

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**ALOHA UTILITIES, INC.,**

**Petitioner,**

v.

**PSC Docket No. 010503-WU  
Filed: March 17, 2004**

**FLORIDA PUBLIC SERVICE  
COMMISSION,**

**Respondent.**

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**ALOHA'S MOTION TO STRIKE CITIZEN'S "RESPONSE"  
OR, IN THE ALTERNATIVE,  
RESPONSE TO CITIZEN'S MOTION TO DISMISS AND CITIZEN'S  
OBJECTION TO TRANSFER PETITION TO DOAH**

The Petitioner, ALOHA UTILITIES, INC., ("ALOHA"), by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves to strike "Citizens Response to Aloha's Petition for Formal Administrative Hearing and Request that Petition be Transferred to DOAH." In the alternative, ALOHA responds in opposition to the relief requested by the Office of Public Counsel ("OPC") in said "Response." In support of this motion to strike and alternative response, ALOHA states:

## ALOHA's Motion to Strike

1. This proceeding involves the Notice of Proposed Agency Action of the Florida Public Service Commission ("PSC") entitled "Order Requiring Interim Refunds." That proposed agency action is dated February 5, 2004. The Notice of Proposed Agency Action contains the requirements of Section 120.569(1) to notify parties of any available administrative hearing or judicial review, as well as the procedure which must be followed to obtain the hearing or judicial review. That Notice of Further Proceedings or Judicial Review advises persons whose substantial interests are affected by the proposed agency action that they may file a petition for a formal proceeding in the form provided by Rule 28-106.201, Florida Administrative Code, which petition must be received by the PSC Clerk by February 26, 2004. The Notice further provides that:

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

ALOHA filed its Petition for a Formal Administrative Hearing on February 26, 2004, thus initiating an adversary administrative proceeding. No other substantially affected person filed a Petition. Thus, at the time ALOHA filed its Petition, the only parties to the proceeding were ALOHA (the Petitioner) and the PSC (the Respondent). Pursuant to the PSC's own Notice of Further Proceedings, any former

objection or protest filed on behalf of the Office of Public Counsel in this docket was deemed abandoned unless the OPC filed a Petition for an administrative proceeding on or before February 26, 2004. It did not. Thus, at the time of the filing of ALOHA's Petition on February 26, 2004, there was no other "party" to be served within the meaning of Rule 28-106.104(4), Florida Administrative Code.

Most importantly, with regard to ALOHA's Motion to Strike, the Office of Public Counsel, having failed to file either a Petition or a Notice of Intervention prior to the filing of its "Response" on March 5, 2004, is not a "party" for the purpose of either responding to ALOHA's Petition, moving to dismiss that Petition or otherwise objecting to any request for relief contained in that Petition. The OPC has not complied with Rules 25-22.039 or 28-106.205, Florida Administrative Code, governing intervention and is not entitled to respond and file motions as if it were a party. Simply put, at this point in time, the Office of Public Counsel is not a party and has no status or standing in this proceeding to file what it has entitled "Citizens Response to Aloha's Petition for Formal Administrative Hearing and Request that Petition be Transferred to DOAH." Accordingly, ALOHA moves that said Response be stricken in its entirety.

## **ALOHA'S Response in Opposition to OPC's Motion to Dismiss**

2. In the event the PSC determines to deny ALOHA's Motion to Strike the Office of Public Counsel's Response to ALOHA's Petition, ALOHA alternatively responds and asserts that the Motion to Dismiss contained therein is utterly without merit and should be denied. The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action, and all material factual allegations of the complaint must be taken as true. Varnes v. Dawkins, 624 So.2d 349 (Fla. 1<sup>st</sup> DCA 1993). The OPC has not cited any legal justification to dismiss ALOHA's Petition for Formal Administrative Hearing. Dismissal based upon the OPC's failure to be served with a copy of ALOHA's Petition, even if the OPC were entitled to such service, which it was not, would be an inappropriate and drastic remedy.

3. The OPC does not, indeed, could not, allege that ALOHA did not timely file its Petition, that ALOHA is not a person substantially affected by the Proposed Agency Action challenged herein, or that ALOHA's Petition does not satisfy the requirements of Rule 28-106.201(2), Florida Administrative Code. Instead, Public Counsel seeks the extreme sanction of dismissal on the sole ground that Public Counsel was not served with a copy of ALOHA's Petition for Formal Administrative Hearing. In support of its Motion to Dismiss, the OPC relies upon Rule 28-

106.104(4), Florida Administrative Code, which provides that copies of pleadings shall be served “upon all other parties to the proceeding.” As discussed above with respect to ALOHA’s Motion to Strike, the Office of Public Counsel was not a party to the proceeding for which ALOHA seeks an administrative hearing, and thus Rule 28.106.104(4) does not apply. Indeed, there was no “proceeding” until such time as ALOHA filed its Petition. Any “party” status which the OPC may have achieved prior to the date of the Notice of Proposed Agency Action in this case ended when it failed to file a Petition within the specified protest period noticed by the PSC.

4. The OPC argues that “this is not a new case. It is a continuation of a rate case filed by Aloha on August 10, 2001.” That argument is directly contrary to the language within the Notice of Proposed Agency Action itself, which acknowledges that all provisions of the Final Order entered in the rate case are now final and effective. (Notice of Proposed Agency Action, page 2) However, even if the Proposed Agency Action at issue in this proceeding were considered to be the “same case” as the “rate case,” (a position urged by the OPC and strongly disputed by ALOHA), the Office of Public Counsel was not a “party” entitled to service of pleadings at the time ALOHA filed its Petition for Formal Administrative Hearing. This is confirmed by the PSC’s own “Notice of Further Proceedings or Judicial Review” attached to the subject Notice of Proposed Agency Action. According to

that Notice, any party status of the OPC in the “rate case” which was not renewed before February 26, 2004, was considered abandoned. In filing its Petition for Formal Administrative Hearing regarding the Proposed Agency Action at issue in this case, ALOHA was entitled to rely upon the Notice of Further Proceedings provided by the PSC in its Notice of Proposed Agency Action.

5. A “party” is defined in Section 120.52(12), Florida Statutes, in part, as

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. . . . (Emphasis supplied)

The Office of Public Counsel is not named in the Notice of Proposed Agency Action, nor had the OPC made an appearance “as a party” at the time ALOHA’s Petition was filed. At the time ALOHA’s Petition was filed, the OPC had not requested and the PSC had not allowed the OPC to intervene or participate in the proceeding as a party. Indeed, the PSC specifically informed interested persons that any objections or protests filed “in this docket” before the issuance date of the Notice of Proposed Agency Action were considered abandoned unless renewed by the filing of a Petition

on or before February 26, 2004. The OPC was simply not a “party” within the meaning of Rule 28-106.104(4) entitled to service of ALOHA’s Petition. Even if the OPC’s “Response” to ALOHA’s Petition, which “Response” was filed on March 5, 2004, could be considered an “appearance” within the meaning of Section 120.52(12)(b), Florida Statutes, so as to confer party status upon the OPC, that “Response” obviously did not exist at the time ALOHA’s Petition was filed on February 26, 2004.

6. The OPC further urges that ALOHA’s Petition should be dismissed because of the “style of the case” on the Petition. ALOHA asserts, first, that the style of a case, even if deemed improper, is not grounds for the extreme sanction of dismissal. Second, ALOHA asserts that the style of this case as it appears on ALOHA’s Petition comports with Rules 28-106.104(5) and 28-106.201, Florida Administrative Code, which rules govern this proceeding. Both rules require that the party requesting relief be identified. As the party requesting relief is ALOHA, the style of the case correctly identifies ALOHA as the Petitioner. As the agency from which relief is requested is the PSC, the style of the case correctly identifies the PSC as the Respondent.

7. In addition, it is ALOHA’s position in this proceeding, and in keeping with the principle of administrative finality, that this is not simply a continuation of the rate case. Indeed, the Notice of Proposed Agency Action states, at page 2, that “the

appellate review process is complete and all provisions of our Final Order are now final and effective.” Thus, the style preferred by the OPC (“In re: Application for increase in water rates for Seven Springs System in Pasco County by Aloha Utilities, Inc.”) is inappropriate for the instant proceeding.

8. In conclusion, the OPC’s Motion to Dismiss is totally devoid of merit. The parties in this proceeding, at the time ALOHA’s Petition for Formal Administrative Hearing was filed, were ALOHA and the PSC. Accordingly, there was no obligation by ALOHA to serve its Petition on anyone other than the PSC. If other substantially interested persons wish to intervene in this proceeding, they must comply with Rules 25-22.039 and 28-106.205, Florida Administrative Code. Absent such compliance, other persons, including the OPC, are not entitled to service of pleadings or to otherwise participate in this proceeding. Moreover, even if the OPC could claim some party status at the time ALOHA’s Petition was filed, the OPC has not and could not allege any prejudice from lack of service of the Petition. The OPC obviously is aware of ALOHA’s Petition and has not even requested any extension of time to respond to that Petition. Most importantly, even if the OPC were entitled to service of the Petition, the failure to serve the OPC is not grounds for dismissal of the Petition. Such failure can be remedied simply by an order requiring notification, a remedy which is clearly moot with respect to the OPC. (See Rules 28-106.109 and



25-22.029, Florida Administrative Code) The OPC's Motion to Dismiss should be denied.

**ALOHA's Response to OPC's Objections to Transfer to DOAH**

9. On three rather nebulous grounds, the OPC opposes ALOHA's request that its Petition for Formal Administrative Hearing be transmitted to DOAH for the assignment of an Administrative Law Judge ("ALJ") to conduct the formal hearing. First, the OPC asserts that there are "almost" no material facts in dispute and that the issues identified by ALOHA raise "virtually" no areas of disputed facts. These statements constitute an admission that ALOHA's Petition does assert some disputed issues of material fact. Second, the OPC urges that the PSC is "uniquely suited to have the best background and understanding" of its prior practice, policy and procedure. Finally, the OPC argues that principles of continuity and cohesiveness "demand that the PSC retain authority to resolve this final array of legal disputes raised by Aloha," alluding to the "multitude of pleadings, testimony, hearing, arguments, decisions, and orders since the case was initiated." These latter two grounds ignore established principles of administrative law.

10. In response, ALOHA asserts that its Petition does indeed raise numerous issues of disputed material fact entitling it to a formal administrative hearing,

pursuant to Section 120.57(1), Florida Statutes. For example, ALOHA intends to present evidence demonstrating that if it had applied the rates mandated in the Final Order during the appeal period, the interim rates would have produced revenues of only 4.08% more than the finally approved rates during that period of time. ALOHA has already refunded 4.87% to its customers. Hence, the Proposed Agency Action of requiring ALOHA to refund an additional \$278,113.00 is contrary to statute, PSC policy and precedent and the terms of the Final Order entered in the rate case. ALOHA has also alleged that the PSC is estopped from ordering the refund which is the subject of this proceeding. This allegation requires the production of factual evidence regarding the actions of the PSC and ALOHA's reliance upon such actions. ALOHA intends to present evidence that the Proposed Agency Action at issue herein is contrary to the PSC's prior practices and precedent. That issue requires proof of both the prior agency practices and precedent and evidence from the PSC elucidating its reasons for deviating from that prior practice and proving the validity of its changed policy. The issues here are not merely legal interpretations and policy. Instead, the issues are factually intensive, and ALOHA is entitled, pursuant to the Administrative Procedures Act, to present these facts at an evidentiary hearing and build a record for further review.

11. The determination of whether a Petitioner is entitled to a formal, as

opposed to an informal, hearing lies initially with the Agency and not with one of the parties, and certainly not with a non-party, such as the OPC in this instance. In its “Response,” at page 3, the OPC asserts that “all parties are in accord” with the facts and that “in reality the parties have no dispute about the underlying facts.” ALOHA submits that the Notice of Proposed Agency Action states many “facts” which ALOHA disputes. In addition, there could only be no dispute of material facts if the PSC itself agreed to or stipulated to the facts asserted in the Petition. The OPC cannot state the position of the PSC through its statement of opposition to a transfer of this Petition to the DOAH. The question is whether the PSC agrees to ALOHA’s allegations of facts, not whether the OPC agrees with those facts. If the PSC does not agree with ALOHA’s allegations of fact, there are disputed issues of material fact.

12. ALOHA has alleged that the directives and statements contained within the Notice of Proposed Agency Action conflict with and are contrary to the PSC’s prior agency practices, procedures and policies. The OPC argues that the PSC, as opposed to an Administrative Law Judge with the DOAH, is “uniquely” suited to have the best background and understanding of its own prior legal practice, policy and procedure. The OPC misunderstands established principles of administrative law. When a substantially interested party requests a formal administrative hearing, the agency may not simply rely upon its own background knowledge and

understanding of its own practice, policy and procedure. It must prove up and validate that policy on the record of the proceedings. Indeed, the discontinuance of a prior policy is the equivalent of the adoption of incipient policy. Florida Cities Water Company v. Florida Public Service Commission, 384 So.2d 1280 (Fla. 1980). And, when an agency's policy is not incorporated in a regularly adopted rule, the agency is required to defend its policy in a Section 120.57(1) proceeding and present evidence and argument and "expose and elucidate its reasons for discretionary action." State, Department of Administration, Div. of Personnel v. Harvey, 356 So.2d 323 (Fla. 1<sup>st</sup> DCA 1978). Also see International Medical Centers, H.M.O. v. Dept. of Health and Rehabilitative Services, 417 So.2d 734 (Fla. 1<sup>st</sup> DCA 1982). As provided in Section 120.57(1)(e), Florida Statutes, when agency action is based on an unadopted rule, the agency must demonstrate that the unadopted rule meets the criteria set forth in Section 120.57(1)(e)2.a through f. In other words, the existence of legal practice, policy and procedure, as well as its validity, unless it is enunciated in a rule, must be proven by competent substantial evidence adduced at the hearing. An Administrative Law Judge at DOAH is as able to judge that evidence as a presiding officer at the PSC. Both must decide the matter on the evidence adduced at hearing, and not upon some ethereal knowledge existent outside the record.

13. Finally, the OPC argues that the multitude of pleadings, testimony,

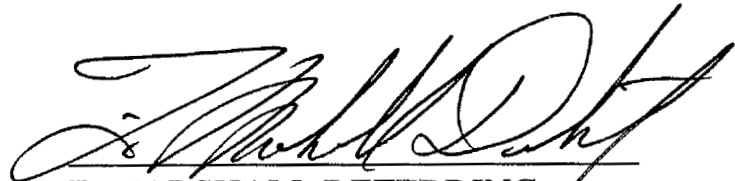
hearings, arguments, decisions and orders since “this” case was filed on August 10, 2001, demand that the PSC retain authority to resolve this Petition. In the first place, whether or not an ALJ from the DOAH conducts the final hearing and renders a Recommended Order, the PSC retains its authority to enter a Final Order in this proceeding. The PSC’s expertise and special knowledge would not be removed in a DOAH proceeding, and it retains its authority to finally resolve any legal issues raised by ALOHA. Second, the OPC’s argument appears to assume that in this proceeding, all of the pleadings, evidence and arguments from the record of prior proceedings which have now become final would automatically be considered in the instant proceeding. That is patently wrong. Only those matters of fact and prior orders which are relevant and are properly admitted into evidence on the record of this proceeding arising from this Petition can be considered by the presiding officer, whether it be an ALJ or the Commission itself. The presiding officer cannot rely upon his or her own knowledge of facts contained in another record for another proceeding. Such would clearly be a denial of due process and in conflict with Chapter 120, Florida Statutes. Indeed, the very existence of numerous pleadings, testimony, arguments, etc. in the related cases provides an additional reason for a disinterested and independent finder of fact to address the issues raised in this Petition.

14. In conclusion, the OPC has failed to assert any legitimate reasons or impediments, legal or practical, why this Petition should not be transmitted to the DOAH for the assignment of an Administrative Law Judge to conduct the formal hearing and render a Recommended Order. The OPC's "Response" mischaracterizes ALOHA's request for transmittal of this case to DOAH as based upon a need for an impartial, disinterested finder of fact. ALOHA has not moved to disqualify or recuse any of the Commissioners from further consideration in this proceeding. Instead, ALOHA's Petition clearly proposes the transfer of this proceeding to the DOAH for hearing based upon interests of expediency and judicial economy. The basis as stated within ALOHA's Petition is that the length of time required for scheduling and conclusion of the administrative hearing will be substantially lessened if the Petition is sent to DOAH for the conduct of a hearing and rendition of a Recommended Order. The decision to transfer the Petition to DOAH is, of course, a discretionary one that lies with the PSC. In the interest of expediency and fairness, ALOHA requests that its Petition be referred to the Division of Administrative Hearings.

WHEREFORE, Aloha Utilities, Inc., respectfully requests that the PSC grant its Motion to Strike the OPC's "Response" to its Petition for Formal Administrative Hearing or, in the alternative, deny the OPC's Motion to Dismiss and transmit

ALOHA's Petition to the DOAH for the conduct of a formal administrative hearing and the entry of a Recommended Order.

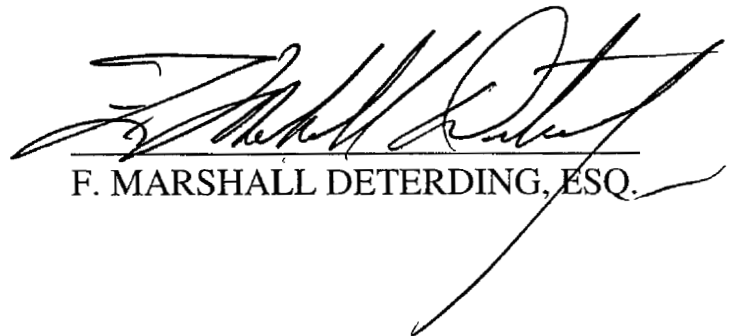
Respectfully submitted this 17<sup>th</sup> day of March, 2004.



F. MARSHALL DETERDING  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Ralph Jaeger, Esq., Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL, 32399-0850; and by U. S. Mail to Stephen C. Burgess, Deputy Public Counsel, Office of Public Counsel, c/o The Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee, FL, 32399-1400, this 17<sup>th</sup> day of March, 2004.



F. MARSHALL DETERDING, ESQ.

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