

BEFORE THE FLORIDA 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.

**ALOHA'S MOTION FOR RECONSIDERATION
OF ORDER ACKNOWLEDGING INTERVENTION**

Aloha Utilities, Inc., ("Aloha"), by and through its undersigned counsel, and pursuant to Rule 25-22.0376, Florida Administrative Code, hereby moves for reconsideration of the Public Service Commission's ("PSC") "Order Acknowledging Intervention," issued on March 18, 2005. That Order, over Aloha's objection, concluded that the Office of Public Counsel ("OPC") is entitled to intervene in this proceeding initiated by the PSC for the purpose of deleting areas from Aloha's Certificate Number 136-W. In support of this Motion, Aloha states

1. In concluding that the OPC has the right to intervene in this proceeding, the PSC's Prehearing Officer has overlooked and/or failed to consider crucial points of

fact (i.e., the nature of this proceeding and the extreme prejudice to Aloha if the OPC is permitted to intervene as a party in this penal action), as well as controlling matters of law (i.e., the Administrative Procedure Act with respect to agency disciplinary actions against licensees; the PSC's sole initial and ultimate burden of proof and the extent of that burden in this proceeding; the legislative authority granted exclusively to the PSC in matters affecting Aloha's Certificate of Authority; the established principle that the general public, whom the OPC purportedly represents, has no independent right to service, or non-service, by a particular utility; and general principles of law and administrative requirements regarding the rights and obligations of intervention).

2. The issue in this proceeding is whether, based upon the sole facts and law alleged in the PSC's Show Cause Order, a portion of Aloha's certificated service territory should be deleted (i.e., whether a portion of Aloha's license in the form of a Certificate of Authorization should be revoked). This proposed disciplinary action is penal in nature, and grounds for such action must be proven by the PSC by clear and convincing evidence. Nair v. Dept. of Business & Professional Regulation, Board of Medicine, 654 So.2d 205 (Fla. 1st DCA 1995); 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). As in any other proceeding which is in the

nature of a penal action, the only proper parties in this proceeding are the prosecuting authority and the person or entity being charged.

3. The fact that there can be only two parties in a penal action (whether civil, administration or criminal) is both well-established and logical. The obvious logical reason is that there is a single authority which has the jurisdiction to “prosecute.” That authority prosecutes, not for the benefit of any specific individual or entity, but, in the exercise of its lawfully delegated police powers, to protect the health, safety and welfare of the public at large. That prosecuting authority has both the initial and the ultimate burden of proof. It either satisfies its initial burden of proof through its own presentation of evidence or it does not. At the trial or hearing, the prosecuting authority cannot satisfy its initial burden of proof through reliance upon evidence presented by a third “party.” At the conclusion of the prosecuting authority’s direct case in chief, the party charged has the right to know that all the evidence against it has been presented. Pursuant to Section 120.60(5), Florida Statutes, and Rule 28-107.004(4), Florida Administrative Code, it is the **agency, and the agency alone, which has the burden of proving that grounds exist which warrant the action proposed to be taken.**

4. Most importantly, a defendant/respondent cannot be required to defend itself against any party other than the proper prosecuting authority. The OPC has

absolutely no authority to take disciplinary action against Aloha's Certificate of Authority. It has no authority to raise new facts or new issues. In short, the OPC can contribute nothing to this proceeding, and its participation deprives Aloha of due process of law. Aloha has the right to defend itself against only the charges and proof presented by one prosecuting authority. In this case, that authority is the PSC.

5. In the administrative realm, the exclusive role of the agency in disciplinary actions is made clear in the case of Associated Home Health Agency v. State, Department of Health and Rehabilitative Services, 453 So.2d 104 (Fla. 1st DCA 1984), holding that a third party has no standing in agency revocation proceedings. That case correctly noted that if a person is privy to information regarding wrongful acts on the part of a licensee, "the proper course is to convey such facts to the agency which has the power to institute proceedings to revoke the license." Indeed, over the 30 years of the existence of the Florida Division of Administrative Hearings, which conducts essentially all of the formal hearings wherein a state agency seeks to take disciplinary action against a licensee, one cannot find a single Recommended Order emanating from such a proceeding wherein a third party was allowed to "intervene." Likewise, one would be hard-pressed to find a single criminal proceeding, which also constitutes a penal action, in which the "victim," a public advocacy entity or any other third person was permitted to intervene as a party in that proceeding. Indeed, a

review of Orders from the PSC itself wherein revocation of a Certificate of Authorization or deletion of territory was addressed¹ indicates no “intervention” by the OPC.

6. The Florida Constitution and/or the Florida Legislature prescribes and designates the entity which is entitled to act as the prosecuting authority in penal actions. In this case, the only authority authorized to bring and effectuate disciplinary action with respect to Aloha’s PSC Certificate of Authority is the PSC itself. Chapter 367, Florida Statutes. It can not delegate this authority to the OPC or to any other entity, nor can it rely upon any other entity to effectuate and enforce the laws exclusively within its jurisdiction and authority to enforce. Likewise, the PSC may not rely upon the broad “duties and powers” of the OPC, as set forth in Section 350.0611, Florida Statutes, as authority for the OPC’s intervention in this particular

¹ See, for example, In Re: Revocation by Florida Public Service Commission of Certificates Nos. 451-W and 382-S Issued to SHADY OAKS MOBILE-MODULAR ESTATES, INC. in Pasco County, Pursuant to Section 367.111(1), F.S. (Order No. PSC-94-0976-FOF-WS, issued August 11, 1994, in Docket No. 930944-WS); In re: Revocation of Certificate No. 432-W for WEST MOBILE VILLAGE WATER SYSTEM in Volusia County, Florida (Order No. 15638, issued February 7, 1986, in Docket No. 860033-WU); In re: Initiation of show cause proceedings against, and investigation into possible overearnings by, SEBRING COUNTRY ESTATES WATER COMPANY in Highlands County (Order No. 20781, issued February 20, 1989, in Docket No. 871308); In re: Service investigation of LANIER UTILITY COMMISSION in PASCO COUNTY, (Order No. 20884, issued March 13, 1989, in Docket No. 881075). Also see Cherry Communications, Inc. v. Deason, 652 So.2d 803 (Fla. 1995).

proceeding.

7. Directly on point is the case of State v. General Development Corporation, 448 So.2d 1074 (Fla. 2d DCA 1984), approved, 469 So.2d 1381 (Fla. 1985). There, the State Attorney for the Twelfth Judicial Circuit attempted to independently initiate a complaint for damages and civil penalties under the authority of Section 403.141(1), Florida Statutes. That statute allows the State, through the Department of Environmental Protection (“DEP”), and in the exercise of its police powers to control, reduce and prevent pollution, to bring a civil cause of action to enforce the provisions of Chapter 403, Florida Statutes. While recognizing the broad powers conferred upon a State Attorney by the Florida Constitution and the Florida Statutes to “appear” in the courts to prosecute or defend on behalf of the state all suits, civil or criminal, the appellate Courts nevertheless held that such broad general law and authority did not negate the DEP’s sole authority to act on behalf of the State in pollution matters. The Court held that the Legislature had chosen the DEP, the state’s chief pollution control agency, as opposed to a localized State Attorney, as the sole authority to enforce the provisions of Chapter 403. Accordingly, the General Development Court held that a State Attorney has no standing to bring an action pursuant to Section 403.141 against an alleged violator of Chapter 403 and no standing to enforce the DEP rules pursuant to Section 120.69, Florida Statutes.

Similarly, the Legislature has conferred upon the PSC exclusive authority over Aloha's Certificate of Authority. No other person or entity, such as the OPC, has standing as a party in a penal action affecting that Certificate. The broad powers given the OPC to "represent the general public of Florida before the Florida Public Service Commission (Section 350.061(1), Florida Statutes) and to appear in PSC proceedings (Section 350.0611(1), Florida Statutes) are simply not applicable to disciplinary, penal actions instituted by the PSC against a utility. While the OPC, a legislative body, may intervene in a rate-making proceeding, which is legislative in nature, it simply is not proper for the OPC to intervene in a disciplinary proceeding which is penal in nature. Just as the Courts have recognized that the burden of proof varies in accordance with the nature of the proceedings, the Courts have also recognized that standing requirements in administrative proceedings vary based upon the nature of the proceedings. See Florida Society of Ophthalmology v. State, Board of Optometry, 532 So.2d 1279 (Fla. 1st DCA 1988).

8. The Office of Public Counsel did not and could not allege any protectable interest in the instant proceeding, in which it seeks to intervene as a party. As noted, above, the OPC was created to "represent the general public of Florida before the Florida Public Service Commission." Section 350.061(1), Florida Statutes. The "general public," and, specifically, the customers of a utility, have no "organic,

economic or political right to service by a particular utility.” 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); Lee County Electric Coop. v. Marks, 501 So.2d 585 (Fla. 1987). Accordingly, it follows that the OPC, created to “represent the general public,” likewise 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.

9. It is likewise well established that a public spirited citizen, taxpayer or other entity has no right to enter into a controversy because of his belief that one side or the other should prevail. Charlotte County Development Commission v. Lord, 180 So.2d 198 (Fla. 2d DCA 1965).² This principle of law is particularly applicable where a responsible governmental entity has been created to fully protect the citizen’s interests and is an existing party to the action. Florida Wildlife Federation v. Board of Trustees of the Internal Improvement Fund, 707 So.2d 841 (Fla. 5th DCA 1998), rev. denied, 718 So.2d 167 (Fla. 1998); Department of Children and Family Services v. Brunner, 707 So.2d 1197 (Fla. 1st DCA 1998). Presumably, the PSC can adequately protect the OPC’s interest if, in fact, the OPC has a legally cognizable interest. Indeed, there has been no allegation by the OPC that the PSC will not

² This concept is even more applicable where a utility customer has no right to service by a particular utility, as discussed above.

adequately protect either its interests or those of the general public.

10. The instant proceeding is not a popularity contest. The PSC has instituted a penal action and proposes to impose the most serious, severe sanction and penalty (revocation of a portion of Aloha's Certificate) which can be imposed upon a utility. To accomplish that proposed objective, the PSC must itself prove, by clear and convincing evidence, that the facts which it has alleged constitute a violation of law over which the PSC has jurisdiction, and that such a violation justifies the extreme sanction of revocation. The OPC simply has no role whatsoever in this proceeding.

11. In fulfilling its burden of proof in this case, the PSC may not rely upon conduct on the part of Aloha not specifically alleged in the charging instrument. Hamilton v. Department of Business and Professional Regulation, 764 So.2d 778 (Fla. 1st DCA 2000); Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996). Thus, the OPC would not be permitted to offer evidence outside the specific facts and law alleged in the Show Cause Order.³ If the OPC has information relevant to the limited issues and facts framed in the Show Cause Order, it may simply convey such information to the real and proper parties in this case. The clear

³ It is apparent from the OPC's "Response in Opposition to Aloha's Motion for Abatement" dated March 22, 2005, that the OPC is, indeed, attempting to interject new and different issues and facts beyond those contained within the Show Cause Order.

and convincing evidence required to be produced by the PSC **alone** must be credible, precise and explicit and of such weight that it produces the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983); Evans Packing Company v. Dept. of Agriculture and Consumer Services, 550 So.2d 112 (Fla. 1st DCA 1989). Most importantly, the PSC may **not** meet its initial burden of proof through the testimony or documentary evidence produced by anyone other than itself. And, as noted above, Aloha cannot be required to defend itself against two prosecutors. Accordingly, any “evidence” adduced by the OPC, if allowed to intervene in this proceeding, would be immaterial, irrelevant or cumulative in this penal action by the PSC against Aloha. It would be extremely prejudicial to Aloha if it were required to defend against evidence presented by the OPC, when the only evidence material in this case is that presented by the PSC.

12. Even where intervention is allowed in non-penal administrative proceedings, a Petition to Intervene must contain the requirements of Section 120.54(5), Florida Statutes, and Rule 28-106.201, Florida Administrative Code. See Rule 28-106.205, Florida Administrative Code. The OPC’s enabling legislation does not exempt it from the requirements of Florida’s Administrative Procedure Act. The OPC’s one sentence “Notice of Intervention” does not meet those statutory and

regulatory requirements. Likewise, the OPC's enabling legislation gives it no advantages over other parties in a particular proceeding, as clearly recognized by the Florida Supreme Court in Citizens v. Mayo, 357 So.2d 731 (Fla. 1978).

WHEREFORE, Aloha Utilities, Inc. requests reconsideration of the PSC's "Order Acknowledging Intervention," and requests that the Office of Public Counsel be denied intervenor status in the instant proceeding.

Respectfully submitted this 28th day of March, 2005.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and U.S. Mail this 28th day of March, 2005, to:

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