

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-01-1533-PCO-WS  
ISSUED: July 24, 2001

ORDER DENYING NOCATEE UTILITY CORPORATION'S MOTION TO STRIKE

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. 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, 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

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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. A 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. 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's additional testimony.

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. On April 26, 2001, NUC timely filed its Response in Opposition to Intercoastal's Motion Regarding Additional Testimony. By Order No. PSC-01-1055-PCO-WS (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), issued May 3, 2001, Intercoastal's motion was granted

in part and denied in part, allowing portions of Intercoastal's additional rebuttal testimony.

On Friday, May 4, 2001, the County filed its Notice of Withdrawal from these proceedings. Also on May 4, 2001, Intercoastal informed the parties and staff by telephone that Intercoastal's primary witness, Mr. M.L. Forrester, had suffered a medical emergency the previous evening, and was expected to remain hospitalized for several weeks. Intercoastal informed the parties that because Mr. Forrester was a crucial witness to Intercoastal, and because it would be impossible for Mr. Forrester to attend and testify at the hearing, Intercoastal intended to seek a continuance in this matter.

Motion for Continuance

Due to the sudden nature of Mr. Forrester's medical emergency, and because the hearing was scheduled to commence the following Monday in St. Augustine, Florida, Intercoastal did not file a motion for continuance, but rather requested that a conference call with the parties and the Prehearing Officer take place on that same day in order for Intercoastal to make an oral motion for continuance. Rather than hear the motion via conference call, the Prehearing Officer informed Intercoastal and the parties that the motion would be heard and ruled upon as a preliminary matter at the hearing.

On Monday, May 7, 2001, the hearing in this matter commenced as scheduled before the full Commission in St. Augustine, Florida. Intercoastal made its oral motion for a continuance during the preliminary matters portion of the hearing. In support of its request for a continuance, Intercoastal described the medical emergency of its witness, M.L. Forrester, who at the time remained hospitalized, and was unable to attend the hearing. Intercoastal stated that because Mr. Forrester had provided over half of Intercoastal's testimony in this matter, and would obviously be unable to testify, it would be prejudicial to Intercoastal to proceed with the hearing. Intercoastal also stated that due to Mr. Forrester's years of experience and knowledge in the field, he had been an integral part of Intercoastal's strategy, and without his presence the weekend prior to and during the hearing, Intercoastal

was without the benefit of Mr. Forrester's assistance throughout the hearing.

The parties were given the opportunity to respond to Intercoastal's request to continue the hearing, and both NUC and JEA indicated that they were opposed to a continuance in the matter. Sawgrass indicated that it took no strong position on either side of the issue. NUC suggested that an alternative to a continuance would be for the parties to stipulate to the prefiled testimony of Mr. Forrester, and enter the deposition of Mr. Forrester into the record in lieu of cross-examination of the parties. Both JEA and Sawgrass indicated that they would not be opposed to the alternative offered by NUC, and JEA and Sawgrass also stated that they would agree to waive cross-examination of Mr. Forrester.

In response to the alternative offered by NUC, Intercoastal expressed a concern that if Mr. Forrester's deposition was entered in the record in lieu of cross-examination, Intercoastal would not have the opportunity for redirect questioning of Mr. Forrester. In addition, Intercoastal pointed to the fact that the deposition of Mr. Forrester was extremely lengthy and also contained extraneous and inadmissible testimony that would otherwise be considered outside the scope for purposes of the hearing. Intercoastal further reiterated its concerns that the absence of Mr. Forrester hindered Intercoastal in its preparation and assistance during the hearing.

In response to the concerns voiced by Intercoastal, a suggestion was made that Intercoastal be allowed to go through the deposition of Mr. Forrester and redact the portions that Intercoastal deemed inappropriate. It was further suggested that Intercoastal be given the opportunity to file written redirect questioning to portions of Mr. Forrester's deposition.

Upon consideration of the discussion following Intercoastal's oral motion for continuance, the motion for continuance was denied with the understanding that the deposition of Mr. Forrester would be entered into the record with the appropriate portions redacted, and Intercoastal would be allowed to file written redirect testimony of Mr. Forrester.

NUC's Motion to Strike

On May 22, 2001, pursuant to the ruling made at the hearing on Intercoastal's oral Motion for Continuance on May 7, 2001, written redirect testimony was filed by Intercoastal on behalf of M.L. Forrester. On May 30, 2001, NUC timely filed its Motion to Strike portions of the redirect testimony of Mr. Forrester. In support of its motion, NUC states that there are two categories of objectionable material contained in Mr. Forrester's written redirect testimony filed by Intercoastal.

The first category of material NUC states is objectionable consists of portions of two answers which refer to a commitment by Intercoastal to reduce its rates if a certificate is granted. In its Motion to Strike, NUC sets out the text of the objectionable material in strike out mode. NUC states that the subject of this material is the same as the subject of the prefiled testimony that was submitted by Intercoastal on April 25, 2001 in its Motion to Accept Prefiled Testimony as Supplemental Intervenor Testimony, or in the Alternative, Motion to Allow Intervenor Direct Testimony, and which was denied by Order No. PSC-01-1055-PCO-WS, issued May 3, 2000.

NUC further states that at the outset of the hearing in this matter, Intercoastal moved to reconsider the aforementioned ruling, and the Commission unanimously ruled not to reconsider the ruling which excluded that testimony. NUC states that Intercoastal also attempted to elicit live testimony on the same subject during its redirect examination of its witness, Mr. James, and that on objection by NUC, it was ruled that the testimony on the topic was to be excluded.

NUC argues that the current written redirect testimony of Mr. Forrester is another attempt by Intercoastal to introduce testimony on this subject, and in order to be consistent with the Commission's prior rulings, this testimony must now be stricken from the record.

The second category of material that NUC states is objectionable is a question and answer related to JEA's Consumptive Use Permit. As with the first category of objectionable material, NUC has set out the text of the objectionable material in strike

out mode. NUC states that the question and answer relating to JEA's Consumptive Use Permit shows within its four corners of the answer that Mr. Forrester is not competent to testify on this subject. NUC states that Mr. Forrester begins the answer by candidly stating that he has not reviewed JEA's Consumptive Use Permits and then proceeds to describe the legal effect of permits which he admits he has not reviewed. NUC states that this portion of Mr. Forrester's answer should be stricken from the record because it is not proper testimony from a witness who has disclaimed any first hand knowledge of the facts at issue.

#### Intercoastal's Response

On June 6, 2001, Intercoastal timely filed its Response in Opposition to Nocatee Utility Corporation's Motion to Strike. In support of its position, Intercoastal states that the redirect testimony to which NUC objects is wholly and properly responsive to matters raised by NUC during cross-examination. In its response, Intercoastal cites to *Harmon v. State*, 527 So. 2d 182 (Fla. 1988), *Tompkins v. State*, 502 So. 2d 415, 419 (Fla. 1986), and *Ramirez v. State*, 739 So. 2d 568, 579-80 (Fla. 1999), in support its contention that the subject of the redirect testimony of Mr. Forrester is admissible because it is in response to, and was the subject of cross-examination questions during the course of Mr. Forrester's deposition.

With respect to the portions of the testimony in response to questions regarding Intercoastal's rates, Intercoastal states that the Order cited in NUC's Motion to Strike disallowed portions of rebuttal testimony, and not responses given in redirect examination. The redirect testimony of Mr. Forrester is in response to cross-examination testimony elicited from him during his deposition, and the testimony that was the subject of the Commission's Order was rebuttal testimony that was offered to rebut testimony given by NUC witness Deborah Swain.

Intercoastal further states that because the parties agreed to utilize Mr. Forrester's deposition in lieu of his live cross-examination at the hearing, and because during that deposition NUC asked Mr. Forrester questions about Intercoastal's rates, NUC has essentially "opened the door" to redirect testimony which responds to cross-examination questions that addressed Intercoastal's rate

position. Intercoastal argues that because redirect testimony is different from rebuttal testimony in that redirect testimony responds directly to cross-examination questioning while rebuttal testimony is offered in response to testimony from another party, Mr. Forrester's written redirect testimony may permissibly respond to cross-examination questions asked directly of him about Intercoastal's future rates.

As to the ruling made by the Commission at the hearing that testimony on redirect examination of Mr. James could not address the Intercoastal commitment from its shareholders to reduce rates to below the rates of NUC's if Intercoastal's application is granted, Intercoastal states that the particular ruling was in response to redirect that was solicited to questions from a Commissioner, and not from redirect of cross-examination questions raised by Intercoastal.

Further, Intercoastal states that it would not be inconsistent with the Commission's prior rulings to now deny NUC's Motion to Strike and allow Mr. Forrester's redirect testimony on the topic of Intercoastal's future rates. Intercoastal asserts that Mr. Forrester's redirect testimony is within the scope of his cross-examination at his deposition, and is now properly expanding upon and modifying those responses through redirect examination.

As to the redirect testimony of Mr. Forrester which pertains to testimony offered at the hearing about JEA's Consumptive Use Permit, Intercoastal states that while NUC's objection is based on Mr. Forrester's admission that he has not reviewed the permits themselves, Mr. Forrester has made no pretense otherwise that he has not reviewed JEA's Consumptive Use Permits. Furthermore, Mr. Forrester's redirect testimony simply comments upon the testimony by a witness from the St. John's River Water Management District, and not on the legal effect of the permits themselves.

Intercoastal states that it was Mr. Forrester's unavoidable absence at the hearing that necessitated the alternative method of entering Mr. Forrester's deposition as his cross-examination as though read and sworn. The submission of written redirect testimony in response to that cross-examination, also as though read and sworn, was to ensure that Mr. Forrester's testimony would

be accurately and fairly entered into the record without undue prejudice to Intercoastal.

Further, according to Intercoastal, because Mr. Forrester is fully apprised of the testimony which took place at the hearing, it is permissible for him to now comment on that testimony during his redirect examination. Intercoastal states that to force Mr. Forrester to limit his answers on redirect strictly to matters which took place prior to the hearing, and to exclude from his testimony matters which took place at the hearing would further handicap his testimony and subject Intercoastal to additional disadvantage in this proceeding.

Intercoastal states that Mr. Forrester should not be forced to give up his ability to assess the testimony of other witnesses involved in this proceeding simply because he was not able to see them testify live. Further, the fact that Mr. Forrester has not reviewed JEA's Consumptive Use Permit is irrelevant to his ability to comment on the testimony of a witness who has significant knowledge of the effect of those permits. Thus, Intercoastal states that Mr. Forrester's redirect testimony is permissible and fully responsive to cross-examination testimony concerning the permits, and requests that NUC's Motion to Strike be denied in its entirety.

#### Rulings

With respect to the portions of Mr. Forrester's written redirect testimony that include the two answers which refer to Intercoastal's rates, I find that Mr. Forrester's written redirect testimony is properly within the scope of the deposition testimony, and shall not be stricken.

With respect to the portion of Mr. Forrester's written redirect testimony that includes the question and answer relating to JEA's Consumptive Use Permit, I find that this testimony is proper in that it contains commentary on another witness' testimony during the hearing. This testimony shall not be stricken and shall be given the weight the Commission deems appropriate.

Accordingly, NUC's Motion to Strike is denied. The portions of Mr. Forrester's written redirect testimony set out in NUC's




motion in strike-out mode shall not be stricken, and shall be included in the record.

Based on the foregoing, it is therefore,

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Nocatee Utility Corporation's Motion to Strike is denied in its entirety, as set forth in the body of this order.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 24th day of July, 2001.

  
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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.