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September 21, 1999

VIA HAND DELIVERY

RECEIVED-FPSC
SEP 21 PM 12:30
RECORDS AND REPORTING

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

Re: Application by Nocatee Utility Corporation for Original Certificates for Water and Wastewater Service in Duval and St. Johns Counties, Florida
Docket No. 990696-WS

Dear Ms. Bayo:

Enclosed for filing please find the original and fifteen copies of Intercoastal Utilities' Response to Motion To Dismiss Intercoastal's Objection and Intercoastal's Response To Nocatee's Second Motion For Protective Order.

Should you have any questions in this regard, please let me know.

Sincerely,

ROSE, SUNDSTROM & BENTLEY, LLP

John L. Wharton, Esq.
For The Firm

Resp. to Motion to Dismiss
DOCUMENT NUMBER-DATE

11354 SEP 21 99

FPSC-RECORDS/REPORTING

2nd Motion Protective Order
DOCUMENT NUMBER-DATE

11355 SEP 21 99

FPSC-RECORDS/REPORTING

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In Re: Application by Nocatee)
Utility Corporation for Original)
Certificates for Water & Wastewater)
Service in Duval and St. Johns)
Counties, Florida)
_____)

Docket No. 990696-WS

INTERCOASTAL UTILITIES' RESPONSE TO
MOTION TO DISMISS INTERCOASTAL'S OBJECTION

Intercoastal Utilities, Inc. ("Intercoastal") hereby files this Intercoastal Utilities' Response To Motion To Dismiss Intercoastal's Objection and in support thereof would state as follows:

1. As Nocatee Utility Corporation ("NUC") candidly admits in its Motion To Dismiss, it has not, under Rule 28-106.204, Fla. Admin. Code, filed its Motion To Dismiss within twenty days after service of Intercoastal's Petition. Additionally, NUC's pleading is not really a "Motion To Dismiss." It is more akin to a Motion For Summary Judgment and yet it does not even allege, or purport to allege, that there are no outstanding issues of material fact left to be resolved in this matter.

2. It appears what NUC is really arguing, without so stating, is the concept of "mootness" as opposed to the concept of "standing." As stated in *Montgomery v. DHRS*, 468 So.2d 1014 (Fla. 1st DCA 1985),

Mootness has been defined as "the doctrine of standing set in a time-frame" the requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).

...

Mootness occurs in two basic situations: "when the issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome."

3. NUC's "mootness claim" should be rejected on two basis discussed in greater detail hereafter: Intercoastal's intent to imminently appeal the decision of the Board of County Commissioners of St. Johns County, and Intercoastal's intention to apply for a certificated territory, which includes that territory which is the subject of Nocatee's application, by filing an application with the PSC.

4. Intercoastal has thirty days to appeal the order of the St. Johns County Board of County Commissioners. That appeal period does not terminate until at least the second week of October, 1999. Intercoastal will appeal the decision of the Board of County Commissioners and that appeal is currently being researched and drafted.¹

5. Intercoastal will remain "an applicant" as long as litigation on its St. Johns County application in St. Johns County remains alive. That application is alive today and will remain alive during the pendency of any appeal. This is obvious by the fact that the appeal could, by its very nature, result in Intercoastal's St. Johns County application ultimately being approved. If Intercoastal should not be considered an "applicant" during this stage of the proceeding because its application is "dead," then it is difficult to explain how that same application might ultimately be approved.

¹The filing of the appeal is not simply by "notice of appeal" as it is at a District Court of Appeal. Rather, the appeal is by a writ of certiorari which must be filed with the Circuit Court within thirty days of the final order and which is a substantially more complex filing than the "notice of appeal" that is normally utilized at a District Court of Appeal.

6. Even if NUC did properly demonstrate mootness, then an exception to that rule would be appropriate in this case. In the case of *Lund v. Department of Health*, 708 So.2d 645 (Fla. DCA 1998), the court recognized an exception to the mootness rule for situations wherein collateral legal consequences affecting the rights of a party may flow from the issues to be decided. Obviously, it is Nocatee's Motion To Dismiss itself which reveals that Intercoastal's imminent application before the PSC will have a "collateral legal consequence." In fact, the application which NUC has filed (and which Intercoastal has challenged) and the application of Intercoastal, which will be filed within the next few weeks, are mutually exclusive.

7. It is apparently the position of NUC that Intercoastal's application in St. Johns County is "dead." While not directly on point, several cases have reviewed the context of an applicant's standing to challenge a rule when the basis of standing was predicated upon the fact that the party was also an applicant and the applicant has subsequently received a Final Order denying its application. For instance, in the case of *Bowen v. HRS*, DOAH Case No. 85-016RX (February, 1986 Final Order), the Administrative Law Judge rejected an argument of mootness in a rule challenge and held,

Had petitioner not taken an appeal from the Final Order denying licensure this cause clearly would have been moot because even if the rule were declared invalid, it would not affect the Department's denial of licensure and any subsequent applications filed by petitioner would be governed by the amended rules and statutes now in existence. ***However, because the petitioner appealed the Final Order of the Department, the question of petitioner's entitlement to licensure under the rules and statutes in***

effect at the time of the Department's Final Order is still live. Should the court remand the cause to the Department for further proceedings, a determination that the challenged rule is invalid could have an affect on those proceedings. Since petitioner could not be afforded relief if the rule were determined invalid, this petition is not moot. (Emphasis added)

In this case, as long as Intercoastal's St. Johns County application is the subject of appeal, it remains "live." Should the Circuit Court or the District Court of Appeal remand the cause for further proceedings, any determination that Nocatee's application should be granted by the Public Service Commission will have a substantial affect on Intercoastal, because the two entities will have essentially filed applications which are, at least to some extent, mutually exclusive.

8. NUC has not even attempted to argue, and has not cited a single case which purports to hold, that Intercoastal is not an "applicant" as long as its application remains the subject of litigation. In this case, Intercoastal is still an applicant for the territory which it sought from St. Johns County. Its application is still "live," is still the subject of active litigation, and may still ultimately be granted by a court of competent jurisdiction. The mere issuance of the Final Order by the County does not deprive Intercoastal of its standing to protest Nocatee's application for a significant portion of the same territory for which Intercoastal has applied to extend its services.²

²In fact, a substantial issue before the Circuit Court in the St. Johns County case will be the fact that the St. Johns County Utilities Department was the opponent and that the St. Johns County Board of County Commissioners (which controls the Utilities Department) was the "judge." This is an issue which the Commission may learn more about as this matter progresses, but whose details will, at this time, be deferred until another day.

9. Another reason NUC's Motion must fail is the fact that Intercoastal will, imminently, file an application at the Public Service Commission which requests that the Commission certificate Intercoastal and incorporate into its certificated area all of that territory for which NUC has filed an "application."³ Intercoastal has already obtained a list of entities to receive notice from the PSC in furtherance of that application. Intercoastal has had a meeting with the PSC staff on the filing of its application. Intercoastal has notified the PSC staff that the filing of the application is imminent. Intercoastal has been working on its application, so that the same will comply with the PSC's rules in all respects, for a significant period of time. It is anticipated that NUC will protest Intercoastal's filing and that the Commission will thereafter consolidate the hearing on each application to promote judicial economy. Intercoastal anticipates that its application will be noticed in the next two weeks and that its application will be filed shortly thereafter.

10. Obviously, Intercoastal could have already filed its application if it adopted the philosophy utilized by NUC in filing its "application." In other words, Intercoastal could have filed a shell application (prior to the expected denial of Intercoastal's application by the County, so that no claim could be made that Intercoastal was not substantially affected) only to file the substance of that application months later, as NUC apparently proposes to do. Intercoastal has chosen not to follow that course, but rather to prepare its application in a manner that will be responsive to all of the

³Whether NUC has actually filed an "application" to this point is somewhat debatable. That point is discussed *infra*.

Administrative Code Rules of the PSC.

11. In point of fact, it is an open question whether NUC has even filed an "application." NUC requested a waiver from the Commission from many of the substantial requirements in the Commission's Administrative Code Rules for the filing of original certificate applications. When that waiver was denied, NUC apparently informed the Commission staff that it would file the remainder of its application for an original certificate *with its prefiled testimony in this case*. It is perhaps an open question whether NUC has even "filed" its "application" within seven days of notice by regular mail and within twenty-one days of publication, as required by Rule 25-30.030(5) and (6), Fla. Admin. Code. It is not an open question that NUC has never, as of the date of the filing of this Motion, achieved an "official date of filing" pursuant to Rule 25-30.025, Fla. Admin. Code. It is obvious that if Nocatee had waited to file its application until the information required by the Commission's Administrative Code Rules was actually at hand and in the proper form such that it was ready to be filed, NUC's application would not even be filed as of this date. Surely, Intercoastal's method of attempting to accumulate all of the information required by the Commission's Administrative Code Rules prior to the filing of its application is the better method.

12. Since there can be no credible argument that Intercoastal would not be substantially affected if in fact it had filed its PSC application *prior to* the time NUC filed its application, in effect NUC is requesting the Commission to punish or prejudice Intercoastal based upon NUC's own failure to wait until it was ready to file its

application before it actually did so.⁴

13. Not only will Intercoastal suffer substantial injury in fact if NUC's original certificate application is allowed to proceed without consideration of Intercoastal's timely protest, the Commission and the public will ultimately be prejudiced also. There are two applicants for the territory for which NUC has applied. One applicant is, of course, NUC. The other applicant is Intercoastal, who has both applied for a substantial portion of the territory before St. Johns County and who will imminently apply for all of the territory before the Public Service Commission. It is in the public interest for the Commission to determine which of those applicants is better able to serve those areas and to determine, upon a comprehensive review of the facts and the financial, managerial, technical, and operational offerings of the two utilities involved, which application should be granted in the public interest. Also at issue is the effect of Intercoastal's application (both the application pending before St. Johns County and the application which will imminently be filed before the PSC) on Intercoastal's existing customers and on the future customers in the other areas of St. Johns County which Intercoastal proposes to serve. NUC would, obviously, rather its application be granted without consideration of any of these facts or circumstances.

WHEREFORE, and in consideration of the above, Intercoastal respectfully requests the Commission deny NUC's Motion To Dismiss and proceed to review both

⁴In this regard, the portion of NUC's Motion which requests the Commission approve its application (if Intercoastal's application is dismissed) is without any foundation in law or fact. NUC has not even yet met the minimum filing requirements or, for all practical purposes, filed an "application" under the Commission's rules.

the unfinished application of NUC and the imminent application of Intercoastal such that a comprehensive schedule may be established which would allow the comparative proposals of the two utilities to be subjected to the scrutiny provided by the administrative hearing process.

DATED this 21ST day of September, 1999.



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CERTIFICATE OF SERVICE

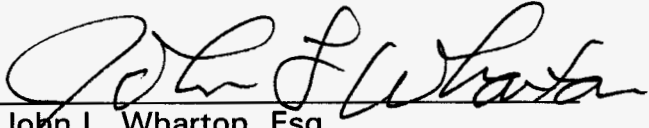
I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by the method indicated below to the following on this 21ST day of September, 1999.

Richard D. Melson, Esq.
Hopping, Green, Sams & Smith, P.A.
P.O. Box 6526
Tallahassee, FL 32301

Via U.S. Mail

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John L. Wharton, Esq.

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