

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

FILE COPY

In Re: Initiation of limited proceeding for possible wastewater rate reduction for Foxwood/Turtle Lakes System for Mad Hatter Utility, Inc. in Pasco County.

Docket No. 970125-WS

In re: Initiation of Show Cause Proceedings Against Mad Hatter Utility, Inc. for Violation of Order No. PSC-93-0295-FOF-WS.

Docket No. 961471-WS

MOTION TO ESTABLISH PROCEDURE

Mad Hatter Utility, Inc. ("Mad Hatter"), by and through undersigned counsel, hereby files this Motion To Establish Procedure and in support thereof would state and allege as follows:

1. By Order dated July 2, 1997, the Commission consolidated Docket Nos. 961471-WS and 970125-WS into a single proceeding. That proceeding is currently scheduled for hearing on November 24, 1997.

2. Docket No. 961471-WS is an initiation of show cause proceedings against Mad Hatter. This docket was initiated by Commission action. Docket No. 970125-WS is the initiation of a limited proceeding for possible wastewater rate reduction for

certain systems of Mad Hatter. This proceeding was initiated by Commission action.

3. The "Time Schedule (CASR) for Docket No. 970125-WS" suggests that company testimony would be due on September 2, 1997.

This is the first testimony to be filed by any party, intervenor, or the staff. The "Time Schedule (CASR) for Docket No. 961471-WS"

likewise suggests that company testimony would be due on September 2, 1997. This is the first testimony to be filed by any party,

CK _____
 FA _____
 PP _____
 YAF _____
 CMJ _____
 DTR _____
 EAC _____
 LES 2 _____
 LM 3 _____

 E. _____
 SC 1 _____
 WJS _____
 JTH _____

DOCUMENT NUMBER-DATE
07923 AUG-56
 FPCO-RECORDS/REPORTING

intervenor, or the staff. While the CASR contains a "warning" that the schedule is tentative and subject to revision, the CASR itself reveals that the Order Establishing Procedure is only to be issued two weeks before the testimony is due. Therefore, it is obvious that the Procedure Order in and of itself will not provide adequate notice to Mad Hatter that its testimony is due such that the testimony may be prepared and filed. Therefore, Mad Hatter must rely on the "tentative" dates in the CASR, as is commonly done by parties who are dealing with the PSC.

4. The CASR's in both dockets contemplate that the first testimony to be filed in each case will be filed by the company (Mad Hatter). To place the initial burden upon Mad Hatter, such that it must file direct testimony before any other party or participant in this hearing, is improper under applicable fact and law and extremely prejudicial to Mad Hatter.

5. It is undisputed that Mad Hatter is not an "applicant" in this case. It is equally undisputed that Mad Hatter did not initiate this proceeding through the filing of any paper or pleading, by a request for any affirmative relief, or a solicitation of the PSC's opinion or position on any issue. With regard to both dockets, it is the position and will remain the position of Mad Hatter that the status quo should be maintained.

6. There is authority that it is the applicant (the party seeking relief and seeking the affirmative of an issue), who has the burden of going forward with the evidence in an administrative proceeding, Mad Hatter is clearly not an applicant in this case.

Neither does Mad Hatter seek relief or the affirmative of any issue. Rather, it is the Commission who seeks relief in this quasi-judicial proceeding, and it is the Commission who is asserting the affirmative of the issue. See, e.g. *Florida Department of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778, 787-88 (Fla. 1st DCA 1981). The case of *Sunshine Utilities v. Florida Public Service Commission*, 577 So.2d 663 (Fla. 1st DCA 1991) addressed the Utility's burden in a proceeding in which it had affirmatively requested rate relief. Third, the Court determined *Sunshine* had the burden of establishing its investment, because it was the applicant. In that case, *Sunshine* had filed an application seeking an alteration in the status quo. This case is completely unlike *Sunshine* in that Mad Hatter has not sought affirmative relief from the Commission in any way, shape, or form and has not filed any paper or pleading with the Commission seeking any alteration or modification of the status quo.

7. The burden is normally placed upon the party bringing the action or the party asserting the affirmative of an issue before an administrative tribunal. *Volpe Construction, Inc. v. Department of Revenue*, 1980 Fla. Tax Lexis 16 (Dec. 16, 1980). In this case, it is the Commission who has brought the action and it is the Commission who is asserting the affirmative of the issue before the administrative tribunal.

8. Any party seeking to change the status quo should have the burden of proof in an administrative proceeding. *Washington County v. Department of Management Services*, 651 So.2d 170 (1st DCA

1995). Once the status quo is established, an agency attempting to change the status quo has the burden to demonstrate that its position is meritorious. *Washington County, supra*.

9. During recent informal discussions with the Commission Staff, the undersigned has been informed of the Commission Legal Staff's position that the show cause proceeding in Docket No. 961471-WS and the limited proceeding in Docket No. 970125-WS must be bifurcated. This is directly contrary to the findings in the most recent order (Order No. PSC-97-0790-FOF-WS).


10. The principles of the Utility, the undersigned counsel, and the Utility's regulatory accountant, all of whom will play a key role in the development in any testimony and preparation for hearing in the above referenced dockets, each have long-standing plans to be out-of-town for at least a week to ten days between the date of filing this motion and August 25, 1997. The absence of the parties during these various times render it virtually impossible for the Utility to prepare testimony by the implied due date contained in the most recent CASR.

11. The decision concerning the appropriate procedural treatment of these cases not only impacts the appropriate timing of filing any testimony, but also impacts who will be responsible for preparing initial testimony and whether or not the two above referenced dockets will be consolidated for hearing. Until these issues are resolved, it is inappropriate for any party to have a pending obligation to file testimony at a date any earlier than four weeks from the date of any such decision and issuance and

finalization of any procedure order that might affect these procedures or obligations.

WHEREFORE, and in consideration of the above, Mad Hatter respectfully requests the Commission issue its Order Establishing Procedure as expeditiously as possible establishing that the proper procedure in this case is that the testimony of the Commission staff, on behalf of the PSC, should be the first testimony filed in this docket and that the PSC has the burden of going forward on its affirmative contentions in both of these dockets. In addition, because of the uncertainty surrounding both the currently suggested controlling dates from the CASR; the lack of any procedure order issued to date which specifically addresses controlling dates; the uncertainty surrounding the appropriate procedure or consolidation of dockets; and the long established summer vacation plans of the key persons involved in the preparations of any testimony on behalf of Mad Hatter; all "controlling dates" (as suggested by the unofficial CASR) including the initial testimony filing dates as well as the hearing date, must be extended until these issues are resolved.

DATED this 5th day of August, 1997.


John L. Wharton, Esq.
F. Marshall Deterding, Esq.
ROSE, SUNDSTROM & BENTLEY
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(904) 877-6555

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by hand-delivery to Bobbie Reyes, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399 on this 5th day of August, 1997.


John L. Wharton, Esq.

mad\procedur.mot