BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA PUBLIC SERVICE
COMMISSION,

Petitioner,

vs.

PSC Docket No. 050018-WU
Order No. PSC-05-0204-SC-WU

ALOHA UTILITIES, INC.,

Respondent.
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ALOHA'S OBJECTION TO PETITIONS TO INTERVENE

Respondent Aloha Utilities, Inc., ("Aloha"), by and through its undersigned counsel, and pursuant to Section 120.60, Florida Statutes, and Chapters 28-106 and 28-107, Florida Administrative Code, hereby objects to the five Petitions to Intervene filed by Sandy Mitchell, Jr., Harry C. Hawcroft, John H. Gaul, Edward O. Wood and Wayne T. Forehand in this proceeding initiated by the Petitioner Public Service Commission ("PSC") for the purpose of partially revoking Aloha's Certificate of Authority Number 136-W. In support of this Motion, Aloha states:

1. By Certificates of Service dated March 17 and 18, 2005, Sandy Mitchell, Jr., "representing 37 home sites in Riviera Estates," Harry C. Hawcroft, John H. Gaul,

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Edward O. Wood and Wayne T. Forehand filed nearly identical[1] "Petitions to Intervene" requesting "full party status" in this penal action instituted by the PSC.

2. The issue in this proceeding is whether, based solely upon the facts and law alleged in the PSC's Show Cause Order, a portion of Aloha's certificated service territory should be deleted (i.e., whether a portion of Aloha's license in the form of a Certificate of Authorization should be revoked). This proposed disciplinary action is penal in nature, and grounds for such action must be proven by the PSC by clear and convincing evidence. Nair v. Dept. of Business & Professional Regulation, Board of Medicine, 654 So.2d 205 (Fla. 1st DCA 1995); Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996); Farris v. Turlington, 510 So.2d 292 (Fla. 1987). As in any other proceeding which is in the nature of a penal action, the **only** proper parties in this proceeding are the prosecuting authority and the person or entity being charged.

3. The fact that there can be only two parties in a penal action (whether civil, administration or criminal) is both well-established and logical. The obvious logical reason is that there is a single authority which has the jurisdiction to "prosecute."

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[1] The Petition to Intervene filed by Edward O. Wood varies in that it contains no "disputed issues of material facts," no "disputed legal issues" and omits what is designated as paragraph C of the "statement of ultimate facts" contained in the other four petitions.

That authority prosecutes, not for the benefit of any specific individual or entity, but, in the exercise of its lawfully delegated police powers to protect the health, safety and welfare of the public at large. That prosecuting authority has both the initial and the ultimate burden of proof to establish both the alleged factual matters asserted and that such facts, if proven, constitute a violation of a specific law which justifies the disciplinary action proposed. The prosecuting authority either satisfies its initial burden of proof through its own presentation of evidence or it does not. At the trial or hearing, the prosecuting authority cannot satisfy its initial burden of proof through reliance upon evidence presented by a third "party." At the conclusion of the prosecuting authority's direct case in chief, the party charged has the right to know that all the evidence against it has been presented. Pursuant to Section 120.60(5), Florida Statutes, and Rule 28-107.004(4), Florida Administrative Code, it is the **agency, and the agency alone, which has the burden of proving that grounds exist which warrant the action proposed to be taken**.

4. Most importantly, a defendant/respondent cannot be required to defend itself against any "party" other than the proper prosecuting authority. The individuals petitioning to intervene in this case have no authority to take disciplinary action against Aloha's Certificate of Authority. They have no authority to raise new facts or new issues beyond those stated in the charging document. In short, these

individuals can contribute nothing to this proceeding, and their participation deprives Aloha of due process of law. Aloha has the right to defend itself against only the charges and proof presented by one prosecuting authority. In this case, that authority is the PSC.

5. In the administrative realm, the exclusive role of the agency in disciplinary actions is made clear in the case of <u>Associated Home Health Agency v. State, Department of Health and Rehabilitative Services</u>, 453 So.2d 104 (Fla. 1st DCA 1984), holding that a third party has no standing in agency revocation proceedings. That case correctly noted that if a person is privy to information regarding wrongful acts on the part of a licensee, "the proper course is to convey such facts to the agency which has the power to institute proceedings to revoke the license."

6. Indeed, the PSC has in place a specific procedure for customer complaints against a utility. See Rule 25-22.032, Florida Administrative Code. Neither that procedure (which has not been invoked by the customers or the PSC with respect to Aloha), nor anything within Section 120.60(5) or the rules adopted to implement that statute (Chapter 28-107, Florida Administrative Code), nor Chapter 367, Florida Statutes, itself, provide a mechanism for customers to intervene in penal actions brought by the PSC.

7. Over the 30 years of the existence of the Florida Division of Administrative

Hearings, which conducts essentially all of the formal hearings wherein a state agency seeks to take disciplinary action against a licensee, one cannot find a single Recommended Order emanating from such a proceeding wherein a third party was allowed to "intervene." Likewise, one would be hard-pressed to find a single criminal proceeding, which also constitutes a penal action, in which the "victim," a public advocacy entity or any other third person was permitted to intervene as a party in that proceeding.

8. The Florida Constitution and/or the Florida Legislature prescribes and designates the entity which is entitled to act as the prosecuting authority in penal actions. In this case, the only authority authorized to bring and effectuate disciplinary action with respect to Aloha's PSC Certificate of Authority is the PSC itself. Chapter 367, Florida Statutes. It can not delegate this authority to any other person or entity, nor can it rely upon any other person or entity to effectuate and enforce the laws exclusively within its jurisdiction and authority to enforce.

9. In the case of State v. General Development Corporation, 448 So.2d 1074 (Fla. 2d DCA 1984), approved, 469 So.2d 1381 (Fla. 1985), the State Attorney for the Twelfth Judicial Circuit attempted to independently initiate a complaint for damages and civil penalties under the authority of Section 403.141(1), Florida Statutes. That statute allows the State, through the Department of Environmental Protection

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("DEP"), and in the exercise of its police powers to control, reduce and prevent pollution, to bring a civil cause of action to enforce the provisions of Chapter 403, Florida Statutes. While recognizing the broad powers conferred upon a State Attorney by the Florida Constitution and the Florida Statutes to "appear" in the courts to prosecute or defend on behalf of the state all suits, civil or criminal, the appellate Courts nevertheless held that such broad general law and authority did not negate the DEP's sole authority to act on behalf of the State in pollution matters. The Court held that the Legislature had chosen the DEP, the state's chief pollution control agency, as opposed to a localized State Attorney, as the sole authority to enforce the provisions of Chapter 403. Accordingly, the General Development Court held that a State Attorney has no standing to bring an action pursuant to Section 403.141 against an alleged violator of Chapter 403 and no standing to enforce the DEP rules pursuant to Section 120.69, Florida Statutes. Likewise, the Legislature has conferred upon the PSC exclusive authority over Aloha's Certificate of Authority. No other person or entity has standing as a party in a penal action affecting that Certificate. These five individuals have no broad Constitutional or statutory authority to prosecute or defend suits on behalf of the State or the PSC. Certainly, if a State Attorney has no standing as a party to enforce the laws delegated to a particular state agency, the five individuals filing petitions to intervene herein have no such standing.

While these five individuals may have standing to participate in a rate-making proceeding, which is legislative in nature, it simply is not proper for them to intervene as "parties" in a disciplinary proceeding which is penal in nature. Just as the Courts have recognized that the burden of proof varies in accordance with the nature and consequence of the proceedings, the Courts have also recognized that standing requirements in administrative proceedings vary based upon the nature of the proceedings. See Florida Society of Ophthalmology v. State, Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988).

10. These five individuals, who assumably are customers of Aloha in the territories which the PSC has noticed its intent to delete, have no protectable interest in the instant proceeding, in which they seek to intervene as a party. It is well established that customers of a utility have no "organic, economic or political right to service by a particular utility." Storey v. Mayo, 217 So.2d 304 (Fla. 1968), cert. denied, 395 U.S. 909, 23 L.Ed.2d 222, 89 S.Ct. 1751 (1969); Lee County Electric Coop. v. Marks, 501 So.2d 585 (Fla. 1987).

11. It is likewise well established that a public spirited citizen, taxpayer or other entity has no right to enter into a controversy because of his belief that one side or the other should prevail. Charlotte County Development Commission v. Lord, 180

So.2d 198 (Fla. 2d DCA 1965).[2] This principle of law is particularly applicable where a responsible governmental entity has been created to fully protect the citizen's interests and is an existing party to the action. Florida Wildlife Federation v. Board of Trustees of the Internal Improvement Fund, 707 So.2d 841 (Fla. 5th DCA 1998), rev. denied, 718 So.2d 167 (Fla. 1998); Department of Children and Family Services v. Brunner, 707 So.2d 1197 (Fla. 1st DCA 1998). Presumably, the PSC can adequately protect the individual interests of these five "intervenors," if, in fact they have any legally cognizable interest. Indeed, there has been no allegation by these five individuals that the PSC will not adequately protect their interests.

12. The instant proceeding is not a popularity contest. The PSC has instituted a penal action and proposes to impose the most serious, severe sanction and penalty (revocation of a portion of Aloha's Certificate) which can be imposed upon a utility. To accomplish that proposed objective, the PSC must itself prove, by clear and convincing evidence, that the facts which it has alleged are true, that such facts constitute a violation of the specific law cited in the Show Cause Order, and that such a violation justifies the extreme sanction of revocation. These five individuals simply have no role whatsoever in this proceeding.

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[2] This concept is even more applicable where a utility customer has no right to service by a particular utility, as discussed above.

13. In fulfilling its burden of proof in this case, the PSC may not rely upon conduct on the part of Aloha not specifically alleged in the charging instrument. Hamilton v. Department of Business and Professional Regulation, 764 So.2d 778 (Fla. 1st DCA 2000); Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996). Accordingly, no other "party" or witness" may be permitted to offer evidence outside the specific facts alleged in the Show Cause Order.[3] Again, if these five individuals have information relevant to the limited issues and facts framed in the Show Cause Order, they may simply convey such information to the real and proper parties in this case. The clear and convincing evidence required to be produced by the PSC **alone** must be credible, precise and explicit and of such weight that it produces the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983); Evans Packing Company v. Dept. of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989). Most importantly, the PSC may **not** meet its initial burden of proof through testimony or documentary evidence produced by anyone other than itself. And, as noted above, Aloha cannot be required to defend itself against six prosecutors. Any "evidence" adduced by these five individuals, in

[3] Similarly, no facts or issues other than those contained within the Show Cause Order can be injected into this proceeding, contrary to the allegations contained within these five petitions to intervene, as discussed below.

a capacity as "parties" in this proceeding, would be immaterial, irrelevant or cumulative in this penal action by the PSC against Aloha. It would be extremely prejudicial to Aloha if it were required to defend against evidence presented by a "party" other than the PSC, when the only evidence material in this case is that presented by the PSC.

14. In addition to the reasons stated above demonstrating the impropriety of third party "intervenors" in penal actions, the allegations of "fact," both "disputed" and "ultimate" stated in the Petitions to Intervene[4] go far beyond the "Findings of Fact" contained within the PSC's Show Cause Order. Such allegations of "fact" are totally improper inasmuch as the PSC has the sole authority to institute and prosecute this penal action against Aloha. Moreover, such facts are totally irrelevant, immaterial and improper because the PSC may not rely, as a basis for any disciplinary action against Aloha, upon facts, conduct or law not specifically alleged in its Show Cause Order. Hamilton v. Department of Business and Professional Regulation, 764 So.2d 778 (Fla. 1st DCA 2000); Cottrill v. Department o Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996). Indeed, even if this proceeding were a non-penal action, which it is not, it is well-established that an intervenor must accept the pleadings as he finds

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[4]As noted in footnote 1 above, the Petition filed by Edward O. Wood contains no disputed issues of material fact.

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them and cannot raise new matters or issues not embodied in the original action. The Riviera Club v. Belle Meade Development Corporation, 141 Fla. 538, 194 So. 783 (Fla. 1940).

15. The Petition to Intervene filed by Sandy Mitchell, Jr. indicates that the Petitioner is Sandy Mitchell, Jr., "representing 37 home sites in Riviera Estates." There is no further identification of such "home sites," nor is there any identification of the persons who may occupy such "home sites." There is no indication that Sandy Mitchell, Jr., is a member of The Florida Bar or a law student certified pursuant to Chapter 11 of the Rules Regulating The Florida Bar. See Rule 28-106.106(1), Florida Administrative Code. And, there is no request from any "home site" owner that Sandy Mitchell, Jr. serve as a qualified representative to appear on anyone's behalf in this proceeding. See Rules 28-106.105 and 28-106.106, Florida Administrative Code. Accordingly, Mr. Mitchell is not authorized to represent "37 home sites in Riviera Estates."

WHEREFORE, Aloha Utilities, Inc. objects to the "Petitions to Intervene" submitted by Sandy Mitchell, Jr., Harry C. Hawcroft, John H. Gaul, Edward O. Wood and Wayne T. Forehand in this proceeding and requests that those individual's requests for "full party status" be denied.

Respectfully submitted this 29th day of March, 2005

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 29th day of March, 2005, to:

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