



# Public Service Commission

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**DATE:** FEBRUARY 17, 2000  
**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYC)  
**FROM:** DIVISION OF LEGAL SERVICES (CIBULA, VAN LEUVEN) SMC  
DIVISION OF WATER AND WASTEWATER (REHWINKEL, REDEMANN) RRR  
**RE:** DOCKET NO. 990696-WS - APPLICATION FOR ORIGINAL CERTIFICATES TO OPERATE WATER AND WASTEWATER UTILITY IN DUVAL AND ST. JOHNS COUNTIES BY NOCATEE UTILITY CORPORATION.

DOCKET NO. 992040-WS - APPLICATION FOR CERTIFICATES TO OPERATE A WATER AND WASTEWATER UTILITY IN DUVAL AND ST. JOHNS COUNTIES BY INTERCOASTAL UTILITIES, INC.

**AGENDA:** 02/29/2000 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\990696R2.RCM

### CASE BACKGROUND

On June 1, 1999, Nocatee Utility Corporation (NUC) filed an application for original certificates to provide water and wastewater service to a development located in Duval and St. Johns Counties known as Nocatee. Docket No. 990696-WS was assigned to that application. On June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal or utility) timely filed a protest to NUC's application and requested a formal hearing.

On December 30, 1999, Intercoastal filed an application requesting an amendment of certificates to provide water and wastewater service to the Nocatee development; to extend its service territory in St. Johns County; and for an original

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certificate for its existing service area. Docket No. 992040-WS was assigned to that application. On January 24, 2000, NUC and its parent company, DDI, Inc. (DDI), timely filed separate objections to Intercoastal's application and requests for hearing. On January 26, 2000, St. Johns County (County) filed a Petition to Intervene in this matter. On January 31, 2000, JEA (formerly known as Jacksonville Electric Authority) and Sawgrass Association, Inc. (Sawgrass) timely filed separate objections to Intercoastal's application and requests for hearing.

On January 11, 2000, Intercoastal filed a Motion to Consolidate Dockets Nos. 992040-WS and 990696-WS. By Order No. PSC-00-0210-PCO-WS, issued February 2, 2000, the Motion to Consolidate was granted and Order No. PSC-99-1764-PCO-WS, issued September 9, 1999, which established the procedure and Order No. PSC-99-2428-PCO-WS, issued December 13, 1999, which set the controlling dates for Docket No. 990696-WS, were ordered to govern Docket No. 992040-WS. Accordingly, these matters are scheduled for an administrative hearing on August 9 and 10, 2000.

On January 24, 2000, NUC and DDI filed a Joint Motion to Dismiss Intercoastal's Application or, in the Alternative, to Preclude Re-Litigation of Issues. On January 26, 2000, the County filed a Motion to Dismiss Intercoastal's application. On January 27, 2000, the County filed a Request for Oral Argument.

This recommendation addresses whether the Commission should grant the County's Request for Oral Argument and whether NUC and DDI's joint Motion to Dismiss or, in the Alternative, to Preclude Re-Litigation of Issues and the County's Motion to Dismiss should be granted.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant St. Johns County's Request for Oral Argument?

**RECOMMENDATION:** No. The Commission should deny St. Johns County's Request for Oral Argument because it is not in compliance with Rule 25-22.058, Florida Administrative Code. However, the County should be permitted to address the Commission during the course of discussion on this item at the agenda conference since the matter has not yet been to hearing. (CIBULA, VAN LEUVEN)

**STAFF ANALYSIS:** Rule 25-22.058, Florida Administrative Code, states that the Commission may grant oral argument upon request of any party to a Section 120.57, Florida Statutes, hearing. The rule states that "a request for oral argument shall be contained in a separate document and must accompany the pleading upon which the argument is requested." Further, Rule 25-22.058, Florida Administrative Code, states that "failure to file a timely request for oral argument shall constitute waiver thereof."

The County's Motion to Dismiss Intercoastal's application was filed on January 26, 2000; however, its request for oral argument on the Motion to Dismiss was not filed until January 27, 2000. As Rule 25-22.058, Florida Administrative Code, specifically states that a request for oral argument must accompany the pleading upon which it is requested and failure to timely file the request shall constitute a waiver, staff recommends that the County's Request for Oral Argument should be denied. However, the County should be permitted to address the Commission during the course of discussion on this item at the agenda conference since the matter has not yet been to hearing.

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**ISSUE 2:** Should DDI, Inc. and Nocatee Utility Corporation's Joint Motion to Dismiss or, in the Alternative, to Preclude Re-Litigation of Issues be granted?

**RECOMMENDATION:** No. Staff recommends that DDI and NUC's Joint Motion to Dismiss be denied. In addition, staff recommends that DDI and NUC's alternative request that the Commission issue an Order precluding the re-litigation of issues be denied. (VAN LEUVEN, CIBULA)

**STAFF ANALYSIS:** Under Florida law the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. When "determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." Id.

DDI, Inc. And Nocatee Utility Corporation's Joint Motion to Dismiss, or in the Alternative, to Preclude Re-Litigation of Issues

As stated in the case background, on January 24, 2000, DDI and NUC filed a Joint Motion to Dismiss, or in the Alternative, to Preclude Re-Litigation of Issues. The basis of the Joint Motion is barred by the doctrines of res judicata and collateral estoppel. In the alternative, DDI and NUC move to preclude the re-litigation of issues already litigated before the County's Board of Commissioners when considering Intercoastal's application. Intercoastal filed a timely response on January 31, 2000.

DDI and NUC first argue that the doctrines of res judicata and collateral estoppel may be applied in this case because "[i]t is well settled that res judicata and collateral estoppel may be applied in administrative proceedings." Thompson v. Department of Environmental Regulation, 511 So. 2d 989, 991 (Fla. 1987). Under res judicata, a final judgement precludes a subsequent suit on the same cause of action because it is conclusive on all matters germane thereto that were or could have been raised in the first action. Collateral estoppel applies when there are two different

causes of action in order to prevent common issues from being re-litigated. Res judicata applies to proceedings unless there has been "a substantial change in circumstances relating to the subject matter with which the ruling was concerned, sufficient to prompt a different or contrary determination." Miller v. Booth, 702 So. 2d 290 (Fla. 3d DCA 1997). Additionally, DDI and NUC cite to cases which hold that res judicata only applies if the second application is not supported by new facts, changed conditions, or additional submissions by the applicant. Thompson, 511 So. 2d at 991. The determination of the applicability of res judicata and whether or not a substantial change in circumstances has occurred lies primarily with the administrative body. Miller, 702 So. 2d at 291; Coral Reef Nurseries, Inc. v. Babcock Company, 410 So. 2d 648, 655 (Fla. 3d DCA 1982). Therefore, DDI and NUC contend that it is proper to apply the doctrines of res judicata and collateral estoppel in this situation.

Next, DDI and NUC argue that Intercoastal's application should be dismissed because

there has been no substantial change since June 1999 in the need for service in the St. Johns County expansion territory, in the landowners service preference, or in Intercoastal's ability to serve the territory, all of which issues were fully and fairly litigated in the hearings before the Authority in June 1999.

Additionally, the DDI and NUC argue that the only substantial change is the addition of the Duval expansion territory. Furthermore, the petitioners claim that without the Duval expansion territory St. Johns would have jurisdiction and the doctrine of res judicata would clearly prevent any re-litigation. Therefore, the petitioners argue that the Duval expansion territory was added in an attempt to forum shop by triggering the jurisdiction of the PSC.

Another argument is that unless the Commission applies the principles of res judicata or collateral estoppel it will be forcing the parties to engage in expensive and time-consuming re-litigation of issues already resolved. Also, the Commission would be sending a signal that forum shopping will be tolerated. Furthermore, DDI and NUC argue that the Commission can discharge its duty to consider multi-county issues by dismissing or precluding the re-litigation of the St. Johns expansion territory and allowing the case to go forward on the Duval expansion territory. In a footnote, DDI and NUC make reference to Brown v. Dept. Of Professional Regulation, 602 So. 2d 1337 (Fla. 1st DCA 1992), in which the Court applied the principle of collateral

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estoppel to dismiss a complaint without requiring an evidentiary hearing. However, the same footnote also makes references to several cases in which the First District Court of Appeal has held that collateral estoppel cannot be resolved on a motion to dismiss because mixed issues of law and fact must be resolved in an evidentiary hearing. See University Hospital, Ltd. v. Agency for Health Care Administration, 697 So. 2d 909 (Fla. 1st DCA 1997); University Community Hospital v. Dept. Of Heath and Rehabilitative Services, 610 So. 2d 1342 (Fla. 1st DCA 1992).

Intercoastal Utilities, Inc.'s Response in Opposition to DDI, Inc. and Nocatee Utility Corporation's Joint Motion to Dismiss, or in the Alternative, to Preclude Re-Litigation of Issues

In response to the Petitioner's motion, Intercoastal states that the "Joint Motion . . . essentially requests this Commission to determine that based upon a pattern of facts and circumstances, which are unknown to the Commission except for the fact that they are alleged by the applicant's opponents, Intercoastal does not have the right . . . to file its application." Next, Intercoastal asserts that the law is clear that a Motion to Dismiss is an inappropriate procedure for raising the defenses of res judicata and collateral estoppel by citing to Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997) and Swinney v. City of Tampa, 707 So. 2d 765, 766 (Fla. 4th DCA 1998). Intercoastal argues that it would be an error for the Commission to consider res judicata because the Swinney Court held that "the trial court erred by considering an affirmative defense that does not appear on the face of the prior pleading." Id. In support of this argument, Intercoastal states that no prior pleadings disclose a factual basis upon which to assert res judicata or collateral estoppel, and that an evidentiary hearing is necessary to determine if the elements have been met. Therefore, Intercoastal asserts that the petitioners can raise these points in their prehearing statements for litigation at the final hearing.

Another argument of Intercoastal is that several of the elements common to both res judicata and collateral estoppel have not been met. These elements are that issues be identical and the relief sought be the same. United States Fidelity & Guaranty Co. v. Odoms, 444 So. 2d 78 (Fla. 5th DCA 1984); Daniel v. Dept. Of Transportation, 259 So. 2d 771 (Fla 1st DCA 1972). Intercoastal states that there are "dozens of factual matters that differ between the instant application and the prior application of Intercoastal in St. Johns County which are unknown to the Commission at this point in time." In further support of this argument, Intercoastal argues that the issues are not the same here

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because in order for the issues to be the same before the authority, the applicable substantive law must be identical. The Florida Bar v. Clement, 662 So. 2d 690, 697 (Fla. 1995). Therefore, Intercoastal contends that the elements of res judicata and collateral estoppel have not been met because of the factual and substantive differences.

#### Staff's Analysis

In filing its motion to dismiss, DDI and NUC have raised the affirmative defenses of res judicata and collateral estoppel as grounds for dismissing Intercoastal's application. Additionally, DDI and NUC raised collateral estoppel as a ground for issuing an Order precluding the re-litigation of issues pertaining to the St. John's expansion territory. However, staff agrees with Intercoastal and the applicable case law which states that a motion to dismiss is not the appropriate avenue to address the issues of res judicata and collateral estoppel. See Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997); Swinney v. City of Tampa, 707 So. 2d 765, 766 (Fla. 4th DCA 1998). Furthermore, staff agrees with Intercoastal that in order to dismiss or preclude the re-litigation of issues, it is necessary for the Commission to be fully aware of the issues litigated before the County. Currently, staff is unaware of all the issues litigated before the County. One reason for this is that under the above noted standards set forth for reviewing a motion to dismiss, it is improper to look beyond Intercoastal's application to the Commission at this time. Moreover, in order to evaluate whether the doctrines of res judicata and collateral estoppel should apply, staff believes that a comparison would need to be made of the County's and the Commission's rules and substantive laws. For the foregoing reasons, staff recommends that the motion be denied.

In addition, the law is well established that, before the res judicata can apply, the following conditions must be present: 1) identity in the thing sued for; 2) identity of the cause of action; 3) identity of persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made. Daniel, 259 So. 2d at 771. The elements of collateral estoppel are "(1) that the parties and issues be identical, (2) that the particular matter be fully litigated and determined in a contest, (3) which results in a final decision, (4) in a court of competent jurisdiction." United States Fidelity & Guaranty Co. v. Odoms, 444 So. 2d 78 (Fla. 5th DCA 1984). The principle difference between res judicata and collateral estoppel is that the cause of action does not need to be the same to apply collateral estoppel. Had these doctrines been properly asserted, staff believes that neither

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the elements of res judicata nor collateral estoppel would have been met at this time.

Based upon the foregoing, staff recommends that DDI and NUC's Motion to Dismiss and alternative request that the Commission issue an Order precluding the re-litigation of issues should be denied.



**ISSUE 3:** Should the Commission grant St. Johns County's Motion to Dismiss Intercoastal Utilities, Inc.'s application?

**RECOMMENDATION:** No. The Commission should deny St. Johns County's Motion to Dismiss Intercoastal Utilities, Inc.'s application. (CIBULA, VAN LEUVEN)

**STAFF ANALYSIS:** A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.

St. Johns County's Motion to Dismiss

As stated in the case background, the County timely filed a Motion to Dismiss Intercoastal's application on January 26, 2000. The County sets forth two grounds upon which Intercoastal's application should be dismissed: 1) lack of subject matter jurisdiction, and 2) res judicata/collateral estoppel.

First, the County argues it is not within the Commission's jurisdiction to award service territory to an existing utility when the utility and the territory requested is located in a nonjurisdictional county. The County states that the plain meaning of Section 367.171(1), Florida Statutes, which grants counties the right to regulate water and wastewater utilities within county boundaries, combined with the legislative intent behind Section 367.171(7), Florida Statutes, which gives the Commission jurisdiction over utilities that transverse county boundaries, does not support the notion that the Commission can assign territory in nonjurisdictional counties to intercounty utilities. Moreover, the County contends that if the Commission asserts jurisdiction and grants the territory requested by Intercoastal in its application, all available water and wastewater service territory in the County will be usurped, which would be contrary to the express right of the County, under Section 367.171, Florida Statutes, to assert its own regulatory jurisdiction and to reject Commission jurisdiction over its water and wastewater utilities. Citing City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991) and Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984, 988 (Fla. 5th DCA 1999), the County asserts that in

jurisdictional counties, the franchise rights awarded by the Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes," implying that the Commission's jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties as well. Thus, the County contends that the only way Sections 367.171(1) and 367.171(7), Florida Statutes, can be harmonized is to limit the jurisdiction of the Commission to award additional service territory to intercounty utilities to service areas located within jurisdictional counties.

In support of its second argument, the County states that Intercoastal had an application before the Board of County Commissioners of St. Johns County (Board) in which Intercoastal requested to serve the same territory that Intercoastal has applied for in this case. The County asserts that after extensive hearings in St. Johns County, the Board ultimately denied Intercoastal's application to serve this territory. The order of the Board denying Intercoastal's application is currently on appeal in Circuit Court. The County contends that the only change to Intercoastal's application before the Commission is the addition of service area in Duval County. Thus, the County argues that the principles of collateral estoppel and res judicata "are appropriate and should be applied in this instance to prevent Intercoastal from profiting from blatant forum shopping and an attempt to re-litigate a cause it has already litigated and lost."

#### Intercoastal's Response

In its response to the County's contention that the Commission lacks subject matter jurisdiction to consider Intercoastal's application, Intercoastal states that, contrary to the County's analysis of the statute, the express wording of Section 367.171(7), Florida Statutes, gives the Commission exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or non-jurisdictional. Further, Intercoastal asserts that if the Legislature had meant Section 367.171, Florida Statutes, to read the way the County suggests it reads, the Legislature could have easily worded the statute accordingly.

Intercoastal also asserts that the County is incorrect when it argues that its application should be dismissed on the grounds of res judicata or collateral estoppel. Intercoastal asserts that, pursuant to University Hospital, Ltd. v. Agency for Health Care Administration, 697 So. 2d 909 (Fla. 1st DCA 1997) and Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997), a motion

to dismiss is an inappropriate procedure to raise the defenses of res judicata and collateral estoppel. Moreover, Intercoastal contends that the doctrines of res judicata and collateral estoppel do not apply because the issues to be litigated in this docket are not identical and the relief sought from the Commission is not the same as that sought from the Board. Further, the utility argues that the applicable substantive law for this docket, Chapter 367, Florida Statutes, is not the same law under which the Board's decision was based; therefore, the issues would not be identical. Additionally, Intercoastal states that the Commission has not yet established the issues to be litigated in this docket, so the Commission cannot yet tell if the issues before the Commission are the same as the issues that were before the Board.

### Staff's Analysis

The applicability of Section 367.171(7), Florida Statutes, to an original certificate application is an issue of first impression before the Commission. Staff agrees with Intercoastal that the Commission has subject matter jurisdiction under this section to consider the utility's application. Section 367.171(7), Florida Statutes, specifically states that "the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional." Although the utility filed an application for an original in existence certificate and for an amendment of its territory, the application is actually viewed by staff as an application for an original certificate in which the requested territory transverses county boundaries. Even though the utility does not yet have any existing lines, facilities, etc., which transverse county boundaries, the definition of utility in Section 367.021(12), Florida Statutes, includes every person, except those exempted under Section 367.022, Florida Statutes, "owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." Assuming all of the allegations in the application are true and viewing all reasonable inferences in favor of Intercoastal, as required by Varnes, the application falls within the Commission's subject matter jurisdiction.

Res judicata and collateral estoppel were also raised by the County as grounds for dismissing Intercoastal's application. Staff agrees with the cases set forth by the utility which state that a motion to dismiss is not the appropriate avenue to address the issues of res judicata and collateral estoppel. As stated in Varnes, when making a determination as to whether the petition

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should be dismissed, the reviewer may not go beyond the four corners of the petition. See Id. at 350. Because the Board's decision denying Intercoastal's application to serve in St. Johns County is not found within the four corners of Intercoastal's application before this Commission, one must look beyond the application, which is contrary to Varnes, to make a determination as to whether the application should be dismissed based on res judicata or collateral estoppel. Therefore, it would be error to dismiss the application on the grounds of res judicata or collateral estoppel.

Based upon the foregoing, staff recommends that the County's Motion to Dismiss Intercoastal's application should be denied.

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**ISSUE 4:** Should these dockets be closed?

**RECOMMENDATION:** No. If the Commission approves staff's recommendations on Issues 2 and 3, these dockets should remain open to allow these matters to proceed to hearing. (CIBULA, VAN LEUVEN)

**STAFF ANALYSIS:** If the Commission approves staff's recommendations on Issues 2 and 3, these dockets should remain open to allow these matters to proceed to hearing.