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BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION
DOCKET NOS. 990696-WS and 992040-WS

POST-HEARING MEMORANDUM FILED ON BEHALF OF INTERCOASTAL UTILITIES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

CASES

FLORIDA PUBLIC SERVICE COMMISSION ORDERS

FLORIDA ADMINISTRATIVE CODE

FLORIDA STATUTES

INTRODUCTION AND BACKGROUND

In accordance with Commission practice, Intercoastal hereby submits a detailed Post-Hearing Memorandum which addresses each of the enumerated issues posed in Commission Order No. PSC-01-1032-PHO-WS, as well as issues which Commissioners requested be briefed at the time of hearing.

On May 7, 8, and 9, 2001, in St. Augustine, Florida, the full Commission heard testimony and received exhibits in this consolidated proceeding.

At the time of hearing, Intercoastal presented the expert testimony of Intercoastal's President, Mr. Buddy James, Mr. Jim Miller, Mr. Mike Burton, Mr. Jim Bowen, and also introduced into the record, by stipulation of counsel and by order of the Commission, all of the prefiled testimony of M.L. Forrester, who was unable to attend the hearing because of a medical emergency. Also by stipulation of all counsel, and pursuant to order of the Commission, Mr. Forrester's Prefiled Redirect Testimony was filed with the Commission, on May 23, 2001.

Intercoastal Utilities is an existing utility serving approximately 3,500 customers in northeast St. Johns County. Intercoastal is currently regulated by the St. Johns County Board of County Commissioners. Both Applications, by Intercoastal to extend its service territory and by Nocatee Utility Corporation ("NUC") for an original certificate, were filed before the Public Service Commission because each applicant contends that it proposes to provide service by and through utility systems which transverse county boundaries (the Duval County/St. Johns County line).

St. Johns County participated in this consolidated proceeding from its inception until the business day before the date set for the formal administrative hearing, on which date it withdrew from the proceeding.

JEA participated as an interested party. JEA proposes to provide bulk utility service to NUC. The evidence also revealed that JEA desires to provide retail service to the Nocatee development, as well as to other areas in northern St. Johns County. JEA has a contractual obligation to support NUC in this proceeding.

The testimony and evidence in this proceeding proved conclusively that Intercoastal has the managerial, operational, technical and financial ability to effectuate its Application. The principals of Intercoastal and its related party, Jax Utilities Management ("JUM"), have a vast amount of experience in the operation of utilities in northeast Florida (perhaps more experience than the principals of any other private utility company in Florida). Additionally, the relationship between JUM and Intercoastal is not one which has recently been formed, nor one which was cobbled together as an afterthought. JUM has performed the services it performs on behalf of Intercoastal since Intercoastal came into existence over 18 years ago. Intercoastal and JUM are related parties which share common goals and common beliefs, and who work together as a single entity to the benefit of both the utility and its present and future customers. Additionally, those employees within JUM who perform the operational and maintenance tasks necessary to make any utility run effectively and efficiently are, in both form and substance, Intercoastal employees. They do nothing other than provide those services on behalf of Intercoastal. In that regard, no valid comparison can be made between Intercoastal's utilization of JUM, its related party and long-time partner, and NUC's total and complete abdication of its utility responsibilities to JEA, an unrelated utility which obviously has its own agenda.

Intercoastal proposed a plan of service which demonstrates conclusively that it will provide effective, efficient, and environmentally sensitive water, wastewater, and reuse services to the areas to which it has proposed to expand. Intercoastal's plan of service both utilizes its existing infrastructure and proposes the construction of innovative and cost-effective facilities which may

be utilized to serve the expanded service area, including the Nocatee development. The evidence revealed that the Nocatee landowner, of which NUC is a wholly-owned subsidiary, has attempted to throw up illusory roadblocks at every turn to Intercoastal's Application. In point of fact, Intercoastal is ready, willing, and able to provide the service which the Nocatee landowner claims it will require, even to the extent those service demands are artificially inflated at this point in time. One example of this is the landowner's over-stated claims for reuse demands. Intercoastal's plan of service can, and will, meet those reuse demands on day one that there is a need for service in the Nocatee development. For example, even though the evidence revealed that Nocatee's three golf courses will not require 650,000 gallons per average annual day for reuse on those properties, Intercoastal can and would meet such a demand, if it was ever necessary.

Intercoastal's plan of service will benefit Intercoastal's existing customers both through the reduction of rate pressure in future years (by increasing economies of scale as Intercoastal's system grows), and by the possible relocation of Intercoastal's facilities east of the Intracoastal Waterway so that all the service provided by Intercoastal to its various territories can be consolidated in the facilities it has proposed to construct to service Nocatee and the other territories for which it has applied. Additionally, Intercoastal's principals have committed to reduce Intercoastal's rates, and Intercoastal's experts believe that such a reduction in rates would be an inevitable consequence, if Intercoastal's Application is granted. Intercoastal's principals fully comprehend, as they always have, the commitment which Intercoastal's Application requires, and Intercoastal's shareholders have never failed to obtain whatever financing, manpower, expertise, or other resources are required to operate Intercoastal in an efficient and effective manner.

Despite a considerable amount of posturing on the part of Intercoastal's opponents in this Application, only a single customer has testified during the two portions of this hearing set aside for customer testimony, and that customer only had a few questions about whether or not Intercoastal's

present wastewater treatment plant would be expanded (it will not). Additionally, most of the "testimony" from the Sawgrass Association, which was comprised of an individual who did not live in the service area and another who has only recently become the President of the Association, did not reflect negatively either on Intercoastal's present quality of service nor on its proposed Application.

Unlike Intercoastal's Application, the evidence conclusively revealed that the Application of NUC is not all it appears to be. NUC is a brand new entity which did not produce a shred of evidence that any principal, owner, officer, or director had even one day's experience in the utility business. NUC is clearly nothing more than a shell created by the current owner of the property which will be developed as Nocatee to attempt to hold on to as much profit from the development of that land as is conceivably possible. NUC is clearly a strawman for the Jacksonville Electric Authority ("JEA"), who will obviously be the real utility in interest with regard to the Nocatee development despite the fact that the vast majority of the development lies within St. Johns County (and JEA is a Duval County governmental entity) and despite the fact that it is obvious that St. Johns County does not desire JEA to invade St. Johns County thusly.

In contrast to Intercoastal, the evidence clearly established that granting NUC's Application, and denying Intercoastal's Application, would result in service to the St. Johns County portion of the development by an entity who will neither be politically responsive to its St. Johns County consumers, nor who will be regulated by any unbiased third party, such as a Public Service Commission. In granting Intercoastal's Application, the Public Service Commission will know what it is getting and can have confidence that the protections the legislature has created for such PSC-regulated utilities will be available to all of the customers of Nocatee, including those within St. Johns County. Granting NUC's Application will not, in any way, shape or form, provide such assurance.

Additionally, the evidence in this proceeding clearly revealed that NUC's parent, the present owner of the Nocatee property, manipulated the DRI process while this case was pending, so that Intercoastal would not initially be able to meet the "requirements" of the Development Order. Despite the fact that the initial letter of intent between the landowner and JEA specifically provided for onsite facilities; despite the fact that the initial testimony of NUC only stated that "irrigation wells" would not be allowed on the property; and despite the fact that NUC chose not to inform any of the commenting agencies in the DRI process that this case was pending or that Intercoastal's plan of service had been proposed; NUC continually trumpeted at the hearing that the Development Order was contrary to Intercoastal's plan of service. However, the evidence clearly revealed that these "requirements" were not even made clear to the commenting agencies in the DRI process until July of 2000, long after this case had started, and that these "requirements" did not come from the Water Management District, did not come from the Department of Community Affairs, and did not come from any other commenting agency or entity in terms of either a directive or a requirement. In any case, it was the opinion of the only expert in the DRI process who testified in this proceeding that the Development Orders could be changed by the St. Johns County Commission, so as to allow onsite facilities, with a "minor" modification (which is a relatively simple process under Florida Statutes). To the extent the landowner has a concern, if Intercoastal's Application is granted, then the evidence and exhibits made clear that the developer and NUC will, in fact, be hoisted upon their own petard. This Commission should not tolerate such a blatant manipulation of the DRI process so as to unduly influence the outcome of this PSC proceeding.

The proposed use of JEA by NUC not only creates the specter that NUC will "cash out" and quickly move out of the picture if the PSC grants its Application, but it also creates the specter that JEA (who has the right to impose a surcharge upon service provided outside of the boundaries of Duval County), will be providing service to Nocatee's St. Johns County customers in perpetuity,

although it will neither be regulated nor politically responsive to that customer base. Additionally, JEA's proposal to provide water from wells in Duval County to those portions of the development that lie with St. Johns County violates the Local Sources First policy.

Finally, NUC and JEA's plans to transport water from wells in Duval County to serve customers within the confines of St. Johns County have been advanced despite the fact that the Nocatee landowner caused to be done an expensive and thorough study which proved there was an ample amount of high quality water located beneath the development as is necessary to serve the development through build out.

While there was a considerable amount of posturing (on behalf of the developers' related party) to the effect that there was no need for service in the lands outside of the Nocatee development (for which Intercoastal has applied), the fact of the matter is that these are the same principal owners who also claimed publicly that Nocatee itself would never be developed until it was suddenly announced that it would not only be developed, but developed on an intensive and massive scale. Additionally, JEA apparently does not believe that the lands east of the Nocatee development do not need service, since they have contractually procured the right to place JEA facilities through the middle of the Nocatee development which exit out the eastern side the development for the precise reason of providing services to areas east of the development. Presumably, JEA is not foolish enough to construct facilities if it believes they are not needed. Clearly, JEA anticipates not only a need for service to those areas east of the Nocatee development, but also that it will be able to procure the easements and/or ownership necessary to construct facilities to provide such service. There is no inherent reason why JEA should be able to obtain the easements or ownership necessary to provide such service, but that Intercoastal would not be able to do so.

While JEA and NUC attempted to create the impression that Intercoastal is for sale, in point of fact, Intercoastal has operated continuously in its same service area for 18 years. If anyone is "for sale", it is clearly NUC, an entity which has not even bothered to assemble an in-house team with any experience in either developing properties or running or operating a utility. NUC is clearly nothing more than a large landholder's business decision to maximize its profits by attempting to hold onto the right to utility service to its lands. JEA clearly desires to provide retail service to the Nocatee development, and if NUC is certificated it will certainly disappear as soon as the right price is arrived at between JEA and NUC's owners.

Additionally, it is clear that even NUC's own plan of service proposes a utility which is effectively exempt under the Florida Statutes. NUC will not only be operated and managed, from top to bottom and from side to side, by JEA, but in fact it will be controlled by JEA for all practical purposes. Conversely, there is no evidence to suggest, nor could such evidence be produced because the fact of the matter is contrary, that JUM controls Intercoastal in any way, shape or form.

Finally, there is some evidence in the testimony in this proceeding that was produced solely to sway this Commission into considering, in some form or fashion, the fact that Intercoastal filed an Application to extend its territory before the St. Johns County Water and Sewer Regulatory Authority a few years ago. The Authority is the alter ego of the St. Johns County Board of County Commissioners, who had intervened in that case as an opponent to Intercoastal's Application. In point of fact, common sense and the evidence reveal that this proceeding involved different parties, a different set of facts, different laws and precedents, a different application by Intercoastal, different costs, a different plan of service, different territory, and a different set of circumstances entirely.

DISCUSSION OF ISSUES

PRELIMINARY ISSUE

Are there policy considerations that indicate that this Commission should not deny both Applications?

There are policy considerations which should persuade this Commission that it would not be appropriate to deny both Applications in this case.

Initially, Intercoastal has proven its entitlement to the service territory extension it seeks and certainly the Commission should not deny its Application in the face of such proof. However, perhaps the larger issue which indicates that the Commission should not deny both Applications in this case is that such a denial could only be predicated upon an unknown future, and upon utility service scenarios which are not a part of the record before the Commission.

In other words, the Commission wouldn't deny the Application of NUC and Intercoastal (assuming, of course, that those Applications met the minimum criteria for the granting of such Applications) unless it believed that the service was either not needed or that any needed service would be met by some entity other than NUC or Intercoastal. Initially, it is incontroverted there is a substantial need for service in the territory for which Intercoastal has applied, and that there will be a substantial need for service in the Nocatee development. Secondly, there is absolutely no evidence in this proceeding how that service would be provided by the only other two utilities who have even remotely or inferentially proposed to provide such service (JEA and St. Johns County). There is no evidence of record as to how St. Johns County would propose to provide service to these areas upon which the Commission could consider the public interest, and act in the best interests of the future rate payers in this fast growing area of northern St. Johns County. Likewise, there is absolutely no record in this proceeding as to how JEA would provide retail service to the Nocatee development (much less the other areas for which Intercoastal has applied), and in fact JEA devoted

a considerable amount of energy in this proceeding to that precise fact (that is, that JEA did not intend to provide retail service to the Nocatee development).

Certainly, this Commission's responsibility is to effectuate that legislative scheme which provides for the provision of water and wastewater utility services in this State by investor-owned utilities. There is certainly no preference in Florida law for utilities operated by governmental entities, and there is no evidence of record in this case which would or could serve as the basis for the Commission making any "determination" or "finding" that retail service to these areas by either JEA of St. Johns County is preferable to what has been proposed by Intercoastal.

Whether the legislative scheme that created the status quo is or is not wise cannot be the Commission's concern in this proceeding. The Commission has no jurisdiction over St. Johns County or JEA and should properly adjudicate the Applications of NUC and Intercoastal and let the chips fall where they may as to any subsequent litigation on the issues of utility services in northern St. Johns County.

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 has failed to establish that its proposed water and wastewater systems will fall under the jurisdiction of the Public Service Commission.

Initially, NUC has not factually established that its proposed systems will transverse county boundaries pursuant to Section 367.171(7), Florida Statutes. The testimony and exhibits in this case reveal that NUC, as a legal entity, will in fact own very little of the infrastructure which will comprise the utility system. NUC failed to establish, as a matter of fact, that it would own a "utility system", as that phrase is used in Section 367.171(7), Florida Statutes, which would transverse the Duval County/St. Johns County line.

The evidence and exhibits in this case also establish that NUC's proposed system will not be subject to regulation by the Commission as a utility, and will not be subject to the provisions of Chapter 367. Section 367.022(2), Florida Statutes, provides an exemption for

> Systems owned, operated, managed or controlled by governmental authorities, including water or wastewater facilities operated by private firms under water or wastewater privatization contracts as to find in s. 153.91, and non-profit corporations formed for the purpose of acting on behalf of a political subdivision with respect to a water or wastewater facility.

The evidence in this case could not have revealed more conclusively that the proposed water and wastewater system of NUC will be comprised of systems operated and managed and controlled by a governmental entity.

It is an established and incontroverted fact on the record in this case that the Jacksonville Electric Authority ("JEA") is a governmental entity. (see, e.g., TR561/L12.)

Equally unchallenged and clearly established was the fact that NUC's proposed systems will be operated by JEA. The President of NUC testified that JEA will provide the operations for the utility. (TR104/L14.) He also testified that JEA would do the collections for the utility, (TR104/L20); that JEA would do the billings for the utility, (TR104/L23); that JEA would provide the wholesale water to the development, (TR105/L01); that JEA would collect the wastewater from the development, (TR105/L04); and that JEA would provide reuse service to the development, (TR105/L07). Every task that falls within the umbrella of the phrase "operations" as that phrase is used in the utility business will be performed exclusively by JEA, a governmental entity, on behalf of NUC.

The evidence was also clear that JEA will provide the management for the utility. The President of NUC testified as much. (TR104/L17.)

JEA's operation of the utility is so pervasive, its management of the utility so thorough, and its control over the utility's product (its water, wastewater, and reuse) so complete and unfettered,

one cannot help but reach the inescapable conclusion that NUC is, in fact, controlled by a governmental authority as well as operated and managed by that same authority.[1]

ISSUE 1

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

The evidence conclusively revealed that there is a need for service in the territory proposed by NUC's Application. Although an NUC witness testified that he believes service would be needed in the fourth quarter of 2002, (TR185,L25), it should be noted that this date has been continually moving further out during the course of this proceeding. NUC's principal testified that there is currently an administrative challenge to the DRIs which has been filed by the Florida Wildlife Federation. (TR995/L13.) This could also delay the initial date on which service should be required.

ISSUE 2

Does NUC have the financial ability to serve the requested territory?

NUC probably has the financial ability to serve the requested territory.

ISSUE 3

Does NUC have the technical ability to serve the requested territory?

The evidence clearly established that NUC does not have the technical ability to serve the requested the territory. Consideration of the record as a whole clearly indicates that NUC is simply a shell which was formed to obtain a certificate so that JEA could then provide service to these large territories in St. Johns County while NUC took some of the profit off of the top. The President of the utility testified that he had no experience operating a utility, and the record contains absolutely

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[1] One might argue that this result is actually better than the alternative, i.e., management of the proposed systems by NUC itself. The President of NUC indicated that he had no experience either operating a utility, (TR104/L09), or as a developer, (TR105/L13). Be that as it may, the arrangement as presently configured renders the proposed utility as exempt from Commission regulation.

no reference of any employee of NUC, or any related party, having any experience in the utility business. (see, e.g., TR104/L11.) Likewise, the President of NUC testified that he has no development experience, and there was no evidence in the record that any employee of any related party to NUC had any development experience. (see, e.g., TR105/L10.)

The record was also clear, and in fact this point was continually reinforced by the testimony of NUC's witnesses, that not only will NUC have no employees (or even individuals who considered themselves dedicated to the necessary tasks which running a utility requires on a day-to-day basis), but NUC will only be "passing through" the services which water and wastewater and reuse utilities sell.

- JEA will provide wholesale water to the development from its wells in Duval County. (TR105/L01.) Therefore, NUC will not have its own source of water.
- JEA will collect the wastewater from the development and transmit it to wastewater treatment plants which are located in Duval County. (TR105/L04.) Therefore, NUC will not have its own facilities to treat wastewater.
- JEA will provide the reuse service to the development from plants located in Duval County. (TR105/L07.) Therefore, NUC will have to purchase any reuse it proposes to provide to the land located within the Nocatee development.
- When the customer in Nocatee gets a bill, that bill will come from JEA because JEA will do the billings for NUC. (TR104/L23.)
- When the customer pays for that bill, he will pay that money to JEA because JEA will do the collections for the utility. (TR104/L20.)
- If a customer calls with a complaint, it will be JEA answering the phone. (TR560/L17.)

Despite the fact that JEA will respond to complaints, do the collections, and process the bills, during each of those activities JEA will be dealing with an individual that does not consider its

customer. That is because JEA's own witness testified that JEA would not consider NUC's customers to be customers of JEA. (TR560/L11.) In the mind of JEA, it will have just one customer under the arrangement with NUC and that customer will be NUC itself. (TR560/L14.)

The effect on the customer of this particular arrangement, and the ramifications of the obvious fact that JEA is a governmental entity ultimately responsive only to the voters of Duval County (and which will never, as a matter of law and fact, have to answer to customers located in St. Johns County) is impossible to quantify today. However, JEA's own expert witness revealed that during negotiations with NUC, JEA exercised a higher level of concern for its customers in Duval County (including those future customers in that portion of the Nocatee development which lies in Duval County) than for customers in St. Johns County. JEA's witness testified that the right of first refusal which exists in the JEA-NUC Agreement was included because of JEA's concerns about what rates any other utility might charge JEA's customers in Duval County, and whether that utility could provide the high level of service that JEA felt their rate payers in Duval County "deserve". (TR546/L04.) The witness admitted he had a particular concern for the rate payers in Duval County, and he wanted to make sure they were taken care of in that regard. (TR546/L12.) This precise concern has previously been addressed by Florida's courts. The Fifth District Court of Appeal, in the case of the *City of Winter Park, Florida vs. Southern States Utilities*, 540 So.2d 178 (Fla. 5th DCA 1989) stated

> when a municipal utility operates beyond its corporate limits, the residents there being served do not own the utility and are not electors in that city. Query: Who regulates the municipal utility in the interest of those served outside the municipality?

NUC has not only failed to prove it has the technical ability to serve the requested territory, it has in fact done an excellent job of proving that it has no technical abilities whatsoever.

ISSUE 4

Does NUC have the plant capacity to serve the requested territory?

NUC does not have the plant capacity to serve the requested territory, and does not propose to construct the plant capacity to serve the requested territory. The evidence and exhibits at hearing also revealed that NUC's purported supplier of water (JEA) may in fact not have the present authority to provide the water that will ultimately be utilized by customers located in St. Johns County (as it testified it had).

While JEA proffered that it had sufficient capacity, by and through Consumptive Use Permits, to effectuate its agreement with NUC, the expert witness at the hearing who testified on behalf of the St. Johns River Water Management District, opined that the District's position was something else altogether. It is the Water Management District's position that JEA would have to have its Consumptive Use Permits modified before it could serve areas outside the area it indicated in its last Consumptive Use Permit application that it intended to serve, (TR864/L18), and it was the witness' understanding that JEA's last Consumptive Use Permit did not include the Nocatee development, (TR864/L24). In the opinion of the Water Management District, in order to serve any portion of Nocatee and St. Johns County, JEA would need to get its CUP modified. (TR865/L21.) The Water Management District has not even reviewed, much less permitted, JEA's service to the Nocatee development as of the time of hearing. (TR868/L25.) The Consumptive Use Permits currently held by JEA only allow for one million gallons per day to be utilized to provide service in St. Johns County, and that was for areas not including Nocatee. (TR869/L05.) While JEA acted astonished at this testimony, suggesting that it had applied for 3.3 million gallons, the Water Management District witness testified that while that may be the amount JEA applied for, the Water Management District only approved one million gallons per day in St. Johns County. (TR869/L05.)

It was the opinion of the expert witness from the Water Management District that in order to get approval for the full amount that JEA proposes to provide to consumers in St. Johns County, JEA would have to comply with the Local Sources Provision Act, and that JEA would have to have a contract or a binding agreement providing for the provision of that water outside of Duval County. (TR870/L09.) It was also the opinion of that expert that if there were any objections or any controversy regarding the provision of such service, then JEA's permit was not going to be approved. (TR870/L14.) The Water Management District witness testified that currently, the Water Management District doesn't have in its files any such agreements or contracts that would allow JEA to provide the service as they have proposed in the evidence in this proceeding. (TR870/L13.) The testimony also revealed that JEA never once brought up the 3.3 mgd request during the review process with the Water Management District and that JEA had been advised that the 3.3 mgd was not approved. (TR871/L13, TR871/L19.)

ISSUE 5

What is the appropriate return on equity for NUC?

To the extent the Commission establishes a return on equity for NUC as part of a Final Order in this case, the Commission should utilize the most current leverage formula approved as of the date of the Final Order establishing NUC's rate of return on equity in this case. This is in keeping with standard Commission policy on such matters.

ISSUE 6

What are the appropriate water, wastewater, and reuse rates and charges for NUC?

The appropriate water and wastewater and reuse rates for NUC are those proposed by NUC, as adjusted, in order to recognize the resolution of other issues in this case concerning rate base, rate of return, and operating costs. In keeping with Commission policy, to the extent that

initial rates are established for NUC, those rates should be set so as to recover 80% of expenses, and return on the NUC Phase I system at build out.

ISSUE 7

What are the appropriate service availability charges for NUC?

The final resolution of this issue is subject to the resolution of other issues concerning rate base and rates established in this proceeding. However, any consideration of the service availability charges of NUC must recognize the additional service availability charge of JEA which will be passed through to the customers within the Nocatee development, as part of the overall service availability charge of NUC.

ISSUE 7A

What is the appropriate AFUDC rate for NUC?

The establishment of the AFUDC rate for NUC should be calculated in accordance with standard Commission policy and rule for establishing such rates, utilizing the most recent information concerning cost of capital and the most recent leverage formula in effect at the time the Final Order is issued on NUC's Application.

ISSUE 8

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

It is entirely predictable that a landowner who proposes to create and certificate a utility to serve the landowner's own proposed development would "prefer" service from the related utility. This type of "landowner preference," however, should be given no weight by the Commission in this case because such "preference" is not determinative or reflective of the public interest nor is it in the ultimate interest of the future customers who will live in the areas to be developed and served. In fact, it is entirely possible that the interests of the current landowner and the interests of those

customers who will ultimately purchase property in the development and receive service may be diametrically opposed.

The seminal case in this regard is *Storey v. Mayo*, 217 So. 2d 304, 307-308 (Fla. 1968), which clearly articulates current Florida law that individuals cannot choose their utility. In that case, the Supreme Court of Florida held 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." The present landowner in this case, DDI, would obviously benefit financially from the certification of its subsidiary company, NUC, as the service provider to the Nocatee development. Florida law makes clear, however, that DDI has no right to demand or receive service by a particular utility simply by virtue of the fact that DDI would benefit from the arrangement. Accordingly, no weight should be given to DDI's preference.

The Public Service Commission has been given regulatory authority over privately-owned utilities, and for this reason it follows that a landowner "preference" should be given no weight by the Commission. "The powers of the Commission over. . .privately-owned utilities is ***omnipotent*** within the confines of the statute and the limits of organic law." *Id.* at 307 (emphasis added). Because of this, the Commission alone has "the power to mandate an efficient and effective utility in the public interest. . . ." *Id.* Again, DDI, as the present landowner in Nocatee, has no authority to select one utility over another, and the Commission's decision should therefore be based strictly on the public interest to be served with no weight given to DDI's preference.

Further, and perhaps most importantly, the present "landowner" in this case, DDI, is not the ultimate landowner who will be receiving service as a customer in the Nocatee development. Those individuals who purchase residences and other property in Nocatee are the ultimate landowners in the development. As such, the interests of those future customers is not even known in the context of a "preference" for a particular service provider, and such interests of future customers might even

conflict with the interests of the present landowner, DDI. As such, and assuming *arguendo* that a landowner preference could be considered by the Commission, it is not even possible to establish a true landowner preference at this stage in the development process since the ultimate landowners are not yet known. For example, it is entirely possible that certain residents and business owners in Nocatee will prefer to have Intercoastal as a service provider, or even St. Johns County for that matter; in fact, it is virtually certain that the residents and property owners in Nocatee will reflect a variety of "landowner preferences." Because the ultimate landowner in Nocatee is not yet known, however, it is impossible at this point to establish a landowner preference which properly reflects the public interest.

As stated previously, and simply put, regardless of whether a landowner preference is voiced by DDI or some future property owner within the development, the Supreme Court of Florida in *Storey* made abundantly clear that individuals cannot choose their utility. Therefore, any individual landowner preference should be given no weight in deciding which utility is to provide service. Based on the foregoing, the Nocatee landowner's preference – whether viewed from the vantage point of the present landowner, DDI, or from the unknown vantage point of Nocatee's future residents and property owners – should be given no weight by the Commission.

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?

Certification of NUC will result in the creation of a utility which will be in competition with, or duplication of, Intercoastal.

Initially, it is obvious that because of the existence of the so-called "Joint Projects", certification of NUC will result in JEA owning major facilities, running east-west in the Nocatee development, which have been sized to provide service to Intercoastal's present territory and the

immediately adjacent area. (see, e.g., TR563/L09.) Additionally, the westward expansion of Intercoastal's presently certificated territory is an expansion which Intercoastal has contemplated for and anticipated for a lengthy period of time, (TR314/L16), and Intercoastal's physical location, existing customer base, and in-place managerial and operational team make it the logical provider of service to Nocatee, (see, e.g., TR320/L20). There is no need for the creation of a new utility to provide those same services which Intercoastal is ready, willing, and able to provide.

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?

The statute clearly authorized the Commission to deny a request for an original certificate for "any new Class C system" under stated conditions. In interpreting this statutory provision, the issues of what constitutes a "new Class C system," as well as the underlying finding required to support that denial based upon the fact that "the public can be adequately served by modifying or extending a current wastewater system" must be made.

The question first arises as to whether the NUC proposed system constitutes a "new Class C system." Based upon the information provided by NUC for at least its first year of operation, the system will be a Class C system as defined by Commission rule (25-30.110(4), F.A.C.). Nowhere in the statutes does it require that the system must be a Class C system at build out, nor does the statute or the rule in any place refer to the need for the system to include a new treatment facility. The purpose of this statutory provision is to allow the Commission to reduce the proliferation of new wastewater utilities, where existing utilities can provide the service. That intent is furthered, regardless of whether a new system will ultimately be larger than "a Class C system" at build out.

The second question revolves around whether or not "...the public can adequately be served by modifying or extending a current wastewater system." A wastewater "system" is defined under the provisions of Section 367.021(11) as including not only pipes in the ground, but also "a combination of functionally related facilities and land." Therefore, the statute clearly does not envision a requirement that the existing system be merely an extension of existing lines and utilization of existing facilities. Rather, it clearly envisions that the current wastewater system is an existing utility company utilizing "functionally related facilities and land." The system as proposed by Intercoastal to provide service to the Nocatee development does include "functionally related facilities and land," regardless of whether new facilities are constructed and/or interconnected.

Finally, the Commission must consider whether or not it "should" deny NUC's Application, based upon its statutory provision. It is clear, from a review of the statute, that the Commission has that authority, based upon the provisions of Section 367.045(5)(a), F.S. and the related underlying statutes, and rules, as well as clear statutory intent. In deciding whether to exercise that authority, the Commission must look to the public interest and to the underlying purpose of the statute. It is clear that the underlying purpose of the statute, as noted above, is to restrict the creation of new utilities where service can be provided by existing utility companies. Such intent is nowhere limited to interconnected systems and, in fact, the statutes specifically authorize consideration of "functionally related facilities and land."

Therefore, based upon the provisions of Section 367.045(a), F.S., the Commission may deny certification to a new Class C utility, where service can be provided by "a current wastewater system." The statutory intent is clear, and includes the instant circumstances. It is in the public interest to deny the creation of a new utility where service can be provided by an existing system, regardless of whether that existing system will be physically interconnected by pipes with its old service territory. Based upon these facts and the clear statutory intent, the Commission should deny

NUC's Application as contrary to the public interest, and the clear intent of the provisions of Section 367.045(5)(a), F.S.

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?

For all of the reasons mentioned in this Brief, it is not in the public interest for NUC to be granted a water certificate and wastewater certificate for the territory proposed in its Application. The evidence has clearly established that any certificate granted to NUC will, in all probability, never be put to the use for which it is intended: to wit, to provide authorization for NUC to actually provider water, wastewater, and reuse service to the development. Rather, the certificate is more likely only to be used to raise NUC's value in the inevitable transfer of NUC's "assets" (which will be comprised primarily of the certificate) to JEA, and later to bestow some shadow authority upon JEA to provide retail service in St. Johns County against the wishes of, and without the permission of, St. Johns County. Neither NUC (which is clearly just a front for JEA) nor JEA will be politically or regulatorily responsive to the ultimate customers in the Nocatee development to the extent Intercoastal, who will be regulated by the Public Service Commission, will be. It is important to remember that the landowner of the Nocatee property will not ultimately be a customer of the utility (and, in point of fact, also will not be the "developer" of the Nocatee property). While NUC's related party attempted to impress upon the Commission the importance of "landowner's preference", it is paramount to remember that the plans of that related entity, by their very nature, mean that NUC's parent company will not ultimately be either the "landowner" or a "customer". And, JEA has not even attempted to hide the fact that it will not consider the customers of NUC to be its customers. (see, e.g., TR560/L19.) Since JEA will not consider NUC's customers to be its customers, and since NUC will have defaulted to JEA on its operational, managerial, and technical

responsibilities, it is obvious that the only utility which proposes to provide service to the Nocatee development in this proceeding which will actually consider the future customers in Nocatee to be its own customers is Intercoastal. This, in and of itself, is a strong public policy consideration for this Commission to take into account.

Additionally, it is clear that NUC cannot provide and will not provide, through the creation of a brand new utility, any service which Intercoastal cannot provide just as quickly, efficiently, and effectively. As a policy matter, there is no need to create a new utility to perform services which could easily and effectively be performed by the logical extension of an already existing utility.

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?

No. The theories of *res judicata* and collateral estoppel are not applicable in the instant case. This issue, stripped to its essence, would essentially have the Commission attempt to determine that, based upon a pattern of facts and circumstances which are unknown to the Commission except for the fact that they are alleged by the applicant's opponents, Intercoastal does not have the right under Florida law to file its Application. If Intercoastal is barred from applying for the service territory proposed in its Application, that is precisely the blind determination the Commission will be making.

Nocatee has simply failed to provide evidence sufficient to establish that the elements of *res judicata* and collateral estoppel have been met. The essential element of both collateral estoppel and *res judicata* is that the issues in both cases must be identical. *United States Fidelity & Guaranty Co. v. Odoms,* 444 So.2d 78 (Fla. 5th DCA 1984). The relief sought must also be the same. See *Daniel v. Department of Transportation*, 259 So.2d 771 (Fla. 1st DCA 1972). A review

of the substantive facts leads to the clear conclusion that neither doctrine is applicable to this proceeding.

In the proceeding before the St. Johns County Water and Sewer Authority , DDI complained that Intercoastal should not be allowed to extend its service area to serve its prospective development because the first phase of that development was located in Duval County and DDI did not want two separate providers of water and sewer service for its development. Now, Nocatee conveniently argues that the St. Johns' portion of Intercoastal's Application has already been litigated and should therefore be summarily denied by this Commission. These two arguments, in and of themselves, reveal that Intercoastal's Application before the Commission is not the same application Intercoastal pursued before St. Johns County. In actuality, this is only one of dozens of factual matters that differ between the instant application and the prior application of Intercoastal in St. Johns County which are virtually unknown to the Commission at this point in time. Further, and perhaps most importantly, the County's withdrawal from this proceeding at the eleventh hour and fifty-ninth minute assured that the Commission would never be in a position to question the County in order to compare the facts of the prior and instant applications. As such, the Commission cannot compare the facts necessary to make a determination as to whether *res judicata* or collateral estoppel even applies here.

It is axiomatic that in order for the issue litigated before the Authority to be identical, the applicable substantive law must be identical. *The Florida Bar v. Clement*, 662 So.2d 690 at 697 (Fla. 1995). That is clearly not the case in these proceedings. In the prior case, St. Johns County was not operating under Chapter 367. In the prior case, St. Johns County was not operating under the Commission's Administrative Code Rules. In the prior case, St. Johns County was not operating under the Commission's precedents, case law and policies. In this case, the Commission will not be operating under the St. Johns County Ordinance applicable to the Authority. In this

case, the Commission will not be operating under the rules, precedents and policies of the Authority or of the St. Johns County Board of County Commissioners.

Further, as noted by the Court in *University Hospital, Ltd., v. Agency for Health Care Administration,* 697 So. 2d 909 (Fla. 1st DCA 1997), collateral estoppel does not apply where unanticipated subsequent events create a new legal situation, and *res judicata* cannot bar a subsequent application for a permit if the second application is supported by new facts, changed conditions or additional submissions by the applicant. These theories apply to the re-litigation of an application before the same agency. Thus, even if the earlier application had been before this Commission, Intercoastal could have filed the instant application since these principles would apply. However, in the instant case, the application is before a different agency, applying different rules, policies and objectives and for a different "permit.".

The instant application differs from the one which Intercoastal filed with the Authority in its scope, in its projected costs, in its specific implementation of Intercoastal's plan of service, etc. Clearly, there is no identity in relief sought by Intercoastal in the St. Johns County proceeding and the instant proceeding. See *Brock v. Associates Finance, Inc.*, 625 So.2d 135 (Fla. 1st DCA 1993).

Based on the foregoing, Intercoastal is not 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.

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?

This issue is a non-issue as it relates to Intercoastal and is an issue raised by the County who subsequently elected, for whatever reason, not to participate in this proceeding.

Intercoastal has clearly established, and there was no evidence or even attempted cross-examination to the contrary, that its proposed service will transverse the Duval County- St. Johns County boundary. Unlike NUC, Intercoastal will not contribute the major facilities through which it proposes to provide water, wastewater and reuse service to another, unrelated utility (as in the case of NUC and JEA). Unlike NUC, Intercoastal is not a mere shell who will be the regulated utility, and the provider of utility services to the ultimate customers in the Nocatee development in name only. Intercoastal's service to the Nocatee development, and the other areas for which Intercoastal has applied, will flow naturally from Intercoastal's present service territory and are a logical extension of that present service territory from its present confines within St. Johns County to include those portions of the Nocatee development that lie within Duval County. The Commission should have full confidence that if Intercoastal is granted the certificate, it is Intercoastal who will provide the services authorized by that certificate. The testimony and exhibits at the time of hearing revealed conclusively that, unfortunately, the Commission cannot have the same confidence with regard to NUC.

ISSUE 13

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

There is a need for service in the territory proposed by Intercoastal's Application. The need for service in the Nocatee development is obvious, a matter of substantial testimony in this proceeding, and incontroverted. The need for service in those territories which lie between Intercoastal's existing territory and the anticipated boundaries of the Nocatee development may seem less immediate, but the inclusion of those territories in Intercoastal's certificated service area will allow both the location and planning of facilities to serve Intercoastal's entire existing and anticipated service territories in a logical and orderly fashion.

It was obvious that the only other real utility-in-interest in this case, JEA, believes that there are needs for service in the other territories for which Intercoastal has applied. Initially, the Joint Projects, which will be owned by JEA even though they lie within the heart of the Nocatee development (and NUC's requested service area), were sized and located so that JEA might provide service to areas in northeastern St. Johns County and/or the Marsh Harbor development. (TR563/L09.) These are the same areas in northeastern St. Johns County (as is the Marsh Harbor development) for which Intercoastal has applied.

Additionally, although this Commission heard testimony from NUC's related party that there is no present intention to develop its property adjacent to Nocatee, that testimony came from the same individual who was reported in the press in 1997 to have made very similar statements regarding the whole of the DDI/Davis Properties, which would include the Nocatee project. This disavowal of any intention to develop those properties appeared in the press only 90 days prior to the time the Nocatee development planning has now been revealed to have begun. (TR346/L16.) Common logic dictates that even in the early stages of the Nocatee construction, the adjacent properties will experience an increase in both their desirability for development and also their value. (TR346/L21.) The resulting spinoff development pressure will come and will likely change the intent of those landowners with respect to land sales. (TR346/L23.). The granting to Intercoastal of the entirety of the requested territory, will allow Intercoastal to continue expansion of its future master service planning for such improvements. (TR347/L06.)

The disingenuous disavowal by NUC's related party of any intentions to develop those lands outside of the Nocatee development is, as is the case with the "conditions" in the Development Orders, a clear case of situational principles which appear to coincide quite nicely with NUC's plans and which are, not surprisingly, at odds with Intercoastal's proposed plan of service. The Commission should see that testimony, and that strategy, for exactly what it is.

The Commission should also be mindful that this testimony came from the same individual who admitted that he was not aware of any harm in Intercoastal getting the territory Intercoastal had requested, other than the fact that if Intercoastal has it, "Nocatee can't have it if it changes its mind." (TR998/L22.) That same individual admitted there are also no deed restrictions that would prohibit the development of the adjacent properties, and there are no conservation easements related to that property. (TR999/L08.) Oddly, that same witness, Mr. Jay Skelton, indicated he would not object to Intercoastal being certificated that adjacent territory "if it was developed ..." (TR1000/L22.)

ISSUE 14

Does Intercoastal have the financial ability to serve the requested territory?

Intercoastal provided the testimony of Mr. James, Mr. Burton, Mr. Forrester, and Mr. Bowen concerning the financial ability of Intercoastal Utilities, Inc. to serve the requested territory. Ms. Swain was the only witness who provided testimony contrary to these four ICU witnesses. In her testimony she raised a few narrow questions about Intercoastal's financial ability. The utility witness responded to each of those fully and completely in their rebuttal testimony. It is clear from the great weight of evidence presented, that Intercoastal has demonstrated its financial ability to serve the requested territory through the testimony of its four witnesses, and through its detailed responses to the relatively minor issues raised in the testimony of Ms. Swain.

Mr. H.R. James, President of Intercoastal Utilities, Inc., provided testimony that the shareholders of ICU had committed to reduce rates immediately upon approval of the request for extension of territory to serve the Nocatee development and the other areas contained within ICU's Application. (TR480/L02.) He also testified that he recognized that those rates would not be compensatory, and that they would not affect the quality of service provided to the utility's customers. (TR486/L01.) Finally, he noted that the shareholders of the utility were fully aware of

the level of subsidy required, and that the shareholders had all agreed in writing to pay for such subsidy. (TR494.)

Mr. Forrester also testified that the principals of the utility had agreed to reduce rates during these first two to three years, and to subsidize those rates in order to produce rates less than those proposed by NUC. (TR1189/L15.)

Mr. Burton's Schedule MB-3 (second revised Exhibit 33) and Exhibit 43 and 44, had calculated the estimated revenue shortfall from the utility's existing rates beginning immediately after granting of the territory, up through the time when even those rates would become compensatory in approximately 2004 or 2005. Thereafter, (TR663/L14), Mr. Burton noted that rates would continually have downward pressure, such that the utility would be able and required to reduce its rates by up to 44% up to the year 2009, depending upon the actual growth experience within the proposed service territory. He too noted that the shareholders had agreed to further reduce initial rates 5% below those proposed by NUC and to fund any shortfall through 2004. (TR786/L15.)

Mr. Bowen provided testimony that he had reviewed the financial statements of each of the five principal shareholders of ICU, and those shareholders had ample financial ability to subsidize the rates during these initial years in order to meet the commitment of the shareholders to immediately reduce rates. (TR1246/L21, TR1250/L03.) As noted in Mr. Burton's testimony and exhibits, after the year 2004 or 2005, the utility's rates would already have a downward pressure, such that there would no longer be a subsidy necessary. (TR663/L14.)

Ms. Swain's main contentions in response to the testimony of the utility's four witnesses was that ICU did not appear able to meet its debt service payments based upon her review of only two years of ICU operations. Ms. Swain admitted that she had reviewed no financial statements for any years prior to 1997, nor any years after 1998. In other words, her entire analysis and statements are

based upon two years of financial statements immediately preceding a rate increase in the utility's sewer system. Both Mr. Burton and Mr. Bowen specifically testified that Ms. Swain's statements were contrary to the most recent financial information of the utility, including its 1999 and 2000 reports. Specifically, Mr. Bowen noted that the utility had more than adequate cash flow to meet the debt service expectations for the years 2000 through 2005, based upon the recent financial statements and projection results reviewed by Mr. Bowen and the projections of Mr. Burton. (TR1251/07.) Mr. Bowen further noted that the concern about the inability to meet debt service during the initial years was an even greater concern for NUC, since its rates will be set initially in full recognition that NUC will be unable to meet its obligations and earn a fair rate of return in those initial years. (TR1218/L07.) As part of his testimony, Mr. Bowen also provided a letter from the bank from which the utility obtained its most recent significant loans, indicating a desire and willingness to continue to do business with ICU and a belief that the bank could provide funding as needed for the utility's expansion (Exhibit 45).

The great weight of evidence clearly demonstrates that ICU does have the financial ability to meet its obligations if the additional territory is granted and the commitment has been made by the shareholders to fund any needed improvements (either through infusion of capital from themselves or through bank loans as offered by First Union Bank). In addition, ICU has demonstrated an ability, through the testimony of Mr. Burton, Mr. Bowen, Mr. Forrester, and Mr. James, of the shareholders to actually subsidize lowering the rates of ICU, for the first two years of operation within the new territory. The evidence also clearly demonstrates that the projections will result in further reductions in rates being justified under the only projections offered, as calculated by Mr. Burton, and the ability of the utility to meet all debt service requirements from cash flow during those years. The only evidence offered in response to this was that of Ms. Swain, wherein she alleged that the utility appeared unable to meet its debt service payments. However, the relevance

of her testimony resulting from reviewing only two nonrepresentative years was substantially, if not completely diminished, as noted by Mr. Bowen. The most recent financial information offered by Mr. Bowen, clearly demonstrates that her concerns are not founded as supported.

Therefore, the evidence clearly demonstrates that ICU does have the financial ability to provide service within the new territory as proposed, based on the commitment from Mr. James, and at rates 5% lower than those proposed by NUC.

ISSUE 15

Does Intercoastal have the technical ability to serve the requested territory?

Intercoastal clearly has the technical ability to serve the requested territory. Initially, it is noteworthy that the utility experts who testified on behalf of NUC, (TR186/L02), and JEA, (TR564/L23), both opined that it was not their opinion that Intercoastal lacked either the operational, managerial, or technical expertise to effectuate their Application.

Intercoastal clearly has the technical ability to provide service to the Nocatee development, and Intercoastal's managerial and operational arrangement with JUM, a related party, is an operational and managerial arrangement which has worked successfully over the entire life of Intercoastal. JUM has continuously provided the operations, maintenance, and management of Intercoastal since 1983. (TR307/L16.) JUM has a 25-year history and has provided operational services to a number of other municipal utility corporations and private investor-owned utilities in Duval, Nassau, Clay, and St. Johns Counties. (TR307/L13.) Intercoastal's corporate structure is supported by the JUM managerial team, the members of which have utility experience ranging from 20-40 years each, with professional and technical qualifications in accounting, planning and design, construction, utility operation, and regulatory matters. (TR324/L07.) Intercoastal's corporate officers have decades of development planning experience in creating large projects which meet or exceed very exacting environmental and community planning standards. (TR361/L11.) The

Intercoastal management and consulting team together possesses literally hundreds of combined years of experience in professional, technical, and practical planning, design, construction, and management of investor-owned and municipal water and wastewater systems, concurrently creating services for large scale and multiple project developments. (TR362/L20.) Intercoastal's existing management procedures and systems are currently in existence to handle work already in place, and Intercoastal's daily operations could be quickly expanded to accommodate any level of development activity arising in the proposed territory. (TR363/L05.)

Intercoastal is not merely a "utility" out shopping, as NUC clearly is, for another entity to actually run the utility. For instance, Intercoastal would never entertain the idea of obtaining operation and maintenance service from JEA. (TR1180/L05.) Intercoastal's relationship with JEA is as it is because the parties have related ownership, related officers, related goals, and strengths and expertise which compliment each other. Intercoastal's relationship with JUM has little resemblance to NUC's "relationship" with JEA. While Intercoastal sometimes utilizes JUM for projects, there has never been an instance, ever, where such utilization of JUM has resulted in Intercoastal incurring additional or unnecessary costs on any given project. (TR1181/L24.) In fact, Intercoastal's experience has been that the utilization of JUM for these types of services has consistently resulted in costs which were at or below market costs. (TR1182/L02.)

In response to legitimate concerns on the part of certain Commissioners about what might happen if JUM and Intercoastal went their separate ways (highly unlikely considering their close relationship and their 18 years of working together), Intercoastal and JUM's President, Mr. Buddy James, clearly indicated that in such a case those JUM employees who are considered Intercoastal employees, and who devote 100% of their work to Intercoastal, would in that case become employees of Intercoastal. (TR491/L18.) In other words, in the case of such an unlikely transition, the same people who work for Intercoastal now would be working for Intercoastal then.

(TR491/L23.) And, that's because that staff is already in place. (TR492/L01.) The 13 or 14 employees who receive JUM checks but who perform the work for Intercoastal are considered to be Intercoastal employees, and they don't do any work for JUM which is non-Intercoastal related, and they never have and they never will. (TR503/L22.)

ISSUE 16

Does Intercoastal have the plant capacity to serve the requested territory?

Intercoastal does not presently have the all the plant capacity necessary to serve the requested territory (neither does JEA), but Intercoastal has proposed a plan of service which reveals that it will be able to meet all the demands of the requested territory while benefitting Intercoastal's present customers in its existing certificated territory.

Intercoastal has provided a plan of service in which water will be provided with water plants utilizing the existing high quality water supply that was established by the water resources plan to lie beneath the development. (TR402/L11.) Intercoastal closely followed the recommendations of that thorough plan in the sizing of its wells to serve the expanded territory. (TR402/L16.) Intercoastal also proposes the construction of wastewater plants to be located onsite with the tentative location in the north central part of the property with an interconnection to Intercoastal's existing outfall coming from the easterly plant. (TR402/L18.) That interconnection would serve two purposes. One would be as a wet weather discharge if all of the reclaimed water couldn't be used at any given point. The normal function of the line would be to serve as a transmission line to take the excess 1.2 million gallons that is currently being discharged into the Intracoastal Waterway from the easterly service area so that that reuse could be sent to Nocatee to supplement the reuse system. (TR402/L18.)

Intercoastal's plan of service would eliminate present discharges to the Intracoastal Waterway (part of which was sometimes referred to as the Tolomato River in this proceeding) and would

create a situation where the only time such discharges to the Intracoastal Waterway would occur is during periods of unusual wet weather conditions. Intercoastal's expert engineer anticipated that the annual average of 1.2 million gallons that is permitted to go into the Intracoastal Waterway now would be substantially reduced, and on paper, might even disappear. (TR403/L05.)

Intercoastal only proposes a small amount of supplemental groundwater for reuse which would only be necessary in the first three years, and which would range from 135,000 gpd in the initial year and drop to 10,000 gpd in the third year, and by the fourth year the need for such supplemental reuse would disappear. (TR403/L11.) This would be true of all the projections for reuse, including the demand of 650,000 a day for golf courses (which the testimony revealed to be high on an annual average basis), and would still only require less than 100 gallons per minute of water in the first year, and drop down to about 10 gallons per minute or less the third year, and then disappear utilizing the reuse supply from the eastern area eventually. (TR403/L16.)

It was the testimony of Intercoastal's expert that based on his knowledge of the Nocatee development, he could not think of any reason why plant sites could not be located thereon. (TR426/L12.) Similarly, he anticipated that any easements to serve the site could be obtained by either Nocatee or across properties owned by related parties to the Nocatee landowner. (TR426/L17.) Obviously, wells would be sited in locations approved by the Water Management District. (TR1153/L16.) As for Intercoastal's temporary water supply, it is important to emphasize that it would only be needed if the projected reuse demands (which appear to be high) are actually achieved and if additional stormwater over the projected 20% cannot be utilized. (TR1091/L04.) This temporary water supply would be obtained from an irrigation well drilling to the lower Floridan aquifer as recommended in the Nocatee Groundwater Supply Development plan.

(TR1091/L08.)[2] Intercoastal also proposes to provide closed storage reservoirs and re-pumping facilities the same as NUC. (TR1096/L04.) Intercoastal has a history of working closely and cooperatively with the Water Management District and does not anticipate any significant hurdles in the CUP process. (TR1097/L19.)

As to the expedient "commitment to the environment" of the present landowner, it is important to note the environment does not stop at the boundaries of Nocatee, and these proposals should all be reviewed in their larger contexts. (TR1103/L19.) Intercoastal has higher treatment constraints imposed on their wastewater treatment than are imposed JEA's Mandarin treatment plant now, (TR1104/L22), and Intercoastal's wastewater treatment facilities meets the standards that JEA is trying to achieve, (TR1105/L06). The capital costs presented by Intercoastal reflect this high level of treatment. (TR1105/L07.)

Intercoastal's expert opined that he believed there would be no effect to onsite wetlands in Nocatee by water withdrawals as proposed by Intercoastal, (TR419/L07), and the only expert planner who testified in the proceeding (on behalf of the Staff and the Department of Community Affairs) also indicated that in his review of the Nocatee lands, it appeared to him that there are substantial upland areas away from wetlands which would accommodate water and wastewater facilities, (TR959/L04).

While Intercoastal does not presently have all the capacity it needs in order to provide service to this large anticipated territory, it has presented a plan of service which is the most effective, expeditious, and logical plan of service for the provision of utility service to those territories for which it has applied. Intercoastal's plan of service creates a real possibility, if not a probability, that the new proposed facilities could at least integrate and support, if not replace, Intercoastal's existing

[2] It should be noted that NUC's witness acknowledged that the Development Order does not prohibit three existing wells in the development from being used for backup supply for the reuse system. (TR182/L12.)

treatment installations, (TR322/L20), without any adverse impact on the potable aquifer, (TR321/L05). Intercoastal's plan of service ensures that 100% of the wastewater generated in both its existing and proposed service territories will be treated to the high standards necessary to make the wastewater available for reuse. (TR322/L16.) Intercoastal's plans for its regional water production facilities will not adversely affect the environment of the proposed territory, (TR365/L16), and the facilities proposed are state-of-the-art, (TR366/L20). Intercoastal's new plants will be designed to become an integral part of the region's environmental focus, accommodating public tours to serve as part of an expanded water conservation education and demonstration program. (TR367/L08.) Intercoastal's new sequencing batch reactor advance wastewater treatment facilities (in its existing service area) are producing reclaimed water of outstanding quality and are expected to be a model for new regional facilities in the proposed territory. (TR367/L25.) Intercoastal's proposed wastewater plants will deliver to customers the safest highest possible quality of reclaimed water for their use produced by new state-of-the-art computer-controlled and continuously monitored advanced wastewater treatment facilities. (TR368/L14.) Intercoastal's conceptual master plan was specifically created with the needs and the future of Nocatee, and the other territories for which Intercoastal has applied, in mind. Intercoastal's conceptual master plan proposes a very innovative environmental improvement and reuse service demand solution with facilities which will transfer excess reclaimed water from Intercoastal's eastern service area westward across the Intracoastal Waterway. (TR369/L06.) This effectively converts the existing discharge of reclaimed water into the Intracoastal Waterway into a reuse water resource for the proposed western service territories. (TR369/L09.) These same facilities will serve double duty as the wet weather discharge mechanism for both the east and west wastewater treatment systems. (TR369/L13.) At the appropriate point in the development of the western area treatment facilities, these same transfer facilities may be converted to phase out the

eastern service area treatment plant. (TR369/L15.) This would further consolidate Intercoastal's operations, escalate the utility's economies of scale, and remove an existing treatment facility from the midst of a heavily populated area. (TR369/L18.) Intercoastal's conceptual master plan was designed so that Intercoastal's existing customers, as well as its future customers, would benefit from the plans' implementation.

Intercoastal also anticipates that it will be able to obtain the land necessary to locate its facilities, and it has been the experience of all the principals of Intercoastal that once a utility obtains the legal right to provide service to a development, the developer and the utility work hand-in-hand to allow the provision of that service. (TR1186/L22.) In fact, it seems absurd to think that the developer who wants to develop his properties would put up roadblocks to the provision of such utility services. (TR1186/L24.)

An additional benefit of Intercoastal's proposed plan of service is that Intercoastal anticipates that its present rates will fall if its Application is granted, and the shareholders are willing to do whatever is necessary in order to make that happen. (TR1189/L18.)

Intercoastal has conclusively demonstrated that it either possesses, or has in place plans to construct, all of the plant capacity necessary to serve the requested territory.

ISSUE 17

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

Those rates as currently existing for ICU, are the rates that the utility had initially proposed to utilize in providing service to the new territory. In addition, as noted within Mr. Burton's (MB-3 second revised Exhibit 33), the utility's projected rates up through the year 2009 would continually fall, beginning at approximately the year 2004 or the year 2005, based upon the benefits that the utility would achieve from service to a larger customer base and substantial

growth. However, while the rates initially proposed to be implemented for service within the new territory by ICU are those currently in effect for the utility as stated in its initial Application, Mr. James also noted to the Commissioners the willingness and formalized commitment of the shareholders to immediately reduce water and wastewater rates, if the requested territory is granted, to a level 5% below those proposed by NUC. (TR480/L01.) Mr. James noted that the commitment to do so had been made by the shareholders, (TR494/L12), and Mr. Bowen confirmed that the shareholders of the utility had prepared written commitments to fund any revenue shortfall resulting from those immediately reduced rates. (TR1277/L20.)

Therefore, the evidence clearly demonstrates that the appropriate rates for water, wastewater and reuse service to be charged by ICU, are those currently in effect for the utility, reduced by the agreement by the President and the shareholders as discussed in Mr. James' and Mr. Bowen's testimony 5% below those proposed by NUC.

As for future rates, the utility has demonstrated through the projections prepared by Mr. Burton, that there will be downward pressure on rates beginning in 2005 and the utility expects to be able to further reduce rates in the years thereafter, up to a potential maximum of 44% by the year 2009. Those projections are clearly outlined in the schedules marked as MB-3 second revised.

ISSUE 18

What are the appropriate service availability charges for Intercoastal?

The utility is proposing to utilize its existing service availability charges, as currently approved throughout the projected period, for service to Phase I of the new certificated service territory. All of the projections by the utility encompass those charges as currently approved and in effect.

ISSUE 18A

Should Intercoastal be authorized an AFUDC rate by the Commission?

Yes, to the extent the Commission grants the additional territory to ICU, it should establish an AFUDC rate in accordance with the standard Commission policy and rules, based upon the most recent cost of capital information available at the time the Final Order is issued in this proceeding.

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?

There is no evidence that Intercoastal's existing customers oppose the proposed extension of its service territory. The testimony put on by the Sawgrass Association, which is a single homeowners' association which represents customers in a portion of Intercoastal's existing territory, did not reveal any significant dissatisfaction with Intercoastal's services even before substantial parts of that testimony were stricken by the Chairman at the time of the hearing. Additionally, despite the substantial publicity which has surrounded this matter, the morning portion of the hearing which was reserved for customer testimony failed to produce a single customer who cared to testify about the application (one way or another) despite a recess which was called in case any customers had not arrived on time. (TR5/L04.) That night, during the evening portion of the hearing reserved for customer testimony, a single customer testified about his concerns about whether the eastern (existing) plant would be expanded and how the application would be financed. (Service Hearing TR9/L01.) That customer did not criticize the proposal, but rather seemed to have questions about it. He seemed satisfied with the explanation that the plant in Intercoastal's existing eastern territory would not be expanded. (see, e.g., Service Hearing TR10/L21.)

While there was some testimony in the case about odors, the fact of the matter is that Sawgrass' own testimony revealed that DEP considered any odor problems to have been taken care.

(TR710/L04.) Even JEA's expert witness readily admitted that it is rather routine for residents to complain about odor from time to time around any wastewater treatment that is located in a residential development. (TR550/L03.) JEA itself has experienced odor problems at the Mandarin plant, the plant which JEA proposes to use to provide bulk service to NUC. (TR550/L04.) It was the testimony of Intercoastal's expert witness that very recent modifications to the treatment plant at Sawgrass have gone a long way to satisfying odor concerns which were occasionally heard in the past from certain residents who live near the plant. (TR1188/L25.)

There is no evidence that Intercoastal's existing customers either oppose, or support, the proposed extension of Intercoastal's service territory. This would appear to essentially moot the other question raised by this issue, that is, what weight the Commission should give such preference. It is the belief and position of Intercoastal that if all of its existing customers knew the benefits which Intercoastal projects they will realize if Intercoastal's Application is granted, support for this Application would be widespread among those customers. Granting Intercoastal's Application will only benefit, and will not adversely affect in any way, Intercoastal's existing customers.

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?

For all of the reasons set forth within this Brief, it is in the public interest for Intercoastal to be granted a water certificate and a wastewater certificate for the territory proposed in its Application.

Unlike NUC, Intercoastal is a genuine, existing utility which will continue to provide the services for which it has applied. Intercoastal has successfully provided service to its present development for 18 years and has in place the technical, managerial, operational, and financial

strength necessary to effectuate its Application. Intercoastal did not file its Application, and did not participate in this proceeding, as a strawman for an unrelated utility who seeks to manipulate this process to obtain an authorization from this Commission (which will then be utilized to sanction that utility providing service in an area that it might not otherwise legally be authorized to do so). Intercoastal is not proposing to provide service through an unrelated third party who will not even consider the utility's customers to be its customers. Intercoastal has been providing services to this portion of St. Johns County long before any other utility provider ever considered service to these areas, and Intercoastal's commitment to providing utility to these areas is a continuing one.

The granting of Intercoastal's Application will present a logical extension of its existing territory which presently abuts the Atlantic Ocean on the east and the territories for which it has applied on the west. Intercoastal's existing customers will benefit both by the fact that they will, by the granting of this Application, come under the jurisdiction of the Public Service Commission and by the fact that Intercoastal's shareholders have committed to reduce rates to those customers if this Application is granted. An additional benefit to Intercoastal's existing customers is the probability that the Sawgrass wastewater treatment plant will eventually be removed from its present location as Intercoastal's facilities are consolidated in the future.

Intercoastal has proven its ability to provide the service necessary on an as and when needed basis in a fashion that is sensitive and responsive to the "environmental ethic" which has been so hyped by the related party of NUC. Intercoastal will work with NUC's related parties so that the Development Orders can be quickly modified, through the "minor modification" process provided by Florida Statute, so that the plants may then be situated in an area which meets the needs of Intercoastal, the landowner, and the future customers of the utility. Intercoastal would harbor no ill will toward the landowner for its obvious attempt to rig the Development Order process to favor its related party, NUC, and would quickly set about the work of permitting and constructing the

facilities necessary to serve the development.

- It is in the public interest for Intercoastal's Application to be granted because it will benefit Intercoastal's existing customers immediately and in the future.
- It is in the public interest for Intercoastal's Application to be granted because it is in the public interest for these large territories to be served by a utility who will continue to be regulated by the Florida Public Service Commission.
- It is in the public interest for Intercoastal's Application to be granted because that new authority will allow Intercoastal to put into place a plan of service which will eventually eliminate discharges to the Intracoastal Waterway.
- It is in the public interest for Intercoastal's Application to be granted because it is a logical extension of a utility which would otherwise be landlocked and which would have a very limited potential for growth.
- It is in the public interest for Intercoastal's Application to be granted because Intercoastal's present customers will pay lower rates in the future as a direct result of the granting of Intercoastal's Application.
- Finally, it is in the public interest for Intercoastal's Application to be granted because the Commission will know that "what it sees is what it gets". Intercoastal will not simply disappear if the Application is granted, as NUC inevitably will, and allow some hidden agenda for utility service to the development to be realized (which is something totally different than what the Commission was told at the time of hearing). Intercoastal's plan of service will be placed into service as and when indicated by the evidence in this proceeding.

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?

This was another issue that was raised by the County, who elected, for whatever reason, not to participate in this proceeding. Certainly, assuming that JEA is in fact the contract bulk supplier to NUC (and not the utility-in-fact which will provide the service if NUC's Application is granted), there is no other utility which will be in competition with, or a duplication of, the proposed water and wastewater systems of either NUC or Intercoastal.

CONCLUSION

Based upon the competent and substantial evidence presented by Intercoastal and reflected in the record in this proceeding and the lack of credible evidence to the contrary, and upon consideration of the record as a whole; applicable Florida law; and applicable precedents of this Commission; Intercoastal's Application should be granted by this Commission.

RESPECTFULLY SUBMITTED this 6th day of June, 2001, by:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by Hand Delivery(*) or by U.S. Mail to the following this 6th day of June, 2001.

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