

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-05-0549-PCO-WU
ISSUED: May 20, 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 MOTION TO STRIKE AND DENYING REQUESTS FOR ORAL ARGUMENT, MOTION FOR RECONSIDERATION OF ORDER ACKNOWLEDGING INTERVENTION, MOTION TO AMEND, AND MOTION FOR ABATEMENT

BY THE COMMISSION:

BACKGROUND

On January 7, 2005, we issued our notice of intent to amend Aloha's Utilities, Inc.'s (Aloha or utility) certificate of authorization to delete certain areas from the utility's service territory. On February 22, 2005, Aloha was served via certified mail Order No. PSC-05-0204-SC-WU (show cause order). The show cause order set forth, in accordance with section 120.60, Florida Statutes, and Rule 28-107.004, Florida Administrative Code, the statutory sections alleged to have been violated by Aloha which warrant the deletion of portions of its service area and the facts and conduct relied upon to establish the violations. On March 15, 2005, Aloha timely filed its response to the show cause order and requested a hearing.

On March 15, 2005, Aloha filed its Motion to Strike and Amend, in which it requested that we strike certain portions of the show cause order and amend the order to address whether mediation is available. Commission staff timely filed its Response to Aloha's Motion to Strike and Amend on March 21, 2005.

Also on March 15, 2005, Aloha filed its Motion for Abatement, requesting that we abate the proceeding in this docket until the final order is issued in 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. A hearing in Docket No. 010503-WU was held on March 8, 2005. We are scheduled to consider staff's recommendation on the matter

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at our May 31, 2005, agenda conference. The final order is scheduled to be issued on June 20, 2005.

Commission staff timely filed its Response to Aloha's Motion for Abatement on March 18, 2005, in which it took no position on Aloha's motion. On March 22, 2005, the Office of Public Counsel (OPC) timely filed Citizens' Response In Opposition to Aloha's Motion for Abatement. On March 29, 2005, the utility filed its Request for Oral Argument in regard to its Motion for Abatement.

By Order No. PSC-05-0300-PCO-WU, issued March 18, 2005, OPC's Notice of Intervention in this docket was acknowledged. On March 28, 2005, Aloha timely filed its Motion for Reconsideration of Order Acknowledging Intervention (Motion for Reconsideration), in which it requested reconsideration of the order allowing OPC to intervene in this proceeding. Along with its Motion for Reconsideration, Aloha included a Request for Oral Argument. OPC timely filed Citizens' Response in Opposition to Aloha's Motion for Reconsideration of Order Acknowledging Intervention on March 30, 2005.

We have jurisdiction pursuant to sections 120.60, 367.045, 367.111 and 367.161, Florida Statutes.

REQUESTS FOR ORAL ARGUMENT

In support of its Requests 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.

Aloha's Request for Oral Argument in regard to its Motion for Reconsideration is denied. Aloha's arguments are adequately contained in its Motion for Reconsideration, and, thus, oral argument is unnecessary.

Aloha's Request for Oral Argument in regard to its Motion for Abatement is also denied. Rule 25-22.058, Florida Administrative Code, states that "[a] request for oral argument shall be contained on a separate document and must accompany the pleading upon which it is requested." Aloha filed its Motion for Abatement on March 15, 2005. Its request for oral argument, however, was not filed until March 28, 2005. Thus, Aloha's Request for Oral Argument is untimely. Moreover, Aloha's arguments are adequately contained in its Motion for Abatement, and, thus, oral argument is unnecessary.

MOTION FOR RECONSIDERATION

I. Aloha's Motion

Aloha requests that we reconsider the decision allowing OPC to intervene in this proceeding. In support of its motion, Aloha states that the Prehearing Officer overlooked and/or failed to consider both critical facts and controlling law when he rendered his decision.

Aloha states that the Prehearing Officer overlooked and/or failed to consider the nature of this proceeding and the extreme prejudice to the utility caused by OPC's intervention in this penal action. Aloha 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 under section 120.60(5), Florida Statutes, and Rule 28-107.004(4), Florida Administrative Code, through evidence presented by a third party. Aloha further states that OPC has no authority to take action against Aloha or to raise new facts or issues in this proceeding, so "OPC can contribute nothing to this proceeding, and its participation deprives Aloha of due process of law."

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 agency revocation proceedings. 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. It further states that it found no license revocation proceeding before the Commission where OPC was a party.

Aloha states that, pursuant to Chapter 367, Florida Statutes, only the Commission is authorized to revoke a utility's certificate and that we cannot delegate this authority to OPC. It further states that we cannot rely on section 350.0611, Florida Statutes, which outlines the duties and powers of OPC, as authority for OPC's intervention in this case.

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 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, OPC cannot participate in disciplinary actions initiated by the Commission based on the broad powers conferred on it by sections 350.061(1) and 350.0611(1).

The utility asserts that OPC "did not and could not allege any protectable interest in the instant proceeding, in which it seeks to intervene as a party." It states that OPC was created to represent the general public before the Commission. 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 the public has no right

to be served by a particular utility. Aloha states that it follows that OPC has “no right to party status for the purpose of advocating a position upon which particular utility will, or will not, provide service to a specified territorial area.”

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 OPC’s interest if, in fact, the OPC has a legally cognizable interest” and that there has been no allegation by OPC that the Commission will not do so.

Aloha states that we may not rely upon conduct not alleged in the initial charging document. It states that, therefore, OPC cannot submit evidence in this proceeding outside the specific facts and law alleged in the show cause order. Aloha further states that we may not meet our initial burden of proof through evidence produced by anyone other than the Commission and that the utility “cannot be required to defend itself from two prosecutors.” Aloha states that “[a]ccordingly, any ‘evidence’ adduced by the OPC, if allowed to intervene in this proceeding, would be immaterial, irrelevant or cumulative in this penal action.”

The utility alleges that OPC’s one sentence notice to intervene does not conform to the requirements of section 120.54(5), Florida Statutes, and Rule 28-106.201, Florida Administrative Code. It states that OPC is not exempt from the requirements of the Florida Administrative Procedure Act.

II. OPC’s Response

OPC states that Aloha’s Motion for Reconsideration should be denied. It asserts that Aloha has failed to meet its burden of showing that the Prehearing Officer made a mistake of fact or law when he acknowledged OPC’s intervention in this proceeding.

OPC states that it has the duty, pursuant to section 350.0611, to represent the people of Florida in proceedings before the Commission. It contends that section 350.0611 specifically states that OPC “shall have such powers as are necessary to carry out the duties of his or her office” and that OPC may appear in any proceeding or action before the Commission.

OPC states that Black’s law dictionary defines the term “proceeding” as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment” and as “any procedural means for seeking redress from a tribunal or agency.” It further states that “Docket No. 050018-WU easily satisfies this criteria, since the docket is a procedure used to carry out the will of the Commission, as expressed and voted upon at an agenda conference.”

OPC contends that Aloha’s Motion for Reconsideration ignores the plain meaning of section 350.0611. It states that the plain language of section 350.0611 provides no exception barring OPC from intervening in a show cause proceeding or a license revocation proceeding, and that, in fact, this section states that OPC may intervene in any Commission proceeding or action. It further states that “Public Counsel’s intervention does not change the burden of proof

in the proceeding, nor does the fact that the Commission is ‘prosecuting’ the action have anything to do with Public Counsel’s right to intervene.”

OPC distinguishes the facts in General Development Corporation, 448 So. 2d at 1074, from the facts in this docket. OPC states that in General Development Corporation the State Attorney attempted to independently bring an action concerning violations of statutes that the Department of Environmental Protection was charged with enforcing. It states that the court found that the Department of Environmental Protection had to bring any such action. It states that, unlike General Development Corporation, the Commission has initiated this action against Aloha and that OPC is only intervening in the matter.

OPC argues that Aloha’s reliance on Associated Home Health Agency, 453 So. 2d at 104, is misplaced. OPC states that in Associated Home Health Agency the court found that a third party did not have standing to request and initiate a section 120.57 hearing to revoke a competing service provider’s license. It asserts that Associated Home Health Agency is not on point because in this case the correct entity, the Commission, initiated the partial license revocation proceeding against Aloha and that the utility, not OPC, requested the hearing in this docket.

III. Analysis and Conclusion

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that was overlooked or not considered when the order was rendered. Diamond Cab Co. v. King, 146 So. 2d 889, 891 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161, 162 (Fla. 1st DCA 1981). The motion for reconsideration should be based on specific facts set forth in the record and should not be based on an arbitrary feeling that a mistake may have been made. Steward Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). Furthermore, it is not appropriate to reargue matters in a motion for reconsideration. Sherwood v. State, 111 So. 2d 96, 98 (Fla. 3d DCA 1959).

Aloha’s arguments in regard to OPC’s authority to intervene in this matter under section 350.0611, whether section 120.60 allows for intervention in license revocation proceedings, and whether OPC’s request for intervention conforms to the requirements of Rule 28-106.201 are the same arguments Aloha made in its opposition to OPC’s intervention and were effectively rejected by the Prehearing Officer when he allowed the intervention. Thus, this is merely reargument, which is not proper for a motion for reconsideration. See Sherwood, 111 So. 2d at 98.

Furthermore, we agree with OPC that General Development Corporation, 448 So. 2d at 1074, and Associated Home Health Agency, 453 So. 2d at 104, are not on point. Unlike General Development Corporation and Associated Home Health Agency, we initiated the license revocation proceeding against Aloha, in accordance with section 120.60. We agree with Aloha that Commission staff has the burden of proof in this proceeding; however, allowing OPC to intervene in this matter does not change that fact.

Aloha has failed to identify a point of fact or law that the Prehearing Officer overlooked or failed to consider when he rendered the order acknowledging OPC's intervention in this matter. See Diamond Cab Co., 146 So. 2d at 891; see also Pingree, 394 So. 2d at 162. Accordingly, Aloha's Motion for Reconsideration is denied.

MOTION TO STRIKE AND AMEND

I. Aloha's Motion

Aloha states that Rule 28-107.004(3), Florida Administrative Code, sets forth the sole requirements for a licensee's response to an initial charging document pertaining to an administrative agency's intent to revoke a license. Aloha states that Rule 28-107.004(3) only requires that the licensee timely request a hearing and that this request for hearing contain: 1) the name and address of the party making the request, for purposes of service; 2) a statement that the party is requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and 3) reference to the communication that the party has received from the agency.

Aloha contends that the show cause order attempts to shift the burden of proof to Aloha to prove its innocence. Aloha states that in four separate places in the show cause order we require Aloha to respond by setting forth specific allegations of fact and law as to why the four service areas delineated in the order should not be deleted from Aloha's certificate of authorization. Aloha asserts that the utility has "no such preliminary or ultimate burden in this case, and it cannot be required to 'respond' or 'show cause' why its Certificate of Authority should not be suspended, revoked, annulled or withdrawn." Aloha, thus, requests that we strike all statements in the show cause order requiring the utility to allege specific allegations of fact and law as to why the four areas delineated in the order should not be deleted from Aloha's certificate.

In addition to its Motion to Strike, Aloha also requests that the show cause order be amended to include language addressing the possibility of mediation in this case. Aloha states that section 120.573, Florida Statutes, and Rule 28-106.111(1), Florida Administrative Code, require agency orders that affect substantial interests include language on whether mediation of the administrative dispute is available and a statement that choosing mediation does not affect the right to an administrative hearing. Aloha states that the show cause order contains no such language.

II. Commission Staff's Response

Staff states that Aloha's Motion to Strike should be granted. Staff agrees with Aloha that Rule 28-107.004 is applicable in this instance and that the disputed language in the show cause order goes beyond what is required in that rule. Staff, however, states that the inclusion of the language was not an attempt to shift the burden of proof from the Commission to the utility.

In regard to Aloha's Motion to Amend, staff states that section 120.573, pertaining to a statement on the availability of mediation, does not apply to license revocation proceedings

under section 120.60. Staff asserts that Rule 28-107.004 specifically states what must be included in an agency's show cause order and that this rule "makes no mention of the need for a statement regarding the availability of mediation."

Staff further states that, if we find that such a statement on mediation is applicable in this instance, we should amend the show cause order to state that statutory mediation under section 120.573 is not available in this case. Pointing to language in section 120.573 indicating that any agreement arrived at from statutory mediation would be binding on the Commission, staff explains that this section is inconsistent with this proceeding because Commission staff does not have the authority to negotiate and sign an agreement that would bind the Commission.

Staff states, however, that it understands that OPC, certain customers, and the utility are currently involved in efforts to mediate issues surrounding Aloha's service and that staff would be willing to participate in any on-going mediation. Staff further asserts that they believe that "it would be an appropriate staff function to recommend that the Commission approve any reasonable settlement that results from the mediation."

III. Analysis and Conclusion

Rule 28-107.004(3) sets forth the requirements for a response to an agency's show cause order for a license revocation. As Aloha states and Commission staff concedes, Rule 28-107.004(3) does not require a licensee to allege specific allegations of fact and law as to why its license should not be revoked. Accordingly, Aloha's Motion to Strike is granted and all statements requiring Aloha to allege specific allegations of fact and law as to why the four areas delineated in the order should not be deleted from the utilities certificate in the show cause order are stricken.

As for Aloha's Motion to Amend, we agree with Commission staff that neither section 120.60 nor Rule 28-107.004, the law setting forth what must be included in an administrative complaint/show cause order to revoke a utility's license, requires us to include a statement on whether mediation is available in this proceeding. Aloha's Motion to Amend is, thus, denied.

It is important to stress, however, that our action should not be interpreted to mean that the parties are prohibited from mediating this matter. Our action addresses only whether a statement on the availability of mediation pursuant to section 120.573 and Rule 28-106.111(1) is required to appear in the show cause order. We encourage mediation and will consider any settlement agreement that results from mediation.

MOTION FOR ABATEMENT

I. Aloha's Motion

Aloha requests that this proceeding be abated until the final order in Docket No. 010503-WU is issued. Aloha further requests that, once the final order is issued, the utility should be directed to confer with Commission staff and report to the Prehearing Officer the status of both

Docket No. 010503-WU and this docket, so that the Prehearing Officer can determine whether continued abatement is appropriate or necessary.

In support of its Motion for Abatement, Aloha states that the neighborhoods that are subject to deletion from Aloha's service territory in this docket are the same neighborhoods that will benefit the most from the implementation of the processes at issue in Docket No. 010503-WU. Furthermore, the utility states that the petitioners in Docket No. 010503-WU live in one of the neighborhoods that is subject to deletion in this docket. The utility states that "the Commission may in Docket No. 010503-WU accept the cost intensive recommendations of the petitioners, only to shortly thereafter litigate whether those same petitioners should be removed from Aloha's service area."

Aloha states that, due to the way the dockets are interrelated, it is "unreasonable, illogical, and contradictory" to proceed with a hearing in this docket before the issuance of the final order in Docket No. 010503-WU, and that it would make no sense to rule on the issues in this docket without some consideration of the outcome or possible outcome of Docket No. 010503-WU. The utility asserts that the issues in this docket "may affect the number of Aloha's customers, the neighborhoods which Aloha serves, the facilities through which Aloha's customers receive service, and other chemical, hydraulic, engineering, rate, legal, and practical issues related to the issue of removal of hydrogen sulfide." It states that, consequently, if we decide in Docket No. 010503-WU to order Aloha to remove the hydrogen sulfide from its water, "the pendency of the show cause proceeding will render the Commission unable to know the costs of such removal; the size, type, or design of any facilities necessary to accomplish such removal; and the rate impact of any such removal." The utility adds that, with the show cause proceeding pending, it may be impossible for Aloha to obtain financing for facilities to implement the removal of hydrogen sulfide.

Aloha states that abating the proceeding in this docket will allow us to consider our decision in Docket No. 010503-WU when addressing the issues in this docket. The utility further states that abatement of the proceeding in this docket "will also allow Aloha and the Commission and its staff an opportunity to address the issues, whether by mediation or otherwise, raised by the Show Cause Order with the hope of resolving the issues raised therein and the concerns of some of Aloha's customers without formal litigation."

II. Commission Staff's Response

Staff takes no position on whether the Motion for Abatement should be granted. Staff, however, offers us some observations that it believes we should consider when making our decision on the motion.

Staff states that abating the proceeding in this docket will provide Aloha with a strong incentive to work diligently to fully implement, on a system-wide basis, the treatment method chosen by the utility to deal with the black water issues before the abatement period ends. Staff further states that if Aloha's treatment method is successful, the proceeding in this docket may be found to be unnecessary and the time and expense of litigating this matter may be avoided.

Staff acknowledges that there is merit to the utility's argument regarding the negative effect the show cause proceeding may have on Aloha's ability to obtain financing for any improvements that we might order in Docket No. 010503-WU. Staff states that, if this proceeding is inactive at the time the utility attempts to secure a loan, Aloha will presumably be in a more favorable posture than if the proceeding is active. Staff further observes, however, that holding this proceeding in abeyance may not make a difference as "the very fact that this proceeding exists, whether currently active or inactive, could cause a higher degree of financial risk for Aloha in its efforts to obtain a loan on favorable terms."

Staff agrees with Aloha that the final order in Docket No. 010503-WU could impact the proceeding in this docket and that abating this proceeding will allow the us to consider our decision in Docket No. 010503-WU when rendering our decision in this docket. However, recognizing that Aloha's customers have experienced problems for upwards of ten years, staff states that the customers want resolution of the matter sooner rather than later and abating this proceeding does not achieve this end.

III. OPC's Response

OPC opposes Aloha's Motion for Abatement. It states that, while we opened a docket to revoke the Aloha's license on January 6, 2005, the subject matter of this proceeding has been pending for almost three years. OPC states that the subject matter of the proceeding in Docket No. 010503-WU has been pending for a number of years as well.

OPC asserts that the proceeding in this docket is based on past actions and inaction by the utility. It states that, although Aloha may raise actions the utility has taken after issuance of the show cause order to demonstrate mitigating circumstances, it is up to the utility to provide this information to us. It contends that the proceeding in Docket No. 010503-WU "should have nothing to do with the Commission going forward to prove up the facts contained in the show cause order." It points out that we are scheduled to vote on the matters in Docket No. 010503-WU on May 31, 2005, and that "Aloha is free to bring up those matters in its defense if it chooses to do so."

OPC states that the Commission is still receiving complaints from Aloha's customers in regard to black water issues. It states that we should not allow these conditions to continue even longer. As for efforts to mediate this matter, OPC asserts that abatement is not necessary for the parties to continue to mediate this dispute.

IV. Analysis and Conclusion

Aloha's Motion for Abatement is denied. The show cause order pertains to past actions and inactions by the utility. Thus, it is not necessary to abate this matter to consider our decision in Docket No. 010503-WU to make a determination on the issues in this docket. Moreover, we find it best to continue to move forward with this docket as this matter already has a long history.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Aloha Utilities, Inc.'s Requests for Oral Argument are denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Reconsideration of Order Acknowledging Intervention is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion to Strike is granted. It is further

ORDERED that Aloha Utilities, Inc.'s Motion to Amend is denied. It is further

ORDERED that Aloha Utilities, Inc.'s Motion for Abatement is denied. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 20th day of May, 2005.

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

By:



Kay Flynn, Chief
Bureau of Records

(S E A L)

SMC

Chairman Baez dissents from the decision to deny Aloha's Motion for Abatement.

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.