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May 17, 1996

**ORIGINAL  
FILE COPY**

**HAND DELIVERY**

Ms. Blanca S. Bayo, Director  
Division of Records and Reporting  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, FL 32399-1850

RE: Docket No. 951056-WS  
Application by PALM COAST UTILITY CORPORATION  
for a rate increase in Flagler County, Florida

Dear Ms. Bayo:

Enclosed for filing are an original and fifteen copies of Palm Coast Utility Corporation's Second Motion for Protective Order, in reference to the above docket.

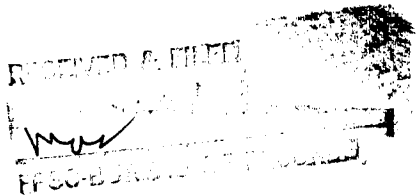
Please acknowledge receipt of the foregoing by stamping the enclosed extra copy of this letter and returning same to my attention. Thank you for your assistance.

Very truly yours,

*B. Kenneth Gatlin*

B. Kenneth Gatlin

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APP \_\_\_\_\_  
CAF \_\_\_\_\_ BKG/met  
CMU \_\_\_\_\_ Enclosures  
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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Application for rate increase in )  
Flagler County by PALM COAST )  
UTILITY CORPORATION )

Docket No. 951056-WS

Filed: May 17, 1996

**PALM COAST UTILITY CORPORATION'S**  
**SECOND MOTION FOR PROTECTIVE ORDER**

Palm Coast Utility Corporation (PCUC) requests, pursuant to Section 367.156, Florida Statutes, Rule 25-22.006(5)(a) and (c), Florida Administrative Code, and Rule 1.280(c), Fla. R. Civ. P., that the Florida Public Service Commission issue a protective order, for certain documents requested by the Office of Public Counsel (OPC) in Citizens' Second Set of Requests for Production of Documents to PCUC, and as grounds states:

1. OPC served Citizens' Second Set of Requests for Production of Documents to Palm Coast Utility Corporation by hand-delivery to PCUC on April 12, 1996. PCUC served its Response to Citizens' Second Set of Requests for Production of Documents to Palm Coast Utility Corporation (hereinafter referred to as PCUC's Response to Request for Production) on May 13, 1996. On May 2, 1996 the Procedural Order was issued in this case. The Order requires objections to discovery to be made within 10 days of service of a discovery request. On May 3, 1996, PCUC filed PCUC's Motion for Extension of Time and Notice of Intent to File Motion for Protective Order relating to OPC's second sets of discovery. PCUC requested until May 13, 1996 in which to file its objections to discovery, and filed notice of intent to file a Motion for Protective Order by May 20, 1996. No order has yet been issued on PCUC's May 3rd Motion.

2. Rule 1.280(c), protective orders, Fla. R. Civ. P., states in part:

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; . . .

PCUC requests that the Commission rule that discovery not be had on OPC's Requests for Production Nos. 37, 46-51, 53, and 56, for the reasons set forth below. Alternatively, if the Commission finds any portion of the discovery requests discoverable in this rate case, PCUC requests that the information be classified as confidential proprietary business information subject to protection pursuant to Section 367.156, F.S., Rule 25-22.0006(5)(a), F.A.C., and subject to the terms of a temporary protective order.

3. Request for Production No. 37

OPC's request for production No. 37 states:

37. Please provide a copy of the audited financial statements (balance sheet, income statement, cash flow statement and accompanying notes) of ICDC for each of the years 1988 forward. If audited financial statements are not available, provide unaudited financial statements.

PCUC responded as follows:

Objection. Irrelevant, not reasonably calculated to lead to admissible evidence in this rate case, encompasses confidential proprietary business information, and may contain privileged information. Not in possession, custody or control of PCUC.

4. Rule 1.280(b), Fla. R. Civ. P., provides, in part:

(1) In General. Parties may obtain discovery regarding any matter, not privileged that is relevant to the subject matter of the pending action. . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Section 367.156, F.S., specifically provides:

(1) The commission shall continue to have reasonable access to all utility records and records of affiliated companies, including its parent company, regarding transactions or cost allocations among the utility and such affiliated companies, and such affiliated companies, and such records necessary to ensure that a utility's ratepayers do not subsidize nonutility activities. . . .

(2) Discovery in any docket or proceeding before the commission shall be in the manner provided for in Rule 1.280 of the Florida Rules of Civil Procedure. Information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue. . . (emphasis added).

This rule and statute do not confer upon OPC a carte blanche ability to obtain any documents from PCUC's affiliates; discovery must be reasonably expected to lead to the discovery of admissible evidence. E.g., Allstate Ins. Co. v. Langston 655 So.2d 91, 95 (Fla. 1995) "Admissible evidence" in this rate case would be that which is relevant to rates or cost of service.

5. ICDC is a nonregulated affiliate of PCUC. The unaudited financial statements of ICDC contain no information which could lead to the discovery of admissible evidence in this case. The "balance sheet, income statement, cash flow statement and accompanying notes" would have no information regarding transactions or cost allocations between PCUC and ICDC, or regarding any rate or cost of service issues in this case for which discovery would be appropriate. Further, ICDC's interest in maintaining the privacy of its business which is not regulated by this Commission far

outweighs OPC's need for this discovery and its probative value. Discovery of this information should be denied.

6. Documents in the possession of nonregulated affiliates are not in the "possession, custody, or control" of the regulated utility if those documents do not pertain to the utility, they are not relevant to the proceeding before the Commission. E.g., In re: Application for rate increase and increase in service availability charges by SSU, Inc., etc., Docket No. 950495-WS, Order No. PSC-95-1258-PCO-WS, 95 FPSC 10:295, 295, issued 10/13/95 ("Rule 1.280(b), Fla. R. Civ. P., allows discovery of information that appears reasonably calculated to lead to discovery of admissible evidence. . . . SSU does not necessarily have possession or control over minutes that do not pertain to it. Accordingly, discovery shall be allowed, but only as to those minutes pertaining in any way to SSU.") Because the financial statements of ICDC do not pertain to PCUC, they should not be considered within the possession, custody, or control of PCUC, and discovery should not be allowed.

7. Alternatively, if the Commission rules that any portion of request for production No. 37 is discoverable, PCUC requests that the documents be classified as confidential proprietary business information pursuant to Section 367.156(3), Fla. Stat., and Rule 25-22.006(5), F.A.C., that a temporary protective order be issued, and that the documents be afforded all protections from disclosures as set forth by rule and statute.

8. Section 367.156(3), Fla. Stat. states:

Proprietary confidential business information means information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosures of the information would cause harm to the ratepayer or the person's or company's business operations, and has not been disclosed. . . . Proprietary business information includes, but is not limited to:

\* \* \*

- (d) Information concerning bid or other contractual data, the disclosure of which would impair the efforts of the utility or its affiliates to contract for goods or services on favorable terms.
- (e) Information relating to competitive interests, the disclosures of which would impair the competitive businesses of the provider of information.

The sensitive nature of this information is such that the documents should be protected from copying, and inspection should be made at ICDC's office in Palm Coast, Florida.

9. To the extent that such information has not been publicly disclosed as required by law, ICDC intends to and treats its financial statements as private and has not disclosed them. The disclosure of its financial statements could cause harm to its business operations, and could put ICDC at a competitive disadvantage. ICDC is currently in a corporate asset disposition phase. Disclosure of this information to the public and thus to potential buyers could result in economic harm to ICDC in its ability to price assets. Potential purchasers could learn from these financial statements, among other things, the amount of financial reserves. Disclosure and knowledge of this financial information would place ICDC at a disadvantage in future sales negotiations.

10. PCUC requests that, in the event a Temporary Protective Order is issued, it include the protections set forth in paragraph 22 herein.

Requests for Production Nos. 46, 47, and 50 (Nonregulated affiliate/third party land and asset transfers).

11. Requests for Production Nos. 46, 47 and 50 are irrelevant and not reasonably calculated to lead to admissible evidence in this case. The requests are for documents concerning the sale of ITT property to an unrelated third party, transactions to which PCUC is not a party.

This request does not appear to be relevant to this proceeding. It appears to be a request for contracts between a non-regulated company and lot purchasers who may or may not become customers of PCUC. Accordingly, OPC's motion to compel production of these documents is denied.

In re: Application of Palm Coast Utility Corporation for increased rates in Flagler County, Docket No. 890277-WS, Order No. 22484, issued 2-1-90. In its final rate order, the Commission rejected OPC attempted to persuade this Commission that affiliate ICDC's land sales practices were relevant to the rate case, stating:

PCUC does not appear to be a party to land sales contracts, none of which are included in the record, since it is neither the buyer or the seller. Further, we do not believe that the land sales practices of ICDC are proper matters for this Commission's consideration. (emphasis added)

In re: Palm Coast Utility Corporation for an increase in water and sewer rates in Flagler County, Florida, Docket No. 890277-WS, Order No. 22843, p. 29, issued 4/23/90. Since PCUC is not a party to the transactions about which OPC requests discovery, discovery should not be allowed.

13. These same requests for production of documents are overly broad and burdensome. Requests Nos. 46 and 47 request all purchase agreements, amendments and supplements, and correspondence between ITT, its affiliates and subsidiaries and Minnesota Power and Light Company and affiliates and/or subsidiaries, concerning the sale of ITT property, land, assets, and land contracts. There are many thousands of pages of information which fall under this discovery request. The legal descriptions alone are many hundreds of pages.

14. Request for Productions Nos. 46 and 47 which requests all correspondence regarding ITT property sales to an unrelated third party, its affiliates and subsidiaries, could contain privileged information. Discovery should not be allowed if a request is overly broad and, as written, may

contain privileged information. E.g., In re: Application for rate increase and increase in service availability charges by SSU, etc., Docket No. 950495-WS, Order No. PSC-95-1318-CFO-WS, issued 10/30/95 (denying OPC's request for production of certain tax information for 1995 and 1996 from certain SSU affiliates, as overly broad and therefore possibly encompassing privileged information. Cites Krypton Broadcasting, infra.)

15. The irrelevance of the requested documents and the burdensomeness of producing said documents far outweighs any perceived benefit of granting discovery. The First District Court of Appeals enunciated the balancing test used when a court decides whether a party should be required to respond to a given discovery request. The Court stated:

The trial court, in deciding whether a party should be required to respond to a given discovery request, should weigh the relevance of the information sought against the burdensomeness of the request. *Wood v. Tallahassee Memorial Regional Medical Center, Inc.*, 593 So.2d 1140 (Fla. 1st DCA 1992), *petition for review denied*, 599 So.2d 1281 (Fla. 1992).

Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathé Communications Co., 629 So.2d 852, 855 (Fla. 1st DCA 1993). Discovery of these request Nos. 46, 47 and 50 should be denied.

16. Finally, Request for Production Nos. 46, 47, and 50, set forth in paragraph 11 above, are or contain confidential proprietary business information. To the best of PCUC's knowledge, none of the documents concerning ITT property transfers have been disclosed, but are and have been treated as confidential. The privacy interests of these nonregulated companies far outweigh any probative value this information could have in this rate case. The contractual information and correspondence involved in contract formation, and appraisals contain competitive contractual terms and conditions that may not be made offered to other parties. Making these terms, conditions, and



related background information containing correspondence and appraisals would undermine ICDC's ability to favorably negotiate in the future. ICDC would therefore be put at a competitive disadvantage in negotiating contracts regarding its assets.

17. If the Commission determines any of the requested information is discoverable, PCUC requests that a temporary protective order be issued pursuant to Section 367.156(3), Fla. Stat., and Rule 25-22.006(5), F.A.C., and that the documents be afforded all protections from disclosure as set forth by rule and statute, as specifically requested in paragraph 22 herein.

Requests for Production Nos. 48, 49, 51, 53 and 56

18. In these requests for production OPC asks for documents (all purchase agreements, amendments, option agreements, correspondence, and any 1993-1996 appraisals and due diligence studies, and estimates on gains or losses on sale) relating to negotiations of a potential sale of Palm Coast Utility Corporation.

Request for Production No. 48

48. Please provide any and all purchase agreements, amendments, and option agreements, entered into between ITT (including any of ITT's subsidiaries or affiliates) and Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates) concerning the sale of Palm Coast Utility Corporation to Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates).

PCUC's response was:

48. Objection. Irrelevant; not reasonably calculated to lead to admissible evidence in this rate case. Confidential proprietary business information.

Request for Production No. 49

49. Please provide all correspondence between ITT (including any of ITT's subsidiaries or affiliates) and Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates) concerning the sale of Palm Coast Utility Corporation to Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates).

PCUC's response was:

49. Objection. Irrelevant; is not reasonably calculated to lead to admissible evidence in this rate case. Confidential proprietary business information and unduly burdensome.

Request for Production No. 51

51. Provide a copy of any appraisals conducted in 1993, 1994, 1995 and 1996 of the Palm Coast Utility Corporation assets which may be sold under the option agreement to Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates).

PCUC's response was:

51. Objection. Irrelevant; not reasonably calculated to lead to admissible evidence in this rate case. Confidential proprietary business information.

Request for Production No. 53

53. Provide a copy of any due diligence studies in ITT's and/or the Company's possession custody or control conducted in 1993, 1994, 1995 and 1996 of the Palm Coast Utility Corporation assets which may be sold under the option agreement to Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates).

PCUC's response was:

53. Objection. Irrelevant; not reasonably calculated to lead to admissible evidence in this rate case. This request may contain privileged information. Confidential proprietary business information.

Request for Production No. 56

56. Provide a copy of calculations or other documents which estimate or attempt to estimate any gains or losses on sale, associated with the potential sale of Palm Coast Utility Corporation's assets to Minnesota Power and Light Company (including any of Minnesota Power and Light Company's subsidiaries or affiliates).

PCUC's response was:

56. Objection. Irrelevant; not reasonably calculated to lead to admissible evidence in this rate case. Confidential proprietary business information; may contain privileged information.

19. PCUC requests that the Commission protect from discovery documents and correspondence relating to the possible future sale of PCUC as irrelevant to this proceeding. Issues relevant to a sale of PCUC are not before the Commission in this proceeding. These discovery requests do not relate to an issue in this rate case. If a transfer proceeds to conclusion, issues relevant to the sale will come before the Commission in a transfer docket. Discovery should not be had concerning issues not before the Commission. E.g., In re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by J.J.'s Mobile Homes, Inc., etc., combined Docket Nos. 921237-WS/940264-WS, Order No. PSC-94-1563-PCO-WS, issued December 15, 1995. J.J.'s Mobile Homes was a certificate amendment case before the Commission. As part of a Motion for Reconsideration, OPC claimed that if, pursuant to an existing contract to purchase the utility, the sale was consummated, discovery was necessary to answer questions before the sale could be approved.

The Commission denied OPC's motion and stated:

In its motion, OPC raised questions about the impact of the purchase of the utility on CDD. Those issues, while relevant to the sale of the utility to the CDD, are not ripe for determination at this point. The sale of the utility to the CDD is not before the Commission in this proceeding. If the sale is completed, it would likely come before the Commission as a transfer application pursuant to Section 367.071(4)(a), Florida Statutes.

Id. See also, Ft. Pierce Utilities Authority v. FPSC, 388 So.2d 1031 (Fla. 1980), where the Florida Supreme Court held that in a proceeding on an application for issuance of securities, the Florida Public Service Commission had no jurisdiction to consider and rule upon a merger of two nonparty corporations which would be made possible by using proceeds from the securities issue. The Court ruled that the Commission had jurisdiction to reserve for a subsequent ratemaking proceeding, issues of valuation and costs which could arise as a result of financing. Likewise, the possible future transfer of PCUC is not ripe for determination in this ratemaking docket, and the Commission has no jurisdiction to consider that issue in this rate case. The information concerning a potential transfer is not reasonably calculated to lead to admissible evidence, and discovery should be denied. PCUC has treated and is treating this information as private and has not disclosed it.

20. Further, the documents or certain documents in discovery requests Nos. 48, 49, 51, 53, and 56, in addition to being irrelevant to the rate case, are proprietary confidential business information pursuant to Section 367.156(3), Florida Statute. PCUC requests that pursuant to Rule 25-22.006(5), F.A.C., a temporary protective order be issued, and that the documents be afforded all protection from disclosure as set forth by rule and statute. Production of the option agreement and correspondence pertaining to ongoing purchase negotiations, agreements and/or transactions could put PCUC and its customers at a disadvantage in affecting favorable transfer terms. Indeed,

the buyer could choose not to exercise the option.

21. The Commission has previously found documents relating to potential sales or purchases of utilities to be confidential proprietary business information. In re: Application for rate increase and increase in service availability charges by SSU, Inc., etc., Docket No. 950495-WS, Order No. PSC-95-1377-CFO-WS, issued Nov. 6, 1995.

22. It is PCUC's position in this motion that discovery of OPC's Requests for Production Nos. 37, 46-51, 53, and 56 should not be had for the reasons set forth herein, and a Protective Order to that effect should be issued. However, if the Commission does rule that any portion of these requests are discoverable, PCUC requests that the Commission issue a Temporary Protective Order as follows:

(a) That due to the sensitive, confidential nature of the documents requested, discovery be viewed only at the offices where the documents are located, at a time mutually convenient to the parties;

(b) That the OPC make a good faith effort to copy only portions of those confidential documents it believes necessary in preparation of its case; and

(c) That this protective order will protect the materials and information from disclosure until OPC completes its review of the materials and information. Once the review is completed, OPC will notify PCUC of the materials and information it intends to use in this docket, and PCUC, in accordance with Rule 25-22.006(5)(a) and (c), F.A.C., will request proprietary confidential treatment of those portions of the materials and information which are, in its opinion, entitled to such treatment. The remainder of any such materials and information which OPC has taken possession of pursuant to this protective order will be returned to PCUC pursuant to Rule 25-

22.006(c), F.A.C.

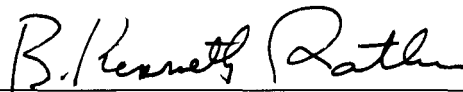
WHEREFORE, PCUC respectfully requests that it be granted a Protective Order ruling:

(1) that discovery on OPC's request for production nos. 37, 46-51, 53, and 56, not be had, or, in the alternative,

(2) in the event the Commission rules any of these documents discoverable, such other alternative or additional protective relief as the Commission may deem appropriate pursuant to Section 367.156(3), Fla. Stat., Rule 25-22.006(5)(c), F.A.C., and Rule 1.280(c), Fla. R. Civ. P., and as set forth herein.

DATED this 17<sup>th</sup> day of May, 1996.

Respectfully submitted,



B. Kenneth Gatlin  
Fla. Bar #0027966  
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1709-D Mahan Drive  
Tallahassee, Florida 32308  
(904) 877-7191

Attorneys for  
PALM COAST UTILITY CORPORATION

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Scott Edmonds, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, Florida 32399-0850, and to Mr. Stephen C. Reilly, Associate Public Counsel, Office of Public Counsel, 111 W. Madison Street, Room 812, Claude Pepper Building, Tallahassee, Florida 32399-1400, on this 17<sup>th</sup> day of May, 1996.

*B. Kenneth Gatlin*

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B. Kenneth Gatlin