

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-05-0354-PCO-WU
ISSUED: April 1, 2005

ORDER DENYING ALOHA UTILITIES, INC.'S REQUEST FOR ORAL ARGUMENT
AND GRANTING INTERVENTION

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 January 24, 2005, John H. Gaul, Harry C. Hawcroft, and Wayne T. Forehand filed Petitions to Intervene. On January 26, 2005, Sandy Mitchell, Jr., filed a Petition to Intervene. On January 31, 2005, Edward O. Wood filed a Petition to Intervene. The petitions did not include certificates of service. On March 22, 2005, Mr. Wood, Mr. Forehand, Mr. Mitchell, Mr. Hawcroft, and Mr. Gaul refiled their Petitions to Intervene, this time including certificates of service with the petitions indicating that copies of the petitions were mailed to the utility, the Office of Public Counsel (OPC), and Commission staff counsel.

On March 29, 2005, Aloha timely filed its Objection to Petitions to Intervene. Included with its objection, Aloha filed a Request for Oral Argument.

Aloha's Request for Oral Argument

In support of its Request for Oral Argument, Aloha states that oral argument will help clarify the issues, ensure that the Commission is 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 proceeding at issue be conducted in accordance with the Florida Administrative Procedure Act and that Aloha is afforded due process of law.

Having considered Aloha's request, I find that the utility's arguments are adequately contained within its response. Oral argument is, thus, unnecessary, and Aloha's Request for Oral Argument is hereby denied.

Petitions to Intervene

The Petitions to Intervene filed by Mr. Wood, Mr. Forehand, Mr. Mitchell, Mr. Hawcroft, and Mr. Gaul all request that the petitioners be accorded full party status in this docket. In support of their requests, the petitioners state that they are customers of Aloha. They further state that as customers of the utility, "[a]ctions taken by the Commission, whether deletion is approved or not, will have a major impact on the quality and cost of potable water that the petitioner will receive in the future." Mr. Hawcroft's, Mr. Mitchell's, Mr. Gaul's, and Mr.

DOCUMENT NUMBER-DATE

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Forehand's petitions set forth disputed issues of fact and law and a statement of ultimate facts. Mr. Wood's petition sets forth a statement of ultimate facts.

Aloha's Response

Aloha states that the Petitions for Intervention should be denied. In support of its objection, the utility asserts that, in any penal action, the only proper parties are the prosecuting authority and the person or entity charged. The utility states that this two party procedure is "well-established and logical" and that the prosecuting attorney cannot satisfy its initial burden of proof, pursuant to section 120.60(5), Florida Statutes, and Rule 28-107.004(4), Florida Administrative Code, though evidence presented by a third party. Aloha further states that the petitioners have no authority to take action against Aloha or to raise new facts or issues in this proceeding.

Citing Associated Home Health Agency, Inc. v. Department of Health and Rehabilitative Services, 453 So. 2d 104 (Fla. 1st DCA 1984), Aloha asserts that a third party has no standing in a license revocation proceeding. Aloha states that its research of orders of the Florida Division of Administrative Hearings did not turn up any orders from a disciplinary proceeding against a licensee where a third party was allowed to intervene.

The utility contends that Rule 25-22.032, Florida Administrative Code, provides a procedure for customer complaints against a utility. It asserts that neither this procedure, nor section 120.60(5), governing license revocations, nor Chapter 367, Florida Statutes, provide for customer intervention in penal actions brought by the Commission.

Aloha states that, pursuant to Chapter 367, only the Commission is authorized to revoke a utility's certificate. The utility asserts that the Commission cannot delegate this authority to another person or entity.

Aloha alleges that State v. General Development Corporation, 448 So. 2d 1074 (Fla. 2d DCA 1984), approved, 469 So. 2d 1381 (Fla. 1985), is directly on point with the circumstances of this case. Aloha states that in General Development Corporation the court found that the broad authority granted to the State Attorney to appear in courts and prosecute and defend civil and criminal actions did not give it standing to bring an action against an alleged violator of Chapter 403, Florida Statutes, which the court stated the Department of Environmental Protection had the sole authority to enforce. Aloha states that, likewise, no other person or entity has standing to participate in this penal action affecting Aloha's certificate of authorization. Aloha states that courts have recognized that standing requirements in administrative proceedings vary based on the nature of the proceeding.

The utility asserts that the petitioners have no protectable interest in this proceeding. Citing 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), and Lee County Electric Coop. v. Marks, 501 So. 2d 585 (Fla. 1987), the utility states that customers have no right to be served by a particular utility.

Citing Charlotte County Development Commission v. Lord, 180 So. 2d 198 (Fla. 2d DCA 1965), Aloha contends that the public has no right to intervene in a proceeding based on a belief that one side or the other should prevail. The utility states that “[p]resumably, the PSC can adequately protect the individual interests of these five ‘intervenors,’ if, in fact, they have any legally cognizable interest” and that there has been no allegation by the petitioners that the Commission will not do so.

The utility states that the petitioners have no role in this proceeding. It states that the Commission may not rely upon conduct not alleged in the initial charging document. It states that, therefore, other parties cannot submit evidence in this proceeding outside the specific facts and law alleged in the show cause order. Aloha further states that the Commission may not meet its initial burden of proof through evidence produced by anyone other than itself and that the utility “cannot be required to defend itself from six prosecutors.” Aloha states that “accordingly, any ‘evidence’ adduced by these five individuals, in a capacity as ‘parties’ to this proceeding, would be immaterial, irrelevant or cumulative in this penal action.”

Aloha states that the disputed and ultimate allegations of fact set forth in the Petitions to Intervene go beyond the findings of fact contained in the show cause order. The utility asserts that such allegations are improper and irrelevant as the Commission has the sole authority to initiate and prosecute this penal action against Aloha and that the Commission cannot rely on facts not specifically alleged in the show cause order while doing so.

Aloha also takes issue with the Petition for Intervention filed by Mr. Mitchell, wherein he indicates representing 37 home sites in Riviera Estates. The utility states that there is no indication that Mr. Mitchell is an attorney or certified law student qualified to represent these home site owners and that there has been no request from any home site owners that Mr. Mitchell serve as a qualified representative on their behalf in this proceeding.

Findings and Conclusion

Upon consideration of all the arguments, I find that the petitioners’ substantial interests may be affected by this proceeding because they are customers of the utility. I agree with Aloha that Commission staff has the burden of proof in this proceeding. However, I find that this does not prevent the petitioners from intervening in this matter. I further find that General Development Corporation, 448 So. 2d at 1074, and Associated Home Health Agency, 453 So. 2d at 104, are not on point because the Commission, not these petitioners, initiated this proceeding and, as I stated above, allowing intervention does not change the fact that Commission staff has the burden of proof in this proceeding.

Accordingly, the Petitions to Intervene filed by Edward O. Wood, Wayne T. Forehand, Sandy Mitchell, Jr., Harry C. Hawcroft, and John H. Gaul are hereby granted. It is important to clarify, however, that Mr. Mitchell is granted intervention only to represent himself in this proceeding. As for Aloha’s concerns about the statements of disputed and ultimate facts and the disputed legal issues set forth in the petitions, the intervenors are hereby on notice that the show cause order issued by the Commission on February 22, 2005, governs the facts and law at issue in this proceeding, and the intervenors may not raise additional issues in this proceeding.

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Pursuant to Rule 25-22.039, Florida Administrative Code, the intervenors take the case as they find it.

Therefore, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Aloha Utilities, Inc.'s Request for Oral Argument is hereby denied. It is further

ORDERED that that the Petitions to Intervene filed by Edward O. Wood, Wayne T. Forehand, Sandy Mitchell, Jr., Harry C. Hawcroft, and John H. Gaul are hereby granted. It is further

ORDERED that all parties to this proceeding shall furnish copies of all testimony, exhibits, pleadings and other documents which may hereinafter be filed in this proceeding to:

Edward O. Wood
1043 Daleside Lane
New Port Richey, FL 34655-4293

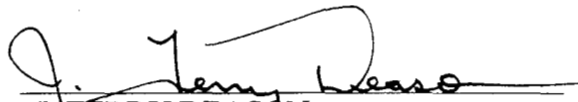
Wayne T. Forehand
1216 Arlinbrook Drive
Trinity, FL 34655-4556

Sandy Mitchell, Jr.
5957 Riviera Lane
Trinity, FL 34655

Harry C. Hawcroft
1612 Boswell Lane
New Port Richey, FL 34655

John H. Gaul
7633 Albacore Drive
New Port Richey, FL 34655

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 1st 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 25-22.0376, 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.