

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for approval) DOCKET NO. 950615-SU
of Reuse Project Plan and) ORDER NO. PSC-96-0658-FOF-SU
increase in wastewater rates in) ISSUED: May 10, 1996
Pasco County by Aloha Utilities,)
Inc.)
_____)

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER DENYING MOTION TO DISMISS
AND
DENYING MOTION TO ASSIGN THE CASE TO THE
DIVISION OF ADMINISTRATIVE HEARINGS

BY THE COMMISSION:

BACKGROUND

Aloha Utilities, Inc. (Aloha or utility), is a class A water and wastewater utility located in Pasco County. The utility consists of two distinct service areas -- Aloha Gardens and Seven Springs. These service areas are physically divided by U.S. Highway 19, the major north/south highway through Pinellas and Pasco Counties. According to Aloha's 1994 annual report, the utility's total annual water revenues were \$1,585,267, with total expenses of \$1,578,694, resulting in a net operating income of \$6,573. Also, for 1994, the utility's total annual wastewater revenues were \$2,147,817, with total annual expenses of \$2,132,270, resulting in a net operating income of \$15,547. The last rate cases for this utility were in 1976 for the Seven Springs service area and 1992 for the Aloha Gardens service area.

Aloha serves approximately 7,000 water customers and 6,800 wastewater customers in its Seven Springs service area. The utility purchases approximately 80% of its total water supply for resale to its Seven Springs customers. Currently, wastewater is treated by a 1.2 million gallons per day (mgd) extended aeration plant that discharges to a number of percolation/evaporation ponds.

Effluent from Aloha's Seven Springs 1.2 mgd wastewater treatment facility is currently being disposed to ground water by three percolation ponds located adjacent to the plant. The

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Department of Environmental Protection (DEP) first became concerned about the operational condition of these ponds in 1989. According to the DEP, the pond effluent levels were continuously near the top of the berms. The DEP also believed that the ponds were leaching effluent into adjacent drainage ditches and then to surface waters.

Because the percolation ponds did not appear to be operating properly, the DEP attempted to persuade Aloha to enter into a Consent Order to construct additional effluent disposal capacity. Since Aloha believed that the percolation ponds were functioning properly, they initially refused to enter into a Consent Order with the DEP. In 1993, the DEP filed suit against Aloha alleging that the utility's Seven Springs wastewater treatment plant had effluent discharges into nearby surface waters which, if occurring, were in violation of the plant's operating permit.

On March 25, 1994, the DEP and Aloha entered into a Consent Final Judgment wherein Aloha agreed to add 400,000 gallons per day (gpd) in additional effluent disposal capacity before December 31, 1994 and pay a \$19,500 fine. The Consent Final Judgment also limited the number of new connections to 200 until 400,000 gpd of additional effluent disposal capacity was placed into service.

As a means of complying with the Consent Final Judgment, the utility proposed a project for the disposal of wastewater which would be constructed in three phases over a period of 24 months. The stated goal of the project plan is to ultimately dispose of all effluent from the Seven Springs plant via reuse.

On June 1, 1995, Aloha applied for approval of these three phases in what it designated as a reuse project plan and an increase in rates for wastewater service to its Seven Springs customers purportedly pursuant to Section 367.0817, Florida Statutes. However, because of deficiencies in the application, the official filing date was established as July 13, 1995, the date on which the utility corrected the deficiencies.

Although Aloha filed this plan pursuant to the provisions of Section 367.0817 (entitled "Reuse Projects"), Florida Statutes, review of the plan showed that, at least in the initial phases, it is not in fact a reuse plan but just a new plan for disposing of effluent. Therefore, instead of reviewing the plan under the provisions of Section 367.0817, Florida Statutes, we have reviewed the filing as if it was made under Section 367.0822 (entitled "Limited proceedings"), Florida Statutes, and by Proposed Agency Action (PAA) Order No. PSC-95-1605-FOF-SU, we proposed to approve only Phase I of the project.

The PAA Order was issued December 28, 1995, and on January 10, 1996, Representative Mike Fasano timely filed his protest and petition requesting an administrative hearing. An administrative hearing is now scheduled for September 9 and 10, 1996.

In response to Representative Fasano's Petition, Aloha Utilities, Inc., filed its Motion to Dismiss "Petition" of Mike Fasano for Administrative Hearing and Motion That Case Be Referred to the Florida Division of Administrative Hearings (DOAH). By document dated February 15, 1996, Representative Fasano filed his response to Aloha's Motion to Dismiss. Representative Fasano is a customer and is protesting on his own behalf.

MOTION TO DISMISS

On February 7, 1996, Aloha filed a Motion to Dismiss Representative Fasano's petition for administrative hearing. Representative Fasano timely responded to Aloha's Motion to Dismiss on February 15, 1996.

Aloha alleges that Representative Fasano's correspondence was not served on Aloha as required by Rule 25-22.036(10), Florida Administrative Code. A copy of the correspondence was facsimiled by Commission staff to counsel for Aloha on January 18, 1996. Aloha also alleges that Mr. Fasano's correspondence fails to meet the requirements for a petition as established in Rule 25-22.036, Florida Administrative Code. Further, Aloha claims that Mr. Fasano is not, for the purposes of this proceeding, within the "zone of interest" that the Administrative Procedures Act was designed to protect. The notice and standing issues are handled separately below.

Aloha alleges that Fasano's correspondence to the Commission fails to follow any of the specifically delineated requirements for a petition as established in Rule 25-22.036, Florida Administrative Code. However, Aloha's motion does not cite any rule, statutory, or case law which would suggest that strict adherence to the Commission's pleading rules is jurisdictional to the Commission's undertaking to schedule a formal proceeding in this docket.

Notice

In Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993), the Florida Supreme Court stated that "[t]he function of a motion to dismiss is to raise as a question of law the sufficiency of facts alleged to state a cause of action." The Court went on to say that "[i]n determining the sufficiency of the complaint, the trial court must not look beyond the four corners of the complaint,

. . . nor consider any evidence likely to be produced by the other side." See also, Holland v. Anheuser Busch, Inc., 643 So. 2d 621 (Fla. 2nd DCA 1994) (stating that it is improper to consider information extrinsic of the complaint).

Aloha is seeking a sanction based upon a perceived failure to fulfill the notice requirement, as set forth in Rule 25-22.036(10), Florida Administrative Code. Rule 25-22.036(7), Florida Administrative Code, delineates the form and content of initial pleadings. The rule states that each initial pleading "should" contain the listed information, but does not require each item, nor does it prescribe a sanction for failing to include the listed information. Aloha argues that pursuant to the holding in Order No. PSC-94-0987-FOF-WS, issued in the Petition for Limited Proceeding to Implement Water Conservation Plan in Seminole County by Sanlando Utilities Corporation, that a petitioner must comply with Rule 25.22.036, Florida Administrative Code, and must set forth disputed issues of material fact and ultimate facts, a demand for relief and the substantial interests of the petitioner.

We have considered and rejected similar arguments by a utility in Docket No. 910637-WS, Application for a Rate Increase in Pasco County by Mad Hatter Utility, Inc. (MHU). In Order No. PSC-92-0610-FOF-WS, Order Denying Motion to Dismiss and Granting Motion to Strike at page 3, we stated:

MHU asserts that since Mr. Hayes' protest fails to raise any disputed issues of material fact and is so devoid of specificity, it is unclear how Mr. Hayes' interests are affected, how the Commission erred in its Order or what a formal hearing would accomplish. Although it acknowledges that the commission has been somewhat averse to granting motions to dismiss PAA protests in the past, MHU suggests that since Mr. Hayes is an attorney, he should be held accountable for not following the Commission's pleading rules.

Aloha is correct in pointing out that protests to PAA Orders are "petitions" within the meaning of Rule 25-22.036, Florida Administrative Code, and as such, PAA protests should meet the form and content requirements of the rule. However, we find that Mr. Fasano's petition and subsequent response has given Aloha adequate notice. Aloha has not cited any legal justification to dismiss the request for hearing based upon a perceived deficiency in the notice. Dismissal based upon a perceived failure to fulfill the notice requirement would be an inappropriate and "drastic remedy,"

that goes beyond the four corners of the complaint. See, Carr v. Dean Steel Buildings, Inc., 619 So. 2d 392 (Fla. 1st DCA 1993). See also, Neal v. Neal, 363 So. 2d 810 (Fla. 1st DCA 1994) (stating that the severity of the sanction should match the violation); and Shahid v. Campbell, 552 So. 2d 321 (Fla. 1st DCA 1989).

Standing

In order for a protestant to have standing, he must demonstrate that he will suffer injury in fact of sufficient immediacy to entitle him to a hearing under Section 120.57, Florida Statute, and that his injury will be of a type or nature which the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1979). While it is true that Mr. Fasano's original protest neglected to assert his standing in this matter, Mr. Fasano's Response to Aloha's Motion to Dismiss satisfies the standing requirements. We have used broad discretion in allowing customers to amend their deficient pleadings so long as that discretion did not act to prejudice the party motioning for dismissal. Mr. Fasano's Response asserts that his home is serviced by Aloha Utilities and he pays the recurring billing by Aloha. Mr. Fasano asserts that PAA Order No. PSC-95-1605-FOF-SU would cause each of the bills for which he is responsible to increase. Mr. Fasano further stated in his Response to Aloha's Motion to Dismiss that the rate increase approved by the PAA Order is based on an inflated rate base, an inflated statement of expenses and an excessive rate of return.

In consideration of the foregoing, we find that Mr. Fasano has satisfied the standing and procedural requirements for his petition and, accordingly, Aloha's Motion to Dismiss is denied.

TRANSFER TO DOAH

As stated earlier, Aloha also requests that this case be transferred to DOAH. Aloha asserts that Fasano, as a state representative, may exercise undue influence upon the Commission and/or its ultimate decision in this case. Aloha states that "filing . . . on Florida House of Representatives stationery, and his express representation that he is filing the letter in a representative capacity as a state legislator, not only is, at a minimum, heavy-handed and obviously intended to intimidate the Commission and/or its staff, it also raises serious questions regarding the potential for fairness and/or the appearance of fairness in this proceeding."

In his Response to Aloha's Motion to Dismiss, Representative Fasano states that he, like any other citizen, should be entitled to a hearing before the Commission. He further states that the allegation of undue influence is based upon unsubstantiated speculation and that there is absolutely no showing of existing or threatened prejudice.

This was the first case filed under Section 367.0817, Florida Statutes. Though subsequently changed to a limited proceeding, this docket is styled as a reuse case and is infused with public policy considerations. Many issues in this case are not strictly factual, but are imbued with policy considerations. One specific issue appears to be whether Aloha has the resources and customer base to support a reuse project. We may be called upon to balance water conservation with economic reality in arriving at our decision. Aloha's request for reassignment of this case to DOAH would effectively remove the Commission's expertise and special knowledge from being present at the formal hearing. In the cases of McDonald v. Department of Banking and Finance, 346 So. 2d 569, 579, (Fla. 1st DCA 1977) and Charlotte County v. General Development Utilities, Inc., 653 So. 2d 1081, 1085 (Fla. 1st DCA 1995), the District Court recognized that agencies had special expertise and that many decisions concerning ultimate facts are actually opinions infused by policy considerations for which the agency has special responsibility. Because these are policy considerations, we find that it would be inefficient to send a case like this to DOAH. Accordingly, Aloha's request to transfer this case to DOAH is denied.

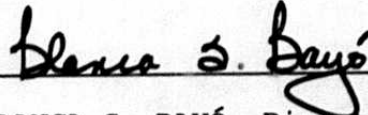
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Motion to Dismiss Representative Fasano's Petition for Administrative Hearing is hereby denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion to have this case referred to the Division of Administrative Hearings is hereby denied.

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By ORDER of the Florida Public Service Commission, this 10th
day of May, 1996.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.