

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-01-0523-PCO-WS
ISSUED: March 6, 2001

ORDER GRANTING MOTION TO COMPEL

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.

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; 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. St. Johns County (County) was granted intervention by Order No. PSC-00-0336-PCO-WS, issued February 17, 2000.

On January 26, 2001, NUC filed its Motion to Compel, or in the Alternative, Motion to Strike Testimony and Exhibit. On February 2, 2001, Intercoastal timely filed a response to Intercoastal's motion.

DOCUMENT NUMBER-DATE

02934 MAR-01

FPSO-RECORDS/REPORTING

NUC's Motion to Compel

In its motion, NUC states that on February 15, 2000, Intercoastal prefiled the direct testimony of Michael E. Burton, with attached Exhibit MB-1 entitled "Financial Analysis." NUC states that on March 17, 2000, NUC served its First Request for Production of Documents on Intercoastal, Item No. 13 of which stated:

Please provide all workpapers or other documents underlying or supporting the Financial Analysis (Exhibit MB-1) filed by Mr. Burton in this docket. This request specifically includes, but is not limited to:

- (a) any workpapers used to translate revenue requirements into rates, including information regarding number of meters by meter size; and
- (b) any workpapers or supporting documents reflecting or projecting costs associated with Intercoastal's existing or planned system located east of the Intracoastal Waterway.

NUC further states that on March 17, 2000, Intercoastal prefiled intervenor testimony for Mr. Burton, which included Exhibit MB-2 entitled "Financial Analysis - Revised." NUC states that Intercoastal timely responded to its request for production of documents, but did not include an electronic copy of the spreadsheets contained in the appendices to Mr. Burton's Exhibit MB-1.

NUC states that it contacted Intercoastal to advise that NUC believed that the electronic version of the spreadsheets (computer program) was encompassed in Item No. 13 of NUC's First Request for Production of Documents as "workpapers or documents underlying or supporting the Financial Analysis," and that Intercoastal should supplement its response to include the computer program. NUC states that it advised Intercoastal that it was willing to hold the computer program confidential under the terms of a protective agreement that the parties had entered into on November 8, 1999, to govern the protection of confidential documents exchanged during discovery in these dockets. NUC further states that, by letter

dated May 24, 2000, Intercoastal stated that the computer program is a privileged document, protected from disclosure.

NUC states that on June 2, 2000, Intercoastal prefiled the rebuttal testimony of Mr. Burton, which included Exhibit MB-3 entitled "Financial Analysis - 2nd Revision." NUC states that, by letter dated January 18, 2001, it again contacted Intercoastal and requested the computer program. NUC states that it again offered to treat the computer program as confidential and indicated to Intercoastal that if it continued to object to producing the computer program, that NUC intended to file a motion to compel.

NUC states that, by letter dated January 23, 2001, Intercoastal stated that the computer program is not discoverable and objected to the production of the computer program on the grounds that the request seeks information which is irrelevant, redundant, overbroad, not reasonably calculated to lead to the discovery of admissible evidence, and is beyond the scope of discovery. NUC states that Intercoastal's letter also stated that the computer program is a trade secret, proprietary business information, work product, and may be subject to further analogous privileges or protections provided under Florida law.

NUC contends that the computer program is discoverable under Rule 1.280, Florida Rules of Civil Procedure, and that it needs the computer program to "adequately prepare to cross-examine Mr. Burton regarding the validity of the information contained in his Exhibits MB-1, MB-2, and MB-3, and the conclusions therefrom that he presents in his prefiled testimony." NUC further states that without access to the computer program, NUC's efforts to determine what numbers are inputs, what numbers represent calculated results, and what calculations are performed to produce those results are hampered.

NUC also asserts that its request for the computer program is not irrelevant, redundant, overboard, and is reasonably calculated to lead to the discovery of admissible evidence. Further, NUC states that it does not concede that the computer program is either a trade secret or proprietary business information. NUC states that even if it was, such information is not ordinarily undiscoverable, but is instead "simply subject to limitations on the manner in which the information is disclosed and can be used."

NUC asserts that the protective agreement signed by the parties is sufficient to protect any interest Intercoastal and Mr. Burton have in protecting the computer program, and that it has offered to agree to additional requirements designed to protect the information, but that Intercoastal has offered none.

NUC requests that Intercoastal be ordered to produce the computer program, including the versions used to generate the spreadsheets in Exhibits MB-1, MB-2, and MB-3, subject only to the parties' existing protective agreement. In the alternative, NUC requests that if the computer program is not produced, Intercoastal should be prohibited from introducing Exhibits MB-1, MB-2, and MB-3 and that all portions of Mr. Burton's testimony that relate to or rely on his financial analysis should be stricken.

Intercoastal's Response

In its response to NUC's motion, Intercoastal states that NUC "seeks to discover a computer program from an expert who works closely with Intercoastal which is proprietary to Intercoastal," and that the "information has been treated privately by Intercoastal and has never been disclosed in the past." Intercoastal further states that NUC's assertion that it cannot engage in discovery without the computer program is just speculation as NUC has not yet attempted to undertake discovery for which it claims the information is a necessary basis and NUC has not explained how obtaining the computer program will further its discovery efforts.

Intercoastal states that NUC admits in its motion that some of the information contained in the computer program might be obtained through the deposition of Mr. Burton, and that it has "repeatedly indicated to NUC that it will make Mr. Burton, his exhibits, and information which is properly discoverable available at deposition." Intercoastal further states that at the deposition of Mr. Burton, NUC will be able to "inquire of Mr. Burton in length and in depth as to each and every fact, figure, column, conclusion, bases, calculation, extrapolation, or foundation for any single figure, word, sentence, or line in Mr. Burton's testimony and exhibits."

Intercoastal states that a balancing test should be applied to NUC's need to discover the information with Intercoastal's interest in holding the computer program private. Intercoastal asserts that NUC's discovery efforts are not hampered at this point because the depositions have not yet occurred, and that NUC has "ample time to send interrogatories asking direct and precise information regarding any numbers about which it is confused." Thus, Intercoastal contends that there is "no need to force the revelation of the computer program."

In regard to NUC's alternative motion to strike testimony, Intercoastal states that the motion is improper because the striking of testimony is a punitive measure. Intercoastal states that if it had disobeyed an order directing it to produce the information, which it would not and will not do, then a motion to strike might be appropriate, but that this is not the case in this instance.

Conclusion and Findings

Rule 28-106.206, Florida Administrative Code, states that "parties may obtain discovery through the means and manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." Rule 1.280(b)(1), Florida Rules of Civil Procedure, states that:

Parties may obtain 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 or the party seeking discovery or the claim or defense of the other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Further, Rule 1.280(b)(5), Florida Rules of Civil Procedure, states that:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged,... the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

In its response to NUC's Motion to Compel, Intercoastal asserts that the computer program is proprietary confidential business information. Section 367.156(3), Florida Statutes, defines proprietary confidential business information as:

information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public.

Intercoastal asserts that the computer program is controlled by the utility, is intended to be and is treated as private by the utility, and has not been disclosed to a third party. However, Intercoastal fails to state what information in the computer program the utility is attempting to protect and what harm will occur to Intercoastal or its ratepayers if the computer program is disclosed. Furthermore, as Section 367.156, Florida Statutes, states that "information which affects a utility's rates or cost of service shall be considered relevant for purposes of discovery in any docket or proceeding where the utility's rates or cost of service are at issue," the request for the computer program is not irrelevant. The computer program was used to determine the water and wastewater rates for Intercoastal that are set forth in the exhibits attached to Mr. Burton's prefiled testimony.

As Intercoastal has not demonstrated that the computer program is proprietary confidential business information or otherwise

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privileged, NUC's Motion to Compel is hereby granted. Intercoastal shall make the computer program contained in Mr. Burton's testimony, including the versions used to generate Exhibits MB-1, MB-2, and MB-3, available to NUC for review within ten days of the issuance date of this Order. No ruling is necessary on NUC's Alternative Motion to Strike Testimony and Exhibit, as it is rendered moot by the granting of NUC's Motion to Compel.

This Order is issued pursuant to the authority granted by Rule 28-106.211, Florida Administrative Code, which provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case.

Based on the foregoing, it is

ORDERED by Commissioner J. Terry Deason, as Prehearing Officer, that Nocatee Utility Corporation's Motion to Compel is hereby granted. It is further

ORDERED that Intercoastal Utilities, Inc., shall make the electronic version of the spreadsheets contained in Michael E. Burton's testimony, including the versions used to generate Exhibits MB-1, MB-2, MB-3, available to Nocatee Utility Corporation for review within ten days of the issuance date of this Order.

By ORDER of Commissioner J. Terry Deason, as Prehearing Officer, this 6th day of March, 2001.



J. TERRY DEASON
Commissioner and Prehearing Officer

(S E A L)

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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 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.