

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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

APPLICATION FOR CERTIFICATES TO :
OPERATE A WATER AND WASTEWATER : DOCKET NO. 992040-WS
UTILITY IN DUVAL AND ST. JOHNS :
COUNTIES BY INTERCOASTAL UTILITIES: :
INC. :

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PROCEEDINGS: PREHEARING CONFERENCE

BEFORE: CHAIRMAN J. TERRY DEASON
Prehearing Officer

DATE: Wednesday, July 12, 2000

TIME: Commenced at 9:30 a.m.
Concluded at 10:30 a.m.

PLACE: Betty Easley Conference Center
Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: JANE FAUROT, RPR
FPSC Division of Records & Reporting
Chief, Bureau of Reporting
(850) 413-6732



DOCUMENT NUMBER-DATE
0856 | JUL 17 8
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1 APPEARANCES:

2 RICHARD D. MELSON, Hopping Green Sams and
3 Smith, Post Office Box 6526, Tallahassee, Florida
4 32314, appearing on behalf of DDI and Nocatee
5 Utility Corporation.

6 F. MARSHALL DETERDING and JOHN WHARTON,
7 Rose, Sunstrom and Bentley, L.L.P., 2548 Blairstone
8 Pines Drive, Tallahassee, Florida 32301, appearing on
9 behalf of Intercoastal Utilities, Inc.

10 KENNETH A. HOFFMAN and J. STEPHEN MENTON,
11 Rutledge, Ecenia, Underwood, Purnell & Hoffman, P.
12 O. Box 551, Tallahassee, Florida 32302-0551,
13 appearing on behalf of Jacksonville Electric
14 Authority.

15 SAMANTHA CIBULA and TYLER VAN LEUVEN, FPSC
16 Division of Legal Services, 2540 Shumard Oak
17 Boulevard, Tallahassee, Florida 32399-0850,
18 appearing on behalf of the Commission Staff.

19 SUZANNE BROWNLESS, 2546 Blair Stone Pines
20 Drive, Tallahassee, Florida 32301, appearing on
21 behalf of St. Johns County, Florida.

22 MICHAEL J. KORN, Korn & Zehmer, P.A., 6620
23 Southpoint Drive, Suite 200, Jacksonville, Florida
24 32216, appearing on behalf of Sawgrass Association,
25 Inc.

P R O C E E D I N G S

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2 COMMISSIONER DEASON: Call the prehearing
3 conference to order. Could I have the notice read,
4 please.

5 MS. CIBULA: By notice issued June 28th, 2000,
6 this time and place has been set for a prehearing
7 conference in the following consolidated dockets: Docket
8 Number 990696-WS, application for original certificates to
9 operate a water and wastewater utility in Duval and St.
10 Johns Counties by Nocatee Utility Corporation; and Docket
11 Number 992040-WS, application for certificates to operate
12 a water and wastewater utility in Duval and St. Johns
13 Counties by Intercoastal Utilities, Inc.

14 COMMISSIONER DEASON: Appearances.

15 MR. WHARTON: John Wharton and Marty Deterding
16 for Intercoastal Utilities.

17 MR. MELSON: Rick Melson of Hopping, Green, Sams
18 and Smith for Nocatee Utility Corporation and DDI, Inc.

19 MS. BROWNLESS: Suzanne Brownless for St. Johns
20 County, Florida.

21 MR. MENTON: Steve Menton and Ken Hoffman for
22 JEA.

23 MR. HOFFMAN: Commissioner Deason, we'll also
24 enter an appearance for Michael B. Wedner on behalf of the
25 JEA.

1 MR. KORN: Mr. Commissioner, this is Michael
2 Korn by teleconference appearing on behalf of Sawgrass
3 Association, Inc.

4 MS. CIBULA: Samantha Cibula and Tyler Van
5 Leuven on behalf of Commission staff.

6 COMMISSIONER DEASON: Okay. Mr. Hoffman, you
7 also made an appearance for Michael Wedner?

8 MR. HOFFMAN: Michael B. Wedner, he is with the
9 Office of General Counsel, and his address is shown on the
10 first page of the draft prehearing order.

11 COMMISSIONER DEASON: Thank you.

12 Staff, do we have any preliminary matters?

13 MS. CIBULA: I believe Mr. Melson wants to raise
14 a preliminary matter about the opening statements at the
15 hearing.

16 COMMISSIONER DEASON: Mr. Melson.

17 MR. MELSON: I was going to do that later, but I
18 can do it now.

19 COMMISSIONER DEASON: Okay.

20 MR. MELSON: Commissioner, on behalf of Nocatee,
21 I would like to request permission to make an opening
22 statement at the hearing. I would request ten minutes. I
23 think it will take less than that. My experience is if I
24 ask for five, it is not enough; and if I ask for ten, it's
25 too much, but I'm safer to ask for ten.

1 COMMISSIONER DEASON: Okay. There has been a
2 request that we have opening statements with a time limit
3 of ten minutes per party. Is that your suggestion?

4 MR. MELSON: Yes, sir.

5 COMMISSIONER DEASON: Is there any objection to
6 that? No objection? Staff.

7 MS. CIBULA: No objection.

8 COMMISSIONER DEASON: I will grant that request,
9 and there will be a strict ten-minute limitation, and ask
10 parties if they can keep it shorter than that, please do
11 so. Don't feel compelled to use your entire ten minutes.
12 I won't feel badly if you use less than ten minutes.
13 Okay. Other preliminary matters?

14 MS. CIBULA: There is also a pending motion to
15 compel and request for oral argument. However, these
16 matters may be taken up as they appear in the prehearing
17 order.

18 COMMISSIONER DEASON: Okay. Is there any desire
19 to hear that right now, or will we just get to it in due
20 time?

21 MS. BROWNLESS: However you wish to do it, sir.

22 COMMISSIONER DEASON: All right. We will just
23 get to it in due time.

24 Do the parties have any preliminary matters
25 before we begin reviewing the prehearing order? Hearing

1 none, we will proceed, then, directly into the draft
2 prehearing order. I trust everyone has that. I will
3 proceed rather quickly. If there are matters which need
4 to be clarified or changed, please let me know.

5 And with that we will begin with Section I, the
6 conduct of the hearings. Section II, case background.
7 Section III, procedure for handling confidential
8 information. Section IV, post-hearing procedures.
9 Section V, prefiled testimony and exhibits. And Section
10 VI, order of witnesses.

11 MS. CIBULA: On the witness list, Sawgrass
12 Association has listed a witness, a Victor Martinelli,
13 which does not have corresponding prefiled testimony.
14 Staff has included the witness here because it was in
15 Sawgrass' prehearing statement. However, staff would
16 recommend that the witness be removed from the prehearing
17 order.

18 COMMISSIONER DEASON: Mr. Korn.

19 MR. KORN: Mr. Commissioner, can you hear me?

20 COMMISSIONER DEASON: Yes. Please respond to
21 staff's comment.

22 MR. KORN: Yes. I spoke with staff about this
23 two days previous, and I told her that that was,
24 basically, a cumulative witness, and we had no objection
25 to that.

1 COMMISSIONER DEASON: It is okay, then, to
2 strike that witness from the order of witnesses?

3 MR. KORN: Well, the concern we had,
4 Mr. Commissioner, was that the prefiled testimony of
5 Mr. Olson was going to be adopted by Mr. Flury, who is the
6 current president of the association. Mr. Martinelli was
7 listed as a fallback in the event that Mr. Flury was
8 unavailable. Mr. Flury is currently out of the state, and
9 won't be back until the end of the month. Basically, the
10 purpose was to have someone there who would adopt
11 Mr. Olson's prefiled.

12 COMMISSIONER DEASON: Okay. Is Mr. Flury going
13 to be able to do that?

14 MR. KORN: Yes, he will. I expect he will. As
15 I said, he is out of the state at the present time. I
16 have not spoken with him for about two weeks.

17 COMMISSIONER DEASON: Okay. Well, at this time
18 we are going to strike from the list Mr. Martinelli, and
19 if you see that you are going to have to have a substitute
20 witness to adopt someone else's prefiled testimony, just
21 notify us and the parties as quickly as you are aware of
22 that situation, but the Commission routinely allows other
23 witnesses to adopt testimony. What we want to avoid is
24 having a witness appear that has not prefiled any type of
25 testimony.

1 MR. KORN: And I understand that. The purpose
2 was simply as a fallback fail-safe.

3 MR. WHARTON: And, Commissioner Deason, to the
4 extent that witness ultimately becomes Mr. Martinelli, we
5 are going to need to get into a motion practice on that.
6 He is a member of the board that regulates Intercoastal in
7 St. Johns County.

8 COMMISSIONER DEASON: Well, we will deal with
9 that if and when that situation presents itself.

10 MR. KORN: Mr. Commissioner, I don't expect that
11 to be a problem. I expect Mr. Flury to be there.

12 COMMISSIONER DEASON: Okay.

13 MS. BROWNLESS: Excuse me. Can I just have a
14 clarifying question? So the only prefiled testimony you
15 have, Mr. Korn, is for Mr. Olson and Pat Arenas, is that
16 correct?

17 MR. KORN: Correct.

18 MS. BROWNLESS: Thank you.

19 MR. WHARTON: And Flury may substitute for
20 Olson?

21 MR. KORN: Correct.

22 MS. BROWNLESS: And he is just on here as a
23 substitute name, is that correct?

24 MR. KORN: That's correct.

25 MR. MELSON: Mr. Chairman, I've got several

1 changes or corrections to the list of issues that my
2 witnesses are responsible for. Can I just give those to
3 staff after the prehearing, or I can give them now, either
4 way.

5 COMMISSIONER DEASON: Please, just give those to
6 staff. Are there other questions or concerns with the
7 order of witnesses?

8 MR. WHARTON: There are, Commissioner. And I
9 can do this at the pleasure of the Commissioner. I can
10 file a motion, I can bring it up at the time of the trial,
11 or we can talk about it right now. What is not reflected
12 on this issue is that you have got a witness on behalf of
13 JEA who filed rebuttal testimony. They are not an
14 applicant, they are an intervenor, they filed intervenor's
15 testimony, they are not entitled to rebuttal. They don't
16 have the burden, they don't get to go first and last. I
17 am not aware of the Commission ever allowing anyone to
18 file rebuttal testimony who is not the applicant, doesn't
19 have the burden, they just -- they filed intervenor
20 testimony and they didn't like something someone said in
21 the other intervenor testimony, and then they filed
22 rebuttal.

23 COMMISSIONER DEASON: Just for clarification, I
24 do not see any rebuttal testimony listed for JEA. So
25 which testimony are you speaking of?

1 MS. CIBULA: At the pre-pre the parties
2 agreed that -- I believe it was Timothy Perkins.

3 MR. MENTON: Timothy Perkins.

4 MS. CIBULA: Yes, he filed rebuttal testimony,
5 but the parties agreed that that testimony would be taken
6 up in the intervenor's testimony instead.

7 COMMISSIONER DEASON: I'm sorry, just one
8 second.

9 MS. CIBULA: That the rebuttal testimony would
10 be taken up in the intervenor's testimony portion of the
11 order of witnesses.

12 MR. WHARTON: The parties wrestled with the
13 fact, Commissioner, that these are consolidated cases, and
14 so there are tracts of direct, then intervenor, and then
15 rebuttal. We tried to combine it in a way that would make
16 some sense where every witness wouldn't come back three
17 times, but you would be hearing testimony not about
18 addressing testimony not put on yet. We tried to resolve
19 that in the pre-pre, and I think we have done this.

20 But the rebuttal is, in fact, contemplated by
21 this order that Mr. Perkins will give both intervenor and
22 rebuttal as noted on Page 7 under his name. And so he did
23 file distinct rebuttal testimony on the rebuttal testimony
24 date. He was the only witness who filed rebuttal
25 testimony on behalf of any party other than the two

1 applicants, Intercoastal and Nocatee.

2 COMMISSIONER DEASON: Okay. Well, I hate to be
3 dense about this, but I see a Timothy Perkins listed under
4 intervenors, I do not see any name for Perkins listed
5 under intervenor/rebuttal. Explain to me how the
6 witnesses are organized in this witness list. How does
7 staff contemplate that these witnesses are going to
8 appear? Just start at the very beginning where it says
9 witness, direct. Who are these witnesses, and what are
10 they going to be testifying to?

11 MS. CIBULA: The direct witnesses are the
12 Nocatee witnesses and the Intercoastal witnesses, and it
13 will be their direct testimony.

14 COMMISSIONER DEASON: They are presenting their
15 direct case concerning their applications for
16 certificates, right?

17 MS. CIBULA: Correct.

18 COMMISSIONER DEASON: Okay. I understand that.
19 Then we get to intervenors.

20 MS. CIBULA: Intervenors, and that is all other
21 parties besides Nocatee and Intercoastal, they will put on
22 their intervenor testimony. Mr. Perkins also filed
23 rebuttal testimony, and he is going to do his rebuttal
24 during the intervenor portion of the hearing.

25 COMMISSIONER DEASON: Is it one piece of

1 testimony or is it two pieces of testimony?

2 MS. CIBULA: It is two pieces of testimony. It
3 will be his intervenor and rebuttal.

4 COMMISSIONER DEASON: All right. So he has two
5 pieces of testimony. He has a piece of intervenor
6 testimony and a piece of rebuttal testimony.

7 And, Mr. Wharton, you are objecting to the
8 rebuttal piece of testimony, correct?

9 MR. WHARTON: And moving to strike that,
10 Commissioner.

11 MR. MENTON: Commissioner, if I could, Mr.
12 Perkins is a vice-president with JEA, and he did offer
13 intervenor testimony, direct testimony in support of the
14 objection that we filed to Intercoastal's application and
15 in support of Nocatee's application.

16 The rebuttal testimony that he sponsored goes
17 directly to some issues that were raised by witnesses
18 sponsored by staff and they are simply clarifying some
19 matters in terms that directly relate to JEA's capability
20 to serve Nocatee under a bulk service arrangement. So it
21 simply responds to some of the concerns that were raised
22 by staff witnesses. And what we had discussed in the
23 pre-prehearing was to simply have him adopt that rebuttal
24 testimony when he appeared during his -- he will appear
25 just one time and adopt his intervenor testimony and his

1 rebuttal testimony.

2 COMMISSIONER DEASON: And the rebuttal testimony
3 is in response to testimony filed by staff?

4 MR. MENTON: Yes, sir.

5 MR. WHARTON: But, Mr. Chairman, it never ends.
6 I have seen rebuttal testimony from NUC we would like to
7 clarify issues on. It just never ends in terms of
8 rebutting the rebuttal. The intervenors get to file
9 intervenor testimony. They don't have the burden. The
10 parties with the burden go first and last.

11 The only witness who did this -- and I'm not
12 aware of any Commission case where someone who came in who
13 wasn't the applicant, filed intervenor testimony and in
14 the very next round when the applicants were filing also
15 put in testimony for a witness. And we do move to strike
16 it.

17 MS. CIBULA: Commissioner, Section 120.57,
18 Florida Statutes, says that all parties shall have an
19 opportunity to respond, to present evidence and arguments
20 on all issues involved, and to conduct cross-examination
21 and submit rebuttal evidence to testimony. Therefore,
22 staff believes that JEA can file rebuttal testimony in
23 this case.

24 COMMISSIONER DEASON: Mr. Wharton, I am going to
25 allow you to make your -- if you so wish, to make your

1 motion in writing. I will allow the parties to respond.
2 And I will take that motion and the responses and I will
3 rule upon them. I'm not prepared to rule on this at this
4 late time on an oral motion on something of this
5 substance.

6 MR. WHARTON: Thank you, Mr. Chairman.

7 MS. CIBULA: And staff will also clarify for
8 Timothy Perkins that intervenor and rebuttal testimony was
9 filed for him in that section.

10 COMMISSIONER DEASON: Yes, that would help,
11 please. Other matters with the order of witnesses?

12 MR. MELSON: Chairman Deason, we have combined,
13 in an effort to try to make this go more quickly,
14 Intervenor and rebuttal testimony for Nocatee and for
15 Intercoastal. I think we agree with Mr. Wharton that it
16 is inappropriate to combine the direct, as well. I think
17 you need to hear the direct cases of the two companies and
18 then hear their responsive cases.

19 Given the number of witnesses, I am concerned
20 that we will not finish in the two days allotted,
21 particularly since we are in St. Johns County starting at
22 10:00 o'clock the first day with customers the first
23 evening, and I just wanted to bring to your attention that
24 we might have difficulty finishing in two days and ask if
25 there is a possibility at this point of considering the

1 scheduling of a third day.

2 COMMISSIONER DEASON: We are currently scheduled
3 for what days of the week?

4 MR. MELSON: Wednesday and Thursday. And the
5 most recent calendar I have shows Friday of that week
6 free. That possibly has changed since the most recent one
7 I have seen.

8 COMMISSIONER DEASON: And when is the hearing
9 scheduled, what are the dates?

10 MS. BROWNLESS: The 16th and 17th, sir.

11 COMMISSIONER DEASON: We can inquire and find
12 out what the availability is. Let me ask this question.
13 Is there any objection from any of the parties to having a
14 third day of hearing on the 18th if it can be done. And
15 I'm not even sure if the facility is available, or if the
16 Commissioners are available, or if there are other
17 conflicts to which I'm not privy. But let me ask the
18 parties, is there any objection to continuing the hearing
19 on to Friday if all of those contingencies enable us to do
20 so?

21 MS. BROWNLESS: No, sir.

22 MR. WHARTON: No.

23 COMMISSIONER DEASON: No objection? Okay. I
24 will certainly endeavor to find out if that is a
25 possibility and let the parties know as quickly as

1 possible.

2 MS. BROWNLESS: Commissioner Deason, where is
3 this hearing to be held in St. Johns County?

4 COMMISSIONER DEASON: Does staff have a
5 location?

6 MS. CIBULA: I think they are still looking for
7 a location. They are trying to get the county
8 administration complex in St. Johns County.

9 MR. MELSON: Commissioner Deason, we have held
10 six days of hearings there before, we are familiar with
11 that complex. It tends to be heavily scheduled because of
12 the various county activities. If on the 18th we needed
13 -- if that date were available and if we needed to
14 continue in Tallahassee, I think that would also be an
15 option. That would pose a little inconvenience for our
16 witnesses, but from my perspective it would be better to
17 finish in three straight days than to face the possibility
18 that we get delayed several weeks.

19 MR. WHARTON: Although really, Mr. Chairman, it
20 only occurs to me that if you are going to drive back that
21 night of the second day, and I've got five witnesses who
22 go last in this case, so I think they are the ones who
23 would be primarily effected, then perhaps, Rick and Mr.
24 Chairman, there is nothing magic about that Friday in
25 terms of if Monday or Tuesday was available. Certainly if

1 you are talking about some six-week delay, let's all get
2 in our cars, drive back and come in here tomorrow morning.

3 COMMISSIONER DEASON: Okay. I will look at the
4 situation and see what possibilities exist.

5 MR. KORN: Commissioner, I would, on behalf of
6 the association, just encourage that the hearing should be
7 concluded as soon as possible and should be concluded
8 entirely in St. Johns County if at all possible.

9 COMMISSIONER DEASON: Well, I understand that,
10 and we will endeavor to take that in consideration, also.

11 MR. KORN: And if I could ask a question of
12 staff. Perhaps this was done at the pre-pre last week
13 when I was out of town. I had originally had the hearing
14 for Tuesday and Wednesday. You said that has now changed
15 to Wednesday and Thursday of that week, the 16th and 17th?

16 MS. CIBULA: Yes. The Commission calendar
17 changed, and it moved the dates to the 16th and 17th.

18 MR. KORN: All right. Thank you.

19 MR. WHARTON: Mr. Chairman, I was remiss in not
20 raising one point under the post-hearing procedure
21 section. And I guess it is just that I would ask your
22 permission to reserve the right at the conclusion of the
23 hearing to address the length of the briefs.

24 Here we have four well-represented parties whose
25 interests are apparently adverse to those of Intercoastal.

1 And to the extent we are looking back at the issues that
2 came down, I would just like to reserve the right to raise
3 the issue whether Intercoastal certainly should not be
4 afforded four times the brief, but whether Intercoastal
5 perhaps will be rebutting a lot of testimony and a lot of
6 argument, and whether it may be appropriate to adjust the
7 size of that brief given the juxtaposition of the parties
8 in this case.

9 COMMISSIONER DEASON: And you wish to reserve to
10 request that at the end of the hearing?

11 MR. WHARTON: Or either we could address it
12 right now. I just think probably something like 75 pages
13 would probably be more appropriate. A lot of people
14 saying a lot of stuff.

15 COMMISSIONER DEASON: Uh-huh. There is a
16 40-page limitation that is currently in the draft
17 prehearing order, is that correct?

18 MS. CIBULA: Correct.

19 COMMISSIONER DEASON: And, Mr. Wharton, you are
20 requesting that be increased to 75 for all parties or just
21 for you?

22 MR. WHARTON: For Intercoastal given the fact
23 that you have got four parties here who are advocating
24 against Intercoastal's application. That is a lot of
25 witnesses to address and a lot of legal arguments coming

1 from different directions.

2 COMMISSIONER DEASON: Mr. Melson.

3 MR. MELSON: Commissioner, I think whatever
4 enlargement of size is granted should be granted to all
5 parties, although at this point I don't anticipate we
6 would require more than 40 pages even if granted a larger
7 number. 75 sounds like a lot, but I guess I really don't
8 have a position.

9 COMMISSIONER DEASON: Ms. Brownless.

10 MS. BROWNLESS: I think I would echo
11 Mr. Melson's comments on that. I certainly think that
12 whatever page limit is given ought to be applied
13 across-the-board.

14 COMMISSIONER DEASON: Uh-huh.

15 MR. MENTON: Mr. Chairman, for JEA there are
16 only two witnesses outside of the direct applicants in
17 this case that -- well, Sawgrass, as well, I guess. But I
18 don't think the issues are all that complicated. You have
19 two applications, which is a little bit unusual, but 75
20 pages seems a little bit excessive.

21 The issues that JEA is going to raise really
22 relate to both applications and they seem -- it doesn't
23 seem like it is going to complicate the matters to the
24 extent that we need to get the 75 pages.

25 MR. WHARTON: Mr. Chairman, you are still

1 talking about 160 pages worth of briefs versus 40, but --

2 COMMISSIONER DEASON: Mr. Korn, do you have any
3 thoughts on this matter?

4 MR. KORN: Well, Commissioner, I can't imagine
5 that Sawgrass' brief is going to be close to 40 pages in
6 length. I would agree that because of Intercoastal's
7 status in the case that they probably should be given some
8 measure of enlargement. I do agree with Mr. Melson that
9 75 sounds high to me. It might be best for the Commission
10 to make that determination at the conclusion of the
11 hearing when all the parties will have had a better
12 opportunity to determine what they are going to need to
13 brief rather than locking into a specific page number at
14 this point.

15 MR. WHARTON: I will modify my request to
16 request 60 pages, Mr. Chairman.

17 MR. HOFFMAN: Commissioner Deason, if I could
18 just add one thing. In my experience I'm not aware of a
19 situation where the Commission has allowed the type of
20 uneven number of pages that Mr. Wharton is suggesting. In
21 rate cases, for example, you will have an applicant on one
22 side and then you will have a host of intervenors on the
23 other side. And perhaps there is reason to expand the
24 number of pages, but if it is done it ought to be
25 across-the-board.

1 COMMISSIONER DEASON: Staff.

2 MS. CIBULA: Staff recommends that if one party
3 gets the extended brief then the other parties should get
4 to extend their brief, as well.

5 COMMISSIONER DEASON: What I am going to do at
6 this point is we will modify the 40 pages for the purposes
7 of the prehearing order, to change that to 50 pages and
8 that will be afforded to all parties. At the conclusion
9 of the hearing if we need to readdress this, we will take
10 it up at that time.

11 Okay. Are we finished with the order of
12 witnesses? Any last questions or concerns? Very well.
13 We will move then into basic positions. Section VII,
14 changes, corrections. Section VIII, issues and positions.

15 MS. BROWNLESS: We do have a slight change to
16 our basic position, please.

17 COMMISSIONER DEASON: Please proceed.

18 MS. BROWNLESS: On Page 10, we would just like
19 to insert -- and I will read the sentence for you. "And
20 is in the process of constructing," and we would like to
21 add, "Through its agreement with JEA."

22 COMMISSIONER DEASON: Very well. Other changes?

23 MR. MENTON: Commissioner, there are a couple of
24 minor changes that we have that I could just get to staff
25 afterwards.

1 COMMISSIONER DEASON: That will be fine.

2 MR. KORN: Commissioner, at the pre-pre meeting
3 last week there were apparently some additional issues
4 added after the statement that Sawgrass Association
5 submitted. And in my conversation with Mr. Cibula I am
6 either prepared to give you the positions now or I can
7 give them to her after this meeting.

8 COMMISSIONER DEASON: Please just give that to
9 staff after the meeting.

10 MR. KORN: Thank you.

11 COMMISSIONER DEASON: Issues and positions,
12 Issue 1. Issue 2. Issue 3. Issue 4. Issue 5.

13 Mr. Korn, there are a number of issues in which
14 there is no position listed for Sawgrass. Do you intend
15 to take positions, or should we insert no position for
16 those that have nothing listed presently?

17 MR. KORN: Commissioner, I believe that those
18 are the ones that I was referring to a moment ago. I can
19 tell you from a global basis Sawgrass does not take a
20 position with respect to the Nocatee application and we
21 have been uniform throughout. There are some added issues
22 that relate to the Intercoastal application that we will
23 take a position on. And as I said, I am prepared to give
24 them to you point-by-point as we track them now, or I can
25 give them to staff later.

1 COMMISSIONER DEASON: Do parties want to hear
2 that now, or is it sufficient just to have those provided
3 to staff?

4 MR. MENTON: Staff is fine.

5 MR. MELSON: Staff is fine.

6 COMMISSIONER DEASON: All right. Please just
7 provide those to staff and the staff will incorporate
8 those into the final prehearing order.

9 MR. KORN: All right. Then I won't interject or
10 interrupt then. Thank you.

11 COMMISSIONER DEASON: Issue 6. Issue 7. Issue
12 8.

13 MS. BROWNLESS: Yes, we have one small change on
14 Issue 8.

15 COMMISSIONER DEASON: Okay.

16 MS. BROWNLESS: And where it says, let's see,
17 "Letters of intent and contracts for service have been
18 entered into by the county and these entities and the
19 county --" sorry, nevermind. I thought that was a verb
20 change, but that is my fault.

21 COMMISSIONER DEASON: Okay. It is fine as is?

22 MS. BROWNLESS: Fine as is.

23 COMMISSIONER DEASON: Very good. Issue 9.
24 Issue 10.

25 MS. CIBULA: On Issue 10, staff was wondering if

1 this issue should be removed since Intercoastal's
2 testimony states that Intercoastal is proposing to build a
3 new system on the west side of the Intercoastal Waterway
4 to serve the Nocatee development, and their prefiled
5 testimony reflects that, yet their position on this issue
6 seems to be contrary to that.

7 COMMISSIONER DEASON: Mr. Deterding.

8 MR. DETERDING: We believe this issue is still
9 pertinent to and is an appropriate legal issue. I mean,
10 there may be some fact portions of this issue, but I think
11 any factual issues related to this are something that
12 everybody can agree on. It's a question of whether or
13 not, for instance, this will be a Class C utility when it
14 is created and so forth. But I believe that this question
15 of law is appropriate for this case and should remain.

16 COMMISSIONER DEASON: Do other parties have
17 comments on this issue? I will let the issue stand.

18 MS. CIBULA: Could staff suggest that the issue
19 be at least clarified so it states that should the
20 Commission deny NUC's application based on the portion of
21 Section 367.045(5)(a), Florida Statutes, which states that
22 the Commission may deny an application for a certificate
23 of authorization for any new Class C wastewater system as
24 defined by Commission rule if the public can be adequately
25 served by modifying or extending a current wastewater

1 system.

2 MR. DETERDING: And, again, to the extent that
3 is the wording straight out of the statute, that is fine.

4 MS. CIBULA: Yes.

5 COMMISSIONER DEASON: Fine, we will make that
6 change, then. I think that just narrows the focus to that
7 narrow particular of the statute to what is relevant here.
8 Very well. Issue 11.

9 MR. MELSON: Commissioner Deason, on Issue 10
10 and 9, as well, I guess I will need to indicate the
11 witnesses who may speak to that. Can I just give that to
12 staff at the conclusion?

13 COMMISSIONER DEASON: Yes, that will be fine.
14 Issue 11. Issue 12. Issue 13. Issue 14. Issue 15.
15 Issue 16. Issue 17. Issue 18. Issue 19. Issue 20. We
16 have two versions of this issue. Is there a dispute as to
17 which version we should actually incorporate?

18 MS. BROWNLESS: Well, Commissioner Deason, I can
19 speak to that. Unfortunately, I was unable to go to the
20 pre-prehearing. And the second wording of that issue, I
21 believe, is my wording. To be honest with you, I like
22 mine better. But I think the gist is virtually the same.

23 COMMISSIONER DEASON: Okay. So you are not
24 objecting to the first wording?

25 MS. BROWNLESS: No, sir.

1 COMMISSIONER DEASON: Is there any objection to
2 the first wording of this issue?

3 MR. HOFFMAN: May I have a moment, Commissioner?

4 COMMISSIONER DEASON: Sure.

5 MR. WHARTON: And, Mr. Chairman, we would prefer
6 to see the issue worded as it is worded in the first
7 paragraph, which was the suggestion of JEA. And neither
8 one of these, obviously, are the suggestion of
9 Intercoastal.

10 MS. BROWNLESS: And the only reason the second
11 wording has any merit at all, Commissioner, is because it
12 is a little more specific with regard to the territory
13 being --

14 COMMISSIONER DEASON: It specifically identifies
15 territory that was previously denied?

16 MS. BROWNLESS: Yes, sir.

17 MR. KORN: Mr. Commissioner, in looking at the
18 two versions, I agree with Ms. Brownless, the second one
19 is probably a little more fact specific, but it doesn't
20 include the res judicata argument. And my recollection is
21 that that was raised by Nocatee and by the county, the
22 specific language of res judicata, as well as collateral
23 estoppel.

24 MS. BROWNLESS: And I would be agreeable to
25 adding that res judicata language in there, Mr. Korn.

1 MR. MENTON: We can go with that. That is
2 acceptable, if we do it that way.

3 COMMISSIONER DEASON: Incorporate that into the
4 second wording and that is sufficient?

5 MR. MENTON: Yes, sir, that would be fine.

6 COMMISSIONER DEASON: Any objection to that?

7 MR. MELSON: So it would read something -- is
8 Intercoastal barred by res judicata or collateral estoppel
9 in this proceeding from applying, et cetera?

10 MS. BROWNLESS: Yes.

11 COMMISSIONER DEASON: Yes. Any objection from
12 staff?

13 MS. CIBULA: No objection from staff.

14 COMMISSIONER DEASON: Does staff have that
15 language?

16 MS. CIBULA: Yes.

17 COMMISSIONER DEASON: That is the version we
18 will use, then. The question I have then is should this
19 issue appear before Issue 12, since it seems to be kind of
20 a threshold issue, or is its present position correct?

21 MS. BROWNLESS: Commissioner Deason, I think my
22 preference would that be it be a preliminary issue prior
23 to Issue 12.

24 COMMISSIONER DEASON: Mr. Wharton.

25 MR. WHARTON: It is a highly fact intensive

1 issue that cannot be decided until the Commission
2 considers the testimony and the evidence, I think, that
3 falls under the other categories. Our contention is this
4 isn't the same application and the same circumstances and
5 the same law.

6 MS. BROWNLESS: I would briefly respond to that,
7 Commissioner Deason. While that argument about the
8 application of the same law may apply to a collateral
9 estoppel issue, which is an issue argument, it wouldn't
10 apply to the res judicata issue, which is a factual issue.
11 There were clear factual findings made by the authority,
12 they are specifically set out in the authority's order
13 which we have asked to be judicially noticed here, and I
14 assume we will get to that in a few minutes. So I think
15 that it can be -- it is a preliminary issue which should
16 be dealt with first.

17 COMMISSIONER DEASON: Let me explain what my
18 concern is, Mr. Wharton. The Commission is going to make
19 its decision on all of the evidence. And just because an
20 issue appears before another one does not mean that it is
21 going to be decided without considering other evidence on
22 other issues. It all has to be considered as a package.

23 It is just the ease of the Commissioners in
24 reviewing the final recommendation and when we proceed in
25 making votes on issues, what seems to be the most

1 efficient way to handle it. And I think it is more
2 efficient to put it earlier in that process. And for that
3 reason, then, Issue 20 is going to be repositioned.

4 Does staff have that?

5 MS. CIBULA: Yes, we do.

6 COMMISSIONER DEASON: Very well.

7 MS. BROWNLESS: So, Commissioner, it will be
8 repositioned prior to Issue Number 12?

9 COMMISSIONER DEASON: Yes, I think that is the
10 correct place. And, of course, there will then have to
11 be -- there would have to be subsequent renumbering unless
12 we wanted to just identify that as 12 -- I'm not sure. It
13 is probably going to necessitate renumbering, which means
14 then there is going to be some fallout effects of that,
15 but I think it is mainly a clerical function. I think
16 staff can realize that there is going to be renumbering
17 and incorporate that.

18 I don't think there is any requirement that the
19 parties then renotify staff as to which issues their
20 witnesses address, it is just simply a renumbering.

21 MR. KORN: Commissioner, you could always do it
22 as 11A, and then you don't even have to have that problem.

23 MS. CIBULA: Staff, can renumber them. It won't
24 be a problem.

25 COMMISSIONER DEASON: Okay. Staff is just going

1 to renumber. They are willing to take on that
2 responsibility. Issue 21.

3 MS. CIBULA: Issue 21, staff recommends that
4 Issue 21 be removed as the Commission has already made a
5 decision on this issue at the June 19th, 2000 special
6 agenda conference.

7 COMMISSIONER DEASON: Ms. Brownless.

8 MS. BROWNLESS: Yes, sir. This issue is in here
9 simply to preserve this issue for purposes of appeal and
10 for the record, and that is the only reason we would like
11 it in there. We obviously understand that the Commission
12 has already ruled on that.

13 COMMISSIONER DEASON: Okay. Explain to me how
14 it preserves it for appeal when you are going to be
15 appealing our decision once the order is issued from the
16 previous decision. So what is the necessity of having it
17 here?

18 MS. BROWNLESS: It is purely a technical point.
19 If you wish to remove it, I certainly will understand your
20 desire to do so.

21 COMMISSIONER DEASON: Comments from other
22 parties?

23 MR. WHARTON: Mr. Chairman, it is either ripe
24 now or it is preserved for appeal. I mean, I don't want
25 to use part of our 50 pages on it. The Commission would

1 literally have to reverse a decision it has made clearly
2 on the same issue. I won't know whether I am supposed to
3 address it in the post-hearing brief. I won't know
4 whether it is something that is going to come up to at the
5 hearing. I think it is an issue that has been settled.

6 COMMISSIONER DEASON: Okay. The issue will be
7 stricken and the remaining issues will be renumbered
8 accordingly.

9 MS. BROWNLESS: And, Commissioner Deason, as
10 long as we all understand that the issue is stricken
11 because it is the consensus of the prehearing officer that
12 the issue has been preserved for appeal, is that correct?

13 MR. WHARTON: Well, the law is the law.

14 MS. BROWNLESS: The law is the law.

15 COMMISSIONER DEASON: What I rule is not going
16 to allow you to -- either you have the right to appeal or
17 not. Whether I have this listed as an order in this
18 prehearing order is not going to dictate that one way or
19 the other.

20 MS. BROWNLESS: Thank you.

21 COMMISSIONER DEASON: Issue 22. That concludes
22 the issues.

23 Section IX, exhibit lists. Changes,
24 corrections, questions.

25 MS. CIBULA: On the exhibit list Sawgrass

1 Association has listed exhibits starting with the
2 complaint for declaratory statement on Page 37 through the
3 exhibit listed as the May, 1999 aerial photo on Page 38,
4 which have no witnesses sponsoring them.

5 MR. KORN: And I will provide those to you, Ms.
6 Cibula.

7 COMMISSIONER DEASON: The question is that there
8 is no witness to sponsor these exhibits, so how do you
9 plan to proceed trying to have these exhibits
10 authenticated and produced as evidence?

11 MR. KORN: I will check my notes, Commissioner,
12 but it is my recollection that the complaint for
13 declaratory relief was, in fact, sponsored. If not, I
14 will file a written motion to supplement that. I think
15 that, in any event, the Commission can take judicial
16 notice of it as a filing.

17 COMMISSIONER DEASON: Okay. What we are going
18 to do is will delete these as exhibits that are listed
19 here, and you will have the ability to request notice of
20 these particular documents.

21 MR. KORN: Thank you.

22 MR. WHARTON: Mr. Chairman, to the extent
23 something wasn't prefiled, I don't want any silence on our
24 part at this time to be taken as acquiescence. I am
25 looking at Page 38, the transcript of proceedings before

1 the St. Johns Authority. That sucker is like this big.
2 I'm pretty sure I haven't seen that. I wasn't copied with
3 that. If something wasn't prefiled, it shouldn't be
4 coming in.

5 COMMISSIONER DEASON: And I will let you make
6 that argument when you ask for the Commission to take
7 notice of that.

8 MS. CIBULA: Also, the county has listed
9 exhibits on Page 36 which have no witnesses sponsoring
10 them.

11 COMMISSIONER DEASON: Ms. Brownless.

12 MS. BROWNLESS: All of the exhibits that we have
13 listed fall clearly within the judicial notice portion of
14 the Evidence Code, 92.02. They are duly enacted
15 ordinances and resolutions of municipalities and counties
16 located in Florida. And these ordinances we have
17 previously provided certified copies of, so they clearly
18 fall within 92.02(10).

19 With regard to the water and sewer authority
20 order that we have identified as SJC-2 and the final order
21 of the county which we have identified as SJC-3, I believe
22 Mr. Miller on behalf of Nocatee has provided uncertified
23 copies in his testimony as DCM-9 and DCM-10.

24 We provided certified copies of SJC-2, SJC-3,
25 and SJC-4 as attachments to our original motion to

1 intervene and motion to dismiss. So Intercoastal has had
2 those for many months now. And we will -- what we are
3 basically seeking to do is simply get them judicially
4 noticed at this time. They have been provided to the
5 parties, and parties have had a chance to respond. And
6 they do clearly fall within the evidence code provision.

7 COMMISSIONER DEASON: Any objection to the
8 Commission judicially noticing the four items listed on
9 Page 36 and sponsored by the county?

10 MR. WHARTON: Yes, Mr. Chairman.

11 COMMISSIONER DEASON: Okay.

12 MR. WHARTON: That is a motion similar to the
13 motion you referred to earlier. It is a motion of
14 substance that I was not aware was going to be raised
15 today. I understand what we are doing today is saying,
16 "Well, this obviously doesn't belong in here or it is a
17 justiciable issue."

18 As far as the admissibility or the relevance of
19 these documents, I would like to be able to reserve the
20 chance to address that if, in fact, they are introduced at
21 the time of trial.

22 COMMISSIONER DEASON: Well, I thought we could
23 just get it clarified early on. But, Ms. Brownless, you
24 are going to have to present it at the time of trial and
25 we will go through the argument at that time.

1 MR. WHARTON: It may be that depending on
2 Suzanne's role in the hearing, she and I can work out
3 something in advance, and I will try to do that.

4 COMMISSIONER DEASON: If you can, that would be
5 much appreciated.

6 MS. CIBULA: So the county's exhibits will be
7 removed from the prehearing --

8 COMMISSIONER DEASON: They will be removed as
9 exhibits and we will deal with it in due course at the
10 hearing.

11 MS. BROWNLESS: And, Commissioner, can you
12 clarify for me the procedure that the Commission has
13 adopted for taking judicial notice so I can make sure I do
14 that appropriately at the hearing.

15 COMMISSIONER DEASON: Yes. You will need to
16 have the documents identified, and you say you have
17 already presented copies of this to all the parties?

18 MS. BROWNLESS: Yes, sir. They are in the file
19 and everybody has got them with the exception of
20 Resolution Number 89-214. There is a copy of that as
21 Attachment A to our motion to dismiss, but it is not a
22 certified copy. All of the other copies are certified
23 copies.

24 COMMISSIONER DEASON: What you will need to do
25 is have a list of these documents, we will identify that

1 list, not the documents themselves, but the list as an
2 exhibit at the time of the hearing, and you can then
3 request that that exhibit list be identified and entered
4 into the record.

5 And if there are objections to that, we will
6 take that up at that time. If that exhibit is accepted,
7 that means that those documents are noticed and they can
8 be used for whatever purpose those documents can under
9 those circumstances.

10 MS. BROWNLESS: And is that done at the very
11 beginning of the hearing prior --

12 COMMISSIONER DEASON: Usually it is at the very
13 beginning, yes.

14 MS. BROWNLESS: -- with preliminary matters?

15 COMMISSIONER DEASON: Uh-huh. Does staff have
16 any objection to that process?

17 MS. CIBULA: No objection to that.

18 COMMISSIONER DEASON: Okay. In fact, many times
19 staff takes it upon themselves to identify many documents
20 or orders and things of official documents and will
21 compile that list, and many times the parties themselves
22 do not have to do that. But I don't know what staff's
23 plans are in this particular case, but you may wish to
24 discuss that with them.

25 MS. BROWNLESS: Thank you, sir.

1 COMMISSIONER DEASON: Any other questions or
2 comments concerning the exhibits?

3 Section X, proposed stipulations. There are
4 none at this time.

5 Before we proceed to pending motions,
6 Mr. Wharton, refresh my memory. We had a discussion very
7 early on today that you were going to -- you were going to
8 file something. You made an oral motion; what was that
9 on?

10 MR. WHARTON: I believe that I moved to strike
11 JEA's rebuttal testimony.

12 COMMISSIONER DEASON: When can you have that
13 submitted?

14 MR. WHARTON: Would it be acceptable if I file
15 that within seven days, given the fact that we go to
16 hearing on the 16th of August?

17 COMMISSIONER DEASON: That's fine. Can we have
18 an expedited response for that? Mr. Hoffman, can you do
19 that within seven days?

20 MR. HOFFMAN: Yes, sir.

21 COMMISSIONER DEASON: Okay. And after I get the
22 response, then I will try to make a ruling within seven
23 days, how about that?

24 MR. HOFFMAN: Along those lines, Commissioner,
25 if Mr. Wharton could fax us a copy of the motion on the

1 day it is filed, we would appreciate it.

2 MR. WHARTON: I will do that.

3 COMMISSIONER DEASON: Staff, please keep me
4 advised of the status of that and bring it to my attention
5 so I can go ahead and make a decision as quickly as
6 possible.

7 MS. CIBULA: We will.

8 MR. WHARTON: Mr. Chairman, in the spirit of
9 also trying to move things along and perhaps not fitting
10 neatly into any box for the way these prehearing
11 conferences go, I wonder if we can ask Mr. Korn on the
12 phone if he is going to give me some dates for his
13 witnesses for deposition.

14 I wrote him a letter like a month ago. And
15 rather than me unilaterally note those and him object and
16 me file a motion for protective order, or if he says no, I
17 will try to file that within the next few days, too.

18 MR. KORN: Well, actually, Mr. Wharton, the
19 letter was sent on July 5th, so it wasn't quite a month.
20 That would make it like a week. And as I think at least
21 staff was aware, I have been out of the state until 11:00
22 o'clock last night. So I got your letter and I figured I
23 would speak with you as soon as I could.

24 MR. WHARTON: Okay, good.

25 COMMISSIONER DEASON: I think you have a

1 commitment from Mr. Korn to try to work with you in that
2 situation. And if that does not suffice, well, then you
3 are free to file a motion.

4 MR. WHARTON: Okay.

5 COMMISSIONER DEASON: And speaking of motions,
6 we will proceed now to Section XI, pending motions. And
7 this is a motion to compel. Mr. Wharton, I believe it is
8 your motion.

9 MR. WHARTON: Yes. Not having done very many of
10 these, particularly in the last many years, I am remiss in
11 not knowing this was going to come up today. I am
12 certainly not the first lawyer to argue a motion without
13 being thoroughly prepared, but --

14 COMMISSIONER DEASON: Well, let me ask this
15 question; are the parties prepared to argue this motion
16 today? Ms. Brownless?

17 MR. WHARTON: I'm ready.

18 MS. BROWNLESS: I am ready; yes, sir.

19 COMMISSIONER DEASON: Okay. Mr. Wharton.

20 MR. WHARTON: The issue here is not a complex
21 matter. The Commission is now subject to the uniform
22 rules. The uniform rules say that the Florida Rules of
23 Civil Procedure as they relate to discovery apply. So the
24 way things have happened in the past at the Commission
25 perhaps has limited relevance since the uniform rules have

1 become operable, but I will address that in a minute
2 anyway.

3 Ms. Brownless says this is a case of first
4 impression, which is an interesting perspective just based
5 on my unique experience in this year alone. Nothing could
6 be more simple. I'm an applicant. I've got the burden.
7 The county has seen fit to file something in opposition to
8 my application. While the county made a representation in
9 its response that, something to the effect, paraphrasing,
10 not having brought the documents that, well, we didn't
11 really file something in opposition, or whatever the exact
12 wording that was, they are trying to get our application
13 tanked. I don't know what is any more adverse than that.

14 The fact that they have chosen not to prefile
15 testimony may raise interesting issues in regard to their
16 ability to prove their standing, but it has nothing to do
17 with what discovery I can undertake. Not only do the
18 Florida Rules of Civil Procedure allow me to do discovery
19 of persons who aren't even parties, some guy down the
20 road, there is a procedure for me to subpoena him and for
21 me to bring him in and talk to him about relevant
22 documents. But certainly this is an entity that has come
23 in and participated in the proceeding.

24 What you have got in the response is a mixture
25 of arguments. One seems to say, well, since they didn't

1 prefile testimony, it obviously can't lead to the
2 discovery of admissible evidence or be relevant. That
3 seems to say that the matter is not subject to discovery.

4 The language in the response then switches over
5 to the Rules of Civil Procedure's references to a
6 protective order. Not only has no protective order been
7 filed in this case, if it had we would be arguing on a
8 different plane. A protective order accedes to the
9 legitimacy of the discovery, but then says for some reason
10 it should not be had.

11 Well, that language that said that the
12 Commission has the power to protect any party from undue
13 burden or expense is where it says, well, Mr. Young is
14 running this little utility department and he is really a
15 busy man, and et cetera. Well, I apologize in advance
16 that the county suing my client is an inconvenience to the
17 county, but it doesn't have anything to do with my ability
18 to do discovery.

19 Now, while it is true Mr. Young didn't prefile
20 in this case, I might sit down and he might say, "You
21 know, we just wrote a document yesterday that says holy
22 cow, if NUC gets this territory it is really bad for the
23 future of the county." Well, I am going to come in and
24 use that document in cross-examination, or I am going to
25 try to figure out some way to get that into evidence.

1 It is also noticed based on the fact that I
2 practice in different forums that often the evidence in
3 Commission proceedings is not limited to the prefiled.
4 Additional evidence and opinions come out in response to
5 staff questions on cross-examination, sometimes
6 cross-examination was allowed that touched upon areas and
7 then redirect gets into new areas, or Commissioners can
8 ask questions. I know in the Aloha case we had a witness
9 who filed a very little bit of testimony who was on the
10 stand for several hours.

11 Another interesting thing happened in the Aloha
12 case. While Ms. Brownless may believe this is a question
13 of first impression, in that case after all the testimony
14 was filed, the Office of Public Counsel decided to take
15 the deposition of a lab technician at Savannah Labs. We
16 did not object to that. That was fine with us. In fact,
17 we attended the deposition with our expert, and OPC's
18 expert was sitting there, too.

19 I will tell you, that deposition was used quite
20 a bit in the Aloha trial on cross-examination of the
21 people who were sitting there. While they couldn't come
22 in and say, "Well, that witness said XYZ," that is clearly
23 hearsay and perhaps is uncorroborated. Those witnesses
24 were allowed if someone asked them a question to say,
25 "Well, my opinion is this. And part of my opinion is what

1 I heard at the deposition I sat at when I was listening to
2 this person from Savannah Labs talk."

3 So it is very simple. We have got a party who
4 is in litigation, they are subject to discovery, they made
5 a voluntary choice not to prefile testimony. I'm not in
6 there asking to speak to the county commissioners, I want
7 to talk to the county utility department. You know,
8 Commissioner Clark asked at the motion to dismiss hearing
9 that we had earlier, she said, "Well, I'm trying to
10 understand here why the county has protested
11 Intercoastal's application and made Intercoastal go
12 through this county process, but they haven't protested
13 NUC's application." And you see they have taken no
14 position on many of these positions involving NUC
15 exclusively.

16 Let's get to the bottom of some of that. I will
17 worry about the admissibility or nonadmissibility at the
18 time of trial. If, in fact, nothing from the deposition
19 comes in, the heap of deposition transcripts that have
20 been taken in litigation which are never used is a mile
21 high. I don't seek to take a deposition that won't be
22 used, but that is an issue that will be finally resolved
23 at the time of trial. It is within the Rules of Civil
24 Procedure, it is duly noticed. I attempt to give Ms.
25 Brownless plenty of warning. I think you have always got

1 a little warning you might be subject to discovery when
2 you choose to sue someone. And it is discovery which is
3 reasonably calculated to lead to the discovery of
4 admissible evidence.

5 COMMISSIONER DEASON: Thank you, Mr. Wharton.

6 Ms. Brownless, before you proceed I just have a
7 couple of quick questions.

8 MS. BROWNLESS: Yes, sir.

9 COMMISSIONER DEASON: You are not suggesting
10 that this witness would be -- that there is some type of a
11 privilege associated with that in that there should not be
12 a deposition because of the privilege nature of the
13 relationship, or the information that he has access to,
14 or -- I'm trying to determine if privilege is a concern
15 here.

16 MS. BROWNLESS: Before I have heard
17 Mr. Wharton's questions of the witness, I couldn't know
18 whether he would have a privilege to assert or not. That
19 would be dependent upon the type of information Mr.
20 Wharton asked.

21 COMMISSIONER DEASON: So that depends on the
22 questions, not whether there should be a deposition or
23 not.

24 MS. BROWNLESS: Yes, sir.

25 COMMISSIONER DEASON: Okay. And are you

1 suggesting that there is no relevancy that this witness
2 could -- the potential witness could not have any -- is
3 not relevant to this proceeding?

4 MS. BROWNLESS: What I am suggesting is that in
5 past Commission procedures, to the extent that I have been
6 aware, obviously if someone prefiles testimony then that
7 person and that person's organization is subject to being
8 deposed and legitimately subject to being deposed. We
9 have not put on an affirmative case here. If you
10 remember, we did not petition for a hearing. We
11 intervened in the ICU certificate docket for the sole
12 purpose of raising the res judicata, collateral estoppel,
13 and subject matter jurisdiction issues. And we asked for
14 a limited intervention for that purpose. We have taken
15 positions that are consistent with that and pursued those
16 issues.

17 We are staying in this case in order to have the
18 right to appeal those issues. Since the other counties
19 who were interested in that issue were not granted
20 intervention, obviously they have no right to pursue an
21 appeal on that point, so we are the only party that has
22 the right to pursue an appeal.

23 It is true that under the Rules of Civil
24 Procedure third parties have the right to be deposed. But
25 my suggestion here is that unlike Mr. Wharton's idea that

1 information gathered from my client could be used at
2 hearing, information in administrative hearings can only
3 be used if it is hearsay if it is corroborated from some
4 other source.

5 All of the county's issues vis-a-vis
6 Intercoastal are stated clearly in the prehearing
7 statement, and they frankly have to do with areas that we
8 are already serving, or attempting, or in the process of
9 serving. Walden Chase and our exclusive service territory
10 in Marsh Harbor, if you look at what we have answered,
11 those are our areas of concern. Those would also be the
12 factual findings that we would seek to have this
13 Commission apply the principle of res judicata to. All
14 the issues in the Authority's prehearing -- the
15 Authority's order and the Commission's order that dealt
16 with service to Walden Chase and service to the 210
17 corridor, service to the Alinece (phonetic) High School.

18 So to the extent that none of the facts
19 surrounding those areas are any different than they were
20 before the Authority, I don't see that Mr. Wharton is
21 harmed by not being able to depose the county. The issues
22 are there. And I would also note that Mr. Wharton can
23 develop that through a witness who is here that has been
24 sponsored by Nocatee, which is Mr. Miller, who I believe
25 has testimony regarding that same, those same topics.

1 We are not here seeking to do anything other
2 than protect the county's exclusive service territory and
3 to argue for the recognition by this Commission of
4 previous rulings of the Authority.

5 MR. WHARTON: Briefly, Mr. Chairman.

6 COMMISSIONER DEASON: Yes.

7 MR. WHARTON: First of all, while I would love
8 to take advantage of the opportunity of attempting to
9 prove a point that is a positive point for Intercoastal
10 through the expert witness of my opponent, that often is
11 not the way the world works.

12 I would have the right and would seek to do
13 discovery of the county and to find out some information
14 about the county even if they were not participating in
15 this case. Here just say to yourself, Commissioner
16 Deason, based on the proceedings we have had in this case,
17 do you think the county opposes Intercoastal's
18 application? Has statements of counsel in the motion
19 hearing given the Commission and the panel in this matter
20 the idea that the county does not oppose the application
21 of Nocatee? Let's find out why.

22 Give me an opportunity to find what is really
23 going on there. Was the decision not to file prefiled
24 testimony in this case some kind of a strategic decision
25 that was designed to deny that information getting to the

1 Commission as far as the admissibility? These arguments
2 can be made at the time of trial.

3 COMMISSIONER DEASON: Thank you. Staff.

4 MR. VAN LEUVEN: Mr. Chairman, staff believes
5 that pursuant to Rule 1.280(b)(1), the information sought
6 by Intercoastal appears to be reasonably calculated to
7 lead to discovery of admissible evidence. The motion
8 should be granted.

9 COMMISSIONER DEASON: Okay. I am going to grant
10 the motion, and the reason is that I want as full and
11 complete record in this proceeding as possible. This
12 deposition may lead to information that is useful, it may
13 not. But we don't know unless the deposition is taken.
14 And for that reason I am going to grant the motion and ask
15 the parties to work together to find a mutually acceptable
16 time and place. And if there are difficulties in that,
17 please see me and we will work that out, as well.

18 Are there any other matters to come before the
19 prehearing officer at this time?

20 Hearing none, thank you all for your
21 participation. I am going to be expecting a motion
22 concerning rebuttal testimony, whether it should be
23 stricken, and that is going to be provided within seven
24 days and a response within seven days.

25 Anything else? Hearing none, thank you all.

1 The prehearing conference is adjourned. Thank you.

2 (The prehearing conference concluded
3 at 10:30 a.m.)

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STATE OF FLORIDA)

CERTIFICATE OF REPORTER

COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, FPSC Bureau of Reporting Official Commission Reporter, do hereby certify that the Prehearing Conference in Docket No. 990696-WS was heard by the Florida Public Service Commission at the time and place herein stated.

It is further certified that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript, consisting of 49 pages, constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED this 17th DAY OF JULY, 2000.



JANE FAUROT, RPR
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Chief, Bureau of Reporting
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