

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: APPLICATION OF MAD HATTER UTILITY, INC. FOR AMENDMENT OF WATER AND WASTEWATER CERTIFICATES IN PASCO COUNTY, FLORIDA

Docket No. 960576-WS

MAD HATTER UTILITY, INC.'S CROSS-MOTION FOR RECONSIDERATION

MAD HATTER UTILITY, INC. (hereinafter "Mad Hatter" or the "Utility"), by and through its undersigned attorneys and pursuant to the provisions of Section 25-22.060, Florida Administrative Code, files this Cross-Motion for Reconsideration of the Commission's Order No. PSC-97-1173-FOF-WS, issued on October 1, 1997 in the above referenced docket, and in support thereof states as follows:

Additional Wastewater Capacity

1. The Commission's order notes that the interpretation of the terms contained within the February 1992 Bulk Wastewater Treatment Agreement Between Mad Hatter Utility, Inc. and Pasco County (hereinafter the "Bulk Wastewater Agreement" or the "Agreement") is currently in dispute and the subject of separate civil court proceedings. The Commission acknowledges the existence of this dispute and while implying an unwillingness to interpret the Agreement, refuses in its order to recognize any wastewater capacity available to Mad Hatter above and beyond that which Pasco County (hereinafter "the County") has publicly conceded it is committed to provide under this Agreement. The Commission thereafter limits the additional territory granted to Mad Hatter based in significant part upon the limitations on the capacity

ACK _____
AFA _____
APP _____
CAF _____
CMU _____
CTR _____
EAG _____
LEG 1 _____
LIN 3 _____
OPC _____
ROH _____
SEC 1 _____
WAS _____
OTH _____

DOCUMENT NUMBER-DATE
10860 OCT 22 97
FPCG-RECORDS/REPORTING

25810700

which the County concedes that they have agreed to provide under the terms of that Agreement.

2. The Commission's action in limiting the capacity recognized as available to Mad Hatter through the bulk service arrangement does effectively interpret the Agreement in favor of the County's position, while declining to give weight to the provisions of Section II-D on Page 5 of the Agreement, which specifically provides for the County's obligation to provide "additional capacity to the extent sufficient unused and uncommitted capacity is available at the County's wastewater treatment facilities". By refusing to interpret the provisions of the Agreement contrary to the County's position (as recently taken for purposes of this docket), the Commission is effectively accepting and condoning the County's position. The order then denies Mad Hatter the right to provide service to certain of the territories requested, primarily because of an alleged lack of available bulk wastewater capacity from Pasco County. By doing so, the Commission is also accepting the County's argument that they do not have the capacity available for service through Mad Hatter which would require additional capacity under Section II-D of the Agreement, while in the same breath, contending that they do have substantial additional capacity to provide such service directly.

3. In its effective refusal to recognize Mad Hatter's right to additional bulk wastewater capacity under Section II-D of the 1992 Bulk Wastewater Agreement, the Commission is effectively authorizing Pasco County to serve several key areas requested for certification by Mad Hatter and forever foreclosing Mad Hatter from

the right to do so. This is clearly demonstrated by the County's attempts immediately after hearing in this proceeding to file supplemental evidence whereby the County has entered into agreements for service to several areas requested for certification by Mad Hatter. The County has apparently proposed to serve those areas despite the existence of both facilities and agreements for the provision of those same services by Mad Hatter.

4. The Commission has failed to properly consider the evidence as to Mad Hatter's interpretation of the Bulk Wastewater Agreement and its requirement or to consult the legal implications of effectively accepting the County's interpretation of the Agreement.

Other Sources of Wastewater Capacity

1. As noted previously, the Commission's decision not to give any weight to the provisions of Section II-D of the February 1992 Bulk Wastewater Agreement between Mad Hatter and Pasco County effectively concedes to Pasco County's position with regard to this and the other provisions of the Agreement. Based on this lack of wastewater capacity, the Commission has denied Mad Hatter the right to service certain areas within its application without consideration of the other alternatives available to Mad Hatter for wastewater treatment capacity. The Commission order, by its absence of consideration of the other alternatives for wastewater treatment capacity available to Mad Hatter, has effectively limited Mad Hatter's available capacity to that which Pasco County has conceded that they are agreeing to provide under the 1992 Bulk Wastewater Agreement.

2. In many, if not most of the cases which come before the Commission concerning the ability to serve additional territory, private utilities regulated by the Commission (as well as those utilities not regulated by the Commission) generally do not have capacity in place to provide service to their territories at build-out at the time they decide to incorporate those areas into their service territory and prudently plan for service to them in the future. Mr. DeLucenay provided extensive evidence concerning the ability of Mad Hatter to obtain additional bulk service capacity from entities other than Pasco County, its ability to construct additional wastewater treatment facilities including assembly of an existing wastewater treatment plant owned by Mad Hatter; Mad Hatter's ability to enforce the provisions of Section II-D of the 1992 Bulk Wastewater Agreement between Pasco County and Mad Hatter; and Mad Hatter's ability to expand its Linda Lakes wastewater treatment plant. Failure to consider these alternatives when combined with the Commission's refusal to interpret the Agreement with Pasco County (other than as interpreted and enforced by the County), misapprehends the facts concerning the availability of alternatives for treatment capacity to Mad Hatter and limits the Utility solely to that capacity conceded by the County in determining Mad Hatter's ability to serve the areas requested in its application.

3. For these reasons, the Commission has misapprehended the facts of record and has failed to consider Mad Hatter's rights under the 1992 Bulk Wastewater Agreement or the other alternatives available to Mad Hatter for the provision of service to the

territories requested in its certificate extension application. The Commission has found in previous extension dockets filed by Mad Hatter that it had the ability to provide service to territories based upon its ability to secure additional capacity as and when needed. This represents the same position the Commission has taken with most, if not all, past extension cases where the capacity to serve the proposed territory was not currently in place. The new policy adopted in the current docket effectively adopts the County's position on interpretation of the Bulk Wastewater Agreement, ignores the Utility's other alternatives for wastewater capacity, and requires that capacity to serve at build-out be in place. Such a change in policy and misapprehension of the law and facts allow Pasco County to duplicate Mad Hatter's existing facilities, contrary to the public interest and to the detriment of Mad Hatter's investment in infrastructure made in reliance on previous Commission orders and policies.

Water Treatment Capacity

1. The Commission in evaluating water service to Parcels B-25, B-26, and B-27, has specifically declined to include those areas within the service territory of Mad Hatter based upon a conclusion as to lack of available bulk wastewater service capacity from Pasco County to service those areas. In other words, the Commission has decided as outlined on Pages 44 and 45 of Order No. PSC-97-1173-FOF-WS to deny a request for extension of water certificates based upon a perceived lack of wastewater capacity. This conclusion by the Commission is nowhere required or even

suggested by statute, rule, precedent, or any evidence of record provided in this proceeding.

2. Mr. DeLucenay provided testimony concerning the ability of Mad Hatter through use of the existing water treatment facilities and distribution facilities to provide service to the territories requested in its application including service to Parcels B-25, B-26 and B-27. He also testified concerning the advantages to all of Mad Hatter's customers of the looping of the existing systems to service those areas. The Commission Staff's DEP witness, Mr. Martinez, specifically testified in agreement with Mr. DeLucenay that the Utility could increase its capacity substantially simply by the addition of larger pumps and pressure tanks as may be needed.

3. The Commission has on numerous occasions recognized that a utility should not have capacity in place to serve its entire service territory at build-out until the demand for such service is imminent. The Commission has granted to utilities additional service territory based upon the utility's ability to expand its existing facilities.

4. Based upon the above two factors, the only evidence of record is that its existing water facilities and capacity will enable Mad Hatter to provide service to the areas proposed for service and to meet the anticipated needs of those territories with possible minor expansion of those existing facilities. The Commission in fact concludes that Mad Hatter has the technical ability to provide water service to all of the areas proposed for

service in its application and has previously ruled in prior extension dockets for these and adjacent areas.

5. The Commission's order specifically finds that it is appropriate to deny Mad Hatter's request for inclusion of certain parcels within its water certificate based upon limitations on wastewater capacity. The Commission grounds this decision on its conclusion that one service provider for both services is somehow required or desirable.

6. The Commission's conclusion as to the desirability of water and wastewater services by the same entity is rendered despite the clear evidence not only concerning the Utility's ability to obtain additional wastewater capacity (either through enforcement of the Agreement with Pasco County or other through other alternatives discussed in the testimony of Mr. DeLucenay and Mr. Rogers); but despite the clear evidence concerning the existing in place capacity and distribution facilities available for the provision of water service to all of the requested territories and specifically to Parcels B-25, B-26, and B-27.

7. The Commission's conclusion regarding the desirability of the provision of water and wastewater service by the same provider is nowhere founded in the law or the evidence presented in this case. There is no provision in Chapter 367 or any other statute cited or enforceable by the Commission as a basis for this conclusion. There is no provision of Commission rules authorizing, recommending or suggesting the desirability of having water and wastewater service provided by the same entity. There is no precedent in case law which requires or even suggests that as a

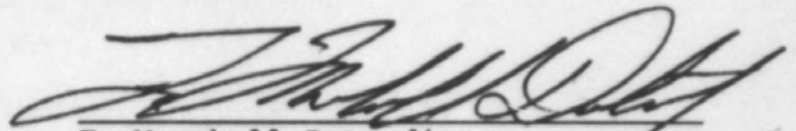
condition for granting additional territory to a utility company for either water or wastewater service. There is no evidence of record in this proceeding to support a conclusion that provision of wastewater and wastewater service by the same entity is either desirable, required, or results in more efficient provision of either service. The Commission has traditionally, in fact, treated matters related to water and wastewater services as separate considerations in virtually all facets of regulating water and wastewater utility regulation.

8. The Commission's decision to tie the consideration of the appropriate water service territory to its conclusions concerning the available capacity for wastewater, and the desirability of service being provided by one entity is based upon a misapprehension of the Commission's legal authority. It also is outside any past precedent as a basis for denying additional territory to a utility with the technical ability to provide that service. In addition, the Commission's decision in this regard is contrary to any facts or evidence of record in this case.

WHEREFORE, Mad Hatter Utility requests that the Florida Public Service Commission reconsider its decision as rendered in Order No. PSC-97-1173-FOF-WS, with regard to the wastewater capacity available to Mad Hatter Utility, Inc. for the provision of service to the territories requested; the Utility's ability to obtain wastewater capacity from other alternative sources; and the Utility's ability to provide water service to the territories requested despite the Commission's conclusions as to its ability on wastewater service. The conclusions on these issues as reached in

the Commission order are based upon misapprehension or overlooked law or fact and are contrary to the record evidence in this proceeding. If the Commission considers the facts and policies and law applicable to these issues, the Commission should grant to Mad Hatter an extension of its service territory to include not only those areas outlined in Order No. PSC-97-1173-FOF-WS, but also to the parcels identified at hearing as B-25, B-26, and B-27.

Respectfully submitted this 22nd
day of October, 1997, by:



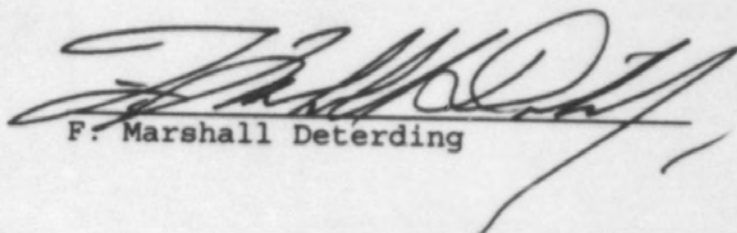
F. Marshall Deterding
ROSE, SUNDSTROM & BENTLEY
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(904) 877-6555

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by *Hand Delivery or U.S. Mail this 22nd day of October, 1997.

Marion Hale, Esq.
Johnson, Blakely, Pope, et al.
Post Office Box 1368
Clearwater, FL 34617

*Rosanne Gervasi, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399


F. Marshall Deterding

mad\cross.pet