

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate ) DOCKET NO. 951056-WS  
increase in Flagler County by ) ORDER NO. PSC-96-0822-PCO-WS  
Palm Coast Utility Corporation ) ISSUED: June 25, 1996  
)

ORDER ON PCUC'S SECOND MOTION FOR PROTECTIVE ORDER AND  
OPC'S SECOND MOTION TO COMPEL AND  
PCUC'S REQUEST FOR ORAL ARGUMENT

On May 17, 1996, Palm Coast Utility Corporation (PCUC or utility) filed its Second Motion for Protective Order pursuant to 25-22.006(5)(a) and (c), Florida Administrative Code. On May 24, 1996, the Office of Public Counsel (OPC or Citizens) filed Citizens' Second Motion to Compel. On June 3, 1996, PCUC filed a timely Response to OPC's Second Motion to Compel. PCUC also requested Oral Argument on its Response to Citizens' Motion to Compel. In its second motion for Protective Order, PCUC requests that discovery not be had on OPC's Document Request Nos. 36, 37, 46, 51, 53 and 56. Alternatively, PCUC seeks a Temporary Protective Order pursuant to Section 367.156, Florida Statutes, for any responses ruled discoverable. As announced at the Prehearing Conference on June 20, 1996, utility's request for oral argument is denied as unnecessary for the resolution of the issues raised.

OPC's Motion to Compel seeks to compel production of Document Request Nos. 37, 48, 49, 51, 53 and 56, and Interrogatory Nos. 45, 47, 51, 52. This order does not address Interrogatory No. 45 as all issues regarding that request have been resolved.

Document Request No. 36

By Document Request No. 36, OPC requests the following:

36. Provide a copy of all agreements between ICDC and the Company.

PCUC states that it provided all agreements, except Developer Agreements. With regard to the Developer Agreements, it objects to providing copies of over 20 years of agreements as voluminous and burdensome to copy. PCUC, however, states that it would make the Agreements available for inspection at its office.

OPC does not take issue with PCUC's objection to providing the Developer Agreements. Instead, it contends that PCUC provided two agreements, but failed to include Exhibits A, B, and C, which were part of the first Agreement. PCUC has provided Exhibits A and B, but could not locate Exhibit C.

DOCUMENT NUMBER-DATE

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PCUC is hereby directed to conduct a good faith search to locate this document. If, after a good faith search, Exhibit C is still not found, PCUC shall so state in writing, no later than June 28, 1996, the reasonable efforts made to locate Exhibit C.

Document Request No. 37

By Document Request No. 37, OPC requests the following:

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 objects to the production of the requested financial statements of its unregulated affiliate, ICDC, on the grounds that they are irrelevant, not reasonably calculated to admissible evidence, and not in its possession, custody or control.

OPC's Motion to Compel states that the material requested is relevant because ICDC collects CIAC for the utility, and provides PCUC with guaranteed revenue for non-used and useful assessments.

I find that the information requested in Document Request No. 37 is reasonably calculated to lead to admissible evidence. Further, I find that PCUC is in possession, custody or control of the documents within the meaning of Rule 1.280(b), Florida Rules of Civil Procedure. However, those documents which PCUC alleges contain proprietary confidential business information shall be protected by a Temporary Protective Order. Such documents shall be kept confidential and exempt from public disclosure under Section 119.07(1), Florida Statutes, for the duration of this Temporary Protective Order.

PCUC shall, in accordance with the provisions of Rule 25-22.006(6)(a), Florida Administrative Code, apply for confidential treatment of those portions of the materials and information which are, in its opinion, entitled to such treatment within fourteen days of notification that OPC has identified the documents or information it will use at the final hearing. This Temporary Protective Order shall remain in effect no longer than eighteen months. However, once OPC determines which information it intends to use and notifies PCUC, PCUC shall have fourteen days to apply for a permanent protective order and this temporary protective order will no longer be in effect fourteen days after such notice.

Further, OPC shall return to PCUC, all materials and information that it does not intend to use in this proceeding. The expiration date of this Order shall be void upon the issuance of an order finding that the information and materials herein are not proprietary and confidential business information. This Order shall have no effect on the subsequent determination of any request for specified confidential classification of any of these materials and information. PCUC shall provide the documents at the Office of Public Counsel.

Document Request Nos. 46, 47, and 50

Through Document Requests Nos. 46, 47, and 50, OPC requested documents concerning the sale of ITT property to Minnesota Power and Light Company, an unrelated 3rd party. PCUC seeks protection from discovery because the information sought is irrelevant and not reasonably calculated to lead to admissible evidence. OPC does not seek to compel production of these documents, therefore, a ruling on PCUC's Motion for Protective Order is unnecessary.

Document Request Nos. 48, 49, 51, 53, and 56

By Document Request Nos. 48, 49, 51, 53, and 56, OPC requests the following:

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).

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).

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).

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).

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 objects to the production of this information on the grounds that the information is irrelevant and is not reasonably calculated to lead to admissible evidence in this rate case. PCUC argues that the possible future sale of PCUC is irrelevant because it is not ripe for determination in this ratemaking docket.

OPC states that discovery of all documents detailing the Option Agreement which PCUC has already entered into with an affiliate of Minnesota Power and Light is relevant and appropriate for discovery. It contends that PCUC was required to file this rate case as a condition precedent to the sale of PCUC to a Southern States Utility surrogate and that the purchase price is to be a percentage of the rate base awarded by this Commission in this rate case. Therefore, OPC contends that the documents are relevant and reasonably calculated to lead to the discovery of admissible evidence to be used in this rate case.

Although OPC is correct in stating that rates are set on a going forward basis, the rates are not calculated based on possible events that may occur beyond the test year. Section 367.081, Florida Statutes, directs the Commission to consider "the prudent

costs of providing service during the period of time rates will be in effect" and also contemplates inclusion in rate base of land or facilities which will be dedicated to public use within 24 months from the test year period. The statute does not contemplate setting rates based on speculative or anticipated sales or transfers of the entire utility some time beyond the test year period. As noted by PCUC, the issues raised by OPC regarding the sale will be ripe for discovery when approval of the transfer or sale is before the Commission. Therefore, PCUC's Motion for Protective Order as to production of Documents Requests Nos. 48, 49, 51, 53, and 56 is granted. OPC's Motion to Compel production of these documents is denied.

Interrogatory No. 47

By Interrogatory No. 47, OPC requests the following information:

47. For the guaranteed revenue received by the Company from 1975 forward, please itemize how the amount charged to each entity was developed.

PCUC responded that the guaranteed revenue for each entity was determined in accordance with the terms in the specified tariffs. OPC does not believe this answer is responsive, and stated that in asking the utility to itemize how the amounts of guaranteed revenues were charged to each entity, it was attempting to discover the dollar amounts of guaranteed revenues charged and collected, by component, (i.e., depreciation, real estate taxes, operating and maintenance expenses, return on investment, administrative) from each entity.

In its response, PCUC stated that it would file a Supplemental Response objecting to providing information prior to the test year, as irrelevant and not reasonably calculated to lead to admissible evidence. PCUC states that since guaranteed revenues are for non-used and useful purposes, such revenues have no relevancy for the determination of the required revenue for used and useful property. However, PCUC states that it would provide, and has since provided, the amount of guaranteed revenues for the test years 1994 and 1995.

Upon reviewing the discovery request and PCUC's objection, it appears that some of the information sought by OPC is reasonably calculated to lead to the discovery of admissible evidence on the issues involving the rate base of this utility. However, producing the requested documents from 1975 forward appears burdensome and not calculated to lead to the discovery of relevant information.

Accordingly, PCUC shall provide the information requested from the year of the last rate case, 1989, forward. These documents shall be produced no later than June 28, 1996.

Interrogatory No. 51

By Interrogatory No. 51, OPC requests the following information:

51. Please explain how the .25 percent contractual service charge rate for administrative services provided by ITT to the Company was determined. State the amount charged to each other affiliate and subsidiary of ITT.

PCUC's response:

51. For the Company see Volume III of Minimum Filing Requirements Docket No. 951056-WS Section titled "Costs Charged or Allocated by Parent or Affiliate" Item No. 1 of Page 2 of 3, dated February 7, 1996, Summary of Information. Provided in Compliance with 25-30.436(4)(h). As to other ITT Units, the Company objects to this interrogatory as not relevant to this proceeding, nor reasonably calculated to lead to admissible evidence.

OPC argues that the section cited in the Minimum Filing Requirements is not responsive because it does not explain how the .25 percent figure for contractual services was determined. Further, OPC states that the information requested as to the other affiliates is relevant because ITT would have an incentive to charge more to regulated operations than to non-regulated operations.

In its response, PCUC states that with regard to the request to explain the .25 percent contractual service charge, it has answered the question, and that there is no other response to the question. As to the amount charged by ITT to each other affiliate and subsidiary of ITT for administrative services, PCUC argues that this information is not reasonably calculated to lead to admissible evidence because the reasonableness of such a charge depends, not on how the charge compares to other entities, but on whether the transaction exceeds the going market rate for such services or is otherwise inherently unfair. PCUC relies on GTE Florida, Inc. v.

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Deason, 642 So. 2d 545, 547-48 (Fla. 1994); on remand, GTE Florida Inc. v. Clark, 668 So. 2d 971 (Fla. 1996) for this proposition.

PCUC's argument is basically that the GTE v. Deason standard precludes an inquiry into how administrative service charges by affiliates are determined, as long as the charges do not exceed the going market rate. I disagree. That argument ignores the fact that the standard also requires inquiry into whether the charges are inherently unfair. To establish whether or not inherent unfairness exists, an inquiry into how the charges are determined is necessary. Therefore, it appears that the information requested is relevant and reasonably calculated to lead to admissible evidence. Accordingly, PCUC shall provide the information requested in Interrogatory No. 51.

Interrogatory No. 52

By Interrogatory No. 52, OPC requests the following information:

52. For each of the years 1994 and 1995, please provide the number of employees employed by ITT, each of ITT's affiliates, and each of ITT's subsidiaries.

PCUC served discovery in response to this interrogatory with respect to its own employees, but objected to providing the information for its affiliates as irrelevant and not within the possession, custody or control of PCUC.

In its Motion to Compel, OPC argues that the information concerning ITT and its affiliates is relevant to the issue of reasonableness of charges from ITT and the ITT Community Development Corporation (ICDC) to the utility. Further, OPC argues that the information is in the control of the utility because it is in the possession and control of its parent company.

In its response to the Motion to Compel, PCUC argues that the number of employees of ITT, affiliates and subsidiaries, has no bearing on the reasonableness of any administrative charges to PCUC. PCUC again relies on GTE v. Deason, supra, to support this argument. However, as discussed above under Interrogatory No. 51, I find that the requested information is relevant to the reasonableness of the charges, and therefore, reasonably calculated to lead to admissible evidence. Further, I find that this information is not beyond the control of PCUC to produce. Accordingly, OPC's Motion to Compel discovery on Interrogatory No. 52 is granted. Discovery shall be served no later than June 28, 1996.

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Based on the following, it is

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that Palm Coast Utility Corporation's Request for Oral Argument on its Response to Citizens' Second Motion to Compel is denied. It is further

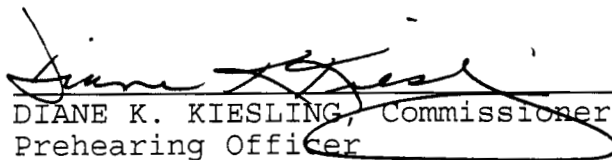
ORDERED that Citizens' Second Motion to Compel is granted in part and Palm Coast Utility Corporation is hereby directed to provide the information requested in Document Request Nos. 36 and 37 and Interrogatory Nos. 47, 51, and 52 to the extent set out in the body of this Order. Compelled discovery shall be filed no later than June 28, 1996. It is further

ORDERED that Citizens' Second Motion to Compel is denied in part with respect to Document Request Nos. 48, 49, 51, 53, and 56. It is further

ORDERED that all documents or information received by the Office of Public Counsel from Palm Coast Utility Corporation in response to Public Counsel's Document Request No. 37 shall be treated as confidential business information protected by a temporary protective order as set out in the body of this order. It is further

ORDERED that Palm Coast Utility Corporation's Second Motion for Protective Order is granted with respect to Document Request Nos. 48, 49, 51, 53, and 56, and denied with respect to Document Request No. 37.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 25th day of June, 1996.

  
DIANE K. KIESLING, Commissioner and  
Prehearing Officer

( S E A L )

DCW



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 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.

MEMORANDUM

**RECEIVED**  
JUN 25 1996

JUNE 25, 1996

255/r  
FPSC-RECORDS/REPORTING

TO: DIVISION OF RECORDS AND REPORTING  
FROM: DIVISION OF LEGAL SERVICES (CYRUS-WILLIAMS) *aw*  
RE: DOCKET NO. 951056-WS - Application for rate increase in  
Flagler County by Palm Coast Utility Corporation *JAS*

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Attached is an ORDER ON PCUC'S SECOND MOTION FOR PROTECTIVE ORDER AND OPC'S SECOND MOTION TO COMPEL AND PCUC'S REQUEST FOR ORAL ARGUMENT, to be issued in the above-referenced docket. (Number of pages in Order - 11)

*Please issue this order today.  
(6/25/96)*

*Thank You!*

DCW/dp

Attachment

**MUST GO TODAY**

cc: Division of Water and Wastewater (Willis, Crouch, Merchant, Moniz, Rendell, Starling, Washington)

I: PCUC.DCW

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