

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. ~~95-1058-WS~~  
Filed: May 1, 1996

ORIGINAL  
FILE COPY

PALM COAST UTILITY CORPORATION'S  
MOTION FOR TEMPORARY PROTECTIVE ORDER  
AND FOR PROTECTIVE ORDER

Palm Coast Utility Corporation (PCUC) requests, pursuant to Section 367.156, Florida Statutes, and Rule 25-22.006(5)(a) and (c), Florida Administrative Code, that the Florida Public Service Commission issue a temporary protective order and protective order in this docket, for certain documents requested by the Office of Public Counsel (OPC), and as grounds states as follows:

1. OPC served Citizens' First Set of Requests for Production of Documents to Palm Coast Utility Corporation (hereinafter referred to as document request) by hand-delivery to PCUC on April 1, 1996. PCUC served its Response to Citizens' First 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 1, 1996. This motion relates to certain documents requested by OPC in its document request.

Request for Temporary Protective Order

- ACK ✓
- AFA 2
- APP 1
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 1
- LIN 3
- OPC \_\_\_\_\_
- RON \_\_\_\_\_
- SEC 1
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

2. PCUC requests a temporary protective order exempting a document from Section 119.07(1), F.S., and granting other protections pursuant to Rule 25-22.006(5)(c), F.A.C. The document for which a temporary protective order is sought is intended to be and is treated by PCUC as private and has not been disclosed.

3. Request for Production No. 4 asks PCUC to:
  4. Provide a complete copy of the Company's internal accounting manuals and chart of accounts.

PCUC's Response to Request for Production states as follows:

For chart of accounts, See Attachment 4.

The Company maintains its books and records in accordance with GAAP and the NARUC system of accounts. Objection to production of these books, as unduly burdensome to the utility, readily available and likely already in the possession of OPC.

In addition, ITT has issued the document "Finance Policies" to all its subsidiaries.

These publications and pronouncements taken as a whole constitute the Company's accounting procedures and practices.

Inspection of "Finance Policies" will be allowed at the offices of PCUC located at 2 Utility Drive, Palm Coast, Florida, 32037 at a time mutually convenient to the parties. Objection to inspection outside PCUC's office and to copying any portions of this document pending ruling on PCUC's Motion for Temporary Protective Order, on the basis that the document is proprietary confidential business information, as further set forth in PCUC's Motion for Temporary Protective Order and for Protective Order.

3. Section 367.156(2), Fla. Stat., states, in part:

Upon showing by a utility or other person and a finding by the commission that discovery will require disclosure of proprietary confidential business information, the commission shall issue appropriate protective orders designating the manner for handling such information during the course of the proceeding and for protecting such information from disclosure outside the proceeding.

This Commission has ruled that the correct time to request protection from copying of material produced is in a motion for protective order. In re: Application for rate increase and service

availability charges by SSU, etc., Docket No. 950495-WS, Order No. PSC-95-1504-PCO-WS, issued 10/5/95.

ITT's "Finance Policies" Manual is proprietary confidential business information pursuant to Section 367.156(3):

(a) Trade secrets.

\* \* \*

(e) Information relating to competitive interests, the disclosure of which would impair the competitive businesses of the provider of information.

4. "Trade secret" is further defined by Sections 688.002(4) and 812.081(1)(c), Florida Statutes. Section 688.002, Fla. Stat., states:

(4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Chapter 812, Florida Statutes, addresses Theft, Robbery, and Related Crimes. Section 812.081(1)(c) states in part:

. . . a trade secret is considered to be:

1. Secret;
2. Of value;
3. For use or in use by the business; and
4. Of advantage to the business, or providing an opportunity to obtain an advantage, over those who do not know or use it when the owner thereof takes measures to prevent it from becoming available to

persons other than those selected by the owner to have access thereto for limited purposes.

5. ITT's "Finance Policies" manual was developed by ITT and is used internally by all subsidiaries, units, and departments, which include unregulated operations. ITT's "Finance Policies" manual is considered a trade secret containing policies that govern the financial, accounting, treasury, tax and control aspects of ITT's business, disclosure of which gives a competitor an opportunity to obtain an advantage over ITT.

6. The commission has protected as confidential materials which relate to competitive interests and unregulated operations, the disclosure of which would impair those operations. In re: Petition of Citizens of the State of Florida to Investigate Southern Bell Telephone and Telegraph Co.'s, Docket No. 890190-TL, Order No. 25297, issued 11/5/91.

7. By this motion, PCUC requests that the "Finance Policies" manual be granted the protection of a Temporary Protective Order as provided by Section 367.156, Fla. Stat., Rule 25-22.006(5)(c), F.A.C., and Rule 1.280(c), Fla. R. Civ. P.:

(a) That the discovery may be viewed only at the offices of PCUC at a time mutually convenient to the parties;

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

(c) This Temporary 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 Temporary Protective Order will be returned to PCUC pursuant to Rule 25-22.006(c), F.A.C.

(d) That all confidential treatment and protections be afforded the manual pursuant to Sec. 367.156, Fla. Stat., and Rule 25-22.006, F.A.C.

### **Motion for Protective Order**

8. PCUC seeks an order protecting certain documents from discovery by OPC, pursuant to Rule 1.280(c), Fla. R. Civ. P., Section 367.156(2), Fla. Stat., and Sec. 25-22.006(5)(a), F.A.C.

9. 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; . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; . . . .

### **Request for Production No. 2**

10. Request for Production No. 2 asks PCUC to:

2. Provide on an IBM compatible floppy disk in spreadsheet format, copies of all electronic schedules and workpapers created in the process of filing or revising the current rate increase request.

PCUC's Response to Request for Production states as follows:

See Attachment 2.

Objection to producing the actual computer program of Guastella Associates, Inc., as opposed to diskettes provided, which is proprietary, confidential business information, and which should be protected against discovery. All workpapers and schedules from Guastella Associates, Inc. are provided through PCUC's responses to Request for Production Nos. 2 and 3.

In response to Request for Production No. 2, PCUC has provided complete IBM compatible floppy disks in spreadsheet format of the electronic schedules and workpapers created in the process of filing this rate case. However, in addition to the three disks provided by Guastella Associates, Inc., there does exist the original computer program itself used by Guastella Associates, Inc. in its consulting business which created the three disks provided to OPC (hereinafter referred to as "computer program").

11. The computer program is "proprietary confidential business information" pursuant to the definition of Section 367.156(3), Florida Statutes. Disclosure of the software format developed by Mr. Guastella would impair his competitive business interests, and as such is proprietary confidential business information pursuant to Section 367.156(3)(e), F.A.C. The software format was uniquely developed by Mr. Guastella and is a trade secret pursuant to Section 367.156(3)(a), F.A.C., and as defined by Sections 688.002(4) and 812.081(1)(c), Florida Statutes.

12. Work program methodology has been protected by the Commission as confidential. E.g., In re: Petition of Citizens of the State of Florida to investigate Southern Bell etc., Docket No. 890190-TL, Order No. 25297, issued November 5, 1991, pg. 5, which granted information clearly revealing Coopers and Lybrand's audit strategy and work program methodology as confidential,

pursuant to Section 364.183(3)(e). It is especially germane that OPC has obtained all information pertaining to this rate case prepared by Guastella Associates, Inc. through production of the computer printout workpapers (RFP No. 3) and three disks (RFP No. 2).

13. PCUC requests that the Commission enter a protective order as provided for in Rule 1.280(c), Fla. R. Civ. P., and Section 25-22.006(5)(a), F.A.C, as follows:

(a) That the discovery not be had; or,

(b) In the alternative, if the Commission denies PCUC's primary request for relief, that production and inspection of the computer program be allowed only as the offices of PCUC or its attorneys and that OPC be prohibited in all events from copying the computer program, and such other relief as is set forth in Rule 25-22.006, F.A.C.

#### Request for Production No. 12

OPC's Request for Production No. 12 requests PCUC to:

12. Provide a copy of correspondence between the Company and any other utility or municipality, city or government agencies concerning the possible purchase of Palm Coast.

OPC defines "Company" in its Document Request to include:

Palm Coast Utility Corporation together with its officers, employees, consultants, agents, representatives, attorneys, and any other person or entity acting on behalf of the Company.

PCUC's Response to Request for Production No. 12 states as follows:

The Company objects to this document request on the grounds that it is irrelevant. Correspondence regarding the potential purchase of Palm Coast Utility Corporation is not reasonably calculated to lead to admissible evidence in this rate case. Further, this request is overly broad and unduly burdensome, and contains proprietary confidential business information. If any of this information is ultimately deemed discoverable, discovery should be made at PCUC's offices because of

the great volume of documents involved and/or the confidential nature thereof.

This correspondence by its nature does not affect PCUC's rates or cost of service. Protection from discovery is therefore appropriate.

14. PCUC's requests that the commission protect this correspondence from discovery as it is irrelevant to this proceeding. Any matters regarding a potential future transfer of PCUC would be appropriately addressed in a future transfer docket, not in this rate case. The Commission in a docket involving an application for water and wastewater certificate amendment denied OPC's Motion for Reconsideration of order Denying Discovery of Attorney Work Product from a Testifying Expert. The Commission pointed out in its order:

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.

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 No. 921237-WS/940264-WS, Order No. PSC-94-1563-PCO-WS, issued December 15, 1995. If the OPC files a Motion to Compel regarding this Request for Production No. 12, PCUC will provide further support for this objection.

15. PCUC additionally seeks protection from OPC's Request for Production No. 12, on the basis that providing copies would be unduly burdensome, and expensive. The request for correspondence covers documents not in PCUC's offices, which include file cabinets of information, as well as correspondence in offices of lawyers, consultants, and other agents which may not be



identical to the documents in PCUC's offices. In order to protect PCUC's against inadvertent disclosure of privileged information, all such files would need to be reviewed.

16. The First District Court of Appeal addressed the issues of overly broad, irrelevant and burdensome discovery requests in Krypton Broadcasting of Jacksonville, Inc. v. MGM - Pathe Communications Co., 629 So.2d 852 (Fla. 1st DCA 1993). The Court quashed the lower court order compelling answers to discovery, stating:

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). Moreover, even if material sought is relevant to the subject matter of a case and admissible or reasonably calculated to lead to admissible evidence, such material may not be discovered if privileged. *State Farm Fire and Casualty Company v. Von Hohenberg*, 595 So.2d 303 (Fla. 3d DCA 1992).

17. PCUC contends that Application of the Court's guidelines in this case would lead the Commission to issue a Protective Order ruling that discovery not be had on this request.

18. Finally, certain correspondence in this broad request between "the Company", as defined, and others, even if not ruled irrelevant to the rate case or overly broad and burdensome, is or may be proprietary confidential business information pursuant to Section 367.156(3), Fla. Stat.. Production of certain correspondence pertaining to ongoing purchase negotiations, agreements and/or transactions could put PCUC and its customers at a disadvantage in affecting favorable transfer terms.

19. PCUC respectfully requests that based on the foregoing the Commission enter a Protective Order:

(a) ruling that discovery on Request for Production No. 12 not be had, or

(b) In the event PCUC's primary request for relief is denied, such other alternative or additional protective relief as the Commission may deem appropriate, pursuant to Section 367.156, F.S., include production at the Company offices where the documents reside and prohibition against copying.

Request for Production No. 18

Request for Production No. 18 requests PCUC to:

18. Provide a copy of all Federal income tax returns for ITT for each of the years 1993, 1994, and 1995, including a complete copy of any and all schedules, workpapers, and consolidating schedules.

PCUC's Response to Request for Production No. 18 states:

The Company objects to this document request as irrelevant to this proceeding. It is not reasonably calculated to lead to admissible evidence in this rate case because the Company's federal income taxes are calculated on a stand alone basis as evidenced in PCUC's Audited Financial Statements; see response to Document Request No. 9 above--"Audited Financial Statements, Notes," Income Tax Matters.

Objection on the basis that the tax returns are proprietary confidential business information. Objection on the basis that production would be unduly burdensome and expensive.

20. PCUC's seeks a Protective Order ruling that discovery not be had because production of the tax returns for ITT are not reasonably calculated to lead to admissible evidence. As stated in PCUC's response to OPC's Request for Production No. 18, PCUC's federal income taxes are calculated on a stand alone basis as evidenced in PCUC's Audited Financial Statements (response to OPC Request for Production No. 9). The ITT income tax returns therefore do not affect PCUC's rates or cost of service, and are not relevant for purposes of discovery in this rate case.

21. The balancing test and guidelines set forth in Krypton Broadcasting are applicable here. In addition to lack of relevance, producing the documents would be unduly burdensome and expensive given the large number of documents. When weighing the relevance of the information sought against the burdensomeness of the request, the result should be a protective order that discovery not be had.

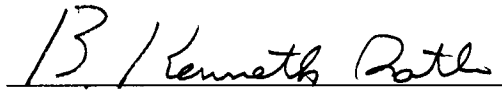
22. Although in this case lack of relevance and the request's burdensomeness should lead to a conclusion of no discovery, the federal income tax returns would clearly be entitled to the protection as confidential proprietary business information, should discovery be allowed. E.g., In re: Application for rate increase in Brevard, Charlotte, etc. by Southern States Utilities, Inc.; et. al., Docket No. 920199-WS, Order No. PSC-92-1073-CFO-WS, issued 9/28/92. Pursuant to Commission practice, under such circumstances, PCUC requests that inspection occur at the ITT offices where the documents reside and that no copying be allowed.

23. PCUC respectfully requests that based on the foregoing, the Commission enter a Protective Order:

- (a) ruling that discovery on Request for Production No. 18 not be had, or
- (b) such other alternative or additional protective relief as the Commission may deem appropriate pursuant to Section 367.1565, Fla. Stat.

WHEREFORE, PCUC respectfully requests that the Commission issue a Temporary Protective Order and Protective Order with the relief requested herein.

Respectfully submitted,



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Gatlin, Woods & Carlson  
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.. Ralph Jaeger, 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 1st day of May, 1996.



B. Kenneth Gatlin

12/15

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a partnership including a professional association

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May 1, 1996

**HAND DELIVERY**

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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 our Certificate of Service of Palm Coast Utility Corporation's Responses to Citizens' First Set of Interrogatories and Responses to Citizens' First Set of Request for Production of Documents, for filing in the above docket..

Also enclosed for filing are an original and fifteen copies of Palm Coast Utility Corporation's Motion for Temporary Protective Order and for Protective Order, and a Request for Oral Argument on Objections to Public Counsel's First Set of Interrogatories and First Set of Requests for Production of Documents and Motion for Temporary Protective Order and for Protective Order.

CK   
FA 2  
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Willis  
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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

BKG/met  
Enclosures

Motion  
DOCUMENT NUMBER - DATE  
04916 MAY-1 96  
FPSC-RECORDS/REPORTING

OA Request  
DOCUMENT NUMBER - DATE  
04917 MAY-1 96  
FPSC-RECORDS/REPORTING

Cert. of Service  
DOCUMENT NUMBER - DATE  
04918 MAY-1 96  
FPSC-RECORDS/REPORTING