

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Initiation of deletion proceedings against Aloha Utilities, Inc. for failure to provide sufficient water service consistent with the reasonable and proper operation of the utility system in the public interest, in violation of Section 367.111(2), Florida Statutes.

DOCKET NO. 050018-WU
ORDER NO. PSC-05-0465-PCO-WU
ISSUED: April 29, 2005

ORDER DENYING THE SOUTHWEST FLORIDA WATER MANAGEMENT DISTRICT'S PETITION TO INTERVENE

By notice issued January 7, 2005, and Order No. PSC-05-0204-SC-WU (show cause order), issued February 22, 2005, the Commission initiated a proceeding to delete a portion of Aloha Utilities, Inc.'s (Aloha or utility) service area. On April 13, 2005, the Southwest Florida Water Management District (SWFWMD or District) filed its Petition to Intervene. On April 22, 2005, Aloha timely filed its Objection to Petition to Intervene Filed by Southwest Florida Water Management District.

Petition to Intervene

The SWFWMD requests intervention in this docket so that the Commission can consider information provided by the District in regard to Aloha's water use and permit when making its determination in this docket. In support of its petition, the SWFWMD states that it is "a regulatory agency created by the State of Florida to preserve and protect the water resources of the District" and that it is charged with administering and enforcing Chapter 373, Florida Statutes, and Chapter 40D, Florida Administrative Code. It states that it is the agency that issued Water Use Permit (WUP) No. 203182.004 to Aloha. It further states that Aloha is currently in violation of its permit and that Aloha and the District are currently litigating the alleged violation in circuit court.

The SWFWMD contends that the Commission's action in this docket may affect the permit and its litigation with Aloha. It states that the size of Aloha's service area is one factor that determines the withdrawal quantities authorized by the permit or renewal of the permit. It asserts that "[a]ny change to Aloha's service area may require a modification of the permit."

Aloha's Response

Aloha objects to the SWFWMD's petition to intervene. In support of its objection, Aloha states that the petition to intervene does not conform to the requirements of section 120.54(5), Florida Statutes, and Rules 28-106.201(2) and 28-106.205, Florida Administrative Code. Aloha states that the petition lacks a statement of the ultimate facts alleged, does not cite to the specific rules or statutes the District contends warrant reversal or modification, and fails to indicate the relief sought by the District. Moreover, the utility states that the "SWFWMD has not, and

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cannot, 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” and that the agency “has not, and cannot, allege that its substantial interests are subject to ‘determination’ or will be ‘affected’ in this proceeding to partially revoke Aloha’s Certificate.”

Aloha states that, while it has been issued a WUP from the SWFWMD, the WUP is not at issue in this proceeding and that the show cause order does not “include or mention Aloha’s WUP, or any alleged violation of thereof.” It states that any information the SWFWMD intends to present concerning the WUP is irrelevant and 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.”

The utility states that the Commission has “no jurisdiction or authority to take any action whatsoever with regard to Aloha’s WUP issued by SWFWMD.” Aloha further states that the Commission has “exclusive jurisdiction over utilities with respect to their authority, service and rates” and that the SWFWMD “has no authority to impose any action affecting Aloha’s Certificate of Authority.”

Citing Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), Aloha argues that the SWFWMD has failed to show that it will suffer an injury in fact of sufficient immediacy to entitle it to intervention and that it has alleged no injury of the nature or type that this proceeding was designed to protect. Aloha states that “[t]his proceeding is not designed to either protect or defeat the current or future existence of Aloha’s WUP.” It further states that “[a]t 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” and that such an interest “is not sufficient to confer party status upon SWFWMD in this proceeding.” Moreover, the utility states that, if the SWFWMD has any relevant information, it can convey the information to the proper parties in this case.

The utility states that this action against Aloha is penal in nature and the grounds for the action must be based solely on the facts and law alleged in the show cause order. Aloha asserts that the only proper parties in this proceeding are the Commission and the utility. Aloha states that its review of orders of the Florida Division of Administrative Hearings did not turn up any orders from disciplinary proceedings against a licensee where a third party was allowed to intervene. It further states that intervenors must take the case as they find it, and the WUP issue raised by the SWFWMD is not included in the show cause order. Aloha states that, consequently, neither the SWFWMD nor any other party may raise it as an issue in this proceeding and the issue has no relevance to this proceeding.

Findings and Conclusion

Upon consideration of all the arguments, I find that the SWFWMD lacks the requisite standing to intervene in this proceeding. The show cause order issued by the Commission on February 22, 2005, governs the facts and law at issue in this proceeding. The order does not


include a charge against Aloha for an alleged violation of its WUP. Thus, the interest the SWFWMD alleges in its petition is not of the nature or type that this proceeding was designed to protect. See Agrico Chemical, 406 So. 2d at 482. Accordingly, the Petition to Intervene filed by the SWFWMD is hereby denied.

Although the SWFWMD is not entitled to intervene in this matter, any evidence it believes should be considered by the Commission can be forwarded to the Commission's prosecutorial staff. Prosecutorial staff can determine whether the evidence should be presented at the hearing.

Therefore, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that the Petition to Intervene filed by the Southwest Florida Water Management District is hereby denied.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 29th day of April, 2005.



J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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-

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22.0376, Florida Administrative Code; or (2) 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 the Commission Clerk and Administrative Services, 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.