ORIGINAL

**IN THE DISTRICT COURT OF APPEAL**
**FIRST DISTRICT**
**TALLAHASSEE, FLORIDA**

COLLIER COUNTY BOARD OF COUNTY COMMISSIONERS; CITRUS COUNTY BOARD OF COUNTY COMMISSIONERS; and SARASOTA COUNTY BOARD OF COUNTY COMMISSIONERS,

Appellants,

v. Case No. 990696-WS

FLORIDA PUBLIC SERVICE COMMISSION; NOCATEE UTILITY CORPORATION; and INTERCOASTAL UTILITIES, INC.

Appellees.

**NOTICE OF ADMINISTRATIVE APPEAL AND**
**ALTERNATIVE PETITION FOR WRIT OF CERTIORARI**

**Notice of Administrative Appeal**

Notice is given that the Collier County Board of County Commissioners; the Citrus County Board of County Commissioners; and the Sarasota County Board of County Commissioners (the "Three Counties), appellants/petitioners, appeal to the District Court of Appeal, First District of Florida, the Order of the Florida Public Service Commission, dated July 11, 2000. A conformed copy of this order is attached hereto as Tab 1 to the Appendix.

The nature of the order is a final order, as to the Three Counties, denying their Petitions to Intervene as parties to the proceeding.

**Alternative Petition for Writ of Certiorari**

Alternatively, in the event the Order of the Florida Public Service Commission ("PSC") is found to be a "non-final" order with respect to them, the Three Counties petition this Court for a Writ of Certiorari granting review of the same order. If that portion of the order denying the Three Counties' Petitions to Intervene is found to be "non-final," it is immediately reviewable pursuant to Florida Statute Section 120.68 because review of the final agency decision on the substantive portions of the utilities', Nocatee Utility Corporation ("Nocatee") and Intercoastal Utilities, Inc., ("Intercoastal") applications will not provide the Three Counties an adequate remedy to (1) challenge the PSC's statutory jurisdiction to award the service territories being sought or (2) participate in the development of the criteria used to determine which utility will be allowed to serve within the nonjurisdictional county in the event the jurisdiction to do so is upheld.

Background

The Order sought to be reviewed, Order On Jurisdiction, Petitions For Intervention And Motions To Dismiss, And Granting Amicus Curiae Status To The Counties, Order No. PSC-00-1265-PCO-WS, issued July 11, 2000 (the "Order") was entered in a PSC proceeding consolidating the separate petitions of the two utilities asking the PSC to grant them certificates to serve substantially the same service territory in a development called Nocatee. Order at 1-2. The requested service area is found both in Duval County and St. Johns County. Order at 1. Furthermore, Duval County is a so-called "jurisdictional" county within the definition of Section 367.171(1), F.S. (Order at 18), which means the PSC has exclusive regulatory jurisdiction over investor-owned water and wastewater utilities therein. St. Johns County, by contrast, is a so-

called "nonjurisdictional" county within the definition of Section 367.171(3), F.S. (Order at 18), which means that the St. Johns County Board of County Commissioners, or its designee, would have substantial, if not completely exclusive, regulatory jurisdiction over investor-owned water and wastewater utilities within that county. Because the service territory sought by both utilities lies within both Duval County and St. Johns County, the utilities and the PSC consider that the PSC has exclusive jurisdiction over the area, including the authority to award over 22,000 acres of service territory within St. Johns County prior to the actual construction of the utilities' physical facilities, pursuant to Section 367.171(7), F.S. Order at 17-26. Section 367.171(7), F.S. provides, in pertinent part:

> (7) Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional . . . .

St. Johns County's Petition to Intervene was granted by order issued on February 17, 2000. Order at 2.[1] On January 26, 2000, St. Johns County filed its Motion to Dismiss stating that the PSC did not have the statutory jurisdiction to grant service territory within the boundaries of St. Johns County pursuant to Section 367.171(7), F.S. On February 23, 2000, the Petition of the Jacksonville Electric Authority to Intervene was granted on the basis that:

> In support of its petition, JEA states that it has a substantial interest in seeing that NUC's application is approved because it has signed a Letter of Intent to provide wholesale water and wastewater service to NUC.

Tab 3 to Appendix, Order No. PSC-00-0393-PCO-WS, issued February 23, 2000 at page 1.

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[1] Tab 2 to Appendix, Order No. PSC-00-0336-PCO-WS, issued February 17, 2000.

Sarasota and Hillsborough Counties filed Petitions for Intervention, respectively, on May 10 and 11, 2000, requesting the opportunity to file Motions to Dismiss based on the argument that the PSC lacks jurisdiction under Section 367.171(7), F.S. to consider either Nocatee's or Intercoastal's applications. Order at page 2.[2] On May 15, 2000, Collier and Citrus Counties filed a Petition for Intervention, and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. Order at page 2.[3] Following the establishment of a briefing schedule, on May 23, 2000, Hillsborough and Sarasota Counties filed their Motions to Dismiss and Collier and Citrus Counties filed their Joint Motion to Dismiss, to which the other parties filed responsive pleadings. Order at page 3.[4]

Oral Arguments on the various Motions were heard by the PSC on June 19, 2000, following which the PSC commissioners voted to deny the Three Counties and Hillsborough County's Petitions to Intervene for the stated reason that the counties had failed to demonstrate an "injury in fact which is of an immediate nature." Order at page 8. The PSC did, however, grant the Counties amicus curiae status for the purpose of supporting St. Johns County's Motion to Dismiss for Lack of Jurisdiction (Order at page 11), but then went on to deny St. Johns County's Motion to Dismiss, and, thus, implicitly the similar motions of the other four counties, finding that the PSC did have the statutory jurisdiction to grant service territory approvals within the political boundaries of nonjurisdictional counties in connection with proposed systems whose

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[2] Tabs 4 and 5 to Appendix.

[3] Tab 6 to Appendix, without its attachments.

[4] Joint Collier and Citrus Motion at Tab 7.

service would transverse county boundaries. Order at page 26 and 29. The Order under appeal incorporating the PSC's decisions was issued July 11, 2000.

Review of the Final Agency Decision Will Not Provide An Adequate Remedy

While the Three Counties believe that the PSC's order denying them intervenor status should be considered as "final" with respect to them and, thus, entitle them to standard judicial review pursuant to Section 120.68, F.S. and the Florida Rules of Appellate Procedure, they are concerned that the order might be determined to be "preliminary, procedural, or intermediate" within the definition of Section 120.68, F.S. and, thus, require a showing that review of the final agency decision would not provide them with an adequate remedy, so as to warrant this Court's immediate review of the order. The Three Counties believe that awaiting review of the final agency decision will not provide them with an adequate remedy because: (1) without party status to this proceeding, the Three Counties will not have standing to challenge the PSC's assertion that it has the statutory authority to award service territory within nonjurisdictional counties, which decision will be a binding precedent upon them as nonjurisdictional counties; and (2) they will have no participation in the establishment of procedures and standards by which the PSC determines which of two or more utilities is best suited to serve within the boundaries of a nonjurisdictional county, which procedures and standards will also serve effectively as precedents binding all nonjurisdictional counties in the event the PSC's authority to make such service territory awards is upheld.

Precedent

As this Court should be aware from its prior decisions, the PSC's attempts to supplant what would otherwise be County water and wastewater jurisdiction pursuant to Section

367.171(7), F.S. have been contentious and long-running. While it may be tempting to think of the PSC as a dispassionate and unbiased finder of fact in this proceeding, the reality is that the PSC thus far has found jurisdiction for itself in a "zero sum" game in which its gain can only come at the expense of nonjurisdictional counties as a class. Despite the fact that nonjurisdictional counties are a limited, clearly and distinctly defined and known class, who will collectively be constrained by the decision in this case, the PSC has chosen to exclude four such counties from any meaningful participation. Participation by groups of Counties to be impacted by the precedents established by the PSC's decisions has generally curbed expansion of the PSC's jurisdiction, while the Counties' absence has fueled it, leading to increased litigation and appeals. Irrespective of the outcome, it is hard to credibly argue that participation by these Counties could harm the process, rather than aid it.

Perhaps coincidently, the PSC's first such Section 367.171(7), F.S. case also targeted St. Johns County and offered no participation for the other counties that would later be burdened with its precedent. In Board of County Commissioners of St. Johns County v. Beard, 601 So. 2d 590 (Fla. 1st DCA 1992), this Court upheld the decision of the PSC made in response to a request for declaratory statement that a utility company operating in Duval, Nassau and St. Johns Counties was a "single water and wastewater system" and under the jurisdiction of the PSC, despite the fact that St. Johns County was a "nonjurisdictional" county, and on the basis that the utility's "service transversed county boundaries," despite the fact that there was no physical connection between the facilities in the several counties.

Following an abortive attempt to institute statewide uniform rates for a large utility, which was reversed by this Court in Citrus County v. Southern States Utilities, Inc., 656 So.2d

1307 (Fla. 1st DCA 1995), the PSC attempted to thwart County efforts to escape the impact of future statewide uniform rate efforts by becoming nonjurisdictional. The PSC did this by finding that it retained jurisdiction over facilities in all Counties through Section 367.171(7), F.S. despite a County's efforts to undertake its own utility regulation. In Hernando County v. Florida Public Service Com'n, 685 So.2d 48 (Fla. 1st DCA 1996), Hernando, Collier, Sarasota, Polk and Hillsborough Counties appealed a final order of the PSC determining that the PSC had jurisdiction over existing facilities and land of Southern States Utilities, Inc. because the utility's facilities constituted a "functionally related" statewide "system" whose "service transverses county boundaries," thus giving the PSC jurisdiction pursuant to Section 367.171(7), F.S. This Court rejected the PSC's attempt to find service transversing county boundaries through a "functionally related" concept, which was based on company wide financing, centralized purchasing, statewide telephone service and similar administrative services, concluding that the PSC must, instead, find that such systems were "operationally integrated with one another in utility service delivery," which required operations in contiguous counties across whose common border the actual utility service traveled.

It appears the continuing viability of Beard for the proposition that the PSC can take jurisdiction from a county on the basis of ancillary services, not actual water or wastewater services, crossing county boundaries must seriously be questioned following the Hernando County decision. The Three Counties believe their rights and interests are more effectively represented and protected - and future litigation and appeals reduced - by their participation in PSC proceedings clearly producing precedents impacting them. Seen in the light of Hernando County, Beard is arguably a PSC decision that both should not have been made initially and

which should not have been upheld by this Court. Had other potentially affected Counties participated in Beard at the PSC, perhaps the PSC would have thought better of its result. Had the other potentially affected Counties participated in Beard on appeal to this Court, this Court might have benefitted from their input and produced an opinion more in line with the result it ultimately reached in Hernando County.

In urging the ouster of the other Counties' participation in this case, the two utilities have argued that the Counties' interests were too speculative and too far removed to warrant intervention in the immediate case. The Three Counties here, along with Hillsborough County, however, believe the "substantial interest" they possess in the outcome of this case is clearer, more distinct and more narrowly defined than the parade of horribles foreseen by the PSC if intervention is granted. There are only 67 county governments in the State of Florida and with respect to the regulation of investor-owned water and wastewater utilities, pursuant to Chapter 367, F.S. These counties can be divided into only two classes: (1) jurisdictional counties; and (2) nonjurisdictional counties. There exists a fairly bright line between the regulatory responsibilities and prerogatives of the PSC and the nonjurisdictional counties with the exception of the conflict engendered by Section 367.171(7), F.S. The Three Counties would urge this Court to keep in mind that each and every time the PSC sets out to determine whether it has jurisdiction over a utility found within the political boundaries of a nonjurisdictional county, it engages in a process that impacts the rights and obligations of each and every one of the nonjurisdictional counties, not just the single county immediately involved in the case. Furthermore, a finding of PSC jurisdiction - a result in which the PSC clearly has a self-interest - can come only at the expense of the nonjurisdictional counties, the very persons the PSC is

refusing the right to be heard in this case. The nonjurisdictional counties, usually consisting of a little less than half of all counties, constitute a known and well-defined class whose common interests are always impacted by any case at the PSC considering the interpretation of Section 367.171(7), F.S. They can easily be noticed and offered participation in any such cases.

The instant case, as recognized by the PSC staff, is one of first impression and of critical importance to all nonjurisdictional counties. Namely, for the first time, it must be established whether the PSC has the authority, pursuant to Section 367.171(7), F.S., to award thousands of acres of utility service territory within a nonjurisdictional county, over the objections of that county, to a currently nonexistent utility, whose proposed service, if it is ever constructed, will "transverse county boundaries." It may be that the PSC has such statutory authority. Whether it does or not, it should be obvious that the decision in this case will impact not just St. Johns County, but each and every other county in Florida, including not only those who are currently nonjurisdictional but also the rest who might some day be. Collier, Citrus, Sarasota and Hillsborough Counties will be impacted by the PSC's decision in this case and they should be heard. Thus, the instant question is not whether the PSC has the authority to grant the service territory being sought, although the Three Counties would argue it does not, but, rather, whether the Three Counties are entitled to party standing in order to challenge the PSC's statutory authority.

Standing Demonstrated

The PSC concluded at Page 8 of its Order that the Counties' Motion to Dismiss must be denied on the basis that none of the Counties, aside from St. Johns County, had demonstrated standing consistent with the requirements of Agrico Chemical Company v. Department of

Environmental Protection, 406 So. 2d 478 (Fla. 1st DCA 1981) by meeting either the requirement of injury in fact or zone of interest. The Counties would respectfully suggest that the PSC erred in this regard and that, as urged to the PSC in the oral arguments by Sarasota County's counsel, the appropriate standard to consider is that announced by this Court in Florida Medical Ass'n v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983).

In Florida Medical Ass'n this Court considered a rule challenge by the Florida Medical Association's which was dismissed by a hearing officer for lack of standing. In reversing, this Court noted that the Florida Medical Association had challenged the validity of the proposed rule alleging that it was an invalid exercise of delegated legislative authority and not merely on the basis of alleged economic harm by a real or potential competitor as was the case in Agrico and many of the cases following it in determining standing in administrative cases. As in Florida Medical Ass'n, each of the Counties seeking intervention in this case coupled their petitions with Motions to Dismiss alleging that the PSC did not have the statutory authority pursuant to Section 367.171(7), F.S. to make service territory approvals within the political boundaries of a nonjurisdictional county. See Collier County and Citrus County Motion to Dismiss at pages 13-14. No county alleged any economic or competitive interest as a basis for suggesting injury in fact. Rather, each of the Counties has argued plainly that the PSC does not have the statutory authority to make awards of service territory within nonjurisdictional counties, whether it be pursuant to existing utilities whose service transverses county boundaries or pursuant to original certificates, as in the instant case, in which there exists no service transversing county boundaries, but merely the proposal of the same to establish the PSC's purported jurisdiction.

When one examines the "zone of interest" requirement of Section 367.171(7), F.S. it is clear that the public interest to be protected is not the economic interests of the two competing utilities or even which is better suited to serve the proposed service territory, but, rather, the apportionment of regulatory jurisdiction between the PSC and the nonjurisdictional counties. Whether the nonjurisdictional counties ultimately prevail on the issue of whether the PSC has the authority pursuant to this statute to make territory awards within nonjurisdictional counties, it seems clear that the purpose, or the zone of interest, of Section 367.171(7), F.S. is one impacting the rights of all nonjurisdictional counties.

This Court has more recently stated in Florida Soc. Of Ophthalmology v. State Bd. Of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988) that "standing in a licensing proceeding may well have to be predicated on a somewhat different basis than standing in a rule challenge proceeding" and, further, despite earlier opinions to the contrary that "[f]or the purpose of standing, there is no significant difference between a section 120.56(1) and section 120.57(1) proceeding,"[5] "[t]here can be, as this case illustrates, a difference between the concept of 'substantially affected' under section 120.56(1) and 'substantial interests' under section 120.57(1)." Florida Medical Ass'n at 1287, 1288. There seems to be room for the position that County governments protesting the PSC's lack of statutory authority to grant service territory awards in any and all nonjurisdictional counties, and in a case of first impression that will effectively bind all such counties with the precedent, should have standing to participate. As stated earlier, the nonjurisdictional counties are a finite, known and well-defined class, whose

[5] Farmworker Rights Organization, Inc. V. Department of Health and Rehabilitative Services, 417 So. 2d 753, 754 (Fla. 1st DCA 1982)

interests in seeing the PSC's jurisdiction restrained versus their own exercise of regulatory authority is identical. Is there injury in fact in this context? The Three Counties suggest to this Court that there is. As shown earlier, the PSC has consistently urged this Court to bind nonjurisdictional counties with the precedents established in earlier cases involving nonjurisdictional counties, but in which cases the later counties had no participation. The same will not only happen here, it should be expected that the result will obtain. As noted by Judge Booth in Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1983), at 47:

> Central to the fairness of administrative proceedings is the right of affected persons to be given the opportunity for adequate and full notice of agency activities. These persons have the right to locate precedent and have it apply, and the right to know the factual basis and policy reasons for agency action. State ex rel. Department of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977). Inconsistent results based upon similar facts, without a reasonable explanation, violate Section 120.68(12)(b), Florida Statutes, as well as the equal protection guarantees of both the Florida and United States Constitutions. North Miami General Hospital, Inc. v. Department of Health and Rehabilitative Services, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978).

The Three Counties, as well as Hillsborough County, have challenged the underlying statutory authority of the PSC to act as it proposes to in this case by granting one or more utilities service territory assignments in a nonjurisdictional county. All nonjurisdictional counties will be substantially affected by this decision because they will bound by the precedent and left without any meaningful opportunity to overturn a finding of jurisdiction here at a subsequent date and in a subsequent proceeding that more directly impacts their territorial boundaries. The fact that the nonjurisdictional counties constitute a finite and known class of persons to be impacted by this

decision should argue not only for the inclusion of these four counties, but the invitation of the PSC, or this Court, for all such nonjurisdictional counties to participate, if they so desire.

Lack of Adequate Remedy

The PSC has denied the Three Counties and Hillsborough County standing in this case, which will necessarily preclude their ability to challenge on appeal of the final order the asserted lack of PSC jurisdiction expressed in the Motions to Dismiss. Consequently, the Three Counties will be denied an adequate remedy unless their denial of standing is reviewed on an interlocutory basis. Furthermore, the PSC will establish procedures in this proceeding that it will necessarily use in determining which of competing utilities is best suited to serve within the service territory found in nonjurisdictional counties in the event the PSC's authority to make such awards pursuant to Section 367.171(7), F.S. is upheld. The ability of the Three Counties to participate in the development of these precedents through this proceeding is critical and failure to have such an opportunity will constitute a lack of an adequate remedy if not granted now.

## CONCLUSION

It is respectfully requested that this Court (1) find that the Order of the PSC sought to be reviewed here is a "final order" as to the Three Counties, who have been denied standing to participate and order that a briefing schedule be had pursuant to the Florida Rules of Appellate Procedure, or (2) Issue a Writ of Certiorari approving the interlocutory review of a non-final order, if the Court determines that the denial of standing does not constitute a final order as to the Three Counties.

Respectfully submitted this 10th day of August, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by either regular U. S. Mail or hand this 10th day of August, 2000, to the following persons:

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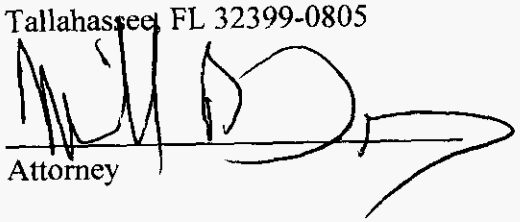

Attorney

# APPENDIX

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation. | DOCKET NO. 990696-WS |
| In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. | DOCKET NO. 992040-WS<br>ORDER NO. PSC-00-1265-PCO-WS<br>*ISSUED:* July 11, 2000 |

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER ON JURISDICTION, DENYING PETITIONS FOR INTERVENTION AND MOTIONS TO DISMISS, AND GRANTING AMICUS CURIAE STATUS TO THE COUNTIES

BY THE COMMISSION:

BACKGROUND

On June 1, 1999, Nocatee Utility Corporation (NUC) filed an application for original certificates to provide water and wastewater service to a proposed development that will be located in Duval and St. Johns Counties known as Nocatee. Docket No. 990696-WS was assigned to that application. According to the application, NUC proposes to provide service to the Nocatee development through a bulk water, wastewater, and reuse agreement with JEA.

On June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal) timely filed a protest to NUC's application and requested a formal hearing. In its protest, Intercoastal stated that it had an

application pending before the Board of County Commissioners of St. Johns County, requesting authority to provide service to the area in NUC's application located in St. Johns County, as well as some additional territory in St. Johns County. On September 7, 1999, St. Johns County issued an order denying Intercoastal's application to expand its territory to serve the area in the Nocatee development located in St. Johns County and the other area requested in Intercoastal's application. The order of the Board of County Commissioners denying Intercoastal's application is currently pending on appeal.

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 area in St. Johns County; and for original certificates for its existing service area. Docket No. 992040-WS was assigned to that application. While Intercoastal's application before the Board of County Commissioners of St. Johns County only included the area in NUC's application located in St. Johns County, the application pending before us includes the entire Nocatee development. NUC, its parent company, DDI, JEA, and Sawgrass Association, Inc., filed objections to Intercoastal's application, and they all requested a hearing. St. Johns County filed a Petition to Intervene in this matter which was granted by Order No. PSC-00-0336-PCO-WS, issued February 17, 2000. This matter is currently scheduled for hearing on August 16 and 17, 2000.

On January 24, 2000, NUC and DDI filed a joint Motion to Dismiss Intercoastal's application based on the doctrines of res judicata and collateral estoppel. On January 26, 2000, St. Johns County also filed a Motion to Dismiss Intercoastal's application, stating that the Commission does not have jurisdiction over the application based on Section 367.171, Florida Statutes, and based on doctrines of res judicata and collateral estoppel.

On May 10 and 11, 2000, Sarasota and Hillsborough Counties, respectively, filed Petitions for Intervention in these dockets, requesting the opportunity to file Motions to Dismiss based on the argument that the Commission lacks jurisdiction under Section 367.171, Florida Statutes, to consider Intercoastal's and NUC's applications. On May 15, 2000, Collier and Citrus Counties filed a Petition for Intervention, and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. At the

May 16, 2000, agenda conference, we deferred consideration of NUC's and DDI's and St. Johns County's Motions to Dismiss to hear oral arguments. We elected to consider the Petitions for Intervention and Motions at a special agenda conference.

By Order No. PSC-00-0980-PCO-WS, issued May 18, 2000, the filing dates for the petitions, motions, and briefs were established for the special agenda conference. On May 23, 2000, Hillsborough and Sarasota Counties timely filed their Motions to Dismiss and Collier and Citrus Counties timely filed their joint Motion to Dismiss. On June 2, 2000, NUC and DDI withdrew their joint Motion to Dismiss Intercoastal's application. On June 6, 2000, NUC timely filed its Response in Opposition to Motions to Intervene and Motions to Dismiss and Intercoastal timely filed its Memorandum Responsive to the Filings of Hillsborough, Sarasota, Collier and Citrus Counties. On June 12, 2000, St. Johns County withdrew the portion of its Motion to Dismiss which pertained the arguments of res judicata/collateral estoppel.

PETITIONS FOR INTERVENTION

As stated above, on May 10, 2000, Sarasota County filed a Petition for Intervention. In support of its petition, Sarasota County states that pursuant to Section 367.171(3), Florida Statutes, it is excluded from the provisions of Chapter 367, Florida Statutes. Further, it asserts that the issue of whether the Commission has jurisdiction to consider Intercoastal's and NUC's applications is one which has far-reaching implications for all nonjurisdictional counties which are bordered by jurisdictional counties. Also, it argues that adopting an interpretation of Section 367.171(7), Florida Statutes, that would allow

> an investor-owned utility to circumvent the regulatory authority of a nonjurisdictional county by applying to the Commission for a certificate of authorization for a proposed utility system that would provide service in both a jurisdictional and nonjurisdictional county would severely undermine Sarasota County's statutory authority and would allow private investor-owned utilities to circumvent the regulations of the county and, in effect, forum shop for a regulator.

Thus, Sarasota County requests that we grant it intervention "on the ground that a decision in this consolidated proceeding

predicated on a legal interpretation of Section 367.171(7), Florida Statutes, will have a substantial impact on Sarasota County's regulatory authority."

On May 11, 2000, Hillsborough County filed its Petition for Leave to Intervene. Like Sarasota County, Hillsborough County also states that pursuant to Section 367.171(3), Florida Statutes, it is a "non-jurisdictional county" and has not relinquished its authority to regulate investor-owned utilities within its borders to the Commission. Hillsborough County asserts that a decision by us to issue an original certificate to serve in areas located in both Duval and St. Johns Counties will call into question Hillsborough County's statutory right to regulate investor-owned utilities within Hillsborough County; its ability to exercise growth management decisions within its own jurisdiction; and its ability to honor contractual commitments to investor-owned utilities within the County.

Hillsborough County cites to Florida Wildlife Federation, Inc. v. Florida Trustees of the International Improvement, 707 So. 2d 841 (Fla. 5th DCA 1998), as the two-pronged test to be used to determine whether intervention should be allowed. It states that under this test, we must determine whether the interest asserted is appropriate to support intervention, and if the requisite interest exists, then we must exercise our discretion to determine whether to permit intervention. Hillsborough states that its interest in the outcome of this matter is sufficient to support intervention and that we have the discretion to determine whether to allow intervention. Further, Hillsborough County asserts that "absent intervention, it will not have an opportunity to fully protect its substantial interest which will be affected through the proceeding." Hillsborough County also states that the "totality of the circumstances in this case, including its affect upon the 39 nonjurisdictional counties, certainly warrants granting of intervention."

On May 15, 2000, Collier and Citrus Counties filed a joint Petition for Intervention and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. In support of their Petition for Intervention, Collier and Citrus Counties state that they are not within our jurisdiction pursuant to Section 367.171(1), Florida Statutes. Further, they state that both Collier and Citrus Counties are bounded by counties within our

jurisdiction, and are thus "susceptible to the same type of petition, and accompanying loss of jurisdiction, facing St. Johns County here." They state that our decision in regard to our jurisdiction over Intercoastal's and NUC's applications may allow us the authority to grant proposed utilities large portions of territory located in nonjurisdictional counties and that the decision will be a "binding precedent in future cases involving similar facts." Thus, Collier and Citrus Counties state that "their input to the decision should be heard," and they request that they be granted full party status to participate in these proceedings.

On June 6, 2000, NUC and Intercoastal timely filed their responses to the Petitions for Intervention. Both cite to Rule 25-22.039, Florida Administrative Code, which states that "persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene." NUC states that a petition for intervention must 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." NUC asserts that the petitioners have not cited any constitutional or statutory right or Commission rule which entitles them to participate in these proceedings, and that thus, the basis of their participation depends upon whether they have a substantial interest that will be determined or affected through these proceedings.

Both NUC and Intercoastal cite to Agrico Chemical Company v. Department of Environmental Protection, 406 So. 2d 478 (Fla. 1st DCA 1981), as the two-prong test to determine whether a person has a substantial interest to participate in a Section 120.57, Florida Statutes, hearing. They state that under Agrico, to have a substantial interest to participate in an administrative proceeding, one must show:

1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes, hearing; and

2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

The first prong of the test concerns the degree of injury and the second prong concerns the nature of the injury. Id. at 482.

Both NUC and Intercoastal contend that Sarasota, Hillsborough, Collier and Citrus Counties' petitions fail both prongs of the Agrico test. NUC states that a person must demonstrate more than a mere interest in the outcome of a proceeding to satisfy the first prong of the Agrico test. Citing Florida Society of Ophthalmology v. Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988), NUC states that the petitioner must show that his rights and interests are immediately affected and thus in need of protection. Further, NUC cites to Village Park Mobile Home Association v. Department of Business and Professional Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987), for the proposition that the alleged injury cannot be speculative or conjectural.

Further, both NUC and Intercoastal state that the potential precedential affect of our decision is not sufficient to confer standing. Intercoastal cites to Department of HRS v. Barr, 359 So. 2d 503 (Fla. 1st DCA 1978) in which the court stated that agency orders rendered in Section 120.57, Florida Statutes, proceedings may "indirectly determine controversies and affect persons yet unborn, but the rule is stare decisis, not res judicata," and Section 120.57, Florida Statutes, proceedings will afford the person an opportunity to attack the agency's position by the appropriate means, and Section 120.68, Florida Statutes, will provide judicial review. Intercoastal also cites to In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogenerational Facility, Order No. 16581, issued September 11, 1986, in Docket No. 860725-EU, in which we stated that a "potential adverse legal precedent does not constitute the 'substantial interest' under Rule 25-22.39, Florida Administrative Code, or the case law." Further, NUC cites to In re: Complaint and/or Petition for Arbitration by Global NAPS, Inc., Order No. PSC-99-2526-PCO-TP, issued December 23, 1999, in Docket No. 991267-TP, in which the Commission denied a petition to intervene filed by a party having a contract similar or identical to the one to be construed by the Commission.

NUC also states that Hillsborough, Sarasota, Collier and Citrus Counties have failed the second prong of the Agrico test because the certificate proceedings under Section 367.045, Florida Statutes, are "designed to protect the interest of the applicant

utility and the public by granting or denying a utility's application for a service territory -- in this case in Duval and St. Johns Counties." It states that the statute "specifically gives a right to participate to the Public Counsel and to governmental authorities, utilities, and customers who would be substantially affected by the requested certification." NUC contends that Hillsborough, Sarasota, Collier and Citrus Counties "have no regulatory authority in Duval or St. Johns Counties, are not potential competing providers of utility service in this area, and are not existing or potential customers of either utility." Thus, NUC concludes that these counties have no "legally cognizable interest in whether [NUC], Intercoastal, or neither, are awarded their requested service territory."

NUC also asserts that Hillsborough County's reliance on Florida Wildlife Federation as support for its standing to intervene is misplaced. NUC states that Florida Wildlife Federation, deals with intervention under Rule 1.230, Florida Rules of Civil Procedure, which "permits intervention by 'anyone claiming an interest in pending litigation.'" NUC states that the civil litigation standard is "different than the standard that applies to intervention in administrative proceedings, which permits intervention only by those whose interests are 'substantially affected.'" Moreover, NUC states that the Hillsborough, Sarasota, Collier and Citrus County Petitions for Intervention would even fail under the Rule 1.230, Florida Rules of Civil Procedure, standard because the court in Union Central Life Insurance Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992), stated that the interest that will entitle a person to intervene must be of "such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." NUC contends that the petitioners will "gain or lose nothing by the direct operation and effect of a Commission decision granting a certificate to NUC (or Intercoastal) to provide service in Duval and St. Johns Counties."

Both NUC and Intercoastal state that the injury Hillsborough, Sarasota, Collier and Citrus Counties allege, the precedential effect that our decision might have on their counties, is exactly the type of speculative, indirect interest that is insufficient to permit a party to participate in an administrative proceeding under Agrico. Thus, both NUC and Intercoastal urge us to deny Hillsborough, Sarasota, Collier and Citrus Counties' Petitions for Intervention.

We agree with NUC and Intercoastal that the two-pronged test set forth in Agrico is controlling in this instance. The basis for Hillsborough, Sarasota, Collier and Citrus Counties' arguments to allow the Counties to intervene in these proceedings is that our decision as to our jurisdiction over Intercoastal and NUC's applications may result in a precedent that could someday have an adverse impact on those counties. Hillsborough, Sarasota, Collier and Citrus Counties are not alleging that there is a utility that is proposing to provide, or that they know of a utility that will propose to provide in the near future, service that will transverse county boundaries, a portion of which will be located in those counties. We agree with NUC and Intercoastal that an injury premised on a potential precedent that might have an affect on the counties at some unspecified time in the future is too speculative to confer standing. See Mobile Home Association, 506 So. 2d at 430. Consequently, we find that Hillsborough, Sarasota, Collier and Citrus Counties' petitions fail the first prong of the Agrico test, which requires an intervenor to show that he or she will suffer an injury in fact which is of an immediate nature. As the Petitions for Intervention fail the first prong of the Agrico test, the second prong of the test need not be addressed. Thus, Hillsborough County's and Sarasota County's Petition for Intervention and Collier and Citrus Counties' joint Petition for Intervention are hereby denied.

Sarasota and Hillsborough Counties filed Motions to Dismiss and Collier and Citrus Counties filed a joint Motion to Dismiss both NUC's and Intercoastal's applications. As these counties do not have standing to intervene in this proceeding, their Motions to Dismiss are hereby denied. See Health Facilities Research, Inc. v. Bureau of Community Medical Facilities, 340 So. 2d 125 (Fla. 1st DCA 1976).

AMICUS CURIAE

In the alternative, Collier and Citrus Counties request to participate as amicus curiae[1], for the purpose of, among other things, to file a motion to dismiss Intercoastal's and NUC's

[1]In the alternative, Collier and Citrus Counties have also filed Petitions for Declaratory Statement and for Rulemaking. As these petitions are outside the scope of these proceedings, they will be addressed at a later date.

applications on the basis that "the Commission lacks the statutory jurisdiction to approve the grant of service territory, at least within the nonjurisdictional county, sought." Collier and Citrus Counties also state that they want to join St. Johns County in opposing Intercoastal's application and want to oppose NUC's application as well, based on our lack of jurisdiction to approve both the applications. Further, they state that

> Allowing some or all of the other nonjurisdictional counties which will be impacted by the outcome of this case to file as amici will not guarantee appeals will not be taken. However, having the benefit of the views and argument of Collier and Citrus Counties on whether this Commission can or should exercise this new and far-reaching area of jurisdiction cannot harm the quality of this Commission's decision-making process. By whatever means, the nonjurisdictional counties should have input to this decision, which will undoubtedly be sought to be applied to them.

In response, NUC and Intercoastal state that Collier and Citrus Counties' request to participate as amicus curiae should be denied. Intercoastal states that, by its request to participate as amicus curiae, Collier and Citrus Counties are actually seeking a limited form of participation in this case that is not supported by any Commission rule. In response to Collier and Citrus County's contention that they wish to participate as amicus curiae to file a Motion to Dismiss NUC's and Intercoastal's applications, NUC cites to Health Facilities Research, 340 So. 2d at 125, in which the court found that an amicus curiae does not have standing to move to dismiss a petition, and to Keating v. State, 157 So. 2d 567, 569 (Fla. 1st DCA 1963), for the proposition that an amicus curiae cannot inject new issues in a proceeding, but can only argue other theories in support of the existing issues.

We note that amicus curiae briefs are generally for "assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. 4th DCA 1996). Chapter 120, Florida Statutes, Administrative Procedure Act, the Florida Rules of Civil Procedure, the Uniform Rules, and our rules do not

provide for the filing of amicus briefs. Rule 9.370, Florida Rules of Appellate Procedure, addresses amicus curiae and states that:

> an amicus curiae may file and serve a brief in any proceeding with written consent of all parties or by order or request of the court. A motion to file a brief as amicus curiae shall state the reason for the request and the party or interest on whose behalf the brief is to be filed. Unless stipulated by the parties or otherwise ordered by the court, an amicus curiae brief shall be served within the time period prescribed for briefs of the party whose position is supported.

In Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991), the court addressed the situation in the federal court system where the Federal Rules of Appellate Procedure and the Rules of the Supreme Court have provisions addressing the filing of amicus curiae briefs, but the Federal Rules of Civil Procedure lack such a provision at the trial court level. The court concluded that it had the inherent authority to appoint an amicus curiae, or "friend of the court," to assist in the proceeding. Further, the court stated that "Inasmuch as an amicus curiae is not a party and does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus." Id. at 1501.

Similarly, allowing participation as amicus curiae is within our discretion. Participation by amicus curiae has been allowed in Commission proceedings on a few occasions. We allowed amicus curiae participation in two cases which went to a Section 120.57, Florida Statutes, hearing. See In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC-99-0535-FOF-EM, issued March 22, 1999, in Docket No. 981042-EM (Louisville Gas & Electric Energy Corporation filed an Amicus Curiae Memorandum of Law in opposition to a motion to dismiss filed by a utility in the case); In re: Investigation of the Rate-Making and Accounting Treatment for the Dismantlement of Fossil-Fueled Generating Stations, Order No. PSC-93-1237-AS-TI, issued August 25, 1993, in Docket No. 890186-EI (Florida Industrial Power Users Group appeared as amicus curiae). There was one case that settled prior to hearing in which a party filed an amicus curiae brief in the proceeding. See In re: Complaint by Telecom

Recovery Corporation against Transcall America, Inc., d/b/a ATC Long Distance Regarding Billing Discrepancy, Order No. PSC-93-1237-AS-TI, issued August 25, 1993, in Docket No. 910517-TI (the Attorney General's Office filed an amicus curiae brief). There have also been two instances in which we allowed amicus curiae participation in declaratory statement proceedings. See In re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-Generation, Order No. PSC-98-0074-FOF-EU, issued January 13, 1998, in Docket No. 971313-EU (Florida Power and Light appeared as amicus curiae); In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, Order No. 20808, issued February 24, 1989, in Docket No. 881326-EI (after Union Carbide withdrew its Petition to Intervene, the Commission treated the points raised in the Motion to Dismiss, that it had previously filed, as an amicus curiae submission, at the request of Union Carbide).

As previously discussed, Collier and Citrus Counties state that they wish to participate as amicus curiae to, among other things, file a Motion to Dismiss Intercoastal's and NUC's applications. Pursuant to Health Facilities Research, an amicus curiae does not have standing to move to dismiss a petition and under Keating, an amicus curiae cannot inject new issues in a proceeding. Thus, we hereby deny Collier and Citrus Counties' request to participate as amicus curiae for the purpose of filing a Motion to Dismiss NUC's and Intercoastal's applications, as such a procedure is not permissible under the law.

Collier and Citrus Counties also state that they wish to participate as amicus curiae in support of St. Johns County's Motion to Dismiss Intercoastal's application and to oppose NUC's application, as well. However, Collier and Citrus Counties have failed to file an amicus curiae brief in this proceeding. On May 23, 2000, Collier and Citrus Counties filed a Motion to Dismiss based upon the argument that this Commission lacks jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes. Because we denied Collier and Citrus Counties' joint Petition for Intervention, Collier and Citrus Counties are not parties and do not have the requisite standing for us to consider their Motion to Dismiss. However, we will allow Collier, Citrus, Sarasota, and Hillsborough Counties to participate as amicus curiae, and we will consider the points raised in their Motions to Dismiss as amicus curiae submissions.

JURISDICTION

St. Johns County's Position:

In its Motion to Dismiss Intercoastal's application, St. Johns County states that we do not have jurisdiction to consider Intercoastal's application. St. Johns County has not stated its position on whether we have jurisdiction to consider NUC's application. St. Johns County states that it is not within the Commission's jurisdiction to award service territory to an existing utility when the utility and territory requested are located in a nonjurisdictional county. Moreover, St. Johns County asserts 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, St. Johns 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 St. Johns County will be usurped, which would be contrary to the express right of St. Johns 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), St. Johns 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 St. Johns County's jurisdiction in nonjurisdictional counties. Thus, St. Johns 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.

Sarasota County's Position:

In its Motion to Dismiss NUC's and Intercoastal's applications, Sarasota County states that this Commission does not have jurisdiction to consider NUC's and Intercoastal's applications. Sarasota County states that St. Johns County, like Sarasota, Hillsborough, Collier and Citrus Counties, is a non-jurisdictional county pursuant to Section 367.171(3), Florida Statutes. Further, it argues that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission does not have jurisdiction to regulate utilities that provide service within their respective geographic boundaries. Sarasota County states that neither Intercoastal nor NUC currently has a system which provides water and/or wastewater service across county boundaries. Sarasota County contends that NUC and Intercoastal are "essentially asking [the Commission] for authorization to provide water and wastewater service in a non-jurisdictional county" and citing Hernando County, it asserts that the Commission "has no authority to consider those requests."

Sarasota County further states that the only exception to the Commission's "lack of jurisdiction in non-jurisdictional counties can be found in Section 367.171(7), Florida Statutes." It asserts that the issue in this proceeding is the time at which the Commission's jurisdiction vests. Sarasota County asserts that this question was answered in In re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc., (Lake Suzy), Order No. PSC-00-0575-PAA-WS, issued March 22, 2000, in Dockets Nos. 970657-WS and 980261-WS. Sarasota County alleges that in Lake Suzy the Commission "held that the Commission is 'vested with jurisdiction [under Section 367.171(7)] at the time of connection,' i.e., when service actually 'transverses county boundaries.'" It further argues that jurisdiction is not triggered by the mere filing of an application and quoting Hernando County asserts that the

> relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), [Florida Statutes], is the actual interrelationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), [Florida Statutes] over which [the Commission] ordinarily has jurisdiction." The Court [in Hernando County] further stated that the

> requirements of Section 367.171(7), [Florida Statutes], "can only be satisfied by evidence that the facilities forming the asserted system exist in contiguous counties across which the service exists."

Sarasota County asserts that, based on Hernando County and Lake Suzy, the "facilities must be actual and must exist before [the Commission] divests a non-jurisdictional county of regulatory authority."

Sarasota County states that it "does not disagree that once a utility system actually provides service which crosses county boundaries, jurisdiction rests with the [Commission]"; however, it further asserts that "it is solely within the non-jurisdictional county's regulatory authority to make the threshold decision as to whether to grant a utility the right to either commence serving within its geographic boundaries or to expand its current service area within that county's boundaries." Finally, Sarasota County states that interpreting Section 367.171(7), Florida Statutes, to allow a utility "to avoid a county's regulatory jurisdiction by a unilateral business decision to include some territory from a jurisdictional county in its expansion plans flagrantly undermines the authority of the non-jurisdictional county to regulate utilities within its geographic boundaries and allows the utility the unfettered opportunity to forum shop for its own regulator."

Hillsborough County's Position:

In its Motion to Dismiss NUC's and Intercoastal's applications, Hillsborough County states that we do not have the jurisdiction to consider NUC's and Intercoastal's applications. It cites to Hernando County, for the proposition that there must be a physical delivery of water and/or wastewater which transverses county boundaries for Section 367.171(7), Florida Statutes, to apply. Further, it argues that Section 125.01(k)(1), Florida Statutes, provides specific authorization to the counties to regulate water and wastewater and that in Section 367.171(1), Florida Statutes, the Legislature provided that the provisions of Chapter 367 would only become effective in a county upon the adoption of a resolution by the Board of County Commissioners of a county wishing to become regulated by the Commission. Moreover, Hillsborough County asserts that

> 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 367.021(12), [Florida Statutes], 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.

Hillsborough County concludes that when Sections 367.171(7), Florida Statutes, and 367.021(12), Florida Statutes, are read together, the "most reasonable interpretation" would be that "when a 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 [Commission]."

Collier and Citrus Counties' Positions:

In their joint Motion to Dismiss, Collier and Citrus Counties state that this Commission does not have the jurisdiction to consider either Intercoastal's or NUC's application. They argue that, based on Hernando County, "there must be actual physical interconnections crossing contiguous county boundaries by which actual water and wastewater services are being transported in order for there to be jurisdiction in the Commission pursuant to Section 367.171(7), [Florida Statutes]." Further, they state that their view

> does not mean that the Commission can grant service territory within a nonjurisdictional county as part of an application, which if ultimately approved and constructed would result in actual physical interconnections transporting water and wastewater services. This type of "bootstrap" logic has no foundation in precedent and would do severe damage to the nonjurisdictional counties' ability to exercise their home rule prerogatives afforded by Chapter 125, Florida Statutes.

Collier and Citrus Counties state that NUC's and Intercoastal's applications include "thousands of acres located exclusively within St. Johns County, a nonjurisdictional county." They assert that "case law does not require the Commission limit itself to grants of territory which will immediately require service." Thus, they argue that "there could be no limit to the

service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk."

Collier and Citrus Counties also state that there is no prior history supporting the Commission granting service territory in a nonjurisdictional county, and that they are not aware of any cases "supporting the Commission's grant of additional territory to a utility within a nonjurisdictional county, even where the utility has already been found to be jurisdictional on the basis of Section 367.171(7), [Florida Statutes]." Further, they cite 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), for the proposition that franchise rights granted by the Commission are "merely equal to, not superior to, those awarded by local governments."

Collier and Citrus Counties state that Section 367.171(7), Florida Statutes, and Chapter 125, Florida Statutes, can be harmonized as follows:

> ...[A]ll existing systems having actual physical service transversing county boundaries must be regulated by this Commission in all statutory respects with the exception of the ability to award service area expansions within nonjurisdictional counties. Commission jurisdiction over such a utility would exist irrespective of whether the utility met the "transverses county boundaries" on the date Section 367.171(7), [Florida Statutes], became effective or by virtue of a nonjurisdictional county knowingly granting a utility service territory within its boundaries coupled with an application in an adjacent county that, once completed, would bring it within this Commission's jurisdiction. Under this scenario, the nonjurisdictional county still maintains control of its own powers and duties provided by both Chapter 125, [Florida Statutes], and Chapter 367, [Florida Statutes]. In the instant case, St. Johns County might elect to award Nocatee (it has already refused Intercoastal) all or a portion of the territory sought within St. Johns County's political boundaries. It could do so with the full knowledge that the Commission would take jurisdiction of whatever the County granted, after, but only after, its territorial grant is mated with territory on the other side of a county boundary. Such an interpretation would do justice to all statutory

provisions considering water and wastewater and would be preferred.

NUC's and Intercostal's Positions:

In their responses to Sarasota, Hillsborough, Citrus, and Collier Counties's Motions to Dismiss, both NUC and Intercoastal state that based on a plain reading of Section 367.171(7), Florida Statutes, we have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties are jurisdictional or nonjurisdictional. Intercoastal states that the Legislature's use of the phrases "Notwithstanding anything in this section to the contrary" and "whether the counties involved are jurisdictional or nonjurisdictional" clearly indicate an intent contrary to that presented by Hillsborough, Sarasota, Collier and Citrus Counties. Further, Section 367.011(2), Florida Statutes, states that we shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates. NUC asserts that as the definition of "utility" found in Section 367.021(12), Florida Statutes, includes "proposed construction of a system" and those "proposing to provide" water and wastewater service, and that under a plain reading of Section 367.171(7), Florida Statutes, and Sections 367.021(12) and 367.011(2), Florida Statutes, the Commission has exclusive jurisdiction over proposed utility systems whose services will transverse county boundaries under Section 367.171(7), Florida Statutes.

NUC states that there is no question that its proposed system will constitute a single system. NUC contends that the only question is whether our jurisdiction attaches when the cross-boundary service is proposed or when water or wastewater begins to flow across the county boundary. NUC cites to In re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU), Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, in which we stated that the Legislature intended to correct the problem of redundant, wasteful, and potentially inconsistent regulation over multi-county utility systems when it enacted Section 367.171(7), Florida Statutes. NUC states that Hillsborough, Sarasota, Collier and Citrus Counties' position that "the Commission lacks jurisdiction to grant a multi-county certificate to a new utility would result in just the type of redundant, wasteful and potentially inconsistent regulation that Section 367.171(7), [Florida Statutes], was designed to protect."

Conclusion and Findings

Duval County opted to give us jurisdiction over its water and wastewater systems on April 1, 1974. It continues to be subject to our jurisdiction. St. Johns County is excluded from our jurisdiction under Section 367.171(3), Florida Statutes. St. Johns County took back jurisdiction over its water and wastewater systems on September 26, 1989. However, both NUC and Intercoastal are proposing to provide service to the entire Nocatee development, which is proposed to span both Duval and St. Johns Counties. Consequently, both utilities' proposed service areas would transverse county boundaries. Thus, the relevant statute to determine whether we have jurisdiction over either NUC's or Intercoastal's application is Section 367.171(7), Florida Statutes, which states:

> Notwithstanding anything to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest [C]ommission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section. (emphasis added)

In Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [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." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, we have subject matter jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes, because each is proposing to construct a utility system whose service would

transverse county boundaries, thus causing the applications to fall within our exclusive jurisdiction.

Plain Meaning

"When the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect." Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995). If it is determined that the statute on its face is ambiguous or unclear, then one would resort to the other rules of statutory construction. See Id. "Only when a statute is doubtful in meaning should matters extrinsic to the statute be considered in construing the language employed by the Legislature." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). As illustrated above, we have jurisdiction over NUC's and Intercoastal's applications based on the plain language of Section 367.171(7), Florida Statutes.

Legislative Intent

If a statute is ambiguous, the first means one should use to construe the statute is to look at the legislative intent because the primary guide to statutory interpretation is to determine the purpose of the legislature. See Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963). Although it is not necessary to look to the legislative intent in this instance because Section 367.171(7), Florida Statutes, is unambiguous, the following is a discussion of the legislative intent behind this section for informational purposes.

In In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU), Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, we discussed the legislative intent behind Section 367.171(7), Florida Statutes. In that Order we stated:

> 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 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 efforts 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.

We reiterated the intent behind Section 367.171(7), Florida Statutes, discussed in GDU, in In re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc., (Lake Suzy), Order No. PSC-00-0575-PAA-WS, issued March 22, 2000, in Dockets Nos. 970657-WS and 980261-WS, which was made final and effective by Order No. PSC-00-0723-CO-WS, issued April 14, 2000. This matter involved Lake Suzy Utilities, Inc., a utility located in DeSoto County, which is a nonjurisdictional county pursuant to Section 367.171(3), Florida Statutes, that proposed to provide water service in DeSoto and Charlotte Counties. The utility was comprised of only one water and wastewater facility which would extend across the boundary of Charlotte and DeSoto Counties, and no separate facility existed or was planned to exist in Charlotte County. We concluded that the Commission had jurisdiction over the utility pursuant to Section 367.171(7), Florida Statutes, stating that "[a]ny other interpretation in this case would create dual regulation" and that "such a result would be inconsistent with both the spirit and legislative intent of Section 367.171(7), Florida Statutes." By Order No. PSC-00-0575-PAA-WS, we approved a settlement agreement between the utility and Florida Water Services, Inc., and granted the utility a certificate to serve territory located in both DeSoto and Charlotte Counties.

As previously stated, NUC and Intercoastal are proposing to provide service to a development which spans two adjacent counties. Consequently, both of the utilities' service areas will transverse county boundaries. Moreover, similar to the utility in Lake Suzy, Intercoastal is an existing utility located in a nonjurisdictional county and is proposing to extend its service area across county lines. Section 367.171(7), Florida Statutes, grants us exclusive jurisdiction over utility systems whose service transverses county boundaries to prevent the problems and harms of dual regulation discussed in GDU and Lake Suzy. Therefore, the legislative intent behind Section 367.171(7), Florida Statutes, supports the conclusion that we have exclusive jurisdiction to consider NUC's and Intercoastal's applications to serve the Nocatee development.

Reading Statutes as a Whole

Another rule of statutory construction is that a statute should be construed in its entirety and as a whole, and "statutory phrases are not to be read in isolation, but rather within the context of the entire section." Acosta v. Richter, 671 So. 2d 149, 153 (Fla. 1996). Section 367.171(3), Florida Statutes, allows counties to exclude themselves from our jurisdiction. Section 367.171(7) Florida Statutes, states that, "Notwithstanding anything in this section to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries." The beginning phrase in subsection (7) expressly conditions the power granted in subsection (3) because the phrase "Notwithstanding anything in this section to the contrary" means that this section governs despite anything in Section 367.171, Florida Statutes, which may be in conflict with subsection (7). When Section 367.171, Florida Statutes, is read as a whole, both subsections (3) and (7) can be read in harmony to state that individual counties may be excluded from the Commission's jurisdiction; however, if a utility system's service transverses county boundaries, such utility will be under our exclusive jurisdiction whether the counties involved are jurisdictional or nonjurisdictional. Moreover, Section 367.171(7), Florida Statutes, when read in conjunction with Section 367.021(12), Florida Statutes, which defines "utility" to include every person owning, managing, operating or controlling a system or proposing construction of a system, can be harmonized to state that Section 367.171(7), Florida Statutes, gives us jurisdiction over existing, as well as proposed utility systems whose service transverses county boundaries.

Logical and Reasonable Construction

When the meaning of a statute is ambiguous, the law favors a rational and sensible construction. Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981). An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

In this case, if we do not have jurisdiction over the utilities' applications, then the utilities would be required to apply to two regulatory authorities, St. Johns County and the Commission, for separate certificates to provide service. Then, when they begin providing service would regulate the whole system. We find that it would not be logical, nor legally accurate, to assert that we do not have jurisdiction to consider both applications for certification, but that we would have jurisdiction to subsequently regulate the system.

Cases Discussing This Commission's Jurisdiction Under Section 367.171(7), Florida Statutes

In Board of County Commissioners of St. Johns County v. Beard, 601 So. 2d 590 (Fla. 1st DCA 1992), the court addressed the issue of whether Jacksonville Suburban Utilities Corporation (now United Water Florida, Inc.), which provided service in Duval, Nassau and St. Johns Counties, was a "single water and wastewater system" under our jurisdiction pursuant to Section 367.171(7), Florida Statutes. The court stated that actual physical connection between the facilities was not required and found that the evidence supported our determination that the utility's facilities constituted a system pursuant to Section 367.021(11), Florida Statutes (1991). Id. at 593. Thus, the court concluded that we had exclusive jurisdiction over the utility under Section 367.171(7), because the service provided by the system crossed county boundaries. Id.

In Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the court addressed the issue of whether we had jurisdiction pursuant to Section 367.171(7), Florida Statutes, over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that its decision in Beard was distinguishable from the circumstances of this case; that the holding in Beard did not reach the question of whether physical interconnection was necessary

under Section 367.171(7), Florida States; and that Beard was not controlling with regard to the issue of the meaning of 'service' as used in Section 367.171(7). Id. at 51. The court further stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), Florida Statutes, is "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court further stated that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by SSU in this case." Id.

NUC's proposal to provide service will result in its facilities physically crossing the Duval County and St. Johns County border as it is proposing to provide service to the entire Nocatee development, which is proposed to span both counties. It would be one system and the question of functional relatedness does not appear to be an issue. Thus, Beard and Hernando County do not restrict our jurisdiction over NUC's application.

Likewise, Intercoastal is proposing to provide service to the Nocatee development which will cause its facilities to physically cross the border of Duval and St. Johns Counties. Intercoastal's existing plant is located on the east side of the Intracoastal Waterway, adjacent to the proposed Nocatee development. Intercoastal is proposing to either extend its current plant to serve the Nocatee development or build separate facilities on the west side of the Intracoastal Waterway. If Intercoastal extends its system to provide service to the Nocatee development, then it would be one system whose facilities cross county lines, placing it within our jurisdiction. If Intercoastal builds new facilities on the west side of the Intracoastal Waterway to serve the Nocatee development, its facilities on the west side of the Intracoastal Waterway will still physically transverse county boundaries, placing the utility within our jurisdiction. Whether the existing facilities located on the east side of the Intracoastal Waterway will be subject to our jurisdiction under the second scenario may

depend on whether those facilities are functionally related, which is when the court's analysis in Hernando County would become relevant. Thus, Beard and Hernando County do not restrict our jurisdiction over Intercoastal's application.

Our jurisdiction under Section 367.171(7), Florida Statutes, was also addressed in In re: Petition of St. Johns Service Company for Declaratory Statement on Applicability and Effect of 367.171(7), F.S., Order No. PSC-99-2034-DS-WS, issued October 18, 1999, in Docket No. 982002-WS. This matter involved a Petition for Declaratory Statement regarding the applicability of Section 367.171(7), Florida Statutes, to a water and wastewater utility regulated by St. Johns County and providing bulk water and wastewater service to two not-for-profit homeowners associations serving customers in Duval County. The utility's point of delivery to the associations was in St. Johns County. We granted the Petition for Declaratory Statement and found that the service arrangement described by the utility did not subject the utility to our jurisdiction because: the utility provided service exclusively to customers in St. Johns County; only the homeowners associations owned distribution and collection facilities in Duval County; the homeowners associations received service from the utility at a point of delivery in St. Johns County at a bulk rate approved by the St. Johns Water and Sewer Authority; the utility did not provide service to any active customer connections in Duval County; no customer connection charges, customer installation fees, developer agreements, or other contractual arrangements existed between any customers in Duval and the utility other than the delivery of bulk water service in St. Johns County; and the utility did not own any lines or appurtenant facilities on the homeowners associations' side of the point of delivery. We found that based on those particular facts, the utility's service did not transverse county boundaries and our jurisdiction was not invoked pursuant to Section 367.171(7), Florida Statutes.

The declaratory statement also included a statement that there was a provision in the service arrangement between the utility and the homeowners association requiring that, upon demand, the homeowners association would transfer all its utility facilities behind the point of delivery in St. Johns County to the utility. The declaratory statement states that if such a transfer were to occur, our jurisdiction would be invoked under Section 367.171(7), Florida Statutes.

NUC's and Intercoastal's applications can be distinguished from the circumstances set forth in Order No. PSC-99-2034-DS-WS. In both applications, the utilities are proposing to provide service directly to customers located in both Duval and St. Johns Counties. Although NUC is proposing to obtain bulk water service from JEA, it will resell the service to the customers in the Nocatee development. Thus, Order No. PSC-99-2034-DS-WS does not prevent us from invoking our jurisdiction pursuant to Section 367.171(7), Florida Statutes, to consider NUC's and Intercoastal's applications.

Cases Discussing the Relationship Between This Commission and Local Governments

City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), involved a private utility company that filed an action against a municipality which had voluntarily annexed into its city limits a tract of land that was specified in the utility's certificates issued by us. When making its determination as to which utility had the right to serve in the disputed area, the court first stated that, "territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from the lack of clear legislative direction." Id. at 225. Finding that there was an absence of clear legislative intent, the court resorted to resolving the dispute "by the application of principles which appear to best serve the public and to be fair and equitable to legitimate competing interests." Id. As the first principle the court stated that, "In Florida, the basis for the right of both governmental and private entities to provide utility services to the public is statutory and the franchise right of each is equal and neither entity is, per se, superior or inferior to the other." Id. Thus, because the court was unable to find clear legislation which pertained to the issue in question, the court determined the territorial rights and duties of the prospective service providers.

NUC's and Intercoastal's applications can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover, in JJ's

Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth the Commission's jurisdiction over these applications. Section 367.171(7), Florida Statutes. Therefore, there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to our jurisdiction.

Based on the foregoing, we find that we have jurisdiction under Section 367.171(7), Florida Statutes, to consider both NUC's and Intercoastal's applications.

## ST. JOHNS COUNTY'S MOTION TO DISMISS

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.

The County argues it is not within our jurisdiction to award service territory to an existing utility when the utility and the territory requested are 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 JJ's Mobile Homes, 579 So. 2d at 255, 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 its response to the County's contention that we lack 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.

As previously set forth in this Order, we find that we have jurisdiction to consider Intercoastal's application. Intercoastal is proposing to provide service to the entire Nocatee development, which is proposed to span both Duval and St. Johns Counties. Consequently, the utility's proposed service area would transverse county boundaries. Thus, the relevant statute to determine whether we have jurisdiction over Intercoastal's application is Section 367.171(7), Florida Statutes, which states:

> Notwithstanding anything to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest [C]ommission jurisdiction over such systems, any portion of which provides service

> within a county that is subject to [C]ommission jurisdiction under this section. (emphasis added)

As previously discussed, in Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [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." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, we have subject matter jurisdiction to consider Intercoastal's application under Section 367.171(7), Florida Statutes, because it is proposing to construct a utility system whose service will transverse county boundaries, thus causing the application to fall within the exclusive jurisdiction of the Commission. As the statute states that we have exclusive jurisdiction over a utility whose service transverses county boundaries, pursuant to Section 367.171(7), Florida Statutes, only the Commission would have the authority to determine whether to grant additional territory to the utility, contrary to the interpretation of Section 367.171(7), Florida Statutes, set forth by St. Johns County.

St. Johns County cites to JJ's Mobile Homes and Lake Utility Services, a case that followed the court's holding in JJ's Mobile Homes, for the proposition that 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." The County asserts that these cases imply that our jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties. The County seems to argue that the only way to harmonize the equal right of the County to regulate utility service in its boundary would be to interpret Section 367.171(7), Florida Statutes, so that we would only have jurisdiction to award additional service territory to a utility that transverses county lines if the additional territory is located within one of the Commission's jurisdictional counties.

As previously discussed, Intercoastal's application can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover,

in JJ's Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth our jurisdiction over Intercoastal's application. Section 367.171(7), Florida Statutes. Therefore, that there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to our jurisdiction.

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 our subject matter jurisdiction. Thus, St. Johns County's Motion to Dismiss Intercoastal's application is hereby denied.

These dockets shall remain open to allow these matters to proceed to hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petitions for Intervention filed by Sarasota and Hillsborough Counties and the joint Petition for Intervention filed by Collier and Citrus Counties are hereby denied. It is further

ORDERED that the Motions to Dismiss filed by Sarasota and Hillsborough Counties and the joint Motion to Dismiss filed by Collier and Citrus Counties are hereby denied. However, these Counties shall be permitted to participate in these proceedings as amicus curiae. It is further

ORDERED that the Motion to Dismiss filed by St. Johns County is hereby denied. It is further

ORDERED that these dockets shall remain open.

By ORDER of the Florida Public Service Commission this 11th day of July, 2000.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

( S E A L )

SMC

Commissioner Clark concurs in a separate opinion as follows:

I concur that we have jurisdiction to consider NUC's and Intercoastal's applications, but for reasons other than those stated by the majority. NUC and Intercoastal have filed applications to serve territory which spans Duval and St. Johns Counties. I believe we have jurisdiction to consider NUC's and Intercoastal's applications with respect to that portion of territory located in Duval County.

Commissioner Jaber dissents, in part, in a separate opinion as follows:

I respectfully dissent from the decision to deny the Petitions for Intervention filed by Sarasota, Hillsborough, Collier and Citrus Counties. In lieu of granting the Counties intervenor status, the majority has allowed these Counties to participate as amicus curiae in this matter. Granting amicus curiae status to the Counties will help the Commission make an informed decision. However, as amicus curiae, these Counties will not be permitted to appeal our decision. By this Order, we have determined that the Commission has jurisdiction under Section 367.171(7), Florida Statutes, to consider Intercoastal's and NUC's applications because the utilities' proposed service will cross county boundaries. This decision will have an impact on other Counties. Thus, I believe Sarasota, Hillsborough, Citrus, and Collier Counties' Petitions for Intervention should be granted.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. | DOCKET NO. 992040-WS |
| In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation. | DOCKET NO. 990696-WS<br>ORDER NO. PSC-00-0336-PCO-WS<br>ISSUED: February 17, 2000 |

ORDER GRANTING ST. JOHNS COUNTY, FLORIDA'S PETITION FOR INTERVENTION

BY THE COMMISSION:

Intercoastal Utilities, Inc. (Intercoastal or utility) is a water and wastewater utility located in and providing service to areas within St. Johns County, Florida (County). On December 30, 1999 Intercoastal filed applications for an original water and wastewater certificate for a utility in existence and charging for service, and for an amendment of certificates for an extension of service territory, pursuant to Section 367.171(7), Florida Statutes, and Rules 25-30.034 and 25-30.036, Florida Administrative Code.

By petition filed January 26, 2000, the County requests leave to intervene in the above-captioned proceeding for the limited purpose of filing a motion to dismiss. No timely response in opposition to the petition has been filed.

In support of its petition, the County states that its substantial interests are affected by Intercoastal's application in two ways. First, the County argues that Intercoastal's application is an attempt to circumvent the County's legitimate, statutory authority to regulate the water and wastewater utilities within St. Johns County. Second, the County states that Intercoastal is seeking through its application to serve areas which the County is currently obligated to serve by Ordinance 99-36 and by contract.

Pursuant to Rule 25-22.039, Florida Administrative Code, a motion for leave to intervene must 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.

Based on the nature of the proceeding, it appears that the Commission's decision may affect the County's substantial interests. Therefore, the County shall be granted intervenor status. However, the County's intervention shall not be limited. Rule 25-22.039, Florida Administrative Code, does not contemplate or provide for limited intervention. As a party to this proceeding, the County may limit its participation to only certain issues, as it sees fit. Furthermore, pursuant to Rule 25-22.039, Florida Administrative Code, the County, as intervenor, takes the case as it finds it.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petition of St. Johns County, Florida to intervene in this proceeding is hereby granted as set forth in the body of this Order. It is further

ORDERED that all parties to this proceeding shall furnish copies of all pleadings and other documents that are hereinafter filed to Suzanne Brownless, Esquire, Suzanne Brownless, P.A., 1311-B Paul Russell Road, Suite 201, Tallahassee, Florida 32301, counsel for St. Johns County, Florida.

By ORDER of the Florida Public Service Commission this 17th day of February, 2000.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

( S E A L )

DTV

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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|---|---|
| In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. | DOCKET NO. 992040-WS |
| In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation. | DOCKET NO. 990696-WS<br>ORDER NO. PSC-00-0393-PCO-WS<br>ISSUED: February 23, 2000 |

ORDER GRANTING JACKSONVILLE ELECTRIC AUTHORITY'S PETITION FOR INTERVENTION

BY THE COMMISSION:

On June 1, 1999, Nocatee Utility Corporation (NUC or utility) filed an application for an original certificate for a proposed water and wastewater system. NUC's proposed system would be located in and providing service to areas within St. Johns County, Florida (St. Johns) and Duval County, Florida (Duval). However, Intercoastal Utilities, Inc. (Intercoastal) filed a timely objection to NUC's application on June 30, 1999. Accordingly, this matter is set for an administrative hearing.

By petition filed February 7, 2000, the Jacksonville Electric Authority (JEA), requests leave to intervene in the above-captioned proceeding. In support of its petition, JEA states that it has a substantial interest in seeing that NUC's application is approved because it has signed a Letter of Intent to provide wholesale water and wastewater service to NUC. No timely response in opposition to the petition has been filed.

Pursuant to Rule 25-22.039, Florida Administrative Code, a motion for leave to intervene must 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.

For the reasons stated in JEA's petition, it appears that JEA's substantial interests may be affected by this proceeding. Therefore, JEA's petition is granted. Furthermore, pursuant to Rule 25-22.039, Florida Administrative Code, JEA, as intervenor, takes the case as it finds it.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Jacksonville Electric Authority's Petition for Intervention is hereby granted. It is further

ORDERED that all parties to this proceeding shall furnish copies of all pleadings and other documents that are hereinafter filed to Kenneth A. Hoffman and J. Stephen Menton, Esquires, Rutledge, Ecenia, Purnell, & Hoffman, P.A., P.O. Box 551, Tallahassee, Florida 32302, and to Michael B. Wedner, Esquire, St. James Building, Ste. 480, 117 West Duval Street, Jacksonville, Florida 32202, counsel for Jacksonville Electric Authority.

By ORDER of the Florida Public Service Commission this 23rd day of February, 2000.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

( S E A L )

DTV

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

# SARASOTA COUNTY GOVERNMENT

## Office of the County Attorney

1660 Ringling Blvd.
Second Floor
Sarasota, Florida 34236

Jorge L. Fernández
County Attorney

May 9, 2000

ORIGINAL

**VIA FEDERAL EXPRESS**

Ms. Blanca Bayo, Director
Division of Records and Reporting
Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

2000 MAY 10 PM 4:12
DIVISION OF ADMINISTRATION
FLORIDA PUBLIC SERVICE COMMISSION

Re: Docket Nos. 990696-WS and 992040-WS

Dear Ms. Bayo:

Enclosed is the original and fifteen(15) copies of Sarasota County's Petition for Intervention in the above-referenced proceedings.

Please indicate receipt of this filing on the enclosed copy of this letter and return to the undersigned in the enclosed stamped envelope. Thank you for your attention to this matter.

Sincerely,

Kathleen F. Schneider
Assistant County Attorney

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

Enclosures

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05816 MAY 10 00
FPSC-RECORDS/REPORTING

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Telephone: (941) 316-7272 Fax: (941) 316-7267

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

ORIGINAL

**Consolidated Dockets:**

**IN RE: Application for Original Certificates to Operate Water and Wastewater Utility in Duval and St. Johns Counties by Nocatee Utility Corporation** — **DOCKET NO. 990696-WS**

**IN RE: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties By Intercoastal Utilities, Inc.** — **DOCKET NO. 992040-WS**

_____/

## PETITION FOR INTERVENTION

COMES NOW, Sarasota County, Florida (the "County"), a political subdivision of the State of Florida, pursuant to Rule 25-22.039, F.A.C. by and through its undersigned attorney, and requests that it be allowed to intervene in this consolidated proceeding for the purpose of filing its Motion to Dismiss and other filings, as may be deemed necessary. In support of its Petition, the County states as follows:

Petitioner

1. The name, address and telephone number of the petitioner is:

Sarasota County, Florida
c/o Kathleen F. Schneider, Assistant County Attorney
Office of the County Attorney
1660 Ringling Blvd., 2nd FL.
Sarasota, FL 34236
Phone: (941) 316-7272

Representative to receive notices and pleadings:

2. The name, address and telephone number of the petitioner's representative who is authorized to receive service and all notices and pleadings during the course of this proceeding is:

Kathleen F. Schneider, Assistant County Attorney
Office of the County Attorney
1660 Ringling Blvd., 2nd FL.
Sarasota, FL 34236
Phone: (941) 316-7272

Substantial Interest

3. Pursuant to Chapter 67-2064, Laws of Florida, Chapter 125, Florida Statutes, Sarasota County Ordinance No. 96-002, as amended, and the home rule power of self-government constitutionally granted by adoption by its charter, Sarasota County has authority to regulate privately-owned water and wastewater facilities located in unincorporated Sarasota County, Florida.

4. Pursuant to section 367.171(3), Florida Statutes, Sarasota County is excluded from the provisions of Chapter 367 until such time as the Board of County Commissioners takes action to subject the County to the regulatory authority of the Public Service Commission ("PSC"). The Board of County Commissioners of Sarasota County has not taken such action. Accordingly, the County is a nonjurisdictional county with regulatory authority over water and sewer utilities providing service solely within its boundaries.

5. In the above-referenced consolidated proceeding, Intercoastal Utilities, Inc. and Nocatee Utility Corporation have each filed applications to provide utility service to an area that encompasses Duval County, a jurisdictional county, and St. Johns County, a nonjurisdictional county.

6. Similar to St. Johns County, Sarasota County is bordered by jurisdictional counties which have opted to forego their regulatory authority and to have water and wastewater utilities within their county boundaries regulated by the FPSC.

7. The issue before the FPSC as to whether the FPSC has jurisdiction to consider an application for a proposed utility system which will serve both a nonjurisdictional county and a jurisdictional county is a first impression issue before the FPSC, and one which has far-reaching implications for all nonjurisdictional counties which are bordered by jurisdictional counties.

8. FPSC staff has issued a recommendation to the Commission stating that, pursuant to section 367.171(7), Florida Statutes, an investor-owned utility can circumvent the regulatory authority of a nonjurisdictional county by applying to the FPSC for a certificate of authorization for a proposed utility system that would provide service in both a jurisdictional and a nonjurisdictional county.

9. A determination adopting Staff's interpretation of section 367.171(7), Florida Statutes would severely undermine Sarasota County's statutory authority and would allow private

investor-owned utilities to circumvent the regulations of the county and, in effect, forum shop for a regulator.

10. There is currently pending before the FPSC a Petition for Intervention and Motion to Dismiss filed on behalf of St. Johns County in Docket No. 992040-WS. Sarasota County requests that the hearing on this motion be postponed for two weeks from the scheduled hearing date to allow the County the opportunity to file its Motion to Dismiss.

11. The parties to this proceeding will not be prejudiced by permitting Sarasota County, Florida to intervene or by postponing the hearing on St.John's Petition for Intervention and Motion to Dismiss in that the hearing on the applications is not scheduled until August 2000.

**WHEREFORE**, Sarasota County, Florida requests that the FPSC grant Sarasota County's Petition to Intervene on the ground that a decision in this consolidated proceeding predicated on a legal interpretation of section 361.171(7), Florida Statutes, will have a substantial impact on Sarasota County's regulatory authority. Further, Sarasota County, Florida further requests that the FPSC postpone the hearing on the Petition for Intervention and Motion to Dismiss filed by St. Johns County for two weeks to allow Sarasota County to file its Motion to Dismiss.

Respectfully submitted this 9th day of May, 2000.

Jorge L. Fernández, County Attorney
Kathleen F. Schneider
Assistant County Attorney
Office of the County Attorney
1660 Ringling Boulevard, Second Floor
Sarasota, Florida 34236
(941) 316-7272

By: Kathleen F. Schneider

Kathleen F. Schneider
Assistant County Attorney
Florida Bar No. 0873306
(Direct all subsequent filings in this matter to Attorney Schneider)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by regular U.S. Mail to on this 10th day of May, 2000, to the following person:

Richard D. Melson, Esq.
Hopping Green Sams & Smith, P.A.
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Samantha Cibula, Esq.
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Chief Assistant County Attorney
Hillsborough County, Florida
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Tampa, FL 33601

Michael B. Twomey, Esq.
P.O. Box 5256
Tallahassee, FL 32314-5256

BY: Kathleen F. Schneider
Kathleen F. Schneider, Esquire

# BOARD OF COUNTY COMMISSIONERS

ORIGINAL

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Hillsborough County
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May 10, 2000

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

Re: Docket No. ~~99096~~ 990696-WS and Docket No. 992040-WS

Dear Ms. Bayo:

Enclosed please find an original and fifteen (15) copies of Hillsborough County's ***Petition for Leave to Intervene*** and ***Request for Oral Argument*** in the above-referenced Dockets.

Please call me if you have any questions.

Sincerely

Donald R. Odom
Chief Assistant County Attorney

DRO/ch
Enclosure(s)

AFA
APP
CAF
CMU
CTR
EAG
LEG 2
MAS 5
OPC
RGR
SEC 1
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Done 5/15/00



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FPSC-RECORDS/REPORTING

ORIGINAL

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

IN RE: Docket No. ~~990960~~ 990696 WS -Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocate 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 PETITION FOR LEAVE TO INTERVENE**

PETITIONER, HILLSBOROUGH COUNTY ("the County"), by and through its undersigned counsel, and pursuant to Rule 25-22.039, F.A.C., files this Petition for Leave to Intervene with the Florida Public Service Commission ("FPSC"). The County is entitled to intervene in this proceeding for the purpose of filing appropriate pleadings including Motions to Dismiss Nocate Utility Corporation's Application for original certificates in Docket No. 99096-WS and Intercostal Utilities, Inc. Application for Certificates to operate a water and wastewater utility in Duval and St. Johns Counties. Substantial interests of the County are subject to determination or will be affected through this proceeding. The County also requests the FPSC delay its hearing scheduled for May 16, 2000 to hear arguments on St. Johns County's Motion to Dismiss and grant the County until May 30, 2000 to file its Motion to Dismiss. In support of this Petition the County states as follows:

1. The name and address of Petitioner is:

Hillsborough County, Board of County Commissioners
c/o Donald R. Odom, Chief Assistant County Attorney
601 East Kennedy Boulevard, 27th Floor
Post Office Box 1110
Tampa, Florida 33601

2. The County is, pursuant to Section 367.171(1), *Florida Statutes (1999)*, a "non-jurisdictional" County in that the County has not relinquished its authority to regulate investor owned utilities within its borders to the FPSC.

3. The County is a Charter County.

4. A decision by the FPSC to issue an original certificate and extension of service territory certificate to serve areas located in both Duval County and St. Johns County, which is a "non-jurisdictional"county will call into question the County's statutory right to regulate investor owned utilities within its jurisdiction. Section 367.171(1) *Florida Statutes* (1999).

5. A decision by the FPSC to award original certificates and extension of service territory certificates within a "non-jurisdictional" county would seriously call into question the County's ability to exercise growth management decisions within its own jurisdiction.

6. A decision by the FPSC to award original certificates in non-jurisdictional counties would seriously call into question the County's ability to honor contractual commitments to investor owned utilities within its jurisdiction.

7. The above captioned dockets are not scheduled for administrative hearing until August 9 and 10, 2000. Therefore, granting the County additional time to file its Motion to Dismiss and delaying hearing arguments on St. Johns County's Motion to Dismiss will not delay disposition of this consolidated docket nor cause prejudice to any of the parties.

**Legal Argument**

The Fifth District Court of Appeal in the case of ***Florida Wildlife Federation, Inc. v. Florida Trustees of the Internal Improvement, et al.***, 707 So.2d 841, described a simple two-prong test to determine if intervention should be allowed. The Court, citing ***Union Central Life Insurance Co. v. Carisle***, 593 So.2d 505 (1992) wrote: First, the Trial Court must determine that the interest asserted is appropriate to support intervention ... Once the Trial Court determines that the requisite interest exists, it must exercise its soundest discretion to determine whether to permit intervention.

The manner in which the County's substantial interests would be affected by a decision by the FPSC to grant certificates in "non-jurisdictional" counties has been enumerated above. The interest that the County has in the outcome of this matter is sufficient to support intervention. Secondly, as discussed in ***Florida Wildlife Federation*** **id.**, the Commission has the discretion to determine whether or not to allow intervention.

The County respectfully submits that a decision by the FPSC to grant a certificate in a "non-jurisdictional" county would have a profound affect upon the thirty nine (39) "non-jurisdictional" counties, including effectively eliminating the "non-jurisdictional" counties' ability to deny requests to provide service within their jurisdictions, honor their pre-existing franchise agreements; and regulate land use within their counties. A sound exercise of the Commission's discretion is to allow intervention in this docket. In conclusion, the Florida Supreme Court has written that:

> Once the trial court determines that the requisite interest exists, it must exercise its sound discretion to determine whether to permit intervention. In deciding this question the court should consider a number of factors, including the derivation of the interest, any pertinent contractual language, the size of the interest, the potential for conflicts or new issues, and any other relevant circumstance. ***Union Central Life Insurance Company v Carisle,*** **id.** at page 508. {Emphasis added.}

The County requests the Commission to follow the Court's instructions and consider the "other relevant circumstance" in this case. Specifically, absent intervention the County will not have an opportunity to fully protect its substantial interest which will be affected through the proceeding. The totality of the circumstances in this case, including its affect upon the thirty-nine (39) "non-jurisdictional" counties, certainly warrants granting of intervention.

WHEREFORE, Hillsborough County requests that the Commission grant its Petition for Leave to Intervene and allow the County to participate in this proceeding.

Respectfully submitted,

Donald R. Odom,
Chief Assistant County Attorney
Hillsborough County, Florida
Fla. Bar No. 239496
Post Office Box 1110
Tampa, Florida 33601

**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 10th day of May, 2000, to the following persons:

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Kathleen F. Schneider, Esq.
Office of the County Attorney
1660 Ringling Blvd., 2nd Floor
Sarasota, FL 34236

Donald R. Odom, Esquire



PI1622wk/2000-623

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

**COLLIER COUNTY AND CITRUS COUNTY PETITION FOR INTERVENTION, AND ALTERNATIVE PETITIONS FOR DECLARATORY STATEMENT, FOR INITIATION OF RULEMAKING, AND FOR PERMISSION TO SUBMIT AMICUS CURIAE MOTION ON JURISDICTION**

The Board of County Commissioners of Collier County ("Collier County") and the Board of County Commissioners of Citrus County ("Citrus County"), political subdivisions of the State of Florida, by and through their undersigned attorney and pursuant to Rules 28-106.204 and 25-22.039, F.A.C., collectively seek intervention in this proceeding for, among others things, the purpose of filing a motion to dismiss on the grounds that the Florida Public Service Commission ("Commission") lacks subject matter jurisdiction over both Intercoastal Utilities, Inc.'s ("Intercoastal") application for original certificate and extension of service territory in Docket No. 992040-WS and Nocatee Utility Corporation's ("Nocatee") application for original certificates in Docket No. 990696-WS, at least to the extent the latter application seeks an original certificate to serve territory found in a nonjurisdictional county. Alternatively, Collier and Citrus Counties petition the Commission to initiate a Section 120.54, F.S. rulemaking proceeding for the purpose of promulgating a rule to address how petitions and/or conflicting petitions seeking a Public Service Commission grant of original certificates in nonjurisdictional counties will be addressed and decided.

## SUMMARY OF PLEADINGS

The Florida Legislature, by its adoption of Chapter 367, F.S., established two routes by which investor-owned water and wastewater utilities may be regulated in Florida. One provides that Florida counties can regulate such utilities within their political boundaries. The second, provides that the counties, if they are disinclined to regulate directly, may, at their election, delegate the responsibility to the Public Service Commission. Prior to 1990, there was no room for confusion, or debate, about which agency had the right to regulate within a given county. There was no middle ground of shared jurisdiction within a county; a county either opted to self-regulate or gave the responsibility over to the Commission. The passage of what is now Section 367.181(7), F.S. in 1990 interjected the potential for confusion by establishing that "the [Florida Public Service Commission] shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional."

Board of County Com'rs of St. Johns County v. Beard, 601 So.2d 590, (Fla. 1st DCA 1992) ("Beard") was the seminal case construing Section 367.181(7), F.S. and involved precisely the same counties involved in the instant proceeding. In Beard, this Commission found that it could divest the Board of County Commissioners of St. Johns County of county jurisdiction over facilities owned and operated by Jacksonville Suburban Utilities Corp. located solely within the political boundaries of that county, despite the fact that St. Johns County was a nonjurisdictional county. The Commission's decision was upheld on appeal with the resulting partial loss of St. Johns County's regulatory jurisdiction.

The decision in Beard resulted from the utility's petition for declaratory statement regarding jurisdiction, which proceeding St. Johns County was allowed to intervene in. No other

nonjurisdictional counties participated in the proceeding. Despite the lack of participation by any of the other almost 30 nonjurisdictional counties, the Commission's order considered in Beard, as well as the appellate decision upholding it, have been repeatedly cited by this Commission and regulated utilities as a binding precedent controlling the actions of the other nonjurisdictional counties in cases involving similar factual circumstances.[1] Unfortunately, the Courts have too often found Beard's holding binding on other nonjurisdictional counties despite the lack of participation by these counties in either the Beard proceeding before the Commission or on appeal. The contentious offspring of Beard, especially those promoting "uniform rates," have yet to be put to rest. Collier and Citrus Counties would respectfully suggest that both the Commission and the other nonjurisdictional counties would have benefitted by additional input from nonjurisdictional counties in the Beard case.

Now, more than nine years after the Beard declaratory petition, the nonjurisdictional counties are faced with the instant case, involving the interpretation of precisely the same statute, the same counties, and a factual and legal scenario recognized by most as "first impression." St. Johns County, whose immediate regulatory jurisdiction is at risk, has challenged the Commission's legal authority to grant the relief sought, at least with respect to the petition of Intercoastal. Why St. Johns County has not also challenged the Commission's jurisdiction to grant Nocatee's application, which is every bit as offensive to nonjurisdictional counties' regulatory authority as Intercoastal's, is not immediately clear. However, it should be imminently obvious to this Commission, and the parties, that the Commission's decision in these consolidated

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[1] Sugarmill Woods Civic Ass'n, Inc. V. Southern States Utilities, 687 So.2d 1346 (Fla. 1st DCA, 1997); Hernando County V. Florida Public Service Com'n, 685 So.2d 48 (Fla. 1st DCA,1996); Citrus County V. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA, 1995)

cases will sought to be used as a binding precedent against the other nonjurisdictional counties in similar cases subsequently brought before the Commission, as well as in the appeals of such cases. That being the case, the Commission, already fully aware that its jurisdiction to grant the instant applications is questionable, at best, and already challenged by St. Johns County, should seek to obtain, and welcome as constructive, the input of all counties it knows will be impacted by the outcome of these consolidated cases. Collier and Citrus County, along with Hillsborough and Sarasota Counties[1], want to participate in this proceeding because they know full well that the grant of the petitions here, as Commission legal staff states is permissible, will be used against them in the future cases seeking to deprive them of jurisdiction under similar facts. These counties, and any of the almost 30 other nonjurisdictional counties should be given the opportunity to participate as formal parties because their substantial interests will be determined by the Commission in this proceeding within the meaning of Section 120.569, F.S. Alternatively, if the Commission has no intention of using its decision in this case as a precedent in cases involving other nonjurisdictional counties, it should so state in the requested petition for declaratory statement. Failing the grant of formal intervenor status in the instant case or issuance of a declaratory statement, the Commission should pause the instant proceeding and initiate a Section 120.54, F.S. rulemaking hearing to provide all nonjurisdictional counties with input in the construction of a rule controlling cases in which actual or prospective utilities request that the Commission grant service territory approval within a nonjurisdictional county. Lastly, failing approval of any of the first three alternatives, the Commission should grant Collier and Citrus Counties and all other nonjurisdictional counties requesting the same, permission to participate as

[1] Sarasota County and Hillsborough County have filed separate petitions seeking intervention in these consolidated cases.

amicus curiae for, among other purposes, the specific purpose of filing a motion to dismiss for lack of jurisdiction.

## PETITIONS FOR INTERVENTION

Petitioners

1. The names, addresses and telephone numbers of the petitioners are:

Collier County
c/o Thomas C. Palmer, Assistant County Attorney
Collier County Attorney's Office
3301 Tamiami Trail East, Building F
Naples, Florida 34112-4961
Phone 941-774-8400

Citrus County
Larry Haag, County Attorney
Citrus County Attorney's Office
3600 W. Sovereign Path, Room 270
Lecanto, Florida 34461
Phone 352-637-9810

Representative to receive notices and pleadings

2. The name, address and telephone number of the petitioners' representative who is authorized to receive service and all notices and pleadings during the course of this proceeding is:

Michael B. Twomey
Post Office Box 5256
Tallahassee, Florida 32314-5256
Phone 850-421-9530

Substantial Interest

3. Petitioners are political subdivisions of the State of Florida, both of which have exercised their right to regulate water and wastewater utilities within their respective political boundaries pursuant to Section 367.171(1), F.S. Collier County exercised its right to regulate and to preempt the Public Service Commission's statutory authority to regulate by its Resolution No.

96-104, adopted February 27, 1996. [Attachment A]. Citrus County withdrew its authorization for the Public Service Commission to regulate by its Resolution No. 99-111, adopted July 27, 1999, which is substantially similar to Collier County's resolution, is not attached.

4. Both Collier County and Citrus County have enacted comprehensive ordinances promulgating regulatory methodologies by which they oversee all aspects of the operations of the regulated, investor-owned water and wastewater utilities within their respective jurisdictions. Collier County's regulatory ordinance is entitled "Collier County Water and Wastewater Utilities Regulatory Ordinance," adopted by Ordinance No. 96-6 on February 27, 1996. [Attachment B]. Citrus County's Regulatory Ordinance, which is not attached, is similar to Collier County's ordinance and was adopted on September 14, 1999 by Resolution No. 99-142.

5. By its respective, paired ordinances, Collier and Citrus Counties have rescinded the Public Service Commission's statutory authority to regulate investor-owned water and wastewater utilities within the counties' political boundaries and supplanted all regulatory functions formerly granted to the Public Service Commission. For example, Section 1-3(A) of Attachment B establishes the Collier County Water and Wastewater Authority and provides for its powers and duties. These duties include, but are not limited to, Section 1-3(A)(1), the issuance and modification of Franchise Certificates, which, by definition, include the geographic service territory a utility is authorized to provide service to. There is no provision of either the Collier County or the Citrus County ordinances providing exceptions for regulated utilities to seek authorization of service territories within these counties' political boundaries in cases in which the utilities might also seek to provide service in adjacent "jurisdictional" counties.

6. As is the situation with St. Johns County in the instant case, both Collier and Citrus Counties are bounded by one or more jurisdictional counties and, thus, are susceptible to the same

type of petition, and accompanying loss of jurisdiction, facing St. Johns County here. Commission staff has issued a recommendation in the instant case stating that it is within the jurisdiction of this Commission to grant the territorial requests sought by both Intercoastal and Nocatee, notwithstanding the fact that the great bulk of the territory sought in each petition is located within St. Johns County, a nonjurisdictional county.

7. This Commission's decision approving either utilities' petition, consistent with Commission staff's recommendation, will adversely affect Collier and Citrus Counties' substantial interests in at least two ways: First, while it is difficult to imagine a larger Commission grant of service territory within a nonjurisdictional county than that sought here, there is conceivably no limitation to the scope of service territory the Commission could potentially grant a utility within the bounds of a nonjurisdictional county. In St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d 1066 (Fla. 1st DCA 1989) one of the major issues on appeal was whether the Commission had incorrectly granted a utility service territory that had no present need for service. While the Court upheld the Commission's grant of a service area of some 22,000 acres in which there was no immediate future need for service largely on the basis that the most of the area was owned by the utility's parent company, the holding is not strictly limited to those facts. Arguably, once a utility got its foot in the door through the device of proposing a utility transversing county boundaries, there would be no limit to a county's territory that would be excluded from Commission jurisdiction under the theories advanced by these utilities and as accepted by Commission staff.

8. Second, and more importantly, it appears that the Commission will be bound to rely on its decision in this case as binding precedent in future cases involving similar facts, to include similar facts in other nonjurisdictional counties, such as Collier and Citrus Counties. As noted by

the First District Court of Appeal in St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d at 1069:

> the agency bears the burden of providing a reasonable explanation for inconsistent results based upon similar facts. Failure to do so violates section 120.68(12)(b) and the equal protection guarantees of the Florida and federal constitutions. Amos v. Department of Health and Rehabilitative Services, 444 So.2d 43, 47 (Fla. 1st DCA 1983).

As noted by Judge Booth in Amos, supra., at 47:

> Central to the fairness of administrative proceedings is the right of affected persons to be given the opportunity for adequate and full notice of agency activities. These persons have the right to locate precedent and have it apply, and the right to know the factual basis and policy reasons for agency action. State ex rel. Department of General Services v. Willis, 344 So.2d 580 (Fla. 1st DCA 1977). Inconsistent results based upon similar facts, without a reasonable explanation, violate Section 120.68(12)(b), Florida Statutes, as well as the equal protection guarantees of both the Florida and United States Constitutions. North Miami General Hospital, Inc. v. Department of Health and Rehabilitative Services, 355 So.2d 1272, 1278 (Fla. 1st DCA 1978).

9. Collier and Citrus Counties will be bound by the Commission's decision in this case, whether or not they are participants. These counties substantial interests will be affected by the Commission's decision made here and their input to the decision should be heard. This Commission, absent reasonable explanation for deviation, which would be hard to imagine in comparable cases, would be required to grant a utility a comparable grant of service territory in both Collier and Citrus Counties, and, indeed, all nonjurisdictional counties, under comparable facts pled in Intercoastal's and Nocatee's petitions.

10. Wherefore, Collier and Citrus Counties request that they be granted full Section 120.57 party status to these proceedings.

## ALTERNATIVE PETITIONS FOR DECLARATORY STATEMENT

11. Pursuant to Section 120.565, F.S., Collier County and Citrus County request that the Florida Public Service Commission issue a declaratory statement stating the following:

> Pursuant to Section 367.171(7), F.S., the Florida Public Service Commission is without statutory, or other, authority to grant service territory approval to investor-owned water or wastewater utilities found within the boundaries of either Collier County or Citrus County pursuant to an original application for same or by extension of an existing certificate, whether the existing certificate be found in either a jurisdictional or nonjurisdictional county.

12. Petitioners are political subdivisions of the State of Florida, both of which have exercised their right to regulate water and wastewater utilities within their respective political boundaries pursuant to Section 367.171(1), F.S. As a consequence, both counties are "nonjurisdictional counties," meaning that they fall outside the full jurisdiction of this Commission with respect to the regulation of investor-owned water and wastewater utilities. The sole statutory exception granting this Commission jurisdiction over such utilities within the political boundaries of nonjurisdictional counties is provided by Section 367.171(7), F.S., which provides that "the [Florida Public Service Commission] shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional." To date, Section 367.171(7), F.S. has been interpreted to allow the Commission to take jurisdiction of existing utility systems whose service transverses county boundaries and thereby divest nonjurisdictional counties of jurisdiction over that portion of such a multi-county utility located within the nonjurisdictional county. Board of County Com'rs of St. Johns County v. Beard, 601 So.2d 590, (Fla. 1st DCA 1992). Petitioners are aware of no Commission Order by which the Commission has granted a service area expansion to any utility found within a nonjurisdictional county, whether it gained jurisdiction by virtue of an existing

utility having service transversing county boundaries, or by grant of an original certificate to a utility found completely within a nonjurisdictional county, and currently regulated by the nonjurisdictional county. Further, Petitioners are unaware of any Commission Order which grants service area expansion through the mechanism of a nonjurisdictional utility proposing to expand until transversing a jurisdictional county boundary.

13. The particular set of circumstances surrounding this petition are: Collier County and Citrus County are both nonjurisdictional counties by virtue of their election to self-regulate pursuant to Section 367.171(1), F.S. Both counties are bounded by one or more counties over which this Commission has Chapter 367, F.S. regulatory authority. Both Collier County and Citrus County have passed ordinances prescribing systems of water and wastewater utility regulation within their respective political boundaries. Likewise, both counties have expended county monies establishing regulatory staffs for the purpose of carrying out their water and wastewater utility ordinances. Each county is concerned by the uncertainty and economic disruption associated with the potential that the Commission might divest them of utility regulatory authority by attempting to grant service area authorizations within their political boundaries beyond service areas already granted to existing cross-county utilities over which the Commission has exercised jurisdiction.

14. Wherefore, Collier and Citrus Counties request that the Florida Public Service Commission grant their request for declaratory statement by issuing the an order stating:

> Pursuant to Section 367.171(7), F.S., the Florida Public Service Commission is without statutory, or other, authority to grant service territory approval to investor-owned water or wastewater utilities found within the boundaries of either Collier County for Citrus County pursuant to an original application for same or by extension of an existing certificate, whether the existing certificate be found in either a jurisdictional or nonjurisdictional county.

## ALTERNATIVE PETITION FOR RULEMAKING

15. Pursuant to Section 120.54, F.S., Collier County and Citrus County petition the Commission to pause the instant proceeding for the purpose of initiating a rulemaking proceeding to consider how all applications for the Commission to award service territory within the political boundaries of nonjurisdictional counties shall be processed.

16. The territorial applications of Intercoastal and Nocatee in the instant case both require this Commission to award territory within a nonjurisdictional county based upon the claim that the utility ultimately established - albeit after the fact - will comprise a "system whose service transverses county boundaries" and, thus, be subject to this Commission's jurisdiction. There are 30 or more nonjurisdictional counties, many of which are bounded by jurisdictional counties, all of which, then, would be potentially subject to the loss of regulatory authority over portions of their county by virtue of applications either identical or similar to those presented by either Intercoastal or Nocatee. While the utility to utility comparisons involved in determining what utility is best suited to provide service may warrant case by case determinations after the Commission finds it has jurisdiction, how and under what circumstances the Commission shall determine that jurisdiction over nonjurisdictional counties will necessarily be uniform and, thus, be a statement of general applicability requiring rulemaking. Stated differently, the Commission's decision as to whether it can grant either the Intercoastal or Nocatee applications will impact all nonjurisdictional counties with a minimum of one bordering jurisdictional county. As such, no case by case development is either necessary or appropriate and a rule should be promulgated.

17. Wherefore, Collier and Citrus Counties request that the Commission pause the instant proceeding for the purpose of initiating a Section 120.54, F.S. rulemaking proceeding for

the purpose of establishing a rule governing under what conditions the Commission can grant awards of service territory within the political boundaries of nonjurisdictional counties.

**ALTERNATIVE REQUEST FOR AMICUS STATUS**

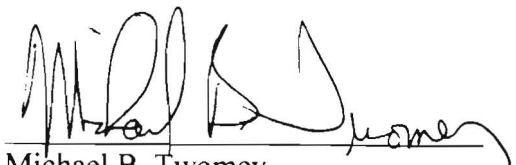
18. Collier County and Citrus County request that they be granted amicus curiae status in these proceedings for the purpose, among others, of filing motions to dismiss the Intercoastal and Nocatee petitions on the basis that the Commission lacks the statutory jurisdiction to approve the grant of service territory, at least within the nonjurisdictional county, sought.

19. In the event the preceding requests for Section 120.57 intervenor status, Section 120.565, F.S. declaratory statement or Section 120.54, F.S. rulemaking proceeding are not granted, Collier and Citrus Counties would respectfully request that the Commission grant them amicus curiae status for the purpose of joining St. Johns County in opposing not only the application of Intercoastal, but Nocatee as well, for want of jurisdiction to approve the same.

20. It should take no citation to observe that this Commission's attempts at interpreting Section 367.171(7), F.S. have been contentious and fraught with litigation. Allowing some or all of the other nonjurisdictional counties which will be impacted by the outcome of this case to file as amici will not guarantee appeals will not be taken. However, having the benefit of the views and argument of Collier and Citrus Counties on whether this Commission can or should exercise this new and far-reaching area of jurisdiction cannot harm the quality of this Commission's decision-making process. By whatever means, the nonjurisdictional counties should have input to this decision, which will undoubtedly be sought to be applied to them.

21. Wherefore, Collier and Citrus Counties respectfully request that they be granted amicus curiae for the purpose, but not limited to, of filing a motion to dismiss for lack of jurisdiction.

Respectfully submitted this 15th day of May, 2000.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by either regular U. S. Mail or hand this 15th day of May, 2000, to the following persons:

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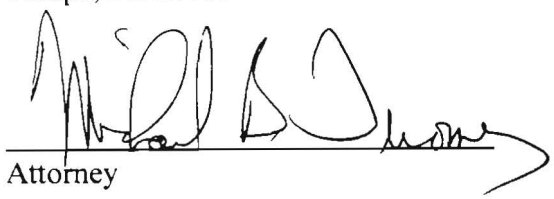

Attorney

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Consolidated Dockets

| | |
|---|---|
| In Re: Application by Nocatee Utility Corporation for Original Certificate for Water & Wastewater Service in Duval and St. Johns Counties, Florida | Docket No. 990696-WS |
| In Re: Application for Certificates to Operate a Water and Wastewater Utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc. | Docket No. 992040-WS |

**COLLIER COUNTY AND CITRUS COUNTY**
**MOTION TO DISMISS**

The Board of County Commissioners of Collier County ("Collier County") and the Board of County Commissioners of Citrus County ("Citrus County"), (collectively "the Counties"), political subdivisions of the State of Florida, by and through their undersigned attorney moves the Florida Public Service Commission ("Commission") to dismiss the above-referenced dockets on the basis that it lacks subject matter jurisdiction to grant these applications requesting service territory approval within a county that has not relinquished its statutory jurisdiction to the Commission pursuant to Section 367.171(7), F.S. In support of their motion, the Counties state as follows:

**PROLOGUE**

"The Further Exercise of Power Should Be Arrested"

We conclude that this case is resolved on the threshold legal issue of whether the PSC exceeded its statutory authority in granting the present

determination of need. As we stated in United Telephone Co. of Florida v. Public Service Commission, 496 So. 2d 116 (Fla. 1986):

> We note preliminarily that 'orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made.' General Telephone Co. v. Carter, 115 So. 2d 554, 556 (Fla. 1959) (footnote omitted). See also Citizens v. Public Service Commission, 448 So. 2d 1024, 1026 (Fla. 1984).
>
> Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives it power solely from the legislature. See Florida Bridge Co. v. Bevis, 363 Sol. 2d 799, 802 (Fla. 1978). As we said in Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So. 2d 577, 582 (Fla. 1965):
>
> > [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Sec. 364.20, Fla. Stat., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.

496 So.2d at 118.[1]

1. Collier and Citrus Counties, like St. Johns County, the county whose territory and jurisdiction is to be usurped by Commission approval of the two applications being considered, and like Hillsborough and Sarasota Counties, who are also seeking dismissal of these applications,

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[1] The Florida Supreme Court recently reversed this Commission's New Smyrna Beach "merchant plant" approval on the basis that the Commission had exceeded its statutory authority. Tampa Electric Co. v. Joe Garcia, Case Nos. SC95444; SC95445; SC95446 (Slip opinion issued April 20, 2000, at pages 10 and 11.)

are political subdivisions of the State of Florida, created by the Florida Constitution, whose jurisdiction and authority are deserving of appropriate respect and deference by this Commission.[2]

2. These consolidated cases involve the question of whether this Commission has the clear statutory authority to approve initial or original applications for exclusive territory or franchises to operate water and/or wastewater utilities within the political boundaries of a county that is considered "non-jurisdictional" within the meaning of Chapter 367, F.S., more specifically, Section 367.171, F.S. The Counties would urge, especially given the history of the statutes being considered, if there exists "Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission, (it) must be resolved against the exercise thereof, and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities, Inc., 281 So.2d 493, 496 (Fla. 1973).

3. The State of Florida has established a multi-jurisdictional statutory solution to the supervision and regulation of the provisioning of water and wastewater utility services to Floridians. On the one hand, Counties have long had the statutory authority to provide water and wastewater services to the unincorporated areas of their counties. (Chapter 153, F.S. 1959). Pursuant to Section 125.01(1)(k)1, F.S., counties have had the statutory authority to provide water and wastewater service since 1971. Specifically, 125.01, F.S. provides:

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[2] Counties are established as the "political subdivisions" of the State of Florida pursuant to Article VIII, Section 1(a), Florida Constitution, and created, abolished or changed by law as provided therein. Specific counties and their political boundaries are established by general law in Chapter 7, F.S. Each of the five counties involved in these proceedings and, in fact, all Florida Counties are officially established within Chapter 7, F.S. and their precise political boundaries set forth. Citrus County is established and described at Section 7.09, F.S.; Collier County at Section 7.11, F.S.; Hillsborough County at 7.29, F.S.; Sarasota County at Section 7.56, F.S.; and St. Johns County at 7.58, F.S.

Powers and duties.—

(1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to:

(k)1. Provide and regulate waste and sewage collection and disposal, water and alternative water supplies, including, but not limited to, reclaimed water and water from aquifer storage and recovery and desalination systems, and conservation programs.

These stated county powers are not restrictive or exclusive, but, rather, incorporate all the necessary implied powers required to carry them out. In fact, Chapter 71-14, Laws of Florida, notes that the intent of the legislation is "to continue and expand" the powers of the county commission. Further, the law states that the counties' powers and duties shall be "liberally construed" in order to secure the broad exercise of "home rule powers authorized by the State Constitution." Specifically, Section 125.01(3)(a) states:

(3)(a) The enumeration of powers herein shall not be deemed exclusive or restrictive, but shall be deemed to incorporate all implied powers necessary or incident to carrying out such powers enumerated . . . .

(b) The provisions of this section shall be liberally construed in order to effectively carry out the purpose of this section and to secure for the counties the broad exercise of home rule powers authorized by the State Constitution. (Emphasis supplied.)

4. The statutory authority for Florida municipalities to engage in the operation of water and wastewater utilities are contained generally in Chapter 166 and 180, Florida Statutes, and are of long-standing effect.

5. This Commission, as a completely statutory creature, had no jurisdiction in the field of water and wastewater regulation until the Florida Legislature saw fit to give it such a role. That

role did not begin until 1971 when, by the passage of Chapter 71-278, Law of Florida, this Commission's authority under Chapter 367 was first created. Prior to then, the Commission had no role as compared to the pre-existing duties and powers of the counties and municipalities. Furthermore, as a "johnny come lately" to the field, statutorily at least, the Commission's authority was clearly placed as subordinate to that of the counties. From the very outset, what is now Section 367.171(3), F.S. provided an expansive list of counties which were excluded completely from the provisions of Chapter 367. This exclusion was based on factors the Florida Legislature expressed this way in the 1999 edition of the statutes:

> (3) In consideration of the variance of powers, duties, responsibilities, population, and size of municipalities of the several counties and in consideration of the fact that every county varies from every other county and thereby affects the functions, duties, and responsibilities required of its county officers and the scope of responsibilities which each county may, at this time, undertake, the Counties of Alachua, Baker, Bradford, Calhoun, Charlotte, Collier, Dade, Dixie, Escambia, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Hillsborough, Holmes, Indian River, Jefferson, Lafayette, Leon, Liberty, Madison, Manatee, Okaloosa, Okeechobee, Polk, St. Lucie, Santa Rosa, Sarasota, Suwannee, Taylor, Union, Wakulla, and Walton are excluded from the provisions of this chapter until such time as the board of county commissioners of any such county, acting pursuant to the provisions of subsection (1), makes this chapter applicable to such county or until the Legislature, by appropriate act, removes one or more of such counties from this exclusion.

(Emphasis supplied.) At its inception, this Commission's jurisdiction, including the ability to grant exclusive service territories or certificates pursuant to Section 367.031, F.S., excluded a long list of counties who could only be brought within the Commission's jurisdiction by statute enacted by the Florida Legislature or by act of the counties elected officials. Not only did the statutory scheme provide that county governments must "opt-in" by resolution (Section 367.171(1), F.S.), it also provided that a county could elect to "opt-out" of this Commission's jurisdiction after staying

the appropriate number of years (also Section 367.171(1), F.S.). The bottom line, however, was, that absent a legislative directive that a given county be under Commission Chapter 367 jurisdiction, the decision to come under the Commission's regulatory authority rested completely and exclusively with the counties and their respective leadership. Furthermore, for the majority of the years the Commission has had water and wastewater authority pursuant to Chapter 367, the totality of the regulatory authority either rested completely with a given county or completely with the Commission. That is, if the Commission had jurisdiction, it had complete jurisdiction, to include ratemaking and the authority to grant original certificates and extensions thereto. Conversely, if a county retained water and wastewater authority and was, thus, "nonjurisdictional," it held the complete authority to include ratemaking and the award of territory to any investor-owned utility seeking to operate within its political boundaries. There was no overlap until the 1989 legislative session and until that session the home rule authority recognized as preeminent in Section 125.01(k)1, F.S. was inviolate.

6. During its 1989 session the Florida Legislature modified the counties' complete discretion to opt-in or opt-out of Commission jurisdiction by passage of Chapter 89-353, Laws of Florida, which provided for the language found in Section 367.171(7), F.S. addressing "jurisdiction over all utility systems whose service transverses county boundaries." This language was first added in 1989 and then was modified somewhat the following year to describe that systems subject to, and remaining subject to, "interlocal agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries" would not be subject to Commission jurisdiction. The section currently reads:

> (7) Notwithstanding anything in this section to the contrary, the commission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest commission jurisdiction over such systems, any portion of which provides service within a county that is subject to commission jurisdiction under this section.

There was a "Sunshine Review" of all the Commission's statutes during 1989 (Chapter 367 by Chapter 89-353, Laws of Florida; Chapter 366 by Chapter 89-292, Laws of Florida) and the following year (Chapter 350 by Chapter 90-272, Laws of Florida; and Chapter 364 by Chapter 90-245, Laws of Florida) and it is difficult, if not impossible, in all that activity to discern any "legislative intent" motivating the change to allow Commission jurisdiction over such water and wastewater systems. However, it seems reasonably clear that there must have been: (1) at least one existing system whose "service transversed county boundaries" motivating the change; and (2) at least one such system that would be allowed to be "grandfathered" out of Commission jurisdiction by virtue of an inter-local agreement as of a date certain.

7. Whether it was "the system" motivating the 1989 "transversing county boundaries" change, the first case to arrive at this Commission pursuant to the statutory change involved General Development Utilities West Coast operation, which involved existing water and wastewater systems whose actual service lines and pipes crossed the county boundaries between Charlotte, DeSoto and Sarasota Counties. Through the rate increase application filed pursuant to Section 367.171(7), F.S., the utility managed to effectively have the "tail wag the dog" inasmuch as this Commission, which had jurisdiction over less than ten percent of all the customers and revenues under the prior law, took jurisdiction over 100 percent of the utility and considered the

full rate increase request. The rate increase was not decided by the Commission because the system was ultimately sold and the rate application dismissed by the utility. One can suspect, but not prove, that the rate increase filed with this Commission alone, as opposed to with multiple jurisdictions, served to ratchet up the sales price obtained for the utility from the governmental agencies involved. If enhancing the sales price of the GDU systems was the ultimate goal of the statutory change, it apparently succeeded. However, as suggested by the Counties, the unintended consequences of this statutory change were yet to begin and they are not concluded, as demonstrated by the instant case. Importantly, however, the first application to the Commission for expanded Commission jurisdiction involved an existing or extant utility system whose physical lines and pipes and, thus, service actually crossed or transversed county boundaries. The next two cases pushed the statutory definition further and in the process further impaired the counties' jurisdiction and home rule prerogatives.

8. In January, 1991, Jacksonville Suburban Utilities Corp. petitioned this Commission for a declaratory statement as to whether the Commission had exclusive jurisdiction over this utility's several water and wastewater facilities located in Duval, Nassau and St. Johns Counties pursuant to Section 367.171(7), F.S. The basis for the jurisdiction, "service transversing county boundaries," was not the actual existence of pipes and delivered service as in the prior GDU case, but, rather, the assertion that centralized management and shared support services constituted the requisite "service." St. Johns County intervened in the Commission's declaratory proceeding, protested the acceptance of managerial and administrative interconnectedness as a "system transversing county boundaries," but lost to this Commission's determination that it had jurisdiction pursuant to Section 367.171(7), F.S. St. Johns County appealed, but the

Commission's order was upheld in a decision reported at Board of County Com'rs of St. Johns County v. Beard, 601 So.2d 590 (Fla. 1st DCA 1992). Thereafter, there was a succession of cases in which utilities sought to have this Commission exert jurisdiction over utilities found within nonjurisdictional counties and without there being any physical pipes transversing county boundaries to support the utilization of Section 367.171(7), F.S.[3] In Hernando County v. Florida Public Service Commission, 685 So.2d 48, 52 (Fla 1st DCA 1996), the Court found that in order to be jurisdictional pursuant to Section 367.171(7), F.S., a utility "system" had to deliver utility services (meaning actual water and wastewater) over a physical interconnection that crossed contiguous county boundaries. In effect, Hernando County implicitly reverses Beard,.

9. Collier and Citrus Counties would urge on this Commission the view that there must be actual physical interconnections crossing contiguous county boundaries by which actual water and wastewater services are being transported in order for there to be jurisdiction in the Commission pursuant to Section 367.171(7), F.S. This view does not mean that the Commission can grant service territory within a nonjurisdictional county as part of an application, which if ultimately approved and constructed would result in actual physical interconnections transporting water and wastewater services. This type of "bootstrap" logic has no foundation in precedent and would do severe damage to the nonjurisdictional counties' ability to exercise their home rule prerogatives afforded by Chapter 125, F.S. Not only would the construction sought by both Nocatee and Intercoastal constitute a decision not liberally construing the provisions of Chapter

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[3] Sugarmill Woods Civic Ass'n, Inc. V. Southern States Utilities, 687 So.2d 1346 (Fla. 1st DCA, 1997); Hernando County V. Florida Public Service Com'n, 685 So.2d 48 (Fla. 1st DCA,1996); Citrus County V. Southern States Utilities, Inc., 656 So.2d 1307 (Fla. 1st DCA, 1995)

125, F.S., it clearly constitutes a case of first impression, which if granted, would greatly stretch this Commission's jurisdiction to a point that the Counties would suggest is beyond that comprehended by the Florida Legislature. In a word, there is no prior history to support this Commission granting service territory within a nonjurisdictional county and there is clearly a reasonable doubt as to the lawful existence of that authority. Given the reasonable doubt to grant service territories within a nonjurisdictional county, the exercise of the power should be arrested. Tampa Electric Co. v. Joe Garcia, supra.

10. The certificated service territory sought by both Nocatee and Intercoastal in their applications includes thousands of acres located exclusively within St. Johns County, a nonjurisdictional county. In fact, the vast majority of the territory sought is within St. Johns County and not Duval County, a jurisdictional county. Under the scenario presented by the applicants in this case and by the Commission staff's recommendation, there is no end to the amount of territory within a nonjurisdictional county that this Commission could grant pursuant to requests similar to those before it. Why stop at just the territory actually proposed to be developed by Nocatee? The case law does not require that the Commission limit itself to grants of territory which will immediately require service. Furthermore, under the scenario presented by Staff's recommendation, it appears that this Commission could effectively grant the applicants in this case or a similar case all the territory within a nonjurisdictional county that is not presently being served, irrespective of whether or not the county commission had already determined that all or part of the area would be better served by another nonjurisdictional utility. Additionally, under this scenario, territory physically adjacent to certificated areas granted by this Commission within the boundaries of nonjurisdictional counties would always be at risk if the utility sought an

expansion of a previously granted certificate. Where would it stop? Where could such an intrusion reasonably be expected to stop once the Commission embarks upon the process of taking jurisdiction from nonjurisdictional counties and using that jurisdiction to grant service territories? The answer, the Counties would submit, is that there could be no limit to the service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk from such a policy.

11. As noted by St. Johns County and apparently conceded by all parties, this is an issue of first impression. Whereas there are cases clearly supporting the Commission's ability (although not without limits) of granting service territory expansions in jurisdictional counties, there are no cases the Counties are aware of supporting the Commission's grant of additional territory to a utility within a nonjurisdictional county, even where the utility has already been found to be jurisdictional on the basis of Section 367.171(7), F.S., let alone where the utility in question is merely proposed, but is otherwise not in existence. Furthermore, as cited by St. Johns County, City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So.2d 219, 225 (Fla. 5th DCA 1991), the franchise rights granted by this Commission are merely equal to, not superior to, those awarded by local governments. In the instant case, approving either the Nocatee or Intercoastal applications will trample on the earlier and inconsistent territorial decision made by St. Johns County. In accord is Lake Utility Services, Inc. v. City of Clermont, 727 So.2d 984, 988 (Fla. 5th DCA 1999).

12. On the surface there is no apparent conflict between the internal provisions of Section 367.171(7), F.S. granting counties the discretion to become and remain "nonjurisdictional" and the provision that requires the Commission to exercise exclusive

jurisdiction over systems whose service transverses county boundaries, provided that one accepts that any systems whose service transverses county boundaries is extant or actually in existence at the time that regulation is sought to be imposed. Under this view, all existing systems having actual physical service transversing county boundaries must be regulated by this Commission in all statutory respects with the exception of the ability to award service area expansions within nonjurisdictional counties. Commission jurisdiction over such a utility would exist irrespective of whether the utility met the "transverses county boundaries" on the date Section 367.171(7), F.S. become effective or by virtue of a nonjurisdictional county knowingly granting a utility service territory within its boundaries coupled with an application in an adjacent county that, once completed, would bring it within this Commission's jurisdiction. Under this scenario, the nonjurisdictional county still maintains control of its own powers and duties provided both by Chapter 125, F.S. and Chapter 367, F.S. In the instant case, St. Johns County might elect to award Nocatee (it has already refused Intercoastal) all or a portion of the territory sought within St. Johns County's political boundaries. It could do so with the full knowledge that the Commission would take jurisdiction of whatever the County granted, after, but only after, its territorial grant is mated with territory on the other side of a county boundary. Such an interpretation would do justice to all the statutory provisions considering water and wastewater and would be preferred. Central Truck Lines, Inc. v. Railroad Comm., 118 Fla. 526, 160 So. 22 (Fla. 1935).

13. If the Commission finds a conflict in the statutes (both 367.171(7) internally and with Chapter 125, F.S.), it should attempt to construe them in a manner that harmonizes and reconciles each with the other and without necessarily finding one meaningless or repealed by implication. Oldham v. Rooks, 361 So.2d 140, 143 (Fla. 1978); State v. Putnam County

Development Authority, 249 So.2d 6, 10 (Fla. 1971); Vocelle v. Knight Brothers Paper Co., 118 So.2d 664, 667 (Fla. 1st DCA 1960).

14. The arguments made by St. Johns County in opposition to Intercoastal's application are excellent and Collier and Citrus Counties adopt those arguments in their entirety, as far as they go. The single problem Collier and Citrus Counties see with St. Johns County's excellent argument is that it does not oppose the application filed by Nocatee and for the same reasons it opposes Intercoastal's application. Whatever this lapse, if it is a lapse, or for whatever the reason Nocatee is not challenged, the Nocatee application is every bit as offensive to the jurisdictional rights of St. Johns County, and all nonjurisdictional counties, as the Intercoastal application.[4]

**CONCLUSION**

15. Section 367.171(7)F.S. clearly provides this Commission with rate and other regulatory authority over utility systems whose actual service, meaning pipes, lines and the transport of water and wastewater services (the things this Commission regulates, not the things that it does not, like telephone services, accounting activities, etc.) transverses county boundaries. Hernando County, supra. Such an interpretation, already upheld by the First District Court of Appeal, does no disservice to, nor is it in any way in conflict with the other statutory rights of the nonjurisdictional counties be they provided by Section 367.171(7), F.S. or Chapter 125, F.S.

[4] The Intercoastal application, seeking an original certificate for the existing utility solely regulated by St. Johns County and then an expansion out and into Duval County is clearly more farfetched and absurd than that presented by Nocatee but it is every bit as offensive to the statutory rights of nonjurisdictional counties. The authority for Commission staff to merely treat Intercoastal's application as one identical to Nocatee's because it is more consistent with Staff's recommendation is not at all apparent. Intercoastal's application should be considered as filed, not as amended by Commission Staff.

However, any interpretation allowing this Commission to grant service territory, either pursuant to an original application or by expansion of an existing certificate, is clearly inconsistent with the rights of the nonjurisdictional counties. While the Commission has an obligation to interpret the statutes it must administer, it is not entitled to a presumption of correctness where the statute involves jurisdiction. Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577 (Fla. 1965). There is no precedent for such an interpretation and there is clearly reasonable doubt that such authority exists. As cited at the outset in Tampa Electric Co. v. Joe Garcia supra., the Commission, as a statutory body, must find explicit support for its actions in its authorizing statutes and where there is any doubt about the existence of such statutory authority to act, the exercise of that power should be arrested. There is more than a little doubt about the Commission's authority to grant certificates for almost 22,000 acres of service territory within St. Johns County in the face of that County protesting such an approval. The Commission should resist any temptation to test its authority in this area where it has previously done so and been reversed.

16. Wherefore, Collier and Citrus Counties respectfully request that this Commission grant their motions to dismiss and those of the other nonjurisdictional counties and decline to consider any applications for service territory within St. Johns County or any other nonjurisdictional county.

Respectfully submitted this 23d day of May, 2000.

/s/ Michael B. Twomey
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