

ORIGINAL

KORN & ZEHMER, P.A.
ATTORNEYS AT LAW
JACKSONVILLE, FLORIDA

PLEASE REPLY TO:
POST OFFICE BOX 550700
JACKSONVILLE, FLORIDA 32255-0700
TELEFAX (904) 296-0384

SUITE 200, SOUTHPOINT BUILDING
6620 SOUTHPOINT DRIVE, SOUTH
JACKSONVILLE, FLORIDA 32216
TELEPHONE (904) 296-2111

June 5, 2001

VIA FEDERAL EXPRESS

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399

Re: Application by Nocatee Utility Corporation for Original
Certificates for Water & Wastewater Service in Duval and St.
Johns County, Florida - Docket No: 990696-WS
&
Intercoastal Utilities, Inc. Application for Amendment of
Certificate for Extension of Territory and for Original Water
and Wastewater Certificate - Docket No: 992040-WS

Dear Ms. Bayo:

Please find enclosed the original and 15 copies of Sawgrass
Association, Inc's Post-Hearing Brief in connection with the above-
referenced consolidated docket. Also enclosed is a diskette
containing the Brief in WordPerfect 8.0 format. It would be
appreciated if your office would acknowledge the date and time of
filing by stamping the enclosed copy of this letter and returning
it to us in the postage prepaid envelope provided.

Should you have any questions, or if anything else is required,
please do not hesitate to contact me. Thank you for your courtesy
and cooperation.

Very truly yours,



Michael J. Korn

- APP _____
- CAF _____
- GMP _____
- JRM 5
- JTR _____
- ECR _____
- WFS 1
- JPC _____
- PAI _____
- RGO _____
- SEC 1
- SER _____
- OTH _____

/clz/enclosures

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

07078 JUN-6 2001

FPSC-RECORDS/REPORTING

01 JUN -5 10 00 AM '01

Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
June 5, 2001
Page Two

cc w/copy enclosures:

John L. Wharton, Esquire and
F. Marshall Deterding, Esquire
Richard D. Melson, Esquire
Samantha Cibula, Esquire
Kenneth A. Hoffman, Esquire and
J. Stephen Menton, Esquire
Michael E. Wedner, Esquire
Sawgrass Association, Inc.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 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
)	<u>Filed June 6, 2001</u>
)	

POST-HEARING BRIEF OF INTERVENOR SAWGRASS ASSOCIATION, INC.

COMES NOW Sawgrass Association, Inc., Intervenor, by and through its undersigned counsel, and pursuant to Rule 28.106.215, Florida Administrative Code, and Order Number PSC-01-1032-PHO-WS, issued April 27, 2001 by The Florida Public Service Commission (Commission), hereby files its post-hearing brief.

INTRODUCTION

Sawgrass Association, Inc. (hereinafter the Association) comprises the largest single group of current water and wastewater customers of Intercoastal Utilities, Inc. (hereinafter ICU or Intercoastal). The Association has intervened in this docket in connection with the application by ICU, which is seeking an expansion of its current certificated area to serve a substantial portion of territory in St. Johns County, Florida and a smaller portion of Duval County, Florida, which comprises the proposed Nocatee development of regional impact.

The Association opposes ICU's application for an amendment of its certificate for an extension of its territory and an original water and wastewater certificate. Based on ICU's prior operations

DOCUMENT NUMBER-DATE

07078 JUN-06

FPSC-RECEIVEDS/REPORTING

and service, the Association does not believe ICU possesses the required ability to serve the subject area, and it is not in the public interest for ICU to be granted a water and wastewater certificate for the proposed territory.

The Association believes ICU does not have a favorable track record of adequately serving its existing (and smaller) customer base, so the Commission should not have confidence in ICU's ability to properly serve a large multi-county area such as the proposed Nocatee development.

As set forth in the Pre-Hearing Order, the Association has not taken a position on those issues concerning the suitability of Nocatee Utility Corporation (hereinafter NUC) to serve the same proposed area. Therefore, this Brief will not address those issues that pertain to NUC's application for an original certificate for water and wastewater service to Nocatee. Additionally, to the extent the Association's position is similar to that asserted by other parties who have submitted post-hearing briefs in this docket, the Association will indicate its adoption of such arguments.

ARGUMENT

Issue A: Has NUC factually established that its proposed water and wastewater systems satisfy the requirements of Section 367.171(7), Florida Statutes, sufficient to invoke Commission jurisdiction to grant its application for original certificates?

Position: **As set forth in the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 1: Is there a need for service in the territory proposed by NUC's application, and if so, when will service be required?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 2: Does NUC have the financial ability to serve the requested territory?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 3: Does NUC have the technical ability to serve the requested territory?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 4: Does NUC have the plant capacity to serve the requested territory?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 5: What is the appropriate return on equity for NUC?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 6: What are the appropriate water, wastewater, and reuse rates and charges for NUC?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 7: What are the appropriate service availability charges for NUC?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 7A: What is the appropriate AFUDC rate for NUC?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 8: What is the Nocatee landowner's service preference and what weight should the Commission give the preference?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 9: Will the certification of NUC result in the creation of a utility which will be in competition with, or duplication of, any other system?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 10: Should the Commission deny NUC's application based on the portion of Section 367.045(5)(a), Florida Statutes, which states that the Commission may deny an application for a certificate of authorization for any new Class C system, as defined by Commission rule, if the public can be adequately served by modifying or extending a current wastewater system?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 11: Is it in the public interest for NUC to be granted a water certificate and wastewater certificate for the territory proposed in its application?

Position: **Consistent with the Pre-Hearing Order, the Association takes no position on this issue.**

Issue 12: Is Intercoastal barred by the doctrines of res judicata and/or collateral estoppel in this proceeding from applying for the same service territory in St. Johns County which it was previously denied by St. Johns County?

Position: **Yes.**

The Association adopts the arguments on this issue as set forth in the post-hearing briefs submitted by JEA and NUC.

Issue B: Has Intercoastal factually established that its proposed water and wastewater systems satisfy the requirements of Section 367.171(7), Florida Statutes,

sufficient to invoke Commission jurisdiction to grant its application for original certificates?

Position: **The Association takes no position on this issue.**

Issue 13: Is there a need for service in the territory proposed by Intercoastal's application, and if so, when will service be required?

Position: **Based upon the testimony presented in this docket, and documents produced in connection therewith, the territory comprising Phase One of the Nocatee development will need water and wastewater service within the coming five (5) years, and thereafter.**

According to Nocatee's projections, service for Phase One of development will be needed in approximately the fourth quarter of 2002 (Douglas Miller, TR 185-186). As future phases of the Nocatee project are developed, there will be additional needs for water, wastewater and reuse service. The Nocatee developers are in the best position to determine exactly when service would be required and the type of service. The Association has no position about when service will be needed to other DDI lands which are not within the current Nocatee DRI, since DDI has indicated there are no plans for any such development (Skelton, TR 984-985, 998).

Issue 14: Does Intercoastal have the financial ability to serve the requested territory?

Position: **Based upon the testimony previously presented in proceedings before the St. Johns County Water and Sewer Authority in June 1999, and based on the testimony submitted in these dockets, it is unclear whether Intercoastal has the financial ability to serve the requested expansion territory.**

The Commission heard testimony and received evidence about the financial circumstances of Intercoastal's owners and investors. ICU has a substantial negative net worth, and its operations are

100% debt financed (Swain, TR 1053-1054). ICU was unable to pay its debt service from its operating earnings in 1997 and 1998, and the only way ICU was able to cover this deficit was to increase its wastewater rates to its existing customers in excess of 40% (Swain, TR 1054).

However, ICU asserts it has the ability to borrow 100% of the funds necessary to expand service into the subject certificated area (James, TR 431; Swain, TR 1055). Ms. Swain calculated the amount ICU would need to borrow in order to construct the infrastructure to serve the Nocatee development was at least \$20,000,000, an amount over six times what ICU has borrowed in the past (Swain, TR 1083; see also Forrester, TR 1189). This debt service would apparently be initially funded by ICU's shareholders (Swain, TR 1069), but if past history with its existing territory is any indication, ICU may ultimately seek to recoup the deficit by increasing ICU's rates in the future. ICU's shareholders only made an initial investment of \$69,000 in the utility, and any other investments they made were more than offset by ICU's negative equity (Swain, TR 1076-1077). It is therefore difficult to conclude that Intercoastal would be able to serve the requested expansion territory simply through further borrowing.

The Association adopts NUC's position in its post-hearing brief, to the effect that Intercoastal's financial statements and financial projections raise serious concerns about ICU's ability to provide adequate service to the territory throughout the life of the Nocatee project and thereafter. This is especially true

because it is undisputed that ICU has been, and continues to be, for sale. In fact, a proposal is to be considered by St. Johns County during the first week of June 2001 for the County to purchase ICU (James, TR 441-443, 447, 458-459).

Issue 15: Does Intercoastal have the technical ability to serve the requested territory?

Position: **No. The Sawgrass community has been subjected to regular noxious odors from ICU's adjacent wastewater treatment plant, even after ICU changed its sewage processing system. There is significant concern about whether ICU can serve the large area of Nocatee when it has problems serving its current territory.**

Based on the evidence presented in this docket, ICU has been unable to stop the noxious odors coming from its sole wastewater treatment facility (WWTF), located immediately adjacent to the Sawgrass development (Arenas, TR 705; Flury, TR 725). The fact that odor continues to be a problem is particularly disturbing because ICU spent substantial funds (from its wastewater rate increase in excess of 40%) to change its wastewater processing method when it introduced its "sequencing batch reactor" process (Exhibit 32 - ARO - 4). This change was to come online in December 1999, but did not occur until approximately February 2000. ICU apologized to its customers about the odor in Mr. James' February 4, 2000 letter, and represented that most of the odors from the WWTF would be removed after the plant process method changed in February 2000 (Arenas, TR 706; Flury, TR 725-726; Exhibit 32 - ARO - 4). However, the odors have been just as bad since that time (Arenas, TR 706). Numerous complaints to Jax Utilities Management (JUM), ICU's service affiliate (James, TR 443), have not led to

satisfactory results, and Sawgrass residents believe it does no good to call or complain, because ICU has not adequately addressed the odor problem (Arenas, TR 706, 708).

Furthermore, in 1999 (prior to the recent expansion of its plant capacity) ICU was operating its WWTF in excess of its permitted 800,000 gpd capacity, yet FDEP chose not to bring an enforcement action for ICU unauthorized usage, or for the fact that ICU was maintaining an open surge pond at its utility site which was being used by ICU to hold raw effluent, because the expansion was supposed to be completed by December 1999 (but did not actually come online until February 2000) (Flury, TR 731-731).

ICU also had to advise the public in October 1999, well after the fact, that the December 1998 level of total coliform bacteria in the drinking water provided by ICU exceeded maximum contaminant levels - ICU described this as "our violation" (Flury, TR 732; Exhibit 32 - ARO - 3). ICU's notice tried to minimize this issue by telling its customers "contaminants [are] expected to be in drinking water," and that subsequent tests showed the water supply was "free of total coliform." ICU then claimed that "At no time did this incident pose a threat to public health and safety" (Exhibit 32 - ARO - 3), yet this record contains no other evidence supporting ICU's claim, or the basis ICU relies on to establish that no customers became ill (Flury, TR 733, 748-750). It is unclear from the record if and when FDEP was aware about ICU's potable water supply exceeding total coliform bacterial guidelines (Cordova, TR 822-823).

Intercoastal (through JUM) has also made makeshift repairs to its existing utility system, such as the repairs of the pump station failure near the Sawgrass North Gate in December 1999. This failure caused raw sewage to flow out of the manholes onto Sawgrass streets (Flury, TR 724-725; Exhibit 32 - ARO - 5), and was not fully fixed until April 2000 (Forrester, TR 352). This does not bode well for ICU's technical ability to serve a substantially larger territory than its current certificated area.

Issue 16: Does Intercoastal have the plant capacity to serve the requested territory?

Position: **ICU's current WWTF has insufficient capacity to serve the requested territory, and it is not cost effective to serve Nocatee from ICU's existing system. The Association cannot evaluate the technical, financial or operational capacity of ICU's proposed new plants, other than based on past performance.**

Based upon the testimony presented at the hearing, ICU does not now have the requisite plant capacity to serve the requested Nocatee territory at the present time, and ICU would have to construct new plants and facilities (James Miller, TR 400, 410). ICU's most recent Plan of Service includes construction of new facilities in the so-called "western territory," which they plan to locate somewhere within the boundaries of Nocatee (James Miller, TR 400, 402), notwithstanding the fact that the Development Order passed by the St. Johns County Board of County Commissioners specifically prohibits location of any water or wastewater facilities onsite (Doug Miller, TR 208-210), and St. Johns County officials had expressed the desire that onsite treatment plants and water wells be barred from Nocatee (Doug Miller, TR 217). ICU has

now represented that they would not serve the proposed territory from any of its facilities located in its current certificated area (Forrester, TR 330, 332, 334, 347-348, 367; James Miller, TR 410).

DDI's engineers have estimated that the Nocatee development will have reuse needs of approximately 1.535 million gallons per day (mgd) during Phase One. This will increase to a projected need of 6.736 MGD by the time of build out (Doug Miller, TR 134; Exhibit 6 - DCM - 3). However, pursuant to the Utility Service Agreement between the Association and ICU, all effluent currently being processed at ICU's existing Sawgrass WWTF (which is currently estimated to have an average daily flow of between 550,000 and 750,000 gallons per day - James, TR 450), is first made available to Sawgrass Country Club for its irrigation needs (James, TR 449; Exhibit 32 - ARO 1). Thus, ICU will not be able to provide sufficient reuse from its existing WWTF, since Sawgrass Country Club is first being provided with reuse water. According to Mr. James himself, an 18 hole golf course in this part of Northeast Florida needs more than an average of 300,000 gallons per day of irrigation (James, TR 470). The Sawgrass Country Club has 27 holes of golf.

Issue 17: What are the appropriate water, wastewater, and reuse rates and charges for Intercoastal?

Position: **Any Intercoastal rates and charges must be considered in conjunction with the pending 1999 rate audit. Intercoastal is obligated under the Utility Service Agreement to provide reuse water needed by Sawgrass Country Club at no charge until 2013.**

Based on the testimony presented at hearing, the Commission does not have information before it about the ongoing audit of ICU's 1999 rate base, which may have an impact on applicable rates (Forrester, TR 326; James, TR 476). Under the terms of the Utility Service Agreement entered into between ICU and Arvida, Inc. in approximately September 1983, ICU is providing reuse water as needed by the Sawgrass Country Club at no charge until September 2013 (Exhibit 32 - ARO - 1; Flury, TR 723).

In all other respects, the Association adopts the position of NUC on this issue.

Issue 18: What are the appropriate service availability charges for Intercoastal?

Position: **The Association takes no position on this issue.**

Issue 18A: Should Intercoastal be authorized an AFUDC rate by the Commission?

Position: **The Association takes no position on this issue.**

Issue 19: Do Intercoastal's existing customers support the proposed extension of its service territory and what weight should the Commission give to their preference?

Position: **Intercoastal's existing customers do not support the proposed extension of its service territory, based on Intercoastal's past performance, and the Commission should consider this position and give it all due and appropriate weight.**

The Association does not support ICU's application (Flury, TR 721, 739). ICU has not shown by its past performance that it should be given any additional territory (Arenas, TR 705-708; Flury, TR 721, 739-740). See the discussion as to Issues 14, 15 and 16 above.

While we recognize the Florida Supreme Court held in Storey v. Mayo, 217 So.2d 304 (Fla. 1968) that customer preference, in and of itself, may not be dispositive in determining which utility should serve a particular territory, the Association believes that in the instant case, as outlined above, ICU's past performance clearly shows it lacks the technical and managerial ability, either directly or through its subsidiary, Jax Utilities Management (Forrester, TR 307) to provide quality service to the Nocatee development.

Additionally, with regard to the weight customer preference should be given, the Florida Supreme Court held in Gulf Coast Electric Cooperative, Inc. v. Clark, 674 So.2d 120 (Fla. 1996) that where all other factors are "relatively equal," a customer's preference with regard to which entity should provide electrical service should be controlling. In the instant case, the Association submits that the proposal of NUC (through its contract with JEA) is far superior to the proposal made by ICU (through its arrangement with JUM).

Issue 20: Is it in the public interest for Intercoastal to be granted a water certificate and a wastewater certificate for the territory proposed in its application?

Position: **No. The Association does not believe it is in the public interest for ICU to be granted a water certificate or wastewater certificate for the proposed territory.**

The Association adopts the argument of NUC on this issue.

ISSUES OF LAW

Issue 21: Can the Commission grant Intercoastal or NUC a certificate which will be in competition with, or a duplication of, any other water and wastewater system?

Position: **No.**

The Association adopts NUC's argument on this issue.

Issue 22: What are the implications for this case of the decisions in the Lake Utility Services and Alafaya Utilities cases?

Position: **The Association adopts the argument of NUC on this issue.**

Issue 23: Should the Commission considering denying both pending applications with the expectation that JEA would then provide retail service to Nocatee?

Position: **No. Based on the record testimony, it appears that St. Johns County might contest JEA's right to provide service to Nocatee, based on its April 24, 2001 ordinance.**

The Association adopts NUC and JEA's argument on this issue.

Issue 24: In light of the agreement between JEA and NUC for operations, management and maintenance service, is NUC exempt from Commission jurisdiction pursuant to Section 367.022(2), Florida Statutes?

Position: **No, because based on the testimony, NUC would not be a system which was owned, operated, managed or controlled by a governmental authority.**

According to the testimony presented, the relationship of JEA to NUC (based on the proposed services to be provided) would be akin to that of an independent contractor, and would be comparable to the proposed Plan of Service and relationship between ICU and JUM (James, TR 443), especially since NUC would retain ultimate control (Skelton, TR 110). Thus, it would not appear NUC would

properly fall within the definition set forth in Section 367.022(2), Florida Statutes.

The Association adopts NUC's argument on this issue.

Issue 25: Should the Commission defer a decision in these cases until after conclusion of a pending administrative challenge to the DCA's decision to find the St. Johns County Comprehensive Plan Amendments for Nocatee in compliance with Chapter 163, Florida Statutes?

Position: **The Association takes no position on this issue.**

Respectfully submitted this 5th day of June 2001.

KORN & ZEHMER, P.A.



Michael J. Korn
Florida Bar No. 296295
6620 Southpoint Drive S, Suite 200
Jacksonville, FL 32216
904/296-2111
Attorney for Sawgrass
Association, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail this 5th day of June 2001 to:

Richard D. Melson, Esquire
Hopping, Green, Sams & Smith,
P.A.
P.O. Box 6526
Tallahassee FL 32301
Counsel for Nocatee Utility
Corp.

J. Stephen Menton, Esquire
Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell &
Hoffman
P.O. Box 551
Tallahassee FL 32302
Counsel for JEA

Samantha Cibula, Esquire
Division of Legal Services
Florida Public Service
Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850

Michael B. Wedner, Esquire
St. James Building, #480
117 West Duval Street
Jacksonville FL 32202
Counsel for JEA

John L. Wharton, Esquire
F. Marshall Deterding, Esquire
Rose, Sundstrom & Bentley, LLP
2548 Blaiirstone Pines Drive
Tallahassee FL 32301
Counsel for Intercoastal
Utilities, Inc.

A handwritten signature in black ink, appearing to read "Nestk", positioned above a horizontal line.

Attorney