

BEFORE THE PUBLIC SERVICE COMMISSION

FLORIDA PUBLIC SERVICE
COMMISSION,

Petitioner,

vs.

PSC Docket No. 050018-WU
Order No. PSC-05-0204-SC-WU

ALOHA UTILITIES, INC.,

Respondent.

RESPONDENT'S MOTION TO STRIKE AND TO AMEND

The Respondent, Aloha Utilities, Inc., by and through its undersigned counsel, and pursuant to Sections 120.60 and 120.573, Florida Statutes, and Rules 28-107.004 and 28-106.111(1), Florida Administrative Code, hereby moves that the Petitioner, Florida Public Service Commission, strike certain language from and add certain language to, as more particularly described below, its "Show Cause Order," Order No. PSC-05-0204-SC-WU, issued February 22, 2005. In support of this Motion, Respondent states:

Motion to Strike

1. When an administrative agency notices its intent to suspend, revoke, annul

or withdraw a license, it does so through an Administrative Complaint.¹ Rule 28-107.004(1) and (2), Florida Administrative Code. The PSC’s “Administrative Complaint,” however labeled, is the “petition,” and the PSC “**shall** have the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee.” Rule 28-107.004(4), Florida Administrative Code. It is well established that the PSC’s burden in this proceeding, both initially and ultimately, is to **prove**, by clear and convincing evidence that the facts alleged are true **and** that such facts constitute a violation of law which justifies the revocation, suspension, annulment or withdrawal of Aloha’s Certificate of Authority. Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996); Farris v. Turlington, 510 So.2d 292 (Fla. 1987).

2. Rule 28-107.004(3), Florida Administrative Code, explicitly sets forth the **sole** requirements for a licensee’s response to an initial charging document setting forth an administrative agency’s intent to suspend, revoke, annul or withdraw a license. The only requirement imposed upon a licensee is to timely request a hearing, and to set forth in that request for a hearing (a) the name and address of the party making the request, for purposes of service; (b) a statement that the party is

¹ Aloha acknowledges that an Order to Show Cause is recognized in Rule 28-107.004(3)(c), Florida Administrative Code, and does not contend that the mere label of the PSC’s notice of intent to delete a portion of Aloha’s service territory as a “Show Cause Order” is violative of Florida’s Administrative Procedure Act.

requesting a hearing involving disputed issues of material fact, or a hearing not involving disputed issues of material fact; and (c) a reference to the communication that the party has received from the agency. Rule 28-107.004(3), Florida Administrative Code. Aloha has filed such a request for a hearing involving disputed issues of material fact in accordance with that Rule.

3. A licensee's request for a formal administrative hearing from an agency's notice of intent to suspend, revoke, annul or withdraw a license is governed by Rule 28-107.004(3), Florida Administrative Code. As held in Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, 870 So.2d 834, 841, footnote 3 (Fla. 3d DCA 2003), neither Section 120.54(5)(b)4, Florida Statutes, nor Rule 28-106.201, Florida Administrative Code, which require more specificity in other requests for hearings, is applicable to the instant proceeding.

4. Contrary to the directives of Florida's Administrative Procedure Act, the Uniform Rules of Procedure adopted by the Legislature in implementation of that Act, and judicial case law affirming the agency's responsibility and burden of proof in license revocation proceedings, the "Show Cause Order" issued by the PSC in this case attempts to place the burden upon Respondent Aloha to prove its innocence. On four separate occasions, the PSC requires Aloha to respond to its "Show Cause Order" by setting forth **specific** allegations of fact and law **why** the four areas

delineated in the Show Cause Order should not be deleted from its Certificate. Aloha 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. The burden to allege and then prove clearly and convincingly that facts and law exist to justify the PSC’s intended action rests upon the PSC. Simply put, Aloha Utilities is not guilty until proven innocent. The PSC must prove, by clear and convincing evidence that grounds exist for the revocation, or partial revocation, of Aloha’s Certificate “contingent upon provisions being made for an alternative service provider to be in place.” If the PSC is unwilling or unable to assume that burden, it should withdraw its Show Cause Order.

5. Accordingly, Aloha moves to strike from the PSC’s “Show Cause Order” all statements and purported requirements, as contained on pages 5 and 6 of that Order, that Aloha show cause, in writing which contains specific allegations of fact and law, why the four areas delineated in said Order should not be deleted from its Certificate No. 136-W.

Motion to Amend

6. Section 120.573, Florida Statutes, mandates that announcements of agency action that affect substantial interests “shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that

choosing mediation does not affect the right to an administrative hearing.” Similarly, Rule 28-106.111(1), Florida Administrative Code, requires that notices of agency decisions “shall also advise whether mediation under Section 120.573, F.S., is available as an alternative remedy, and if available, that pursuit of mediation will not adversely affect the right to administrative proceedings in the event mediation does not result in a settlement.” Contrary to that statutory and regulatory mandate, the PSC’s “Show Cause Order” does not contain such advice.

7. Accordingly, Respondent Aloha moves that the PSC’s “Show Cause Order” be amended to provide a statement of whether mediation is available in this proceeding.

Respectfully submitted this 15th day of March, 2005.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 15 copies of the foregoing has been furnished by Hand Delivery to the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, FL, 32399, on this 15th day of March, 2005:



JOHN L. WHARTON, ESQ.