

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.)

DOCKET NO. 930944-WS

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MOTION TO DETERMINE THE PRESENTATION OF EVIDENCE

Shady Oaks Mobile-Modular Estates, Inc., by and through its undersigned attorneys, files this Motion To Determine The Presentation Of Evidence, and as grounds therefore states:

1. On September 23, 1993, the PSC noticed its intent to initiate proceedings to revoke Certificate Nos. 451-W and 382-S which were issued to Shady Oaks Mobile-Modular Estates, Inc. ("Shady Oaks" or "Utility"). No specific facts or violations of statutes, orders or rules were asserted as a basis for the initiation of the revocation proceeding, rather, only a general assertion that Shady Oaks has a long "history of failure to comply with Commission statutes, orders and rules."

2. The Order Establishing Procedure issued by the Public Service Commission on December 13, 1993, requires the Utility to initiate the discovery process by filing direct testimony and exhibits. It is unreasonable and inconsistent with established legal principles to require the Utility to bear the burden of disproving baseless and naked allegations of violations of unnamed and unspecified regulatory requirements. In the instant case, the PSC has alleged that it has initiated an action to revoke the Utility's certificates based upon "Shady Oaks' long history of

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failure to comply with the Commission's statutes, orders, and rules." The PSC staff has not alleged the existence of any fact which would form the basis for a violation of any specific regulatory requirement. Absent any specific allegations, the Utility is not in a position to adequately respond or to present direct testimony in its defense.

The fundamental principles of due process require that a party be informed with reasonable certainty of the nature of the charges against him. *Florida Board of Pharmacy v. Levin*, 190 So.2d 768 (Fla. 1966). In the instant case, basic fairness and due process requires that the Utility be advised of the specific facts or actions which have led to the violation of any specific regulatory requirement regulating the activities of the Utility.

This issue was addressed in the *Complaint of Hugh Keith against Beverly Beach Enterprises, Inc.*, PSC Order No. 22605 [90 FPSC 2.440 (2/26/90)]. The Commission stated:


It is a well established administrative law principle that the burden of proof is on the party asserting the affirmative of an issue. *Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778 (Fla. 1st DCA 1981); *Balino v. Department of Health and Rehabilitative Services*, 348 So.2d 349 (Fla. 1st DCA 1977).

In the *Complaint of Hugh Keith against Beverly Beach Enterprises*, the Commission stated that a party asserting in the affirmative that the Utility collected an improper amount of CIAC carries the burden of proof on this issue.

In the instant case, it is the staff who is asserting a violation of regulatory requirements as a basis for the revocation of the Utility's certificates and, as such, the staff should carry the burden of proof on this issue. This principle cannot be ignored merely because it is the staff asserting the affirmative of an issue. In the case of *Pic and Save Central Florida, Inc. v. Division of Alcoholic Beverages and Tobacco*, 601 So.2d 245 (Fla. 1st DCA 1992), the court noted that the burden is upon the agency to establish the elements of the allegation in the Notice to Show Cause. In that case, the Commission issued a Notice to Show Cause and the court ruled that the Division bore the burden to establish the elements of the allegation by clear and convincing evidence since it involved the possible revocation of a license. Clearly, a certificate revocation case such as is involved in the case at bar, would require the PSC staff to bear at least the same burden of proof as is required in a show cause proceeding involving the revocation of a license.


Based upon the above-cited authority, the PSC staff as the asserting party has the burden of proof to establish by clear and convincing evidence a violation of any regulatory requirement which might affect the Utility's certificates. As such, the PSC staff should be required to initiate the process by filing its direct testimony and exhibits which should set forth with specificity such facts necessary to establish the basis for the assertion of a violation of Commission statutes, orders, and rules.

DATED this 13th day of January, 1994.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by hand-delivery to Catherine Bedell, Esq., Florida Public Service Commission, 101 E. Gaines Street, Tallahassee, FL 32399-0850 on this 13th day of January, 1994.


Robert A. Antista, Esq.

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