

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 990696-WS

In the Matter of:

APPLICATION FOR ORIGINAL
CERTIFICATES TO OPERATE WATER AND
WASTEWATER UTILITY IN DUVAL AND
ST. JOHNS COUNTIES BY NOCATEE
UTILITY CORPORATION.

APPLICATION FOR CERTIFICATES TO
OPERATE A WATER AND WASTEWATER
UTILITY IN DUVAL AND ST. JOHNS
COUNTIES BY INTERCOASTAL UTILITIES
INC.

DOCKET NO. 992040-WS

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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: COMMISSIONER J. TERRY DEASON
Prehearing Officer

DATE: Monday, April 16, 2001

TIME: Commenced at 1:30 a.m.
Concluded at 2:25 p.m.

PLACE: Betty Easley Conference Center
Room 152
4075 ESPLANADE WAY
TALLAHASSEE, FLORIDA

REPORTED BY: JANE FAUROT, RPR
FPSC Division of Records & Reporting
Chief, Bureau of Reporting

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1 APPEARANCES:

2 RICHARD D. MELSON, Hopping Green Sams and Smith, Post
3 Office Box 6526, Tallahassee, Florida 32314, appearing on
4 behalf of DDI and Nocatee Utility Corporation.

5 JOHN WHARTON, Rose, Sundstrom and Bentley, L.L.P.,
6 2548 Blainstone Pines Drive, Tallahassee, Florida 32301,
7 appearing on behalf of Intercoastal Utilities, Inc.

8 J. STEPHEN MENTON, Rutledge, Ecenia, Underwood,
9 Purnell & Hoffman, P. O. Box 551, Tallahassee, Florida
10 32302-0551, appearing on behalf of Jacksonville Electric
11 Authority.

12 SUZANNE BROWNLESS, 1311-B Paul Russell Road, Suite
13 201, Tallahassee, Florida 32301, appearing on behalf of St.
14 Johns County.

15 MICHAEL J. KORN, Korn & Zehmer, P.A., 6620 Southpoint
16 Drive, Suite 200, Jacksonville, Florida 32216, appearing on
17 behalf of Sawgrass Association, Inc.

18 SAMANTHA CIBULA and LORENA A. ESPINOSA, FPSC Division
19 of Legal Services, 2540 Shumard Oak Boulevard, Tallahassee,
20 Florida 32399-0850, appearing on behalf of the Commission
21 Staff.

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P R O C E E D I N G S

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2 COMMISSIONER DEASON: Call the prehearing conference to
3 order. Could I have the notice read, please.

4 MS. ESPINOZA: By notice issued April 6th, 2001, this
5 time and place has been set for a prehearing conference in the
6 following consolidated dockets: Docket Number 090696-WS,
7 application for original certificates to operate a water and
8 wastewater utility in Duval and St. Johns Counties by Nocatee
9 Utility Corporation; and Docket Number 992040-WS, application for
10 certificates to operate a water and wastewater utility in Duval
11 and St. Johns Counties by Intercoastal Utilities, Inc.

12 COMMISSIONER DEASON: Take appearances.

13 MR. MENTON: Good afternoon. This is Steve Menton from
14 Rutledge, Ecenia, Purnell & Hoffman on behalf of JEA.

15 MR. MELSON: Rick Melson of Hopping, Green, Sams &
16 Smith on behalf of Nocatee Utility Corporation and DDI, Inc.

17 MR. WHARTON: John Wharton, Rose, Sundstrom & Bentley
18 representing Intercoastal Utilities, Inc.

19 MS. BROWNLESS: Susan Brownless, Susan Brownless, P.A.,
20 representing St. Johns County, Florida.

21 MS. CIBULA: And we have Michael Korn participating by
22 telephone.

23 MR. KORN: Yes. This is Michael Korn of Korn & Zehmer
24 on behalf of the Sawgrass Association.

25 MS. CIBULA: Samantha Cibula and Lorena Espinoza on

1 behalf of Commission staff.

2 COMMISSIONER DEASON: Thank you.

3 Staff, any preliminary matters?

4 MS. CIBULA: No preliminary matters that we know of.

5 COMMISSIONER DEASON: Okay. Do the parties have any
6 preliminary matters? Very well.

7 It is my intention, then, that we would proceed through
8 the draft prehearing order. There are going to be sections which
9 I feel like we can proceed through rather quickly. If I go too
10 fast, just stop me and we will go back and address any concerns
11 which you may have.

12 Having laid that predicate, we will then go through
13 section-by-section beginning with Section I , conduct of
14 proceedings. Any questions, concerns?

15 Section II, case background, which is quite extensive
16 in this docket. I notice that at the conclusion of the case
17 background there is a reference to opening statements, that if
18 there is to be opening statements each statement would not exceed
19 ten minutes. I would just inquire of the parties at this point
20 do the parties contemplate opening statements? Yes. I am
21 getting an indication yes. Mr. Melson, yes; Mr. Wharton,
22 Ms. Brownless. Very well. We will include that in the
23 prehearing order, then, that there will be opening statements.
24 Is ten minutes per party sufficient?

25 MR. MELSON: Yes, sir.

1 COMMISSIONER DEASON: I'm getting the indication that
2 yes, it is. Okay. Ten minutes per party. I would request that
3 you abide by that. We have a large number of witnesses to
4 address in this proceeding, and I think we have three days set
5 aside. So time, perhaps, will be at a premium.

6 Section III --

7 MR. KORN: Mr. Hearing Officer?

8 COMMISSIONER DEASON: Yes.

9 MR. KORN: Just a point of inquiry. Did you want to go
10 over what the sequence of opening statements ought to be at this
11 point, or would that be something that would be hold over until
12 the hearing itself?

13 COMMISSIONER DEASON: I'm sorry, could you repeat your
14 question, please.

15 MR. KORN: I'm sorry. The sequence of opening
16 statements. I had assumed that since Nocatee had filed the first
17 application they would probably go first, but I wanted to just
18 confirm that that was how the sequence of the openings would be
19 entertained.

20 COMMISSIONER DEASON: I am open to suggestions on that
21 part.

22 Staff, do you have any suggestion?

23 MS. CIBULA: Staff would recommend that Nocatee Utility
24 Corporation go first, then Intercoastal, then JEA, then the
25 County, then Sawgrass Association.

1 COMMISSIONER DEASON: Is there any objection to the
2 proposed order as just recited by staff counsel?

3 MR. WHARTON: I think we would object, Commissioner.
4 All the intervenors in this case are in opposition to
5 Intercoastal's application, and I would rather have the
6 intervenors state their case. It's not that the intervenors are
7 going to be learning anything from the opening statements of the
8 applicants, and have the applicants go last. I just feel like if
9 NUC goes first and we go second, then they are going to followed
10 by two parties. Certainly JEA and NUC are reading from exactly
11 the same page in this case. And we are just going to be
12 sandwiched by opening statements that are going to be, in part,
13 responsive. I would rather have the applicants go last, even if
14 Intercoastal didn't go last, and have the intervenors go and
15 state their cases to begin with.

16 MS. BROWNLESS: Commissioner, you know the burden of
17 proof is on the applicants who in this case are NUC and ICU. So
18 it would strike me that they, in fact, should go first.

19 COMMISSIONER DEASON: Mr. Melson.

20 MR. MELSON: Nocatee Utility Corporation's preference
21 is to go first. Beyond that, whatever order the other parties
22 and the Commission are comfortable with.

23 COMMISSIONER DEASON: Okay. Any other comments?

24 MR. MENTON: I just think that we have two applicants
25 in this case. I think we ought to get the applicants to go first

1 and have them lay out the basis for their applications and then
2 hear from the other parties. JEA has intervened to support the
3 Nocatee application, so -- and then we have intervened in
4 opposition to or objected to the Intercoastal application. So we
5 will be commenting on both applications. So I think it only
6 makes sense to hear from both applicants first.

7 COMMISSIONER DEASON: Okay. Mr. Wharton, I understand
8 your concern, but I believe that the order as set out by staff
9 counsel will meet our needs, and that is the order in which we
10 will proceed.

11 Okay. Section III, procedure for handling confidential
12 information. It seems fairly standard. Any concerns, questions?
13 Very well.

14 Section IV, post-hearing procedures. Likewise, it
15 appears standard.

16 Section V, prefiled testimony and exhibits and
17 witnesses.

18 Section VI, order of witnesses. I will entertain any
19 questions or concerns about the order of witnesses at this point
20 if there are any.

21 MS. CIBULA: Staff would just note that Intercoastal
22 hasn't stated witnesses for Jim Miller on Page 8. I mean, issues
23 for Mr. Miller.

24 COMMISSIONER DEASON: Okay. This is on Page 8 for
25 Witness --

1 MS. CIBULA: Jim Miller. He is the very last witness
2 listed on Page 8. There aren't any issues listed for him.

3 MR. WHARTON: Assumably, Samantha, those are the same
4 ones that we do state for Miller on Page 7. It's just kind of
5 funny, because the witnesses are listed more than once. I mean,
6 I will double-check that, though, and I will get that to you
7 today.

8 MS. CIBULA: Okay.

9 COMMISSIONER DEASON: Very well.

10 MR. MELSON: Commissioner Deason, for Witness Doug
11 Miller on Page 7, the second entry we should add Issue A to the
12 front of his list of issues.

13 COMMISSIONER DEASON: Very well. Now, let's just
14 review for a moment and make sure that at least I understand. We
15 will have direct testimony first from the applicants, Nocatee
16 going first, followed by Intercoastal. We will then have
17 intervenors with JEA, Sawgrass, and followed by the county and
18 then staff witnesses. Correct so far? And then we will go into
19 rebuttal testimony? I guess I'm a little confused at this third
20 category. It says intervenor/supplemental intervenor/rebuttal.

21 MS. CIBULA: What the parties decided is that we would
22 have all the direct witnesses first, then all the intervenor
23 witnesses who weren't the two companies go second, and then third
24 have the intervenor testimony and rebuttal testimony last of the
25 two companies.

1 MR. WHARTON: I think what we tried to do,
2 Commissioner, when we met during the summer was to the extent
3 there has been numerous rounds of testimony, and perhaps it is
4 not over yet, because you have just issued an order saying there
5 is some opportunity for response, that we would try to do it in
6 the order that the testimony lays rather than having people
7 testifying about responding to testimony that hasn't been given
8 yet. And even if that means we are kind of parading them up and
9 down, certainly my people are going to be sitting right there the
10 whole time.

11 COMMISSIONER DEASON: Okay. And I assume the parties
12 are in agreement with this concept?

13 MR. MELSON: Yes, sir. I think this is a very workable
14 arrangement.

15 COMMISSIONER DEASON: Very well.

16 Any other questions or concerns with the order of
17 witnesses?

18 MR. MENTON: Commissioner, Mr. Melson's comment just a
19 second ago did raise for me an issue that perhaps we should list
20 Issue A also under Scott Kelly.

21 COMMISSIONER DEASON: Okay. We will make that
22 addition.

23 MR. MENTON: Thank you, sir.

24 COMMISSIONER DEASON: Okay. Section VII, basic
25 positions. Any changes or corrections? Very well.

1 Issue VIII. These are the specific issues and
2 positions. We have Issue A, and it appears that there is not a
3 position stated for Intercoastal.

4 MR. WHARTON: Our position would be no.

5 MS. CIBULA: And also staff believes that Issue A along
6 with Issue B found on Page 24 should be stricken as both issues
7 have already been addressed in Order Number PSC-00-1265-PCO-WS
8 issued in this docket wherein the Commission determined that it
9 has the jurisdiction pursuant to Section 367.171(7), Florida
10 Statutes, to consider both NUC's and Intercoastal's application.

11 MS. BROWNLESS: And we would like an opportunity to
12 respond to that, please.

13 COMMISSIONER DEASON: Okay. Ms. Brownless, you may
14 proceed.

15 MS. BROWNLESS: This is the County's issue. This is an
16 issue that we requested be included. And I would state by saying
17 that the staff misconstrues the intent of this issue. It is not
18 a rehash of the jurisdictional issue that was previously raised
19 by the County and disposed of in the order mentioned, which I
20 will for shorthand call 00-1265.

21 The issue that was addressed by Order 00-1265 was did
22 the Commission have jurisdiction to award an original certificate
23 to a proposed intercounty utility where one county was
24 nonjurisdictional without the prior approval of the project by
25 the nonjurisdictional county. Now that was an issue that was

1 raised by St. Johns County, Hillsborough County, Collier County,
2 Sarasota County, and Lee County, and all of us argued that the
3 nonjurisdictional county needed to act first on such
4 applications.

5 Order Number 00-1265 rejected both of those, rejected
6 this argument, and stated, and I quote, "That the PSC has, quote,
7 exclusive jurisdiction over proposed utility systems whose
8 services will traverse county boundaries under 367.171(7),
9 Florida Statutes," close quote. In other words, that an
10 allegation that lines would cross county boundaries was a
11 colorable enough claim for the PSC to assert jurisdiction over an
12 intercounty application and to go forward and process it.

13 Now, we do not agree, obviously, with this
14 interpretation of the law, but we accept that that is the ruling
15 for purposes of this case and the ruling made in that order. The
16 issue that we seek to address here is different. It is NUC's
17 burden to produce facts that support its case by a preponderance
18 of the evidence. That is the standard under Chapter 120, and
19 that is they are required to present facts whose probative
20 weight, influence, force, or power taken together would cause a
21 reasonable person to reach the conclusion that they are
22 advocating.

23 We do not think that NUC has produced such evidence
24 with regard to having future physical facilities which cross
25 county boundaries. And this issue is an attempt to raise that

1 factual consideration to the Commission.

2 The reason that we do not think NUC has produced such
3 evidence and what we would like to argue to the Commission are
4 the following three points. First of all, that NUC does not own
5 legal title to the three large joint projects which are shown on
6 their maps to cross county boundaries. That the other lines that
7 are being proposed by them are lines that have been projected to
8 be installed by DDI, who is the developer of this land project.
9 And there is some question based upon the deposition of
10 Mr. Skelton, who is the president of DDI, whether DDI will
11 actually be the real developer.

12 So to the extent that lines have been shown on maps
13 which are the result of DDI's engineers' projections, if DDI does
14 not actually end up being the final developer then that calls
15 into question how many lines there will be and where they will
16 be. And, finally, we are concerned because there are no
17 subdivision maps that were actually incorporated into the DRI or
18 the development order that was issued by Duval County and St.
19 Johns County. So that you actually don't have a plat of the
20 subdivision, a proposed plat that has been filed with any
21 governmental entity in connection with these developments.

22 So, although I appreciate that the wording of the issue
23 may have been confusing, the idea is that we would like to
24 raise -- is we would like to raise the factual issue of whether
25 evidence has been produced, a preponderance of the evidence has

1 been produced to substantiate NUC's allegation.

2 COMMISSIONER DEASON: Any response, Mr. Wharton?

3 MR. WHARTON: Understanding fully that Issue B is the
4 equivalent of Issue A directed against my client and, you know,
5 with, I guess, risking the possibility that we could be hoisted
6 on our own petard here, I would agree with the county that it is
7 a different question as to whether someone who is invoking the
8 Commission's jurisdiction by crossing county lines has proven
9 they have crossed county lines, I think that is a different issue
10 than the Commission took up in the prior order. And we do
11 believe it is an appropriate issue.

12 COMMISSIONER DEASON: Mr. Melson.

13 MR. MELSON: Commissioner, understanding that this is
14 limited to a factual question and not a legal question, I don't
15 believe Nocatee has a strong objection to the issue. Since Ms.
16 Brownless took a moment to argue the merits of the factual issue,
17 let me simply say that we believe the evidence will show that
18 phase one of the Nocatee development occurs on both sides of the
19 county line and will be served by a transmission and distribution
20 grid, and lines will necessarily cross the county line to serve
21 that development.

22 We disagree with the County's position, which they
23 obviously are free to argue, that some more formal evidence is
24 required. We believe once you hear the evidence you will be
25 persuaded that we have met the standard.

1 COMMISSIONER DEASON: Mr. Menton.

2 MR. MENTON: I would just join with Mr. Melson. I
3 think that the evidence will establish that this system will
4 necessarily cross county lines. And we believe that that is
5 sufficient to invoke Commission jurisdiction.

6 COMMISSIONER DEASON: Very well.

7 Mr. Korn, do you have any comments?

8 MR. KORN: No, Mr. Commissioner.

9 COMMISSIONER DEASON: Very well. Staff, do you want to
10 close?

11 MS. CIBULA: Commissioner, in that order we did look at
12 whether the proposed application would cross county boundaries.
13 However, if you would like to keep the issue in, that is fine
14 with staff.

15 COMMISSIONER DEASON: Yes, I will keep the issue. And
16 just for clarification so that the other Commissioners when they
17 review this prehearing order, perhaps it would be more clear if
18 we just inserted the term -- after NUC we would insert the term
19 factually. Has NUC factually established. And perhaps that
20 would be more clear.

21 MS. BROWNLESS: Thank you.

22 MR. WHARTON: It would be the same thing with Issue B
23 after Intercoastal.

24 COMMISSIONER DEASON: Yes, we could do the same thing
25 there, as well. Okay.

1 Issue 1, changes, corrections, comments.

2 MR. MELSON: Chairman Deason, I have got a concern
3 about a number of issues with regard to the County's position,
4 and this the first issue that raises it. They say since St.
5 Johns County intends to provide service to that portion of the
6 proposed service territory, referring to the St. Johns County
7 portion, St. Johns County's witness has got absolutely no
8 testimony about a proposal to serve the territory. They have got
9 absolutely no testimony about a plan of service. There are no
10 other witnesses for any of the other parties that have sponsored
11 any such testimony. And I am concerned that the County is trying
12 to posture itself to introduce -- at the hearing try to introduce
13 testimony that does not exist today.

14 COMMISSIONER DEASON: Ms. Brownless.

15 MS. BROWNLESS: This is, as I sit here today, the
16 County's position. We believe it is our responsibility to bring
17 to the Commission's attention what our position is. Mr. Melson
18 is correct when he said that the County's witness, Mr. Young's
19 testimony does not address this. At some point in the future I
20 think the County will be requesting that it be allowed to modify
21 Mr. Young's testimony. And we would certainly make those
22 appropriate motions at that time.

23 COMMISSIONER DEASON: Okay. Any further comments?

24 MR. WHARTON: I think we are just presuming what the
25 evidence will show. That position will either be borne out or

1 not by the evidence. You would need more in front of you to
2 strike it today certainly, I think.

3 MR. MELSON: Commissioner Deason, my concern is I am
4 getting ready to take Mr. Young's deposition on Thursday of this
5 week. To the extent that St. Johns County is maintaining a
6 position that they have a plan, I am going to need to inquire
7 into that. I'm running the risk that by doing so I create a
8 deposition that some other adverse party could put into the
9 record as evidence of that plan.

10 Given the Commission's procedures for requiring
11 prefiled testimony, we are here at the prehearing conference, to
12 date there is no testimony at all, as Ms. Brownless admits, that
13 supports this position. I just feel that it is inappropriate for
14 the County to take a position on a matter of fact when the
15 record, by their own admission, will not contain any evidence on
16 that matter.

17 MS. BROWNLESS: If I may address that, Commissioner. I
18 think it is -- it is clear that there has been no prefiled
19 testimony. The County has always taken positions at the date the
20 prefiled testimony was filed. We took a position consistent with
21 what the County's position was at that time. I am not going to
22 sit here and tell you that the County has not further developed
23 its position. I think it is my responsibility to tell the
24 Commission the most relevant and most current facts,
25 and that is what we are seeking to place before the Commission.

1 If Mr. Melson believes that he is being unduly penalized by the
2 County's position, he is by his own admission taking Mr. Young's
3 deposition on Thursday, he can certainly pursue whatever he wishes
4 and whatever he believes to be relevant. The County is not going
5 to object to that line of inquiry at the deposition. And then he
6 can take whatever actions he deems necessary.

7 He may believe that based upon that deposition that a
8 continuance is necessary in order for him to file supplemental
9 testimony. And if so, he certainly is free to pursue that. Or
10 the Commission may feel that further continuance is necessary.

11 COMMISSIONER DEASON: Staff, do you have any concluding
12 thoughts?

13 MS. CIBULA: Just that time is starting to run short in
14 the hearing, so if the County plans on filing a motion to add
15 testimony, they need to do it right away.

16 COMMISSIONER DEASON: Mr. Melson, I understand the
17 concern, and I have some sympathy for it. However, I am
18 reluctant at this point to dictate to a party what their position
19 must be. Oftentimes parties appear before this Commission and do
20 not file any prefiled testimony, and certainly take positions on
21 issues. I understand that there is a factual claim that is
22 asserted within the position. The record will bear it out one
23 way or the other.

24 So as to clarify this for the purposes of this
25 prehearing order, I think it may be appropriate to insert the

1 words after St. Johns County on the second line of the position
2 just have it state since St. Johns County claims it intends to
3 provide service. And perhaps that will be clear to the reader
4 that perhaps that is something that has been asserted and the
5 record either will prove that or will not as the case may be.

6 MS. BROWNLESS: I'm sorry, Commissioner, how would you
7 like to modify this?

8 COMMISSIONER DEASON: I would propose that we would
9 modify the position to on the second line, it says "since St.
10 Johns County," I would insert the two words "claims it intends to
11 provide service."

12 Any objection to that terminology?

13 MS. BROWNLESS: Well, that's fine. Why don't we say --
14 that's fine. Why don't we say asserts, asserts that or claims?
15 That's fine. You want to say claims that it intends?

16 COMMISSIONER DEASON: Claims it intends to provide
17 service.

18 MS. BROWNLESS: Okay.

19 MR. MENTON: Commissioner, if I might just follow up
20 with Mr. Melson. One of the concerns that we have is that we do
21 have this deposition scheduled for Thursday of Mr. Young. And we
22 are not certain whether or not the County intends to provide
23 supplemental testimony or whether they are going to rely solely
24 upon the prefiled testimony that has been submitted to date. And
25 that will affect how we approach that deposition. So we would

1 appreciate some guidance in terms of whether or not they do
2 intend to submit supplemental prefiled testimony. If so, when
3 can we expect it and what issues might be addressed so we can
4 prepare for the depositions.

5 COMMISSIONER DEASON: Ms. Brownless, your response.

6 MS. BROWNLESS: Well, to the extent of preparing for
7 the depositions, I think that based upon this position and based
8 upon the depositions that we all have been previously engaged in,
9 I mean, I think we have done 10, or 12, or some significant
10 number of depositions, I think Mr. Melson and Mr. Menton are free
11 to inquire of Mr. Young what the specific plan of service is that
12 the County has and to develop the record with that regard. We
13 certainly are not going to object to that on Thursday.

14 And I would reiterate again that if based upon that
15 information they believe they need additional time or they need
16 whatever, that they can request that from the Commission as they
17 deem appropriate.

18 COMMISSIONER DEASON: Ms. Brownless, let me ask you
19 this. Do you intend to request the ability to provide additional
20 testimony on this question?

21 MS. BROWNLESS: I am not authorized to give an answer
22 to that today. I don't want to mislead you and say that I will
23 not do that, but a decision on that point has not been made as of
24 today's date.

25 COMMISSIONER DEASON: I wish I could give you more

1 guidance, but you have gotten your answer. Before there will be
2 any more additional testimony there will have to be a motion
3 filed to request that. I will have to rule upon that. I will
4 also have to give opportunity for parties to respond before I
5 make that ruling. And as staff has already indicated, the date
6 for hearing grows nearer and nearer. As of this point there has
7 not been a request filed. There may not be a request filed. And
8 if one is filed, it may not be granted. That is the only
9 guidance I can give you.

10 MR. WHARTON: And, Commissioner Deason, perhaps now is
11 an appropriate place to say that we are not -- there is going to
12 be more testimony in this case. I mean, I understand that just
13 in terms of the timing, in terms of whether the filing of
14 testimony after a deposition would create an occasion where maybe
15 that individual would have to be deposed again just on that
16 point, which I understand might occur. But, I mean, since we are
17 having this discussion, I certainly don't want anyone to say that
18 I stood silent. Unless the brains of opposing counsel have been
19 dulled through some happenstance, I anticipate right now we are
20 going to file additional testimony which we say is responsive to
21 the testimony of Ms. Swain, which was the subject of your order,
22 and that the other side is going to take the position it goes
23 beyond that. It's as simple as that. I haven't decide yet
24 whether we are just going to call it rebuttal or we are going to
25 put a motion on the front of it, but we are going to try to file

1 it by this Friday.

2 COMMISSIONER DEASON: Very well. And we will deal with
3 it promptly.

4 MR. WHARTON: I understand.

5 COMMISSIONER DEASON: And to the extent the parties
6 feel that that responsive testimony goes beyond the bounds of
7 being responsive and introduces new matters, well, then there
8 certainly can be an objection filed to that, as well.

9 MR. WHARTON: I understand.

10 COMMISSIONER DEASON: And there could be the
11 possibility it could be stricken. Those are matters we will deal
12 with in due course.

13 MR. WHARTON: We believe it is responsive, but we will
14 spell that out within the testimony and within any motion we put
15 on there.

16 COMMISSIONER DEASON: Very well. No one should be
17 caught off guard.

18 MR. MELSON: We learn more every moment.

19 MR. WHARTON: Yes, we do.

20 COMMISSIONER DEASON: Issue 3, questions, concerns?
21 Issue 4. Issue 5. Issue 6. Issue 7.

22 MR. WHARTON: We had a position there, and it is
23 language that I will give to Ms. Cibula later. It just says that
24 the AFUDC rate should be as determined by NUC's capital structure
25 and the proper application of the leverage formula in effect at

1 the time of the final order. And that is language that I will
2 just give Ms. Cibula this afternoon.

3 COMMISSIONER DEASON: Very well.

4 MR. WHARTON: No one has to write it down now.

5 COMMISSIONER DEASON: Very well. Thank you. Issue 7A.

6 MR. WHARTON: I don't think JEA had -- and I guess --
7 I'm sorry, I skipped ahead. It's 7A that JEA also does not have
8 a position there. And that was actually 7A that I was just
9 speaking to. I spoke out of turn there.

10 COMMISSIONER DEASON: Very well. Does JEA have a
11 position on 7A?

12 MR. MENTON: No, sir, we do not.

13 COMMISSIONER DEASON: You just take no position?

14 MR. MENTON: We will just adopt NUC's position.

15 COMMISSIONER DEASON: Very well. Issue 8. Issue 9.

16 MR. MELSON: Chairman Deason, this is another one where
17 there is a statement the County intends to provide service. We
18 have had that conversation. There are a number of issues that
19 fall into that category. I counted Issues 1, 9, 10, 13, and 21.
20 I don't know whether it is appropriate to insert the claim
21 language each time or not. I think we now understand the status,
22 so I guess I'm less concerned about exactly how the language
23 reads.

24 COMMISSIONER DEASON: Okay. Well, I think for clarity
25 and for consistency we will insert the same language unless there

1 is an objection by Ms. Brownless.

2 MS. BROWNLESS: No, sir, that's fine.

3 COMMISSIONER DEASON: Very well. Issue 10. Issue 11.
4 Issue 12. Okay, we are now on Issue B. I think that we have
5 already had the basic argument on this Issue, and I think unless
6 there is something that I'm not aware of at this point --

7 MR. WHARTON: I think that -- okay. That's right.
8 That's fine the way it is.

9 COMMISSIONER DEASON: Very well.

10 MS. CIBULA: For Issue A and B on staff's position we
11 would like to take out the language about that the issue is
12 unnecessary and should be stricken from both Issues A and B since
13 the prehearing officer has decided to put the issue in.

14 COMMISSIONER DEASON: Very well. You may make that
15 change. Issue 13. Issue 14. Issue 15. Issue 16. Issue 17.
16 Issue 18. Issue 18A.

17 MR. MELSON: Commissioner, NUC takes no position on
18 Issue 18A.

19 COMMISSIONER DEASON: Very well.

20 MS. BROWNLESS: Likewise, Commissioner, the County
21 takes no position.

22 COMMISSIONER DEASON: Okay.

23 MR. MENTON: JEA takes no position.

24 COMMISSIONER DEASON: Mr. Korn, do you have a position
25 on Issue 18A?

1 MR. KORN: No, sir, we take no position.

2 COMMISSIONER DEASON: Very well. Issue 19. Issue 20.
3 Issue 21. Staff, I'm a little concerned that we have a statement
4 of two different issues, or which appear to be two different
5 issues, and I'm having difficulty understanding the difference.
6 In the second terminology you used there you have both
7 Intercoastal or NUC, and in the first issue it just references
8 Intercoastal. Can you clarify the situation?

9 MS. CIBULA: The issue that was originally on the
10 prehearing order, it was just pertaining to Intercoastal. When
11 we had the second pre-pre and the County requested that the issue
12 pertain to both Intercoastal and NUC. And I believe JEA is
13 opposed to having the issue changed to NUC and Intercoastal.

14 COMMISSIONER DEASON: Okay. Mr. Menton, can you
15 explain your concern.

16 MR. MENTON: Well, Commissioner, I believe Issue 9
17 largely addresses this issue already.

18 COMMISSIONER DEASON: Give me a moment to review Issue
19 9, please.

20 MR. MENTON: Excuse me, I'm sorry. Issue 9 raises it
21 in a general sense. I believe Issue 21 gets more specific with
22 respect to the County's system. This goes back to the discussion
23 we have already had. The County has not submitted any prefiled
24 testimony directly related to how the proposed application of
25 Nocatee Utility Corporation would be in competition with the

1 County's existing system.

2 So I think there are two issues. Number one, it seems
3 to be duplicative of Issue Number 9; and, number two, the issue
4 about there is no prefiled testimony that would relate directly
5 to the County's system.

6 COMMISSIONER DEASON: Ms. Brownless.

7 MS. BROWNLESS: Yes, sir. These issues are paired
8 issues, that is true. And they are paired fact versus statement
9 of law. This is a legal issue, Issue Number 21, can the
10 Commission, does the Commission have the authority to do that
11 under Chapter 367. And then Issue Number 9 is the factual issue.
12 Is there an actual duplication of service or competition of
13 service that will take place?

14 And with regard to whether the County has put in
15 prefiled testimony or not, the County will either be able to
16 demonstrate it or it won't. That can be worked out at hearing.
17 That is no reason to disallow this factual issue. All the County
18 did was suggest that NUC be included. The argument is the same
19 for Intercoastal as well as NUC.

20 COMMISSIONER DEASON: Okay. So you are indicating that
21 this is the legal issue, and that it applies equally to
22 Intercoastal and NUC?

23 MS. BROWNLESS: Yes, sir.

24 COMMISSIONER DEASON: Okay. Mr. Melson, Mr. Wharton.

25 MR. MELSON: If it's a legal issue, I think it would be

1 better to delete the reference to the County's water and
2 wastewater system, simply saying competition whether duplication
3 of any other system. The question assumes that there is a county
4 system in vicinity to be duplicated or competed with.

5 MS. BROWNLESS: Well, to the extent that part of ICU's
6 application, Intercoastal's application specifically references
7 Walden Chase, Marsh Harbor, where -- well, in the case of Walden
8 Chase and Allenice (phonetic) High School, where the County is
9 actually right at this moment providing water and sewer service,
10 that's why it references the County's water and wastewater system
11 with regard to those entities.

12 COMMISSIONER DEASON: So, Mr. Melson, you are
13 indicating that for purposes of the legal issue, it is
14 unnecessary to make reference to the County's water and
15 wastewater system. The basis of the legal issue would be whether
16 there was competition with any other separate system?

17 MR. MELSON: Correct.

18 COMMISSIONER DEASON: Mr. Wharton, any comments?

19 MR. WHARTON: I also to the extent that that is
20 correctly categorized as an issue of law would think that it
21 should be genericized. I might even suggest getting rid of the
22 phrase original certificate and just saying a certificate.
23 Because Intercoastal, in fact, is having to file two
24 applications. One is an extension. But it does just seem like
25 the issue should be made generic. I think that will still cover

1 the concerns that Ms. Brownless --

2 COMMISSIONER DEASON: Is there a distinction in the law
3 between original certificates and extensions in relation to there
4 being competition with another system?

5 MR. WHARTON: I don't believe there is.

6 MR. MELSON: I don't believe so.

7 MS. BROWNLESS: I don't think so.

8 MR. WHARTON: It is for forbidden in each case.

9 COMMISSIONER DEASON: So you are suggesting that we
10 strike the reference to original?

11 MR. WHARTON: And just kind of genericize the whole
12 issue. Can the Commission grant a certificate to either one of
13 these applicants that would be a duplication of or competition
14 with another entity.

15 COMMISSIONER DEASON: Very well.

16 MS. BROWNLESS: What do you want to say now, John?

17 MR. MELSON: Commissioner Deason, let me make an
18 alternative suggestion. To the extent this is a legal issue, I
19 wonder if there is a way to combine it with Issue 9 and the
20 corresponding issue for Intercoastal. Will the certification of
21 NUC result in the creation of a utility which will be in
22 competition with or duplication of any other system. If, yes,
23 can a certificate be granted under that circumstance. And simply
24 get all the questions in one place.

25 MS. BROWNLESS: Commissioner, I would like to keep them

1 as clearly a separate factual issue and a separate legal issue.

2 COMMISSIONER DEASON: I think it may be clearer to have
3 it as a separate legal issue. I know it helps me if an issue is
4 labelled as a legal issue.

5 MS. BROWNLESS: And the wording of this, what is the
6 final wording?

7 COMMISSIONER DEASON: Mr. Wharton, can you provide that
8 wording right now or do you need --

9 MR. WHARTON: Can the Commission grant Intercoastal or
10 NUC a certificate which will be in competition with or a
11 duplication of any other water and wastewater system.

12 MS. BROWNLESS: Thank you.

13 COMMISSIONER DEASON: Does staff have any objection to
14 that wording?

15 MS. CIBULA: No, staff is fine with that.

16 COMMISSIONER DEASON: Any other objections to the
17 wording?

18 MR. KORN: No objection.

19 COMMISSIONER DEASON: Very well. Show that we will
20 incorporate that wording then for Issue 21. Any questions or
21 concerns with positions on Issue 21?

22 MR. MENTON: Mr. Chairman, I may need to get with staff
23 to clarify JEA's position on here. I think the original position
24 was drafted when this issue related solely to the Intercoastal
25 system and to the duplication with the Walden Chase service. Now

1 that it has been more generalized, I think I'm going to have to
2 make that a little bit clearer, because we don't object in terms
3 of the Nocatee application.

4 COMMISSIONER DEASON: Very well. Can you get that
5 language to staff today?

6 MR. MENTON: Yes, sir.

7 COMMISSIONER DEASON: Very well.

8 MR. MELSON: Mr. Chairman, I will need to get language
9 to staff today, as well.

10 COMMISSIONER DEASON: Very good.

11 MR. KORN: Mr. Chairman, I may need to do the same.

12 COMMISSIONER DEASON: Very well. You will have that
13 opportunity.

14 MR. KORN: Thank you, sir.

15 COMMISSIONER DEASON: You may need to try to fax that
16 over to staff today, if possible.

17 MR. KORN: I will do my best.

18 COMMISSIONER DEASON: Okay. I believe that is the last
19 issue. That's correct. Section IX, exhibit lists. Changes or
20 corrections?

21 MR. MELSON: Mr. Chairman, on the top of Page 37, DCM-6
22 and DCM-7 should both probably say revised DCM-6 and revised
23 DCM-7. There were updated copies of those filed.

24 COMMISSIONER DEASON: Very well. Any other changes?

25 MR. MELSON: On Page 39, a similar change at the bottom

1 of the page. DDS-12 should be revised DDS-12.

2 COMMISSIONER DEASON: Very well.

3 MS. BROWNLESS: Is that also true for Exhibit 13, Rick?

4 MR. MELSON: No, there was no update to Exhibit 13.

5 COMMISSIONER DEASON: Other changes? Section X,
6 proposed stipulations. There has not been a settlement in this
7 case, I take it?

8 MR. MENTON: Mr. Chairman, I'm sorry. To go back there
9 was very one important -- on JM Number 2 on Page 40, I think
10 there is an extra 0 in 2000 there.

11 COMMISSIONER DEASON: Okay. On Page 40, can you direct
12 me there?

13 MR. MENTON: JM-2 on the conceptual master plan.

14 COMMISSIONER DEASON: Oh, yes. That would be far in
15 the future, wouldn't it?

16 MR. WHARTON: And I'm sure we would have revised that
17 baby many times by then.

18 COMMISSIONER DEASON: Okay. Section 11, pending
19 motions. Apparently there has been a request for official
20 recognition and a motion to take judicial notice. Is there
21 anything objectionable or controversial about these particular
22 items?

23 MS. CIBULA: No.

24 MR. WHARTON: I don't believe there is, however, I also
25 think that the common practice is that those are requests rather

1 than motions, and that usually as a matter of evidence they are
2 taken up at the beginning. I mean, as I sit here right now it
3 looked to me like the kind of information that should come in. I
4 just noticed that one of them was filed a motion. And, in
5 fact -- well, just that.

6 COMMISSIONER DEASON: Well, we can just take this up as
7 one of the first matters of the hearing after opening statements.
8 We can take it up at that point. Is there any objection to that,
9 Ms. Brownless?

10 MS. BROWNLESS: No, sir, but I would just explain why
11 it is done as a motion. It's done as a motion so that you give
12 the other side or all the other parties an opportunity to object
13 and to file written objections to it. That was the theory behind
14 this so, that we didn't have to take time at the beginning of the
15 hearing to do it.

16 MR. WHARTON: Well, the inference in that position,
17 though, is that I have already missed that time to respond. That
18 is the difference between calling it a motion and calling it a
19 request, which is what the Administrative Procedure Act calls it.
20 And I have never seen those held to a seven-day time frame.

21 COMMISSIONER DEASON: Okay. So you are in -- now, you
22 are indicating that at the beginning of the hearing you may have
23 an objection?

24 MR. WHARTON: It's possible.

25 MS. BROWNLESS: Well, with all due respect,

1 Commissioner, one of the reasons I called it a motion, the whole
2 purpose of doing it this way is to have a definitive point in
3 time in which the other side either says, yes, I will do
4 something or, no, I won't. Yes, I will object, or, no, I won't.
5 And that's why it is done this way. The rules of evidence which
6 I believe the Commission has traditionally followed in this
7 regard, indicate that it shall be admitted. In other words, it
8 shall be taken judicial notice of if all parties are given notice
9 and those parties don't object. And that is why it was done in
10 this way. I think that is a procedure that is allowed. And I
11 understand that Mr. Wharton doesn't want to do that and has
12 missed the time.

13 MR. WHARTON: Whether it shall be admitted is a
14 different issue than whether or not it should have been attached
15 to a motion. The Commission certainly would not automatically
16 enter these things into evidence if we missed the time to respond
17 to a motion. The question is whether you are going to do it
18 with -- whether or not you are going to muzzle me. You are still
19 going to have to make the determination whether you believe it is
20 the type of information that would come in under what the --

21 COMMISSIONER DEASON: What we will do at this point is
22 I will not make a ruling. I would ask you to review it and be
23 prepared to address it at the preliminary stages of the hearing.
24 It may be that you have no objection in this whole argument, it
25 will be moot.

1 MR. WHARTON: That is what I anticipate.

2 COMMISSIONER DEASON: However, if do you intend to make
3 an objection, Ms. Brownless, you certainly will be free to raise
4 the question as to whether he is making an untimely objection.

5 MS. BROWNLESS: Thank you.

6 COMMISSIONER DEASON: Okay. Section XII. Apparently
7 there are no pending confidentiality matters. And apparently I
8 have made no rulings. And I believe that that is the sum total
9 of the draft prehearing order at this point.

10 Are there any further matters which need to be
11 addressed today, Mr. Melson?

12 MR. MELSON: Commissioner Deason, there is a
13 possibility yet of a motion to compel discovery. At this point
14 I'm trying to avoid that. And I believe Mr. Wharton is working
15 with me in good faith in an effort to avoid it. But if I am
16 forced to file one, I don't want that to come as a surprise.

17 COMMISSIONER DEASON: Okay. Do we have any indication
18 that if a motion becomes necessary when one would be filed?

19 MR. MELSON: I am waiting for a list of additional
20 documents that I am supposed to be able to review, and my
21 understanding is that is coming to me shortly.

22 COMMISSIONER DEASON: Mr. Wharton, can you confirm
23 that?

24 MR. WHARTON: I would say that certainly we will give
25 Mr. Melson that list no later than tomorrow. I would also agree

1 to respond if he is forced to move to compel within two days of
2 the filing of that motion. I think we are going to give it all
3 to them; but to the extent we don't, let's get an order and then
4 we will give it all to them. Or we won't.

5 COMMISSIONER DEASON: Very well. I would just request,
6 Staff, that if a motion is filed, and given the short response
7 period which Mr. Wharton has agreed to, that the matter be
8 brought to my attention as quickly as possible.

9 MS. CIBULA: We will do that.

10 COMMISSIONER DEASON: Very well. Further matters?

11 MR. MENTON: Commissioner, one additional matter I did
12 want to mention at this point. We are still evaluating the
13 possibility of filing a motion for summary final order with
14 respect to either the res judicata or collateral estoppel. And I
15 know that that is an issue that is identified in this prehearing
16 order. At this point when we complete discovery we are going to
17 examine that issue, the whole matter a little bit closer.

18 We believe that these proceedings -- there were
19 extensive hearings that were conducted before the St. Johns
20 County Water and Sewer Authority. I understand that this is a
21 different application, but there may be certain issues in
22 particular and maybe a matter of issue preclusion rather than
23 res judicata of the whole application that we may try to present
24 to the Commission. I just wanted to alert you to that.

25 We still haven't decided for sure, but I do believe

1 that it is highly likely we will file a motion seeking -- if not
2 collateral estoppel with respect to the Intercoastal application,
3 at least issue preclusion on certain matters.

4 COMMISSIONER DEASON: You could raise the question of
5 collateral estoppel pretty much at any time, is that correct?

6 MS. CIBULA: That's correct.

7 COMMISSIONER DEASON: But when you start saying that
8 your remedy may be the elimination of issues, that is what I was
9 hoping we could do today and that when we walked out of this room
10 today that we would have nailed down what the issues are. So I'm
11 a little disappointed that that may be your perceived remedy. My
12 question is if that is your perceived remedy, why weren't you
13 prepared today to identify those issues which are inappropriate?

14 MR. MENTON: Well, sir, I think we are still trying to
15 fully understand through the discovery process what is included
16 within the application, how the application of Intercoastal has
17 changed from this proceeding to the last proceeding, and to
18 determine whether or not Intercoastal has any additional evidence
19 related to the testimony that was presented regarding the plan of
20 service that Nocatee anticipated through its joint arrangement
21 with JEA at the time of the last proceeding.

22 At this point, I don't believe -- I understand that the
23 application that Intercoastal has filed with the Commission
24 includes some additional territory. There is a new plan of
25 service. But there are a number of aspects of this proceeding

1 before the Commission that are identical to what took place
2 before the St. Johns County Water and Sewer Authority, including
3 how JEA intends to provide service, what JEA's capacity is,
4 et cetera.

5 So my concern is that once -- until we complete the
6 discovery process and know exactly what is going to be presented,
7 we weren't certain as to which issues we might be able to present
8 to the Commission and say in good faith that these issues were
9 already heard and resolved by the St. Johns County Water and
10 Sewer Authority and there is no need for the Commission to
11 revisit those.

12 COMMISSIONER DEASON: You do realize that we are going
13 to hearing May 7th, 8th, and 9th?

14 MR. MENTON: Yes, sir. And the discovery will be
15 completed this week. The last round of depositions are scheduled
16 for Thursday and Friday of this week.

17 COMMISSIONER DEASON: If it is necessary for you to
18 file such a motion, when do you anticipate filing it?

19 MR. MENTON: We would anticipate filing it upon
20 completion of the discovery the first part of next week,
21 probably.

22 COMMISSIONER DEASON: And what is the normal response
23 period?

24 MR. MENTON: Ten days, I believe.

25 COMMISSIONER DEASON: Is that correct?

1 MS. BROWNLESS: Seven days.

2 COMMISSIONER DEASON: Given the nearness of the
3 hearing, perhaps the best thing to do, if that happens you would
4 be entitled to file that, we would receive the responses and we
5 would address it as one of the preliminary matters at the
6 hearing.

7 MR. MENTON: Thank you, sir.

8 COMMISSIONER DEASON: Any other matters?

9 MR. KORN: Mr. Commissioner --

10 COMMISSIONER DEASON: Yes.

11 MR. KORN: -- I just wanted to confirm, my
12 conversations with Staff indicated that it was the Commission's
13 intent to hear from customer comments on the evening of the first
14 day of hearing, which would be May 7th at approximately 7:00
15 o'clock. And I didn't know whether that needed to be addressed
16 in the order or just confirmed so that I can make sure of that
17 timing?

18 COMMISSIONER DEASON: Staff.

19 MS. CIBULA: There is a service hearing at 10:00 a.m.
20 at the beginning of the hearing. There is also one at 7:00
21 o'clock p.m. on the day of the first --

22 COMMISSIONER DEASON: And has that notice been issued?

23 MS. CIBULA: Yes, it has.

24 COMMISSIONER DEASON: Okay. Apparently there will be
25 the opportunity for -- Mr. Korn, there will be the opportunity

1 for public testimony at 10:00, which is the beginning of the
2 hearing on the first day. And then in the evening of the first
3 day at 7:00 p.m. there also will be an opportunity for public
4 testimony.

5 MR. KORN: That just confirms what I needed to know.
6 Thank you, sir.

7 COMMISSIONER DEASON: Okay. Any additional matters at
8 this time? Hearing none, thank you all for your participation.
9 This prehearing conference is adjourned.

10 MR. KORN: Thank you, Mr. Commissioner. I'm going to
11 sign off.

12 MS. BROWNLESS: Thank you.

13 COMMISSIONER DEASON: Thank you.

14 (The prehearing conference concluded at 2:25 p.m.)
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STATE OF FLORIDA)

: CERTIFICATE OF REPORTER


COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, FPSC Bureau of Reporting
FPSC Commission Reporter, do hereby certify that the
Prehearing Conference in Docket No. 990696-WS and 992040-WS was
heard by the Florida Public Service Commission at the time and
place herein stated.

IT IS FURTHER CERTIFIED that I stenographically
reported the said proceedings; that the same has been transcribed
under my direct supervision; and that this transcript, consisting
of 38 pages constitutes a true transcription of my notes of said
proceedings.

I FURTHER CERTIFY that I am not a relative, employee,
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DATED THIS 18TH DAY OF APRIL, 2001.



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