

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for approval of ) DOCKET NO. 940761-WS  
special service availability ) ORDER NO. PSC-95-1206-PHO-WS  
contract with Lake Heron in ) ISSUED: September 28, 1995  
Pasco County by MAD HATTER )  
UTILITY, INC. )  
\_\_\_\_\_ )

Pursuant to Notice, a Prehearing Conference was held on September 27, 1995, in Tallahassee, Florida, before Commissioner Diane K. Kiesling, as Prehearing Officer.

APPEARANCES:

F. MARSHALL DETERDING, ESQUIRE, Rose, Sundstrom & Bentley, 2548 Blairstone Pines Drive, Tallahassee, Florida 32301  
On behalf of Mad Hatter Utility, Inc.

ROSANNE G. CAPELESS, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0863  
On behalf of Commission Staff.

PREHEARING ORDER

I. CASE 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 1993 annual report, MHU serves 1,709 water customers and 1,672 wastewater customers.

On July 19, 1994, MHU filed requests for approval of two special service availability contracts; one with "AFI, Inc. (VOPII)" (AFI), which was processed in Docket No. 940760-WS, and the other with Lake Heron, which was processed in the instant docket. By Order No. PSC-94-1603-FOF-WS, issued December 27, 1994, in both dockets, the Commission approved both service availability contracts.

DOCUMENT NUMBER-DATE

09627 SEP 28 95

FFSC-RECORDS/REPORTING

MHU also filed, both in Docket No. 940760-WS and in the instant docket, certain proposed revised tariff sheets containing revised territory descriptions, which filings were unrelated to the utility's requests for approval of the aforementioned special service availability contracts. Specifically, the utility filed proposed revised water and wastewater tariff sheets nos. 3.0 through 3.18, describing territory which, by Order No. PSC-94-1603-FOF-WS, the Commission found does not fall within the utility's certificated area. The utility based these revised territory descriptions on Order No. 20067, issued September 26, 1988, in Docket No. 870982-WS. By Order No. PSC-94-1603-FOF-WS, the Commission found, among other things, that "[w]e expressly stated in [Order No. 20067] that we were not granting the utility any additional territory or amending certificates at that time." Consequently, the Commission denied approval of the proposed revised tariff sheets.

Moreover, by Order No. PSC-94-1603-FOF-WS, the Commission found that MHU is currently serving outside of its certificated territory in violation of Section 367.045(2), Florida Statutes. However, the Commission did not believe it necessary for the utility to show cause as to why it should not be fined for serving outside of its certificated territory. Instead, the Commission ordered MHU to file an amendment application to include the uncertificated territory which it is currently serving by February 28, 1995.

On January 17, 1995, MHU filed, in the instant docket, an objection to Order No. PSC-94-1603-FOF-WS, to the extent that the Order rejects proposed revised water and wastewater tariff sheets nos. 3.0 through 3.18 and directs the utility to file an amendment application to serve the uncertificated territory which it is currently serving by February 28, 1995. Therefore, this matter has been set for formal hearing on October 4, 1995, in Tallahassee.

By Order No. PSC-95-1028-PCO-WS, issued August 21, 1995, in this docket, the Prehearing Officer denied MHU's Motion for Continuance of the hearing until the second quarter of 1996. On September 15, 1995, MHU filed a second Motion for Continuance of the September 15, 1995, prehearing conference and the October 4 hearing. As a result, the prehearing conference was rescheduled to September 22, 1995, pending the utility's filing of an offer of settlement. On September 20, 1995, MHU filed a Notice of Substitution of Counsel, and a third Motion for Continuance of the prehearing conference. As a result, the prehearing conference was again postponed, until September 27, 1995.

## II. PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

A. Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending a formal ruling on such request by the Commission, or upon the return of the information to the person providing the information. If no determination of confidentiality has been made and the information has not been used in the proceeding, it shall be returned expeditiously to the person providing the information. If a determination of confidentiality has been made and the information was not entered into the record of the proceeding, it shall be returned to the person providing the information within the time periods set forth in Section 367.156, Florida Statutes.

B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 367.156, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.

In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:

- 1) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 367.156, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.
- 2) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- 3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not

subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.

- 4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- 5) At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the Court Reporter shall be retained in the Commission Clerk's confidential files.

### III. POST-HEARING PROCEDURES

Rule 25-22.056(3), Florida Administrative Code, requires each party to file a post-hearing statement of issues and positions. A summary of each position of no more than fifty words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position; however, if the prehearing position is longer than fifty words, it must be reduced to no more than fifty words. The rule also provides that if a party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

A party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than sixty pages, and shall be filed at the same time. The prehearing officer may modify the page limit for good cause shown. Please see Rule 25-22.056, Florida Administrative Code, for other requirements pertaining to post-hearing filings.

### IV. PREFILED TESTIMONY AND EXHIBITS; WITNESSES

Testimony of all witnesses to be sponsored by the utility and by Staff has been prefiled. All testimony which has been prefiled in this case will be inserted into the record as though read after the witness has taken the stand and affirmed the correctness of the

testimony and associated exhibits. All testimony remains subject to appropriate objections. Each witness will have the opportunity to orally summarize his or her testimony at the time he or she takes the stand. Upon insertion of a witness' testimony, exhibits appended thereto may be marked for identification. After all parties and Staff have had the opportunity to object and cross-examine, the exhibit may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

Witnesses are reminded that, on cross-examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer.

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

V. ORDER OF WITNESSES

<u>Witness</u>	<u>Appearing For</u>	<u>Issues Nos.</u>
<u>Direct</u>		
Larry G. DeLucenay	MHU	All
Robert W. Griffiths, P.E.	MHU	2, 6, 8
Richard P. Redemann, P.E.	Staff	All
<u>Rebuttal</u>		
Larry G. DeLucenay	MHU	All

VI. BASIC POSITIONS

MHU: MHU substantially complied with the requirements of Order 20067 by completing construction of utility facilities necessary to provide service to projects requesting service within the extended territory, then sending in a letter on November 30, 1989 to the PSC, requesting that a docket be opened to issue the new certificates. Although some time has passed since the request has been made, the PSC never acted on the request which was appropriately filed under the previous statute. MHU should not be required to apply for the territory again

under the new statute, and the PSC should open a docket under the old request and old statute.

**STAFF:** Staff's positions are preliminary and based on materials filed by the utility and on discovery. The preliminary positions are offered to assist the utility in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions. The information gathered through discovery and prefiled testimony indicates, at this point, that the territory at issue is not within MHU's certificated area, and that MHU should be required to file for an amendment, pursuant to Section 367.045, Florida Statutes, and the applicable Commission rules. However, a final determination cannot be made until the evidence presented at hearing is analyzed.

VII. ISSUES AND POSITIONS

**ISSUE 1:** Has the Commission granted an amendment to MHU's certificates to include the territory at issue in this proceeding?

POSITIONS

**MHU:** Although the Commission has not granted the amendment, by Order No. 20067, issued September 26, 1988, in Docket No. 870982-WS, the Commission specifically states that MHU has the authority to provide service in response to requests within the extended territory at issue. Order No. 20067 also provided a mechanism for MHU to file a letter subsequent to extending facilities and providing service, whereby no further objections would be considered. (DeLucenay)

**STAFF:** No. By Order No. 20067, the Commission resolved certain objections to the utility's amendment application, but did not grant an amendment to MHU's certificates. The Commission determined that no amendment would be granted until MHU installed the necessary facilities to provide service. The Commission also determined that MHU was not under any requirement to extend service; but that it may provide the service, install the necessary facilities, and apply within the specified time period. (Redemann)

**ISSUE 2:** Did MHU fulfill the requirements as set forth in Order No. 20067 in order to obtain the certificate amendments to serve the territory at issue?

POSITIONS

MHU: Yes. MHU mailed a letter on November 30, 1989, return receipt requested, which was received and signed for by the PSC staff. That letter complied with Order No. 20067. By that letter, MHU requested that a docket be opened to consider its 1987 application for extended territory; requiring that the next step be taken by the staff to open a docket. Once a docket was opened, the PSC would then investigate whether appropriate facilities were in fact installed by MHU. (DeLucenay, Griffiths)

STAFF: No. Although MHU has produced a copy of a letter dated November 30, 1989, requesting finalization of its September 1987 territory application and fee, along with copies of a receipt for certified mail and a return receipt showing the apparent signature of Douglas B. Martin, of the Commission mailroom, the Commission has no record of having received the letter or executed return receipt. However, whether the Commission received the letter or executed return receipt is irrelevant. Even if it were timely received by the Commission clerk, that letter would not have satisfied MHU's duty to fulfill the requirements of Order No. 20067 in order to obtain the certificate amendments. The utility did not: 1) timely notify the Commission that it had constructed the necessary facilities to serve the territory at issue; and 2) submit a revised legal description of the territory at issue to reflect the terms of the stipulation which the Commission accepted by Order No. 20067. (Redemann)

ISSUE 3: Did MHU ever notify the Commission that it has completed construction in the territory at issue?

POSITIONS

MHU: Yes. The order did not require that MHU specifically state in its letter requesting a docket, that all work was completed. It could be presumed, however, by the request itself and verified by information to be provided by MHU after docket scheduling. (DeLucenay)

STAFF: No. Although the utility indicates that it has constructed within the territory, it has not notified the Commission that the construction is complete. (Redemann)

**ISSUE 4:** Should MHU be required to file an amendment application to serve the territory at issue in this proceeding, in accordance with Section 367.045, Florida Statutes, and the applicable Commission rules?

POSITIONS

MHU: No. MHU complied with Order No. 20067, and should, therefore, be allowed to continue to process its application under the statute and related rules in effect at the time of the MHU original application in 1987, as part of the continuation of that application described in Order No. 20067. The Commission should follow through on MHU's 1989 request to open the docket to complete that process. (DeLucenay)

STAFF: Yes. Pursuant to Section 367.045, Florida Statutes, and the applicable Commission rules, the utility should be required to file an amendment application in order to serve any territory which falls outside of its certificated area. (Redemann)

**ISSUE 5:** Is MHU in violation of Section 367.045, Florida Statutes, by serving outside of its territory without Commission approval?

POSITIONS

MHU: No. MHU complied with Order No. 20067, and MHU had authority to provide service upon request within the extended territory under Order No. 20067. All utility lines were constructed under the express authority of Order No. 20067. The passage of time should not affect the authority to provide service pursuant to that Order. Principles of equitable estoppel and fundamental fairness dictate that the Commission is estopped from penalizing MHU based on the passage of time. (DeLucenay)

STAFF: Yes. By Order No. 20067, the Commission determined that MHU could provide the service if it installed the necessary facilities and applied within the specified time period. Because MHU did not timely notify the Commission that it had installed the necessary facilities to serve the territory at issue, MHU was not granted the certificate amendments. However, by Order No. PSC-94-1603-FOF-WS, issued December 27, 1995, in this docket, the Commission essentially forgave the utility for serving outside of its certificated territory because



much of the construction was completed several years ago, during the time that Section 367.061, Florida Statutes, was in effect. To correct the violation, the Commission ordered MHU to file an amendment application to include the territory it is currently serving by February 28, 1995. Although the utility did not file the application, it did protest the order under its legal rights as a substantially affected party. MHU should again be required to file an amendment application by a time certain to serve those portions of the territory at issue in which it is currently serving in violation of Section 367.045, Florida Statutes. If MHU fails to so file, it should be fined up to \$5,000 for each day that the violation continues, pursuant to Section 367.161, Florida Statutes. (Redemann)

**ISSUE 6:** Did MHU make extensive service available within that extended territory prior to the extended deadline, April 30, 1990?

**POSITIONS**

**MHU:** Yes. The extensive service made available was inspected by Commission staff in connection with a MHU rate case. (DeLucenay, Griffiths)

**STAFF:** Through discovery and prefiled testimony in this docket, MHU has indicated that it had negotiated agreements with several developers to provide service within the territory at issue prior to April 30, 1990. However, whether MHU had made service available within the territory at issue prior to April 30, 1990, is irrelevant because MHU did not fulfill the requirements of Order No. 20067 in order to obtain the necessary certificates to serve within that territory. (Redemann)

**ISSUE 7:** If MHU did not fully comply with Order No. 20067, was MHU ever noticed of noncompliance or was any alleged noncompliance substantial enough to cause MHU to be required to file a new application under the new statute, Section 367.045, Florida Statutes?

**POSITIONS**

**MHU:** MHU has complied with Order No. 20067. MHU specifically contends that if the Commission finds that there are any elements of noncompliance, such elements are de minimis and do not warrant penalizing MHU for what is otherwise

substantial compliance. MHU was never notified of any noncompliance or alleged noncompliance. Because MHU complied with Order No. 20067, the docket should be opened as requested, and the Commission should evaluate whether MHU permitted and/or extended sufficient facilities to be granted the territory pursuant to Section 367.061, Florida Statutes (1987). MHU should not be required to file a new application under the new statute, Section 367.045, Florida Statutes. (DeLucenay)

STAFF: Under Section 367.061, Florida Statutes (1987), MHU was required to complete construction before the Commission could lawfully grant amendments to its certificates. Therefore, the utility's failure to notify the Commission that construction was complete by the April 30, 1990, deadline, is not a de minimis element of noncompliance. MHU is statutorily required to apply to the Commission in order to serve within the territory at issue, pursuant to Section 367.045, Florida Statutes. Moreover, the Commission was under no obligation to notify MHU of its noncompliance with the requirements of Order No. 20067, which requirements were applicable only if MHU continued to seek to serve within the territory at issue. By Order No. 20067, the Commission did not require MHU to apply to serve within that territory. (Redemann)

ISSUE 8: Did MHU rely in good faith to its detriment on the Commission's representation that it merely needed to provide service to the territory and send a letter asking for the docket to be opened?

POSITIONS

MHU: Yes. MHU relied to its detriment on the representations contained in Order No. 20067 by fulfilling its obligations through the expenditure of a significant sum of money towards servicing the new territory while, at the same time, Pasco County was ignoring the Commission's dismissal of its objections by intruding into the area in question with its own lines as detailed in paragraphs 21-27 of its petition. Based on MHU's detrimental reliance, the Commission is equitably estopped from declining to open a docket pursuant to Order No. 20067 in order to finalize MHU's application under Section 367.061, Florida Statutes (1987). The Commission should not now deny resolution of that Order and docket request merely because of the passage of time. (DeLucenay, Griffiths)

**STAFF:** By Order No. 20067, the Commission did not make the representation that MHU merely needed to provide service to the territory and send a letter asking for a docket to be opened. In addition to dismissing Pasco County's objection to MHU's notice of extension, by Order No. 20067, the Commission ordered MHU to submit a revised legal description of the territory sought in order to reflect the terms of its stipulation with Paradise Lakes. The Commission also granted MHU an extension of time, to April 30, 1989, in which to complete construction of the necessary facilities, and to apply to serve the territory at issue. By Order No. 21218, issued May 10, 1989, in Docket No. 890463-WS, the Commission granted MHU a second extension of time in which to complete construction, until April 30, 1990. Regardless of whether the Commission received MHU's letter dated November 30, 1989, MHU did not submit the required legal description of the territory sought; nor did it timely notify the Commission that it had completed the necessary construction to serve the territory at issue. (Redemann)

**ISSUE 9:** Was the statutory change subsequent to the filing of the 1987 application substantive in nature so as to apply prospectively only?

**POSITIONS**

**MHU:** Yes. Because substantive changes implemented with the passage of Section 367.045, Florida Statutes (1993), are substantive in nature, they cannot be retroactively applied to MHU's 1987 application. MHU's application must be considered under the law as it existed at the time the application was filed. (DeLucenay)

**STAFF:** Whether changes implemented with the passage of Section 367.045, Florida Statutes, are substantive in nature so as to preclude retroactive application of this Section to MHU's 1987 application is irrelevant. By Order No. 20067, the Commission permitted MHU to reapply by referencing its 1987 application by letter only if MHU completed construction by April 30, 1989, which deadline was subsequently extended to April 30, 1990. MHU did not timely notify the Commission that construction was complete. Therefore, MHU should be required to submit a new application, which application should be processed under the current law. (Redemann)

VIII. EXHIBIT LIST

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Direct</u>			
Larry G. DeLucenay	MHU	LGD-1	Resume
"	"	LGD-2	Notices of Extension
"	"	LGD-3	Letter/Objection to Notice of Extension
"	"	LGD-4	Transcript of December 6, 1994, agenda conference
"	"	LGD-6	System Maps
Robert W. Griffiths	"	RWG-1	Resume
Richard P. Redemann	Staff	RPR-1	Resume
"	"	RPR-2	Order No. 20067
"	"	RPR-3	Order No. 21218
"	"	RPR-4	November 30, 1989, letter
"	"	RPR-5	1989 tariff filing log book
"	"	RPR-6	Docket index listing
"	"	RPR-7	relevant portion of November 21, 1994, recommendation
<u>Witness</u>			
<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
<u>Rebuttal</u>			
Larry G. DeLucenay	MHU	LGD-5	November 30, 1989, letter (same as RPR- 4)

MHU and Staff reserve the right to identify any documents produced in discovery, and to identify additional exhibits for the purpose of cross-examination.

IX. PROPOSED STIPULATIONS

1. On September 14, 1987, pursuant to Section 367.061, Florida Statutes (repealed on October 1, 1989), MHU filed an application for an amendment to its certificates in order to serve the territory at issue in this proceeding.
2. MHU may undisputedly enter into the record the Affidavit of Douglas B. Martin, sworn to on September 26, 1995. Further, Mr. Martin's presence at the hearing is not necessary.

X. PENDING MOTIONS


Pasco County's Motion to Intervene in this docket was filed on September 26, 1995, and is pending at this time.

It is therefore,

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 28th day of September, 1995.

  
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DIANE K. KIESLING, Commissioner and  
Prehearing Officer



( S E A L )

RGC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.