

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for a Rate) DOCKET NO. 910637-WS
Increase in Pasco County by) ORDER NO. PSC-93-0135-FOF-WS
Mad Hatter Utility, Inc.) ISSUED: 01/26/93
_____)

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
SUSAN F. CLARK

ORDER DENYING MOTION TO STRIKE

BY THE COMMISSION:

CASE BACKGROUND

Mad Hatter Utility, Inc., (MHU or utility) is a class B size utility located in Lutz, Florida. On October 18, 1991, MHU completed the minimum filing requirements for a general rate increase, and that date was established as the official date of filing for this proceeding. By Proposed Agency Action (PAA) Order No. PSC-92-0123-FOF-WS, issued March 31, 1992, this Commission allowed MHU increased rates, required the refund of excess interim and emergency rates (which were granted in a separate docket), reduced MHU's service availability charges, and found MHU in violation of several Commission rules. On April 21, 1992, Mr. Timothy G. Hayes filed a timely protest to the PAA Order. Pursuant to the protest, this Commission held a hearing on September 2, 3, and 25, 1992.

MHU and the Office of Public Counsel (OPC) filed their briefs on November 2, 1992. On November 13, 1992, MHU filed a Motion to Strike requesting that the Commission strike certain portions of OPC's brief. On November 23, 1992, OPC filed a response to MHU's motion. This Order reflects our disposition of MHU's motion.

MOTION TO STRIKE

In its motion, MHU requests that the Commission strike from OPC's brief "all references to an alleged issue, related to ownership of land utilized by Applicant in its water operations," specifically, that portion of the brief starting on page 14, eight lines from the bottom, and continuing to page 18, four lines from the top.

DOCUMENT NUMBER-DATE

00987 JAN 26 1993

FPSC-RECORDS/REPORTING

MHU raises two basic arguments. First, MHU contends that, pursuant to the Order Establishing Procedure, Order No. PSC-92-0327-PCO-WU, issued May 11, 1992, all issues not raised prior to the issuance of the Prehearing Order are waived unless good cause is shown. MHU asserts that OPC failed to make a good cause showing for the ownership issue, and, therefore, the argument in OPC's brief is improper. In its motion, MHU states,

Citizens contend that this issue was raised by one of Applicant's customers and reference page 19 of the transcript of the Hearing. A review of the referenced transcript page indicates that there is absolutely no testimony whatsoever dealing with the legal ownership of that property.

Further, in its motion to strike, MHU refers to OPC's motion at the hearing to disallow MHU from presenting any additional evidence regarding ownership of the subject property because of an alleged discovery violation, and MHU represents,

In denying OPC's Motion, the Commissioners specifically noted that there was no issue as to ownership before them, and that the response of Applicant to the discovery requests . . . were not unresponsive.

MHU then goes on to say that it did not present any additional documentary evidence or testimony on the ownership issue because "as the Commissioners specifically noted, no such issue was before them (Tr. 157-159)."

MHU's second argument is that OPC failed to comply with Rule 25-22.056(3)(a), Florida Administrative Code, which requires that any new issue identified by a party in a post-hearing statement be clearly identified as such. For this reason, and the reason stated above, MHU moves that we strike OPC's brief's references to the ownership issue.

In its three paragraph response to MHU's motion, OPC states only that it disputes MHU's allegations, that the record speaks for itself, and that the record speaks for itself.

In evaluating the merits of MHU's motion, we have reviewed the Prehearing Order, the prehearing conference transcript, and the pertinent portions of the hearing transcript. Based on our review, we note the following considerations.

First, neither the utility's ownership of the subject land nor its reclassification of same are listed as issues in the Prehearing Order. Furthermore, there was no mention made regarding either on the record at the prehearing conference.

Early in the hearing, a customer asked a question regarding the utility's reclassification of property from wastewater to water. He did not question whether the utility owned the land, only why the land was transferred. The customer even referred to the audit report, which mentions the transfer.

Contrary to MHU's statement, this Commission did not deny OPC's motion regarding the alleged discovery violation at the hearing. The transcript reveals that OPC moved the Commission to prohibit MHU from presenting any evidence on the subject land reclassification beyond that contained in Exhibit No. 8, which was provided to OPC in response to Document Request No. 9. When OPC first made the motion, the presiding Commissioner stated that ruling was reserved until MHU attempted to offer additional evidence on the matter. When one Commissioner asked MHU's president for recording information for the property shown in Exhibit No. 8, OPC invoked its objection again, but then withdrew it. Later, when MHU's president was asked on redirect to clarify the discrepancy between the dates on the unexecuted deed in Exhibit No. 8, and the recording information he testified to in response to the Commissioner's question, OPC again objected. The presiding Commissioner sustained the objection "until such time as we get into further testimony concerning ownership by witnesses put on by OPC or cross examination by OPC." Thus, the ruling was that if OPC opened the door on the ownership question, MHU could respond with evidence.

Additionally, at the hearing, one Commissioner stated that ownership was not put in issue, that nothing in Document Request No. 9 suggested that there was a question concerning ownership of the subject property, and that she did not think MHU's response, as contained in Exhibit No. 8, was unresponsive. Although counsel for OPC asked some questions of MHU witness Nixon related to the

ownership question, when confronted by a Commissioner whether or not OPC thought ownership was an issue, counsel for OPC said, "I'm not real sure."

In consideration of the above, we believe that OPC should be precluded from raising ownership as an issue. However, disregarding the ownership question leaves, in our view, one remaining question: the reclassification of the land from wastewater to water.

A customer did indeed ask about the reclassification. OPC pursued it. MHU did not object to Exhibit No. 8 being admitted into evidence, nor did MHU object to the numerous questions regarding the reclassification which OPC and Mr. Hayes posed to MHU's witnesses. Albeit true that the reclassification of the land was not an issue in the Prehearing Order, there remains a fair amount of evidence on the record concerning it.

That portion of OPC's brief which MHU seeks to strike appears under the rubric of issue no. 3, concerning recovery of investment in abandoned plant. OPC prefaces its argument with the following:

An issue related to the plant abandonment, raised by one of Mad Hatter's customers (Tr. 19) concerns the Utility's claim that \$153,662 of land previously booked to the Foxwood wastewater system should be reclassified to the Foxwood water operations.

In this section of its brief, OPC makes references to ownership. However, the brief also addresses the reclassification question. In this area of discussion, OPC contends, "This Commission . . . should not require ratepayers to provide a return on property which has not been proven to be used and useful in the provision of water service." In addition, OPC quotes from the hearing transcript an exchange with utility witness Nixon regarding the reclassification, and then asserts that the Commission does not have before it "substantial evidence upon which to find that the property in question belongs to the Utility's water operations."

There is much evidence relevant to the reclassification of the land on the record, and OPC suggests that this Commission cannot very well ignore it. For purposes of considering MHU's motion, we agree. Since OPC's references to ownership are inextricably mingled with the rest of its argument regarding the

ORDER NO. PSC-93-0135-FOF-WS
DOCKET NO. 910637-WS
PAGE 5

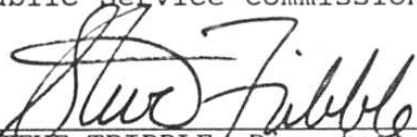
reclassification, we shall not grant MHU's motion in part by striking only OPC's references to ownership.

Finally, we agree with MHU that OPC failed to comply with Rule 25-22.056(3)(a), Florida Administrative Code, which requires that any new issue identified by a party in a post-hearing statement be clearly identified as such. However, OPC's failure to comply with the Rule does not dictate that OPC's argument be stricken.

Based on the foregoing, it is, therefore,

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

By ORDER of the Florida Public Service Commission this 26th day of January, 1993.



STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

MJF

ORDER NO. PSC-93-0135-FOF-WS
DOCKET NO. 910637-WS
PAGE 6

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.