

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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

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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  
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Chief, Bureau of Reporting  
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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

1  
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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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

3 COUNTY OF LEON )

4

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

7

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

10

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

13

14 DATED this 17th DAY OF JULY, 2000.

14

15

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17 \_\_\_\_\_  
18 JANE FAUROT, RPR  
19 FPSC Division of Records & Reporting  
20 Chief, Bureau of Reporting  
21 (850) 413-6732

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