

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-01-1623-PCO-WS
ISSUED: August 8, 2001

ORDER DENYING MOTION TO SUPPLEMENT THE RECORD

On July 31, 2001, Intercoastal Utilities, Inc. (Intercoastal) filed a Motion to Supplement the Record. In its motion, Intercoastal states that relevant information which supplements the facts set forth at the final hearing has developed since the close of evidence in these proceedings. Attached to its motion is a newspaper article dated June 29, 2001. Intercoastal requests that the Commission supplement the record in these proceedings with the newspaper article.

Intercoastal cites to In re: Application for certificate to provide alternative local exchange telecommunications service by BellSouth BSE, Inc., Order No. PSC-98-1165-FOF-TX, issued August 27, 1998, in Docket No. 971056-TX and Wilson v. Johnson, 41 So. 2d 395 (1906), for the proposition that a party does not have a right to present evidence after the record is closed, but the Commission may reopen the record and permit a party to supplement it with further evidence. Intercoastal states that pursuant to Order No. PSC-98-1165-FOF-TX, relevancy is required for admitting supplemental evidence into the record and that the information contained in the newspaper article is relevant to these proceedings.

Intercoastal admits that the newspaper article is "probably hearsay evidence." Nevertheless, Intercoastal asserts that hearsay evidence may be used in administrative proceedings pursuant to

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Section 120.57(1)(c), Florida Statutes, for the purpose of supplementing or explaining other evidence and that the Commission has allowed hearsay evidence to supplement or explain non-hearsay testimony. Intercoastal asserts that the newspaper article is being offered to supplement the evidence presented at the hearing which addressed the timing and the need for service of the Nocatee project.

On August 1, 2001, Nocatee Utility Corporation (NUC) filed its Response in Opposition to Intercoastal's Motion to Supplement the Record. In its response, NUC states that the article is only marginally relevant to the issues in these proceedings and that the record already contains evidence of challenges to the Department of Community Affairs' (DCA) proposed decision to approve the comprehensive plan changes. NUC contends that "the article adds nothing but speculation as to potential time frames for resolving those challenges."

NUC further states that the article constitutes double hearsay because it is an out-of-court statement of a newspaper reporter containing hearsay statements attributed to a number of different people. NUC states that none of the individuals identified in the article have testified in these proceedings and they are not available for discovery or cross-examination at this time.

NUC also argues that the issue of whether the Commission should defer its decision on the applications based on the challenges to the DCA's proposed decision is already before the Commission. NUC states that the "hearsay statements and speculation by several different individuals about the potential impacts of these challenges on the timing of the development has no probative value."

NUC asserts that the authority cited by Intercoastal does not support granting the motion. NUC states that the Commission denied a motion to supplement testimony in Order No. PSC-98-1165-FOF-TX and the court upheld a continuance of a hearing for a witness who had transportation problems in Wilson. Furthermore, NUC states that it found two cases in which the Commission allowed the record to be supplemented. Order No. PSC-95-9735-PCO-WS, issued June 20, 1995, in Docket No. 921237-WS, involved an exhibit that was identified at the hearing but was inadvertently not moved into the

record; and Order No. PSC-95-1391-FOF-TL, issued November 8, 1995, in Docket No. 920260-TL, involved a deposition introduced at the hearing which was inadvertently missing a late-filed deposition exhibit.

NUC states that the Commission's rules and the Uniform Rules of Procedure do not contemplate reopening the record to admit this type of information and that the Prehearing Order issued in these dockets set forth the post-hearing procedures to be followed. NUC also states that Intercoastal waited until thirty-two days after the article was published to file its motion and that this "unexplained delay justifies denying the motion on timeliness grounds alone."

Staff counsel contacted counsel for JEA and Sawgrass Association, Inc. (Sawgrass). Both JEA and Sawgrass stated that they oppose Intercoastal's motion.

In In re: Petition of General Telephone Company of Florida to increase certain rates and charges, Order No. 9192, issued December 27, 1979, in Docket No. 790084-TP, the Commission denied a party's motion to supplement the record with a newspaper article on the basis that the article was hearsay, immaterial, and cumulative of testimony previously presented for consideration. The Commission also determined in that order that at some point the record in the case must close. Id. at 26; see also Florida Bridge Company v. Bevis, 363 So. 2d 799 (Fla. 1978) (stating that the Commission has the discretion to terminate its data-gathering function).

The newspaper article at issue has not been subject to cross-examination or other evidentiary evaluation. Moreover, as even Intercoastal admits, the article is hearsay evidence. While it is correct that pursuant to Section 120.57(1), Florida Statutes, hearsay evidence may be allowed to supplement or explain other evidence, this newspaper article goes beyond mere supplementation or explanation of other evidence of record. Among other things, the article states that certain challenges to St. Johns County's approval of the Nocatee development order could delay construction of the project until 2004. Although the impacts of such challenges on the timing of the development were addressed at the hearing, the record does not contain evidence to show that such challenges would delay the project for that length of time. Further, as NUC

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states, the newspaper article appears to be nothing more than speculation as to the impact of those challenges on the timing of the Nocatee development.

Upon consideration, there appears to be no compelling reason to supplement the record with this newspaper article. Accordingly, Intercoastal's Motion to Supplement the Record is hereby denied.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Intercoastal Utilities, Inc.'s Motion to Supplement the Record is hereby denied.

By ORDER of Commissioner J. Terry Deason as Prehearing Officer, this 8th day of August, 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.

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 the Commission Clerk and Administrative Services, 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.