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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Applications For An Amendment Of Certificate For An Extension Of Territory And For an Original Water And Wastewater Certificate (for a utility in existence and charging for service)	**Docket No. 992040-WS**
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'S MEMORANDUM RESPONSIVE TO THE FILINGS OF HILLSBOROUGH, SARASOTA, COLLIER AND CITRUS COUNTIES

Intercoastal Utilities, by and through undersigned counsel, hereby files this Intercoastal's Memorandum Responsive To The Filings Of Hillsborough, Sarasota, Collier and Citrus Counties and, in response to the various Motions filed by Hillsborough County, Sarasota County, Collier County, and Citrus County ("the Counties"), Intercoastal submits the following:

I. The Counties should be denied intervention in this case.

1. Clearly the Counties, the closest of which is on the other side of the state from the proposed certificated territory of both Intercoastal ("IU") and Nocatee Utility Corporation ("NUC"), are not substantially affected by the applications of Intercoastal and NUC. The Counties have not even alleged, nor could they, that any application which proposes utility service traversing a county boundary is currently pending or proposed for any boundary of their county.[1] The Counties in fact do not even attempt

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[1]If that were the case, that would obviously be the appropriate forum in which to attempt to raise these issues.

to hide that their purposes for intervention or to otherwise be heard in this case are based upon the fact that this case ***might*** have an effect upon any or all of the counties if a similar application traversing county boundaries were filed by some unknown utility at some undetermined future date. In that respect, the Counties have not even attempted to argue that their implicit position that these events might actually occur in their counties at some unknown future date is based on anything more than idle speculation.

The Counties are not substantially affected by the applications of Intercoastal and NUC. The applications of Intercoastal and NUC do not traverse a county boundary which affects any of these Counties. The application of Intercoastal and NUC do not even propose service in any county which is **adjacent to** any of the Counties. It is a physical impossibility that the service proposed by Intercoastal or NUC could ever expand to the extent that such service was proposed within any reasonable proximity to any of the Counties. In reality, the Counties' only position is that this case "might set a precedent" which might affect them at some unknown future date in some unknown future proceeding in some unknown way. This wholly speculative basis for attempting to interfere in this proceeding, which is essentially nothing more than an attempt to "head-off at the pass" a ruling which may or may not affect these Counties in any way, shape or form at some unknown date in the future, cannot possibly justify their intervention or participation in this case.

One can imagine the increased workload in American courts or in the agencies of the state of Florida if any person who was concerned that any precedent in any

case might affect it in some way (at some unknown future date) had standing to participate in that case as a party (or by some other limited form of participation). The idea is absurd, and the very absurdity of the idea is the reason that the Counties cannot produce any authority to support their intervention in this case.

2. Rule 25-22.039, Fla. Admin. Code, requires that an intervenor "have a substantial interest in the proceeding" and provides that petitions for leave to intervene,

> [M]ust include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding. Intervenors take the case as they find it.

The key words are "substantial interests." In numerous APA judicial opinions, these words have been consistently interpreted, with regard to standing, to mean that the petitioning party must demonstrate that he/she will suffer a real and present injury in fact as a result of the proceeding, and that the nature of the injury is one under the protection of the relevant statutes. These two prerequisites to standing are often referred to as the "injury in fact" and the "zone of interest" tests. *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478 (Fla. 2nd DCA 1981). The Counties have not alleged, nor could they, either that they will suffer an immediate injury in fact from any determination made in this proceeding or that their interests are within the zone of protection contemplated by this proceeding.

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The PSC has recently reiterated this test for standing to intervene in the case of *In re: Complaint and/or petition for arbitration by Global NAPS, Inc., etc.* [Order No. PSC 99-2526-PCO-TP483, 99 FPSC 12:483 (December 23, 1999)]. There, the PSC stated:

> When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that he does, in fact, have standing to participate in the case. (citations omitted). To prove standing, the petitioner must demonstrate that he will suffer an injury in fact, which is of sufficient immediacy to entitle him to a Section 120.57 hearing, and that his injury is of a type or nature that the proceeding is designed to protect. (Citations omitted)

Also see *Ameristeel Corp. v. Clark,* 691 So.2d 473 (Fla. 1997), wherein the Florida Supreme Court, in reliance upon the two-pronged ("injury in fact" and "zone of interest") test for standing, affirmed the PSC's ruling that a proceeding to approve a territorial agreement is not the proper forum for intervention by a resident electricity consumer.

In *Dept. of HRS v. Barr*, 359 So.2d 503 (Fla. 1st DCA 1978), the appellate court aptly recognized that,

> Respondents have expressed concern that persons not parties to a Section 120.565 proceeding, who therefore are not in a position to seek judicial review of the resulting declaratory statement, may later be adversely affected by the agency's enforcement against them of its interpretation of law thus announced. That is true. Agency orders rendered in Section 120.57 proceedings may in the same way indirectly determine controversies and affect persons yet unborn. But the rule is stare decisis, not res judicata. If such a person's substantial interests are to be determined in the light of a prior agency order or declaratory statement,

> Section 120.57 proceedings will afford him the opportunity to attack the agency's position by appropriate means, and Section 120.68 will provide judicial review in due course.

Like the Counties here, the complaining party in *Barr* argued that it might later be adversely affected by an agency's enforcement of a prior interpretation of law entered in another proceeding. The Counties' position here is no greater than "persons yet unborn" discussed in *Barr*, who have ample opportunity to attack the PSC's action when, and if, they ever become substantially affected by such action.

The assertions of Hillsborough County (at page 3 of its Petition for Leave to Intervene) with regard to the standards for intervention are simply wrong.

In the case of *In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogeneration Facility*, 86 FPSC 211 (September 11, 1986), the PSC held that "potential adverse legal precedent does not constitute the "substantial interest" needed for intervention under our rule . . . or the case law." In that case, the PSC denied the Petition to Intervene of Metropolitan Dade County into a declaratory statement proceeding, even though Dade County had a pending § 120.57 proceeding involving a similar issue. Here, the only allegation of "standing" alleged by the Counties, by their own statements and pleadings, is potential adverse legal precedent. The Counties do not assert that the PSC has taken, or is about to take, jurisdiction over a matter within their jurisdictional boundaries.

3. Collier and Citrus Counties readily admit that, with the exception of the failure of St. Johns County to oppose the application filed by Nocatee, "the arguments

made by St. Johns County in opposition to Intercoastal's application are "excellent" and that Collier and Citrus Counties "adopt those arguments in their entirety." ("Collier and Citrus County Motion To Dismiss," page 13, paragraph 14). That admission having been made, there is absolutely no reason for the allowance of the Counties as intervenors. Thus, in addition to the Counties' total lack of substantial interest in the instant proceedings, there is no justification for the PSC to be burdened by, or for Intercoastal or Nocatee to be required to respond to, the same argument made by five separate counties.

II. The Counties' Motion To Dismiss should be denied.

4. *Two prefatory remarks are essential.* First, Intercoastal should not be required to respond to the merits of the assertions of the Counties' Motions To Dismiss prior to an Order granting their petitions for leave to intervene. Second, the Uniform Rules of Procedure require that Motions To Dismiss be filed within 20 days. Rule 28-106.204(2). The Counties' Motions were filed well in excess of 20 days. In an abundance of caution, however, and in the event that the PSC allows consideration of the arguments made by the Counties, the following responses are offered.

5. The Counties' apparent argument is that under § 367.171, Fla. Stat., this Commission does not have the jurisdiction to "assign" service territories within non-jurisdictional counties. The Counties' filings speak several times to the Counties' "express right" to assert their own regulatory jurisdiction and to reject Commission regulatory jurisdiction. The problem with this "express right," purportedly based on

§ 367.171, Fla. Stat., is that the same Legislature that created the "right," in fact, in the same statute, limited that right with language that is clear and unequivocal when it stated,

> Notwithstanding anything in this section to the contrary, the Commission shall have exclusive jurisdiction over all utility systems whose service traverses county boundaries, whether the counties involved are jurisdictional or non-jurisdictional ... Section 367.171(7), Fla. Stat.

The Legislature took care to point out that this directive was "notwithstanding anything in this section to the contrary" and that it applied to counties "whether the counties involved are jurisdictional or non-jurisdictional." The Legislature could not have more definitively and precisely worded subdivision (7) of § 367.171 so as to indicate an intent totally contrary to that urged by the Counties. If the Legislature had intended Chapter 367.171 to be read as the Counties suggest, it could easily have worded the statute accordingly.

6. In essence, what is suggested by the Counties is that any utility which traverses county boundaries cannot expand in the non-jurisdictional county. After all, such an action would be contrary to the "express right" of the Counties to reject Commission regulatory jurisdiction over "their" water and wastewater utilities, as the Counties suggest in their filings. Such a construction would necessarily be based on fantasy rather than on any of the Legislature's directives so clearly reflected in § 367.171, Fla. Stat. The Commission not only has jurisdiction over ***all*** utility systems whose service ***traverses county boundaries***, but that jurisdiction is ***exclusive***. See §

367.171(7), Fla. Stat. For the Commission to find as the County suggests would require an order which literally turned the language of § 367.171(7) on its head. Either the Commission has jurisdiction over all utility systems whose service traverses county boundaries and that jurisdiction is exclusive, or the Commission does not. The Legislature made clear by the way it worded § 367.171(7) that the Commission does, in fact, have such exclusive jurisdiction.

7. It is difficult to understand why the Counties maintain that this is a matter of "first impression" when the Commission has, in fact, reviewed the force and effect of § 367.171(7), Fla. Stat. several times. For instance, this Commission has reiterated its exclusive jurisdiction over all utility systems whose service traverses County boundaries, whether or not the counties are jurisdictional. See, e.g., *In re: Lake Suzy Utilities, Inc.*, Order No. PSC-00-0575-PAA-WS (March 22, 2000), in which the Commission held,

> We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate the regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies ... This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers. Inefficiency stems from the need for multiple rate filings and multiple rate hearings. It also stems from the need to perform jurisdictional cost studies to attempt to allocate the costs of a single system across multiple jurisdictions. These inefficiencies could result in unnecessary and wasteful effort which would translate into higher rate case expense and higher rates to customers. Inconsistency can occur when regulators apply different ratemaking principles

> to the same system or make inconsistent determinations on the same issue. The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries ... By concentrating exclusive jurisdiction over these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

Also see, *In re: Petition of St. Johns Service Company for Declaratory Statement on Applicability and Effect of 367.171(7),* Order No. PSC-99-2034-DS-WS (October 18, 1999) in which the Commission stated,

> Our decision is consistent with the legislative intent behind § 367.171(7), Fla. Stat. When the Legislature enacted this provision in 1989, it intended to eliminate the regulatory problems that exist when utility systems provide service across political boundaries and are subject to economic regulation by two or more agencies... See *In Re: Petition of GDU for Declaratory Statement Concerning Regulatory Jurisdiction Over Its Water And Sewer System In Desoto, Charlotte And Sarasota Counties*, Order No. 22459, 90 F.P.S.C. 1:396 (1990),

III. Collier County and Citrus Counties' Alternative Petitions For Declaratory Statement, For Initiation Of Rulemaking And For Permission To Submit Amicus Curiae Motion should be dismissed.

A. Declaratory Statement

8. The purpose of a declaratory statement is to address the applicability of a statutory provision or an order or rule of the agency in particular circumstances. See § 120.565, Fla. Stat.; *DBPR v. Investment Corp. of Palm Beach*, 747 So.2d 374 (1999). In this case, the Counties cannot even attempt to describe the "particular

circumstances" upon which they seek a declaration because, in fact, their only reason for attempting to be heard in this case is that they believe some unknown set of circumstances may occur at some unknown date in the future. Stated simply, the "particular circumstances" in which this issue might affect the Counties has not yet occurred, and may or may not occur at some unknown date in the future. As recently as January of this year, the First District Court of Appeal, in the case of *Friends of Florida v. Florida DCA*, 25 Fla. Law W. D283, stated that,

> A Petition for Declaratory Statement may be used only to resolve questions or doubts as to how the statutes, rules, orders may apply to the petitioner's particular circumstances. A declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency.

In this case, it is obvious the Counties are doing exactly what the *Friends of Florida* court declared was an inappropriate utilization of the declaratory statement process. The Counties themselves do not deny that what they seek is a policy statement of general applicability from the PSC. Under the theory of the Counties, not only could every county which is not jurisdictional to the PSC intervene in this case, and seek a declaratory statement on an issue which does not affect their circumstances, but every county which is jurisdictional but which is adjacent at any point to a county which is not jurisdictional would also have standing to intervene or petition for a declaratory statement. A further logical extension of the Counties' theory would also apparently give every ratepayer in the state of Florida standing to

intervene in every rate case and seek declaratory statements. After all, the Commission might take action in a pending rate case emanating from Miami which would set a "precedent" which might affect the intervening ratepayor in Pensacola should his system ever raise rates at some unknown date in the future. Certainly, the Commission has consistently interpreted the right to seek a declaratory statement much more narrowly than the Counties suggest, and the Commission's decisions in that regard have been completely consistent with applicable case law. The Counties have provided no cases or authority to the contrary. For all the reasons stated above, the Counties have not presented any basis for disposition of these issues by declaratory statement.

B. Amicus Curiae

9. Likewise, any request for permission to be heard in this case through the vehicle of *amicus curiae* should be denied. The Florida Administrative Procedure Act expressly provides that a "party" includes,

> Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding is a party. Any agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties. 120.52(11)(c), Fla. Stat.

What the Counties really seek, should their petitions to intervene be denied, is a "limited form of participation" in this case. Yet the Counties have not cited any rule of the Public Service Commission which would authorize such participation. There is

no such rule. The Counties' request to be heard in this matter through the vehicle of *amicus curiae* should be denied.

C. Rule-Making.

10. The Counties are not entitled to "pause" the instant proceeding for the purpose of initiating a rule-making proceeding. Petitions to initiate rulemaking must be filed in accordance with Rule 28-103.006, Fla. Admin. Code. Such petitions may not be filed in the context of another administrative proceeding, particularly as an alternative basis in a Motion.

11. To the extent it is the position of any or all of the Counties that rulemaking is required in this instance, the same is clearly not the case under the statute. While some Florida Statutes may be fraught with ambiguity, § 367.171(7), Fla. Stat., could not be more clear. No rule is necessary to implement the strikingly clear concept that "***notwithstanding anything in this section to the contrary*** *the Commission shall* ***have exclusive jurisdiction*** *over* ***all*** *utility systems whose service* ***traverses county boundaries*** *whether the counties involved* ***are jurisdictional or non-jurisdictional ...***"

The question which is begged is: How could any rule be more clear than the statute? There can be no allegation in this case that what IU and NUC proposed is a utility system whose service traverses county boundaries. The Counties have suggested nothing to the contrary and, in fact, would have absolutely no basis in fact for doing so. If the Counties are faced with some future situation regarding their own county boundaries in which there is a valid question as to whether the utility service actually traverses those boundaries, then perhaps that is the time to request the

Commission to go to rulemaking or to file a Petition For Declaratory Statement. However, the Counties do not even attempt to allege those circumstances at this point in time.

12. A "rule" is a statement that "implements, interprets or prescribes law or policy." Section 120.52(15) Fla. Stat. Section 367.171(7) is absolutely clear. It needs no interpretation. The PSC already has rules which govern the implementation of matters under its jurisdiction. What the Counties seek, in reality, is a rule which exceeds the PSC's authority and would directly contravene the express provisions of § 367.171(7). If the PSC were to engage in such rulemaking activity, it would constitute an invalid exercise of delegated legislative authority within the meaning of § 120.52(8), Fla. Stat. The Counties' improper request for rulemaking should be denied.

IV. Even if the Counties' attempts to raise the issue of rulemaking or to submit a Petition For Declaratory Statement could properly be made at this time, they should not be made in the instant proceedings.

13. Even if the Counties were able to satisfy the Commission that the circumstances necessary in order to justify a declaratory statement or the initiation of rulemaking by the Commission, those matters should not be heard in this docket. Those matters should be filed as independent proceedings, dealt with by the Commission as stand-alone matters, and should be based on whatever facts and circumstances are required by law. The instant dockets are not the appropriate forum in which the Counties may pursue those remedies.

V. Conclusion.

Before reaching the merits of anything the Counties have raised within their numerous filings, this Commission should determine that they are not appropriate persons to either be granted party status in this proceeding or to otherwise be heard in this proceeding. In point of fact, the Counties have absolutely nothing to do with the applications of IU and NUC. The applications of IU and NUC have no impact upon the Counties in any way, shape or form. The Counties merely seek to intervene in this case on the basis of "circumstances" yet to occur at some unknown future date and under some nebulous and unknown future set of circumstances and based upon their concern that this Commission might decide something in the present case which will come back to haunt the Counties at a later time. Should that be the case, the APA's arsenal of remedies is available. The Counties' logic would give the right to every chainsaw manufacturer to intervene in every case involving a chainsaw, would give the right to every doctor to intervene in any case involving medical care, etc. The Counties cannot produce a single shred of authority from any court in any jurisdiction to support such an absurd contention. Indeed, the APA, the PSC's rules, and Florida judicial case law are to the contrary. The fact is, this case has nothing to do with the Counties. If they want to request the Commission to issue a declaratory statement or otherwise act on issues related to Section 367.171, they must do so in a separate and independent proceeding.

This Commission should determine that the Counties do not have standing to participate in these consolidated dockets in any way, shape or form, and immediately

end the Counties' attempt to storm this proceeding by spurious pleadings. Should the Commission decide that the Counties should be heard, then the Commission should find that each and every request the Counties have made is without basis, that the statute is clear and has been reviewed by the Commission many times, and that the applications of IU and NUC should go forward to litigation in August as currently scheduled.

DATED this 6th day of June, 2000.

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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 27th day of June, 2000.

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