



Public Service Commission

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RECORDS AND REPORTING

DATE: OCTOBER 7, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (CIBULA) *S.M.C.*
DIVISION OF WATER AND WASTEWATER (REHWINKEL, REDEMANN) *BSM*

RE: DOCKET NO. 990696-WS - APPLICATION FOR ORIGINAL CERTIFICATES TO OPERATE WATER AND WASTEWATER UTILITY IN DUVAL AND ST. JOHNS COUNTIES BY NOCATEE UTILITY CORPORATION.

AGENDA: 10/19/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990696.RCM

CASE BACKGROUND

On June 1, 1999, Nocatee Utility Corporation (NUC or utility) filed an application for original certificates to operate a water and wastewater utility in Duval and St. Johns Counties, Florida. On June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal) timely filed a protest to NUC's application for original certificates and requested a formal hearing. Accordingly, this matter has been scheduled for an administrative hearing on May 9 and 10, 2000. Intercoastal's protest relates only to the portion of territory contained in NUC's certificate application located in St. Johns County.

Along with its application, NUC included a petition requesting a temporary variance from or a temporary waiver of Rules 25-30.033(1)(h), (j), (k), (m), (o), (r), (t), (u), (v), (w), (2), (3), and (4), and 25-30.433(10), Florida Administrative Code. On June 30, 1999, Intercoastal timely filed comments in regard to

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NUC's petition for temporary variance from or waiver of the above-mentioned rules. By Order No. PSC-99-1603-PAA-WS, issued on August 16, 1999, the Commission denied NUC's petition for temporary variance from or waiver of the above-mentioned rules.

A substantial portion of the territory requested in NUC's application is located in St. Johns County (County), with a portion crossing the County boundary into Duval County. Because NUC would be a utility system whose service transverse the boundary of St. Johns and Duval Counties, NUC is subject to this Commission's jurisdiction pursuant to Section 367.171(7), Florida Statutes. Intercoastal, which is located in St. Johns County, is not within the Commission's jurisdiction. Intercoastal is regulated by St. John's County.

Intercoastal has an application before the St. Johns County Water and Sewer Regulatory Authority (Authority) requesting an extension of its service territory in St. Johns County, and this proposed extension includes all of the territory located in St. Johns County that is in NUC's application. NUC's parent company, DDI, is one of the parties in litigation against Intercoastal in regard to Intercoastal's application before the Authority. On August 4, 1999, the Authority entered a preliminary order denying Intercoastal's application to extend its certificated area. On September 7, 1999, the Board of County Commissioners of St. Johns County voted to adopt and issue its Final Order Confirming the St. Johns County Water and Sewer Authority's Preliminary Order 99-00012.

On September 14, 1999, NUC filed a Motion to Dismiss Intercoastal's Objection and to Grant Nocatee's Certificate Application Without Hearing. On September 21, 1999, Intercoastal filed Intercoastal Utilities's Response to Motion to Dismiss Intercoastal's Objection.

This recommendation addresses whether the Commission should grant or deny NUC's motion to dismiss.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Nocatee Utility Corporation's Motion to Dismiss Intercoastal's Objection and to Grant Nocatee's Certificate Application Without Hearing?

RECOMMENDATION: No. Nocatee Utility Corporation's Motion to Dismiss Intercoastal's Objection and to Grant Nocatee's Certificate Application Without Hearing should be denied. (CIBULA)

STAFF ANALYSIS: As previously stated, NUC filed a Motion to Dismiss Intercoastal's Objection and to Grant Nocatee's Certificate Application Without Hearing. Intercoastal timely filed a response to NUC's motion. NUC's motion, Intercoastal's response, and staff's analysis are discussed in greater detail below.

NUC's Motion to Dismiss

In its motion to dismiss, NUC states that the County's final order denying Intercoastal's application to extend its service area, which includes a substantial portion of land that is also in NUC's certificate application that is currently before this Commission, has caused Intercoastal to lose its standing to object to NUC's application. In support of its motion, NUC cites Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). In Agrico, the Court sets forth a two-pronged test to determine whether a person has a substantial interest in a proceeding, which is: 1) an individual must show that he or she will suffer injury in fact of sufficient immediacy to warrant a formal hearing; and 2) the injury must be of a type or nature which the proceeding is designed to protect.

NUC states that in Intercoastal's objection to NUC's application, Intercoastal alleged that it had standing to protest NUC's application because Intercoastal had an application before the Authority for the extension of its service territory that included substantially all of the territory requested by NUC in its application before the Commission. NUC argues that Intercoastal no longer has standing to require an administrative hearing in this proceeding because Intercoastal's regulator, the County, has entered a final order denying Intercoastal's application to extend its service area, which according to NUC means that under Agrico "Intercoastal no longer has any substantial interests that will be affected by NUC's certification proceeding" and that it "will not suffer any injury in fact as a result of Commission action on NUC's original certificate application." NUC concludes that

Intercoastal's objection to NUC's application should be dismissed.

NUC also states that it recognizes that its motion to dismiss was not filed within 20 days after service of Intercoastal's objection, pursuant to Rule 28-106.204, Florida Administrative Code. However, NUC states that the County's final order depriving Intercoastal of standing did not occur until September 7, 1999, and that the motion to dismiss was filed within 20 days of that date. Therefore, NUC argues that its motion to dismiss should be considered timely within the meaning of the rule.

Intercoastal's Response to NUC's Motion to Dismiss

In its response, Intercoastal makes two arguments against NUC's motion to dismiss Intercoastal's objection: 1) that the motion to dismiss was not filed within 20 days of service of Intercoastal's objection and is actually an unsupported motion for summary judgment; and 2) that its objection to NUC's application has not been rendered moot by the County's final order denying Intercoastal's application.

First, Intercoastal argues that NUC's motion to dismiss was not filed within 20 days of service of Intercoastal's objection and request for hearing, pursuant to Rule 28-106.204, Florida Administrative Code, which NUC admits in its motion to dismiss. Intercoastal further states that the motion to dismiss is "more akin to a Motion for Summary Judgment" and that, as a motion for summary judgment it does not "allege, or purport to allege, that there are no outstanding issues of material fact left to be resolved in this matter."

Second, Intercoastal asserts that NUC is effectively arguing in its motion, rather than the concept of standing, the concept of mootness. In support of this assertion, Intercoastal cites Montgomery v. Department of Health and Rehabilitative Services, 468 So. 2d 1014 (Fla. 1st DCA 1985), which states that "mootness has been defined as 'the doctrine of standing set in a time-frame' the requisite personal interest that must exist at the commencement of the litigation (standing) must continue through the existence (mootness)." Intercoastal argues that NUC's "mootness claim" should be rejected for two reasons: 1) Intercoastal is appealing the County's final order, which means that its application before the County is still the subject of litigation and that the appellate process could still determine that Intercoastal's application should not have been denied by the County; and 2) Intercoastal is filing its own application for the territory in NUC's application.

Staff's Analysis

Rule 28-106.204, Florida Administrative Code, states that motions to dismiss the petition shall be filed no later than 20 days after the service of the petition unless otherwise provided by law, and the law does not provide otherwise.

Moreover, staff believes that the determination of whether Intercoastal's objection should be dismissed depends on the "finality" of the County's final order. Florida follows the rule that a judgment becomes final only when the appellate process, once started, has been completed. Whitley v. Maryland Casualty Company, 376 So. 2d 476, 477 (Fla. 1st DCA 1979); GEICO Financial Services, Inc. v. Kramer, 575 So. 2d 1345, 1347 (Fla. 4th DCA 1991). The time for Intercoastal to file an appeal to the County's final order has not yet expired, and Intercoastal states in its response to NUC's motion to dismiss that it will file an appeal to the final order. Although the County's final order confirming the Authority's decision to deny Intercoastal's application to extend its territory is final for purposes of appeal, Intercoastal's appeal of the County's final order prevents the final order from being final for the purpose of dismissing Intercoastal's objection in this proceeding. See Kramer 575 So. 2d at 1347.

For the foregoing reasons, staff believes that Intercoastal still has standing to object to NUC's certificate application under Agrico and that Intercoastal's objection is not moot under Montgomery. Staff recommends that NUC's Motion to Dismiss Intercoastal's Objection and to Grant Nocatee's Certificate Application Without Hearing should be denied.

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ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open in order to proceed to hearing in this matter. (CIBULA)

STAFF ANALYSIS: This docket should remain open in order to proceed to hearing in this matter.