

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Applications For An Amendment Of Certificate For An Extension Of Territory And For an Original Water And Wastewater Certificate (for a utility in existence and charging for service)

Docket No. 992040-WS

RECORDED AND REPORTING

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In re: Application by Nocatee Utility Corporation for Original Certificates for Water & Wastewater Service in Duval and St. Johns Counties, Florida

Docket No. 990696-WS

MOTION TO COMPEL DEPOSITION

Intercoastal Utilities ("IU"), by and through undersigned counsel, hereby files this Motion To Compel Deposition, and in support thereof would state and allege as follows:

1. St. Johns County is a party in the above-referenced matter. The position of St. Johns County is adverse to the position of IU and St. Johns County has requested that IU's application be denied (see Petition of St. Johns County, page 16). St. Johns County participation has been established as follows:

However, the County's intervention shall not be limited. Rule 25-22.039, Florida Administrative Code, does not contemplate or provide for limited intervention. As a party to this proceeding, the County may limit its participation to only certain issues, as it sees fit.

See Order No. PSC-00-0336-PCO-WS.

2. In mid-June, 2000, IU informed all the parties to this matter that it would seek to take certain depositions. Counsel for IU wrote the attached letter to Counsel for the County to arrange a deposition of the director of the County Utilities Department, Mr. Bill

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ROSE, SUNDSTROM & BENTLEY, LLP

2548 BLAIRSTONE PINES DRIVE, TALLAHASSEE, FLORIDA 32301

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Young. Counsel for St. Johns County then contacted the undersigned and expressed the County's position that Mr. Young could not be deposed because the County had intervened in this matter only to pursue the summary dismissal of IU's application and, perhaps more importantly, that Mr. Young was not a witness who had prefiled testimony in this proceeding. IU does not seek here to represent any specific factual assertions on behalf of the County. The County will set forth its own reasons for indicating that it will not provide Mr. Young for deposition (in the absence of an Order by the Prehearing Officer) in its response to this Motion.

3. The fact that the County did not prefile any testimony, or that Mr. Young did not prefile any testimony, in this case is wholly irrelevant to whether the request to take his deposition is a proper request under Rule 28-106.206, Florida Administrative Code, and the applicable rules of the Florida Rules of Civil Procedure. Under Rule 28-106.206, "parties may obtain discovery through the means and in the manner provided in Rules 1.280-1.400, Florida Rules of Civil Procedure". Under the applicable Rule of Civil Procedure, IU is entitled to

engage in appropriate discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the parties seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and added in the location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

See Rule 1.280(b)(1), Florida Rules of Civil Procedure.

4. Nothing could be more simple than what IU proposes: St. Johns County has petitioned for an administrative hearing adverse to IU's application. St. Johns County is a party in the litigation resulting from that Petition and others. IU seeks to do discovery of matters relevant to the subject matter or matters which are reasonably calculated to lead to the discovery of admissible evidence. The fact is, the evidence that comes into a Commission proceeding is usually not limited to the prefiled testimony. Witnesses also introduce evidence while being cross examined, while subject to redirect and often in response to questions from the Commission panel. Thus, it may be that witnesses who will testify in this proceeding will learn information which is very pertinent and relevant to the subject matter of the litigation by reviewing Mr. Young's sworn testimony. Additionally, Mr. Young's sworn testimony could lead to a search for additional evidence, based on documents, actions, discussions, or other matters which he may testify about at the deposition, which were previously unknown.

5. If the County has nothing relevant to say in this proceeding, it should get out. The County has already made representations, whether in writing or orally, that the County intends to serve part of the area for which IU has applied, the County is opposed to IU's application, the County believes that the prior litigation involving a separate IU application should be given "full faith and credit" at the PSC, etc. Additionally, perhaps the deposition of Mr. Young will finally get at the answer to the question that is begged by the County's posture in this case: why has the County filed a jurisdictional Motion to Dismiss IU's application, but did not bother to file a similar motion adverse to the application of NUC, whose application raises this same jurisdictional argument? If the County has a "hidden

agenda”, that agenda should be brought to light and considered by the parties and the Commission to the extent that it is relevant and admissible in this hearing. For the County to hide in the dark will not benefit the parties, the public, or the Commission. Mr. Young is a County employee and the County is a public entity and party-litigant to this case. What does the County have to hide? If the deposition does not yield information which addresses a major issue in this hearing or which eventually supports a finding of fact pertinent to this matter, then the deposition will merely go on the heap upon which millions of other depositions transcripts lie. However, that is exactly what the discovery process is all about. Often unanticipated or unknown information is yielded which is highly pertinent to the issues in a case. Other times, depositions or other discovery matters result in the transmission of information which is perhaps not so pertinent.

6. Assuming that the County has nothing to hide, and that the County’s posture on this issue is based on the inconvenience or expense of producing Mr. Young for deposition, that inconvenience pales in comparison to the expense to IU by the County’s participation in this case. Again, assuming the County has nothing to hide, for the County to take the implicit position that its decision to sue IU in administrative litigation represents an inconvenience to the County is certainly ironic at best.

7. To deny IU the opportunity to engage in discovery as to another party litigant in this case would be to deny due process to IU. The County must have some position in this case, otherwise, why did it file a petition? The County must have something relevant to say about IU’s application, otherwise, why has it filed motions adverse to IU’s application and argued those motions before the Commission? The County is a full party in this case

and can (whether they presently intend to do so or not) engage in cross examination of IU's witnesses, at least attempt to move documents into evidence, brief issues, and support motions adverse to IU. A cost benefit analysis (in actuality, the "benefit" of allowing the County to be immune from the normal deposition process is not clear to counsel for IU) clearly indicates that IU's need to explore this information exceeds any "need" on the part of County to somehow be exempt from the Florida Rules of Civil Procedure as made applicable by the Florida Administrative Code.

8. IU seeks to do nothing extraordinary, oppressive or out of the ordinary in this case. It gave ample notice for its intent to depose this single individual on the part of the County. While the rules would clearly allow IU to take the deposition of an individual who was unconnected to the litigation or any party, in this case the individual is, in fact, connected to a party and is, in fact, the director of the County Utility Department. The County wants to have its cake and eat it too. It wants to be able to attack IU, all the way to the point where IU's application is dismissed and its proposal frustrated, but it does not want to subject itself to even the dimmest light of discovery. This attempt to prevent a deposition under these circumstances should not be allowed by the Commission and would set an untenable precedent.

9. Additionally, it is irrelevant that Mr. Young is not "witness" in this matter. Depositions routinely occur before witness lists have been exchanged and/or witnesses are known. Sometimes an individual who a party might intend to be a witness turns out not to be witness because his deposition "didn't go well". Depositions are part of the discovery process, and while they are sometimes taken for the purpose of cross

examination, they are also taken for the purpose of discovering information. While this deposition may not be used to impeach the testimony of Mr. Young at the hearing (since he apparently doesn't intend to be a witness), the deposition can certainly be put to any of the other myriad uses which depositions serve under Florida law.

WHEREFORE, and in consideration of the above, IU respectfully requests the Commission order St. Johns County to produce Mr. Young for deposition at a time and place convenient to IU and as expeditiously as possible following the Commission's order.

DATED this 27<sup>th</sup> day of June, 2000.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by the facsimile and regular U.S. Mail to the following on this 27<sup>th</sup> day of June, 2000.


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June 20, 2000

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OF COUNSEL

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1311-B Paul Russell Road, #201  
Tallahassee, FL 32301

RE: Intercoastal Utilities, Inc.  
Our File No. 26003.13

Dear Suzanne:

As we have discussed, I would like to take the deposition of Bill Young on behalf of your client in this case. I would imagine that the appropriate time frame for this deposition would be the month of July. I wanted to give you advance notice of my intent to take this deposition so that you could coordinate your schedule with the schedule of Mr. Young and, hopefully, thereafter to give me severally mutually agreeable dates for this deposition.

I would appreciate very much if you will check with the availability of Mr. Young for deposition and let me know a range of dates as soon as possible. Then we can go ahead and notice the deposition and everyone's schedule will be set far in advance.

To the extent you intend to take the deposition of any of the individuals who prefiled testimony on behalf of Intercoastal, please let me know. All of those individuals are located in the Jacksonville area and I will immediately determine available dates for such depositions.

We reserve the right to take a "designee" deposition of your client and/or to properly request the production of documents at the deposition. However, at this time, we seek only to schedule the deposition of Mr. Young.

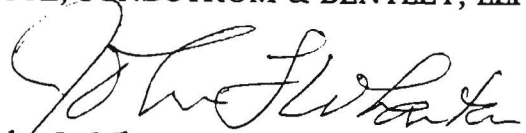


Suzanne Brownless, Esq.  
June 20, 2000  
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If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

ROSE, SUNDSTROM & BENTLEY, LLP



John L. Wharton, Esq.  
For The Firm

JLW/brm

cc: M.L. Forrester