziano's concern. And of course we always want to
3 be aware of and sensitive to and provide due process to
4 all parties that come before this Commission. In my
5 mind, we are not violating due process. I believe we
6 even heard Mr. Wharton say that this could be
7 interpreted in his mind as a preliminary procedural type
8 matter.

9 I think due process is afforded. It is
10 certainly afforded with regard to the ultimate
11 disposition of these funds. And there are remedies
12 available. If Aloha feels that moving these monies to
13 the escrow account as recommended by staff is not
14 appropriate, there are remedies available that it can
15 pursue.

16 **COMMISSIONER ARGENZIANO:** Thank you.

17 **COMMISSIONER EDGAR:** Thank you.

18 Commissioner McMurrian.

19 **COMMISSIONER McMURRIAN:** To follow up on that,
20 what are those remedies? I'm not asking you to list
21 every remedy in the world, but -- because he talked
22 about going straight, you know, appealing, an
23 interlocutory appeal, and, as he mentioned, I'm not an
24 attorney. So what would be the action they would take?

25 **MS. BRUBAKER:** Certainly. Reconsideration is

1 certainly an option that's available if the utility
2 wishes to pursue that. But also for interlocutory
3 appeal it would be, I believe, and I'm looking to our
4 appellate counsel, but I think that would be to the
5 1st DCA, if I'm not mistaken, and she's nodding. So,
6 yes, that would be to the 1st DCA if they believe an
7 interlocutory appeal is necessary in this situation.

8 **COMMISSIONER McMURRIAN:** So one follow-up. So
9 it may be difficult, noting what he said about
10 interlocutory appeals, but they do have the ability to
11 seek that route.

12 **MS. BRUBAKER:** That's correct.

13 **COMMISSIONER McMURRIAN:** Okay. Thank you.

14 **COMMISSIONER EDGAR:** Commissioner Skop.

15 **COMMISSIONER SKOP:** Thank you, Madam Chairman.
16 And I appreciate staff's analysis on this. I agree with
17 staff to the extent that the bank has provided notice of
18 withdrawal and basically, at least in my opinion, the
19 Commission has taken the appropriate measures to
20 safeguard the funds and continue to hold them in escrow
21 in an interest bearing account at the lowest possible
22 cost to all the parties. And at such time should Aloha
23 prevail in whatever protest it desires to engage in, a
24 court would certainly have its jurisdiction to order the
25 BCM to release those funds to the party prevailing. So

1 I think that there is adequate due process and I do
2 appreciate staff's thorough analysis on the matter.

3 **COMMISSIONER EDGAR:** Thank you.

4 Commissioners, any further discussion or
5 question? Okay. Hearing none, we have had a motion
6 pending with a second for the staff recommendation as
7 modified on all issues on this Item 6A. All in favor,
8 say aye.

9 (Unanimous affirmative vote.)

10 Any opposed? Show it adopted. Thank you.

11 **MR. WHARTON:** Thank you, Commissioner.

12 (Agenda item concluded.)

13 * * * * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF FLORIDA)
 : CERTIFICATE OF REPORTER
COUNTY OF LEON)

I, LINDA BOLES, RPR, CRR, 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 2nd day of June, 2009.

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