

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA PUBLIC SERVICE  
COMMISSION,

Petitioner,

vs.

PSC Docket No. 050018-WU

ALOHA UTILITIES, INC.,

Respondent.

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**ALOHA’S OBJECTION TO PETITION TO INTERVENE  
FILED BY SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT**

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 and Rule 25-22.039, Florida Administrative Code, hereby objects to the Petition to Intervene filed by the Southwest Florida Water Management District (“SWFWMD”) in this proceeding initiated by the Florida Public Service Commission (“PSC”) for the purpose of partially revoking Aloha’s Certificate of Authority Number 136-W. In support of this Objection, Aloha states:

(1) The Petition to Intervene filed by SWFWMD does not conform with the requirements of Section 120.54(5), Florida Statutes, or the requirements of Rule 28-

106.201(2) or Rule 28-106.205, Florida Administrative Code. While those requirements are not applicable to a Respondent in an administrative proceeding instituted to revoke a license, if intervention is permissible at all in such a proceeding (and Aloha submits that it is not), an “intervenor” must comply with the petition requirements set forth in the statute and rules cited above.

2. Pursuant to Rule 28-106.205, Florida Administrative Code, a Petition to Intervene must conform with the requirements of Rule 28-106.201(2). It must also include sufficient allegations to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to agency rule, or because its substantial interests are subject to determination or will be affected through the proceeding. SWFWMD has satisfied neither requirement.

3. Contrary to Section 120.54(5), Florida Statutes, and Rule 28-106.201(2)(e), (f) and (g), Florida Administrative Code, SWFWMD’s Petition to Intervene contains no statement of the ultimate facts alleged, or specific facts which SWFWMD contends warrant reversal or modification of the PSC’s proposed agency action. SWFWMD’s Petition contains no statement of the specific rules or statutes it contends require reversal or modification of the PSC’s proposed agency action. And, SWFWMD’s Petition contains no statement of the relief sought by SWFWMD or the

precise action which SWFWMD wishes the PSC to take with respect to the PSC's proposed agency action. Indeed, it is impossible to discern from SWFWMD's Petition whether SWFWMD wishes to intervene on behalf of the Petitioner PSC or the Respondent Aloha. Accordingly, its Petition should be dismissed.

4. Most importantly, SWFWMD has not, and can not, allege that it is entitled to participate in this disciplinary, penal administrative action as a matter of constitutional or statutory right or pursuant to agency rule. Similarly, SWFWMD has not, and can not, allege that its substantial interests are subject to "determination" or will be "affected" in this proceeding to partially revoke Aloha's Certificate.

5. The only statutes and rules cited by SWFWMD pertain to its duty to preserve and protect the water resources within its geographic boundaries (Chapter 373, Florida Statutes) and its responsibilities to regulate the consumptive uses of water (Chapter 40D, Florida Administrative Code). SWFWMD has indeed issued to Aloha a water use permit ("WUP") for a public water supply system, a portion of which is the subject of this proceeding, and the parties are involved in litigation concerning that permit. (Aloha strenuously disputes that it "is currently in violation of that Permit, as alleged in Paragraph 6 of SWFWMD's Petition). However, the important point is that such WUP is in no manner at issue in the instant proceeding. Indeed, the PSC has no jurisdiction or authority to take any action whatsoever with

regard to Aloha's WUP issued by SWFWMD.

6. The PSC's Show Cause Order contains "findings of fact" alleged to constitute a violation of Section 367.111(2), Florida Statutes, which the PSC alone has the authority to enforce. The alleged "facts" within the Show Cause Order do not include or mention Aloha's WUP, or any alleged violation thereof. 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. 1<sup>st</sup> DCA 2000); Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1<sup>st</sup> DCA 1996). Accordingly, any "information" which SWFWMD's desires to "present" "concerning Aloha's water use and the Permit" (Paragraph 9 of SWFWMD's Petition) is totally irrelevant to any issue or result in this proceeding. Indeed, any such "information" would be extremely prejudicial to Aloha's right to confront and defend itself against only the facts and charges alleged in the Show Cause Order which is the subject of this proceeding.

7. The sole grounds alleged by the PSC as a basis for partially revoking Aloha's Certificate is a violation of that portion of Section 367.111(2), Florida Statutes, which provides that each utility shall provide service that is not less sufficient than is consistent with the reasonable and proper operation of the utility in the public interest. The WUP issued by SWFWMD is no manner relied upon as the

basis for the alleged violation claimed by the PSC.

8. The PSC has exclusive jurisdiction over utilities with respect to their authority, service and rates. Section 367.011(2), Florida Statutes. SWFWMD has no authority to impose any action affecting Aloha's Certificate of Authority

9. Having alleged no constitutional, statutory or regulatory basis for its intervention (and assuming *arguendo* that intervention is proper in a disciplinary action instituted by an administrative agency, which it is not), it was incumbent upon SWFWMD to allege facts sufficient to demonstrate that its substantial interests are subject to determination or will be affected through this proceeding. Since this proceeding does not involve Aloha's WUP, SWFWMD's interests are not subject to determination in this proceeding, nor will its interest in Aloha's WUP be affected in any manner. SWFWMD simply has no standing to participate as a party in this proceeding.

10. The requirements for standing in an administrative proceeding are well established. As stated in Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478, at 482 (Fla. 2d DCA 1981):

Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The

first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

11. The allegations contained within SWFWMD's Petition to Intervene are insufficient to meet either of the requirements for standing under Agrico. In addition to the fact that Aloha's WUP is not even at issue in this proceeding, SWFWMD's concerns are entirely speculative. SWFWMD states, at paragraph 7 of its Petition, that the PSC's action in this case "**may** affect the Permit and the District's litigation with Aloha" and "**may** require a modification of the Permit." (Emphasis supplied) Even if those statements were true, they do not demonstrate an "injury in fact which is of sufficient immediacy" within the meaning of Agrico. Indeed, they do not demonstrate an "injury" to SWFWMD at all. At best, SWFWMD's "interests" can be classified as an interest in receiving information concerning the extent and size of Aloha's authorized service area should it be changed as a result of this case. Such an informational interest is not sufficient to confer party status upon SWFWMD in this proceeding. That interest can be satisfied with a simple telephone call. If SWFWMD is privy to any information which is relevant to the limited issues and facts framed in the Show Cause Order, it may simply convey such information to the real and proper parties in this case. See Associated Home Health Agency v. State, Department of Health and Rehabilitative Services, 453 So.2d 104 (Fla. 1<sup>st</sup> DCA

1984).

12. SWFWMD also fails to allege that its “injury” is of a type which the proceeding is designed to protect. SWFWMD has not even alleged that it is a customer of Aloha Utilities, Inc. Again, the instant proceeding has nothing to do with the WUP issued by SWFWMD to Aloha. This proceeding is not designed to either protect or defeat the current or future existence of Aloha’s WUP. SWFWMD simply has no claim to any disciplinary action which may or may not be imposed by the PSC in this case. Such disciplinary action is the only subject of litigation in this case. The amount of water which may be withdrawn under a SWFWMD WUP is not an interest to be protected under Chapter 367, Florida Statutes.

13. Even if SWFWMD were able to allege any direct or immediate legally cognizable interest in this case, such an asserted interest can be protected by the PSC, the sole entity with authority to impose or withhold disciplinary action against Aloha’s Certificate. Department of Children and Family Services v. Brunner, 707 So.2d 1197 (Fla. 1<sup>st</sup> DCA 1998); Florida Wildlife Federation v. Board of Trustees of the Internal Improvement Trust Fund, 707 So.2d 841 (Fla. 5<sup>th</sup> DCA 1998), rev. denied, 718 So.2d 167 (Fla. 1998).

14. The proposed disciplinary action instituted by the PSC is penal in nature, and grounds for such action must be based solely upon the facts and law alleged in

the PSC's Show Cause Order, which must be proven by the PSC by clear and convincing evidence. Nair v. Department of Business & Professional Regulation, Board of Medicine, 654 So.2d 205 (Fla. 1<sup>st</sup> 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. A defendant/respondent cannot be required to defend itself against any "party" other than the proper prosecuting authority.

15. Over the 30 years of the existence of the Florida Division of Administrative Hearings, which conducts essentially all of the formal hearing 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." In a Final Order concerning attorneys fees, the DOAH Administrative Law Judge noted that a professional association (the Florida Institute of Certified Public Accountants) had not intervened in a disciplinary proceeding instituted by the State Board of Accountancy against a licensed certified public accountant, "**nor had they any standing to do so.**" Ibanez v. Department of Professional Regulation, Board of Accountancy, 1992 Fla. Div. Adm. Hear. LEXIS



6997 (1992). Similarly, 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, a governmental agency with some interest in the subject matter of the offence or any other third person was permitted to intervene as a party in that proceeding.

16. 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 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). Also see PSC Rule 25-22.039, Florida Administrative Code, providing that intervenors take the case as they find it. The WUP issued to Aloha by SWFWMD is not embodied in the PSC’s Show Cause Order and has no relevance to this proceeding. Neither SWFWMD nor any other party may raise the issue of Aloha’s WUP in this proceeding.

17. Third persons or entities simply have no role in agency disciplinary actions, which are of a penal nature. There can be but one Petitioner – the prosecuting agency which has jurisdiction to take action against the licensee, and one Respondent(s) – the person(s) against whom disciplinary action is proposed. A Respondent can not be required to defend itself against any “party” other than the

proper prosecuting authority designated by law, nor can facts or law not set forth in the charging document be considered in such a proceeding.

WHEREFORE, Aloha Utilities, Inc. objects to the Petition to Intervene filed by the Southwest Water Management District and requests the its request for party status be denied.

Respectfully submitted this 22nd day of April, 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 22nd day of April, 2005, to:

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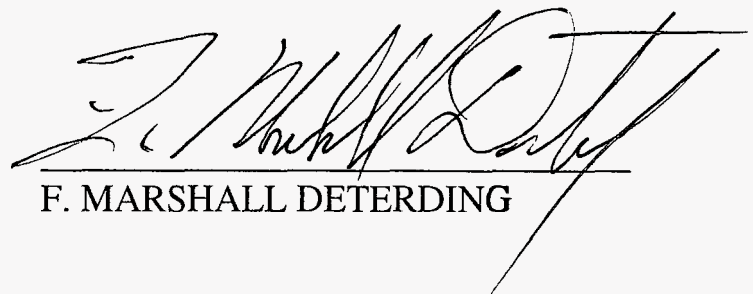
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