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May 22, 2000

Blanca Bayo, Director of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 99096-WS and Docket No. 992040-WS

Dear Ms. Bayo:

Enclosed please find an original and fifteen (15) copies of Hillsborough County's **Motion to Dismiss** in the above-referenced Dockets.

Please call me if you have any questions.

Sincerely

Donald R. Odom
Chief Assistant County Attorney

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Enclosure(s)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Docket No. 990960WS - Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation

And

Docket No. 992040-WS - Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercostal Utilities, Inc.

HILLSBOROUGH COUNTY'S MOTION TO DISMISS

COMES NOW, HILLSBOROUGH COUNTY, (County), a political subdivision of the State of Florida, pursuant to Order No. PSC-00-0980-PCO-WS, *Order Establishing Filing Dates for Special Agenda Conference*, dated May 18, 2000, by and through its undersigned attorney, and files this *Motion to Dismiss* the above-referenced Applications. In support of its Motion, the County states the following:

1. The County is a political subdivision of the State of Florida and pursuant to Part IV, Chapter 125, *Florida Statutes* and Hillsborough County Ordinance 83-9 is a charter county.
2. Pursuant to Section 367.171(1), *Florida Statutes* (1999) the County is a non-jurisdictional County in that the County has not relinquished its authority to regulate investor owned utilities within its borders to the Florida Public Service Commission ("FPSC").
3. Pursuant to Section 367.171(1), *Florida Statutes* (1999) St. Johns County is a non-jurisdictional county in that St. Johns County has not relinquished its authority to regulate investor owned utilities within its borders to the FPSC.

Florida Public Service Commission, 685 So.2d 48 (1st DCA 1997). In **Hernando County** the Court emphasized that a showing must be made that utility service transverses county boundaries before FPSC jurisdiction may be invoked. The Court opined that in order to invoke Section 367.171(7), a factual showing must be made that utility facilities located in non-jurisdictional counties must be a part of a system providing service which transverses county boundaries. In the **Hernando County** case the Court went on to quote Chairman Deason's dissent in PSC Order no. PSC-95--0894-FOF-WS as follows:

Chairman Deason logically concluded that service means the physical delivery of water and/or wastewater. See also, **Citrus County v. Southern States Utilities**, 656 So.2d 1307, 1310 (Fla. 1st DCA,) review denied mem., 663 So.2d 631 (Fla. 1995) (To satisfy the prerequisites of Section 367.171(7), the PSC must find that "the systems were operationally integrated, or functionally related, in ... utility service delivery [rather] that physical management") (emphasis added).

There has been no showing in this Docket that there is physical delivery of water and/or wastewater which transverses county boundaries. Therefore, 367.171(7) cannot apply.

13. Given the strong preference expressed by the Legislature and the Courts in favor of the counties' discretion to regulate water and wastewater service within their boundaries, it is inconceivable that the Legislature intended by providing a definition of utility in Section 367.011(12), that includes prospective or proposed construction of a system, that the counties would be divested of their fundamental right to regulate water and wastewater systems located within their boundaries. The granting of a certificate to ICU in this docket would appear to be particularly unjust since ICU's application is predicated upon the fact that only 8% of the proposed area to be served is located in Duval County while 92% of the area proposed to be served is located in St. Johns County. Such a construction would result in a situation where investor

owned utilities would be free to thwart the desires of non-jurisdictional counties by seeking certificates to operate water and wastewater systems from the Public Service Commission merely by proposing construction of a system which transverses the counties' boundaries. Such a result would seriously jeopardize non-jurisdictional counties' ability to plan for the provision of utility service within their boundaries, honor pre-existing utility contracts, and influence growth management within their borders.

14. Legal considerations aside, a practical problem resulting from such a construction of Section 367.011(12) is what happens if these "proposed" systems are not timely built. Does the regulatory authority revert back to the counties? If so, when?
15. Given the foregoing, the most reasonable interpretation of Section 367.171(7) and 367.011(12) together, is that when proposed utility service transverses county boundaries into a non-jurisdictional county, the non-jurisdictional county must give its consent before its regulatory authority may be usurped by the FPSC.
16. The Courts have traditionally been as careful to limit unlawful exercise of power by administrative agencies as they have been to protect the prerogatives of the counties. The First District Court of Appeal in the case of *Hernando County v. Florida Public Service Commission*, *id.* at page 4 quoted the Florida Supreme Court in *City of Cape Coral v. GAC Utilities*, 281 So.2d 493 (1973) as follows:

Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested.

Reasonable doubt has been raised regarding the FPSC's lawful authority to usurp the counties' ability to grant or deny certificates for service within their jurisdictions. The County respectfully suggests that the FPSC should not ignore the holding in *City*

of Cape Coral, id. and Hernando County, id. by granting certificates in the above-referenced dockets.

WHEREFORE, HILLSBOROUGH COUNTY requests the Commission dismiss the Application for Original Certificate filed by Nocatee Utility Corporation and the Request for Original Certificate and Extension of Service area filed by Intercostal Utilities, Inc.



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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by regular U.S. Mail on this 22nd day of May, 2000, to the following persons:

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