

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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

In Re: Application for certificates )  
 to operate water & wastewater )  
 utility in Duval and St. Johns )  
 Counties by Intercoastal Utilities, Inc. )

Docket No. 992040-WS

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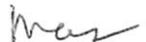
**INTERCOASTAL'S RESPONSE TO NOCATEE'S MOTION TO COMPEL OR, IN THE ALTERNATIVE, MOTION TO STRIKE TESTIMONY AND EXHIBIT**

Intercoastal Utilities, Inc. ("Intercoastal"), hereby files this Response to Nocatee's ("NUC") Motion to Compel or, in the Alternative, Motion to Strike Testimony and Exhibit and would state and allege as follows:

1. Nocatee's Motion to Strike Testimony is so specious, so improper, and so without foundation in law or fact that it merits no substantive response. Any suggestion that **as a direct result of the Commission's Order** denying a motion to compel, that testimony should be stricken, is patently absurd. The striking of testimony is a punitive measure. Nocatee has made an argument that it needs certain information in order to test the evidence presented within the testimony. If the Commission disagrees, then Nocatee's beef will be with the Commission, and not with Intercoastal. If Intercoastal had disobeyed an

order directing it to produce the information (which it would not and will not do), then perhaps a motion to strike *might* be appropriate. But, to suggest that if the Commission itself determines the information should not be disclosed or the discovery should not be had, then

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the alternative to strike the testimony is completely devoid of any procedural merit. It is tantamount to suggesting that: "Since we sent improper discovery, which was properly objected to and which the Commission refused to order provided, and since we still believe we really need the testimony and the Commission was wrong, the testimony should be stricken."

2. Nocatee's Motion to Compel should be denied. Nocatee seeks to discover a computer program from an expert who works closely with Intercoastal which is proprietary to Intercoastal. The information has been treated privately by Intercoastal and has never been disclosed in the past. The information is proprietary confidential business information to Intercoastal.

3. NUC has not even attempted to undertake the discovery for which it claims the information is a necessary basis, so its assertion that it can not engage in the discovery without the information is mere speculation.

4. NUC candidly admits, on page 4 of its Motion, that "some of the same information might be available via a lengthy deposition" of Mr. Burton involving a line-by-line and column-by-column inquiry regarding the printed spreadsheets that comprise the exhibits themselves. NUC then says that it is "entitled to its choice of discovery methods". NUC has already indicated it intends to take the deposition of Mr. Burton. It is rather astonishing that NUC would suggest that this proprietary confidential business information, which has been held secret from the public and not disclosed to third parties, should be given to NUC just so that the deposition may be shortened.

5. NUC's suggestion that it will be unable to engage in discovery regarding Mr. Burton's conclusions, as reflected in his exhibits, is conclusory at best. NUC has not even attempted to explain how obtaining the model will further its discovery efforts. Intercoastal has repeatedly indicated to NUC that it will make Mr. Burton, his exhibits, and information which is properly discoverable available at deposition. Additionally, Intercoastal has informed NUC and reiterates at this time, that it is willing to work with NUC in order to clear up any misunderstanding or lack of comprehension NUC has about Mr. Burton's exhibits.

At a minimum, the Commission should apply a balancing test to NUC's need to discover the information with Intercoastal's interest in holding this computer program private. At deposition of Mr. Burton, NUC will be provided the opportunity 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 or exhibits. There is no need for the revelation of this proprietary and work product computer program in order for NUC to engage in this discovery.

6. If Mr. Burton can not make NUC understand the bases for his conclusions in a multi-hour deposition in which depositions are rarely, if ever, made, then Mr. Burton is hardly going to be able to convince the Commission and its Staff that his conclusions should be adopted in the Final Order on this matter. NUC will have ample opportunity at deposition (with the assistance of their two financial experts, Mr. Frank Sideman and Ms. Deborah Swain) in order to ascertain the bases for Mr. Burton's conclusions and testimony. In fact, Intercoastal has asserted informally to NUC that all calculations undertaken within the

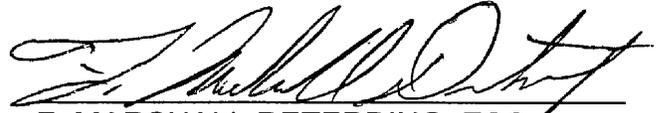
computer program are readily apparent from the face of Mr. Burton's schedules generated by the computer program.

7. At the top of page 4, in its only attempt to explain why it needs this information despite its confidential nature, NUC says it will be "hampered" in its efforts to determine "what numbers are inputs, what numbers represent calculated results, and what calculations are performed to produce those results". The parties have tentatively agreed that depositions will occur well in advance of hearing in this case. NUC certainly is not "hampered" at this point because the depositions have not even occurred yet. The depositions will provide ample opportunity for NUC to ask Mr. Burton directly "what numbers are inputs, what numbers represent calculated results, and what calculations are performed to produce those results". Additionally, NUC has had and continues to have ample time to send interrogatories asking direct and precise information regarding any numbers about which it is confused. There is no need to force the revelation of this computer program, which was created by Mr. Burton for Intercoastal and which has not been disclosed, and will not be disclosed, by Intercoastal to any third persons.

8. Assumably, Ms. Swain uses a computer program for her conclusions also, but it is notable that Intercoastal has not attempted to obtain such computer program. Intercoastal believes it will be able to fully explore Ms. Swain's conclusions in deposition and through other discovery methods without digging into any products she may have created based on her own knowledge, expertise, and opinions which is not readily available in the public domain, or which has not been disclosed to third persons in the past.

WHEREFORE, and in consideration of the above, Intercoastal respectfully requests this Commission deny NUC's Motion to Compel and Motion to Strike Testimony and Exhibit.

DATED this 2<sup>nd</sup> day of February, 2001.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by facsimile and U.S. Mail to the following this 2<sup>nd</sup> day of February, 2001.

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