

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Initiation of show cause) DOCKET NO. 961471-WS
against Mad Hatter Utility, Inc.) ORDER NO. PSC-97-0140-FOF-WS
for violation of Order PSC-93-) ISSUED: February 11, 1997
0295-FOF-WS)
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The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER TO SHOW CAUSE
AND
INITIATING LIMITED PROCEEDING FOR POSSIBLE
WASTEWATER RATE REDUCTION

BY THE COMMISSION:

BACKGROUND

Mad Hatter Utility, Inc., (MHU or utility) is a Class B utility located in Lutz, Florida. The utility is located 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 systems in three separate communities: Linda Lakes, Foxwood, and Turtle Lakes. According to MHU's 1995 annual report, MHU serves 1,890 water customers and 1,804 wastewater customers.

MHU's last rate case was finalized by Order No. PSC-93-0295-FOF-WS, issued February 24, 1993, in Docket No. 910637-WS. In that Order, we recognized the loss associated with MHU's abandonment of the Foxwood and Turtle Lakes wastewater plants, including land, and allowed recovery of the loss in rates over a period of eight years. We further required the utility to report to the Commission any future sale of this abandoned land and any proposed rate reduction resulting therefrom.

DOCUMENT NUMBER-DATE

01501 FEB 11 97

FPSC-RECORDS/REPORTING

We have received information that this land was sold and as of this date, the utility has failed to notify us. This Order addresses MHU's apparent violation of Order No. PSC-93-0295-FOF-WS.

SHOW CAUSE

By Order No. PSC-93-0295-FOF-WS, MHU was ordered to report to the Commission any future sale of abandoned utility land and any proposed rate reduction resulting therefrom. On November 18, 1996, we received information from an attorney representing Pasco County which indicates that the abandoned land referenced in Order No. PSC-93-0295-FOF-WS has been sold and a net gain on the sale was realized. To date, MHU has failed to report this sale to the Commission or any proposed rate reduction resulting therefrom. Section 367.161, Florida Statutes, authorizes the Commission to assess a penalty of not more than \$5,000 for each offense, if a utility is found to have knowingly refused to comply with, or to have knowingly violated any provision of Chapter 367, Florida Statutes, or any lawful rule or order of the Commission.

We believe MHU's apparent violation of Order No. PSC-93-0295-FOF-WS rises in these circumstances to the level of warranting initiation of show cause proceedings. By Order No. PSC-93-0295-FOF-WS, we recognized the loss associated with the abandonment of the Foxwood and Turtle Lakes plants, including the land, and allowed MHU to recover this loss through its wastewater rates over a period of eight years. That loss is still being recovered in current wastewater rates. The order also required MHU to report any future sale of this abandoned land and any proposed reduction in rates resulting therefrom. Order No. PSC-93-0295-FOF-WS at p. 4.

According to the documentation provided to us, sometime in 1994, Mr. Larry DeLucenay, president of the utility and one of the majority shareholders, through a series of financial transactions obtained a mortgage on the utility and then proceeded to foreclose on that mortgage in order to obtain clear title to the property. Mr. DeLucenay then sold the property to a developer at a sales price of \$195,000. A net gain of approximately \$132,734 was realized on the sale. The documentation further indicates that MHU's accountants evaluated this transaction in light of the order and advised the utility that the potential revenue decrease was not a material event that should be disclosed. However, even though MHU may have relied on its accountant's advise with regard to disclosure of the potential revenue decrease, MHU still had a duty to report the sale of the land to the Commission. To date, MHU has failed to report the sale or any proposed rate reduction resulting therefrom to the Commission in direct violation of Order No. PSC-

93-0295-FOF-WS. The pertinent language of Order No. PSC-93-0295-FOF-WS is unmistakable, and MHU's failure to report the sale of abandoned land or any proposed rate reduction resulting therefrom in compliance with Order No. PSC-93-0295-FOF-WS appears willful. For these reasons, we find it appropriate to order the utility to show cause in writing within twenty days why it should not be fined \$5,000 for violation of Order No. PSC-93-0295-FOF-WS.

MHU's response shall contain specific allegations of fact and law. This opportunity to file a written response shall constitute MHU's opportunity to be heard prior to a final determination of noncompliance or assessment of penalty. A failure to file a timely written response shall constitute an admission of the facts herein alleged and a waiver of the right to a hearing. Should MHU file a timely written response that raises material questions of fact and request a hearing pursuant to Section 120.569, Florida Statutes, further proceedings may be scheduled before a final determination on this matter is made. If the utility fails to respond within 20 days of the issuance of this order, the fine of \$5,000 shall be imposed without further action of this Commission. If MHU fails to respond to reasonable collection efforts by this Commission, the fine shall be deemed uncollectible, and this matter shall be referred to the Comptroller's Office for further collection efforts based on this Commission's finding that, under the aforesaid circumstances, further collection efforts would not be cost effective. Reasonable collection efforts shall consist of two certified letters requesting payment. Any collection as a result of the action of the Office of the Comptroller shall be deposited in the State General Revenue Fund pursuant to Section 367.161, Florida Statutes. If, however, the utility responds to the show cause by remitting the \$5,000 fine, no further action is required.

INITIATION OF LIMITED PROCEEDING

As stated earlier, by Order No. PSC-93-0295-FOF-WS, we recognized the loss on abandonment of the Foxwood/Turtle Lakes plants, including land, and allowed MHU to recover this loss through wastewater rates over a period of eight years. The loss on the abandonment of the land was established to be \$83,201, with an annual amortization of \$10,377. Although MHU has never submitted to this Commission any information regarding the sale of the land, it is still recovering through wastewater rates the loss on the abandonment of the land.

Based on the information we have received, it appears that the following occurred before the land was sold and a gain was realized. In 1993, the Foxwood Wastewater Plant was closed and the ponds began to dry up. In 1994, a developer in MHU's service area

offered to purchase this percolation pond land for \$195,000 only if clear title could be given. However, the utility did not have clear title. In the process of refinancing MHU's troubled debt from Barnett Bank to CoBank, Mr. Larry DeLucenay, the majority shareholder and the president of MHU, signed a note payable to Barnett Bank for \$50,000. Barnett Bank then assigned its mortgage on this pond property to Mr. DeLucenay. Mr. DeLucenay demanded payment from MHU, his own company, and then, when he was not paid by MHU, he foreclosed on the property. Mr. DeLucenay then had clear title and was able to sell the property to the developer.

Although it appears that, when the sale occurred to the developer, MHU no longer held legal title and was not a party to that transaction, the land sale was consummated through a related party transaction between Mr. Larry DeLucenay and MHU, namely, Mr. DeLucenay's foreclosure of the property. Mr. DeLucenay is the president of MHU, and he and his wife together own 80.5% of MHU's voting stock. Because the foreclosure on the land was a related party transaction, any argument that a "sale" did not occur between MHU and Mr. DeLucenay is irrelevant.

We are concerned that this transaction may have been used as a means to circumvent Order No. PSC-93-0295-FOF-WS and avoid passing the realized gain back to the customers of MHU. While there is documentation which suggests that the land may have had no book value because the encumbrances would have exceeded the total proceeds from the sale, this documentation is only an internal memorandum written by MHU's accountant opining that the potential revenue decrease was not a material event which should be disclosed. The veracity of this document and its underlying facts have not been verified.

Based on the above, we find it appropriate to initiate a limited proceeding to determine whether or not the gain on the sale of the utility land should be attributable to the existing customers and whether rates should be reduced for the reasons stated herein. A new docket shall be opened for processing the limited proceeding. This docket shall remain open only to complete the show cause process.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mad Hatter Utilities, Inc. shall show cause in writing within twenty days of the issuance of this order why it should not be fined \$5,000 for violation of Order No. PSC-93-0295-FOF-WS. It is further

ORDERED that Mad Hatter Utilities, Inc.'s written response must contain specific allegations of fact and law. It is further

ORDERED that Mad Hatter Utilities, Inc.'s opportunity to file a written response shall constitute its opportunity to be heard prior to a final determination of noncompliance and assessment of penalty by this Commission. It is further

ORDERED that failure to file a timely written response shall constitute an admission of the facts alleged in the body of this order and a waiver of the right to a hearing. It is further

ORDERED that, in the event that Mad Hatter Utilities, Inc. files a written response that raises material questions of fact and requests a hearing pursuant to Section 120.569, Florida Statutes, further proceedings will be scheduled before a final determination on this matter is made. It is further

ORDERED that if the utility fails to respond within 20 days of the issuance of this order, the fine of \$5,000 shall be imposed without further action of this Commission. It is further

ORDERED that if Mad Hatter Utilities, Inc. fails to respond to reasonable collection efforts by this Commission, the fine shall be deemed uncollectible and shall be referred to the Comptroller's Office for further collection efforts.

ORDERED that if the utility responds to the show cause by remitting the \$5,000 fine, this docket shall be closed administratively. It is further

ORDERED that a limited proceeding shall be initiated to determine whether or not the gain on the sale of the utility land should be attributable to the existing customers and whether rates should be reduced for the reasons stated herein. It is further

ORDERED that a new docket shall be opened for the limited proceeding. It is further

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ORDERED that this docket remain open pending completion of the show cause process.

By ORDER of the Florida Public Service Commission, this 11th day of February, 1997.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

by: Kay J. [Signature]
Chief, Bureau of Records

(S E A L)

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CONCURRING OPINION

Commissioner Deason concurs in a separate opinion as follows:

I concur in the Commission's decision to initiate a limited proceeding to determine whether any gain on sale results from the transfer of the former effluent disposal site and, if so, whether and to what extent any benefit should flow to the customers. I think it is premature for the Commission to speculate on the circumstances that might give rise to our having authority to capture any benefits at some point in the future. In my view it would have been preferable to guarantee protection to the ratepayers at the time the proceeding is initiated by utilizing whatever authority that we found to grant increased rates to Ortega Utility Company by Order No. 25685, issued February 4, 1992, in Docket No. 911168-WS, and to Betmar Utilities, Inc. by Order No. 93-0525-FOF-WU, issued April 7, 1993, in Docket No. 910963-WU, as well as to Mad Hatter in making the interconnection that was necessitated by the abandonment of this very site. See Order No. 25711.

I can discern no reason why the same authority that exists to give utilities protection pending a hearing (or opportunity in the case of a PAA) for a rate increase cannot be used to give customers the same straight-forward protection pending a hearing to decide whether to reduce rates. When we have granted emergency temporary rates we do not make any qualitative assessment of the utility request. No judgement is made on whether the expenditure will ultimately be made in a prudent manner. The only thing required is a bare prima facie showing by the utility in conjunction with a limited proceeding petition. Our staff's findings serve the same preliminary showing purpose. Ultimately, in either case, a full opportunity for hearing is available whether rates are increased or revenues are just held subject to refund.

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NOTICE OF FURTHER PROCEEDINGS OR 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: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting 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.