BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for amendment of Certificates Nos. 340-W and 297-S in Pasco County by Mad Hatter Utility, Inc.	DOCKET NO. 960576-WS ORDER NO. PSC-97-1630-FOF-WS ISSUED: December 31, 1997

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING

ORDER DENYING MOTION AND CROSS-MOTION FOR RECONSIDERATION OF ORDER NO. PSC-97-1173-FOF-WS

BACKGROUND

Mad Hatter Utility, Inc. (MHU or utility), is a Class A utility located in south central Pasco County, Florida, which is in the Northern Tampa Bay Water-Use Caution Area, as designated by the Southwest Florida Water Management District. MHU owns and operates water and wastewater facilities in three separate communities: Linda Lakes, Foxwood, and Turtle Lakes. According to its 1996 annual report, MHU serves approximately 2,013 water and 1,040 wastewater customers with combined annual operating revenues of $1,361,504 and a combined net loss of $77,418.

On May 8, 1996, the utility filed the amendment application at issue in this docket. In its amendment application, the utility sought to include in its Certificates Nos. 340-W and 297-S, the uncertificated territory that it was currently serving as well as certain adjacent territory which it was not currently serving. On June 13, 1996, Pasco County (County) filed an objection to the application and a petition for administrative hearing on the matter, stating, among other things, that the County would soon provide service to certain of the parcels included in MHU's amendment application. A prehearing conference was held on May 5, 1997 in Tallahassee, and a formal hearing was held on May 13-14, 1997, in Pasco County.

On October 1, 1997, Final Order No. PSC-97-1173-FOF-WS was issued in this docket, amending MHU's certificates to include

additional territory. On October 13, 1997, the County timely filed a Motion for Reconsideration of the Final Order. On October 22, 1997, MHU timely filed a Cross-Motion for Reconsideration and its Response to Pasco County's Motion for Reconsideration. On November 3, 1997, the County timely filed its Response to Mad Hatter's Cross-Motion for Reconsideration.

Rule 25-22.060(1)(a), Florida Administrative Code, permits a party who is adversely affected by an order of this Commission to file a motion for reconsideration of that order. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Company of Miami v. King, 146 So. 2d 889 (Fla. 1962). In Diamond Cab, the Florida Supreme Court declared that the purpose of a petition for reconsideration is to bring to an agency's attention a point of fact or law which was overlooked or which the agency failed to consider when it rendered its order. In Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974), the Court held that a petition for reconsideration should be based upon specific factual matters set forth in the record and susceptible to review. See also Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). We have applied this standard in our review of the County's motion, as well as the utility's cross-motion.

MOTION FOR RECONSIDERATION

In its motion for reconsideration, the County states that we erred in making a determination that MHU has an additional 40,000 gallons per day (gpd) of capacity available to it through the parties' 1992 bulk wastewater treatment agreement (bulk agreement). The County argues that, pursuant to the bulk agreement, the committed unused capacity which it has provided to MHU is for customers in MHU's existing certificated territory. Thus, according to the County, MHU has already reserved the additional capacity for future customers in its existing certificated territory, and we cannot use that unused, committed capacity to justify extension of MHU's territory. The County therefore requests that we delete the provisions of the Final Order which conclude that MHU is able to provide an additional 40,000 gpd of wastewater service to future customers in the extended territory and thus deny MHU's application to serve Parcels B-1A, B-20, B-24, B-25, B-26, B-27, C-9, and C-10.

In its response, MHU states that we should deny the motion because it is plainly a request by the County for us to reweigh the evidence of record in a light more favorable to the County.

Moreover, MHU argues that the County asks us to interpret the commitment of any additional capacity by the County to third parties as falling under the bulk agreement, and to place restrictions on the use of that capacity which are not envisioned by the plain wording of the bulk agreement.

We first note that with respect to the County's request that we deny MHU's request to serve parcels B-1A, B-20, B-24, B-25, B-26, B-27, C-9, and C-10, by the Final Order at 49, we denied MHU's application to serve Parcels B-25, B-26, B-27, C-9, and C-10. Therefore, it is unnecessary for us to reconsider our decision with respect to those parcels.

With respect to the availability of an additional 40,000 gpd of wastewater treatment by the County for MHU, the record reflects that County witness Bramlett testified that MHU was currently sending about 340,000 gpd to the County. The bulk agreement requires the County to treat up to 350,000 gpd. When asked if the County had agreed to provide service to any additional wastewater from MHU, witness Bramlett answered that "[t]he County is committed to treat an additional 30,000 gpd of wastewater to be delivered by Mad Hatter when the customers to whom Mad Hatter has agreed to provide service are connected."

We find that the record does not provide any specific connection between the additional 30,000 gpd of treatment capacity from the County and the terms of the bulk agreement. Rather, the record reflects that current wastewater flows by MHU to the County are about 10,000 gpd less than the terms of the bulk agreement, and that the County has agreed to treat an additional 30,000 gpd of wastewater beyond the terms of the bulk agreement. Therefore, our finding that MHU has an estimated 40,000 gpd of available wastewater treatment capacity is accurate. We agree with MHU that the County essentially requests that we reweigh the evidence in order to reach a different conclusion concerning the amount of additional capacity that MHU has under the bulk agreement, which is an inappropriate basis for reconsideration. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d at 317.

We note that we found that there was a wastewater capacity need of 750 gpd for Parcel B1-A. Parcel B-20 was estimated to require 435 gpd, and Parcel B-24 was estimated to require a future demand of 435 gpd. These parcels combine for a wastewater demand of 1,620 gpd, which is well within both the 350,000 gpd parameter

under the bulk agreement and the additional 30,000 gpd parameter as testified to by witness Bramlett.

We find that we did not overlook or fail to consider any point of fact or law in finding that MHU has an additional 40,000 gpd of treatment capacity under the bulk agreement and that it therefore has the capacity to serve Parcels B1-A, B-20, and B-24. For the foregoing reasons, and pursuant to Diamond Cab, we hereby deny the County's motion for reconsideration.

CROSS-MOTION FOR RECONSIDERATION

On October 22, 1997, MHU timely filed a cross-motion for reconsideration of the Final Order, as permitted by Rule 25-22.060(1)(b), Florida Administrative Code. The cross-motion is separated into three areas of argument. First, the utility states that we effectively interpreted the bulk agreement in favor of the County's position and failed to properly consider the evidence as to MHU's interpretation of Section II-D of the bulk agreement. Second, MHU states that we did not properly consider the utility's alternatives with respect to it providing wastewater service in the proposed amended territory. Third, the utility argues that we erred in denying service provision to Parcels B-25, B-26, and B-27 by not considering MHU's ability to obtain additional wastewater capacity through the alternative options as reflected in the record, and that we erred by adopting a "one service provider" rationale, which is not specified by either statute or rule.

In its response to the cross-motion, the County states that we correctly interpreted the language of the bulk agreement, and that the utility did not meet its burden of proof with respect to the rules concerning financial and technical ability, land ownership and the proposed method of effluent disposal. With respect to the utility's third argument, the County responds that MHU did not provide any concrete plans or evidence concerning its ability to expand its existing wastewater facilities, and that a public interest determination would support the decision to have one consistent service provider, since splitting the service between two providers would result in more expense to the utility, which would translate into higher rates for the customer.

The utility's first argument, that our decision has the effect of interpreting the bulk agreement in favor of the County's position, is unfounded. The record indicates that the bulk agreement exists, and that the parties dispute the meaning of the

various provisions thereof, which dispute is being litigated in a separate proceeding outside the jurisdiction of this Commission. These facts were considered in the public interest portion of the Final Order, at 44-49. We acknowledged the dispute between the parties concerning the interpretation of the bulk agreement and the pending external litigation. However, we appropriately based our decisions concerning the various parcels upon the record made in the instant case.

The utility's second argument is that we did not correctly evaluate the facts concerning the other alternatives available to MHU for wastewater treatment capacity, which effectively limited MHU to the terms of the bulk agreement. We note that we focused our analysis of those alternatives on the financial ability of the utility to serve and the effect that this amendment would have on rates. We acknowledged that other wastewater treatment options had been promoted by the utility, but that no specific plans were presented in order to make an affirmative finding, either on the utility's financial ability to extend its facilities, or on the impact on rates. We recognized the existence of these plans. However, as the County points out in its response, we found that the plans were speculative. That we reviewed the record and came to a decision different from what the utility desired is not an appropriate basis for reconsideration.

The utility's third argument is that we inappropriately denied MHU the extension of water service to Parcels B-25, B-26, and B-27 based on the limitation of providing wastewater service to these parcels. The utility argues that the record indicates the availability of water service to these parcels, and that there is no specific statutory or rule provision that identifies a "one service provider" concept as a criterion.

We concur that the record reflects an availability of water service to Parcel B-27 by MHU. However, we disagree with the utility's statement concerning Parcels B-25 and B-26, since the record reflects that there are proposed line extensions to both these parcels by MHU. With respect to the "one service provider" concept, we found that it is preferable for customers to have one consistent service provider. Final Order at 44. Although this is not a criterion specified by statute or rule, the finding was made within our consideration of the public interest, which is a required consideration under Section 367.045(5)(a), Florida Statutes, in ruling upon amendment applications. The utility argues that the record is devoid of any reference to one service

provider being preferable. This is not the case. For example, customer witness Tim Hayes testified that it is extremely frustrating to be in the middle of a conflict between the County and MHU and to have to pay higher rates to a private utility to act as a middleman when the sewage is being treated by the County.

For informational purposes, we note that any time a service area is split between service providers, it requires coordination and communication between the utilities to assure that customers are not handicapped in their service provision. The record demonstrates an ongoing dispute between MHU and the County, to the extent that we find that it would not be in the best interests of the customers to split the service providers in the same territory in this case.

We further note that our decision with respect to a service provider for Parcels B-25, B-26, and B-27 was not solely reliant on the "one service provider" concept, as suggested by the utility. Rather, we incorporated the projected need for service, estimated demand, and possible sources of service into our evaluation and final decision.

The burden of the party requesting reconsideration of a decision is to show that we either erred or failed to consider a point of fact or law when we rendered our decision. We believe that we clearly understood the facts, correctly applied the law, and came to a reasoned decision in this case. Therefore, we hereby deny the utility's cross-motion for reconsideration.

Because no further action is necessary, this docket shall be closed upon expiration of the appeal time, or if the case is appealed, upon disposition thereof by the appellate court.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Pasco County's Motion for Reconsideration of Order No. PSC-97-1173-FOF-WS is denied. It is further

ORDERED that Mad Hatter Utility, Inc.'s, Cross-Motion for Reconsideration of Order No. PSC-97-1173-FOF-WS is denied.

By ORDER of the Florida Public Service Commission this 31st day of December, 1997.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.