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May 22, 1996

FILE COPY

HAND DELIVERY

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 Palm Coast Utility Corporation's Response to Citizens' Motion to Compel and a Request for Oral Argument on Palm Coast Utility Corporation's Response to Citizens' Motion to Compel, in reference to the above docket.

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

- ACK _____
- AFA 1
- APP _____
- CAF _____
- CMU _____ BKG/met
- CTR _____ Enclosures
- EAG _____
- LEG Edmonds
- LIN 3
- OPC _____
- RCH _____
- SEC 1
- NAS _____
- 3TH _____

RECEIVED & FILED

Max
EPSC-BUREAU OF RECORDS

Response
DOCUMENT FILED - DATE
05655 MAY 22 88
DIVISION OF RECORDS & REPORTING

OA Request
DOCUMENT FILED - DATE
05656 MAY 22 88
DIVISION OF RECORDS & REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 951056-WS
Filed: May 22, 1996

**ORIGINAL
FILE COPY**

**PALM COAST UTILITY CORPORATION'S
RESPONSE TO CITIZENS' MOTION TO COMPEL**

Palm Coast Utility Corporation (PCUC), pursuant to Rule 25-22.037, F.A.C., hereby files its response to Citizens' Motion to Compel, and states:

Request for Production No. 12

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.

PCUC's response:

12. 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.

1. PCUC has verified by telephone conference with OPC that this request refers only to correspondence concerning the current potential sale of PCUC. PCUC's response is not changed by this clarification.

2. OPC's Motion to Compel should be denied because correspondence concerning the negotiations of the sale of PCUC is irrelevant and not reasonably calculated to lead to admissible evidence in this case. OPC has failed to demonstrate "a reasonably 'calculated' causal connection

between the information sought and the possible evidence relevant to the pending action.”

Calderbank v. Cazares 435 So.2d 377, 379 (Fla. 5th DCA 1983). The Court in Calderbank quashed an order compelling discovery. The Court elaborated as follows:

If a logical connection is not readily apparent, the questioner should make it apparent by pointing out to the court his reasoning process based on facts and inferences demonstrating how he calculates that the sought information will “reasonably” lead to admissible evidence. The mere fact that an inquiry that appears to be irrelevant “might” lead to evidence that is relevant and admissible to the issues in the pending suit is not sufficient. Such a rule would place no limitation on the authority of any litigant to invade, by questions, the privacy of a witness.

3. OPC appears to offer three arguments to support its relevancy argument. The first argument is that there is a need “to determine the ‘true’ consideration paid for the Utility and sales impact on PCUC and its customers on a going forward basis (paragraph 5 of Motion to Compel). This reason fails to support OPC’s position because 1) the potential sales price of the utility in a future transaction is not an issue in this case and it is totally unrelated to ratemaking herein, and 2) the “sales impact on PCUC and its customers on a going forward basis” has no connection to any issue in this case and is totally unrelated to ratemaking herein.

4. Section 367.081, Rates; procedure for fixing and changing, Fla. Stat., states in part:

(2)(a) The commission shall, either upon request or upon its own motion, fix rates which are just, reasonable, compensatory, and not unfairly discriminatory. In every such proceeding the commission shall consider. . . a fair return on the investment of the utility in property used and useful in the public service. (emphasis added).

“Investment” in Florida is net original cost. E.g., In re: Application of Keystone Water Company, Inc. for an increase in water rates to its customers in Clay County, Florida, Docket no. 800641-WU, Order No. 10465, issued 12/21/81. PCUC’s original cost has been the basis for the determination

of rates by the Commission in all prior PCUC rate cases. In re: Application of Palm Coast Utility Corporation for an increase in water and sewer rates in Flagler County, Florida, Docket No. 890277-WS, Order No. 22843, p. 31-36. Correspondence regarding the current sales negotiations have no bearing on the Utility's net original cost. No matter what the sale price might be, if there is a sale, the Commission will establish rates in this current proceeding on nothing other than original cost.

5. Likewise, Section 367.081, Fla. Stat., does not contemplate that the "sales impact on PCUC and its customers on a going forward basis" is properly considered in ratemaking. There has been no utility transfer which could be considered, in any event. Sales negotiations are not at issue in the case, cannot relate to an issue in the case, and are irrelevant.

6. Section 367.071, Sale, assignment, or transfer of certificate of authorization, facilities, or control, Florida Statutes, requires a determination by "the commission that the proposed sale, assignment, or transfer is in the public interest and that the buyer, assignee, or transferee will fulfill the commitments, obligations, and representations of the utility." Issues relating to a "sales impact" caused by a transfer are heard by the Commission in a transfer docket. Questions about the impact of the potential purchase of the utility are not ripe for determination in this rate case. 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 Dockets Nos. 921237-WS/940264-WS, Order No. PSC-94-1563-PCO-WS, issued December 15, 1995 (discussed in PCUC's Motion for Temporary Protective Order and for Protective Order); Ft. Pierce Utilities Authority v. FPSC, 388 So.2d 1031 (Fla. 1980).

7. OPC's second reason given to support the relevance of reviewing correspondence concerning the proposed purchase of PCUC is a need "to examine the extent Utility personnel participated in these transactions for the purpose of proposing adjustments to test year salary

expenses for PCUC” (paragraph 6 of Motion to Compel). Examination of correspondence concerning the potential sale of PCUC can not reasonably be expected to lead to any admissible evidence in this case regarding the issue of test year salary expenses. Such correspondence can give no indication of the percentage an employee’s time was devoted to sales negotiations.

8. More importantly, adjustments to test year salary expenses should not be made to the extent Utility personnel participated in PCUC sales negotiations. The PSC regulates public utilities, but does not manage the day to day operations of them. See, e.g., In re: Application of Century Utilities, Inc., for an increase in water and sewer rates in Palm Beach County, Florida, Docket No. 861564-WS, Order No. 19161, p. 11 (In reviewing the utility’s officer and employee bonus program the Commission stated: “However, our statutory mandate is not to manage this company, but to regulate it. If viewed as salary, the bonuses do not cause the salaries to be unreasonably high, thus we find no cause for their disallowance.”) Part of the running of the utility may be fielding inquiries and corresponding regarding a transfer of that utility. These duties are legitimate utility business, part of running the utility, and adjustments are not properly made to delete time spent thereon.

9. OPC’s third reason given to support its need for discovery of these documents is that such correspondence: “is presumptively relevant to PCUC’s business, and particularly relevant to understanding the near future business of PCUC” (paragraph 7 of Motion to Compel). OPC misses the point regarding relevancy. The point is whether correspondence concerning the potential sale of PCUC is reasonably calculated to lead to admissible evidence in this rate case. The logical connection which OPC must show is the relevance of the documents to an issue in the rate case. OPC’s framing of this discovery question is too broad and if accepted would allow issues having no bearing upon ratemaking to be inappropriately included in this rate case.

10. Production of correspondence concerning the proposed sale would be expensive and unduly burdensome. The burdensome nature of providing copies of this correspondence was explained in paragraph 15 of PCUC's Motion for Temporary Protective Order and for Protective Order. In its Motion for Protective Order, PCUC asks that in the event this correspondence is deemed relevant and discoverable, it be specified as confidential proprietary business information and that discovery be had at PCUC's office. As OPC will be viewing other information at PCUC's office, production of response 12 at PCUC's office would not be a burden upon OPC. OPC queries why PCUC can not disclose correspondence concerning assets already sold, or concerning the Option Agreement. No PCUC assets have been sold in connection with the potential sale, contrary to what might be inferred from OPC's Motion to Compel. OPC's comment concerning the Option Agreement is not germane to its Motion to Compel since the Option Agreement is not included in Request for Production No. 12.

Request for Production No. 18

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:

18. 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.

11. The ITT consolidated tax returns can not reasonably be expected to lead to the discovery of admissible evidence in this case. There are to PCUC's knowledge several hundred corporations which form a part of these tax returns, with total revenues in excess of 23 billion dollars. PCUC's revenue is only 8.5 million. OPC claims the tax returns hold "information that should be analyzed to determine the proper revenue requirement for PCUC." The MFRs contain the information needed to determine PCUC's revenue requirements. Tax Schedule C-9 of the MFRs requires that a copy of PCUC's most recently filed federal income tax return be provided or made available for review. PCUC's notation on that schedule states: "The state and federal tax worksheets for PCUC for the 1994 tax year are available for review at the Utility's office." This PCUC tax information is sent to ITT for use in preparing its consolidated tax return. Thus, to PCUC's knowledge, the ITT consolidated tax return offers no information concerning PCUC other than what is already available to review at PCUC's offices, subject to a finding of confidentiality and the protections of a temporary protective order.

12. OPC cites Southern States Docket No. 940495-WS to support its position that the ITT tax returns are discoverable. Contrary to OPC's statement, there is a distinguishing difference between the SSU case and PCUC. It appears, from a review of the relevant orders, that SSU did not object to production of the consolidated tax returns, but to the manner of production. PCUC objects to discovery of ITT tax returns because the burden and expense of allowing inspection of these documents in New York far outweighs the likelihood that such discovery would lead to admissible evidence. The ITT consolidated tax returns consist of thousands of pages of supporting schedules. OPC has made no showing that the data and information supplied by PCUC is in any way insufficient to allow determination of PCUC's revenue requirement. It is not appropriate to allow discovery

which provides little useful information, being only duplicative, where the information is most likely readily available through less burdensome discovery routes. See, e.g., discussion by Court in Syken v. Elkins, 644 So.2d 539, 545 (Fla. 3d DCA 1994); See also Krypton Broadcasting of Jacksonville, Inc. v. MGM-Pathe Communications Co., 629 So.2d 852, 855 (Fla. 1st DCA 1993) (See PCUC's Motion for Protective Order). OPC's Motion to Compel should be denied.

Document Request No. 25

25. Provide a copy of the Company's 1995 expenses broken down into the accounts and departments shown on the Company's B-5 Schedules of the MFRs. (Please provide this for both water and wastewater separately.)

PCUC's response:

25. The above noted B-5 Schedules are the Company's projected 1995 expenses broken down into accounts and departments. The Company objects to the extent any other information may be being requested on the basis of vagueness and the need for clarification.

OPC has clarified this request in its Motion to Compel, paragraph 16:

The Citizens have requested the Company should provide the information for actual 1995 format as reflected on the B-5 Schedules of the MFRs.

Based upon this clarification, PCUC additionally responds: No such document exists.

13. A party is not required to create a document which does not exist in response to a request for production. Syken v. Elkins, 644 So.2d 539, 546 (Fla. 3d DCA 1994) (The Court quashed the lower court's orders compelling discovery, stating, inter alia. "An expert may not be compelled to compile or produce nonexistent documents."); See, LeJeune v. Aikin, 624 So.2d 788 (Fla. 3d DCA 1973) ("Clearly, a trial court has no authority to order the discovery of nonexistent

records.”); Balzebre v. Anderson, 294 So.2d 701 (Fla. 3d DCA 1974).

14. PCUC requested pursuant to Rule 25-30.430, F.A.C., and was granted “a projected year end test year ending December 31, 1995, with an historical base year ended December 31, 1994. The projected test year will be composed of six months actual data and six months projected data.” OPC is essentially asking PCUC to provide all MFR expense information for an historic test year ending December 31, 1995. The use of a rate case test year is designed to give limited parameters to what would otherwise be a wholly unweildy proceeding. To compile and format the expense information requested by OPC would take one full week of PCUC’s Assistant Comptroller’s time. This person is currently working on responses to OPC’s third set of interrogatories, OPC’s third set of requests for production, and responses to discovery from Dunes Community Development District. In the midst of the rate case with ongoing discovery preparation, it would be an extremely heavy burden to format a new Sch. B-5 using an historic December 31, 1995 test year.

WHEREFORE, PCUC respectfully requests that OPC’s Motion to Compel be denied.

DATED this 22nd day of May, 1996.

Respectfully submitted,

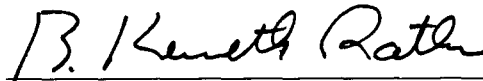


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Attorneys for
PALM COAST UTILITY CORPORATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Scott Edmonds, 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, and by U.S. Mail to Mr. Richard D. Melson, Esquire, Hopping Green Sams & Smith, 123 South Calhoun Street, Tallahassee, Florida 32314, on this 22nd day of May, 1996.



B. Kenneth Gatlin