

MEMORANDUM

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April 24, 1998

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FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (OTTINOT) *AO* *RS*

RE: DOCKET NO. 971481-WS - PETITION OF MAD HATTER UTILITY, INC. IN PASCO COUNTY FOR VARIANCE FROM RULE 25-30.036(3)(D), F.A.C., OR, IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME.

98-0586-FR-WS

Attached is an ORDER DENYING MOTION TO STRIKE AND NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING PETITION FOR VARIANCE, to be issued in the above-referenced docket.

(Number of pages in order - 10)

HO/lw

Attachment

cc: Division of Water and Wastewater (Messer, Redemann)

I:971481or.ho

*3 faxed
1 mailed*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Mad Hatter Utility, Inc. in Pasco County for variance from Rule 25-30.036(3)(d), F.A.C., or, in the alternative, motion for extension of time.

DOCKET NO. 971481-WS
ORDER NO. PSC-98-0586-FOF-WS
ISSUED: April 27, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER DENYING MOTION TO STRIKE

AND

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING PETITION FOR VARIANCE
OF RULE 25-30.036(3)(d)

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein, granting petition for variance, is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

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 1996 annual

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report, MHU serves approximately 2,013 water and 1,940 wastewater customers with combined annual operating revenues of \$1,361,504 and a combined net loss of \$77,418.

On May 8, 1996, MHU filed an application to amend its Certificates Nos. 340-W and 297-S (Docket No. 960576-WS). On June 13, 1996, Pasco County (County) filed an objection to the application and a petition for administrative hearing stating, among other things, that the County would soon provide service to certain of the parcels included in MHU's amendment application. The hearing was held on May 13-14, 1997 in Pasco County.

During the hearing, MHU was required to provide proof that it owns the land upon which its six water treatment plants are located. MHU provided proof of ownership of all but the water treatment plant in the Linda Lakes Groves subdivision. Consequently, by Order No. PSC-97-1173-FOF-WS, issued October 1, 1997, the Commission ordered the utility to provide proof of ownership of, or a continued right to the use of, the land upon which the Linda Lakes Groves water treatment plant is located while granting MHU's application to amend Certificates Nos. 340-W and 297-S.

On November 12, 1997, the utility filed a Petition for Variance of Rule 25-30.036(3)(d), Florida Administrative Code, or, In The Alternative, A Motion For Extension of Time. The Commission received comments from the County on December 22, 1997. On January 14, 1998, MHU filed a Motion To Strike the County's comments. On January 22, 1998, the County filed its response to MHU's motion.

MOTION TO STRIKE

In its motion to strike the County's comments, MHU argues that the County lacks standing to comment upon its petition because the County is not an interested person as provided by Rule 28-104.003(1), Florida Administrative Code. MHU states that the County is merely continuing its harassment of the utility as it has no legitimate interest in the outcome of the Commission's decision in this docket. The utility further states that the County is nothing more than a mere intermeddler in the administrative process.

On January 22, 1998, the County filed its response to MHU's motion. In its response, the County argues that MHU cites no

authority for its contention that the County is not an "interested person" as defined by Section 120.542(6), Florida Statutes. The County states that it is an interested person entitled to comment because its residents may be adversely affected by the Commission's decision in this matter. Further, the County asserts that it is a "person" as defined by Section 120.52(13), Florida Statutes, which provides that a person is "any unit of government in or outside the state."

We agree with the County that it is an interested person who may file comments in this matter. Section 120.542(6), Florida Statutes, provides that the uniform rules shall provide a means for interested persons to provide comments on petitions for variances and waivers. While Section 120.542(6) does not define the term interested persons, the term "person" is defined by Section 120.52(13), which provides that a person "means any unit of government in or outside the state, and any agency described in subsection (1)." (emphasis added) Moreover, subsection (1) of Section 120.52, Florida Statutes, defines agency as "other unit of government in the state, including counties and municipalities". (emphasis added) The County is clearly a unit of government and an agency under the aforementioned definitions. Therefore, we find that the County is an interested person as defined above.

Further, we do not agree with MHU's interpretation of Rule 28-104.003(1), Florida Administrative Code, to support its contention that the County lacks standing to comment. This Rule does not define the term interested person. Indeed, the Rule only states that "any interested person or other agency may submit written comments on a petition for variance". As stated previously, the County is an interested person and an agency as defined by Section 120.52, Florida Statutes.

Additionally, in the amendment docket, the County was granted party status after it filed its objection. Therefore, we believe that the County is merely restating its position regarding an issue that was not resolved in that docket.

Based on the foregoing, we find it appropriate to deny MHU's motion to strike the County's comments.

PETITION FOR VARIANCE

As previously indicated, during a hearing held in Docket No. 960576-WS, MHU was required to provide proof that it owns the land

upon which its six water treatment plants are located pursuant to Rule 25-30.036(3)(d), Florida Administrative Code. MHU provided proof of ownership of five water treatment facilities, but did not prove ownership of the sixth water treatment plant located in Linda Lakes Groves. We found a plat book and a map showing the location of the Linda Lakes Groves water treatment facilities to be insufficient proof of ownership. Consequently, pursuant to Order No. PSC-97-1173-FOF-WS, issued October 1, 1997, in Docket No. 960576-WS, we ordered MHU to provide proof of ownership of the sixth water treatment plant by November 10, 1997, or within sixty days from the September 9, 1997, agenda conference.

On November 12, 1997, in lieu of providing proof of ownership of the land upon which the Linda Lakes Groves water treatment plant is located, MHU filed a petition for variance of Rule 25-30.036(3)(d), Florida Administrative Code, or in the alternative, a motion for extension of time. The utility seeks the variance because it does not own the land upon which the Linda Lakes Groves water treatment plant is located.

Rule 25-30.036(3)(d), Florida Administrative Code, requires a utility to provide evidence that it owns the land upon which its treatment facilities are located that will serve the proposed territory, or a copy of an agreement such as a 99-year lease which provides for the continuing use of that land or a written easement or any other cost effective alternative.

In its petition, MHU argues that it should be granted a variance because no person has made any claim on the property on which the Linda Lakes Groves water treatment facilities are located in approximately 25 years of operation of those facilities by the utility and its predecessor. MHU states that the Commission has considered the utility's right in this property and approved of the current ownership situation in the original transfer proceeding in 1974, in one extension case, and in one rate case. MHU argues that the underlying statute does not contain a specific requirement for written proof of ownership interest in land on which the facilities are located. MHU states that it would be a substantial economic hardship for it to obtain ownership of the small piece of property because of the substantial cost associated with acquiring the property. MHU further states that the purpose of the underlying statute is served by its willingness to pursue legal action if any claim is made against the utility as to its right to operate its water treatment facilities on this property.

On December 22, 1997, we received comments from the County during the 30-day comment period. In its comments, the County argues that MHU's petition is deficient because it does not state the reasons why the variance requested would serve the purposes of the underlying statute. The County states that the petition is also deficient because it does not state whether the variance requested is permanent or temporary. The County asserts that MHU has no right to foreclose on the property because it does not have any ownership interest therein. The County states that MHU or perhaps the customers will have to pay either to purchase the property or condemn it when the property owner asserts ownership rights to the property. The County further states that MHU should have raised this issue in a motion for reconsideration in Docket No. 960576-WS.

In a letter dated February 5, 1998 in response to our staff's inquiries regarding the ownership of the property, MHU stated that it had performed a title search of the property when it sought to obtain a quit-claim deed or a warranty deed from the original developer. However, the original developer informed MHU that it no longer had an interest in the property and the property was dedicated to the County. MHU stated that the assertion in the original pleading that it would be required to pursue foreclosure proceedings was due to a typographical error. MHU also stated that full condemnation proceedings would be required for it to obtain ownership of the property. MHU asserted that the cost of condemnation proceedings would be substantial according to discussions it had with a local real estate counsel and that it will provide our staff with a written estimate for cost of a condemnation proceeding.

To determine the ownership of the small parcel on which the Linda Lakes Groves water treatment plant is situated, our staff had several discussions with the Pasco County Property Appraiser Office (County Appraiser). Our staff was informed by the County Appraiser that the water treatment plant is situated on a small road. The County Appraiser further stated that its records do not indicate an owner for the small piece of property. Our staff was also informed that the County has no ownership interest in the property. Our staff requested an appraisal of the property, but the County Appraiser informed staff that the property has never been appraised because it has never been assessed for tax purposes.

In a letter dated February 19, 1998, MHU provided our staff with an estimated cost of a condemnation proceeding. In that

letter, MHU stated that there are numerous expenses which make a condemnation proceeding impractical in this matter. According to this letter, the expenses include paying the landowner the fair market value of the land which may include a statutory interest of ten percent for the past use of the land, the cost of hiring an appraiser, surveyor, and engineer which can easily approach \$10,000 with the utility's attorney's fees in excess of that amount. MHU stated that this inordinate expense is the reason why MHU's is seeking a permanent variance from the requirement of Rule 25-30.036(3)(d), Florida Administrative Code.

Statutory Requirements

Pursuant to Section 120.542(6), Florida Statutes, on December 3, 1997, the Commission provided notice to the Department of State, which published notice of the waiver request in the Florida Administrative Weekly. After reviewing the petition, staff found the petition to be deficient. Our staff requested specific cost information on MHU's assertion that it would be a substantial economic hardship for it to obtain ownership of the small parcel. Moreover, pursuant to Section 120.542(7), Florida Statutes, within thirty days of receipt of a petition for variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted to require by this section. The agency can request clarification of the additional information within thirty days after receipt of the additional information. In this docket, staff received MHU's first response to its request for additional information on February 5, 1998. By letter dated February 19, 1998, our staff requested additional information to clarify MHU's first response.

Pursuant to Section 120.542(8), Florida Statutes, the Commission is required to issue an order in writing granting or denying the petition stating the relevant facts and reasons supporting the Commission's decision "within ninety days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition". On February 19, 1998, MHU submitted its second response to our staff's request for additional information. Therefore, the ninety-day statutory period for us to rule on the petition commenced on February 19, 1998.

Section 120.542(2), Florida Statutes, in pertinent parts, provides that "variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the

underlying statute will be or has been achieved by other means by the person and that application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver".

The Underlying Statute

The underlying statute pertaining to the rule in this instance is Section 367.045, Florida Statutes, which provides that a utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the Commission. In requesting an extension of service area, the utility shall provide all information required by rule or order of the Commission, which information may include a detailed inquiry into the ability or inability of the applicant to provide service pursuant to Section 367.045(2)(b), Florida Statutes. This statute does not explicitly require proof of ownership of the land upon which the utility's facilities are located. However, Rule 25-30.036(3)(d), Florida Administrative Code, requires a utility to provide proof of ownership of the land upon which its facilities are located. This Rule implements Section 367.045(2)(b), which requires the utility to submit information relating to its ability or inability to provide service to the area it seeks to add. The underlying policy is that an applicant's ability to provide service is questionable in the absence of ownership of the land or a long-term lease.

We agree with the County that MHU does not have a right to foreclose on the property. However, we do not agree with the County that MHU's petition does not satisfy the statutory requirements for a rule waiver or variance. By Order No. PSC-97-1173-FOF-WS, in Docket No. 960576-WS, we found that MHU has the ability to provide service to the additional area. Thus, we find that the purpose of the underlying statute has been achieved as indicated by MHU's ability to provide service. Moreover, MHU has had long term use of the property without anyone contesting its ability to utilize the property. The utility has operated from this property for over twenty years. Further, the County Appraiser has indicated to us that no one has any claim to the property upon which MHU's Linda Lakes Groves water treatment plant is located.

With regard to the County's assertion regarding whether the utility should have filed a motion for reconsideration, we believe

that a motion for reconsideration is the not the proper procedural tool to address the issue regarding the ownership of the property upon which the Linda Lakes Groves water treatment plant is located. Indeed, the purpose of a motion for reconsideration is to bring to an agency's attention a point of law or fact which it overlooked or failed to consider when it rendered its order. See, Diamond Cab of Miami v. King, 146 So. 2d 889, 891 (Fla. 1962). In this docket, MHU is not alleging that Commission has made a mistake of law or fact.

Substantial Hardship

We also find that the utility has demonstrated that it would be a substantial economic hardship for it to obtain ownership of the land. The utility states the cost of condemnation proceedings would exceed \$10,000, which includes fees to surveyors, engineers, and attorneys. The County Appraiser has indicated to us that the property has a very low monetary value because it is basically a median strip in the road. Therefore, we believe that the cost of obtaining the ownership of the property would be a substantial economic hardship.

Based on the foregoing, we find it appropriate to grant MHU's petition because the utility has demonstrated that a variance from Rule 25-30.036 (3)(d), Florida Administrative Code, would serve the underlying purpose of Section 367.045, Florida Statutes, and the application of the rule would cause it a substantial economic hardship. Accordingly, we find that MHU has satisfied the statutory requirements of Section 120.542(2), Florida Statutes.

Since we are granting the petition for variance, the utility's alternative motion for extension of time is moot. Upon expiration of the protest period, if a substantially affected person has not timely filed a protest, this docket shall be closed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Mad Hatter Utility, Inc.'s Motion to Strike Pasco County's comments is hereby denied. It is further

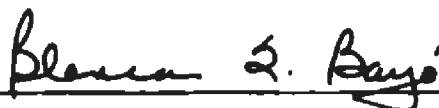
ORDERED that Mad Hatter Utility, Inc.'s Petition for Variance of Rule 25-30.036(3)(d), Florida Administrative Code, is hereby granted. It is further

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ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 27th day of April, 1998.



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 120.569(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.

As identified in the body of this order, our action granting petition for variance is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida

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Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on May 18, 1998. In the absence of such a petition, this order shall become effective on the date subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If the relevant portion of this order becomes final and effective on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water 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 of the effective date 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.

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 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 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.