

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Request for approval of) DOCKET NO. 940761-WS
special service availability) ORDER NO. PSC-95-1521-FOF-WS
contract with Lake Heron in) ISSUED: December 7, 1995
Pasco County by MAD HATTER)
UTILITY, INC.)
_____)

The following Commissioners participated in the disposition of this matter:

JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

ORDER REJECTING PROPOSED OFFER OF SETTLEMENT

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 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.

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 is not within the utility's certificated area. The utility based these revised territory

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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 this violation. 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. The hearing was originally scheduled for October 4, 1995, in Tallahassee. However, because state offices were closed that day due to the onset of Hurricane Opal, the hearing has been rescheduled to December 15, 1995.

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 and was held on September 27, 1995. The Prehearing Order, Order No. PSC-95-1206-PHO-WS, was issued on September 28, 1995.

On September 26, 1995, Pasco County (County) filed a Motion to Intervene in this docket. The County's motion was granted by Order No. PSC-95-1317-PCO-WS, issued October 27, 1995.

Proposed Offer of Settlement

On October 3, 1995, MHU filed a Proposed Offer of Settlement. By this document, MHU essentially offers to withdraw its objection to Order No. PSC-94-1603-FOF-WS and to file an amendment application to include at least that portion of the territory at issue which MHU is currently serving, as required by that Order, if the Commission in turn agrees to, among other things, incorporate the following statements regarding duplication of service into an order otherwise reinstating Order No. PSC-94-1603-FOF-WS:

D. . . . Duplication of existing facilities is not in the public interest and in fact, is contrary to law pursuant to Section 367.045(5) (a), Florida Statutes, as to those systems regulated by the . . . Commission. It is noted that language similar to that contained in Section 367.045(5) (a), Florida Statutes, is also contained in Section 153.04(2) (b), Florida Statutes, and Section 180.06(9), Florida Statutes, as to county and municipally constructed systems[,] respectively.

E. While the Commission has no jurisdiction over utilities owned by governmental entities[,] to the extent any utility proposes to serve within the existing certificated territory of a utility regulated by this Commission, such second utility, whether regulated by this Commission or not, should file with this Commission an application for deletion of that territory from the regulated utility's service area, prior to any attempts to provide service or to negotiate to provide service therein.

F. Duplication of utility facilities is generally not in the public interest nor economically sound and only where an appropriate agency or court of competent jurisdiction finds that the first facilities present are unable to provide service to the adjacent areas, should duplication of existing facilities occur.

Proposed Offer of Settlement at 5-6.

Also at page 5 of the Proposed Offer of Settlement, MHU contends that there are areas into which it has already constructed facilities and proposed for service under Order No. 20067, as well as areas inside of its existing certificated service territory for which duplicate facilities have been and are proposing to be constructed by a neighboring utility since the rendering of Order No. 20067. According to MHU, such duplicative facilities, to the

extent they exist, would render MHU's facilities less useful in providing service within that area.

Our generic concern with MHU's proposal is that there is no reason for us to issue an order containing policy statements in this docket with respect to duplication of service within a utility's existing certificated service territory. MHU's existing certificated service territory is not at issue here. At issue is whether MHU fulfilled the requirements of Order No. 20067 such that it should have obtained the required certificates to serve within certain uncertificated areas that it had requested to serve in 1987, or whether MHU must file a new amendment application under current law to serve within those areas.

We note that MHU currently has a motion for preliminary injunction pending against the County before the United States District Court for the Middle District of Florida. According to MHU's Motion for Continuance of October 4, 1995, Hearing Date, filed August 17, 1995, in this docket, by the motion filed in the District Court, the utility seeks to protect its right to serve both new and existing customers within its existing certificated territory.

We believe that MHU seeks the issuance of a Commission order incorporating the above-quoted policy statements to use to its advantage in the federal court action. We suggest that if MHU wishes to present to the court Commission policy on duplication of service within a utility's certificated service territory, it should research existing Commission orders rather than seek to craft a new order on the subject. For example, by Order No. PSC-92-0450-DS-SU, issued June 4, 1992, in Docket No. 920167-SU, in re: Petition by Lee County for declaratory statement relative to sewer service certificate granted to North Ft. Myers Utilities, Inc., in Lee County, the Commission notes that "Commission policy has long embodied the principle that wasteful duplication of public utility facilities is to be avoided." By that Order, the Commission also notes that the opinion in Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), addresses "how territorial disputes in the area of water and wastewater utilities are to be resolved consistent with public utility policy of avoiding wasteful duplication of utility facilities."

Moreover, certain of the above-quoted statements as proposed by MHU contain inaccuracies. The above-quoted language from paragraph D. is accurate only if one assumes that the existing facilities which are being duplicated are adequate to meet the reasonable needs of the public. Under Section 367.045(5)(a), Florida Statutes, this Commission may not grant a certificate if a

proposed system will compete with, or duplicate, another "unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service."

We do not believe that Paragraph E. of the Offer of Settlement, quoted above, accurately reflects existing Commission policy. Section 367.022, Florida Statutes, provides that systems owned, operated, managed, or controlled by governmental authorities are not subject to Commission regulation, nor are they subject to the provisions of Chapter 367, except as expressly provided. Chapter 367, Florida Statutes, does not authorize this Commission to request that an unregulated utility file an application for deletion of a regulated utility's service area before providing service or negotiating to provide service to that area. And we question whether the unregulated utility would have standing to file the application, as suggested by MHU. Disputes involving encroachments into a regulated utility's certificated territory by a non-regulated utility are properly brought before a court of law. (See, e.g., Order No. PSC-92-0450-SD-SU, by which the Commission declined to issue a requested declaratory statement on whether a newly-created, non-regulated sewer service cooperative could operate in a regulated utility's certificated area because the territorial dispute would be resolved by a court rather than by the Commission.)

On the other hand, disputes involving whether a certificated utility is providing adequate service are properly brought before this Commission, under the authority of Section 367.045(5)(a), Florida Statutes. (See, e.g., Order No. PSC-95-1319-FOF-WS, issued October 30, 1995, in Docket No. 940264-WS, in re: Application for amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's Mobile Homes, Inc., and Investigation into provision of water and wastewater service by JJ's Mobile Homes, Inc., to its certificated territory in Lake County.) Therefore, paragraph F., quoted above, is inaccurate to the extent that it suggests that a court of law is an appropriate forum in which to bring such disputes.

Other terms of MHU's Proposed Offer of Settlement include various statements of fact and utility contentions which the utility also requests that we acknowledge in exchange for its offer to file an amendment application. The statements of fact can be verified from a reading of Orders Nos. 20067, 21218, and PSC-94-1603-FOF-WS, and we would see no harm in acknowledging utility contentions as such.

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However, for the foregoing reasons, we reject MHU's Offer of Settlement in its entirety. We decline to agree to make utility-proposed policy statements which are irrelevant to the proceedings at bar in exchange for a withdrawal of the utility's objection to Order No. PSC-94-1603-FOF-WS, particularly when the proposed statements contain inaccuracies. The utility's objection to Order No. PSC-94-1603-FOF-WS shall be resolved through the formal hearing process, as scheduled, unless the utility unconditionally withdraws the objection.


This docket shall remain open in order to resolve the utility's objection to portions of Order No. PSC-94-1603-FOF-WS.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mad Hatter Utility, Inc.'s, Proposed Offer of Settlement is hereby denied. It is further

ORDERED that this docket shall remain open in order to resolve Mad Hatter Utility, Inc.'s, objection to portions of Order No. PSC-94-1603-FOF-WS.

By ORDER of the Florida Public Service Commission, this 7th day of December, 1995.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.