

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-97-0534-PHO-WS
ISSUED: May 9, 1997

Pursuant to Notice, a Prehearing Conference was held on May 5, 1997, in Tallahassee, Florida, before Commissioner Diane K. Kiesling, as Prehearing Officer.

APPEARANCES:

F. Marshall Deterding, Esquire, Rose, Sundstrom & Bentley, LLP, 2548 Blainstone Pines Drive, Tallahassee, Florida 32301.
On behalf of Mad Hatter Utility, Inc.

Marion Hale, Esquire, and Charles A. Samarkos, Esquire, Johnson, Blakely, Pope, Bokor, Ruppel & Burns, P.A., 911 Chestnut Street, Clearwater, Florida 34617-1818.
On behalf of Pasco County.

Rosanne G. Capeless, Esquire, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.
On behalf of the Commission Staff.

PREHEARING ORDER

I. CASE 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 systems in three separate communities; Linda Lakes, Foxwood, and Turtle Lakes. According to its 1995 annual report, MHU serves approximately 1,890 water and 1,804 wastewater customers with combined annual operating revenues of \$1,298,700 and a combined net operating income of \$41,215.

On July 19, 1994, MHU filed requests for approval of two special service availability contracts; one with AFI, Inc. (VOPII), and the other with Lake Heron, which were processed in Dockets Nos. 940760-WS and 940761-WS, respectively. By Order No. PSC-94-1603-

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FOF-WS, issued December 27, 1994, in both dockets, the Commission approved both service availability contracts.

MHU also filed, in both dockets, proposed revised water and wastewater tariff sheets nos. 3.0 through 3.18, describing certain territory which the Commission found was not within the utility's certificated area. Consequently, by Order No. PSC-94-1603-FOF-WS, the Commission denied approval of the proposed revised tariff sheets. The Commission also found that MHU was serving outside of its certificated territory in violation of Section 367.045(2), Florida Statutes. However, the Commission did not believe it necessary to require the utility to show cause as to why it should not be fined for this violation. Instead, the Commission required MHU to file an amendment application within sixty days in order to request to serve the territory that it was already serving without a certificate.

MHU filed a timely protest to the order which it later withdrew prior to hearing. By Order No. PSC-96-0172-FOF-WS, issued February 7, 1996, in Docket No. 940761-WS, the Commission acknowledged the utility's notice of withdrawal of protest, declared Order No. PSC-94-1603-FOF-WS to be final and effective, and required the utility to file an amendment application within ninety days. The utility complied by filing, on May 8, 1996, the amendment application which is at issue in this docket.

In its amendment application, the utility seeks to include in its Certificates Nos. 340-W and 297-S, the uncertificated territory that it is currently serving as well as certain adjacent territory which it is 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. Consequently, the matter is set for a formal hearing on May 13-14, 1997.

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 Division of Records and Reporting'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 50 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 50 words, it must be reduced to no more than 50 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 60 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 parties and 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>Proffered By</u>	<u>Issues #</u>
<u>Direct</u>		
Larry G. DeLucenay	MHU	all
Douglas S. Bramlett	County	1-5, 7-9, 12, 13
John Gallagher	County	4, 8, 13
H. Clyde Hobby	County	5, 13
Michael Orsi	County	5, 13
Dr. Robert C. Kratz	County	4
Michael Moses	County	5, 6, 12, 13
Thomas O'Connor	County	12, 13
Joseph Squitieri*	County	12, 13
Peter H. Burghardt*	Staff	4
Milton Martinez*	Staff	4
Peter Screnock*	Staff	4
<u>Rebuttal</u>		
Larry G. DeLucenay	MHU	all
Edwin J. Rogers, P.E.	MHU	1-9, 13
Robert C. Nixon**	MHU	5, 12, 13

* Witnesses Squitieri, Burghardt, Martinez, and Screnock are available to testify beginning at 1:00 p.m. on Tuesday, May 13, 1997.

** Witness Nixon is available to testify on Tuesday, May 13, 1997.

VI. BASIC POSITIONS

MHU: MHU's basic position is that there is a need for water and wastewater service within the territories into which MHU proposes to extend and that MHU has the technical,

managerial, and financial ability to provide such wastewater service and can do so more efficiently and at less cost than Pasco County. Thus, the granting of MHU's application is in the public interest. In addition, it is MHU's position that the County's current and past actions in plain contravention of the previous findings of the Public Service Commission have been in violation of the requirements of Florida Statutes concerning duplication of facilities and have been contrary to not only the Commission's findings and statutes, but contrary to the public interest as well.

COUNTY: MHU lacks the capacity to serve the area for which it seeks a PSC certificate and lacks the financial ability to obtain that capacity. Furthermore, it is not in the public interest to have MHU serve those areas.

STAFF: Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties 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, at this point, indicates that MHU has been serving certain portions of the territory included in its amendment application for some time, and that if this is the case, it would be an unnecessary duplication of service for Pasco County to serve those particular areas. Staff has no preliminary position on the portions of territory included in the amendment application which MHU is not currently serving. Staff's final positions will be based on analysis of the evidence presented at hearing.

VII. ISSUES AND POSITIONS

ISSUE 1: Does MHU include in its amendment application all of the uncertificated territory in which it currently provides service as required by Order No. PSC-96-0172-FOF-WS, issued February 7, 1996, in Docket No. 940761-WS, and what are those specific areas?

POSITIONS

MHU: Yes. Those are parcels A-3, A-4, B-21, B-22, B-23, B-24, C-6 and C-6A, C-7 and C-8. (DeLucenay, Rogers)

COUNTY: The County believes MHU has included in its amendment application all of the uncertificated territory to which

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it currently provides service, which includes Parcels A-3, A-4, B-21, B-22, B-23, C-6, C-7, and C-8. (Bramlett)

STAFF:

Yes, it appears that MHU has included in its amendment application all of the uncertificated territory in which it currently provides service, in accordance with Order No. PSC-96-0172-FOF-WS. These areas include:

A-3 (Woodruff MHP); A-4 (Holy Trinity Church); B-21 (Robco); B-22 (Larreau); B-23 (Rusch Plaza); B-24 (Kniff Property); C-6 and C-6A (Twin Lakes Subdivision); C-7 (Woodridge); C-8 (Highland Oaks).

ISSUE 2: Does MHU include in its amendment application territory in which it currently does not provide service, and what are those specific areas?

POSITIONS

MHU: Yes. B-1A, B-20, B-25, B-26, B-27, C-9, C-10.
(DeLucenay, Rogers)

COUNTY: Agree with staff, except for Parcels B-24 and C-6A. Additionally, the majority of Parcel C-8 is not served by MHU. (Bramlett)

STAFF: Yes, MHU includes in its amendment application territory in which it currently does not provide service. These areas include:

B-1A (T & G Properties); B-20 (Willet); B-25 (Ash Property); B-26 (Meadowview); B-27 (Como Club/Mossvie); C-9 (Myrtle Lakes Baptist Church); C-10 (Ash Property--Myrtle Lake).

ISSUE 3: Pursuant to Section 367.045(2)(b), Florida Statutes, is there a need for service in the territory which MHU seeks to add to its certificates of authorization?

POSITIONS

MHU: Yes. In all of the areas requested for inclusion in the utility certificate. (DeLucenay, Rogers)

COUNTY: Yes. (Bramlett)

STAFF: Yes, there appears to be a need for service in the following portions of the requested territory, as evidenced by MHU's assertion that it is already providing service in these areas:

A-3 (Woodruff MHP); A-4 (Holy Trinity Church); B-21 (Robco); B-22 (Larreau); B-23 (Rusch Plaza); B-24 (Kniff Property); C-6 and C-6A (Twin Lakes Subdivision); C-7 (Woodridge); C-8 (Highland Oaks).

Staff has no position with respect to the need for service in the remainder of the territory requested pending further development of the record.

ISSUE 4: Does MHU have the technical ability and adequate capacity to serve the territory which it seeks to add to its certificates of authorization?

POSITIONS

MHU: MHU has, in the past, and will continue in the future, to have the technical ability to provide service to its entire existing service territory and the additional territory requested in the amendment.

MHU does have the capacity in place to serve the immediate needs of the current proposed territory. To the extent MHU does not currently have the capacity in place to provide a service to the new territory when needed, the utility will have that capacity in place at the time of need for such service as demonstrated in the past and subject to final design and permitting of each project and phase. (DeLucenay, Rogers)

COUNTY: No. MHU does not have the capacity to provide service nor does it have the financial ability to obtain capacity. Furthermore, it does not have any DEP permit to provide wastewater treatment service. (Bramlett, Gallagher, Kratz)

STAFF: Yes, MHU appears to have the technical ability and adequate capacity to serve the following portions of the territory included in its amendment application, in which portions MHU states that it is already providing service at build-out or near build-out capacity:

A-3 (Woodruff MHP); A-4 (Holy Trinity Church); B-21 (Robco); B-22 (Larreau); B-23 (Rusch Plaza); C-6 and C-6A (Twin Lakes Subdivision); C-7 (Woodridge).

Staff has no position with respect to the utility's technical ability or capacity to serve the remainder of the territory requested pending further development of the record. (Burghardt, Martinez, Screnock)

ISSUE 5: Does MHU have the financial ability to serve the territory which it seeks to add to its certificates of authorization?

POSITIONS

MHU: Yes. (DeLucenay, Rogers, Nixon)

COUNTY: No. MHU has represented to the Court in the federal action it initiated against Pasco County that it is on the brink of financial ruin. In order to adequately serve the proposed territory, MHU would need to build a new wastewater treatment plant or upgrade its existing plant. MHU lacks the financial ability to finance the construction of any new facilities. Furthermore, even if it could finance the construction, the impact would be devastating upon its capital structure. (Bramlett, Hobby, Orsi, Moses)

STAFF: No position pending further development of the record.

ISSUE 6: Does MHU own the land upon which its treatment facilities that serve or will serve the proposed territory are located, or, if not, is the utility entitled to continued use of that land?

POSITIONS

MHU: Yes. MHU owns or has an arrangement for continued use of the Linda Lakes wastewater treatment plant site and owns the land on which its water treatment facilities are located. To the extent additional plant sites or wastewater treatment sites are necessary, those will have to be acquired by the utility and the utility will obtain either ownership or a right to continuous use unless the Foxwood sewage treatment plant site can be incorporated into that use. (DeLucenay, Rogers)

COUNTY: Since MHU has not specified how it plans to treat the sewage, Pasco County does not know whether MHU owns the land beneath the alleged utility treatment facilities. (Moses)

STAFF: Yes, it appears that MHU owns the land or has long term lease to the land upon which its existing facilities are located. To the extent that the proposed territory would not be served from those plants, staff has no position pending further development of the record.

ISSUE 7: Does service exist from other sources within geographical proximity to the areas that MHU seeks to add to its certificates of authorization?

POSITIONS

MHU: Pasco County has attempted to extend services into some of the areas adjacent to those currently certificated and/or served by MHU and proposed for service hereunder counter to the requirements of the provisions of Section 153, Florida Statutes. (DeLucenay, Rogers)

COUNTY: Yes. Pasco County has service and is completing the construction of additional lines. (Bramlett)

STAFF: Yes, service appears to be available from Pasco County within geographical proximity to certain portions of the areas that MHU seeks to add to its certificates of authorization.

ISSUE 8: Would the proposed amendment of MHU's territory result in the extension of a system which would be in competition with, or a duplication of, any other system or portion of a system?

POSITIONS

MHU: No. Pasco County's attempts to extend services into and adjacent to the areas currently served by MHU's systems since 1975, is a duplication of MHU's existing service, and is contrary to law and public policy. To the extent duplication exists under relevant law, it has or will result from actions by Pasco County. MHU believes that the Commission should not reward such actions by unregulated local government entities or it will, in effect, vitiate any value to its findings as to those entities. In addition, failure to recognize such inappropriate actions by local government renders regulated utilities in the State of Florida unable to move forward with expansions in an orderly manner because of the unrestrained ability of local government to ignore findings by the regulatory agency as to the public interest and ignore the law as determined recently by a Federal District Court. Any Commission actions which reward local government arrogance of this nature, even after Commission's findings of: the need for service; and that the private utility is in the best position to provide such service, renders the private utility unable to use previously developed master plans or to plan and expand for the future in an efficient manner. (DeLucenay, Rogers)

COUNTY: Yes. The County is completing the infrastructure necessary to serve south central Pasco County, including those areas for which MHU seeks a PSC certificate. (Bramlett, Gallagher)

STAFF: No position pending further development of the record.

ISSUE 9: If the proposed amendment of MHU's territory would result in the extension of a system which would be in competition with, or a duplication of, any other system or portion of a system, is such other system or portion thereof inadequate to meet the reasonable needs of the public or are the persons operating it unable, refusing, or neglecting to provide reasonably adequate service?

POSITIONS

MHU: In addition to the points raised in response to Issue 8 above, there are several areas within MHU's proposed extension territory for which neither the County or any entity other than MHU has any facilities in a position which renders them readily able to serve. (DeLucenay, Rogers)

COUNTY: No, the County's system is adequate to meet the reasonable needs of the public. The County is not unable, refusing or neglecting to provide reasonably adequate service. (Bramlett)

STAFF: No position pending further development of the record.

ISSUE 10: Stricken.

ISSUE 11: Withdrawn.

ISSUE 12: What is the projected impact of the extension on the utility's monthly rates and service availability charges, if any?

POSITIONS

MHU: MHU does not believe there will be any impact on monthly rates or service availability charges other than the possible reduction in any upward pressure on rates

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resulting from full utilization of existing facilities and economies of scale. (DeLucenay, Nixon)

COUNTY: MHU has provided no information regarding how it plans to serve the territory and thus the County cannot determine the impact on the utility's monthly rates and service availability charges, if any. (Bramlett, Moses, O'Connor, Squitieri)

STAFF: No position pending further development of the record.

ISSUE 13: Pursuant to Section 367.045(5)(a), Florida Statutes, is it in the public interest for the Commission to grant MHU's amendment application?

POSITIONS

MHU: Yes. It is in the public interest to grant MHU's application for extension of service territory and it is not in the public interest to allow the County to continue its brazen disregard for the public interest, Florida Statute, and the specific findings of regulatory bodies and courts and attempt to duplicate the facilities of MHU. (DeLucenay, Rogers, Nixon)

COUNTY: No. It is not in the public interest to have MHU serve the areas. (Bramlett, Gallagher, Hobby, Orsi, Moses, O'Connor, Squitieri)

STAFF: The determination of whether it is in the public interest for the Commission to grant MHU's amendment application is dependent upon the resolution of other issues.

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 of Larry G. DeLucenay.
Larry G. DeLucenay	MHU	_____ (LGD-2)	Application for amendment of Water & Wastewater Certificates for MHU.
Larry G. DeLucenay	MHU	_____ (LGD-3)	Additional information to support the original application.
Douglas Bramlett	County	_____ (DB-1)	Bulk wastewater treatment agreement between MHU and Pasco County.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Douglas Bramlett	County	_____ (DB-2)	MHU proposed expanded service area parcel analysis.
Douglas Bramlett	County	_____ (DB-3)	Area map (Exhibit 3 to DB-1).
Clyde Hobby	County	_____ (CH-4)	Utility Extension and Service Agreement between MHU and Sunfield Homes, Inc.
Michael Moses	County	_____ (MM-5)	Preliminary report concerning fair market value of MHU as of August 11, 1991.
Peter H. Burghardt	Staff	_____ (PHB-1)	Consent Agreement between DEP and Pasco County.
<u>Rebuttal</u>			
Larry G. DeLucenay	MHU	_____ (LGD-4) (identified as LGD-3)	Letter from Thomas A. Bustin dated May 12, 1994.
Larry G. DeLucenay	MHU	_____ (LGD-5) (identified as LGD-4)	Map.
Larry G. DeLucenay	MHU	_____ (LGD-6)	Letter from John Cole dated April 17, 1997.
Edwin J. Rogers	MHU	_____ (EJR-1)	Resume.

<u>Witness</u>	<u>Proffered By</u>	<u>I.D. No.</u>	<u>Description</u>
Edwin J. Rogers	MHU	_____ (EJR-2)	Memo from Mr. Rogers dated April 29, 1997.

Parties and Staff reserve the right to identify additional exhibits for the purpose of cross-examination.

IX. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

X. PENDING MOTIONS

There are no motions pending at this time.

XI. RULINGS

The County was given leave, if it so chooses, to prefile testimony by May 9, 1997, on the limited issue of MHU's potential interconnection with Hillsborough County.

The following motions were denied:

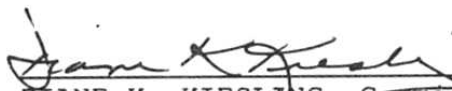
- 1) MHU's Motion to Strike Prefiled Testimony, filed April 17, 1997;
- 2) MHU's Motion to Expedite Discovery Response, filed April 23, 1997; and
- 3) MHU's Motion to Strike Prefiled Testimony, filed April 25, 1997.

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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 9th day of May, 1997.



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

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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.