

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation.

DOCKET NO. 990696-WS

In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.

DOCKET NO. 992040-WS
ORDER NO. PSC-01-1055-PCO-WS
ISSUED: May 3, 2001

ORDER GRANTING IN PART AND DENYING IN PART INTERCOASTAL UTILITIES, INC.'S MOTION TO ACCEPT PREFILED TESTIMONY, DENYING REQUEST FOR ORAL ARGUMENT, GRANTING ST. JOHNS COUNTY'S MOTION TO ACCEPT ADDITIONAL INTERVENOR TESTIMONY, AND DENYING MOTION FOR CONTINUANCE

Background

On June 1, 1999, Nocatee Utility Corporation (NUC) filed an application for original certificates to provide water and wastewater service to a development located in Duval and St. Johns Counties known as Nocatee. Docket No. 990696-WS was assigned to that application. On June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal) timely filed a protest to NUC's application and requested a formal hearing. By Order No. PSC-99-1764-PCO-WS (Order Establishing Procedure), issued September 9, 1999, controlling dates were established in this docket. On November 23, 1999, NUC and Intercoastal filed a Joint Motion to Revise Schedule and Hearing Dates. That motion was granted by Order No. PSC-99-2428-PCO-WS, issued December 13, 1999, and the controlling dates were changed accordingly.

On December 30, 1999, Intercoastal filed an application requesting an amendment of certificates to provide water and wastewater service in the Nocatee development, to extend its service territory in St. Johns County (County), and for an original certificate for its existing service area. Docket No. 992040-WS was assigned to that application. NUC and its parent company, DDI,

DOCUMENT NUMBER-DATE

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FPSC REGULAR REPORTING

Inc. (DDI), Sawgrass Association, Inc. (Sawgrass), and JEA (formerly known as Jacksonville Electric Authority) timely filed objections to Intercoastal's application and requested a formal hearing. By Order No. PSC-00-0210-PCO-WS, issued February 2, 2000, Dockets Nos. 990696-WS and 992040-WS were consolidated. The County was granted intervention by Order No. PSC-00-0336-PCO-WS, issued February 17, 2000. JEA was granted intervention by Order No. PSC-00-0393-PCO-WS, issued February 23, 2000. The prehearing conference was held on July 12, 2000. The administrative hearing was scheduled for August 16, 17, and 18, 2000.

On July 21 and July 26, 2000, respectively, Intercoastal filed a Motion for Continuance and Supplemental Motion for Continuance, and on July 26, 2000, the County filed its Motion for Continuance. By Order No. PSC-00-1462-PCO-WS (Order Denying Oral Argument, Granting Motions for Continuance, and Order on Prehearing Conference), issued August 11, 2000, another prehearing conference and hearing dates were scheduled for March 28, 2001, and April 4 through 6, 2001, respectively.

On February 23, 2001, the County, JEA, and NUC filed a Joint Motion for Continuance. On February 27, 2001, Intercoastal timely filed its Response in Opposition to Joint Motion for Continuance. By Order No. PSC-01-0543-PCO-WS, issued March 7, 2001, the Joint Motion for Continuance was granted, and the prehearing conference and hearing dates were rescheduled for April 16, 2001, and May 7 through 9, 2001, respectively.

On March 22, 2001, NUC filed a Motion for Leave to File Additional Direct Testimony. The additional direct testimony requested was that of witness Deborah D. Swain. The sole purpose of that testimony was to correct a computational error. On March 29, 2001, Intercoastal timely filed its Response in Opposition to Nocatee's Motion for Leave to File Additional Direct Testimony. By Order No. PSC-01-0932-PCO-WS, issued April 11, 2001, the Motion for Leave to File Additional Direct Testimony was granted, and the parties and staff were given 14 days from the issuance date of the Order to file rebuttal testimony to NUC witness Swain's additional testimony.

Intercoastal's Motion to Accept Prefiled Testimony and Request for Oral Argument

On April 25, 2001, Intercoastal filed a Motion to Accept Prefiled Testimony as Additional Rebuttal or, in the Alternative, Motion to Allow Additional Direct Testimony. Attached to its Motion, Intercoastal provided the Additional Rebuttal Testimony of witnesses H.R. James, Jim L. Bowen, and Michael E. Burton. In a separate pleading filed contemporaneously with the Motion, Intercoastal also requested that oral argument on the Motion be granted.

In support of its Motion, Intercoastal states that the additional testimony it filed should be accepted as rebuttal testimony because it is testimony which is specifically responsive in all respects to witness Swain's alteration of her prior testimony. Intercoastal further states that in the absence of witness Swain's testimony, it would not have sought to have filed the testimony it now seeks to file.

Intercoastal further states that should the Prehearing Officer determine that the testimony is not proper rebuttal, it should be allowed as additional direct testimony. According to Intercoastal, the additional testimony is not a significant alteration to its previous filings, but rather is entirely consistent with its intent and posture throughout the entire case. In support of its request that oral arguments on the Motion be granted, Intercoastal states that by allowing such argument, the Prehearing Officer will be more able to make a fully informed decision.

On April 26, 2001, NUC timely filed its Response in Opposition to Intercoastal's Motion Regarding Additional Testimony. In its Response, NUC states that the additional rebuttal testimony filed by Intercoastal goes beyond the scope of proper rebuttal that was contemplated by the Order that allowed NUC's additional testimony. NUC states that to the extent the testimony exceeds proper rebuttal, it should not be allowed at this late date either as rebuttal testimony or as additional testimony.

NUC further states that witness Burton's testimony contains both proper rebuttal and improper rebuttal testimony, and specifies the lines and pages of witness Burton's testimony that should be

allowed. NUC states that the entirety of both witnesses James and Bowen's testimony is improper rebuttal, and should not be allowed as either rebuttal testimony or as additional testimony. Accordingly, NUC urges the denial of Intercoastal's request to file the additional testimony of witnesses James and Jim L. Bowen, and to allow only the portions of witness Burton's testimony as set out in its Response.

Staff counsel contacted counsel for JEA, Sawgrass, and St. Johns County regarding this matter. Both JEA and Sawgrass indicated that they adopt NUC's position on this matter, and counsel for St. Johns County indicated that it took no position on this matter.

Upon consideration, it appears that the majority of the additional testimony filed by Intercoastal on April 25, 2001, can not be properly categorized as "rebuttal testimony." Order No. PSC-01-0932-PCO-WS allowed the parties to file rebuttal testimony only in response to NUC's witness Swain's additional testimony. The following portions of witness Burton's additional rebuttal testimony appears to be responsive to the additional direct testimony of witness Swain:

- (i) page 1, line 1 through page 2, line 3
- (ii) page 3, line 4 through page 6, line 17
- (iii) page 11, line 5 through page 11, line 6
- (iv) Exhibit MB4-1 to MB4-2

Therefore, Intercoastal's motion is granted as to the portions of witness Burton's testimony set forth above, and denied as to the remainder of witness Burton's testimony and as to the additional testimony of witnesses Bowen and James in their entirety. That proposed testimony is not proper rebuttal because it goes beyond responding to the additional direct testimony filed by witness Swain.

With respect to Intercoastal's alternative request to allow this testimony to be filed as additional direct testimony, Intercoastal has had ample opportunity to have prefiled this testimony long before now, irrespective of witness Swain's additional direct testimony.

Furthermore, because Intercoastal's arguments are adequately contained within its Motion, oral argument is unnecessary. Therefore, Intercoastal's request for oral argument is denied.

St. Johns County's Motion to Accept Additional Intervenor Testimony

On April 30, 2001, the County filed its Motion to Accept Prefiled Testimony as Supplemental Intervenor Testimony or, in the Alternative, Motion to Allow Intervenor Direct Testimony. Attached to its Motion was supplemental intervenor testimony of witness William G. Young with supporting exhibits, and supplemental intervenor testimony of witness Donald E. Maurer with supporting exhibits.

The County states that on April 24, 2001, the Board of County Commissioners of St. Johns County (Board) enacted Resolution 2001-82 which classifies the Nocatee development area in St. Johns County as an Exclusive Service Area (ESA) pursuant to County Ordinance 99-36, the St. Johns County Water and Wastewater Service Area Ordinance. Simultaneous with the adoption of the resolution, the Board also adopted a plan of service for water, wastewater, and reuse. Witnesses Young and Maurer's additional testimony includes Resolution 2001-82 and a plan of service incorporated in, and adopted with, the resolution.

The County states that classification of the Nocatee development as an ESA obligates the County to provide water and wastewater services to the Nocatee development in a timely fashion. The County further states that there is no question that the County's plan of service and the County's official resolution adopting that plan of service are relevant to the issue of need for service in the St. Johns County portion of the Nocatee development. The County states that allowing this testimony will present all of the relevant facts to the Commission and will not harm any party to this case. Furthermore, the County points out that witness Young has already been deposed with respect to the matters contained within this testimony and that all parties have been given copies of the proposed exhibits attached thereto.

On April 30, 2001, NUC timely filed its Response in Opposition to St. Johns County's Motion Regarding Additional Testimony. As grounds therefor, NUC states that the additional testimony the

County seeks to file is both untimely and not relevant to the issues the Commission must decide in this proceeding.

In its Response, NUC requests that if the County's late-filed testimony regarding its new plan of service is accepted, that NUC be permitted to file rebuttal testimony regarding the County's plan of service by the close of business on Thursday, May 3, 2001. Staff counsel contacted counsel for JEA, Sawgrass, and Intercoastal regarding the County's Motion. JEA states that it adopts NUC's position, and both Sawgrass and Intercoastal state that they oppose the Motion.

Upon consideration, it appears that the inclusion of the additional testimony that the County seeks to file is necessary in order for this Commission to have all the facts before it at the hearing with respect to who, if either, of the applicants are best able to serve the area at issue in these dockets, or any portion(s) thereof. Moreover, because the County's resolution was not enacted until April 24, 2001, the County could not have prefiled this testimony until now.

For the foregoing reasons, the County's Motion to Accept Additional Intervenor Testimony is granted. The parties and staff shall have until the close of business on May 3, 2001, in which to file rebuttal to this testimony.

St. Johns County's Motion for Continuance

On April 30, 2001, the County filed a Motion for Continuance. In support of its Motion, the County again states that on April 24, 2001, the Board enacted Resolution 2001-82 which classifies the Nocatee development area in St. Johns County as an ESA pursuant to County Ordinance 99-36. Also on April 24, 2001, the Board voted to set the purchase of Intercoastal for a Chapter 125, Florida Statutes, public hearing to be held in the first week of June, 2001.

The County acknowledges that two continuances have already been granted in this docket at its request in association with either JEA/NUC or Intercoastal. The County further acknowledges that these continuances were granted, in part, because of the County's potential purchase of Intercoastal, which was already

rejected once by the Board at a Chapter 125 public hearing in August of 2000. The County goes on to state, however, that all of the reasons upon which the prior decisions to grant continuances were based twice before are still compelling in this instance.

In its Motion, the County states that counsel for the County contacted counsel for the other parties to this docket regarding its Motion and that counsel for Intercoastal and Sawgrass both were undecided on this issue, and NUC and JEA oppose the Motion. However, staff counsel contacted counsel for the other parties, and counsel for both Intercoastal and Sawgrass stated that they joined NUC and JEA in opposing the Motion.

On April 30, 2001, NUC timely filed its Response in Opposition to St. Johns County's Motion for Continuance. As grounds therefor, NUC states that the resolution adopted by the County on April 24, 2001, and the vote to schedule another public hearing in the first week of June, 2001, on another proposed acquisition of Intercoastal are not sufficient grounds upon which to grant a third continuance in this matter. NUC states that since both Intercoastal and the County oppose the granting of a certificate to NUC, the acquisition of one by the other should not make any change that is relevant to NUC's certificate application.

I find it unnecessary to continue the hearing in order to allow the County to prefile its additional intervenor testimony. Moreover, the potential purchase of Intercoastal by the County does not, in and of itself, warrant a third continuance of the hearing in this matter. Therefore, the County's Motion for Continuance is denied.

Based on the foregoing, it is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Intercoastal Utilities, Inc.'s Motion to Accept Prefiled Testimony as Additional Rebuttal or, in the Alternative, Motion to Allow Additional Direct Testimony is granted in part and denied in part, as set out in the body of this Order. It is further


ORDERED that Intercoastal Utilities Inc.'s Request for Oral Argument is denied. It is further

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ORDERED that St. Johns County's Motion to Accept Prefiled Testimony as Supplemental Intervenor Testimony, or in the Alternative, Motion to Allow Intervenor Direct Testimony is granted. Parties and staff shall have until the close of business on Thursday, May 3, 2001, in which to file rebuttal to this testimony. It is further

ORDERED that St. Johns County's Motion for Continuance is denied.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 3rd day of May, 2001.



J. TERRY DEASON
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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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 25-22.0376, 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.