

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation of PALM COAST )	DOCKET NO. 871395-WS
UTILITY CORPORATION for verification )	
of utility investment in water and )	ORDER NO. 21697
sewer assets in Flagler County )	
_____ )	ISSUED: 8-8-89

ORDER DENYING REQUEST FOR CONFIDENTIAL TREATMENT  
AND DENYING MOTION TO COMPEL

By Order No. 18785, issued February 2, 1988, this Commission initiated an investigation into the level of investment in utility assets by Palm Coast Utility Corporation (PCUC). By Order No. 18713, issued January 21, 1988, this Commission acknowledged the intervention of the Office of Public Counsel (OPC) in this proceeding.

On August 12, 1988, the Staff of this Commission (Staff) and OPC visited the offices of ITT Community Development Corporation (ICDC) to review documents pertinent to this investigation. Before it would allow any review of such materials, ICDC required Staff and OPC to sign confidentiality representations.

On September 21 through 23, 1988, Staff and OPC visited the offices of ITT for further review of documents pertaining to this investigation. Before it would allow any review of such materials, ITT also required Staff and OPC to sign confidentiality representations.

On April 6, 1989, Staff filed a recommendation in this docket for consideration at the April 18, 1989 Agenda Conference. At the Agenda Conference, OPC requested that we defer voting on Staff's recommendation until such time as OPC completed its own investigation and filed its findings. We rejected OPC's request but indicated that, if OPC brought any new information to our attention prior to the expiration of a deadline established by the Prehearing Officer, we would reconsider our decision. We also voted to adopt Staff's recommendation, as orally modified, except for one issue, which was deferred until a later Agenda Conference.

DOCUMENT NUMBER-DATE

07991 AUG -8 1989

FPSC-RECORDS/REPORTING

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 2

REQUEST FOR SPECIFIED CONFIDENTIAL TREATMENT

On June 13, 1989, OPC filed its findings and recommendations (OPC's memorandum) in this docket, which contained a number of exhibits. Also on June 13, 1989, ICDC filed a request for specified confidential classification of materials used in OPC's memorandum. ICDC requested that all "materials" provided by it or ITT pursuant to the provisions of the confidentiality representations discussed above, whether documentary or oral, be afforded confidential treatment under Rule 25-22.006, Florida Administrative Code. In addition, ICDC requested that the Prehearing Officer enter an order protecting it from public dissemination of the above-referenced materials.

On June 27, 1989, ICDC filed a supplemental request for specified confidential treatment of materials gleaned during this investigation. ICDC identified six exhibits attached to OPC's memorandum for which it requested specified confidential treatment. ICDC also stated that such identification was made without waiver of any rights that it might have pursuant to the confidentiality representations or Section 350.121, Florida Statutes.

On July 11, 1989, OPC filed a response to ICDC's supplemental motion. In its response, OPC argued that none of the documents used by it qualify for confidential treatment. OPC also argued that it had used all materials furnished by ICDC and ITT in arriving at its findings and recommendations. OPC further argued that, notwithstanding the above-mentioned confidentiality representations the burden remains with ICDC to show that any materials are confidential.

Confidentiality of Materials Under  
Section 350.121, Florida Statutes

Since ICDC purports to reserve any rights it might have under Section 350.121, Florida Statutes, the applicability of that section to the proceeding at hand will be analyzed first. Under Section 350.121, Florida Statutes, if this Commission undertakes an inquiry, all materials obtained incident to that inquiry are confidential during the pendency of the inquiry.

This proceeding is not an inquiry. It is a formal investigation into the level of PCUC's investment in utility

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 3

assets. The investigation is narrowly focused and is designed to lead to a resolution of some form. Accordingly, the Prehearing Officer finds that the provisions of Section 350.121, Florida Statutes, and Rule 25-22.006(2), Florida Administrative Code, do not apply to this proceeding.

Confidentiality of Materials Under  
Section 367.156, Florida Statutes

Pursuant to Section 367.156, Florida Statutes, a utility may request that any proprietary confidential business information be kept confidential. Under Rule 25-22.006(4)(a), Florida Administrative Code,

[a] request for classification of material as specified confidential shall be filed in writing and shall identify the specific information which justifies the classification. Classification of the material as proprietary confidential business information is to be justified by demonstrating how the information it contains falls under one or more of the statutory examples or, if no statutory example is applicable, by including a justifying statement indicating what penalties or ill effects upon the company or its ratepayers will result from disclosure of the information to the public.

Further, under Rule 25-22.006(4)(c), Florida Administrative Code,

[t]he burden of proof shall be on the source to show that the document or other material in question contains bona fide proprietary confidential business information. A request for specified confidential classification that fails to identify the proprietary information in sufficient detail to permit a reasoned analysis or which fails to provide a detailed justification for classification may be denied as insufficient on its face.

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 4

As discussed above, ICDC identified six documents for which it has requested specified confidential treatment. Each of these documents is discussed below, separately.

Exhibit F of OPC's memorandum - This document is a memorandum from N. Friedman to R. A. Martorelli dated April 12, 1976. ICDC claims that Exhibit F was prepared in anticipation of or incident to litigation and that it is, therefore, protected as work product. However, ICDC neither identified any specific information which justifies confidential treatment nor indicated what penalties or ill effects might befall it or PCUC's ratepayers as a result of disclosing the material to the public. ICDC's request appears, therefore, insufficient on its face. Nevertheless, in OPC's response to ICDC's supplemental request for specified confidential treatment, OPC alleges that Exhibit F was copied from federal court files for Case No. 370-Orl-Civ-Y and that it has, therefore, been in the public domain for over a decade. ICDC made no response to OPC's claim. Since it appears that Exhibit F is available from sources other than ICDC, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of this document.

Exhibit B of OPC's memorandum - ICDC claims that Exhibit B, a water and sewer rate study of August 31, 1977, is a document prepared for internal use which contains trade secrets. Although ICDC did specify a statutory example as required by Rule 25-22.006(4)(a), Florida Administrative Code, it did not identify the specific information which justifies confidential classification. In addition, a review of Exhibit B does not reveal anything that appears to be a trade secret. Further, in its response, OPC claims that the document was furnished by PCUC's ratepayers, not ICDC. ICDC did not reply to OPC's response. Since ICDC's request is insufficient on its face and because it appears that the information is available other than from ICDC, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of Exhibit B.

Exhibit C of OPC's memorandum - ICDC contends that Exhibit C, a letter to Mr. and Mrs. Charles Prestopine, dated August 6, 1976, is a trade secret. As with the materials discussed above, ICDC did not identify the specific information which warrants confidential treatment. Further, a review of the document does not reveal anything that appears to be a trade

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 5

secret. In its response to ICDC's supplemental motion for confidential treatment, OPC claims that the letter is one of many sent to lot purchasers in Palm Coast. OPC also argues that the letter was not furnished by ICDC, but by one of PCUC's customers. OPC's contention is further bolstered by a submittal by James Martin, a customer of PCUC, who claims that he supplied the letter to OPC. ICDC did not reply to either OPC's response or Mr. Martin's submittal. Since ICDC's request is insufficient on its face and because Exhibit C is available through sources other than ICDC, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of Exhibit C.

Exhibit D of OPC's memorandum - ICDC contends that Exhibit D, a letter dated May 1, 1981, to Mr. Ronald Matte, is an intercorporate appraisal which, if made public, could affect the future marketability and value of properties. ICDC did not identify any specific information which justifies confidential treatment, however, it did indicate that public disclosure of the information might harm it. In its response, OPC claims that the information was not furnished by ICDC or ITT, but by PCUC. ICDC did not reply to OPC's response. Since ICDC's request is insufficient on its face and because it does not appear that the information was provided by ICDC, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of Exhibit D.

Exhibit E of OPC's memorandum - ICDC argues that Exhibit E, a memorandum from Richard Vaughan and Zev Cohen to Eli Pritchard, dated January 13, 1975, appears to have been prepared in anticipation of or incident to litigation. ICDC, therefore, claims that it is protected as work product. Again, ICDC did not identify specific information which would justify confidential treatment or indicate how disclosure of the material could harm it or PCUC's ratepayers. OPC responded to ICDC's request by stating that Exhibit E was copied from federal court files for Case No. 370-Orl-Civ-Y and that it has, therefore, been in the public domain for over a decade. ICDC did not reply to OPC's response. Since ICDC's request is insufficient on its face and because the information appears to be otherwise available to the public, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of Exhibit E.

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 6

Exhibit K of OPC's memorandum - ICDC contends that Exhibit K, a memorandum from L. Scrabis to J. McClure dated February 4, 1976, appears to have been prepared in anticipation of or incident to litigation and that it is, therefore, protected as work product. As with almost all of ICDC's other requests, it neither identified specific information which would justify confidential treatment, nor pointed out how disclosure of the information could harm it or PCUC's ratepayers. OPC responded to ICDC's request by stating that this information was furnished by PCUC, not ICDC or ITT. ICDC did not reply to OPC's response. Since ICDC's request is insufficient on its face and because it does not appear that ICDC even furnished the information, the Prehearing Officer finds it appropriate to deny ICDC's request for confidential treatment of Exhibit K.

MOTION TO COMPEL IDENTIFICATION OF DOCUMENTS

On June 30, 1989, ICDC filed a motion to compel OPC to identify materials pursuant to the confidentiality representations discussed above. ICDC requested that we order OPC to identify all materials obtained from ICDC or ITT which OPC intends to use in this proceeding.

On July 14, 1989, OPC filed a document which would appear to satisfy ICDC's concerns. OPC claims that it has at all times maintained that it intended to use and that it did, indeed, use all documents obtained from ICDC or ITT in preparing its findings and recommendations. OPC then lists all documents that it has received from either ICDC or ITT. Upon consideration, it appears that OPC's response has rendered ICDC's motion devoid of any further practical significance. ICDC's motion to compel is, therefore, denied.

Based on the discussion above, it is

ORDERED by Commissioner Thomas M. Beard, as Prehearing Officer, that ITT Community Development Corporation's request for specified confidential treatment of certain materials is denied, as set forth in the body of this Order. Any protest to this ruling shall be filed within fourteen (14) days of the date of this Order. It is further

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 7

ORDERED that ITT Community Development Corporation's motion to compel identification of materials is denied, as set forth in the body of this Order.

By ORDER of Commissioner Thomas M. Beard, as Prehearing Officer, this 8th day of AUGUST, 1989.

  
THOMAS M. BEARD, Commissioner and  
Prehearing Officer

RJP

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 the portion of the order denying the motion to compel identification of materials, 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 sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the

ORDER NO. 21697  
DOCKET NO. 871395-WS  
PAGE 8

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.