

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition by customers of Aloha Utilities, Inc. for deletion of portion of territory in Seven Springs area in Pasco County.

DOCKET NO. 020896-WS

In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.

DOCKET NO. 010503-WU
ORDER NO. PSC-05-0076-FOF-WS
ISSUED: January 21, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER GRANTING REQUEST FOR ORAL ARGUMENT AND MOTION FOR
TERMINATION OF PROCEEDINGS AS THEY RELATE TO
DELETION OF TERRITORY

BY THE COMMISSION:

BACKGROUND

By Order No. PSC-04-0712-PAA-WS, issued July 20, 2004, we set for hearing three customer petitions requesting that the Commission delete territory from Aloha Utilities, Inc.'s (Aloha or utility) Seven Springs service area. The hearing to obtain customer testimony on the petitions was scheduled for January 27-28, 2005. The hearing to consider the merits of the deletion petitions was scheduled for March 8-10, 2005.

On November 9, 2004, Aloha filed a Motion for Termination of Proceedings as They Relate to Deletion of Territory (Motion for Termination).¹ Along with its motion, Aloha also filed a Request for Oral Argument. On November 10, 2004, Aloha filed a Notice of Supplemental Authority. On November 16, 2004, the Office of Public Counsel (OPC) timely filed its Response to Aloha's Motion for Termination.

On November 24, 2004, Aloha also timely filed a Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS. Order No. PSC-04-1152-PCO-WS (the Discovery Order) addressed a discovery dispute between Aloha and Commission staff. Commission staff

¹ Pursuant to Order No. PSC-04-0929-PCO-WS, Docket No. 020896-WS was consolidated with Docket No. 010503-WU. Docket No. 010503-WU pertains to the protest of Order No. PSC-04-0712-PAA-WS, addressing the measurement of the water quality at Aloha's facilities. Aloha's Motion for Termination has no impact on Docket No. 010503-WU.

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requested that we compel Aloha to provide a list of the names and addresses of all of its water and wastewater customers who reside within the Seven Springs area. Aloha requested that we issue a protective order to prevent the discovery. In its response to Aloha's Motion for Protective Order, Commission staff revised its discovery request to include only the names and addresses of the water customers located in the area for which deletion of territory has been requested.

The Discovery Order granted Commission staff's revised Motion to Compel and denied Aloha's Motion for Protective Order. Aloha was ordered to provide the revised information requested by staff within 5 days of the issuance of the Discovery Order.

Aloha's motion for reconsideration was accompanied by a Request for Oral Argument. Commission staff timely filed its Response to Aloha's Motion for Reconsideration of Order No. PSC-04-1152-PCO-WS on December 2, 2004.

We have jurisdiction pursuant to sections 120.569 and 367.045, Florida Statutes.

REQUEST FOR ORAL ARGUMENT

As stated above, Aloha filed a Request for Oral Argument along with its Motion for Termination. In support of its request, Aloha states that oral argument will help clarify the issues, ensure that we are fully informed, and allow the parties to elaborate on their concerns or comments. Aloha further states that it is in the interest of the utility, the Commission, the customers, and the public in general that the proceedings at issue be conducted in accordance with the Florida Administrative Procedure Act and that Aloha is afforded due process of law.

Our decision on Aloha's Motion for Termination may impact the future progression of this proceeding. We find that, due to the potential effect on this proceeding, further discussion at the agenda conference would be beneficial. Accordingly, Aloha's Request for Oral Argument on its Motion for Termination is granted.

MOTION FOR TERMINATION

I. Aloha's Motion

In support of its Motion for Termination, Aloha states that its certificate of authorization is a license or franchise as contemplated by section 120.52(9), Florida Statutes. The utility cites City of Mount Dora v. JJ's Mobile Homes, 579 So. 2d 219, 223-224 (Fla. 5th DCA 1991), for the proposition that its certificate or franchise constitutes a valuable property right that may not be abrogated without providing compensation and due process of law.

Aloha asserts that the license revocation provisions contained in section 120.60(5), Florida Statutes, and Rule 28-107.004, Florida Administrative Code, require us to serve an administrative complaint on Aloha before we can revoke part of its certificate. Aloha states that the administrative complaint must set forth the statutes or rules Aloha has allegedly violated, the facts or conduct relied upon to establish the violation, and a statement that Aloha has a right to a

hearing. Aloha alleges that we have failed in this proceeding to follow the requirements of section 120.60(5) and Rule 28-107.004.

Aloha cites Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996), for the proposition that courts require agencies to strictly adhere to the mandates of section 120.60(5) when revoking a license. Citing Phillips v. Department of Business and Professional Regulation, 737 So. 2d 553 (Fla. 1st DCA 1998), Aloha states that courts have found that an administrative complaint issued without specific allegations of facts specifying the conduct on which the disciplinary action is proposed violates section 120.60 of the Administrative Procedure Act and due process of law.

Aloha states that we conducted a customer service hearing on April 8, 2004. It further asserts that virtually all the customers stated that they wished to be deleted from Aloha's service area in order to obtain service from Pasco County. Aloha states that, although it was barred from participating in the hearing through cross-examination of witnesses or presenting its own evidence, we used this testimony, along with letters received after the hearing, as a basis for setting the Seven Springs customers' deletion petitions for formal hearing.

Aloha states that the Order Establishing Procedure for this proceedings shows that, while we are the "sole entity with authority to act upon Aloha's certificates, the Commission clearly is not assuming the burden of proving that grounds exist which warrant the undisclosed action proposed to be taken against Aloha." It contends that Commission staff is attempting to shift the burden of proof to Aloha. Aloha cites Associated Home Health Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104 (Fla. 1st DCA 1984), for the proposition that only the agency, not third parties, may initiate and prosecute license revocation proceedings and that the agency has the burden of proving that a license should be revoked.

Aloha further claims that the preliminary list of factual and legal issues for the March hearing authored and distributed to the parties by Commission staff goes beyond the allegations in the Seven Springs customers' deletion petitions. The utility further asserts that it will not know of the allegations against it until the prehearing conference, which is scheduled only twelve days prior to the hearing. The utility states that, consequently, it is unable to properly defend itself in this proceeding.

II. OPC's Response

In its response, OPC argues that Aloha's Motion for Termination is actually a motion to dismiss. OPC states that, as such, the motion is barred by Rule 28-106.204(2), Florida Administrative Code, which states that motions to dismiss petitions must be filed within 20 days after service of the petition, unless otherwise provided by law. OPC states that, as the petitions were filed back in 2002, this 20-day deadline has long since passed.

OPC questions whether Aloha's certificate is a license which confers property rights on Aloha. Citing Alterman Transport Lines, Inc. v. State of Florida, 405 So. 2d 456 (Fla. 1st DCA 1981), OPC points out that the court has found that an entity may hold a license, but the license is not property in a constitutional sense.

Citing Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248 (Fla. 1993), OPC states that the Florida Supreme Court found that the Commission did not have to follow the procedures set forth in section 120.60 to revoke a long distance carriers' certificate. OPC, however, also acknowledges that the court's rationale in the Beard case was based on the fact that the interchange carrier certificates were general and did not delineate a specific service area. OPC states that this is not the case with Aloha's certificate of authorization. Nevertheless, OPC states that it is at least debatable whether Aloha's certificate of authorization is a license.

Despite its initial objections, OPC concludes that "the prudent course of action at this time is to comply with the provisions of the Administrative Procedure Act relating to licensing." OPC states, however, that it is not necessary to terminate or dismiss the current proceeding as we need only serve an administrative complaint on the utility and the Commission staff could use the prefiled testimony filed by the customers on November 18, 2004, to support its complaint. Aloha would then get an opportunity to respond to the complaint. OPC states that under this procedure there is no reason that the March 8-10, 2005, hearing dates could not be met.

III. Analysis and Conclusion

Aloha's Motion for Termination raises the issue of whether the license revocation procedure set forth in section 120.60(5) is applicable to this proceeding. As noted above, OPC concedes in its response that we should follow that procedure.

A. Applicability of Section 120.60(5), Florida Statutes, (License Revocation) and Section 367.045(6), Florida Statutes, (Certificate Revocation) to this Proceeding

Section 120.60 provides a procedure for license revocation by an agency. Section 120.60(5) states, in pertinent part,

No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57.

The Commission statute pertaining to the revocation of water or wastewater utilities' certificates of authorization is section 367.045(6). Section 367.045(6) states:

The revocation, suspension, transfer, or amendment of a certificate of authorization is subject to the provisions of this section. The Commission shall give 30 days' notice before it initiates any such action.

While section 367.045 sets forth the procedure a utility must follow to apply for an amendment of its certificate of authorization, this section is silent as to the procedure we must follow when revoking a certificate of authorization without an application from the utility.

Section 120.80, Florida Statutes, which sets forth agency exceptions from Chapter 120, addresses section 120.60 in relation to the statutes we are charged with enforcing. Specifically, section 120.80(13)(c) states that “[t]he Florida Public Service Commission is exempt from the time limitations in s. 120.60(1) when issuing a license.” A plain reading of this section indicates that: 1) the Administrative Procedure Act contemplates that we issues licenses, as this section grants the Commission an exemption from the time requirements set forth in section 120.60(1) when issuing a license; and 2) while this section specifically exempts the Commission from subsection (1) of section 120.60, the section does not exempt us from the license revocation procedure set forth in subsection (5) of section 120.60.

Section 120.52, Florida Statutes, also bolsters the notion that the certificate of authorization granted to a water/wastewater utility is a license as contemplated by section 120.60. Section 120.52(9) defines license to mean:

a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.

Thus, the plain language of the statute appears to cover a water or wastewater certificate of authorization. It also should be noted that there is persuasive authority, City of Mount Dora v. JJ’s Mobile Home, Inc., 579 So. 2d 219, 223 (Fla. 5th DCA 1991), stating that the certificates issued by the Commission to utilities under our jurisdiction constitute franchises.

Florida Interexchange Carriers Association v. Beard, 624 So. 2d 248, 251-252 (Fla. 1993), also provides some guidance on this issue. The Beard case involved a Commission order wherein certain long distance service areas were reclassified by the Commission as extended calling service areas. Id. at 249. The effect of this reclassification was to remove the interexchange carriers’ right to compete on these routes. Id. The Florida Interexchange Carriers Association argued that our action was a de facto cancellation of the carriers’ certificates and, thus, was invalid because we failed to follow the license revocation procedure set forth in section 120.60. Id. at 251-252. The court found that the certificates issued by us to the carriers were not licenses and, thus, we were not required to follow the section 120.60 procedure for revoking a license. Id. at 252. The court’s rationale for concluding that the carriers’ certificates were not licenses was that the certificates did not entitle the carriers to compete over a specific route, but were general in nature. Id.

Applying the court’s reasoning to the facts of this case would seem to indicate the opposite result. Aloha’s certificate entitles the utility to exclusively serve a defined territory. Whereas the court found in Beard that we were not required to follow the license revocation procedures in section 120.60 because the interexchange carriers’ certificates did not authorize the companies to serve specific routes, it follows that the court may find that Aloha’s certificate is a

license and that we are required to adhere to the license revocation procedure in this case because Aloha's certificate entitles the utility to exclusively serve a specific territory.

Another issue is whether the deletion of a portion of Aloha's service area would amount to a license revocation. Associated Home Health Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104, 105 (Fla. 1st DCA 1984), involved a health care association that was authorized by the Department of Health and Rehabilitative Services (HRS) to operate in Broward and Palm Beach Counties. HRS revoked the health care association's authority to operate in Palm Beach County. Id. Although HRS only revoked a portion of the area in which the health care association could operate, the court still required HRS to follow the license revocation procedure set forth in section 120.60. Id. at 106.

It appears that the same would hold true for a partial deletion of Aloha's service territory. Aloha's certificate of authorization sets forth the territory the utility is authorized to serve. If the territory at issue is deleted from Aloha's service area, we will amend Aloha's certificate of authorization to remove this territory. This action would, in effect, amount to a partial license revocation.

B. Procedure for Revoking a Certificate Under Sections 120.60(5) and 367.045(6), Florida Statutes

Section 120.60(5) and Rule 28-107.004 require that an administrative complaint be provided to the licensee either via personal service or certified mail. Rule 28.107.004(2) states that an administrative complaint must include:

- 1) the statutory provisions or rules alleged to have been violated;
- 2) the facts and conduct relied on to establish the violation; and
- 3) a statement that the licensee has a right to request a hearing conducted in accordance with sections 120.569 and 120.57.

The information required in an administrative complaint is basically the same information placed in our show cause orders. In fact, Rule 28-107.004(c) implies that an order to show cause would suffice in lieu of an administrative complaint, as it states that requests for hearing in response to the complaint must reference "the notice, **order to show cause**, administrative complaint, or other communication the party has received from the agency." [emphasis added] We note that our show cause orders are served via certified mail to the entity to which they are directed, which is another requirement of section 120.60(5).

Order No. PSC-04-0712-PAA-WS, which initiated this deletion proceeding, does not appear to comply with the requirements of an administrative complaint/order to show cause as set forth in section 120.60 and Rule 28-107.004(2). While we cite to sections 367.121, 367.045, 367.111, and 367.161 in Order No. PSC-04-0712-PAA-WS as the basis for our jurisdiction to delete a utility's territory or revoke a utility's certificate, the order does not specifically state the statutes or rules alleged to have been violated by Aloha, nor does it specifically set forth the facts and conduct relied on to establish any such violations. Moreover, as Order No. PSC-04-0712-

PAA-WS does not appear to constitute an administrative complaint, an administrative complaint has not been served to Aloha as required by section 120.60(5) and Rule 28-107.004.

In addition to the requirements of section 120.60(5), section 367.045(6) states that we must provide 30 days notice before we initiate a revocation action. Although Order No. PSC-04-0712-PAA-WS states that we set the deletion petitions directly for hearing, this order may not fulfill the requirements of section 367.045(6) as it does not specifically state that it is our notice to initiate a certificate revocation proceeding.

We note that in a prior proceeding to revoke a utility's certificate, we appear to have complied with the noticing procedures set forth in section 367.045(6) and substantially complied with the noticing procedure set forth in section 120.60, even though we did not cite to this section. In Order No. PSC-93-0542-FOF-WS, issued April 9, 1993, we initiated a certificate revocation proceeding against Shady Oaks Mobile-Modular Estates, Inc. We then opened Docket No. 930944-WS, In re: Revocation by Florida Public Service Commission of Certificates Nos. 451-W and 382-S Issued to Shady Oaks Mobile-Modular Estates, Inc. in Pasco County, Pursuant to Section 367.111(1), F.S., (Shady Oaks), in which we issued a notice to the customers and a certified notice to the utility of our intent to initiate the revocation of the utility's certificate and provided an opportunity to file objections.

C. Burden of Proof in License Revocation Proceedings

The Administrative Procedure Act is clear as to who has the burden of proof in license revocation proceedings. Rule 28-107.004(2) states that the agency shall have the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee. The Seven Springs customers appear to have the burden of proof in this proceeding, as it is currently constituted.

Associated Home Health Agency, 453 So. 2d at 104, addressed the situation where, as here, a third party initiated a license revocation proceeding and essentially prosecuted the case as well. The case involved a dispute between two home health care associations (herein referred to as "Association A" and "Association B") before the Department of Health and Rehabilitative Services (HRS). Id. at 104. Association A requested a section 120.57 hearing in regard to whether the license of Association B should be revoked. Id. HRS ultimately revoked Association B's license. Id. at 105.

Association B appealed the decision and argued that HRS had the burden to initiate the license revocation proceeding and that it was improper to allow Association A to initiate and prosecute the revocation proceeding. Id. at 105-106. The court agreed and stated that: 1) the agency has the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee; 2) an agency may not turn its burden of proof over to a third party; 3) Association A should not have been permitted to initiate the revocation proceeding; and 4) the proper course of action is for Association A to convey the facts supporting the license revocation to the agency, which has the power to institute proceedings to revoke a license. Id. As a result,

the court reversed HRS's decision to revoke the license, but allowed the agency to conduct a proper proceeding under section 120.60 to revoke the license.

While the Associated Home Health Agency case indicates that Commission staff may use evidence provided by the Seven Springs customers to support its case against Aloha, the case is clear that we are required to initiate and prosecute the license revocation. It should be noted that we initiated the certificate revocation proceeding in the Shady Oaks case, and Commission staff had the burden of proof in that proceeding.

It is also important to note that there is an elevated standard of proof in license revocation proceedings. While ordinary section 120.569 proceedings apply the preponderance of the evidence standard, the clear and convincing evidence standard applies to license revocation proceedings. See Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

D. Conclusion

The plain language of sections 120.52(9) and 120.80(13)(c) and the Florida Supreme Court's reasoning in Beard, 624 So. 2d at 251-252, indicate that Aloha's certificate of authorization is a license. Sections 120.60(5) and 367.045(6) set forth the procedure we must follow to revoke a utility's certificate of authorization. It appears from a review of the procedure thus far in this case that the requirements of sections 120.60(5) and 367.045(6) have not been met. Section 120.60(5) specifically states that no license revocation is lawful unless the agency complies with the procedure set forth in that section. As no notice of the initiation of a revocation proceeding has been issued pursuant to section 367.045(6) and this proceeding does not currently conform to the procedure set forth in section 120.60(5), we hereby grant Aloha's Motion for Termination of Proceedings as They Relate to Deletion of Territory.

REQUEST FOR ORAL ARGUMENT AND MOTION FOR RECONSIDERATION OF ORDER NO. PSC-04-1152-PCO-WS

As mentioned above, Aloha also filed a Motion for Reconsideration of the Discovery Order, which was accompanied by a Request for Oral Argument. Our decision on Aloha's Motion for Termination renders the Motion for Reconsideration of the Discovery Order and Request for Oral Argument moot.

DISPOSITION OF DOCKETS NOS. 020896-WS AND 010503-WU

Docket No. 020896-WS, relating to the petitions of the customers to delete territory in Aloha's Seven Springs service area, shall be closed and the customer hearing scheduled for January 27-28, 2005, is hereby cancelled.

Docket No. 010503-WU, relating to the measurement of the water quality at Aloha's facilities, is not impacted by Aloha's Motion for Termination. Thus, Docket No. 010503-WU shall remain open to proceed to hearing.

Based on the foregoing, it is

ORDERED that Aloha Utilities, Inc.'s Request for Oral Argument is granted. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Termination of Proceedings as They Relate to Deletion of Territory is granted. It is further

ORDERED that the hearing scheduled for January 27-28, 2005, is cancelled. It is further

ORDERED that Docket No. 020896-WS shall be closed. It is further

ORDERED that Docket No. 010503-WU shall remain open.

By ORDER of the Florida Public Service Commission this 21st day of January, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

SMC

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.

Any party adversely affected by the Commission's final action in this matter may request:

- 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.