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JULY 24, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (CAPELESS) MC
DIVISION OF WATER & WASTEWATER (BRADY, REDEMANN) FB BSM

RE: DOCKET NO. 960576-WS - MAD HATTER UTILITY, INC. - APPLICATION FOR AMENDMENT OF CERTIFICATES NOS. 340-W AND 297-S
COUNTY: PASCO

AGENDA: AUGUST 5, 1997 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\960576-R.RCM -- ORAL ARGUMENT WAS NOT REQUESTED.

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 1996 annual 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 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-FOF-WS, issued December 27, 1994, in both dockets, the Commission approved both service availability contracts.

DOCUMENT NUMBER-DATE
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FPSC-RECORDS/REPORTING

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, stating, among other things, that the County will soon provide service to certain of the parcels included in MHU's amendment application. Consequently, a prehearing conference was held on May 5, 1997, in Tallahassee, and a formal hearing was held on May 13-14, 1997, in Pasco County. The parties filed post-hearing statements and briefs on June 30, 1997. On that same date, the County additionally filed a "Motion to Supplement the Record," which is the subject of this recommendation. A full post-hearing recommendation on the merits is scheduled to be filed on August 6, 1997, for the August 18, 1997, agenda conference.

DISCUSSION OF ISSUES

ISSUE 1: Should the County's "Motion to Supplement the Record" be granted?

RECOMMENDATION: No, because no action has been requested, none is necessary. The Commission should not consider the County's filing when it rules on the merits of this case. If the County's filing is construed to be a motion to supplement the record, as suggested by the title of the filing, it should be denied. (CAPELESS)

STAFF ANALYSIS: On June 30, 1997, the County filed, among other things, what it titled a "Motion to Supplement the Record." The record in this docket was made at the hearing held on May 13-14, 1997, in Pasco County. By its filing, the County seeks to notify the Commission of post-hearing negotiations between the County and potential customers concerning service within certain portions of the territory at issue in this docket. The County also seeks to notify the Commission of its intent to provide the service to those portions, and suggests that the Commission may wish to take this matter into consideration in making its post-hearing decision on MHU's amendment application.

On July 9, 1997, MHU filed a Response in Opposition to Motion to Supplement the Record, arguing that the motion should be denied because the record in this matter is closed and there is nothing in the Commission rules, the Uniform Rules of Procedure, or the Florida Administrative Procedure Act to authorize a supplementation of the record in the form and manner requested by the County. Moreover, the prehearing order issued in this case could not be more clear as to what post-hearing procedures should be followed. The County's filing represents an attempt to place before the Commission the result of an after-the-fact negotiation which would constitute newly created evidence. Contrary to its due process rights, MHU will have no opportunity to conduct discovery on, cross-examine, or rebut the assertions and materials contained therein. Moreover, the information is hearsay and is totally uncorroborated in the record. Finally, MHU asserts that the County's filing is nothing more than a signal to the Commission, based upon a tortured interpretation of City of Mount Dora v. JJs Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), that the County intends to serve certain of the parcels at issue in this docket whether MHU or the Commission likes it or not.

Staff preliminarily notes that although the County's filing is titled a "motion to supplement the record," it contains no prayer for relief of any kind. The County does not request that the Commission take any type of action. Rather, as noted above, it merely notifies the Commission, in advance of the Commission's decision on the merits of this case, of its intent to serve within certain portions of the territory at issue. Accordingly, staff recommends that because no action has been requested, none is necessary.

Moreover, staff agrees generally with MHU, and recommends that the Commission should not consider the County's filing in ruling on the merits of this case. The filing falls outside of the record of this case, and the County does not request that the Commission conduct an evidentiary hearing in order to admit the information as evidence. The filing contains documents which have not been authenticated as required by the Florida Rules of Evidence, and, as MHU points out, information upon which parties and staff have not had an opportunity to conduct discovery, to cross-examine, or to rebut. Therefore, if the Commission were to construe the County's filing as a true motion to supplement the record, as the title of the filing suggests, staff would recommend that the motion should be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No, the docket should remain open in order for the Commission to rule upon MHU's amendment application. (CAPELESS)

STAFF ANALYSIS: This docket should remain open in order for the Commission to rule upon MHU's amendment application, which ruling is scheduled to be made at the August 18, 1997, agenda conference.