

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

FILED: MARCH 21, 2005

RESPONSE TO ALOHA UTILITIES, INC.'S MOTION TO STRIKE AND TO AMEND

The Staff of the Florida Public Service Commission, by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby files its Response to Aloha Utilities, Inc.'s (Aloha or utility) Motion to Strike and to Amend filed on March 15, 2005, and states that:

Motion to Strike

1. Aloha moves to strike from Order No. PSC-05-0204-SC-WU, issued February 22, 2005, in this docket ("show cause order"), all statements and "purported requirements" that Aloha show cause, in a writing that contains specific allegations of fact and law, why the four areas delineated in the show cause order should not be deleted from its water certificate. Aloha argues that by the inclusion of this language, contained on pages 5 and 6 of the show cause order (hereinafter referred to as "disputed language"), the Commission erroneously attempts to place the burden upon Aloha to prove its innocence.

2. In its show cause orders, the Commission typically includes language requiring the utility to show cause as to why its actions or inactions should not result in the imposition of a penalty pursuant to Section 367.161, Florida Statutes. Commission show cause orders generally contemplate the imposition of a monetary penalty or fine rather than certificate revocation.

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3. When a utility requests a hearing on a Commission show cause order that contemplates the imposition of a monetary penalty, the utility must request a formal hearing by way of a written petition that complies with the requirements of Rule 28-106.201, Florida Administrative Code, just as a substantially affected person must do when requesting a hearing on a proposed agency action. Such a petition must contain, among other things, “[a] statement of all disputed issues of material fact,” pursuant to Rule 28-106.201(2)(d), and “[a] concise statement of the ultimate facts alleged, as well as the rules and statutes which entitle the petitioner to relief,” pursuant to Rule 28-106.201(2)(e). The requirement for a utility to show cause as to why a monetary penalty should not be imposed is proper, as it aligns with the requirements of this rule.

4. Nevertheless, Staff agrees with Aloha that because this case involves the partial revocation of Aloha’s water certificate, Rule 28-107.004, rather than Rule 28-106.201, Florida Administrative Code, applies in determining what constitutes the petition for hearing and what information the petition must contain. In license revocation proceedings, the agency is the petitioner. Rule 28-107.004(4) provides that “[t]he agency complaint [in this case, show cause order] shall be considered to be the petition, and the agency shall have the burden of proving that grounds exist which warrant the action proposed to be taken against the licensee.” Rule 28-107.004(2) sets forth the matters which must be contained in the agency’s administrative complaint or show cause order.

5. While the show cause order contains all of the matters required by Rule 28-107.004(2), Florida Administrative Code, the disputed language goes beyond those matters.

Moreover, Rule 28-107.004(3) sets forth the matters that must be included in requests for hearing filed in response to an agency's administrative complaint or show cause order involving license revocation (or, in this case, partial revocation). Rule 28-107.004(3)(b) requires requests for hearing to include "[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." The rule does not require such requests for hearing to include a statement of all disputed issues of material fact, or a concise statement of the ultimate facts alleged.

6. Staff does not concede that the inclusion of the disputed language is an attempt to shift the burden of proof in this case from the Commission to the utility. The language was merely included as a matter of course and to elicit Aloha's position on the disputed issues of fact and law. Nevertheless, for the foregoing reasons, Staff agrees that it should be removed from pages 5 and 6 of the show cause order and thus supports Aloha's motion to strike.

7. Staff notes that the inclusion of the disputed language does not constitute reversible error since unlike in Scott v. Department of State, Div. of Licensing, 828 So. 2d 1091 (Fla. 2nd DCA 2002), the Commission has not denied Aloha's request for hearing as not having been in compliance therewith. Aloha will have the opportunity to state its position on the disputed issues of fact and law during the course of discovery and its defense in this proceeding.

Motion to Amend

8. Aloha further moves that the show cause order be amended to provide a statement of whether mediation is available in this proceeding in accordance with Section 120.573, Florida Statutes, and Rule 28-106.111(1), Florida Administrative Code.

9 Staff disagrees that the Commission is required to provide a statement as to the availability of mediation in a Commission-initiated license revocation proceeding. Section 120.573 applies generally to agency actions that affect substantial interests. License revocation proceedings, however, are governed by the more specific requirements of Section 120.60, Florida Statutes, and Chapter 28-107, Florida Administrative Code. Rule 28-107.004, which specifies the matters that must be contained in an agency's administrative complaint or show cause order in a license revocation proceeding, makes no mention of the need for a statement regarding the availability of mediation. Staff believes that the more specific provisions of the license revocation rules control in this type of proceeding.

10. If the Commission agrees with Aloha that a statement regarding the availability of mediation is required, Staff believes that the Commission should amend the show cause order to state that statutory mediation under Section 120.573, Florida Statutes, is not available in this case. Section 120.573 provides that "[i]f mediation results in settlement of the administrative dispute, the agency *shall* enter a final order incorporating the agreement of the parties." (Emphasis added.) Thus, the statute contemplates that any agreement resulting from statutory mediation would be binding on the Commission. Since the Commission is a collegial body, and since Staff does not have the authority to negotiate and sign an agreement that would bind the Commission, statutory mediation under Section 120.573 is fundamentally inconsistent with the conduct of a Commission-initiated proceeding involving disciplinary action.

11. Staff understands that Aloha, Public Counsel and various customers may still be involved in efforts to mediate a global resolution of issues surrounding Aloha's service. If those


parties believe it would be helpful, Staff is willing to participate in that on-going mediation. Staff believes that it would be an appropriate staff function to recommend that the Commission approve any reasonable settlement that results from the mediation. However, since this non-statutory mediation is not subject to the requirements of Section 120.573, the Commission would appropriately retain the ultimate discretion to determine the effect of any such settlement on this show cause proceeding.

12. For the foregoing reasons, Staff does not support Aloha's Motion to Amend. However, if the Commission concludes that a statement of whether mediation is available is required in licensing proceedings, Staff suggests that the Commission amend the show cause order to reflect that statutory mediation under Section 120.573 is not available in this case for the reasons stated in Paragraph 11, above.

WHEREFORE, in consideration of the foregoing, Staff respectfully requests that Aloha's Motion to Strike be granted and that Aloha's Motion to Amend be denied. With respect to the Motion to Amend, if the Commission concludes that a statement of whether mediation is available is required in this case, Staff suggests that the Commission amend the show cause order to reflect that mediation under Section 120.573 is not available in this case.

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rosanne Gervasi", written over a horizontal line.

ROSANNE GERVASI, Staff Counsel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and one true and correct copy of the Staff's Response to Aloha Utilities, Inc.'s Motion to Strike and to Amend has been served by facsimile and U.S. Mail to Marshall Deterding and John Wharton, Esquires, Rose, Sundstrom and Bentley, LLP, 2548 Blirstone Pines Drive, Tallahassee, FL 32301, and that a true and correct courtesy copy thereof has been furnished to the following by U. S. Mail this 21st day of March, 2005:

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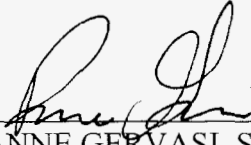
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