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June 6, 2001

BY HAND DELIVERY

Blanca L. Bayó
Director, Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

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

Dear Ms. Bayó:

Enclosed for filing on behalf of Nocatee Utility Corporation and DDI are the original and fifteen copies of their Post Hearing Brief.

By copy of this letter, this document has been furnished to the parties on the service list. If you have any questions regarding this filing, please call.

Very truly yours,

Richard D. Melson

RDM/mee
Enclosures
cc: Service List
Mr. O'Steen
Mr. Skelton
Mr. Miller
Ms. Swain

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.	)	Docket No. 992040-WS
	)	Filed: June 6, 2001

NOCATEE UTILITY CORPORATION'S POST-HEARING BRIEF

Nocatee Utility Corporation (NUC) and DDI, Inc. (DDI) hereby file their post-hearing brief.

SUMMARY

This consolidated docket involves competing applications to provide service to territory in Duval and St. Johns Counties. NUC is a wholly-owned subsidiary of DDI, Inc. DDI is the owner (through a wholly-owned subsidiary) of approximately 15,000 acres of land located west of the Intracoastal Waterway in Duval and St. Johns Counties that has been permitted for development as the Nocatee Development of Regional Impact. NUC has an agreement with JEA under which NUC will obtain bulk water, wastewater and reuse service from JEA in quantities and time frames which meet the needs of the development. As an affiliate of the landowner of a major development project, NUC is uniquely positioned to provide service in a way that is consistent with

the overall plans and needs of the development, including its strong environmental ethic. DDI and other Davis family interests also own additional land in Duval and St. Johns Counties which is not planned for development and which has no need for service.

Intercoastal is an existing single-county utility whose service territory is located east of the Intracoastal Waterway in St. Johns County. Intercoastal's application includes the Nocatee development which NUC proposes to serve, additional DDI and Davis family lands in St. Johns County which have no need for service, and one other proposed development in St. Johns County. Intercoastal's current plan for service (which has changed repeatedly over the past two years) involves the construction of new facilities west of the Intracoastal Waterway; on-site potable water wells; use of groundwater to supplement reuse for irrigation purposes; and wet weather discharges into the Intracoastal Waterway. These features are inconsistent with the development order conditions for the Nocatee development; hence Intercoastal's plan of service is not technically feasible. Additionally, following a six day evidentiary hearing, St. Johns County previously denied Intercoastal's application to extend its service area to include the portion of its requested territory that is located in St. Johns County.

When all factors are considered, including the need for service, the financial and technical capabilities of the parties, the projected rates, the feasibility of the plans for service, the landowner and customer preferences, and other factors, it is in the public interest to grant NUC's application and to deny Intercoastal's application. (See Issue 11 for a comprehensive summary of the reasons the Commission should take such action.)

SPECIFIC ISSUES

NUC's position on the issues identified in the prehearing order and the additional issues identified at hearing is set forth below, together with a summary of the evidence that supports its position.

ISSUE A: **Has NUC factually established that its proposed water and wastewater systems satisfy the requirements of Section 367.171(7), Florida Statutes, sufficient to invoke Commission jurisdiction to grant its application for original certificates?**

NUC: **Yes. Phase I of the Nocatee development includes development in both Duval and St. Johns Counties. NUC will serve that development through a single water, wastewater and reuse system which includes utility invested and/or developer contributed lines that physically cross the county boundary.**

[Note: This was an issue requested by St. Johns County, which subsequently withdrew from this case.]

As shown on Exhibit 3, NUC's requested service territory --the Nocatee development -- is located in both Duval and St. Johns Counties. (See also Ex. 6, DCM-6 and DCM-7) The first area to be developed in Nocatee will be the Town Center, which is bisected by the Duval/St. Johns County line. (D.Miller, T 149)

NUC will serve Nocatee through a single utility system which receives bulk water, wastewater and reuse service from JEA at a point of connection in Duval County. (D.Miller, T 133) NUC will provide service to its retail customers in both counties through an on-site transmission and distribution grid that criss-crosses back and forth across the Duval/St. Johns County line. (D.Miller, T 149; Ex. 6, DCM-6 and DCM-7)

Even if the Commission were to ignore the major on-site backbone lines which may be designated as "joint projects" to be owned by JEA, NUC will have other distribution and collection lines that cross the county boundary. (D.Miller, T 144) For example, the major reuse transmission main will deliver reclaimed water to a NUC-owned storage and repumping facility to be located in St. Johns County. (See D.Miller, T 187; Ex. 6, DCM-7) From that point, reclaimed water will be repumped and supplied at pressure to customers in both Duval and St. Johns Counties. Similarly, wastewater from both counties will be collected and pumped to JEA from a single master lift station located in St. Johns County. (Ex. 6, DCM-7)

ISSUE 1: Is there a need for service in the territory proposed by NUC's application, and if so, when will service be required?

NUC: **Yes. The boundaries of NUC's proposed territory are the same as those of the Nocatee development which has obtained approval as a Development of Regional Impact. NUC expects that service will be required beginning in late 2002.**

DDI, Inc. is the parent company of both SONOC Company, LLC and Nocatee Utility Corporation. SONOC owns approximately 15,000 acres in Duval and St. Johns Counties that will be developed over the next 25 years as a multi-use development known as Nocatee. (Skelton, T 95-96) The boundaries of NUC's proposed service territory are identical to those of the Nocatee development. (Skelton, T 984; D.Miller, T 130-131)

Because of its size, the Nocatee development is subject to review under Chapter 380, Florida Statutes, as a development of regional impact (DRI). (Skelton, T 97) The Nocatee DRI has been approved by Development Orders issued by the City of Jacksonville (acting through its City Council) and by St. Johns County (acting through its Board of County Commissioners).[1] Those Development Orders (D.O.s) both authorize the development, thereby creating a need for service, and impose numerous legally binding conditions on the development.

The water and wastewater related conditions in the St. Johns County Development Order (Resolution No. 2001-30) and the City of Jacksonville Development Order (Ordinance No. 2001-13-E) include the following.

- A central water supply system for potable water is required.
- No on-site water treatment plants are allowed.
- No on-site potable water wells are allowed.
- No surficial aquifer wells/irrigation wells are allowed except those serving as a back-up source for reuse supply.
- Irrigation demands shall be met using reuse water (i.e. treated wastewater effluent and stormwater).
- A central sewer system is required.
- No on-site wastewater treatment plants are allowed.
- No wet weather discharges are allowed to the Tolomato River or its tributaries.

[1] These development orders were granted official recognition by the Commission. See Exhibit 1.

(See Exhibit A to this Brief for an excerpt from the St. Johns County D.O. setting forth the exact language of these conditions. Identical language appears in the City of Jacksonville D.O. See also, D.Miller, T 147, 1017)

Because the development orders authorize the Nocatee development and require central water and sewer services, there is a need for service to Nocatee. However, because development cannot proceed except in full compliance with the Development Order conditions, there will be no need for service unless the providing utility's plan of service complies with each of these conditions. (D.Miller, T 1017, 1031) As discussed in Issues 3 and 15 below, NUC has proposed a plan of service that complies with these conditions while Intercoastal has proposed a plan of service that violates these conditions. If Intercoastal were certified, its inability to comply with the development order conditions means that development could not proceed, and the need for service would be negated.

The current estimate is that water, wastewater and reuse service will be required by the fourth quarter of 2002. (D.Miller, T 185-186) This is later than the dates originally estimated in NUC's application primarily due to a longer than anticipated DRI approval process. (See D.Miller, T 145)

In certificate application cases, the Department of Community Affairs (DCA) provides information to the Commission as to whether there is a current need for service to a requested territory in light of the local government's adopted comprehensive plan.

(Gauthier, T 943) Mr. Gauthier of DCA testified that although (1) both local governments have adopted DRI development orders for Nocatee; (2) the DCA has determined not to appeal the development orders; (3) both local governments have adopted Comprehensive Plan Amendments for Nocatee; and (4) the DCA has issued its notice of intent to find the Comprehensive Plan Amendments in compliance with Chapter 163, there technically is not yet a need for service because one environmental group has requested a hearing on the DCA's decision to approve the St. Johns County Comprehensive Plan Amendments. (Gauthier, T 933-935) If that administrative challenge is resolved in favor of the DCA, the local governments, and the developer -- and the Comprehensive Plan Amendments take effect -- there will be a need for service to the Nocatee development. (Gauthier, T 945)

The Commission should therefore find that there is a need for service in the area covered by NUC's certificate application and that such need is currently estimated to begin in the late 2002. As discussed in Issue 25, the Commission should not defer its decision pending final resolution of the administrative challenge to the St. Johns County Comprehensive Plan amendments.

ISSUE 2: Does NUC have the financial ability to serve the requested territory?

NUC: **Yes. NUC has entered into a Master Service Agreement with DDI, Inc. to ensure funding for the utility construction and operations until the utility becomes self-sufficient. DDI has ample net worth (currently over $2 billion) to fund the utility operations during this start-up period.**

In May 1999, NUC entered into a Master Service Agreement with its parent company, DDI, Inc. (Ex. 5, HJS-2) Under paragraph 1.c of that agreement, DDI is legally obligated, among other things, to:

> c. Finance the Phase I operations of Utility [NUC] through capital contributions, loans, guaranteed revenues, or as otherwise mutually agreed until Utility's operating revenues are adequate to cover its operating costs.

Apart from this legally enforceable obligation, DDI is firmly committed to providing NUC the required financial resources, given the integral role that utility service plays in the Nocatee community. (Skelton, T 99) As Mr. Skelton testified, DDI intends to ensure that utility services are provided when needed and in a manner consistent with the development order conditions that govern the project. (Skelton, T 103, 110)

DDI clearly has the financial resources to fulfill its funding obligations to NUC. DDI's financial statements dated November 30, 1998 showed that it had assets of over $164 million and a net worth of over $29 million. (Ex. 5, HJS-1) Because those financial statements are prepared on an income tax basis, they value assets at original cost. At fair market value, DDI had a net worth in excess of $1 billion when Mr. Skelton's direct testimony was filed in February 2000, and a net worth of over $2 billion at the time of the hearing. (Skelton, T 90, 98-99)

There is no question that NUC, through its Master Service Agreement with DDI, has the financial resources necessary to provide service to the Nocatee development.

ISSUE 3: Does NUC have the technical ability to serve the requested territory?

NUC: **Yes. NUC has entered into an agreement to obtain bulk water, wastewater and reuse service from JEA. Under the agreement, JEA will provide line maintenance, meter reading, billing, customer service, and other day-to-day operational services to NUC.**

NUC and its parent corporation, DDI, do not have any first-hand experience in the day-to-day operation of a utility system. For that reason, NUC's plan is (1) to purchase water, wastewater and reuse service on a wholesale basis from an existing utility, and (2) to contract with an experienced third-party utility operator to provide management and operations services. (Skelton, T 99-100; D.Miller, T 136) This is similar to the manner in which DDI typically uses third-party contractors to handle day-to-day operations of its various business ventures. (Skelton, T 100-101)

At the time its application was filed, NUC's parent, DDI, had entered into a Letter of Intent with JEA to provide wholesale service, with an option to obtain management services as well. (Skelton, T 100-101; D.Miller, T 136; Ex. 6, DCM-4) In December 1999, NUC determined that were other qualified contract operators from which to choose, including United Water, which provided a detailed response to NUC's request for qualifications and statement of interest. (Skelton, T 101; D.Miller, T 136)

The agreement with JEA was subsequently finalized on July 24, 2000 by the execution of a comprehensive Agreement for Wholesale Utilities, Operations, Management and Maintenance (the "NUC/JEA Agreement"). (Ex. 7, DCM-13A) Under that agreement, JEA will provide NUC with wholesale water, wastewater and reclaimed

water service for the duration of all phases of the Nocatee development, with a minimum period of 25 years. (Kelly, T 541; D.Miller, T 141; Ex. 7, DCM-13A, ¶6.3) In addition, JEA will provide operation, management and maintenance (O&M) service to NUC for ten years, with automatic renewal for three additional 5-year periods, unless terminated by either party. (Kelly, T 541; D.Miller, T 141-142, 199, 203; Ex. 7, DCM-13A, ¶6.3)

In providing such services, JEA is required to comply with the provisions of the Nocatee Environmental Water Resource Plan ("NEWRAP") as detailed on Exhibit E to the Agreement. (Ex. 7, DCM-13, ¶6.6) These requirements parallel the utility-related development order conditions that have been imposed on the Nocatee development. Service by JEA will therefore comply with all applicable provisions of the development orders. (D.Miller, T 1018)

So long as NUC continues to use JEA's O&M service, NUC will pay a bundled rate for wholesale utilities and O&M equal to 80% of the retail rates that JEA would have charged for providing service directly to the end users. (D.Miller, T 142, 148, 198; Swain, T 254) If the O&M provisions are terminated, JEA will continue to provide wholesale utilities at its prevailing wholesale rates. (D.Miller, T 143, 208; Ex. 7, DCM-13A, ¶6.3, 7.2) The provision for a bundled rate has two benefits: first, NUC was able to negotiate a rate which results in lower total costs to its end users than under the originally contemplated wholesale agreement (Swain, T 256; D.Miller, T 213-241); second, NUC's costs are tied to a retail rate which can be changed only when JEA's retail rates are changed for all its customers. (D.Miller, T 198-199)

JEA has the technical ability to provide wholesale and O&M services to NUC. JEA's water and wastewater system currently provides service to over 200,000 water accounts, over 147,000 wastewater accounts, and has over $132 million in annual operating revenues. (Kelly, T 508, 540)

During the hearing, several Commissioners had questions regarding the details of how customer service and response to Commission inquiries would be handled on a day-to-day basis. The details of those interactions have not yet been finalized. (See Swain, T 263, 266, 270) NUC plans to have an officer/employee responsible for managing the JEA contract arrangement. (Swain, T 263) NUC also recognizes that as the certificated utility, it is responsible to the Commission and its customers to ensure that the utility is operated in full compliance with all Commission rules. (Swain, T 264-268) At a day-to-day operating level, JEA at a minimum will establish a separate telephone number, manned 24 hours a day, to handle billing and service inquiries from NUC customers. (Kelly, T 543, 560, 567) Details such as whether this number will be answered by a single employee dedicated to servicing NUC or by a pool of call center employees that handle calls for both NUC and JEA have not yet been worked out. In this capacity, however, JEA will be acting as the agent of NUC, which will have the ultimate right to direct the manner in which JEA represents it. (Skelton, T 114; see Kelly, T 560)

The use of management contracts is not uncommon in the utility business. Intercoastal, for example, has no employees. (James, T 433) All operations and maintenance services are provided for it by JUM pursuant to a management contract.

(James, T 433) Other than the management contract, the only relationship between Intercoastal and JUM is that Mr. James, a minority stockholder of Intercoastal, is a 50% stockholder of JUM. (James, T 433, 489) And JEA itself has other contract management arrangements, including one with all the Navy military bases in northeast Florida. (Kelly, T 566)

Under the NUC/JEA agreement, JEA does not have responsibility for planning or construction of the on-site utilities system. NUC will own the on-site water and transmission distribution facilities, the wastewater collection facilities, and reuse distribution facilities, including on-site reuse storage and high pressure pumping facilities. (D.Miller, T 133-134, 148; Kelly, T 542) NUC has provided the required proof that it has an agreement to purchase the land on which the reuse storage and pumping facilities will be located. (Ex. 27) The master planning for NUC-owned facilities is being conducted for NUC by the engineering firm of England Thims and Miller, which has substantial experience in water and wastewater utility work for major land development projects. (D.Miller, T 128, 129, 133-137, 187-188; Ex. 6, DCM-1) Similarly, NUC has assembled a team of rate and accounting consultants and attorneys with experience in the utility industry to assist it with matters in their areas of expertise.

In summary, NUC, through its contractual relationship with JEA and other consultants, has provided the technical ability necessary to serve its requested territory.

ISSUE 4: Does NUC have the plant capacity to serve the requested territory?

NUC: **Yes. NUC has an agreement to obtain bulk water, wastewater and reuse service from JEA. JEA has the capacity to serve the requested territory, including the capacity to provide sufficient reuse for the utility's needs from the outset of the project.**

Under the NUC/JEA Agreement, JEA is obligated to provide water, sewer and reclaimed water service in the amounts shown as projected demands on Exhibit D to the Agreement. (Ex. 7, DCM-13, ¶5) At build-out in 2026, these amounts are 6.1 MGD for water, 5.2 MGD for wastewater, and 5.39 MGD for reuse. (D.Miller, T 131; Ex. 7, DCM-13, page 24) Additional reuse demand (up to 20% of the total) will be met with stormwater. (D.Miller, T 131-132)

JEA currently has available capacity in existing plants to serve the first five years of development (Phase I) and is contractually committed to expand its treatment system as required to meet the projected demand for future phases. (Perkins, T 595; Ex. 7, DCM-13, ¶5) The Phase I demands total 729,000 gpd for water, 614,000 gpd for wastewater, and 1,228,000 gpd of reclaimed water for reuse. (D.Miller, T 131; Ex. 7, DCM-13, page 24) Even prior to the finalization of the NUC/JEA agreement, JEA had confirmed in writing that it could provide service for all five phases of the project. (D.Miller, T 134; Ex. 6, DCM-5)

Water service will be provided to NUC from JEA's South Grid, which has approximately 60 MGD of excess capacity. Projects are underway to add 7 MGD of additional capacity to the South Grid and to interconnect the South Grid with JEA's

North Grid for even greater capacity and reliability. (Perkins, T 596-599, 614-615; Kelly, T 518, 522-523)

The record reveals a difference in interpretation as to whether JEA's existing Consumptive Use Permits will have to be modified in order for it to provide wholesale water service to NUC. The current position of at least one member of the St. Johns River Water Management District staff is that a modification may be required, although she had not reviewed the maps necessary to state a definitive opinion in five or six years. (Silvers, T 864-865) JEA, on the other hand, is confident that its existing CUP includes authorization to provide up to 3.3 MGD of water to locations in St. Johns County, including NUC, and that no permit modification is required. (Perkins, T 616, 906-914; Ex. 34; Ex.35) The existence of this difference in interpretation should have no impact on the Commission's decision in this docket. Whatever party ultimately provides water to the requested territory must obtain a CUP. If either NUC or Intercoastal were to provide service from their own wells, they could not even apply for CUPs unless and until they were granted a certificate by the Commission. (J.Miller, T 1119) The issuance or existence of a CUP is thus in no way a prerequisite to a Commission finding of technical ability to serve.

Wastewater service will initially be provided to NUC from JEA's Mandarin Wastewater Treatment Plant. That plant has a permitted capacity of 7.5 MGD, including approximately 1.5 MGD of uncommitted capacity. The Mandarin Plant has been designed for expansion to 15 MGD. In future phases, JEA's Arlington East Plant may

supplement the Mandarin Plant in providing service to NUC. (Perkins, T 596, 614, Kelly, T 523)

Reclaimed water will initially be provided to NUC from JEA's Mandarin Plant, which is being upgraded to provide approximately 5 MGD of reclaimed water, and several options exist for meeting the reuse needs for later phases of Nocatee. (Perkins, T 603, 615-616) The record shows that the original impetus for obtaining wholesale service from JEA related to its ability to meet 100% of Nocatee's reuse requirements from day one of the development. (Skelton, T 103; D.Miller, T 135, 148-149, 150) As NUC's projections show, Nocatee will produce insufficient reclaimed water to serve the needs of the development for reuse, even assuming that 20% of the irrigation demands can be met by stormwater. (D.Miller, T 131-132) Because JEA has excess reclaimed water capacity, NUC approached JEA to discuss obtaining wholesale reuse service. JEA declined to provide such service on a stand-alone basis, unless NUC also purchased wholesale water and wastewater service. (D.Miller, T 164) Because JEA was uniquely positioned to meet Nocatee's reclaimed water needs, NUC thereupon pursued negotiation of a cost-effective agreement for the provision of all required services.

Under the NUC/JEA Agreement, NUC will obtain water and wastewater service for Phase I at a point of connection adjacent to the Nocatee development in Duval County. JEA currently has a 24" water main and a 20" wastewater force main located in the U.S. 1 right-of-way adjacent to Nocatee. (Kelly, T 508-509, 541-542; D.Miller, T 148, 188; Ex. 3; see Ex. 6, DCM-7) (These lines were installed by JEA to provide bulk

service to St. Johns County for the County's customers in Walden Chase and Marshall Creek.) Thus no new off-site water or wastewater lines will be required to serve Phase I. The point of connection for reclaimed water will be at JEA's backbone reuse main on Greenland Road, located north of Nocatee in Duval County. NUC will construct a 12" reuse main to connect to JEA's backbone line, which is currently under construction. (D.Miller, T 148)

In summary, through its agreement with JEA, NUC has provided adequate capacity from existing facilities to serve Phase I of Nocatee and has obtained JEA's commitment to provide whatever additional capacity is necessary to provide service to future phases. (D.Miller, T 168) The record shows that JEA has the financial strength to meet that commitment. (Kelly, T 533-534, 540)

ISSUE 5: What is the appropriate return on equity for NUC?

NUC: **The appropriate return on equity for NUC is 9.62%, based on the Commission's leverage graph for 2000.**

Based on NUC's projected 40% debt/60% equity capital structure, the appropriate return on equity produced by the application of the Commission's leverage graph for the year 2000 is 9.62%, plus or minus 1%, as shown at page 8 of Late-Filed Exhibit 13. This compares with a return on equity of 9.46% produced by the 1999 leverage graph which was in effect at the time NUC's application was filed. (Swain, T. 247; see Ex. 10, DDS-13, Sch. 3) The 40/60 debt-equity ratio was selected to provide adequate equity while minimizing the rate impact on customers. (Swain, T 298)

ISSUE 6: **What are the appropriate water, wastewater, and reuse rates and charges for NUC?**

NUC: **The appropriate rates and charges for NUC are designed to recover the utility's cost of providing service, and a reasonable return, at the time the first phase of the utility system is projected to reach 80% of capacity (100% of capacity for the reuse system), as shown on Late-Filed Exhibit 13.**

Pursuant to Commission policy, NUC has proposed water and wastewater rates that are designed to recover the utility's cost of service, including a reasonable return on investment, at the time the first phase of the utility system is projected to reach 80% of capacity, or during year four of utility operations. (Swain, T 245, 260) Although the proposed rates by definition are not expected to produce a fair rate of return until year four, this is a reflection of Commission ratemaking policy for new utilities, and NUC has requested the full amount to which it is entitled. (Swain, T 1078-1079; see Burton, T 688-689)

As discussed in Issue 2, NUC has access to the financial resources necessary to enable it to provide service prior to the time that its revenues are sufficient to cover its operating expenses. Based on analysis performed by Ms. Swain, revenues should cover operating expenses at least by the third year of operations. (Swain, T 1079)

NUC initially proposed rates for reuse service that would be fully compensatory in year four, when the reuse system reached 80% of its phase I capacity. (Swain, T 245, 251) These rates, however, resulted in gallonage charges that were high enough to be a potential disincentive to reuse, particularly for high volume users such as golf courses.

(Silvers, T 856) NUC therefore modified its reuse rate proposal by reallocating some costs from the gallonage charge to the base facility charge, increasing the developer's required contribution, and by designing the rates to recover costs (including a fair rate of return) when the reuse system reaches 100% of its phase I capacity in year five. (Swain, T 1066-1068) These changes were sufficient to produce reuse rates that will be affordable to large volume users while remaining competitive for service to residential users. (Swain, T 260-261, 1066, 1080)

All rate calculations are based on the costs NUC will incur under the NUC/JEA agreement for bundled wholesale service and O&M services, the costs that NUC will incur for capital facilities constructed by NUC as estimated by England Thims and Miller, and other operating expenses (insurance, taxes, etc.) estimated by ETM or by Ms. Swain. (Swain, T 249-250, 254-256, 261)

Pursuant to a request at hearing by the Commission staff (T 292-293), NUC recalculated its rates using consistent factored ERCs (meter equivalency data), rather than the flow data called for in the spreadsheet supplied by the Commission staff for initial rate calculations. In addition, that recalculation more accurately reflects the cap for underlying wastewater service purchased from JEA and updates the cost of capital calculation to use a return on equity from the 2000 leverage graph. The results of this recalculation, and the supporting workpapers, are included in Late-Filed Exhibit 13.

Based on this recalculation, the proposed water, wastewater and reuse rates, and the bill for a residential customer using both 10,000 gallons per month of potable water and 10,000 gallons per month of irrigation for reuse, are as follows:

	Water	Wastewater	Total	Reuse
BFC	$ 8.87	$ 13.47	--	$ 9.71
Gallonage	$ 1.59	$ 4.48	--	$ 0.35
Typical bill 10,000 gallons per month	$ 24.73	$ 54.15	$ 78.88	$13.24

As discussed under Issue 11 below, the combined water and wastewater rates for a 10,000 gallon residential customer ($78.88) are approximately 1% lower than the grandfather rates ($79.70) proposed by Intercoastal in its competing application. Rate differential should therefore play little or no role in the Commission's deliberations in this docket.

ISSUE 7: What are the appropriate service availability charges for NUC?

NUC: **The appropriate service availability charges consist of main extension charges for NUC plus a pass-through of JEA's capacity charges, as follows:

	NUC	JEA Pass-Through	Total
Water	$ 95	$ 140	$ 235
Wastewater	$ 115	$ 1,025	$ 1,140
Reuse	$ 550	$ 240	$ 790

**

The appropriate service availability charges for NUC consist of two components (Swain, T 261):

- A main extension charge designed to produce the maximum contribution (net CIAC at build out equal to 75% of net plant at build out) permitted under the guidelines of Rule 25-30.580. (Swain, T 290-291) This charge is designed to offset NUC's investment in water transmission and distribution plant, wastewater collection plant, and reuse distribution plant (including distribution mains, storage tanks and repumping facilities). In order to produce affordable reuse rates, NUC will also require the developer to contribute a substantial portion of the off-site reuse transmission main, which will have the effect of bringing the overall net CIAC level for reuse to approximately 94% of net plant. (Swain, T 290, 1067)

- A pass-through of JEA's charge for plant capacity. This charge represents a customer's contribution toward the cost of the JEA water and wastewater treatment plant facilities from which bulk service will be provided to NUC.

As discussed under Issue 3 above, the NUC/JEA agreement obligates JEA to supply water, sewer and reclaimed water to NUC, as needed by customers of NUC, in the quantities set forth in Exhibit D to that agreement. (Ex. 7, DCM-13 at 6, 24) The agreement obligates JEA to provide bulk water, sewer and reclaimed water service to NUC for the duration of all phases of the development, with a minimum term of twenty-five years. (D.Miller, T 141; Swain, T 297-298; Ex. 7, DCM-13, §6.3 at page 6) In this situation, the NUC customer is protected because JEA is obligated to provide service on a continuous basis from the plant that the JEA capacity fee is designed to offset. (Swain, T 297)

Although the proposed tariff filed by NUC as part of its minimum filing requirements disclosed the JEA fee through a footnote, NUC is willing to modify its tariff in any manner directed by the Commission to clarify the nature and amount of the passed-through JEA connection fee. (Swain, T 279-280, 299)

ISSUE 7A: What is the appropriate AFUDC rate for NUC?

NUC: **The appropriate AFUDC rate for NUC is 9.77%, which is equal to its overall weighted of capital using a 9.62% cost of equity from the Commission's 2000 leverage graph.**

Based on a 9.62% return on equity from the Commission's 2000 leverage graph and a 10.0% assumed interest rate on debt, the appropriate AFUDC rate for NUC is equal to its overall weighted cost of capital of 9.77%, as shown at page 8 of Late-Filed Exhibit 13.

This compares with an overall weighted cost of capital of 9.68% using the equity return of 9.46% produced by the 1999 leverage graph which was in effect at the time NUC's application was filed. (Swain, T. 251-252; see Ex. 10, DDS-13, Sch. 3)

ISSUE 8: What is the Nocatee landowner's service preference and what weight should the Commission give the preference?

NUC: **The landowner prefers service from NUC. Because this preference is based on the need to plan for utility service as an integral part of the overall development and to see that utility service is provided consistent with the environmental standards for Nocatee, the Commission should give significant weight to this preference.**

The landowner in this case prefers to receive service from NUC. (Skelton, T 985) As discussed above, the territory covered by NUC's application is coextensive with the Nocatee development of regional impact. (D.Miller, T 130-131) The landowner of Nocatee has gone to great lengths to ensure that Nocatee will be developed in accordance with high standards for protection of the environment, including standards the landowner intends to adhere to that go beyond the commitments in the development orders. (Skelton, T 102; D.Miller, T 138, 146, 193-195, 206-207) In addition to numerous utility-related conditions, including 100% reuse for irrigation throughout the development, the landowner has set aside 2,000 acres as a preserve which includes 3-1/2 miles of frontage on the Tolomato River, has set aside 7,000 acres of greenway preserve including 1,000 acres of uplands, and has established a wildlife management plan. (Skelton, T. 102) Numerous other conditions that attest to the environmental sensitivity with which Nocatee is being developed are set forth in the Development Orders for the project.

Given the desire to see the entire development, including utility service, be implemented in a way that is consistent with the landowner's environmental ethic, and given the reality that landowner control can best ensure that utility planning is integrated with overall development planning, DDI organized NUC as the preferred vehicle for providing utility service to Nocatee. (Skelton, T 97-98, 102-103; D.Miller, T 138, 209) Because this landowner preference is based on sound planning concerns, the Commission should afford it significant weight in its deliberations.

In its prehearing position, the staff cites Storey v. Mayo, 217 So.2d 304 (Fla. 1968) for the general proposition that customers cannot choose their utility. The facts in that case are significantly different from those currently before the Commission, however, and the decision in that case does nothing to prevent the Commission from giving significant weight to the landowner's preference. In Storey, two electric utilities had *agreed* on a territorial boundary and the Commission had approved their territorial agreement as being in the public interest. In upholding the Commission decision against a challenge by customers who desired to be served by the other utility, the Florida Supreme Court stated that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Id. at 307-308.

In a more recent case involving a *dispute* between two electric utilities, however, the Court held that it was reversible error for the Commission to disregard customer preference in a situation where each utility was capable of serving the territory in dispute. Gulf Coast Electric Co-op, Inc. v. Clark, 674 So.2d 120 (Fla. 1996).

In a case involving a contested water and sewer certificate application, the District Court of Appeal upheld a Commission order which gave weight to the importance of having an overall plan for orderly development of a large scale land development project and the unique ability of a developer-related utility to perform such planning. St. Johns North Utility Corp. v. Florida Public Service Commission, 549 So.2d 1066 (Fla. 1st DCA, 1989). In the decision affirmed by the First District Court of Appeal, the Commission had specifically stated:

> The Commission may consider the service preference of the majority landholder in the disputed territory. . . .That such preference may be a factor in certification cases has been recognized by the Supreme Court. Davie Utilities, Inc. v. Yarborough, 263 So.2d 215 (Fla. 1972), at 218.

In re: Objections to Application of Sunray Utilities, Inc., Docket No. 870539-WS, Order No. 19428, 88 FPSC 6:41 at 60-61 (June 6, 1988)

Based on these precedents, NUC submits that in a *disputed* certificate extension case, the Commission is entitled to consider both landowner preference and the unique ability of a developer-related utility to integrate utility planning with overall planning for the development in making its public interest determination. For the reasons set forth above, NUC believes that the Commission should give great weight to these factors in the particular circumstances of this case.

ISSUE 9: Will the certification of NUC result in the creation of a utility which will be in competition with, or duplication of, any other system?

NUC: **No. The certification of NUC will not result in creation of a utility that will be in competition with, or duplication of, any other system.**

The certification of NUC will not result in creation of a utility that will be in competition with or duplication of any other system.

First, there is no other utility currently serving the territory for which NUC has requested certification and JEA has backbone facilities in closer proximity to the property than any other potential wholesale or retail provider. (D.Miller, T 138)

Second, Intercoastal's existing system is located on the east side of the Intracoastal Waterway. Under Intercoastal's plan of service, new stand-alone water and wastewater treatment facilities would be constructed on the west side of the Intracoastal Waterway to serve the Nocatee development. (J.Miller, T 400) Since such facilities do not exist today, there is no competition with, or duplication of, any system of Intercoastal.

Third, by entering into an agreement with JEA to purchase capacity from existing JEA facilities, NUC has avoided any possible claim that it will duplicate JEA's system.

Fourth, although St. Johns County may claim the right to serve Nocatee, the County's existing water and wastewater facilities are located over 15 miles from Nocatee and, given right-of-way congestion issues, it is not feasible to extend those facilities to serve Nocatee. (D.Miller, T 1041-1043) Thus NUC does not duplicate or compete with the County's system.

Finally, NUC gave notice of its application in accordance with Commission rules to all other utilities operating in St. Johns and Duval Counties. (Ex. 4, Late-Filed Exhibits M and V) None of these utilities (other than Intercoastal) has objected to NUC's application or claimed any ability to serve NUC's requested territory.

ISSUE 10: Should the Commission deny NUC's application based on the portion of Section 367.045(5)(a), Florida Statutes, which states that the Commission may deny an application for a certificate of authorization for any new Class C system, as defined by Commission rule, if the public can be adequately served by modifying or extending a current wastewater system?

NUC: **No. First, NUC's wastewater system will not be a Class C system. Second, Nocatee cannot be served by the modification or extension of an existing system. Intercoastal proposes to build a new wastewater system to serve Nocatee, not to modify or extend its existing system.**

Section 367.045(5)(a) provides in pertinent part that "the Commission may deny an application for a certificate of authorization for any new Class C wastewater system, as defined by Commission rule, if the public can be adequately served by modifying or extending a current wastewater system."

NUC will not be a Class C wastewater system. A Class C utility is defined in Rule 25-30.110(4) as a utility whose average annual water or wastewater revenues (whichever is greater) for the past three years are less than $200,000. NUC has proposed rates that are designed to produce $1,119,666 in wastewater revenues during its fourth year of operation. (Ex. 13, page 18) Based on its projection of steady growth from year one to year four, revenues would increase approximately as follows: $279,916, $599,833, $839,749, $1,119,666. Thus NUC should exceed the Class C threshold during its first year of operation, and will certainly exceed that threshold on an average basis over its first three years of operation.

In any event, there is no evidence that Nocatee could be served by the modification or extension of an existing system. The only competing plan in this record was put forth by Intercoastal, which proposes to serve Nocatee through the construction of a new stand-alone wastewater system on the west side of the Intracoastal Waterway, not through the modification of extension of its existing system on the east of the waterway.

ISSUE 11: Is it in the public interest for NUC to be granted a water certificate and wastewater certificate for the territory proposed in its application?

NUC: **Yes. There is a need for service to the requested territory; NUC has demonstrated both the financial and technical ability to serve; NUC has the only plan of service complies with the Nocatee development orders; the landowner prefers service by NUC; NUC's arrangement with JEA results in reasonable, competitive rates; and NUC's application is superior to the competing application of Intercoastal.**

In determining whether the grant of a certificate is in the public interest, the Commission should consider whether the applicant meets all statutory requirements for a certificate and any other factors that bear on a public interest determination. In the case of competing applicants, the Commission should consider the relative ability of the applicants to serve, together with other factors such as landowner and customer preference and general public policy considerations.

An analysis of all of these factors demonstrates that the Commission should grant a certificate to NUC and deny a certificate to Intercoastal. Because of the comparative nature of the analysis required, NUC is combining its discussion of Issue 11 relating to NUC and Issue 20 relating to Intercoastal. As discussed in detail in other issues:

Need for Service. There is a need for service to NUC's requested territory, but only if that service complies with the development order conditions which are a prerequisite to development. (Issue 1) Intercoastal's plan of service violates numerous development order conditions. The Nocatee development could not proceed under Intercoastal's plan, and hence there would be no need for service. Also, there is no need

for service, now or in the future, to the additional Davis family lands outside Nocatee that are included in Intercoastal's application. (Issue 13)

Financial Ability. Through its Master Service Agreement with DDI, NUC has demonstrated its financial ability to serve its requested territory. (Issue 2) Intercoastal's financial ability to serve is questionable, given: its negative net worth; its use of 100% debt financing, which translates to a high degree of financial risk; its proposed rates which do not provide a fair rate of return; its need to obtain major new debt financing from third parties; and its need for substantial cash subsidies from shareholders who heretofore have not made any significant investment in the utility. (Issue 14) Even if Intercoastal has the financial ability to serve, NUC's financial strength is much greater.

Technical Ability. NUC has demonstrated its technical ability to serve by entering into a comprehensive agreement with JEA under which NUC will obtain bulk water, wastewater and reclaimed water service, together with management, operations and maintenance services. Those services will be provided in a manner that fully complies with the development order conditions that govern Nocatee. (Issue 3) Intercoastal, through its management agreement with JUM, may have the ability to operate a utility. In this case, however, Intercoastal has failed to provide a technically feasible plan of service, insisting instead on providing service in a manner that violates numerous conditions in the Nocatee development orders. (Issue 15)

Plant Capacity. NUC's agreement with JEA provides existing capacity to serve at least Phase I of Nocatee and obligates JEA to provide future capacity sufficient to meet

the full needs of NUC's service territory. (Issue 4) Intercoastal does not have existing capacity to serve the requested territory, but instead relies on plans to construct new water and wastewater plants on the west side of the Intracoastal Waterway. Contrary to Commission rule, Intercoastal has not provided evidence that it owns the needed plant sites. (Issue 16)

Current Rate Comparison. In accordance with Commission policy for new utilities, NUC has proposed rates that will be fully compensatory in year four of utility operation (year five for reuse), which are the maximum rates to which it is entitled. NUC has also proposed water and wastewater service availability charges that comply with Commission guidelines on the maximum amount of CIAC. (Issues 6 and 7) Intercoastal has proposed to continue its existing rates, even though such rates are insufficient to produce a fair rate of return and must therefore be subsidized by its shareholders. It also proposes to continue its existing service availability charges, but has made no showing that those charges comply with Commission guidelines on CIAC. (Issues 17 and 18) The following table shows that NUC's and Intercoastal's combined water and wastewater rates for a 10,000 gallon per day residential customer are within 1% of each other. (See Ex. 13) Rate differential therefore provides no strong basis to prefer one provider over the other.

@ 10,000 gal.	Water	Wastewater	Combined W&WW
NUC	$ 24.73	$ 54.15	$ 78.88
Intercoastal	$ 15.81	$ 63.89	$ 79.70

Future Rates. Based on a financial analysis by Mr. Burton, Intercoastal claims that the Commission should prefer Intercoastal because, due to economies of scale, it may be able to offer lower rates in the future. The reliability of Mr. Burton's projections is questionable at best, given the approximately 17 eleventh-hour changes that he was required to make to the analysis (see Burton, T 635-641) and the fact, among others, that his plant-in-service totals require a $710,899 adjustment simply to tie to Intercoastal's annual report and he used an overly simplistic used and useful analysis.[2] (Burton, T 764, 770) Even if the Commission were to accept Mr. Burton's fourth version of his rate projections, they would still not provide a basis for preferring Intercoastal, since he performed no quantitative analysis of the future economies of scale that might be achieved by NUC over the same period. Further, as Mr. Burton made clear, Intercoastal is not proposing any rate changes based on his analysis, it is merely intended to give the reader "a general sense of what pressures will be acting upon Intercoastal's rates over this time period." (Burton, T 686)

Long Term Commitment to Serve. Given DDI's desire to control the provision of utilities to Nocatee, and the projected 25-year build-out period for the development, it is reasonable to infer that NUC intends to provide service for the long term. (See Skelton, T 98, 110) In order to protect its interests, JEA negotiated the inclusion of a "right of first refusal" in the NUC/JEA agreement. However, a right of first refusal is not an option to

[2] Because Intercoastal steadfastly refused to provide an "open" version of Mr. Burton's electronic model, NUC was unable to test the sensitivity of Mr. Burton's results to the numerous assumptions that he was required to make. (See Burton, T 674-675, Swain, T 1061)

purchase -- it is simply a right to purchase if and when the utility would otherwise be sold to a third party. The record shows no plan or intention to sell NUC at any time in the future. (D.Miller, T 234) To the contrary, it shows that there have been no discussions with JEA regarding a sale outside of the negotiations surrounding the right of first refusal. (D.Miller, T 162, 235; Kelly, T 544)

Intercoastal, on the other hand, is and has been for sale. (James, T 436) In 1998, Intercoastal made a written proposal for its acquisition by St. Johns County. (James, T 437; Ex. 18) Since 1999, there have been active sale negotiations with both JEA and St. Johns County. (James, T 437-444) In August 2000, Intercoastal had a draft agreement to sell the utility to St. Johns County for a purchase price which gave significant value to future connections in Nocatee -- a territory that Intercoastal has never been authorized to serve. (James, T 437-441; Ex. 19) Less than two weeks before the final hearing in this docket, St. Johns County voted to schedule another public hearing for early June to consider the acquisition of Intercoastal on different terms. (James, T 443; Ex. 20)

Intercoastal now claims that if it is granted the certificates requested in this case, it will not be for sale. The credibility of this claim must be weighed in light of Mr. James' testimony that obtaining the requested certification would add significant value to the utility (James, T 448, 461); the efforts that have been made to sell Intercoastal beginning in 1998 and continuing to this day; and the track record of selling 23 of the 25 utilities in which Mr. James has had an ownership interest. (James, T 461) It also must be weighed in light of the memorandum that Mr. James sent to Bill Young, the St. Johns

County Utilities Director, in January 2001, in which Mr. James indicated that if Intercoastal was certified in northern St. Johns County, it would preserve the County's options to provide county-wide service on an integrated or coordinated basis, presumably through the purchase of Intercoastal. (James, T 444-447; Ex. 21)

Because of the expectation that JUM, in which Mr. James owns a 50% interest, will obtain the contracts to build the substantial plant additions required under Intercoastal's plan of service, it is entirely possible that Intercoastal will not be for sale until after JUM has reaped its profit on the construction projects.[3] (See James, T 434, 463) Yet given the substantial subsidies that will be required from Intercoastal shareholders in future years, it is not reasonable to conclude that Intercoastal has any intention of serving the requested territory over the long term.

Landowner and Customer Preference. The landowner of Nocatee clearly prefers to receive service from NUC, since this will enable it to integrate the master planning of utilities with the master planning for the overall development. Such integrated planning will ensure that utilities are provided when and where needed, are provided in a manner that is consistent with the development order conditions that govern the project, and are provided consistent with the landowner's environmental standards for the development. (Issue 8) Intercoastal customers -- speaking through their homeowners' association -- have stated their preference that the Commission deny Intercoastal's application to expand

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[3] For example, JUM performed over $3 million in construction projects for Intercoastal during 1998. (Bowen, T 1259; Ex. 45, JLB-1 at Note 5)

its service territory. (Issue 19) Although the weight to be given to these preferences is in the sound discretion of the Commission, they are both factors that should be considered in the required public interest determination.

Proliferation of Utility Plants. As the Commission is aware, a major goal of state policy and comprehensive planning for utility systems is to avoid the proliferation of new water and wastewater treatment facilities. NUC's plan to rely on existing JEA facilities as the underlying basis for service to Nocatee is consistent with that goal; Intercoastal's plan to build new stand-alone facilities conflicts with that goal. (See D.Miller, T 1028-1029)

Developer-Utility Relationship. NUC recognizes that the Commission has occasionally frowned on developer-related utilities because of its concern that a developer may seek to set artificially low rates at the outset of the development in order to help promote sales. In this case, however, NUC has requested the full rates to which it is entitled, which will be fully compensatory in year four of the development. Intercoastal, on the other hand, is the party that proposes non-compensatory rates in an apparent effort to convince the Commission that customers will "benefit" from artificially low, subsidized rates.

Summary. For all the reasons summarized above, and discussed in more detail elsewhere in this brief, it is in the public interest to grant NUC its requested water and wastewater certificates and to deny Intercoastal's competing application.

ISSUE 12: Is Intercoastal barred by the doctrines of res judicata and/or collateral estoppel in this proceeding from applying for the same service territory

in St. Johns County which it was previously denied by St. Johns County?

NUC: **Yes. Intercoastal fully litigated an application to serve the St. Johns County portion of its proposed territory before the County, which denied its application. The Commission should honor that decision and bar Intercoastal from re-litigating its request to serve the St. Johns County portion of its proposed territory.**

Intercoastal's application to serve the St. Johns County portion of its requested expansion territory covers virtually the same territory that it previously sought authorization to serve from St. Johns County. That application, which was filed on March 8, 1999, was considered by the St. Johns County Water and Sewer Regulatory Authority ("Authority") during a six-day formal evidentiary hearing in June, 1999. (D.Miller, T 1013-1015)

On August 4, 1999, the Authority entered its Preliminary Order 99-00012 denying Intercoastal's application. (Ex. 38, DCM-9) Subsequently, on September 7, 1999, the Board of County Commissioners of St. Johns County voted to adopt its Final Order Confirming the St. Johns County Water and Sewer Authority's Preliminary Order. (Ex. 38, DCM-10)

Given the fact that the same issues regarding Intercoastal's application to serve the St. Johns County portion of its requested territory have previously been heard and resolved by the County, the Commission should apply the principles of res judicata and/or collateral estoppel and deny Intercoastal's application.

It is well settled that res judicata and collateral estoppel may be applied in administrative proceedings. Thomson v. Department of Environmental Regulation , 511 So.2d 989, 991 (Fla. 1987); Holiday Inns, Inc. v. City of Jacksonville , 678 So.2d 528, 529 (Fla. 1st DCA 1996); United Stated Fidelity & Guaranty Co. v. Odoms , 444 So.2d 78, 80 (Fla. 5th DCA 1984); Hays v. State Dept. of Business Regulation , 418 So.2d 331 (Fla. 3d DCA, 1982).

The courts have recognized that the principles of res judicata and collateral estoppel do not always apply neatly to administrative proceedings. Thomson , supra. at 991. Nevertheless the doctrine applies to such proceedings unless there has been "a substantial change in circumstances relating to the subject matter with which the [earlier] ruling was concerned, sufficient to prompt a different or contrary determination." Miller v. Booth, 702 So.2d 290, 291 (Fla. 3d DCA 1997) quoting Metropolitan Dade County Board of County Commissioners v. Rockmatt Corp. , 231 So.2d 41, 44 (Fla. 3d DCA 1970). A determination of whether a substantial change in circumstances has occurred lies primarily with the discretion of the administrative agency. Miller , supra. at 291; Coral Reef Nurseries, Inc. v. Babcock Company , 410 So.2d 648, 655 (Fla. 3d DCA 1982).

Applying these principles to the facts of this case, the Commission should deny Intercoastal's application as to the St. Johns County Expansion Territory. There has been no substantial change since June 1999 in the need for service in the St. Johns County Expansion Territory, in the landowner's service preference, or in Intercoastal's ability to serve the territory, all of which issues were fully and fairly litigated in the hearings held

before the Authority in June 1999. Indeed, the only substantial change has been Intercoastal's addition of the proposed Duval County Expansion Territory and a modification to its plan of service.

The addition of the Duval County territory is nothing more than an attempt at forum-shopping. Without the Duval County portion of the application, St. Johns County would continue to have exclusive jurisdiction to grant or deny Intercoastal's extension requests, and the doctrine of administrative res judicata would clearly apply to support denial of its renewed application. In these circumstances, the Commission should apply the principles of res judicata and collateral estoppel and deny Intercoastal's application to serve the portion of its requested territory that was at issue in the earlier proceedings.

ISSUE B: Has Intercoastal factually established that its proposed water and wastewater systems satisfy the requirements of Section 367.171(7), Florida Statutes, sufficient to invoke Commission jurisdiction to grant its application for original certificates?

NUC: **Yes. By definition, any utility that proposes to serve the multi-county Nocatee development will necessarily have facilities that cross a county-line.**

If Intercoastal were granted a certificate to serve its requested territory, that service would necessarily require it to operate facilities that cross a county line. The Commission thus has jurisdiction to consider Intercoastal's application. However, for reasons summarized in Issue 11, the Commission should deny Intercoastal's application on the grounds that NUC's application better serves the public interest.

ISSUE 13: Is there a need for service in the territory proposed by Intercoastal's application, and if so, when will service be required?

NUC: **There is a need in 2002 for service to Nocatee that complies with the conditions of the Nocatee development order. There is no need for service to the Davis family lands outside Nocatee that are included in Intercoastal's application. Thus, there is no need that will not be satisfied by NUC's proposal.**

As discussed under Issue 1, there is a need for service to the Nocatee development beginning in late 2002, assuming that the service provider can comply with the provisions of the Development Orders for Nocatee. Since development cannot take place unless those conditions are met, there will be no need for service if the Commission grants certificates to a utility -- such as Intercoastal -- that cannot provide service in compliance with those conditions. As discussed under Issue 15, Intercoastal admits that its plan of service violates numerous conditions in the development orders for Nocatee.

Intercoastal's application as filed also included several areas other than Nocatee, namely (i) the Walden Chase development, (ii) the proposed Marsh Harbor development, and (iii) other DDI or Davis family lands in St. Johns County. Intercoastal has verbally amended its application to exclude Walden Chase, which is being served by St. Johns County under a bulk service agreement with JEA and NUC takes no position on the need for service to the proposed Marsh Harbor development.

There definitely is not a need for service to the other Davis family lands in St. Johns County outside the Nocatee development. Except for two small areas owned by DDI, and depicted in dark yellow on Exhibit 3, these lands are owned by Estuary

Corporation and are part of the Davis family's D-Dot Ranch. There are no plans to develop that property, now or in the future. The landowners' intention is to preserve that land in its natural state forever, and it will certainly not be developed in our lifetime.[4] (Skelton, T 984-985, 993, 998, 1003-1004)

Mr. Gauthier confirmed that there is approximately 8,000 acres of Intercoastal's proposed territory in St. Johns County that is outside Nocatee, Walden Chase and Marsh Harbor and is not currently served by existing septic tanks. That area is currently within St. Johns County's "rural silvicultural" designation, and does not have a need for service. (Gauthier, T 945-946) In fact, the conceptual master plan prepared by Intercoastal's own engineer for service through 2026 included no plans to provide service to this portion of its requested territory. (J.Miller, T 405)

The Commission should therefore find that there is no need for service to the portions of Intercoastal's proposed territory outside Nocatee and that service to Nocatee is better provided by NUC.

ISSUE 14: Does Intercoastal have the financial ability to serve the requested territory?

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[4] Mr. Skelton told Commissioner Palecki that if NUC were certificated to serve its requested territory, it would be acceptable to grant Intercoastal a certificate to serve the other Davis family lands, provided that facilities could be placed on that property only if the territory were ever developed. (Skelton, Tr. 1000) Counsel for NUC would note that (i) the record shows no need for service to this territory, (ii) because this land is all within St. Johns County, Intercoastal would not be a multi-county utility and any such certificate would have to come from St. Johns County, and (iii) in an earlier proceeding before St. Johns County, the County denied Intercoastal's application to serve this portion of the proposed territory on the grounds there was no need for service (see Ex. 38 at DCM-9, page 8 at ¶18).

NUC: **Intercoastal's financial statements and financial projections raise grave concerns about its ability to provide adequate service to the requested territory over the long term. In any event, NUC has superior financial ability.**

It is unclear whether Intercoastal has the financial ability to serve its requested territory, which would result in a utility over five times its current size. The facts which cause concern about Intercoastal's financial ability include:

- Intercoastal has a negative net worth of over $1.3 million, and has not had a positive net worth since it was acquired by its current owners. (James, T 435; Ex. 45, JLB-1)

- Intercoastal is 100% debt financed, which means that it has a high level of financial risk. (Swain, T 1054) Through its leverage graph, the Commission attempts to discourage equity ratios of less than 40% in order to minimize the risk faced by utilities that it regulates. (See Order No. PSC-1162-PAA-WS; T 1262)

- Intercoastal's proposed grandfather rates are insufficient to produce a fair rate of return through the first five years of the development of Nocatee, producing a shortfall of approximately $2,481,000. (Burton, T 883-884; Ex. 33, Tab 1, Figure 1, page 1) These are dollars that would never get made up in future years. (Burton, T 687) Since Intercoastal has no equity, this means that its operating income will be insufficient to cover its operating expenses and to pay the interest on its debt. (Swain, T 1054, 1055-1056)

- Even when cash flow from CIAC is included, Intercoastal's shareholders will be required to provide significant cash subsidies of up to $1,280,000 to enable the utility to pay its bills.[5] (Burton, T 887-888; Ex. 33, Tab 1, Figure 18, line 34) If the shareholders decided to finance the incremental plant facilities with 40% equity, this number would grow substantially, and shareholders would be called on to invest up to $6.5 million in 2007. (Burton, T 888-889; Ex. 33) These subsidies must come from shareholders who to date have a total investment of only $69,000 in the utility. (Bowen, T 1257; Ex. 45, JLB-1)

- The shareholder's ability and commitment to provide these subsidies is supported only by hearsay evidence, which is insufficient under the APA to support a finding of fact. No shareholder financial statements were presented and no effort was made to introduce "affidavits" which are claimed to demonstrate their commitment to fund the utility. (James, T 486; Bowen, T 1270) Although Intercoastal presented testimony of an accountant who has reviewed those financial statements, he was unable to answer even the most basic questions that would reveal the reliability of those statements. (See Bowen, T 1271-1272)

- Assuming 100% debt financing, which is the proposal advocated by Mr. Burton, Intercoastal will require additional debt financing of over $17 million in 2002 ($12.6 million water and wastewater and $4.5 million reuse) and an additional $11

[5] The required subsidies would be even greater if development occurs more slowly than expected, and cash flow from CIAC is delayed.

million in 2007 ($9.1 million water and wastewater and $1.9 million reuse) to build the new facilities it proposes to serve its requested territory. (Burton, T 679, 885; Ex. 33) The letter from First Union on which Intercoastal relies to demonstrate its ability to obtain financing is not a firm commitment, but is more akin to an expression of interest in lending if the expansion project is proven to be financially feasible. (Bowen, T 1264-1266)

In summary, there is insufficient basis in this record for the Commission to conclude that Intercoastal can finance the significant capital investment required to serve Nocatee, either initially or over the next 25 years, particularly when it proposes to use 100% debt financing and to charge subsidized rates in early years.

ISSUE 15: Does Intercoastal have the technical ability to serve the requested territory?

NUC: **In the abstract, Intercoastal may have the technical ability to operate a utility. However, it has not proposed a technically feasible plan of service for the requested territory. To the contrary, its plan of service admittedly violates all of the utility related conditions of the development orders governing Nocatee.**

Intercoastal has no employees and hence no technical ability to operate a utility apart from its management contract with JUM. (James, T 435) NUC concedes that by virtue of this management contract, Intercoastal has the general technical ability to operate a water and wastewater utility, although unlike the NUC/JEA agreement, the Intercoastal/JUM agreement can be terminated at will. (James, T 484) Intercoastal,

however, has not demonstrated the technical ability to provide service to the territory requested in this case. (D.Miller, T 1020)

Despite full knowledge of the development order conditions which govern service to Nocatee, Intercoastal insists on pursuing a plan of service that violates those conditions. In particular, Intercoastal's plan of service involves the following features, each of which its consulting engineer admits violates the development orders for Nocatee: (1) on-site potable water wells; (2) an on-site water treatment plant; (3) an on-site wastewater treatment plant; (4) use of groundwater to supplement reclaimed water for irrigation purposes; and (5) wet weather discharges to the Tolomato River or its tributaries.[6] (J.Miller, T 405-406; D.Miller, T 1018, 1027)

Intercoastal's plan for dealing with these violations is naive at best -- it simply characterizes these conditions as voluntary agreements by DDI designed to foreclose service by Intercoastal[7] and assumes that if Intercoastal is certificated, DDI will be willing and able to obtain amendments to delete these conditions. (See J.Miller, T 1112, 1155) This speculation is not supported by the record. (See D.Miller, T 1031-1032) In fact, Mr.

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[6] Intercoastal claims in Mr. Forrester's redirect testimony that the ICWW is not a tributary to the Tolomato River. (Forrester, T 1182, 1186) Yet Mr. Lear's testimony indicates that irrespective of any development order condition, it would be difficult to approve a wet weather discharge to the ICWW unless the discharge point were considerably north of the SR 210 bridge. (Lear, T 832)

[7] For example, Intercoastal attempted to establish through Ms. Silvers that the development order requirements for no on-site wells and 100% reuse were not imposed by the WMD. (See T 861-862) Yet Ms. Silvers conceded that she did not provide the WMD's final comments on Nocatee, had not seen those comments, and did not know if they addressed locations of wells or reuse requirements. (Silvers, T 873-874)

Jim Miller, who believes the development order could be changed, admits that he has no first-hand knowledge of the process that would have to be followed to amend those conditions. (J.Miller, T 1124)

The evidence shows that the development orders were approved by the St. Johns County Commission (on a 3-2 vote) and by the City Council of the City of Jacksonville. (D.Miller, T 233) With a few limited exceptions not relevant to the utility-related conditions, any amendment will require action by both the St. Johns County and the City of Jacksonville. (See St. Johns County Resolution 2001-30, ¶12) Intercoastal is thus asking the Commission to grant it a certificate on the assumption that these two political bodies will agree to reverse course and eliminate conditions they have previously imposed on the development.

The testimony of Mr. Skelton and Mr. Douglas Miller, both of whom were involved in the process that led to obtaining the development orders, shows that such amendments would not be achievable. (D.Miller, T 204-206, 1031-1036) The planning for Nocatee started, long before the application for development approval was filed, with a visioning process. (D.Miller, T 184, 205) That process involved meetings with regulators, public officials, and private interest groups to design a project that addressed environmental and planning concerns above and beyond the strict requirements of existing regulations. (D.Miller, T 222)

This visioning process was the source of a number of the water resource related conditions. For example, the Executive Director of the St. Johns River Water

Management District and DEP Secretary Struhs indicated that DDI's commitment to 100% reuse for irrigation was a key to their agencies' support, and the three St. Johns County Commissioners who voted to approve Nocatee also said reuse was necessary to secure their approval. (Skelton, T 988-989, 991, 996; D.Miller, T 1035) Similarly, County Commissioners in St. Johns County made it clear that despite the existence of adequate potable water under the Nocatee property, they would not support the project absent a commitment for no on-site potable water wells, in part because all of northern St. Johns County is in a water use caution area. (Skelton, T 991-992, 1001; D.Miller, T 1038-1039) Based on the history of the permitting process for Nocatee, which was approved by St. Johns County on a narrow 3-2 vote, there is no realistic chance that these development order conditions could be modified to accommodate Intercoastal's plan of service.

In summary, Intercoastal's plan of service is not technically feasible because it ignores the binding conditions which have been placed on development in the area it proposes to serve. (See D.Miller, T 232)

ISSUE 16: Does Intercoastal have the plant capacity to serve the requested territory?

NUC: **No. Intercoastal's plan of service requires the construction of new water, wastewater and reuse facilities on the west side of the Intracoastal Waterway. Intercoastal has not provided proof that it owns the sites on which such facilities are proposed to be located.**

Intercoastal does not have the current plant capacity necessary to serve its requested territory. Intercoastal concedes that it is not cost-effective for Intercoastal to serve Nocatee from its existing plants on the east side of the Intracoastal Waterway (ICWW). Therefore, Intercoastal's plan of service involves the construction of new water and wastewater treatment plants on the west side of the ICWW. (J.Miller, T 400, 401-402)

For reuse, Intercoastal proposes to pipe treated effluent from its existing Sawgrass Plant across the ICWW to be combined with treated effluent from its new plant on the west side of the ICWW. Even the combination of these two sources of treated effluent is insufficient to meet the full reuse needs of its proposed territory, and will require supplemental use of groundwater, which is prohibited by the Nocatee development orders. (J.Miller, T 403, 406; see Lear, T 831) While Mr. Jim Miller attempts to downplay the amount of the shortfall, he (i) ignores the fact that in addition to at least a 300,000 gpd obligation to the Sawgrass golf course, the Plantations golf course has a first claim to all remaining reclaimed water to the extent needed for their facility (James, T 452); and (ii) assumes in his calculations that the total amount available for reuse equals the total wastewater treatment plant capacity, even though actual flow rates are currently below that capacity. (J.Miller, T 1116-1117)

Rule 25-30.036(3)(d) requires an applicant for an extension of service territory to provide "evidence that the utility owns the land upon which the utility treatment facilities that will serve the proposed territory are located. . . ." Intercoastal has failed to provide

this evidence. In fact, its own witnesses have affirmatively testified that Intercoastal does not own or control its proposed plant sites. (J.Miller, T 407)

The Commission should therefore find that Intercoastal does not have the current capacity to serve its requested territory and that its application is deficient for failure to demonstrate ownership of (or even an agreement to acquire) the necessary plant sites.

ISSUE 17: What are the appropriate water, wastewater, and reuse rates and charges for Intercoastal?

NUC: **Intercoastal's application requests that its existing water and wastewater rates be applied to the expansion territory even though its projections show that these rates do not provide a fair rate of return. Intercoastal has not requested specific reuse rates. Because the Commission should deny Intercoastal's application in any event, this issue is moot.**

Intercoastal's application proposes to continue its existing water and wastewater rates as approved by St. Johns County, despite the fact that Intercoastal is in the final stages of preparing a rate case filing before the County. (Burton, T 681-682) Mr. Burton's financial analysis shows that continuation of Intercoastal's current rates will not provide a fair rate of return, and in fact is estimated to produce a cumulative $2.4 million shortfall over the first five years of the Nocatee development. (Burton, T 883-884)

Intercoastal has not proposed any specific reuse rates, nor furnished the Commission the information necessary to set such rates. (See Burton, T 777)

In any event, the Commission need not set rates for Intercoastal, since its application should be denied, in which case Intercoastal will remain under the jurisdiction of St. Johns County.

ISSUE 18: What are the appropriate service availability charges for Intercoastal?

NUC: **Intercoastal's application requests that its existing water and wastewater service availability charges be applied to the expansion territory. Intercoastal has not requested specific reuse service availability charges. Because the Commission should deny Intercoastal's application in any event, this issue is moot.**

Intercoastal's application proposes to continue its existing water and wastewater service availability charges as approved by St. Johns County. Intercoastal has provided no evidence that these proposed rates comply with the Commission's guidelines for service availability charges.

Intercoastal's intention with regard to reuse service availability charges is unclear. Mr. Forrester testifies that Intercoastal does not intend to impose a service availability charge for reuse (Ex. 15, Forrester Deposition at 76-77), yet Mr. Burton's financial analysis assumes that the reuse service availability charge will equal the current water service availability charge. (Burton, T 777)

In any event, the Commission need not set service availability charges for Intercoastal, since its application should be denied, in which case Intercoastal will remain under the jurisdiction of St. Johns County.

ISSUE 18A: Should Intercoastal be authorized an AFUDC rate by the Commission?

NUC: **Intercoastal's application does not request authorization of an AFUDC rate nor present the financial information necessary to calculate such a rate. Because the Commission should deny Intercoastal's application in any event, this issue is moot.**

No further discussion of this issue is required.

ISSUE 19: Do Intercoastal's existing customers support the proposed extension of its service territory and what weight should the Commission give to their preference?

NUC: **Intercoastal's existing customers have expressed concerns regarding the quality of service received from Intercoastal and appear to oppose the extension of its service territory. The Commission should consider this customer preference in making its ultimate decision in this proceeding.**

NUC defers to the briefing of this issue by the Sawgrass Homeowners Association.

ISSUE 20: Is it in the public interest for Intercoastal to be granted a water certificate and a wastewater certificate for the territory proposed in its application?

NUC: **No. As discussed in detail in Issue 11, NUC is the superior choice to provide service to Nocatee and it is in the public interest to grant a certificates to NUC, not to Intercoastal.**

See the discussion under Issue 11 for a comparative evaluation of the competing applications filed by NUC and Intercoastal.

ISSUES OF LAW

ISSUE 21: Can the Commission grant Intercoastal or NUC a certificate which will be in competition with, or a duplication of, any other water and wastewater system?

NUC: **No. However, granting NUC's application will not create such competition or duplication.**

[Note: This was an issue requested by St. Johns County, which subsequently withdrew from this case.]

Section 367.045(5)(a) provides that the Commission may not grant a certificate for a new system "which will be in competition with, or duplication of, any other system or portion of a system" unless the Commission determines that the other system is inadequate to meet the reasonable needs of the public or that the person operating the system is unable, refuses or neglects to provide reasonably adequate service.

In applying this provision, the Commission has stated:

> ...Commission precedent clearly requires that some physical facilities be in existence before the competition/duplication analysis is made.

In re: Application of Alafaya Utilities, Docket No. 951419-SU, Order No. PSC-96-1281-FOF-SU, 96 FPSC 10:209, 223 (October 15, 1996). See also, In re: Application of East Central Florida, Docket No. 910114-WU, Order No. PSC-92-0104-FOF-WU, 92 FPSC 3:374 (March 27, 1992) (Commission not required to hypothesize which of two proposed systems might be in place first and thus duplicate or compete with the other).

Although the County withdrew from this case on the eve of hearing, Mr. Douglas Miller's testimony demonstrates that the County's well fields are located approximately 15 miles away from Nocatee and its wastewater treatment plant is located approximately 20 miles away. Extending service to Nocatee would require placing new lines in the U.S. 1 corridor, where the Department of Transportation has indicated that there is not room to construct any more utility lines. (D.Miller, T 1041-1043) Since the County has no physical facilities in existence in proximity to Nocatee, there is simply no competition or duplication for the Commission to examine.

Even if the Commission were to consider potential competition or duplication of a County system, the fact that the nearest facilities are over 15 miles away would preclude any finding of duplication. In re: Objection to Southern States , Docket No. 861649-WS, Order No. 18525, 87 FPSC 12:125, 126 (December 9, 1987)(City does not have lines in the territory and is not now serving the territory therefore no duplication or competition exists); In re: Objection to Seacoast, Docket No. 850597-WS, Order No. 17158, 87 FPSC 2:34,36-37 (February 5, 1987)(no competition or duplication where nearest County facilities are eight to ten miles away).

ADDITIONAL ISSUES

The following are additional issues on which Commissioners have requested briefing.

ISSUE 22: What are the implications for this case of the decisions in the Alafaya Utilities and Lake Utility Services cases?

NUC: **These cases support the proposition that the Commission should evaluate NUC's application based on the statutory standards in Chapter 367, and should give no weight to the fact that St. Johns County may ultimately claim in court that its right to serve Nocatee is superior to NUC's.**

The Commission has exclusive jurisdiction to grant certificates to private multi-county utilities; it has no jurisdiction over service by governmental bodies such as St. Johns County. In making its certification decisions, the Commission is required to consider potential service by a governmental body only to the extent that the granting of a certificate would result in competition with, or duplication of, an existing governmental

utility system that was ready, willing and able to provide service in a timely fashion. As discussed in Issues 9 and 21, there is no such competition or duplication in this case.

Alafaya Utilities, Inc.

The facts in the Alafaya case, In re: Application of Alafaya Utilities, Docket No. 951419-SU, Order No. PSC-96-1281-FOF-SU, 96 FPSC 10:209 (October 15, 1996), aff'd sub nom. Ovideo v. Clark, 699 So.2d 316 (Fla. 1st DCA 1997), were as follows. Alafaya applied to extend its service territory to several contiguous parcels of land which were located within the City of Oviedo. The City opposed the extension on the grounds that the City's Wastewater Master Plan called for service by the City, that the City's Comprehensive Plan contained a policy that the City was to be the utility provider, and that certification of Alafaya would result in duplication of or competition with the City's system.

In amending Alafaya's certificates over the City's objection, the Commission found, among other things, that:

(1) the City had not finalized its plans for how it would serve the territory and, depending on the method chosen, it was either impossible or unlikely that the City could provide service in a timely manner, 96 FPSC 10:209 at 218;

(2) there could be no competition with or duplication of a proposed system which did not yet exist, id. at 223;

(3) the Commission was not bound by Comprehensive Plan provisions that designated the City as the preferred provider, since the overriding goal of the plan was to ensure the provision of central wastewater service, id. at 221; and

(4) in granting the application:

> ...it is not necessary that we judge whether or when the City could serve the territory, It is only necessary to conclude that the City failed to demonstrate Alafaya's inability to adequately serve the disputed territory, or how the application was otherwise contrary to the public interest.

Id. at 227.

Upon appeal by the City, the First District Court of Appeal affirmed the Commission's order in an opinion that discussed only the comprehensive planning issue. On that point, the court concluded that the Legislature had chosen not to require the Commission to defer to a local comprehensive plan, and that it would not read additional requirements into the otherwise unambiguous statute. 699 So.2d at 318.

Lake Utility Services, Inc.

In the Lake Utility Services (LUSI) case, the utility applied to the Commission for a certificate extension. The City of Clermont objected to that application, then withdrew its objection one week before the final hearing. The Commission thereupon granted the requested certificate amendment. In re: Lake Utility Services, Inc., Docket No. 920174-WU, Order No. PSC-92-1369-FOF-WU (November 24, 1992).

When the City subsequently advised a developer within LUSI's territory that it was required to obtain utility service from the City in order to obtain development approval,

LUSI sued in circuit court for a declaratory judgment that it had the exclusive right to provide water service. The City responded by claiming that it had the exclusive right to serve pursuant to an ordinance that had established a Chapter 180 utility district prior to the date of LUSI's certificate from the Commission.

In upholding LUSI's right to serve, the Fifth District Court of Appeal began by stating the controlling principle of law that the entity which first acquired the legal right to provide service to the disputed area and which has the ability to do so is the entity with the exclusive legal right to serve. Lake Utility Services, Inc. v. City of Clermont, 727 So.2d 984, 988 (Fla. 5th DCA 1999) citing City of Mount Dora v. JJ's Mobile Homes, Inc. 579 So.2d 219 (Fla. 5th DCA 1991).[8] Although the court found that Clermont was "first in time" because its ordinance predated LUSI's PSC certificate amendment, the court went on to find that the City's failure to exercise its duty to promptly and efficiently provide service when needed resulted in a waiver of its right to serve. Id. at 990-911. Accordingly the court upheld LUSI's exclusive right to serve the disputed territory.

Implications for This Docket

Under the Alafaya, LUSI and Mount Dora cases, it is clear that this Commission must judge NUC's application against the statutory standards in Chapter 367 without considering whether St. Johns County may ultimately claim a prior right to serve the territory at issue. So long as NUC's proposed service does not duplicate or compete with

[8] The Mount Dora case set out both the first-in-time principle and the qualification that the first-in-time entity loses its right if it does not have the present ability to serve in a timely manner. 579 So.2d at 225.

any existing County service -- which it does not -- the matter of which entity ultimately has the legal right to serve is a matter for the courts. Based on the remoteness of the County's existing facilities and other factors, NUC is confident that if the Commission grants NUC a certificate, NUC will prevail in any future litigation by or against the County. The possible outcome of such an action, however, is not a matter that the Commission should consider in making its certification decision in this case.

ISSUE 23: Should the Commission consider denying both pending applications with the expectation that JEA would then provide retail service to Nocatee?

NUC: **No. Based on the legal positions that it has previously taken, if both applications were denied, St. Johns County would likely argue that JEA does not have the right to serve Nocatee on a retail basis. Resolving that issue could involve extended litigation that would prevent Nocatee from receiving utility service in a timely manner.**

Commissioner Jaber has asked whether it would be a viable option for the Commission to deny both NUC's application and Intercoastal's application on the assumption that JEA would step in and serve the Nocatee development on a retail basis. The short answer is no. If the Commission took that approach, it would not be fulfilling its obligation to grant a certificate when there is a demonstrated need for service and a qualified applicant. Instead, the Commission would unintentionally be encouraging a protracted legal battle with St. Johns County that could delay service to Nocatee. It would also be making the unwarranted assumption that JEA is willing to provide the full panoply of utility services, including reuse, on a retail basis.

Likelihood of Litigation

Prior to the time it withdrew from this proceeding on the eve of hearing, St. Johns County had taken the legal positions that (1) the County intends to serve the St. Johns County portion of Nocatee (Prehearing Order, page 14); and (2) JEA does not have the authority to provide utility service in St. Johns County without the County's permission. (Prehearing Order, page 12; D.Miller, T 233)

Based on these positions, if the Commission denies both applications, it is likely that the County would oppose in court any attempt by JEA to serve Nocatee on a retail basis. In that regard, NUC expects that the County would argue that (a) under St. Johns County Ordinance No. 99-36 and Resolution No. 2000-82, Nocatee is located within the County's "exclusive service territory" and the County has thereby established a right to serve that is prior in time (and hence superior) to any right that JEA might have; and (b) that pursuant to an Interlocal Agreement executed between the County and JEA at the time that JEA acquired JCP Utility Company (a private utility providing service to the Julington Creek Plantation in St. Johns County), JEA has given up any right that it might otherwise have had to provide retail service to Nocatee. JEA, on the other hand, contends that it has the right to serve Nocatee on a retail basis without the County's permission. (Kelly, T 569)

NUC is confident that if JEA chose to litigate with the County, JEA would ultimately prevail. However, during the time such litigation was on-going, Nocatee would be denied service from any source.

JEA's Willingness to Serve on a Retail Basis

There is no evidence in this record that JEA would agree to provide reclaimed water service on a retail basis within Nocatee. In fact, the record supports an inference that it would not. JEA's wastewater rates currently subsidize its reuse rates and JEA does not provide retail reuse service in Duval County. (Perkins, T 621, 623) If JEA proposed to extend retail service to Nocatee, it would open itself to a claim by Duval County residents that they were being required to subsidize a higher quality of service to residents in St. Johns County than JEA provides to residents in Duval County. (See D.Miller, T 195) This could well lead JEA to decline to offer reuse service to Nocatee; in which case Nocatee would have no practical way to comply with the provisions which require 100% reuse as a precondition to development.

Summary

The Commission should discharge its obligation to rule on the competing service proposals properly before it and should refrain from assuming that service would be available on a retail basis from JEA in the event it were to deny both applications.

ISSUE 24: In light of the agreement between JEA and NUC for operations, management and maintenance service, is NUC exempt from Commission jurisdiction pursuant to Section 367.022(2), Florida Statutes?

NUC: **No. NUC is not a "system[] owned, operated, managed, or controlled by governmental authorities" within the meaning of Section 367.022(2).**

Section 367.022(2), Florida Statutes, exempts from Commission jurisdiction "systems owned, operated, managed, or controlled by governmental authorities." Commissioner Jaber raised the issue of whether, as a result of the operations, management and maintenance agreement between NUC and JEA, the resulting system would be "managed or controlled" by JEA so as to divest the Commission of jurisdiction over NUC's application.

NUC has found no judicial decisions, and only one Commission order, which are relevant to this question.[9] In re: Windstar Development Company , Docket No. 870406-SU, Order No. 17659, 87 FPSC 6:59 (June 4, 1987). In Windstar the Commission considered a request for a governmental exemption by a private sewer company which had deeded its utility system to Collier County and then leased it back until the County's off-site sewer facilities were ready to receive sewage from the Windstar development. Since the system was "owned" by Collier County, Windstar claimed entitlement to the governmental exemption.

In denying the exemption, the Commission found that the arrangement between Windstar and the County "does not provide for any meaningful economic regulation of or regulatory oversight over Windstar's operation." In that situation "we do not believe that the Legislature...intended that a utility, whose ratesetting operations and management are under private control, would be entitled to an exemption." Id. at 60. In essence, the

[9] There are numerous Commission decisions finding that particular governmental bodies are not jurisdictional, but those all involve systems where the government owns and operates the system in its proprietary capacity.

Commission found that to qualify for the governmental exemption, the governmental entity would need to exercise management and control to such a degree that it was responsible for setting rates and for operation of the utility.

In NUC's case, JEA will have no ratesetting authority over NUC. Further, the operations and management services provided by JEA are those of an independent contractor, not of a proprietor. NUC has the right under the contract to terminate the O&M relationship on proper notice, and ultimately has the right to require JEA to perform to the standards set forth in the agreement. In this situation, JEA does not "own, operate, manage or control" NUC within the meaning of the governmental exemption.

ISSUE 25: Should the Commission defer a decision in these cases until after conclusion of a pending administrative challenge to the DCA's decision to find the St. Johns County Comprehensive Plan Amendments for Nocatee in compliance with Chapter 163, Florida Statutes?

NUC: **No. In order to avoid delaying the Nocatee development, various licensing efforts must proceed in parallel. The Commission should not defer a decision in this case, particularly when there is a substantial likelihood that the Commission's decision will itself be appealed.**

Based on the testimony by Mr. Gauthier (see Issue 1), Commissioner Palecki asked the parties to address in their briefs whether the Commission should defer its decision in this docket until after the pending challenge to the St. Johns County Comprehensive Plan Amendments is complete and a final order has been issued by the Department of Community Affairs either approving or rejecting those amendments. (T 966)

The Commission should not defer its decision. The permitting for a large scale project such as Nocatee is a massive undertaking involving approvals from many local, regional and state agencies. In order to begin development in a timely fashion, many of these approvals need to be pursued in parallel and every approval is potentially subject to administrative litigation and/or appeal by one or more entities. The fact that one private group has challenged one required approval should not be a basis for the Commission, or any other agency, to defer action on the approvals that are within its jurisdiction.[10] This is particularly true where, as here:

(1) the local government has taken the necessary action to amend the Comprehensive Plan and the DCA has issued a favorable notice of intent to find those amendments in compliance with the law; and

(2) the governing law, Section 367.045(5)(b), Florida Statutes, specifically provides that in making certificate decisions, the Commission is not bound by the local comprehensive plan of the county or municipality. Indeed, the Commission is not even required to consider such plan unless the local government has objected to the certificate application on the grounds of inconsistency with the comprehensive plan. No such objection has been filed in this case.

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[10] Deferring a decision in this case would be analogous to the Commission deferring a decision on the prudency of proceeding with a natural gas pipeline project until every approval required for construction of the project had been obtained from every state and local government having any jurisdiction over the project. In both cases, deferring a decision would not be wise regulatory policy.

There is a danger of substantial harm to NUC and DDI if the Commission were to defer its decision. Both the final approval of the Comprehensive Plan amendments and the determination of the authorized utility provider are on the critical path for the project. Development cannot begin until the amendments are approved and cannot begin until there is an authorized utility provider.

The Commission may recall that its jurisdiction in this docket to grant new multi-county certificates was challenged by Citrus, Hillsborough and Orange Counties. Those parties attempted to appeal the Commission's decision finding that it has jurisdiction to proceed and denying those counties intervenor status. The District Court of Appeal held that the counties attempt to appeal was premature, and that the question of their standing could be reviewed on an appeal from the Commission's final order in this docket. Given the possibility, or even probability, that the Commission's certification decision will be appealed, there is a substantial danger of a project-affecting delay if the Commission defers its decision until after the Comprehensive Plan Amendments have become final.[11]

RELIEF REQUESTED

For all the reasons stated above, NUC urges the Commission to grant its application for water and wastewater certificates in Duval and St. Johns County and to deny the competing certificate application filed by Intercoastal.

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[11] As discussed under Issue 22 above, there is also a possibility that the relative rights of NUC under a PSC certificate and St. Johns County under a local utility ordinance will have to be resolved in the courts before the Nocatee development can proceed.

RESPECTFULLY SUBMITTED this 6th day of June, 2001.

HOPPING GREEN SAMS & SMITH, P.A.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served this 6th day of June, 2001, on the following:

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EXHIBIT A

EXCERPTS FROM

ST. JOHNS COUNTY DEVELOPMENT ORDER FOR NOCATEE

be elevated to a height that is above the base flood elevation of the FEMA 100-year floodplain.

21. **Water Supply.**

(a) **Potable Water.** A central water supply system shall provide potable water needs for all development within Nocatee. There shall be no on-site water treatment plants within Nocatee. There shall no on-site potable water wells and no surficial aquifer wells except those serving as a backup supply for the reuse system. No building permits shall be issued for any portion of the Nocatee development until the Developer has provided the County written confirmation from the providing utility that adequate capacity of treated potable water and service/distribution infrastructure will exist for the development proposed.

(b) **Reuse.** Irrigation demands within Nocatee shall be met using reuse water. Reuse water shall consist of the following sources:

(i) Wastewater effluent treated to Public Access standards and delivered to the end user by the utility provider.

(ii) Stormwater.

(c) **Wells.** There shall be no on-site potable water wells within Nocatee. Irrigation wells will be allowed only as a back-up source to the reuse supply system. The three existing wells may be used for fire protection and/or a back-up source for reuse supply. The Developer shall include deed restrictions prohibiting the installation of private wells in all conveyances within Nocatee, except as provided above. All other existing ground water wells and all wells discovered during the development process shall be reported immediately to the District and St. Johns County. Any abandoned wells discovered during development shall be properly

plugged and abandoned in accordance with District rules and regulations.

(d) **Water Conservation**.

(i) The Developer shall implement a customer and employee water conservation education program as specified in section 12.2.5.1(e) of the St. Johns River Water Management District, Consumptive Use Permitting Applicant's Handbook. The curriculum of the education program shall be supplied with the first annual Monitoring Report until buildout.

(ii) The Developer shall prepare and submit a xeriscape plan for each Phase of development in association with the District Consumptive Use Permit.

(iii) The Developer shall evaluate irrigated turf acreage and establish limits in association with the Consumptive Use and/or Environmental Resource Permit.

(iv) The Developer shall display information on xeriscaping and/or native vegetation and/or drought-tolerant vegetation (SJRWMD Xeriscape Plant Guide), water conservation guides & IFAS's Xeriscape plant guides and IFAS Cooperative Extension Services' "Florida Yards and Neighborhoods" materials) in a prominent location in the Nocatee sales offices.

(v) The Developer shall utilize at least 70% of fertilizer use in slow-release/organic form throughout developer-maintained areas (or any entities that may take over in the future). These areas include golf courses and common areas serving commercial areas and residences.

(vi) The installation of once-through cooling is prohibited. Developer shall require tenants to use air-cooling where feasible.

(vii) Cooling towers shall maximize cycles of concentration by providing

efficient water treatment.

(viii) Decorative and ornamental fountains are prohibited except for those that use reclaimed water and serve both ornamental and recreational uses, consistent with Florida Laws and rules.

22. **Wastewater Management**. Central sewer service shall be provided for the Nocatee DRI, except for temporary, and low-flow, isolated restroom facilities, such as golf course restrooms, until central service is available within 1,000 feet of the facility. Further, septic drain fields shall be no closer than 75 feet from a wetland or water body and associated upland buffers. There shall be no on-site wastewater treatment plants within Nocatee, and there shall be no wet weather wastewater effluent discharges to the Tolomato River or its tributaries. No building permits shall be issued for any portion of the Nocatee development until the Developer has provided written confirmation from the providing utility that adequate wastewater treatment capacity and service/distribution infrastructure will exist to serve the development proposed.

23. **Stormwater Management**.

(a) **Stormwater Treatment**. The stormwater system for Nocatee will be designed using multiple discharge points throughout the project in order to minimize the intensity and volume of discharge from any single point, thereby reducing the potential for flooding and erosion. All drainage improvements will be designed so that the rate of stormwater which flows into the creeks and tributary wetland systems is equal to or reduced from the pre-development conditions. The normal water elevation of each stormwater management facility will be designed and established so that the adjacent wetland systems are not adversely affected. It is anticipated that wet detention