

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FLORIDA PUBLIC SERVICE
COMMISSION,

Petitioner,

PSC Docket No. 060606-WS
ORDER No. PSC-08-0266-SC-V

vs.

ALOHA UTILITIES, INC.,

Respondent.

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**RESPONDENT'S MOTION TO STRIKE
AND MOTION FOR EXTENSION OF TIME**

The Respondent, ALOHA UTILITIES, INC., by and through its undersigned counsel, and pursuant to Sections 120.569 and 120.57, Florida Statutes, and Rules 28-106.2015(5), 28-106.111(3) and 28-106.204, Florida Administrative Code, hereby moves the Petitioner, Florida Public Service Commission, to strike certain language from its "Order Initiating Show Cause Proceeding," issued April 30, 2008, and to grant Respondent additional time to file its request for an administrative hearing. In support of these Motions , Respondent states:

Motion to Strike

1. Under the purported authority of Section 367.161(1), Florida Statutes, Petitioner's "Order Initiating Show Cause Proceeding" seeks to

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impose an administrative fine against Respondent for alleged knowing and willful violation of Respondent's obligations under Order No. PSC-06-0270-AS-WU.

2. Page 6 of the Petitioner's "Order Initiating Show Cause Proceeding" requires Respondent "to show cause, in writing, within 21 days, why it should not be fined a total of \$15,000 . . ." That same page orders that "the utility's response to this show cause order shall contain specific allegations of fact and law." Page 5 of the Order again states that Respondent ALOHA must show cause, in writing, within 21 days, why it should not be fined and that "[t]he utility's response to the show cause order shall contain specific allegations of fact and law."

3. While denominated an "Order Initiating Show Cause Proceeding," that "Order" seeking to impose an administrative fine is "deemed an administrative complaint," is considered the "petition," and the Public Service Commission ("PSC") is the Petitioner. Rule 28-106.2015(1)-(3), Florida Administrative Code. Florida law is clear that before the PSC may impose any administrative fine against Aloha, the PSC has the burden to prove by clear and convincing evidence the violations alleged in its administrative complaint. See Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996); Pic N' Save

Central Florida, Inc. v. Department of Business Regulation, 601 So.2d 245 (Fla. 1st DCA 1992).

4. In accordance with Florida's Administrative Procedure Act, persons whose substantial interests are affected by agency action are entitled to request an administrative hearing, and agencies are required to "indicate the procedure which must be followed to obtain the hearing." Section 120.569(1), Florida Statutes.

5. The "Order Initiating Show Cause Proceeding" advising Aloha that its response must "contain specific allegations of fact and law" is directly contrary to Florida law regarding the PSC's burden of proof in this proceeding and directly contrary to Rule 28-106.2015(5), Florida Administrative Code, which governs this proceeding. At this stage of the proceeding, Aloha's only obligation, should it desire to request a hearing, is to file a "request for hearing" containing its name, address, telephone number and facsimile number (if any); its attorneys' name, address, telephone number, facsimile number (if any); a statement requesting an administrative hearing "identifying those materials facts that are in dispute" or indicating that there are none; a statement of when Aloha received notice of the administrative complaint, and a statement including the file number to the administrative complaint. Rule 28-106.2015(5)(a)-(e), Florida

Administrative Code. There is no requirement that Aloha's "response to the show cause order" contain "specific allegations of fact and law," as required in the PSC's Petition.¹ Such a requirement is violative of well-established law that the PSC's burden in this proceeding 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 PSC's intent to impose a \$15,000 administrative fine. Osborne, Stern, 670 So.2d at 934-35. Aloha has no obligation or duty to set forth, in its request for a hearing, specific allegations of fact or law or to otherwise show why it should not be fined, as required in the PSC's "Order Initiating Show Cause Proceeding." It need only identify those material facts that are in dispute or indicate that there are no facts in dispute. Rule 28-106.2015(c), Florida Administrative Code.

¹ It should be noted that agency disciplinary actions governed by Rule 28-106.2015, Florida Administrative Code, are specifically exempt from the requirements of Rule 28-106.201(2), requiring petitions to contain, *inter alia*, a statement of the ultimate facts alleged and the specific rules or statutes which a petitioner contends warrant reversal or modification of the agency's proposed action. In addition, it is established law in Florida that a specific rule covering a particular subject area (such as Rule 28-106.2015 governing agency administrative complaints) controls over a rule covering the same and other subjects in more general terms (such as Rule 28-106.201 governing the initiation of proceedings for an evidentiary hearing), and the former is construed as an exception to the latter. People Against Tax Revenue Mismanagement v. County of Leon, 583 So.2d 1373 (Fla. 1991); G.E.L. Corporation v. Department of environmental Protection, 875 so.2d 1257 (Fla. 5th DCA 2004); Barnett Banks, Inc. v. Department of Revenue, 1999).

6. The PSC is, or at least should be, well aware that it may not require Respondent ALOHA to include specific allegations of fact or law in its response, nor may the PSC attempt, through its initial pleading, to shift the burden of proof to ALOHA to prove its innocence. In a prior proceeding, the PSC's show cause order contained an identical requirement that ALOHA respond by alleging "specific allegations of fact and law" as to why disciplinary action should not be taken against it. ALOHA filed a Motion to Strike such requirement, the Commission staff agreed, and the PSC granted the Motion to Strike. In re: Initiation of Deletion Proceeding, etc., Docket No. 050018-WU, Order No. PSC-05-0549-PCO-WU (May 20, 2005). While that Motion to Strike was based upon former Rule 28-107.004(3), Florida Administrative Code, the only difference in the current Rule 28-106.2015(5)(c) governing requests for hearings in agency enforcement actions is the requirement that the material facts in dispute be identified.

7. Accordingly, Respondent ALOHA moves to strike from the PSC's "Order Initiating Show Cause Proceeding" all statements and requirements, as contained on pages 5 and 6 of that Order, that ALOHA show cause, in writing, within 21 days, why it should not be fined and that ALOHA's response contain specific allegations of law and fact.

Motion for Extension of Time

8. The PSC's "Order Initiating Show Cause Proceeding" requires ALOHA to file its written response within 21 days (or on or before May 21, 2008). ALOHA fully intends to respond to that Order and/or to request a hearing. However, as discussed above, ALOHA believes that the Order contains illegal requirements with regard to ALOHA's response and/or request for hearing. Until such time as a ruling is issued on the instant Motion to Strike, ALOHA is uncertain of its obligations and requirements regarding such response and/or request for hearing. Accordingly, and pursuant to Rule 28-106.111(3), Florida Administrative Code, ALOHA requests an extension of time to file a response and/or request for hearing until ten (10) days after issuance of the PSC's ruling on this Motion to Strike.

9. In accordance with Rule 28-106.111(3), Florida Administrative Code, the undersigned counsel for ALOHA certifies that he has consulted with counsel for the Public Service Commission and Counsel for the Office of Public Counsel regarding these Motions. Both such counsel represented that their positions on these motions will be stated in their Responses thereto.

Respectfully submitted this 13th day of May, 2008.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to the following parties on this 13th day of May, 2008:

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