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June 6, 2001

Ms. Blanca S. Bayo, Director
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Florida Public Service Commission
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Re: Docket No. 990696-WS and 992040-WS

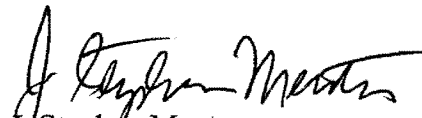
Dear Ms. Bayo:

Enclosed for filing on behalf of JEA are the following:

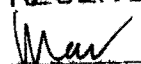
1. Original and fifteen copies of JEA'S Post-Hearing Brief And Statement of Positions and Issues; and
2. A diskette containing the brief formatted in Word Perfect.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your assistance with this filing.

Sincerely,


Stephen Menton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original)
certificates to operate water) Docket No. 990696-WS
and wastewater utility in Duval)
and St. Johns Counties by)
Nocatee Utility Corporation.)
_____)

In re: Application for certificates)
to operate a water and wastewater) Docket No. 992040-WS
utility in Duval and St. Johns)
Counties by Intercoastal Utilities,)
Inc.) Filed: June 6, 2001
_____)

**JEA’S POST-HEARING BRIEF AND STATEMENT
OF POSITIONS AND ISSUES**

Intervenor, JEA, hereby submits its Post-Hearing Brief and Statement of Position and Issues for Docket Nos. 990696WS and 992040-WS. In this Brief, references to Exhibits in the record will be designated “Exhibit __ [with further reference to page number or late-filed exhibit number]”. References to the testimony in the record transcript will be designated “Tr. Vol. __, p. __.”

I. INTRODUCTION

These consolidated dockets involve competing applications to provide service to territory in Duval and St. Johns Counties. JEA intervened to support the application submitted by Nocatee Utility Corporation (“NUC”). JEA also filed an objection to the application submitted by Intercoastal Utilities, Inc. (“Intercoastal”). On the basis of the record evidence in this proceeding, the Florida Public Service Commission (“Commission”) should grant the application submitted by NUC in Docket No. 990696-WS and should deny the application filed by Intercoastal in Docket No. 992040-WS.

II. BASIC POSITION

DDI, Inc., its affiliates and subsidiaries are part of the Davis family empire which owns extensive land in northeast Florida including approximately 15,000 acres of land located west of the Intracoastal Waterway in Duval and St. Johns Counties which has been designated a development of regional impact (“DRI”) known as Nocatee. As a DRI, development of Nocatee can only proceed in accordance with the requirements of development orders issued by the local governments in which the property is located.

NUC is a wholly-owned subsidiary of DDI. NUC was specifically established to provide utility services for the Nocatee development. Only NUC has provided a viable plan of service for the territory requested. Granting the NUC application will allow Nocatee to proceed with development consistent with the development orders issued for the property. Approval of NUC’s application will also enable the developer to ensure that utility service accommodates the sensitive environmental needs of the area consistent with the long-term development plans for the property. NUC’s plan of service will result in reliable, cost-effective service for the ultimate residents.

NUC and DDI, Inc., the developer of Nocatee and the parent company of NUC, have entered into a Wholesale Water and Sewer Service Agreement with JEA pursuant to which JEA will provide bulk water, wastewater and reuse service to NUC in quantities and time frames which meet the needs of the development. The infrastructure necessary to provide this service is largely constructed. Approval of the NUC Application will result in the territory being incorporated into a regional water and wastewater system and will eliminate the need to duplicate facilities already constructed by JEA.

By contrast, Intercoastal is a relatively small utility that currently operates in a small section of one county with a service area of approximately 5,000 acres, all of which is east of the Intracoastal

Waterway. Intercoastal's application in this docket seeks to secure a certificate to serve approximately 25,000 acres, more than five times its current size. The entire area requested by Intercoastal is west of the Intracoastal Waterway. Thus, Intercoastal will not be able to serve the requested territory from its existing facilities. Instead, it will need to construct entirely new facilities on the west side of the Intracoastal. Intercoastal's application includes the Nocatee development which NUC proposes to serve, additional DDI and Davis family lands in St. Johns County which have no need for service, and other proposed developments in St. Johns County which have no need for service. Nocatee is the only portion of the territory requested by Intercoastal for which there is a foreseeable need for service in the future. However, the development orders for the DRI include specific conditions which are inconsistent with the plan of service which Intercoastal proposes. Intercoastal's plan of service involves the construction of new facilities west of the Intracoastal Waterway, on-site potable water wells, use of groundwater to supplement reuse for irrigation purposes, and wet weather discharges into the Intracoastal Waterway all of which are inconsistent with the development orders for the Nocatee development. Intercoastal will not be able to provide service in accordance with the strong environmental ethic of the development. In particular, the evidence demonstrates that it is extremely unlikely that Intercoastal would be able to meet the reuse needs of the development. Accordingly, Intercoastal's plan of service is not technically feasible and its application must be denied.

Intercoastal previously filed a request to expand its certificated territory approximately two years ago with its existing regulator, the St. Johns County Water and Sewer Authority. That prior application included the St. Johns County portion of Nocatee as well as other Davis family lands in St. Johns County which have been requested by Intercoastal in this docket. After an extensive

evidentiary hearing that addressed many of the same issues raised in this docket, Intercoastal's previous application to serve the St. Johns County portion of the territory it has requested in the docket was denied. Intercoastal has failed to provide the Commission with a factual or legal basis to deviate from the explicit findings made by Intercoastal's current regulator with respect to Intercoastal's earlier attempt to grab this territory. Intercoastal's repeated attempts to obtain control of the service rights for the requested territory is a transparent attempt to drive up the value of the utility for purposes of a long-anticipated sale.

In sum, a need for service only exists consistent with the development orders issued for Nocatee. Only NUC can provide service consistent with those development orders. NUC has demonstrated compliance with the applicable statutory and rule criteria for issuance of an original certificate. The public interest will be best served if NUC's Application is approved and Intercoastal's application is denied.

III. POSITION ON THE ISSUES

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?

Summary of Position: Yes. NUC has established that its proposed system satisfies the requirements of Section 367.171(7), Florida Statutes. The Nocatee development includes land in both Duval and St. Johns Counties. NUC proposes to serve the development through a single water, wastewater and reuse system which includes lines that physically cross the county boundaries.

Analysis and Argument: JEA adopts NUC's position. NUC will serve Nocatee through a single utility system which receives bulk water, wastewater and reuse service from JEA at a point

of connection in Duval County (D.Miller, Tr. Vol. 1, p. 133; Kelly, Tr. Vol. 3, p. 541; Perkins, Tr. Vol. 4, p. 627). NUC will provide service to its retail customers in both counties through an on-site transmission and distribution grid that criss-crosses back and forth across the Duval/St. Johns County line (D.Miller, Tr. Vol. 1, p. 144, 149; Exhibit 6, DCM-6 and DCM-7). Wastewater from both counties will be collected and pumped to JEA from a single master lift station located in St. Johns County (Exhibit 6, DCM-7). This dual county system clearly satisfies the requirements of Section 367.171(7).

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

Summary of Position: Yes.

Analysis and Argument: JEA adopts NUC's position. The boundaries of NUC's proposed service territory are identical to those of the Nocatee development. (Skelton, Tr., Vol. 6, p. 984; D.Miller, Tr. Vol.1, pp. 130-131). NUC was specifically established by the developer of the Nocatee DRI to meet the unique service needs of the project. (Skelton, Tr. Vol.1, pp. 95-98, 101-103). The Development Orders issued by the local governments impose numerous legally binding conditions on the development (D.Miller, Tr. Vol.1, p. 147; Vol. 7, p. 1017). There is a need for service consistent with the terms and conditions of the Development Orders.

The current estimate is that Nocatee will need water, wastewater and reuse service by the fourth quarter of 2002 (D.Miller, Tr. Vol.1, pp. 185-186). JEA has been working closely with NUC and the developer of the territory to coordinate the timely delivery of service (Tr. Vol. 3, pp. 508, 515-517). Through its contract with JEA, NUC will be able to meet the expected service needs of Nocatee (Kelly, Tr., Vol. 3, pp. 521-524; Perkins, Tr. Vol. 4, pp. 595-599).

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

Summary of Position: Yes.

Analysis and Argument: JEA adopts NUC's position on this issue. The evidence presented at the hearing demonstrates that NUC will have the financial ability to serve the requested territory (Skelton, Tr. Vol.1, pp. 98-99, Exhibit 5).

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

Summary of Position: Yes. Through its agreement with JEA, NUC has put in place a long-term arrangement to provide all of the technical needs for the utility by contracting with the experienced operator of one of the largest utilities in the state.

Analysis and Argument: At the time its application was filed, NUC's parent, DDI, had entered into a Letter of Intent with JEA to provide wholesale service, with an option to obtain management services as well. (Skelton, Tr. Vol. 1, pp. 100-101; D.Miller, Tr. Vol. 1, p. 136; Exhibit 6, DCM-4). After exploring other options with respect to operations and management ("O&M"), NUC entered into an agreement with JEA which was finalized on July 24, 2000 and is embodied in a comprehensive Agreement for Wholesale Utilities, Operations, Management and Maintenance (the "Wholesale Agreement") (Ex. 7, DCM-13A). Pursuant to this Agreement, JEA will provide NUC with wholesale water, wastewater and reclaimed water service for the duration of all phases of the Nocatee development, with a minimum period of 25 years (Kelly, Tr. Vol. 3, p. 541; D.Miller, Tr., Vol. 1, p. 141; Exhibit 7, DCM-13A, ¶6.3). JEA will also provide operations, management and maintenance services to NUC in accordance with this mutually acceptable contractual arrangement for ten years (Kelly, Tr. Vol. 4, p.541). There are additional automatic renewal periods provided for in the Agreement (D. Miller, Tr. Vol. 2, pp. 199, 203). Service by JEA will comply with all

applicable provisions of the development orders. (D.Miller, Tr. Vol. 6, p. 1018). If the O&M provisions are terminated, JEA will continue to provide wholesale utilities at its prevailing wholesale rates (D.Miller, Tr. Vol. 2, p.143; Vol. 2, p.208; Exhibit 7, DCM-13A, ¶6.3, 7.2).

JEA is a large utility with extensive experience providing water and wastewater services in northeast Florida (Kelly, Tr. Vol. 3, pp. 510, 540; Perkins, Tr. Vol. 4, p. 614). There is no question that JEA has the technical ability to provide wholesale and O&M services to NUC. JEA's water and wastewater system currently provides service to over 200,000 water accounts, over 147,000 wastewater accounts. JEA has over \$132 million in annual operating revenues (Kelly, T. Vol. 3, pp. 508, 540). The NUC application will allow the Nocatee development to be incorporated into JEA's large, regionalized system which will provide dependability and will minimize environmental impact (Perkins, Tr. Vol. 4, pp. 592-594, 601-604). Due to its size and longevity, JEA has a wealth of knowledge and expertise regarding the hydrogeology and environment of this part of the state (Perkins, Tr. Vol. 4, pp. 592-594). Through its Wholesale Agreement with JEA, NUC is able to take advantage of this expertise and the vast resources of one of the largest utilities in the state (Kelly, Tr. Vol. 3, pp. 531-534). For example, JEA is currently in the middle of a five-year \$600 million capital improvements program to reduce operation and maintenance costs and expand and improve service to all of its customers (Kelly, Tr. Vol. 4, pp. 534-535). As the contract operator, JEA will be able to offer many unique benefits and sophisticated technological features that could not typically be provided by a smaller utility (Kelly, Tr. Vol. 4, pp. 535-538).

The operation and maintenance arrangement between NUC and JEA is not unusual in the utility industry (James, Tr. Vol. 3, pp. 433,462). JEA has other contract management arrangements, including one with all the Navy military bases in northeast Florida (Kelly, Tr. Vol. 4, p. 566).

Similarly, all of the operations, management and maintenance for Intercoastal is performed by a separate company known as Jax Utilities Management, Inc. (James, Tr. Vol. 3, pp. 432-433, 461-462).¹ Details of day-to-day operations have not yet been worked out, but JEA, at a minimum, will establish a separate telephone number, to handle billing and service inquiries from NUC customers (Kelly, Tr., Vol. 4, pp. 543, 560, 567). In dealing with customers of NUC, JEA will be acting as an agent for NUC. NUC as the regulated entity will retain control and responsibility over how services are provided (Skelton, Tr. Vol. 1, p. 114).

NUC will own distribution lines that cross county boundaries, will own numerous facilities necessary to provide service including reuse storage tanks and other utility equipment, and will ultimately be responsible to the Commission for the operation of the utility (Kelly, Tr. Vol. 3, p.542; D. Miller, Tr. Vol.1, pp. 133-134, 148). NUC will have control over the development of the utility services through the completion of the DRI project expected in 25 years (Kelly, Tr. Vol. 4, p. 542).

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

Summary of Position: Yes.

Analysis and Argument: The NUC plan of service calls for all of the water, wastewater and reuse service to be provided by JEA. Under the Wholesale Agreement, JEA is obligated to provide water, sewer and reclaimed water service in the amounts shown as projected demands on Exhibit D to the Agreement (Ex. 7, DCM-13, ¶5). JEA already has in place or is in the process of constructing the regional infrastructure which will provide the wholesale service to NUC (Kelly, Tr. Vol. 3, pp. 508, 525-529). The testimony was unrefuted that JEA will have the capacity within its

¹The meter reading, the billing and the collection for Intercoastal is done by Jax Utilities Management (James, Tr. Vol. 3, pp. 463-467).

system to provide the service (Kelly, Tr. Vol. 3, pp. 514, 521-524; Perkins, Tr. Vol. 4, pp. 592, 595-599). JEA currently has available capacity in existing plants to serve at least the first five years of development (Phase I) and is contractually committed to expand its treatment system as required to meet the projected demand for future phases (Perkins, Tr. Vol. 4, p. 595; Exhibit 7, DCM-13, ¶5). JEA's existing long term facilities planning easily accommodates providing the bulk service necessary to serve Nocatee (Perkins, Tr. Vol. 4, pp. 603-604, 614).

As noted above, JEA is one of the largest water and wastewater utilities in Florida (Kelly, Tr. Vol. 3, p. 540). JEA's extensive interconnected system can provide bulk water and wastewater service to this area.

JEA has water and wastewater lines near the Nocatee property that can be easily accessed to provide bulk service to the developer (Perkins, Tr. Vol. 4, p. 614). Service to the Nocatee development will be accessed from JEA's existing transmission lines at a point near the Duval County/St. Johns County boundary at a location in Duval County (Kelly, Tr. Vol. 3, pp. 541-542). Bulk water service will be initially provided to NUC from JEA's interconnected grid of large water plants located on the south side of Duval County. The South Grid provides a very high level of reliability and allows JEA to balance withdrawals from the Floridan Aquifer in order to minimize drawdown and other adverse impacts to the water resources (Kelly, Tr. Vol. 3, pp. 541-542; Perkins, Tr. Vol. 4, pp. 596-599). JEA's South Grid has excess capacity to meet the needs of Nocatee. Projects are underway to add 7 MGD of additional capacity to the South Grid and to interconnect the South Grid with JEA's North Grid for even greater capacity and reliability (Perkins, Tr. Vol. 4, pp. 596-599, 614-615; Kelly, Tr. Vol. 3, pp. 518, 522-523). The wastewater would be transmitted back to JEA's Mandarin Wastewater Treatment Plant which currently has approximately 1.5 MGD

of excess capacity. Even Intercoastal's expert engineer admitted that the Mandarin plant "has operated quite well." (J.Miller, Tr. Vol. 7, p. 1131). The plant was built with the ability to expand to 15 MGD if necessary (Perkins, Tr. Vol. 4, p. 596; J.Miller, Tr. Vol. 7, p. 1133). In addition, JEA could easily divert flows to the Arlington East Wastewater Treatment Plant which is currently being expanded to 20 MGD and has additional excess capacity to serve Nocatee if needed (Perkins, Tr. Vol. 4, p. 596).

At the hearing, Staff witness Caroline Silvers of the St. Johns Water Management District amended her prefiled testimony to indicate for the first time that JEA may need to seek a modification of its consumptive use permit in order to provide bulk water service to NUC. Even so, Ms. Silvers indicated that it was likely that JEA would be able to demonstrate to the District that it could supply the Nocatee development without resulting in harm to the water resources (Silvers, Tr. Vol. 5, p. 845). It is not clear what prompted the change in the prefiled testimony of Ms. Silvers. JEA clearly included sufficient capacity in its permit application to provide bulk service to the northern St. Johns County area which includes Nocatee (Perkins, Tr. Vol. 6, pp. 906-908, 920, 924-925, 928-929). The suggestion by Ms. Silvers that a permit modification may be necessary had not been conveyed to JEA prior to this hearing (Perkins, Tr. Vol. 5, pp. 908-909, 921). It is JEA's belief that it has obtained all of the necessary permits to provide bulk water service to NUC (Kelly, Tr. Vol. 3, pp. 523-524; Perkins, Tr. Vol. 4, p. 616, Vol.6, pp. 906-915, 920, 922; Exhibit 34; Exhibit 35). In any event, resolving this difference of interpretation should not provide any obstacles to service since the District will likely approve a modification of the permit if one is in fact necessary (Perkins, Tr. Vol. 6, p. 909, 920; Silvers, Tr. Vol. 5, p.845). There is clearly enough capacity in the permits to provide bulk service to NUC (Perkins, Tr. Vol. 4, p. 597, Vol. 6, pp. 913, 928-929).

JEA has excess reclaimed water capacity and is uniquely positioned to meet Nocatee's reclaimed water needs (D. Miller, Tr. Vol. 1, pp. 135, 148-150). JEA is involved in an \$11 million program to implement reuse from its Mandarin plant (Perkins, Tr. Vol. 4, pp. 602-604). This reuse system will include 25 miles of reuse transmission mains and will allow JEA to reuse approximately 5 million gallons per day (Perkins, Tr. Vol. 4, pp. 615-616). Reclaimed water for Nocatee will initially be provided from JEA's Mandarin Plant. Several options exist for meeting the reuse needs for later phases of Nocatee (Perkins, Tr. Vol. 4, pp. 603, 615-616). JEA will have sufficient reuse capacity to meet the needs of Nocatee in both the short and long run (Perkins, Tr. Vol. 4, p. 627). Wholesale reuse service by JEA will not require the use of backup wells to tap into potable water supplies. By providing reuse to Nocatee, JEA will be able to significantly reduce its current surface water discharges.

Pursuant to the terms of the Wholesale Agreement, NUC will obtain water and wastewater service for Phase I at a point of connection adjacent to the Nocatee development in Duval County. JEA currently has a 24" water main and a 20" wastewater force main located in the U.S. 1 right-of-way adjacent to Nocatee (Kelly, Tr. Vol. 3, pp.508-509, 525-526, 541-542; D.Miller, Tr. Vol. 1, pp.148, 188; Exhibit 3; see Exhibit 6, DCM-7). These lines are already installed and were designed to provide bulk service to St. Johns County for the County's customers in Walden Chase and Marshall Creek and to accommodate additional development in the region (Kelly, Tr. Vol.3, pp.508, 525-528). Thus, no new off-site water or wastewater lines will be required to serve Phase I of Nocatee. The point of connection for reclaimed water will be at JEA's backbone reuse main on Greenland Road, located north of Nocatee in Duval County. NUC will construct a 12" reuse main

to connect to JEA's backbone line, which is currently under construction (D.Miller, Tr. Vol. 1, p.148; Perkins, Tr. Vol.4, p.627).

Issue 5: What is the appropriate return on equity?

Summary of Position: JEA takes no position.

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

Summary of Position: JEA takes no position.

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

Summary of Position: JEA takes no position.

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

Summary of Position: JEA takes no position.

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

Summary of Position: The developer of Nocatee specifically established NUC to meet the ambitious environmental goals of the project while providing service on a timely basis with the capacity required to meet the needs of the development. Under these circumstances, the Commission should give significant weight to the landowner's preference.

Analysis and Arguments:

There is no question that the landowner in this case strongly prefers to receive service from NUC (Skelton, Tr. Vol. 6, p.985). The territory requested in NUC's application is limited to the Nocatee development (D.Miller, Tr. Vol. 1, pp. 130-131). DDI organized NUC as the preferred vehicle for providing utility service to Nocatee (Skelton, Tr. Vol. 1, pp. 97-98, 102-103; D. Miller,

Tr. Vol. 1, pp.138, Vol.2, p.209). Because Nocatee will be developed in accordance with ambitious environmental standards, the developer wanted to retain control of the utility to ensure those standards are met (Skelton, Tr. Vol.1, p.102; D.Miller, Tr. Vol. 1, pp. 138, 146, Vol. 2, pp. 193-195, 206-207). Under these circumstances where the landowner preference is based on sound planning concerns, the Commission should afford that preference significant weight in its deliberations.

In an early case involving the Commission's approval of a territorial service agreement between two electric utilities, the Florida Supreme Court stated that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So.2d 304 (Fla. 1968). In that case, the two utilities had agreed on a territorial boundary, and the Commission had approved that agreement as being in the public interest. The case did not involve competing applications to provide service. The decision also did not address a situation where a landowner established a utility to coordinate utility service with overall development planning.

In a more recent case involving a dispute between two electric utilities, the Court held that it was reversible error for the Commission to disregard customer preference in a situation where each utility was capable of serving the territory in dispute. Gulf Coast Electric Co-op, Inc. v. Clark, 647 So.2d 120 (Fla. 1996). The Supreme Court has also recognized customer preference as a factor to consider in certificate cases. See, Davie Utilities, Inc. v. Yarborough, 263 So.2d 215 (Fla. 1972). Thus, customer preference is clearly a relevant factor for the Commission to consider in this docket.

In a District Court of Appeal decision involving a contested water and sewer certificate application, the court upheld a Commission order which gave weight to the importance of having an overall plan for orderly development of a large scale land development project. The approved

order recognized the unique ability of a developer-related utility to perform such planning. St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d 1066 (Fla. 1st DCA 1989). In at least one prior case, the Commission has recognized that a specific request for service by a developer in the requested territory expansion area “would bolster the merit of [the applicant’s] filing.” In re: Application for Amendment of Certificate Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., Docket No. 941121-WS, Order No. PSC-96-1137-FOF-WS, 96 FPSC 9:190 at 194 (Sept. 10, 1996). These precedents provide further support for the Commission’s consideration of both landowner preference and the unique ability of a developer-related utility to integrate utility planning with overall planning for the development in making its public interest determination.

In sum, the particular circumstances of this case that merit consideration by the Commission are the following:

- (1) NUC’s entire portion of the proposed expansion area is planned for development (i.e., Nocatee) and is owned by a single party (i.e. DDI)²;
- (2) As part of its overall development plans for Nocatee, DDI is proposing to provide retail water, wastewater and reuse service through an affiliated, multi-county utility company;
- (3) The development plans incorporate ambitious environmental standards that will require close coordination with the utility provider.

All of these factors strongly support approval of NUC’s application.

²By contrast, Intercoastal’s application includes extensive additional territory in addition to Nocatee. The record reveals that neither the developer of Nocatee nor the owners or developers of any other area have requested service by Intercoastal and the developer of Nocatee has indicated that it does not desire service from Intercoastal and is concerned about Intercoastal’s ability to comply with the environmental goals of the development.

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

Summary of Position: No.

Analysis and Argument: JEA adopts NUC's position on this issue. No evidence was presented to indicate that NUC's application will duplicate any existing system. Because Intercoastal existing system is located on the east side of the Intracoastal Waterway, there is no competition with, or duplication of Intercoastal's system.

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 system, as defined by Commission rule, if the public can be adequately served by modifying or extending a current wastewater system?

Summary of Position: No. Section 367.045(5)(a) does not apply.

Analysis and Argument: JEA adopts NUC's position on this issue. There is no evidence in the record that Nocatee can be served by the modification or extension of an existing system. Intercoastal proposes to serve Nocatee through the construction of a new stand-alone wastewater system on the west side of the Intracoastal Waterway, not through the modification or extension of its existing system on the east-side of the waterway. In any event, NUC's wastewater system will not be a Class C system as defined by the Commission rule.

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?

Summary of Position: Yes. Granting the NUC application will enable water and wastewater service to be provided to the Nocatee development in the most environmentally sensitive manner possible. Through its contract with JEA, NUC will be able to provide future customers with low cost, reliable service.

Argument and Analysis: Approval of NUC's application is clearly in the public interest. NUC's plan of service will enable the developer of Nocatee to meet its ambitious environmental goals. The Wholesale Agreement with JEA will enable the utility needs of Nocatee to be met through interconnection with a large regionalized system that avoids uneconomical duplication of lines and facilities. The Wholesale Agreement obligates JEA to provide bulk water, sewer and reclaimed water service to NUC for the duration of all phases of the development, with a minimum term of twenty-five years (D.Miller, T. Vol. 1, p.141; Swain, T. Vol. 2, pp.297-298; Exhibit 7, DCM-13, §6.3 at page 6). Thus, NUC customers are protected because JEA is obligated to provide service on a continuous basis. As discussed above, JEA has a wealth of knowledge and expertise regarding the hydrogeology and environment in this part of the state (Perkins, Tr. Vol. 4, pp. 593, 614). JEA's interconnected grid system minimizes the risk of unacceptable adverse environmental impacts from water withdrawals³ (Perkins, Tr. Vol. 4, pp. 593, 602-603, 614).

³As detailed in Issue 4, bulk water will be provided to NUC from JEA's interconnected grid of large water plants located on the south side of Duval County (Kelly, Tr. Vol. 3, pp. 522-523; Perkins, Tr. Vol. 4, pp.596-599). This South Grid provides a very high level of reliability and will enable JEA to balance withdrawals from the Floridan Aquifer in order to minimize draw-down and other adverse impacts to the water resources (Perkins, Tr., Vol. 4, p.598). In the near future, JEA's South Grid will be interconnected with JEA's North Grid to provide additional, capacity, flexibility and environmental protection (Perkins, Tr. Vol. 4, p. 599).

The Wholesale Agreement will allow JEA to better utilize some of its existing water and wastewater treatment plant capacity (Kelly, Tr. Vol. 3, p. 517). The service needs of Nocatee can be easily met through the regionalized water and wastewater systems established by JEA in this area (Kelly, Tr. Vol. 3, p. 541). JEA is already providing bulk water and wastewater services in St. Johns County pursuant to an agreement with the County (Kelly, Tr. Vol. 3, p.520). Service to the Nocatee Development will be tied into JEA's existing transmission lines (Kelly, Tr. Vol. 3, p.541). Construction of the water and wastewater facilities necessary to provide wholesale service to this area has essentially been completed (Kelly, Tr. Vol. 3, p.508). The lines constructed by JEA in Duval County to which NUC will connect have been up-sized in order to meet the foreseeable needs of Nocatee and other developments in this area (Kelly, Tr. Vol. 3, pp.525-528). Accordingly, Nocatee can be easily integrated into JEA's regionalized, comprehensive and economically sized system (Kelly, Tr. Vol. 3, p. 541). Providing wholesale service to Nocatee will allow for the more efficient utilization of the major regionalized system that has already been put in place (Kelly, Tr. Vol. 3, p. 517). Allowing Intercoastal to serve Nocatee will necessitate the construction of brand new facilities in the Nocatee development which would duplicate much of the work that has already been done by JEA (Kelly, Tr. Vol. 3, p. 538).

In its opposition to NUC's application, Intercoastal has raised a red herring argument based on the local sources first policy. While there has been some controversy and confusion as to how local sources first will be implemented and applied, it is simply not relevant to the bulk service arrangement between JEA and Nocatee (Perkins, Tr. Vol. 4, pp. 599-600). The policy arises when a transporting authority seeks to transfer water from one area to another without confirming or addressing the needs of the area from which the water is being withdrawn (Perkins, Tr. Vol. 4, p.

626). That policy has no application to the JEA/NUC arrangement (Perkins, Tr. Vol. 4, p. 626). In fact, during the permit review process conducted the St. Johns River Water Management District in connection with JEA's recently issues consumptive use permit, the District Staff conducted a local sources first analysis of JEA's application which projected the provision of 3.3 MGD of water to Northern St. Johns County including Nocatee (Perkins, Tr. Vol. 6, pp. 907-911). The technical staff report prepared by the District concluded that "the proposed withdrawal and use of water to be authorized in this permit meets the requirements of the local sources first legislation." (Perkins, Tr. Vol. 6, pp. 911-912). Thus, there is no merit to any of the contentions raised by Intercoastal with respect to local sources first.

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?

Summary of Position: Yes. Intercoastal previously sought approval from the St. Johns County Water and Sewer Authority ("Authority") to serve the territory in St. Johns County requested by Intercoastal in this docket. The Authority denied Intercoastal's request and that decision was affirmed by the St. Johns County Board of County Commissioners. The Commission should honor those determinations and apply the doctrines of res judicata and/or collateral estoppel to bar Intercoastal from re-litigating the same issues that were resolved by the Authority when it denied Intercoastal's earlier request for new territory in St. Johns County.

The water and wastewater service areas for which Intercoastal is requesting original certificates to operate a water and wastewater utility in this docket can be divided into two sections. The first section is comprised of the water and sewer service territory currently certificated to

Intercoastal by the St. Johns County Water and Sewer Authority. The second section is partially comprised of exactly the same water and wastewater service areas in St. Johns County which Intercoastal sought to add to its service territory through a March 9, 1999 application to the Authority as discussed below. This second section also includes water and wastewater service areas in Duval County which were not part of NUC's prior application. Intercoastal's application should be denied in so far as it relates to territory in St. Johns County previously denied to it by its current regulator. Intercoastal's repeat attempt to secure this territory is barred by the doctrines of res judicata and collateral estoppel.

Analysis and Argument: Intercoastal currently operates a single-county utility subject to the regulatory jurisdiction of St. Johns County. More specifically, Intercoastal is regulated by the Authority and the Board of County Commissioners of St. Johns County ("Board") pursuant to St. Johns County Ordinances and Regulations. On March 8, 1999, Intercoastal filed an application with the Authority for extension of its service area to include additional territory in St. Johns County. Intercoastal's current franchise territory lies totally in St. Johns County, east of the Intracoastal Waterway. The Intercoastal application filed with the Authority sought approval to extend Intercoastal's existing service area to include an additional approximately 25,000 acres located west of the Intracoastal waterway. The bulk of the proposed expansion territory consisted of lands owned by DDI, including the portion of the Nocatee development in St. Johns County.

Intercoastal's application submitted to the Authority was opposed by DDI, the St. Johns County Utility Department, and JEA. Under the governing ordinances of St. Johns County, the Authority conducted a six-day formal evidentiary hearing in June 1999 on Intercoastal's application and the objections thereto. After extensive post-hearing filings by the parties, the Authority entered

its Preliminary Order 99-00012 denying Intercoastal's application to extend its certificated territory. A copy of the Preliminary Order is included in Exhibit 34; DCM-9. The Preliminary Order included detailed findings of fact and conclusions of law. As demonstrated below, many of those findings and conclusions are directly pertinent to this proceeding and should not be revisited by the Commission.

On September 7, 1999, the St. Johns County Board of County Commissioners held a public meeting to review the Authority's Preliminary Order and to hear argument from interested parties. At the conclusion of that meeting, the Board voted to adopt a Final Order confirming in *toto* the Authority's Preliminary Order 99-00012. Paragraphs 4 and 5 of the Board's Final Order provide as follows:

Upon a review of the extensive record before us we find that the decision of the Authority with regard to the criteria stated in County Code §§173/4-204C.(e) are supported by competent substantial evidence of record as is extensively documented in the Proposed Preliminary Orders submitted by the parties...We further find that the hearing before the Authority did comport with the essential requirements of the law in that all parties were given an opportunity to present and cross examine witnesses, give opening and closing statements, introduce evidence into the record and file proposed preliminary orders.

A copy of the Board's Final Order is included in Exhibit 34; DCM-10.

In October 1999, Intercoastal filed a Petition for Certiorari Review of the Board's Final Order. There has been no court order staying the Board's Final Order and that Final Order remains in effect.

The doctrines of *res judicata* and *collateral estoppel* are closely related and the courts sometimes use the language of *res judicata* and *collateral estoppel* interchangeably. 32 Fla. Jur.2d,

Judgments and Decrees, §135. The difference between the two is that under res judicata a final judgment precludes a subsequent suit on the same cause of action and is conclusive of all matters germane thereto that were or could have been raised in the first action. Collateral estoppel applies where the two causes of action are different. In this situation, the adjudication in the first action only estops the parties from litigating issues or questions which are common to both causes of action and which were actually adjudicated in the first action. Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So.2d 843 (Fla. 1984); Gordon v. Gordon, 59 So.2d 40, 44 (Fla. 1952), cert. denied, 344 U.S. 878 (1952). The legal concept behind collateral estoppel is that a party should not be able to relitigate a second time the same issues and questions common to both causes of action. 32 Fla. Jur.2d, Judgments and Decrees, §135.

It is well settled that res judicata and collateral estoppel may be applied in administrative proceedings. Thomas v. Department of Environmental Regulation, 511 So.2d 989, 991 (Fla. 1987); Holiday Inns, Inc. v. City of Jacksonville, 678 So.2d 528, 529 (Fla. 1st DCA 1996). While, the principles are sometimes difficult to apply in the context of administrative proceedings, Thomson, supra, at 991, the courts have consistently held that the res judicata and collateral estoppel doctrines can preclude relitigation of causes and issues resolved in an administrative setting. Doheny v. Grove Isle, Ltd., 442 So.2d 966, 975 (Fla. 1st DCA 1983); United States Fidelity & Guaranty Co. v. Odoms, 444 So.2d 78, 80 (Fla. 5th DCA 1984)(“Where an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, as to which the parties have had an adequate opportunity to litigate, the court will apply res judicata or collateral estoppel to enforce repose.”); Hays v. State Dept. of Business Regulation, 418 So.2d 331 (Fla. 3^d DCA, 1982). In administrative proceedings involving an application for governmental approval of a license or

permit, the principles can be applied to preclude a second application that is not supported by new facts, changed conditions, or additional submissions by the applicant. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So.2d 648, 655 (Fla. 3d DCA 1982). A determination of whether a substantial change in circumstances has occurred lies primarily within the discretion of the administrative agency. Miller v. Booth, 702 So.2d 290, 291 (Fla. 3d DCA 1997); Coral Reef Nurseries, supra, 410 So.2d 648, 655 (“The determination of the applicability of the res judicata doctrine is primarily within the province of the administrative body considering the matter in question, and that body’s determination may only be overturned upon a showing of a complete absence of any justification therefor.”)

Applying these principles to the facts of this case, the Commission should apply the principle of res judicata to dismiss Intercoastal’s application as to the St. Johns County expansion territory. There has been no substantial change since June 1999 with respect to the need for service in the St. Johns County expansion territory, the landowner’s service preference remains the same and Intercoastal’s ability to serve the territory has not improved. All of those issues were fully and fairly litigated in the hearings held before the Authority in June 1999. Indeed, the only substantial change from the prior application is Intercoastal’s inclusion of a request for additional territory in Duval County. By including some lands in Duval County in its application, Intercoastal seeks to become a multi-county utility and trigger Commission jurisdiction under Section 367.171, Fla. Sta., thereby side-stepping the unfavorable decision it previously received from St. Johns County. Without the Duval County portion of the application, St. Johns County would continue to have exclusive jurisdiction to grant or deny Intercoastal’s extension requests, and the doctrine of administrative res judicata would clearly apply to support denial of its renewed application.

Even considering the inclusion of new territory in the present application, the principles of collateral estoppel and res judicata are appropriate and should be applied in this instance to prevent Intercoastal from relitigating a cause it has already tried and lost. The 24,900 acres which Intercoastal is seeking to add to its service territory in St. Johns County is exactly the same 24,900 acres which the Authority and the Board refused to grant to Intercoastal. While nothing of substance has changed from Intercoastal's side, the County and JEA have all invested significant time and money fulfilling obligations to provide adequate, reliable and timely water and wastewater services to the Walden Chase development and Allen Nease High School which were included in the territory sought in both of Intercoastal's applications. In addition, the Development Orders for Nocatee have now been issued and effectively preclude the revised plan of service offered by Intercoastal in this docket. Thus, in this case, changed circumstances actually provide further justification for denying Intercoastal's efforts to obtain new service territory in St. Johns County.

Intercoastal's contention that its application filed with the PSC is outside the reaches of the collateral estoppel or res judicata doctrine because of the new territory in Duval County which was not part of the application filed with the Authority is not persuasive. Intercoastal fails to point out that during the course of the proceedings before the Authority, Intercoastal learned that the Nocatee development included land in both St. Johns County and Duval County. Nonetheless, Intercoastal continued to pursue its application with the Authority thereby compelling a ruling from the Authority. As discussed above, that ruling specifically rejected Intercoastal's request to add the territory in St. Johns County which is a significant portion of the territory requested in its pending application with the Commission.

Intercoastal also contends that because it has changed its plan of service in its current application (after multiple versions of a service plan were offered during the proceedings before the Authority), the doctrines of res judicata and collateral estoppel should not apply. The Commission should rule that Intercoastal is barred by the principle of collateral estoppel from re-litigating any issues related to the St. Johns County expansion territory that were tried and decided in the prior proceedings before the Authority and Board. At a minimum, Intercoastal should be precluded from contesting issues decided by the Authority on which no new evidence was presented. See, Club and Community Consulting Corp. v. Brown, 728 So.2d 822 (Fla. 4th DCA 1999)(“The application of collateral estoppel does not require that the entire claim have been previously litigated only that an issue have [sic] been litigated.”); Brown v. Dept. of Professional Regulation, 602 So.2d 1337 (Fla. 1st DCA 1992)(specific findings of fact in an administrative order can serve as the basis for application of collateral estoppel).

Many of the specific findings made by the Authority and ultimately adopted by the Board in connection with Intercoastal’s prior application are clearly relevant to the issues in this docket. Even if the Commission concludes that res judicata does not require automatic denial of Intercoastal’s pending application, collateral estoppel should be applied to preclude Intercoastal from contesting or relitigating factual issues that were fully presented and addressed during the earlier proceeding. Among the pertinent findings and conclusions of the Authority which are not affected by any changes in Intercoastal’s application with the Commission are the following, which are taken verbatim from the Authority’s Order:

Findings of Fact

1. The Applicant, Intercoastal Utilities, Inc., is an investor-owned water and wastewater utility regulated by the St. Johns Water and Sewer Authority whose current service territory is bounded on the west by the Intercoastal Waterway and encompasses approximately 4,500 acres. Intercoastal's operating agent is Jax Utilities Management, Inc. (JUM), a 25-year old consulting firm, whose "lead owner" is Mr. H.R. James, a shareholder in Intercoastal. Intercoastal purchased the utility facilities of the developer of the Sawgrass development in approximately 1983. Intercoastal currently provides water and wastewater service to approximately 3,400 water customers and 3,000 sewer customers in northeast St. Johns County pursuant to Water Franchise Certificate No. 13 and Wastewater Franchise Certificate No. 14 issued by the county. Intercoastal's existing customer base is primarily single-family and condo/apartment communities, with limited non-residential areas.

2. JEA is a municipal utility regulated by a governing board providing water and sewer utility services in Duval and Clay Counties to approximately 180,000 water and 135,000 sewer accounts. JEA serves these customers through an interconnected grid which unites 34 water plants and 5 wastewater plants in a regionalized-type system.

* * *

4. DDI is a private corporation controlled by the Davis family which owns and is developing Nocatee...The Nocatee subdivision is located in two counties, Duval and St. Johns, and consists of approximately 15,000 acres with all but 2,200 acres located in St. Johns County. Nocatee will have about 14,000 residential units and several million square feet of commercial properties.

* * *

10. The Walden Chase subdivision is located at the northeast portion of the intersection of U.S. 1 and CR 210. It is likely that Walden Chase will be the first development in the requested territory to need service.

11. Walden Chase is part of the Exclusive Service Area designated by the County Ordinance. The developer of this subdivision has entered into an agreement with the County for water and wastewater service.

12. The County intends to meet its obligations to Walden Chase through a wholesale agreement with JEA (the "County/JEA Agreement") pursuant to which JEA will provide both water and wastewater service to certain portions of northern St. Johns County specifically including Walden Chase.
13. . . . The County/JEA Agreement will enable the Utility Department to meet these requirements.

* * *

15. DDI is the owner of approximately 25,000 acres of land in St. Johns County and approximately 25,000 acres of land in Duval County. Approximately 90% of the requested territory consists of land owned by DDI or its affiliates.
16. Intercoastal's Application for expansion of its water and wastewater franchise includes substantially all of the 25,000 acres owned by DDI in St. Johns County. DDI has never requested service from Intercoastal for any portion of its property. Indeed, DDI's representative specifically requested Intercoastal to not proceed with the Application.
17. DDI is planning a multi-use development of 15,000 acres consisting of 12,800 acres in St. Johns County and 2,200 acres in Duval County. This development, known as "Nocatee," is planned to be built in five phases with each phase taking an estimated 5 years with total anticipated build-out time of 25 years.
18. DDI has no plans to develop the 12,000 plus acres of property it owns in St. Johns County which is not part of Nocatee. Thus, there is currently no need for service in this vast portion of the requested territory.
19. Due to its size, Nocatee will be reviewed and permitted as a Development of Regional Impact ("DRI"). As a DRI, Nocatee will be required to comply with the applicable provisions of the local comprehensive plans.
20. Nocatee spans the St. Johns/Duval County Line. Approximately 12,800 acres in St. Johns County. [sic]
21. Nocatee will be developed in five phases, with each phase lasting about five years, for a total development horizon of about 25 years. Based on current permitting plans, development within Phase I will require water, wastewater and reuse service in 2002.

* * *

C. Intercoastal's Plan of Service

* * *

24. Intercoastal's existing service area is entirely on the east side of the Intercoastal Waterway. The proposed territory to be served is entirely west of the waterway. Intercoastal has two water treatment facilities...and one wastewater treatment facility . . .
25. In preparing its plan of service for the Territory Expansion Area, Intercoastal was not responding to any requests for service and did not obtain any information regarding the needs of the owners of the specific properties or developments in the area.
26. At the hearing, there was confusion as to exactly how Intercoastal intended to serve the new territory. Indeed, as discussed below, Intercoastal's plan has changed several times.
27. On April 22, 1999, Intercoastal submitted prefiled testimony before the FPSC in opposition to the territory expansion request of United Water Florida, Inc. for portions of the proposed new territory. In that testimony, Intercoastal indicated that its initial service to the disputed area would be provided through a wholesale/partnership with JEA. Intercoastal's plan to enter into a wholesale arrangement with JEA was abandoned after JEA signed agreements with the county and with DDI. At this time, Intercoastal is not pursuing any further negotiations with JEA.

* * *

35. JEA currently has 34 water plants and five major regional wastewater plants. JEA has an extremely reliable system that provides redundance through two interconnected water grids and a loop system. The capacity of several of JEA's existing water and wastewater treatment plants exceed current usage.
36. JEA's south grid currently consists of 14 interconnected water treatment plants with 54 water supply wells. The firm capacity of JEA's south grid was recently increased by 10.8 mgd in May to bring the total capacity to over 103 mgd. These capacity figures are conservatively stated. Just taking into account the south grid, JEA has sufficient capacity to provide service under the agreements with St. Johns County and DDI.
37. JEA's north grid consists of 9 interconnected water plants with 46 wells. There is currently excess water available in JEA's north grid that can

potentially be used to meet water demands in the south grid. Plans are already underway to link the two water grids. When the linkage is completed, JEA will be able to further balance its withdrawals to protect against environmental damage.

* * *

39. JEA is already in the process of expanding its existing system in southern Duval County to provide regional service. This expansion is going forward irrespective of the results of Intercoastal's territory expansion request. JEA is installing a system that will provide a backbone for regional service. It will enable the establishment of a comprehensive, economically sized system to serve throughout the surrounding area including northern St. Johns County.
40. JEA is bringing a 24 inch water line from the existing terminus of its facilities at Bayard south to Racetrack Road. From the county line, the current plan calls for a 20 inch water line extension south along U.S. 1. From Nease High School, JEA will run a 16 inch water main and a 12 inch force main to Walden Chase. The routes selected were chosen to accommodate the regional needs of the area and to provide the most efficient service to the customers in need of immediate service.

* * *

43. JEA is in the process of implementing a major reuse plan. JEA's reuse master plan includes a 24 inch reuse main that is extended east from Mandarin. This line is already in the planning stages and will be implemented shortly. The services provided in St. Johns County will be hooked up to this network.

E. DDI Plan of Service

44. DDI has taken several steps toward the provision of water, wastewater and reuse service for the Nocatee development. These steps, which include the following, demonstrate DDI's desire to provide utility service to its development.
 - (1) DDI has formed a wholly-owned subsidiary called Nocatee Utility Corporation.

- (2) Nocatee Utility Corporation has applied to the Florida Public Service Commission for a multi-county water and wastewater certificate to serve the entire Nocatee development, including both the Duval County and St. Johns County portions of the development.
- (3) DDI has entered into a Letter of Intent with JEA under which JEA will provide bulk water, wastewater and reuse service to Nocatee Utility Corporation. JEA has facilities planned or in place that are sufficient to meet the needs of the Nocatee development in a timely fashion. The viability of bulk service by JEA is further evidenced by the fact that a bulk agreement with JEA was Intercoastal's first choice for the means of providing service to the proposed expansion territory.
- (4) DDI intends to provide reuse throughout its development...
- (5) DDI has entered into an agreement with Nocatee Utility Corporation under which DDI will provide the financial resources required for Nocatee Utility Corporation to provide retail service to the Nocatee development.

* * *

- (7) DDI has developed a planning approach known as Nocatee Environmental and Water Resource Area Plan ("NEWRAP"). NEWRAP represents an integrated approach to all water use and environmental issues. According to DDI, it would be difficult or impossible for DDI to implement NEWRAP if retail water, wastewater and reuse service were provided to the development by an unrelated third party such as Intercoastal.

F. Applicant's Ability to Serve

45. There is significant doubt as to whether the Applicant [Intercoastal] has the ability to provide service to the requested area.
46. As discussed in more detail below, there are significant unanswered questions as to whether Intercoastal has sufficient operating capacity to serve the requested territory. Intercoastal has a contractual obligation to provide a specified level of reuse to Sawgrass. Taking into account this commitment and the limited size of Intercoastal's wastewater facility, even including the full amount of the current expansion, it does not appear that there will be sufficient capacity to enable Intercoastal to meet the reuse needs of Nocatee.

* * *

54. Intercoastal's contention that its plan of service is somehow superior to other alternatives because of Intercoastal's special commitment to reuse is simply erroneous. . . .
60. DDI, the owner of Nocatee, has expressed a preference for service from JEA via contract. DDI has not requested service from Intercoastal.
61. DDI does not desire utility service from Intercoastal. DDI's reasons for not desiring such utility service include the following:

* * *

- (2) Intercoastal does not have the ability to provide sufficient reuse service to Phase I of Nocatee at the outset of the development.
- (3) DDI desires to retain control over the provision of water, wastewater and utility service to Nocatee to ensure that such service is available as and when required to meet the needs of the development. DDI does not want water, wastewater and reuse service to Nocatee to be subject to potential changes in the financial situation and business plans of a third party.
- (4) The provision of retail service to Nocatee by any third party utility would adversely impact DDI's ability to implement its water resource plans and to develop its property in the most environmentally sensitive manner. . . . This involvement by a third party utility - whose utility-related goals would conflict with some of the developers' environmental goals - would interfere with the implementation of DDI's integrated water resource plan.
- (5) DDI believes that Intercoastal does not have the necessary facilities in place today to provide service to Nocatee and does not have anything more than conceptual plans as to how such service will be provided.

* * *

- (8) If service were provided by Intercoastal, DDI would be required to contribute substantial assets to Intercoastal which would create value for Intercoastal's stockholders when Intercoastal's system is eventually sold. If service is provided by DDI or its affiliate, the value of those assets would be retained directly or indirectly by DDI.
62. Finally, Intercoastal's existing customers have vocally opposed the application for the proposed territory. The Sawgrass Association which represents approximately 1,600 residential customers currently served by

Intercoastal, has expressed concern over Intercoastal's apparent plan to provide service, at least temporarily, to the new territory via Intercoastal's existing facilities.

CONCLUSIONS OF LAW

* * *

5. Subsection (e) of Section 173/4-204.C of the Ordinance contemplates an inquiry into the need for service in the territory involved in the application. Intercoastal has failed to demonstrate a need for service to the portion of the proposed expansion area owned by DDI which is outside the boundaries of the planned Nocatee development. The Authority concludes that it is not in the public interest to grant a certificate expansion for a large area which has no foreseeable need for utility service. Intercoastal's certificate expansion application for this portion of the requested territory should therefore be denied...
6. Subsection (e) of Section 173/4-204.C of the Ordinance permits an inquiry into the ability of the applicant to provide service to the territory applied for....Intercoastal has also failed to demonstrate that it can commence reuse service to Nocatee in a time frame and quantity that meets the needs of the developer....
7. In the exercise of its discretion, the Authority concludes that Intercoastal's informational submissions to the St. Johns River Water Management District (SJRWMD) as part of the 2020 Water Planning process do not confer any particular rights on Intercoastal in this certificate extension proceeding...correspondence from the SJRWMD makes it clear that Intercoastal's information submission does not grant Intercoastal any preferred status with respect to future required permitting activities.

* * *

13. Based on all the factors discussed above, we determine that it is not in the public interest to grant any portion of Intercoastal's requested certificate extension.

Intercoastal has not given the Commission any reason to divert from any of the findings or conclusions quoted above. With the exception of the County, whose Board confirmed the findings

and conclusions of the Authority, the parties in this docket are identical to the parties in the proceedings before the Authority. In fact, many of the same witnesses testified in both proceedings. For example, for Intercoastal M.L. Forrester, H.R. James and Michael Burton testified in both proceedings. For DDI, Douglas Miller testified in both cases and for JEA, Scott Kelly and Tim Perkins were witnesses in both proceedings. As indicated earlier, the only changed circumstances provides further reasons to deny Intercoastal's land grab. The Commission should discourage repetitive litigation by applying the doctrines of res judicata and collateral estoppel to Intercoastal's request for new territory in St. Johns County.

Issue B: Has Intercoastal actually 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?

Summary of Position: JEA takes no position.

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

Summary of Position: No.

Analysis and Argument: With respect to the Nocatee development, which is included in the territory requested by Intercoastal, development can only proceed consistent with the Development Orders. Thus, there is only a need for service if the providing utility's plan of service complies with the Development Order conditions (D.Miller, Tr. Vol. 7, pp. 1017, 1031). Intercoastal's plan of service violates several Development Order conditions including the prohibition of on-site potable water wells, on-site water treatment plant and an on-site wastewater treatment plant, the prohibition of groundwater to supplement reclaimed water for irrigation

purposes, the prohibition of wet weather discharges to the Tolomato River or its tributaries (J.Miller, Tr. Vol. 3, pp. 405-406; D.Miller, T. Vol. 7, pp. 1018, 1027). If Intercoastal's application is granted, its inability to comply with the Development Order conditions means that development could not proceed, and the need for service would be negated. Intercoastal cannot provide service in accordance with the Development Orders for the property. For example, the land cannot be developed with on-site wells proposed by Intercoastal as part of its plan of service. Consequently, there is no need for the service Intercoastal proposes to provide.

There is additional land outside of Nocatee owned by the Davis family which have been included in Intercoastal's application. There is no need for service in that area.⁴ (Skelton, Tr. Vol. 6, pp. 984-985, 993, 998, 1003-1004).

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

Summary of Position: JEA's adopts NUC's position on this issue.

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

Summary of Position: No. Only NUC through its Wholesale Agreement with JEA can provide service to Nocatee in accordance with the conditions that have been placed on the development through the Development Orders.

⁴There is also no need for service for the Walden Chase and Marshall Creek developments in St. Johns County which were included as part of the territory sought by Intercoastal in this consolidated docket. The Walden Chase developer has arranged to receive service from St. Johns County under a bulk service arrangement between the County and JEA (Kelly, Tr. Vol. 3, pp. 520-521). Intercoastal has indicated during the course of these proceedings that it is no longer seeking certification of those areas. An amendment to the application to reflect such a deletion has apparently not yet been filed.

Analysis and Argument: Intercoastal has not demonstrated the technical ability to provide service to the territory requested in this case (D.Miller, T. Vol. 2, p. 232, Vol. 6, p.1020).

As discussed above, Intercoastal cannot provide service consistent with the conditions of the Development Orders. Intercoastal's speculation that DDI would be willing and able to obtain amendments to delete these conditions is unfounded (D.Miller, T. Vol. 6, pp. 1031-1032). The testimony of Jay Skelton and Doug Miller, both of whom were involved in the DRI process that led to the Development Orders, confirms that it is highly doubtful that such amendments could be obtained (D.Miller, T. Vol. 2, pp.204-206; Vol. 6, pp.1031-1036; Skelton, Tr. Vol. 6, pp. 988-92).

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

Summary of Position: No. Intercoastal would have to construct new water, wastewater and reuse facilities on the west side of the Intercoastal Waterway in order to provide service to the requested territory.

Argument and Analysis: Intercoastal does not have the current plant capacity necessary to serve its requested territory. Intercoastal's plan of service involves the construction of new water and wastewater treatment plants on the west side of the Intracoastal Waterway (J.Miller, Tr. Vol. 3, pp. 400, 401-402). Essentially, Intercoastal will have to create a whole new utility. There are serious questions as to whether Intercoastal could obtain the approvals to build the necessary facilities (Lear, Tr. Vol. 5, pp. 838-839). The St. Johns River Water Management District has designated most of southern Duval County and all of St. Johns County as a priority water use caution area. Intercoastal cannot meet the needs of the Nocatee Development without new wells in the water use caution area.

With respect to reuse, Intercoastal proposes to pipe treated effluent from its existing Sawgrass Plant across the Intracoastal Waterway. Even then, Intercoastal cannot meet the full reuse needs of Nocatee and will require supplemental use of groundwater, which is prohibited by the Development Orders (J.Miller, Tr. Vol. 3, pp. 403, 406). Intercoastal's engineer, Jim Miller, attempted to downplay the amount of the reuse shortfall by minimizing Intercoastal's obligations to provide reuse to the Sawgrass golf course. He also failed to take into account the preemptive right of the Plantations golf course to all remaining reclaimed water to the extent needed for their facility (James, Tr. Vol. 3, p.452; Miller, Tr. Vol. 7, pp. 1144-1145). Moreover, Miller's calculations incorrectly assumed that the total amount available for reuse equals the total wastewater treatment plant capacity, even though actual flow rates are currently well below that capacity (J.Miller, Tr. Vol. 7, pp. 1116-1117, 1143-1144).

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

Summary of Position: JEA takes no position.

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

Summary of Position: JEA takes no position.

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

Summary of Position: JEA takes no position.

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?

Summary of Position: Intercoastal's existing customers are concerned about continued adverse service implications if Intercoastal's application is approved. These concerns

were voiced before the St. Johns County Water and Sewer Authority during the proceeding on Intercoastal's prior application to serve the additional territory in St. Johns County and are reflected by the participation of the Sawgrass Homeowners' Association in this proceeding. In reaching its decision in these consolidated dockets, the Commission should consider the concerns of the customers and their complaints about service by Intercoastal.

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?

Summary of Position: No.

Analysis and Argument: Intercoastal has failed to provide a technically feasible plan of service. Instead, it has offered a plan that violates numerous conditions in the Nocatee Development Orders. Granting Intercoastal's application would unduly hamper the developer's ambitious environmental goals. In addition, Intercoastal would unnecessarily duplicate facilities that have already been constructed by JEA.

Intercoastal's main motivation in this case is to obtain the certificates to increase the value of the utility. Intercoastal is and has been for sale for quite some time (James, Tr. Vol. 3, p.436). This is not surprising since the owners of Intercoastal have owned approximately 25 utilities over the years and have sold 23 of them (James, Tr. Vol. 3, p. 461). In 1998, Intercoastal made a written proposal to sell its system to St. Johns County (James, Tr. Vol. 3, p. 437; Exhibit 18). Since 1999, there have been active sale negotiations with both JEA and St. Johns County (James, Tr. Vol. 3, pp. 437-444). In August 2000, Intercoastal had a draft agreement to sell the utility to St. Johns County for a purchase price which gave significant value to future connections in Nocatee -- a territory that Intercoastal has never been authorized to serve (James, Tr. Vol. 3, pp. 437-441; Exhibit 19).

Recently, St. Johns County voted to schedule a public hearing to once again consider the acquisition of Intercoastal (James, Tr. Vol. 3, p. 443; Exhibit 20). Mr. James admitted that obtaining the requested certification would add significant value to the utility (James, Tr. Vol. 3, pp. 448, 461).

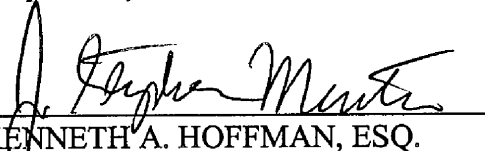
ADDITIONAL ISSUES

JEA defers to and adopts the position of the applicant NUC with respect to additional issues raised at the hearing including the relevance of the decisions in the Alafaya Utilities and Lake Utility Services cases, and the applicability of Section 367.022(2), Florida Statutes.

RELIEF REQUESTED

For all the reasons stated above, the Commission should grant NUC's application for water and wastewater certificates in Duval and St. Johns County and deny the competing certificate application filed by Intercoastal.

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CERTIFICATE OF SERVICE

I HEREBY certify that a copy of the foregoing was furnished by U.S. Mail to the following this 6th day of June, 2001:

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