State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 12, 2000

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

FROM: DIVISION OF LEGAL SERVICES (CIBULA, VAN LEUVEN)
DIVISION OF REGULATORY OVERSIGHT (REHWINKEL, REDEMANN)

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

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

AGENDA: 06/19/2000 - SPECIAL AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\990696R3.RCM

CASE BACKGROUND

On June 1, 1999, Nocatee Utility Corporation (NUC) filed an application for original certificates to provide water and wastewater service to a proposed development that will be located in Duval and St. Johns Counties known as Nocatee. Docket No. 990696-WS was assigned to that application. According to the application, NUC proposes to provide service to the Nocatee development through a bulk water, wastewater, and reuse agreement with JEA.

On June 30, 1999, Intercoastal Utilities, Inc. (Intercoastal) timely filed a protest to NUC's application and requested a formal hearing. In its protest, Intercoastal stated that it had an

application pending before the Board of County Commissioners of St. Johns County, requesting authority to provide service to the area in NUC's application located in St. Johns County, as well as some additional territory in St. Johns County. On September 7, 1999, St. Johns County issued an order denying Intercoastal's application to expand its territory to serve the area in the Nocatee development located in St. Johns County and the other area requested in Intercoastal's application. The order of the Board of County Commissioners denying Intercoastal's application is currently pending on appeal.

On December 30, 1999, Intercoastal filed an application requesting an amendment of certificates to provide water and wastewater service to the Nocatee development; to extend its service area in St. Johns County; and for original certificates for its existing service area. Docket No. 992040-WS was assigned to that application. While Intercoastal's application before the Board of County Commissioners of St. Johns County only included the area in NUC's application located in St. Johns County, the application pending before the Public Service Commission (Commission) includes the entire Nocatee development. NUC, its parent company, DDI, JEA, and Sawgrass Association, Inc., filed objections to Intercoastal's application, and they all requested a hearing. St. Johns County filed a Petition to Intervene in this matter which was granted by Order No. PSC-00-0336-PCO-WS, issued February 17, 2000. This matter is currently scheduled for hearing on August 15 and 16, 2000.

On January 24, 2000, NUC and DDI filed a joint Motion to Dismiss Intercoastal's application based on the doctrines of res judicata and collateral estoppel. On January 26, 2000, St. Johns County also filed a Motion to Dismiss Intercoastal's application, stating that the Commission does not have jurisdiction over the application based on Section 367.171, Florida Statutes, and based on res judicata and collateral estoppel.

On May 10 and 11, 2000, Sarasota and Hillsborough Counties, respectively, filed Petitions for Intervention in these dockets, requesting the opportunity to file Motions to Dismiss based on the argument that the Commission lacks jurisdiction under Section 367.171, Florida Statutes, to consider Intercoastal's and NUC's applications. On May 15, 2000, Collier and Citrus Counties filed a Petition for Intervention, and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. At the May 16, 2000, agenda conference, the Commission deferred consideration of NUC's and DDI's and St. Johns County's Motions to

Dismiss, and to hear oral arguments. The Commission elected to consider the Petitions for Intervention and Motions at a special agenda conference.

By Order No. PSC-00-0980-PCO-WS, issued May 18, 2000, the filing dates for the petitions, motions, and briefs were established for the special agenda conference. On May 23, 2000, Hillsborough and Sarasota Counties timely filed their Motions to Dismiss and Collier and Citrus Counties timely filed their joint Motion to Dismiss. On June 2, 2000, NUC and DDI withdrew their joint Motion to Dismiss Intercoastal's application. On June 6, 2000, NUC timely filed its Response in Opposition to Motions to Intervene and Motions to Dismiss and Intercoastal timely filed its Memorandum Responsive to the Filings of Hillsborough, Sarasota, Collier and Citrus Counties.

This recommendation addresses: 1) whether jurisdiction rests with the Commission to rule upon NUC's and Intercoastal's applications for certificates; 2) the Petitions for Intervention filed by Hillsborough, Sarasota, Collier and Citrus Counties; 3) the Motion to Dismiss filed by St. Johns County; and 4) the Motions to Dismiss filed by Hillsborough, Sarasota, Collier and Citrus Counties.

DISCUSSION OF ISSUES

ISSUE 1: Does the Commission have jurisdiction under Section 367.171(7), Florida Statutes, to consider Nocatee Utility Corporation's and Intercoastal Utilities, Inc.'s applications for certificates?

RECOMMENDATION: Yes. The Commission has jurisdiction under Section 367.171(7), Florida Statutes, to consider both Nocatee Utility Corporation's and Intercoastal Utilities, Inc.'s applications for certificates. (CIBULA, VAN LEUVEN)

STAFF ANALYSIS: While none of the parties nor the interested persons filed briefs on the threshold issue of whether the Commission has jurisdiction to consider NUC's and Intercoastal's applications, staff is offering to the Commission, for informational purposes, the parties' and interested persons' positions on this matter gleaned from the motions and responses filed in these dockets.

St. Johns County's Position:

In its Motion to Dismiss Intercoastal's application, St. Johns County states that the Commission does not have jurisdiction to consider Intercoastal's application. St. Johns County has not stated its position on whether the Commission has jurisdiction to consider NUC's application. St. Johns County states that it is not within the Commission's jurisdiction to award service territory to an existing utility when the utility and territory requested are located in a nonjurisdictional county. Moreover, St. Johns County asserts that the plain meaning of Section 367.171(1), Florida Statutes, which grants counties the right to regulate water and wastewater utilities within county boundaries, combined with the legislative intent behind Section 367.171(7), Florida Statutes, which gives the Commission jurisdiction over utilities that transverse county boundaries, does not support the notion that the Commission can assign territory in nonjurisdictional counties to intercounty utilities. Moreover, the County contends that if the Commission asserts jurisdiction and grants the territory requested by Intercoastal in its application, all available water and wastewater service territory in the County will be usurped, which would be contrary to the express right of the County, under Section 367.171, Florida Statutes, to assert its own regulatory jurisdiction and to reject Commission jurisdiction over its water and wastewater utilities. Citing City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991) and Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984, 988

(Fla. 5th DCA 1999), the County asserts that in jurisdictional counties, the franchise rights awarded by the Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes," implying that the Commission's jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties. Thus, the County contends that the only way Sections 367.171(1) and 367.171(7), Florida Statutes, can be harmonized is to limit the jurisdiction of the Commission to award additional service territory to intercounty utilities to service areas located within jurisdictional counties.

NUC's and Intercostal's Positions:

In their responses to Sarasota, Hillsborough, Citrus, and Collier Counties's Motions to Dismiss, both NUC and Intercoastal state that based on a plain reading of Section 367.171(7), Florida Statutes, the Commission has exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties are jurisdictional or nonjurisdictional. Intercoastal states that the Legislature's use of the phrases "Notwithstanding anything in this section to the contrary" and "whether the counties involved are jurisdictional or nonjurisdictional" clearly indicate an intent contrary to that presented by Hillsborough, Sarasota, Collier and Citrus Counties. NUC asserts that as the definition of "utility" found in Section 367.021(2), Florida Statutes, includes "proposed construction of a system" and those "proposing to provide" water and wastewater service, and that under a plain reading of Section 367.171(7), Florida Statutes, and Section 367.021(2), Florida Statutes, the Commission has exclusive jurisdiction over proposed utility systems whose services will transverse county boundaries under Section 367.171(7), Florida Statutes.

NUC states that there is no question that its proposed system will constitute a single system. NUC contends that the only question is whether the Commission's jurisdiction attaches when the cross-boundary service is proposed or when water or wastewater begins to flow across the county boundary. NUC cites to In re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU), Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, in which the Commission stated that the Legislature intended to correct the problem of redundant, wasteful, and potentially inconsistent regulation over multi-county utility systems when it enacted Section 367.171(7), Florida Statutes. NUC states that Hillsborough, Sarasota, Collier and Citrus Counties'

position that "the Commission lacks jurisdiction to grant a multi-county certificate to a new utility would result in just the type of redundant, wasteful and potentially inconsistent regulation that Section 367.171(7), [Florida Statutes], was designed to protect."

Sarasota County's Position:

In its Motion to Dismiss NUC's and Intercoastal's applications, Sarasota County states the Commission does not have jurisdiction to consider NUC's and Intercoastal's applications. Sarasota County states that St. Johns County, like Sarasota, Hillsborough, Collier and Citrus Counties, is a non-jurisdictional county pursuant to Section 367.171(3), Florida Statutes. Further, it argues that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission does not have jurisdiction to regulate utilities that provide service within their respective geographic boundaries. Sarasota County states that neither Intercoastal nor NUC currently has a system which provides water and/or wastewater service across county boundaries. Sarasota County contends that NUC and Intercoastal are "essentially asking [the Commission] for authorization to provide water and wastewater service in a non-jurisdictional county" and citing Hernando County, it asserts that the Commission "has no authority to consider those requests."

Sarasota County further states that the only exception to the Commission's "lack of jurisdiction in non-jurisdictional counties can be found in Section 367.171(7), Florida Statutes." It asserts that the issue in this proceeding is the time at which the Commission's jurisdiction vests. Sarasota County asserts that this question was answered in In re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc., (Lake Suzy), Order No. PSC-00-0575-PAA-WS, issued March 22, 2000, in Dockets Nos. 970657-WS and 980261-WS. Sarasota County alleges that in Lake Suzy the Commission "held that the Commission is 'vested with jurisdiction [under Section 367.171(7)] at the time of connection,' i.e., when service actually 'transverses county boundaries.'" It further argues that jurisdiction is not triggered by the mere filing of an application and quoting Hernando County asserts that the

> relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), [Florida Statutes], is the actual interrelationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), [Florida Statutes]

> over which [the Commission] ordinarily has jurisdiction." The Court [in Hernando County] further stated that the requirements of Section 367.171(7), [Florida Statutes], "can only be satisfied by evidence that the facilities forming the asserted system exist in contiguous counties across which the service exists."

Sarasota County asserts that, based on Hernando County and Lake Suzy, the "facilities must be actual and must exist before [the Commission] divests a non-jurisdictional county of regulatory authority."

Sarasota County states that it "does not disagree that once a utility system actually provides service which crosses county boundaries, jurisdiction rests with the [Commission]"; however, it further asserts that "it is solely within the non-jurisdictional county's regulatory authority to make the threshold decision as to whether to grant a utility the right to either commence serving within its geographic boundaries or to expand its current service area within that county's boundaries." Finally, Sarasota County states that interpreting Section 367.171(7), Florida Statutes, to allow a utility "to avoid a county's regulatory jurisdiction by a unilateral business decision to include some territory from a jurisdictional county in its expansion plans flagrantly undermines the authority of the non-jurisdictional county to regulate utilities within its geographic boundaries and allows the utility the unfettered opportunity to forum shop for its own regulator."

Hillsborough County's Position:

In its Motion to Dismiss NUC's and Intercoastal's applications, Hillsborough County states that the Commission does not have the jurisdiction to consider NUC's and Intercoastal's applications. It cites to Hernando County, for the proposition that there must be a physical delivery of water and/or wastewater which transverses county boundaries for Section 367.171(7), Florida Statutes, to apply. Further, it argues that Section 125.01(k)(1), Florida Statutes, provides specific authorization to the counties to regulate water and wastewater and that in Section 367.171(1), Florida Statutes, the Legislature provided that the provisions of Chapter 367 would only become effective in a county upon the adoption of a resolution by the Board of County Commissioners of a county wishing to become regulated by the Commission. Moreover, Hillsborough County asserts that

> Given the strong preference expressed by the Legislature and the Courts in favor of the counties' discretion to

> regulate water and wastewater service within their boundaries, it is inconceivable that the Legislature intended by providing a definition of utility in Section 367.021(12), [Florida Statutes], that includes prospective or proposed construction of a system, that the counties would be divested of their fundamental right to regulate water and wastewater systems located within their boundaries.

Hillsborough County concludes that when Sections 367.171(7), Florida Statutes, and 367.021(12), Florida Statutes, are read together, the "most reasonable interpretation" would be that "when a proposed utility service transverses county boundaries into a non-jurisdictional county, the non-jurisdictional county must give its consent before its regulatory authority may be usurped by the [Commission]."

Collier and Citrus Counties' Positions:

In their joint Motion to Dismiss, Collier and Citrus Counties state that the Commission does not have the jurisdiction to consider either Intercoastal's or NUC's application. They argue that, based on Hernando County, "there must be actual physical interconnections crossing contiguous county boundaries by which actual water and wastewater services are being transported in order for there to be jurisdiction in the Commission pursuant to Section 367.171(7), [Florida Statutes]." Further, they state that their view

> does not mean that the Commission can grant service territory within a nonjurisdictional county as part of an application, which if ultimately approved and constructed would result in actual physical interconnections transporting water and wastewater services. This type of "bootstrap" logic has no foundation in precedent and would do severe damage to the nonjurisdictional counties' ability to exercise their home rule prerogatives afforded by Chapter 125, Florida Statutes.

Collier and Citrus Counties state that NUC's and Intercoastal's applications include "thousands of acres located exclusively within St. Johns County, a nonjurisdictional county." They assert that "case law does not require the Commission limit itself to grants of territory which will immediately require service." Thus, they argue that "there could be no limit to the service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk."

Collier and Citrus Counties also state that there is no prior history supporting the Commission granting service territory in a nonjurisdictional county, and that they are not aware of any cases "supporting the Commission's grant of additional territory to a utility within a nonjurisdictional county, even where the utility has already been found to be jurisdictional on the basis of Section 367.171(7), [Florida Statutes]." Further, they cite City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991), and Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984, 988 (Fla. 5th DCA 1999), for the proposition that franchise rights granted by the Commission are "merely equal to, not superior to, those awarded by local governments."

Collier and Citrus Counties state that Section 367.171(7), Florida Statutes, and Chapter 125, Florida Statutes, can be harmonized as follows:

> ...[A]ll existing systems having actual physical service transversing county boundaries must be regulated by this Commission in all statutory respects with the exception of the ability to award service area expansions within nonjurisdictional counties. Commission jurisdiction over such a utility would exist irrespective of whether the utility met the "transverses county boundaries" on the date Section 367.171(7), [Florida Statutes], became effective or by virtue of a nonjurisdictional county knowingly granting a utility service territory within its boundaries coupled with an application in an adjacent county that, once completed, would bring it within this Commission's jurisdiction. Under this scenario, the nonjurisdictional county still maintains control of its own powers and duties provided by both Chapter 125, [Florida Statutes], and Chapter 367, [Florida Statutes]. In the instant case, St. Johns County might elect to award Nocatee (it has already refused Intercoastal) all or a portion of the territory sought within St. Johns County's political boundaries. It could do so with the full knowledge that the Commission would take jurisdiction of whatever the County granted, after, but only after, its territorial grant is mated with territory on the other side of a county boundary. Such an interpretation would do justice to all statutory provisions considering water and wastewater and would be preferred.

Staff's Analysis:

Duval County opted to give the Commission jurisdiction over its water and wastewater systems on April 1, 1974. It continues to be subject to the Commission's jurisdiction. St. Johns County is excluded from the Commission's jurisdiction under Section 367.171(3), Florida Statutes. St. Johns County took back jurisdiction over its water and wastewater systems on September 26, 1989. However, both NUC and Intercoastal are proposing to provide service to the entire Nocatee development, which is proposed to span both Duval and St. Johns Counties. Consequently, both utilities' proposed service areas would transverse county boundaries. Thus, the relevant statute to determine whether the Commission has jurisdiction over either NUC's or Intercoastal's application is Section 367.171(7), Florida Statutes, which states:

> Notwithstanding anything to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest [C]ommission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section. (emphasis added)

In Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [except those exempted under Section 367.022, Florida Statutes] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, staff believes that the Commission has subject matter jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes, because each is proposing to construct a utility system whose service would transverse county boundaries, thus causing the applications to fall within the exclusive jurisdiction of the Commission.

Plain Meaning

"When the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect." Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995). If it is determined that the statute on its face is ambiguous or unclear, then one would resort to the other rules of statutory construction. See Id. "Only when a statute is doubtful in meaning should matters extrinsic to the statute be considered in construing the language employed by the Legislature." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). As illustrated above, staff believes that the Commission has jurisdiction over NUC's and Intercoastal's applications based on the plain language of Section 367.171(7), Florida Statutes.

Legislative Intent

If a statute is ambiguous, the first means one should use to construe the statute is to look at the legislative intent because the primary guide to statutory interpretation is to determine the purpose of the legislature. See Tyson v. Lanier, 156 So. 2d 833, 836 (Fla. 1963). Although staff believes that it is not necessary to look to the legislative intent in this instance because Section 367.171(7), Florida Statutes, is unambiguous, the following is a discussion of the legislative intent behind this section for informational purposes.

In In re: Petition of General Development Utilities, Inc. For Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU), Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, the Commission discussed the legislative intent behind Section 367.171(7), Florida Statutes. In that Order the Commission stated:

> We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies ... This duplicative economic regulation is inefficient and results in potential inconsistency in the treatment of similarly situated customers. Inefficiency stems from the need for multiple

> rate filings and multiple rate hearings. It also stems from the need to perform jurisdictional cost studies to attempt to allocate the costs of a single system across multiple jurisdictions. These inefficiencies could result in unnecessary and wasteful efforts which would translate into higher rate case expense and higher rates to customers. Inconsistency can occur when regulators apply different ratemaking principles to the same system or make inconsistent determinations on the same issue.
>
> The Legislature chose to promote efficient, economic regulation of multi-county systems by giving the Commission exclusive jurisdiction over all utilities whose service crosses county boundaries .... By concentrating exclusive jurisdiction over these systems in the Commission, the Legislature has corrected the problem of redundant, wasteful, and potentially inconsistent regulation.

The intent behind Section 367.171(7), Florida Statutes, discussed in GDU was reiterated by the Commission in In re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc., (Lake Suzy), Order No. PSC-00-0575-PAA-WS, issued March 22, 2000, in Dockets Nos. 970657-WS and 980261-WS, which was made final and effective by Order No. PSC-00-0723-CO-WS, issued April 14, 2000. This matter involved Lake Suzy Utilities, Inc., a utility located in DeSoto County, which is a nonjurisdictional county pursuant to Section 367.171(3), Florida Statutes, that proposed to provide water service in DeSoto and Charlotte Counties. The utility was comprised of only one water and wastewater facility which would extend across the boundary of Charlotte and DeSoto Counties, and no separate facility existed or was planned to exist in Charlotte County. The Commission concluded that it had jurisdiction over the utility pursuant to Section 367.171(7), Florida Statutes, stating that "[a]ny other interpretation in this case would create dual regulation" and that "such a result would be inconsistent with both the spirit and legislative intent of Section 367.171(7), Florida Statutes." By Order No. PSC-00-0575-PAA-WS, the Commission approved a settlement agreement between the utility and Florida Water Services, Inc., and granted the utility a certificate to serve territory located in both DeSoto and Charlotte Counties.

As previously stated, NUC and Intercoastal are proposing to provide service to a development which spans two adjacent counties. Consequently, both of the utilities' service areas will transverse

county boundaries. Moreover, similar to the utility in Lake Suzy, Intercoastal is an existing utility located in a nonjurisdictional county and is proposing to extend its service area across county lines. Section 367.171(7), Florida Statutes, grants the Commission exclusive jurisdiction over utility systems whose service transverses county boundaries to prevent the problems and harms of dual regulation discussed in GDU and Lake Suzy. Therefore, staff believes that the legislative intent behind Section 367.171(7), Florida Statutes, supports the conclusion that the Commission has exclusive jurisdiction to consider NUC's and Intercoastal's applications to serve the Nocatee development.

Reading Statutes as a Whole

Another rule of statutory construction is that a statute should be construed in its entirety and as a whole, and "statutory phrases are not to be read in isolation, but rather within the context of the entire section." Acosta v. Richter, 671 So. 2d 149, 153 (Fla. 1996). Section 367.171(3), Florida Statutes, allows counties to exclude themselves from the Commission's jurisdiction. Section 367.171(7) Florida Statutes, states that, "Notwithstanding anything in this section to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries." The beginning phrase in subsection (7) expressly conditions the power granted in subsection (3) because the phrase "Notwithstanding anything in this section to the contrary" means that this section governs despite anything in Section 367.171, Florida Statutes, which may be in conflict with subsection (7). When Section 367.171, Florida Statutes, is read as a whole, both subsections (3) and (7) can be read in harmony to state that individual counties may be excluded from the Commission's jurisdiction; however, if a utility system's service transverses county boundaries, such utility will be under the exclusive jurisdiction of the Commission whether the counties involved are jurisdictional or nonjurisdictional. Moreover, Section 367.171(7), Florida Statutes, when read in conjunction with Section 367.021(12), Florida Statutes, which defines "utility" to include every person owning, managing, operating or controlling a system or proposing construction of a system, can be harmonized to state that Section 367.171(7), Florida Statutes, gives the Commission jurisdiction over existing, as well as proposed utility systems whose service transverses county boundaries.

Logical and Reasonable Construction

When the meaning of a statute is ambiguous, the law favors a rational and sensible construction. Wakulla County v. Davis, 395

So. 2d 540 (Fla. 1981). An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

In this case, if the Commission does not have jurisdiction over the utilities' applications, then the utilities would have to apply to two regulatory authorities, St. Johns County and the Commission, for separate certificates to provide service. Then, when they begin providing service, the Public Service Commission would regulate the whole system. Staff believes it would not be logical, nor legally accurate, to assert that the Commission does not have jurisdiction to consider both applications for certification, but would have jurisdiction to subsequently regulate the system.

Cases Discussing the Commission's Jurisdiction Under Section 367.171(7), Florida Statutes

In Board of County Commissioners of St. Johns County v. Beard, 601 So. 2d 590 (Fla. 1st DCA 1992), the court addressed the issue of whether Jacksonville Suburban Utilities Corporation (now United Water Florida, Inc.), which provided service in Duval, Nassau and St. Johns Counties, was a "single water and wastewater system" under the Commission's jurisdiction pursuant to Section 367.171(7), Florida Statutes. The court stated that actual physical connection between the facilities was not required and found that the evidence supported the Commission's determination that the utility's facilities constituted a system pursuant to Section 367.021(11), Florida Statutes (1991). Id. at 593. Thus, the court concluded that the Commission had exclusive jurisdiction over the utility under Section 367.171(7), because the service provided by the system crossed county boundaries. Id.

In Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the court addressed the issue of whether the Commission had jurisdiction pursuant to Section 367.171(7), Florida Statutes, over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that its decision in Beard was distinguishable from the circumstances of this case; that the holding in Beard did not reach the question of whether physical interconnection was necessary under Section 367.171(7), Florida States; and that Beard was not controlling with regard to the issue of the meaning of 'service' as used in Section 367.171(7). Id. at 51. The court further stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), Florida

Statutes, is "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court further stated that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by SSU in this case." Id.

NUC's proposal to provide service will result in its facilities physically crossing the Duval County and St. Johns County border as it is proposing to provide service to the entire Nocatee development, which is proposed to span both counties. It would be one system and the question of functional relatedness does not appear to be an issue. Thus, staff believes that Beard and Hernando County do not restrict the Commission's jurisdiction over NUC's application.

Likewise, Intercoastal is proposing to provide service to the Nocatee development which will cause its facilities to physically cross the border of Duval and St. Johns Counties. Intercoastal's existing plant is located on the east side of the Intercoastal Waterway, adjacent to the proposed Nocatee development. Intercoastal is proposing to either extend its current plant to serve the Nocatee development or build separate facilities on the west side of the Intercoastal Waterway. If Intercoastal extends its system to provide service to the Nocatee development, then it would be one system whose facilities cross county lines, placing it within the Commission's jurisdiction. If Intercoastal builds new facilities on the west side of the Intercoastal Waterway to serve the Nocatee development, its facilities on the west side of the Intercoastal Waterway will still physically transverse county boundaries, placing the utility within the Commission's jurisdiction. Whether the existing facilities located on the east side of the Intercoastal Waterway will be subject to the Commission's jurisdiction under the second scenario may depend on whether those facilities are functionally related, which is when the court's analysis in Hernando County would become relevant. Thus, staff believes that Beard and Hernando County do not restrict the Commission's jurisdiction over Intercoastal's application.

The Commission's jurisdiction under Section 367.171(7), Florida Statutes, was also addressed in In re: Petition of St. Johns Service Company for Declaratory Statement on Applicability and Effect of 367.171(7), F.S., Order No. PSC-99-2034-DS-WS, issued October 18, 1999, in Docket No. 982002-WS. This matter involved a Petition for Declaratory Statement regarding the applicability of Section 367.171(7), Florida Statutes, to a water and wastewater utility regulated by St. Johns County and providing bulk water and wastewater service to two not-for-profit homeowners associations serving customers in Duval County. The utility's point of delivery to the associations was in St. Johns County. The Commission granted the Petition for Declaratory Statement and found that the service arrangement described by the utility did not subject the utility to the Commission's jurisdiction because: the utility provided service exclusively to customers in St. Johns County; only the homeowners associations owned distribution and collection facilities in Duval County; the homeowners associations received service from the utility at a point of delivery in St. Johns County at a bulk rate approved by the St. Johns Water and Sewer Authority; the utility did not provide service to any active customer connections in Duval County; no customer connection charges, customer installation fees, developer agreements, or other contractual arrangements existed between any customers in Duval and the utility other than the delivery of bulk water service in St. Johns County; and the utility did not own any lines or appurtenant facilities on the homeowners associations' side of the point of delivery. The Commission found that based on those particular facts, the utility's service did not transverse county boundaries and jurisdiction was not invoked pursuant to Section 367.171(7), Florida Statutes.

The declaratory statement also included a statement that there was a provision in the service arrangement between the utility and the homeowners association requiring that, upon demand, the homeowners association would transfer all its utility facilities behind the point of delivery in St. Johns County to the utility. The declaratory statement states that if such a transfer were to occur, the Commission's jurisdiction would be invoked under Section 367.171(7), Florida Statutes.

NUC's and Intercoastal's applications can be distinguished from the circumstances set forth in Order No. PSC-99-2034-DS-WS. In both applications, the utilities are proposing to provide service directly to customers located in both Duval and St. Johns Counties. Although NUC is proposing to obtain bulk water service from JEA, it will resell the service to the customers in the Nocatee development. Thus, staff believes that Order No. PSC-99-

2034-DS-WS does not prevent the Commission from invoking its jurisdiction pursuant to Section 367.171(7), Florida Statutes, to consider NUC's and Intercoastal's applications

Cases Discussing the Relationship Between the Commission and Local Governments

City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219 (Fla. 5th DCA 1991), involved a private utility company that filed an action against a municipality which had voluntarily annexed into its city limits a tract of land that was specified in the utility's certificates issued by the Commission. When making its determination as to which utility had the right to serve in the disputed area, the court first stated that, "territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from the lack of clear legislative direction." Id. at 225. Finding that there was an absence of clear legislative intent, the court resorted to resolving the dispute "by the application of principles which appear to best serve the public and to be fair and equitable to legitimate competing interests." Id. As the first principle the court stated that, "In Florida, the basis for the right of both governmental and private entities to provide utility services to the public is statutory and the franchise right of each is equal and neither entity is, per se, superior or inferior to the other." Id. Thus, because the court was unable to find clear legislation which pertained to the issue in question, the court determined the territorial rights and duties of the prospective service providers.

NUC's and Intercoastal's applications can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover, in JJ's Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth the Commission's jurisdiction over these applications. Section 367.171(7), Florida Statutes. Therefore, staff believes there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to the Commission's jurisdiction.

Based on the foregoing, staff believes that the Commission has jurisdiction under Section 367.171(7), Florida Statutes, to consider both NUC's and Intercoastal's applications.

ISSUE 2: Should the Commission grant the Petitions for Intervention filed by Sarasota and Hillsborough Counties and the joint Petition for Intervention filed by Collier and Citrus Counties, or in the alternative, should the Commission grant Collier and Citrus Counties' request to participate as amicus curiae?

RECOMMENDATION: The Commission should deny the Petitions for Intervention filed by Sarasota and Hillsborough Counties and the joint Petition for Intervention filed by Collier and Citrus Counties. Consequently, Sarasota and Hillsborough Counties' Motions to Dismiss and Collier and Citrus Counties' joint Motion to Dismiss should be denied, for lack of standing. Staff notes that Sarasota, Hillsborough, Collier and Citrus Counties will still have the opportunity to participate at the special agenda conference as interested persons since this matter has not yet been to hearing. At that time they can provide the Commission with their comments on the Commission's jurisdiction to consider Intercoastal's application under Section 367.171(7), Florida Statutes. Also, the Commission should deny Collier and Citrus Counties' alternative request to participate as amicus curiae for the purpose of filing a Motion to Dismiss Intercoastal Utilities' and Nocatee Utility's applications; however, the Commission can consider the points raised in Collier and Citrus Counties' joint Motion to Dismiss as an amicus curiae submission, if it so desires, and can give the points raised as much weight as the Commission deems appropriate. (CIBULA, VAN LEUVEN)

STAFF ANALYSIS: As stated in the case background, Sarasota, Hillsborough, Collier and Citrus Counties filed Petitions to Intervene in these proceedings.

The Petitions for Intervention

On May 10, 2000, Sarasota County filed a Petition for Intervention. In support of its petition, Sarasota County states that pursuant to Section 367.171(3), Florida Statutes, it is excluded from the provisions of Chapter 367, Florida Statutes. Further, it asserts that the issue of whether the Commission has jurisdiction to consider Intercoastal's and NUC's applications is one which has far-reaching implications for all nonjurisdictional counties which are bordered by jurisdictional counties. Also, it argues that adopting an interpretation of Section 367.171(7), Florida Statutes, that would allow

> an investor-owned utility to circumvent the regulatory authority of a nonjurisdictional county by applying to

> the Commission for a certificate of authorization for a proposed utility system that would provide service in both a jurisdictional and nonjurisdictional county would severely undermine Sarasota County's statutory authority and would allow private investor-owned utilities to circumvent the regulations of the county and, in effect, forum shop for a regulator.

Thus, Sarasota County requests that the Commission grant it intervention "on the ground that a decision in this consolidated proceeding predicated on a legal interpretation of Section 367.171(7), Florida Statutes, will have a substantial impact on Sarasota County's regulatory authority."

On May 11, 2000, Hillsborough County filed its Petition for Leave to Intervene. Like Sarasota County, Hillsborough County also states that pursuant to Section 367.171(3), Florida Statutes, it is a "non-jurisdictional county" and has not relinquished its authority to regulate investor-owned utilities within its borders to the Commission. Hillsborough County asserts that a decision by the Commission to issue an original certificate to serve in areas located in both Duval and St. Johns Counties will call into question Hillsborough County's statutory right to regulate investor-owned utilities within Hillsborough County; its ability to exercise growth management decisions within its own jurisdiction; and its ability to honor contractual commitments to investor-owned utilities within the County.

Hillsborough County cites to Florida Wildlife Federation, Inc. v. Florida Trustees of the International Improvement, 707 So. 2d 841 (Fla. 5th DCA 1998), as the two-pronged test to be used to determine whether intervention should be allowed. It states that under this test, the Commission must determine whether the interest asserted is appropriate to support intervention, and if the requisite interest exists, then the Commission must exercise its discretion to determine whether to permit intervention. Hillsborough states that its interest in the outcome of this matter is sufficient to support intervention and that the Commission has the discretion to determine whether to allow intervention. Further, Hillsborough County asserts that "absent intervention, the County will not have an opportunity to fully protect its substantial interest which will be affected through the proceeding." Hillsborough County also states that the "totality of the circumstances in this case, including its affect upon the 39 nonjurisdictional counties, certainly warrants granting of intervention."

On May 15, 2000, Collier and Citrus Counties filed a joint Petition for Intervention and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. In support of their Petition for Intervention, Collier and Citrus Counties state that they are not within the Commission's jurisdiction pursuant to Section 367.171(1), Florida Statutes. Further, they state that both Collier and Citrus Counties are bounded by counties within the Commission's jurisdiction, and are thus "susceptible to the same type of petition, and accompanying loss of jurisdiction, facing St. Johns County here." They state that the Commission's decision in regard to its jurisdiction over Intercoastal's and NUC's applications may allow the Commission the authority to grant proposed utilities large portions of territory located in nonjurisdictional counties and that the decision will be a "binding precedent in future cases involving similar facts." Thus, Collier and Citrus Counties state that "their input to the decision should be heard," and they request that they be granted full party status to participate in these proceedings.

Responses to Petitions for Intervention

On June 6, 2000, NUC and Intercoastal timely filed their responses to the Petitions for Intervention. Both cite to Rule 25-22.039, Florida Administrative Code, which states that "persons, other than the original parties to a pending proceeding, who have a substantial interest in the proceeding, and who desire to become parties may petition the presiding officer for leave to intervene." NUC states that a petition for intervention must include "allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right, or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding." NUC asserts that the petitioners have not cited any constitutional or statutory right or Commission rule which entitles them to participate in these proceedings, and that thus, the basis of their participation depends upon whether they have a substantial interest that will be determined or affected through these proceedings.

Both NUC and Intercoastal cite to Agrico Chemical Company v. Department of Environmental Protection, 406 So. 2d 478 (Fla. 1st DCA 1981), as the two-prong test to determine whether a person has a substantial interest to participate in a Section 120.57, Florida Statutes, hearing. They state that under Agrico, to have a substantial interest to participate in an administrative proceeding, one must show:

1) that he will suffer an injury in fact which is of sufficient immediacy to entitle him to a Section 120.57, Florida Statutes, hearing; and

2) that his substantial injury is of the type or nature which the proceeding is designed to protect.

The first prong of the test concerns the degree of injury and the second prong concerns the nature of the injury. Id. at 482.

Both NUC and Intercoastal contend that Sarasota, Hillsborough, Collier and Citrus Counties' petitions fail both prongs of the Agrico test. NUC states that a person must demonstrate more than a mere interest in the outcome of a proceeding to satisfy the first prong of the Agrico test. Citing Florida Society of Ophthalmology v. Board of Optometry, 532 So. 2d 1279 (Fla. 1st DCA 1988), NUC states that the petitioner must show that his rights and interests are immediately affected and thus in need of protection. Further, NUC cites to Village Park Mobile Home Association v. Department of Business and Professional Regulation, 506 So. 2d 426 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987), for the proposition that the alleged injury cannot be speculative or conjectural.

Further, both NUC and Intercoastal state that the potential precedential affect of a Commission decision is not sufficient to confer standing. Intercoastal cites to Department of HRS v. Barr, 359 So. 2d 503 (Fla. 1st DCA 1978) in which the court stated that agency orders rendered in Section 120.57, Florida Statutes, proceedings may indirectly determine controversies and affect persons yet unborn, but the rule is stare decisis, not res judicata, and Section 120.57, Florida Statutes, proceedings will afford the person an opportunity to attack the agency's position by the appropriate means, and Section 120.68, Florida Statutes, will provide judicial review. Intercoastal also cites to In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Cogenerational Facility, Order No. 16581, issued September 11, 1986, in Docket No. 860725-EU, in which the Commission stated that a "potential adverse legal precedent does not constitute the 'substantial interest' under Rule 25-22.39, Florida Administrative Code, or the case law." Further, NUC cites to In re: Complaint and/or Petition for Arbitration by Global NAPS, Inc., Order No. PSC-99-2526-PCO-TP, issued December 23, 1999, in Docket No. 991267-TP, in which the Commission denied a petition to intervene filed by a party having a contract similar or identical to the one to be construed by the Commission.

NUC also states that Hillsborough, Sarasota, Collier and Citrus Counties have failed the second prong of the Agrico test because the certificate proceedings under Section 367.045, Florida Statutes, are "designed to protect the interest of the applicant utility and the public by granting or denying a utility's application for a service territory -- in this case in Duval and St. Johns Counties." It states that the statute "specifically gives a right to participate to the Public Counsel and to governmental authorities, utilities, and customers who would be substantially affected by the requested certification." NUC contends that Hillsborough, Sarasota, Collier and Citrus Counties "have no regulatory authority in Duval or St. Johns Counties, are not potential competing providers of utility service in this area, and are not existing or potential customers of either utility." Thus, NUC concludes that these counties have no "legally cognizable interest in whether [NUC], Intercoastal, or neither, are awarded their requested service territory."

NUC also asserts that Hillsborough County's reliance on Florida Wildlife Federation as support for its standing to intervene is misplaced. NUC states that Florida Wildlife Federation, deals with intervention under Rule 1.230, Florida Rules of Civil Procedure, which "permits intervention by 'anyone claiming an interest in pending litigation.'" NUC states that the civil litigation standard is "different than the standard that applies to intervention in administrative proceedings, which permits intervention only by those whose interests are 'substantially affected.'" Moreover, NUC states that the Hillsborough, Sarasota, Collier and Citrus County Petitions for Intervention would even fail under the Rule 1.230, Florida Rules of Civil Procedure, standard because the court in Union Central Life Insurance Co. v. Carlisle, 593 So. 2d 505 (Fla. 1992), stated that the interest that will entitle a person to intervene must be of "such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." NUC contends that the petitioners will "gain or lose nothing by the direct operation and effect of a Commission decision granting a certificate to NUC (or Intercoastal) to provide service in Duval and St. Johns Counties."

Both NUC and Intercoastal state that the injury Hillsborough, Sarasota, Collier and Citrus Counties allege, the precedential effect that the Commission's decision might have on their counties, is exactly the type of speculative, indirect interest that is insufficient to permit a party to participate in an administrative proceeding under Agrico. Thus, both NUC and Intercoastal urge the

Commission to deny Hillsborough, Sarasota, Collier and Citrus Counties' Petitions for Intervention.

Staff's Analysis

Staff agrees with NUC and Intercoastal that the two-pronged test set forth in Agrico is controlling in this instance. The basis for Hillsborough, Sarasota, Collier and Citrus Counties' arguments to allow the Counties to intervene in these proceedings is that the Commission's decision as to its jurisdiction over Intercoastal and NUC's applications may result in a precedent that could someday have an adverse impact on their counties. Hillsborough, Sarasota, Collier and Citrus Counties are not alleging that there is a utility that is proposing to provide, or that they know of a utility that will propose to provide in the near future, service that will transverse county boundaries, a portion of which will be located in their counties. Staff agrees with NUC and Intercoastal that an injury premised on a potential precedent that might have an affect on the counties at some unspecified time in the future is too speculative to confer standing. See Mobile Home Association, 506 So. 2d at 430. Consequently, Hillsborough, Sarasota, Collier and Citrus Counties' petitions fail the first prong of the Agrico test, which requires an intervenor to show that he or she will suffer an injury in fact which is of an immediate nature. As the Petitions for Intervention fail the first prong of the Agrico test, the second prong of the test need not be addressed. Thus, staff recommends that Hillsborough County's and Sarasota County's Petition for Intervention and Collier and Citrus Counties' joint Petition for Intervention be denied.

Sarasota and Hillsborough Counties filed Motions to Dismiss and Collier and Citrus Counties filed a joint Motion to Dismiss both NUC's and Intercoastal's applications. If the Commission agrees with staff that these counties do not have standing to intervene in this proceeding, their Motions to Dismiss should be denied. See Health Facilities Research, Inc. v. Bureau of Community Medical Facilities, 340 So. 2d 125 (Fla. 1st DCA 1976).

Staff notes that Sarasota, Hillsborough, Collier and Citrus Counties will still have the opportunity to participate at the special agenda conference as interested persons since this matter has not yet been to hearing. At that time they can provide the Commission with their comments on the Commission's jurisdiction to consider Intercoastal's application under Section 367.171(7), Florida Statutes.

Collier and Citrus Counties' Alternative Request to Participate As Amicus Curiae

In the alternative, Collier and Citrus Counties request to participate as amicus curiae[1], for the purpose of, among other things, to file a motion to dismiss Intercoastal's and NUC's applications on the basis that "the Commission lacks the statutory jurisdiction to approve the grant of service territory, at least within the nonjurisdictional county, sought." Collier and Citrus Counties also state that they want to join St. Johns County in opposing Intercoastal's application and want to oppose NUC's application as well, based on the Commission's lack of jurisdiction to approve both the applications. Further, they state that

> Allowing some or all of the other nonjurisdictional counties which will be impacted by the outcome of this case to file as amici will not guarantee appeals will not be taken. However, having the benefit of the views and argument of Collier and Citrus Counties on whether this Commission can or should exercise this new and far-reaching area of jurisdiction cannot harm the quality of this Commission's decision-making process. By whatever means, the nonjurisdictional counties should have input to this decision, which will undoubtedly be sought to be applied to them.

In response, NUC and Intercoastal state that Collier and Citrus Counties' request to participate as amicus curiae should be denied. Intercoastal states that, by its request to participate as amicus curiae, Collier and Citrus Counties are actually seeking a limited form of participation in this case that is not supported by any Commission rule. In response to Collier and Citrus County's contention that they want to participate as amicus curiae to file a Motion to Dismiss NUC's and Intercoastal's applications, NUC cites to Health Facilities Research, Inc. v. Bureau of Community Medical Facilities, 340 So. 2d 125 (Fla. 1st DCA 1976), in which the court found that an amicus curiae does not have standing to move to dismiss a petition, and to Keating v. State, 157 So. 2d 567, 569 (Fla. 1st DCA 1963), for the proposition that an amicus curiae cannot inject new issues in a proceeding, but can only argue other theories in support of the existing issues.

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[1] In the alternative, Collier and Citrus Counties have also filed Petitions for Declaratory Statement and for Rulemaking. As these petitions are outside the scope of these proceedings, they will be addressed at a later date.

Staff notes that amicus curiae briefs are generally for "assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. 4th DCA 1996). Chapter 120, Florida Statutes, Administrative Procedure Act, the Florida Rules of Civil Procedure, the Uniform Rules, and the Commission's rules do not provide for the filing of amicus briefs. Rule 9.370, Florida Rules of Appellate Procedure, addresses amicus curiae and states that:

> an amicus curiae may file and serve a brief in any proceeding with written consent of all parties or by order or request of the court. A motion to file a brief as amicus curiae shall state the reason for the request and the party or interest on whose behalf the brief is to be filed. Unless stipulated by the parties or otherwise ordered by the court, an amicus curiae brief shall be served within the time period prescribed for briefs of the party whose position is supported.

In Resort Timeshare Resales, Inc. v. Stuart, 764 F. Supp. 1495, 1500 (S.D. Fla. 1991), the court addressed the situation in the federal court system where the Federal Rules of Appellate Procedure and the Rules of the Supreme Court have provisions addressing the filing of amicus curiae briefs, but the Federal Rules of Civil Procedure lack such a provision at the trial court level. The court concluded that it had the inherent authority to appoint an amicus curiae, or "friend of the court," to assist in the proceeding. Further, the court stated that "Inasmuch as an amicus curiae is not a party and does not represent the parties but participates only for the benefit of the court, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus." Id. at 1501.

Staff believes that similarly, allowing participation as amicus curiae is within the discretion of the Commission. Participation by amicus curiae has been allowed in Commission proceedings on a few occasions. The Commission allowed amicus curiae participation in two cases which went to a Section 120.57, Florida Statutes, hearing. See In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC-99-0535-FOF-EM, issued March 22, 1999, in Docket No. 981042-EM (Louisville Gas & Electric Energy Corporation filed an Amicus Curiae Memorandum of Law in opposition to a motion to dismiss filed by a utility in the case); In re: Investigation of

the Rate-Making and Accounting Treatment for the Dismantlement of Fossil-Fueled Generating Stations, Order No. PSC-93-1237-AS-TI, issued August 25, 1993, in Docket No. 890186-EI (Florida Industrial Power Users Group appeared as amicus curiae). There was one case that settled prior to hearing in which a party filed an amicus curiae brief in the proceeding. See In re: Complaint by Telecom Recovery Corporation against Transcall America, Inc., d/b/a ATC Long Distance Regarding Billing Discrepancy, Order No. PSC-93-1237-AS-TI, issued August 25, 1993, in Docket No. 910517-TI (the Attorney General's Office filed an amicus curiae brief). There have also been two instances in which the Commission allowed amicus curiae participation in declaratory statement proceedings. See In re: Petition of IMC-Agrico Company for a Declaratory Statement Confirming Non-Jurisdictional Nature of Planned Self-Generation, Order No. PSC-98-0074-FOF-EU, issued January 13, 1998, in Docket No. 971313-EU (Florida Power and Light appeared as amicus curiae); In re: Petition of Florida Power and Light Company for a Declaratory Statement Regarding Request for Wheeling, Order No. 20808, issued February 24, 1989, in Docket No. 881326-EI (after Union Carbide withdrew its Petition to Intervene, the Commission treated the points raised in the Motion to Dismiss, that it had previously filed, as an amicus curiae submission, at the request of Union Carbide).

As previously discussed, Collier and Citrus Counties state that they wish to participate as amicus curiae to, among other things, file a Motion to Dismiss Intercoastal's and NUC's applications. Staff agrees with NUC that pursuant to Health Facilities Research, an amicus curiae does not have standing to move to dismiss a petition and under Keating, an amicus curiae cannot inject new issues in a proceeding. Thus, staff recommends that the Commission deny Collier and Citrus Counties' request to participate as amicus curiae for the purpose of filing a Motion to Dismiss NUC's and Intercoastal's applications, as such a procedure is not permissible under the law.

Collier and Citrus Counties also state that they want to participate as amicus curiae in support of St. Johns County's Motion to Dismiss Intercoastal's application and oppose NUC's application as well; however, Collier and Citrus Counties have failed to file an amicus curiae brief in this proceeding. On May 23, 2000, Collier and Citrus Counties filed a Motion to Dismiss based upon the argument that the Commission lacks jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes. If the Commission accepts staff's recommendation to deny Collier and Citrus Counties' joint Petition for Intervention, then, as discussed above, Collier and Citrus

Counties would not be parties and thus would not have the requisite standing to allow the Commission to consider Collier and Citrus Counties' Motion to Dismiss. However, staff believes the Commission can consider the points raised in Collier and Citrus Counties' joint Motion to Dismiss, found in Issue 4, as an amicus curiae submission, if it so desires, and can give the points raised as much weight as the Commission deems appropriate.

ISSUE 3: Should the Commission grant St. Johns County's Motion to Dismiss Intercoastal Utilities, Inc.'s application?

RECOMMENDATION: No. The Commission should deny St. Johns County's Motion to Dismiss Intercoastal Utilities, Inc.'s application. (CIBULA, VAN LEUVEN)

STAFF ANALYSIS: A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.

St. Johns County's Motion to Dismiss

As stated in the case background, St. Johns County (County) timely filed a Motion to Dismiss Intercoastal's application on January 26, 2000. The County sets forth two grounds upon which Intercoastal's application should be dismissed: 1) lack of subject matter jurisdiction, and 2) res judicata/collateral estoppel.

First, the County argues it is not within the Commission's jurisdiction to award service territory to an existing utility when the utility and the territory requested are located in a nonjurisdictional county. The County states that the plain meaning of Section 367.171(1), Florida Statutes, which grants counties the right to regulate water and wastewater utilities within county boundaries, combined with the legislative intent behind Section 367.171(7), Florida Statutes, which gives the Commission jurisdiction over utilities that transverse county boundaries, does not support the notion that the Commission can assign territory in nonjurisdictional counties to intercounty utilities. Moreover, the County contends that if the Commission asserts jurisdiction and grants the territory requested by Intercoastal in its application, all available water and wastewater service territory in the County will be usurped, which would be contrary to the express right of the County, under Section 367.171, Florida Statutes, to assert its own regulatory jurisdiction and to reject Commission jurisdiction over its water and wastewater utilities. Citing City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991) and Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984, 988 (Fla. 5th DCA 1999), the County asserts that in jurisdictional counties, the franchise rights awarded by the

Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes," implying that the Commission's jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties as well. Thus, the County contends that the only way Sections 367.171(1) and 367.171(7), Florida Statutes, can be harmonized is to limit the jurisdiction of the Commission to award additional service territory to intercounty utilities to service areas located within jurisdictional counties.

In support of its second argument, the County states that Intercoastal had an application before the Board of County Commissioners of St. Johns County (Board) in which Intercoastal requested to serve the same territory that Intercoastal has applied for in this case. The County asserts that after extensive hearings in St. Johns County, the Board ultimately denied Intercoastal's application to serve this territory. The order of the Board denying Intercoastal's application is currently on appeal in Circuit Court. The County contends that the only change to Intercoastal's application before the Commission is the addition of service area in Duval County. Thus, the County argues that the principles of collateral estoppel and res judicata "are appropriate and should be applied in this instance to prevent Intercoastal from profiting from blatant forum shopping and an attempt to re-litigate a cause it has already litigated and lost."

Intercoastal's Response

In its response to the County's contention that the Commission lacks subject matter jurisdiction to consider Intercoastal's application, Intercoastal states that, contrary to the County's analysis of the statute, the express wording of Section 367.171(7), Florida Statutes, gives the Commission exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or non-jurisdictional. Further, Intercoastal asserts that if the Legislature had meant Section 367.171, Florida Statutes, to read the way the County suggests it reads, the Legislature could have easily worded the statute accordingly.

Intercoastal also asserts that the County is incorrect when it argues that its application should be dismissed on the grounds of res judicata or collateral estoppel. Intercoastal asserts that, pursuant to University Hospital, Ltd. v. Agency for Health Care Administration, 697 So. 2d 909 (Fla. 1st DCA 1997) and Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997), a motion to dismiss is an inappropriate procedure to raise the defenses of

res judicata and collateral estoppel. Moreover, Intercoastal contends that the doctrines of res judicata and collateral estoppel do not apply because the issues to be litigated in this docket are not identical and the relief sought from the Commission is not the same as that sought from the Board. Further, the utility argues that the applicable substantive law for this docket, Chapter 367, Florida Statutes, is not the same law under which the Board's decision was based; therefore, the issues would not be identical. Additionally, Intercoastal states that the Commission has not yet established the issues to be litigated in this docket, so the Commission cannot yet tell if the issues before the Commission are the same as the issues that were before the Board.

Staff's Analysis

St. Johns County states that Intercoastal's application should be dismiss based upon res judicata/collateral estoppel. Before the doctrine of res judicata can apply the following conditions must be present: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality in the person for or against whom the claim is made. See Daniel v. Dept. of Transportation, 259 So. 2d 771, 773 (Fla. 1st DCA 1972). To demonstrate collateral estoppel, it must be shown that: 1) the parties and issues are identical; 2) the particular matter was fully litigated and determined; 3) a final decision was rendered; and 4) the matter was resolved in a court of competent jurisdiction. See United States Fidelity & Guaranty Co. v. Odoms, 444 So. 2d 78, 79 (Fla. 5th DCA 1984). Res judicata is claim preclusion, and collateral estoppel is issue preclusion.

Staff agrees with the cases set forth by the utility which state that a motion to dismiss is not the appropriate avenue in which to address the issues of res judicata and collateral estoppel. As stated in Varnes, when making a determination as to whether the petition should be dismissed, the reviewer may not go beyond the four corners of the petition. See Id. at 350. Because the Board's decision denying Intercoastal's application to serve in St. Johns County is not found within the four corners of Intercoastal's application before this Commission, one must look beyond the application, which is contrary to Varnes, to make a determination as to whether the application should be dismissed based on res judicata or collateral estoppel. Therefore, it would be error to dismiss the application on the grounds of res judicata or collateral estoppel.

The County also argues that the Commission does not have jurisdiction under Section 367.171(7), Florida Statutes, to consider Intercoastal's application. As set forth in Issue 1, staff believes that the Commission has jurisdiction to consider Intercoastal's application. Duval County opted to give the Commission jurisdiction over its water and wastewater systems on April 1, 1974. It continues to be subject to the Commission's jurisdiction. St. Johns County is excluded from the Commission's jurisdiction under Section 367.171(3), Florida Statutes. St. Johns County took back jurisdiction over its water and wastewater systems on September 26, 1989. However, Intercoastal is proposing to provide service to the entire Nocatee development, which is proposed to span both Duval and St. Johns Counties. Consequently, the utility's proposed service area would transverse county boundaries. Thus, the relevant statute to determine whether the Commission has jurisdiction over Intercoastal's application is Section 367.171(7), Florida Statutes, which states:

> Notwithstanding anything to the contrary, the [C]ommission shall have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties involved are jurisdictional or nonjurisdictional, except for utility systems that are subject to, and remain subject to, interlocal utility agreements in effect as of January 1, 1991, that create a single governmental authority to regulate the utility systems whose service transverses county boundaries, provided that no such interlocal agreement shall divest [C]ommission jurisdiction over such systems, any portion of which provides service within a county that is subject to [C]ommission jurisdiction under this section. (emphasis added)

In Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [except those exempted under Section 367.022, Florida Statutes] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, the Commission has subject matter jurisdiction to consider Intercoastal's application under Section 367.171(7), Florida Statutes, because it is proposing to construct a utility system whose service would transverse county boundaries, thus causing the application to fall

within the exclusive jurisdiction of the Commission. As the statute states that the Commission has exclusive jurisdiction over a utility whose service transverses county boundaries, pursuant to Section 367.171(7), Florida Statutes, staff believes only the Commission would have the authority to determine whether to grant additional territory to the utility, contrary to the interpretation of Section 367.171(7), Florida Statutes, set forth by St. Johns County.

St. Johns County cites to JJ's Mobile Homes and Lake Utility Services, a case that followed the court's holding in JJ's Mobile Homes, for the proposition that the franchise rights awarded by the Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes." The County asserts that these cases imply that the Commission's jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties. The County seems to argue that the only way to harmonize the equal right of the County to regulate utility service in its boundary would be to interpret Section 367.171(7), Florida Statutes, so that the Commission would only have jurisdiction to award additional service territory to a utility that transverses county lines if the additional territory is located within one of the Commission's jurisdictional counties.

JJ's Mobile Homes involved a private utility company that filed an action against a municipality which had voluntarily annexed into its city limits a tract of land that was specified in the utility's certificates issued by the Commission. When making its determination as to which utility had the right to serve in the disputed area, the court first stated that, "territorial rights and duties relating to utility services as between prospective suppliers are more properly defined and delineated by administrative implementation of clear legislation than by judicial resolution of actual cases and controversies resulting from the lack of clear legislative direction." Id. at 225. Finding that there was an absence of clear legislative intent, the court resorted to resolving the dispute "by the application of principles which appear to best serve the public and to be fair and equitable to legitimate competing interests." Id. As the first principle the court stated that, "In Florida, the basis for the right of both governmental and private entities to provide utility services to the public is statutory and the franchise right of each is equal and neither entity is, per se, superior or inferior to the other." Id. Thus, because the court was unable to find clear legislation which pertained to the issue in question, the court determined the territorial rights and duties of the prospective service providers.

Intercoastal's application can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover, in JJ's Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth the Commission's jurisdiction over Intercoastal's application. Section 367.171(7), Florida Statutes. Therefore, staff believes that there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to the Commission's jurisdiction.

Assuming all of the allegations in the application are true and viewing all reasonable inferences in favor of Intercoastal, as required by Varnes, the application falls within the Commission's subject matter jurisdiction. Thus, staff recommends that the Commission should deny St. Johns County's Motion to Dismiss Intercoastal's application.

ISSUE 4: If the Commission denies staff's recommendation in Issue 2 and instead grants Sarasota and Hillsborough Counties' Petitions for Intervention and Collier and Citrus Counties' joint Petition for Intervention, should Sarasota and Hillsborough Counties' Motions to Dismiss and Collier and Citrus Counties' joint Motion to Dismiss be granted?

RECOMMENDATION: No. Sarasota and Hillsborough Counties' Motions to Dismiss and Citrus and Collier Counties' joint Motion to Dismiss should be denied. (CIBULA, VAN LEUVEN)

STAFF ANALYSIS: In Issue 2, staff recommends that the Commission deny Sarasota, Hillsborough, Collier and Citrus Counties' Petitions for Intervention and that Sarasota, Hillsborough, Collier and Citrus Counties' Motions to Dismiss should be denied for lack of standing. The following is staff's recommendation on Sarasota, Hillsborough, Citrus and Collier Counties' Motions to Dismiss, which has been completed in the event that the Commission denies staff's recommendation in Issue 2 that the requests for intervention of these Counties should be denied.

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.

Sarasota County's Motion to Dismiss

In its Motion to Dismiss, Sarasota County states that St. Johns County, like Sarasota, Hillsborough, Collier and Citrus Counties, is a non-jurisdictional county pursuant to Section 367.171(3), Florida Statutes. Further, it argues that pursuant to Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the Commission does not have jurisdiction to regulate utilities that provide service within their respective geographic boundaries. Sarasota County states that neither Intercoastal nor NUC currently have a system which provides water and/or wastewater service across county boundaries. Moreover, Sarasota County asserts Intercoastal admits in its application that its system in St. Johns is not currently within the Commission's jurisdiction. However, Intercoastal is attempting to invoke the Commission's jurisdiction with its application, which is contrary

to the requirements of Section 367.031, Florida Statutes, which Sarasota County states provides that an original certificate can be granted only to a utility which is subject to the jurisdiction of the Commission. Sarasota County contends that NUC and Intercoastal are "essentially asking [the Commission] for authorization to provide water and wastewater service in a non-jurisdictional county" and citing Hernando County, it asserts that the Commission "has no authority to consider those requests."

Sarasota County further states that the only exception to the Commission's "lack of jurisdiction in non-jurisdictional counties can be found in Section 367.171(7), Florida Statutes." It asserts that the issue in this proceeding is the time at which the Commission's jurisdiction vests. Sarasota County asserts that this question was answered in In re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and DeSoto Counties by Lake Suzy Utilities, Inc., (Lake Suzy), Order No. PSC-00-0575-PAA-WS, issued March 22, 2000, in Dockets Nos. 970657-WS and 980261-WS. Sarasota County alleges that in Lake Suzy the Commission "held that the Commission is 'vested with jurisdiction [under Section 367.171(7)] at the time of connection,' i.e. when service actually 'transverses county boundaries.'" It further argues that jurisdiction is not triggered by the mere filing of an application and quoting Hernando County asserts that the

> relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), [Florida Statutes], is the actual interrelationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), [Florida Statutes] over which [the Commission] ordinarily has jurisdiction." The Court [in Hernando County] further stated that the requirements of Section 367.171(7), [Florida Statutes], "can only be satisfied by evidence that the facilities forming the asserted system exist in contiguous counties across which the service exists."

Sarasota County asserts that, based on Hernando County and Lake Suzy, the "facilities must be actual and must exist before [the Commission] divests a non-jurisdictional county of regulatory authority."

Sarasota County states that it "does not disagree that once a utility system actually provides service which crosses county boundaries, jurisdiction rests with the [Commission]"; however, it further asserts that "it is solely within the non-jurisdictional

county's regulatory authority to make the threshold decision as to whether to grant a utility the right to either commence serving within its geographic boundaries or to expand its current service area within that county's boundaries." Finally, Sarasota County states that interpreting Section 367.171(7), Florida Statutes, to allow a utility "to avoid a county's regulatory jurisdiction by a unilateral business decision to include some territory from a jurisdictional county in its expansion plans flagrantly undermines the authority of the non-jurisdictional county to regulate utilities within its geographic boundaries and allows the utility the unfettered opportunity to forum shop for its own regulator."

Hillsborough County's Motion to Dismiss

In its Motion to Dismiss, Hillsborough County also cites to Hernando County, for the proposition that there must be a physical delivery of water and/or wastewater which transverses county boundaries for Section 367.171(7), Florida Statutes, to apply. Further, it argues that Section 125.01(k)(1), Florida Statutes, provides specific authorization to the counties to regulate water and wastewater and that in Section 367.171(1), Florida Statutes, the Legislature provided that the provisions of Chapter 367 would only become effective in a county upon the adoption of a resolution by the Board of County Commissioners of a county wishing to become regulated by the Commission. Moreover, Hillsborough County asserts that

> Given the strong preference expressed by the Legislature and the Courts in favor of the counties' discretion to regulate water and wastewater service within their boundaries, it is inconceivable that the Legislature intended by providing a definition of utility in Section 367.021(12), [Florida Statutes], that includes prospective or proposed construction of a system, that the counties would be divested of their fundamental right to regulate water and wastewater systems located within their boundaries.

Hillsborough County concludes that when Sections 367.171(7), Florida Statutes, and 367.021(12), Florida Statutes, are read together, the "most reasonable interpretation" would be that "when a proposed utility service transverses county boundaries into a non-jurisdictional county, the non-jurisdictional county must give its consent before its regulatory authority may be usurped by the [Commission]."

Citing Hernando County and City of Cape Coral v. GAC Utilities, 281 So. 2d 493 (1973), Hillsborough County states that if there is reasonable doubt as to the existence of a particular power being exercised by the Commission, the Commission should not exercise that power. Hillsborough County asserts that there has been reasonable doubt raised regarding the Commission's "lawful ability to usurp the counties' ability to grant or deny certificates for service within their jurisdiction."

Collier and Citrus Counties' Joint Motion to Dismiss

Like Hillsborough and Sarasota Counties, Collier and Citrus Counties argue that, based on Hernando County, "there must be actual physical interconnections crossing contiguous county boundaries by which actual water and wastewater services are being transported in order for there to be jurisdiction in the Commission pursuant to Section 367.171(7), [Florida Statutes]." Further, they state that their view

> does not mean that the Commission can grant service territory within a nonjurisdictional county as part of an application, which if ultimately approved and constructed would result in actual physical interconnections transporting water and wastewater services. This type of "bootstrap" logic has no foundation in precedent and would do severe damage to the nonjurisdictional counties' ability to exercise their home rule prerogatives afforded by Chapter 125, Florida Statutes.

Collier and Citrus Counties state that NUC's and Intercoastal's applications include "thousands of acres located exclusively within St. Johns County, a nonjurisdictional county." They assert that "case law does not require the Commission limit itself to grants of territory which will immediately require service." Thus, they argue that "there could be no limit to the service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk."

Collier and Citrus Counties also state that there is no prior history supporting the Commission granting service territory in a nonjurisdictional county, and that they are not aware of any cases "supporting the Commission's grant of additional territory to a utility within a nonjurisdictional county, even where the utility has already been found to be jurisdictional on the basis of Section 367.171(7), [Florida Statutes]." Further, they cite City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991), and Lake Utility Services, Inc. v. City of Clermont, 727 So.

2d 984, 988 (Fla. 5th DCA 1999), for the proposition that franchise rights granted by the Commission are "merely equal to, not superior to, those awarded by local governments."

Collier and Citrus Counties state that Section 367.171(7), Florida Statutes, and Chapter 125, Florida Statutes, can be harmonized as follows:

> ...[A]ll existing systems having actual physical service transversing county boundaries must be regulated by this Commission in all statutory respects with the exception of the ability to award service area expansions within nonjurisdictional counties. Commission jurisdiction over such a utility would exist irrespective of whether the utility met the "transverses county boundaries" on the date Section 367.171(7), [Florida Statutes], became effective or by virtue of a nonjurisdictional county knowingly granting a utility service territory within its boundaries coupled with an application in an adjacent county that, once completed, would bring it within this Commission's jurisdiction. Under this scenario, the nonjurisdictional county still maintains control of its own powers and duties provided by both Chapter 125, [Florida Statutes], and Chapter 367, [Florida Statutes]. In the instant case, St. Johns County might elect to award Nocatee (it has already refused Intercoastal) all or a portion of the territory sought within St. Johns County's political boundaries. It could do so with the full knowledge that the Commission would take jurisdiction of whatever the County granted, after, but only after, its territorial grant is mated with territory on the other side of a county boundary. Such an interpretation would do justice to all statutory provisions considering water and wastewater and would be preferred.

Like Hillsborough County, Citrus and Collier Counties assert that there is "clearly a reasonable doubt as to the lawful existence" of the Commission's authority to grant service territory in a nonjurisdictional county. Further, they argue that based on United Telephone Company of Florida v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986) and Tampa Electric Company v. Garcia, Case Nos. SC95444; SC95445; SC95446, issued April 20, 2000, the Commission's "exercise of power should be arrested" given this reasonable doubt.

Intercoastal's and NUC's Responses

Intercoastal states that pursuant to Rule 28-106.204(2), Florida Administrative Code, motions to dismiss must be filed within 20 days after service of the petition. Intercoastal states that Hillsborough County's and Sarasota County's Motions to Dismiss and Collier and Citrus County's joint Motion to Dismiss were filed well in excess of the 20 day deadline.

Both NUC and Intercoastal state that based on a plain reading of Section 367.171(7), Florida Statutes, the Commission has exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties are jurisdictional or nonjurisdictional. Intercoastal states that the Legislature's use of the phrases "Notwithstanding anything in this section to the contrary" and "whether the counties involved are jurisdictional or nonjurisdictional" clearly indicate an intent contrary to that presented by Hillsborough, Sarasota, Collier and Citrus Counties. NUC asserts that as the definition of "utility" found in Section 367.021(2), Florida Statutes, includes "proposed construction of a system" and those "proposing to provide" water and wastewater service, and that under a plain reading of Section 367.171(7), Florida Statutes, and Section 367.021(2), Florida Statutes, the Commission has exclusive jurisdiction over proposed utility systems whose services will transverse county boundaries under Section 367.171(7), Florida Statutes.

NUC states that there is no question that NUC's proposed system will constitute a single system. NUC contends that the only question is whether the Commission's jurisdiction attaches when the cross-boundary service is proposed or when water or wastewater begins to flow across the county boundary. NUC cites to In re: Petition of General Development Utilities, Inc. for Declaratory Statement Concerning Regulatory Jurisdiction Over its Water and Wastewater System in DeSoto, Charlotte, and Sarasota Counties, (GDU), Order No. 22459, issued January 24, 1990, in Docket No. 891190-WS, in which the Commission stated that the Legislature intended to correct the problem of redundant, wasteful, and potentially inconsistent regulation over multi-county utility systems when it enacted Section 367.171(7), Florida Statutes. NUC states that Hillsborough, Sarasota, Collier and Citrus Counties position that "the Commission lacks jurisdiction to grant a multi-county certificate to a new utility would result in just the type of redundant, wasteful and potentially inconsistent regulation that Section 367.171(7), [Florida Statutes], was designed to protect."

As an example, NUC asserts that because the Commission ordinarily sets initial rates as part of the application process, NUC would have to prepare "just the type of cost allocation study for initial ratemaking purposes that the Commission has said the statute was designed to prevent," if NUC were required to file for original certificates with the Commission, for Duval County, and St. Johns County. Further, the utility asserts that "if either regulatory body made adjustments to NUC's rate filing, it would result in the inconsistent treatment of similarly situated customers." Moreover, NUC states that "even if initial rates were not set in the application process, NUC would still be required to submit (and to litigate) its certificate application twice," and "if one regulatory body granted the certificate and the other denied it, NUC would be unable to proceed with its single, integrated system and would suffer exactly the type of inconsistent result the statute was designed to prevent."

NUC also asserts that there is "nothing in prior Commission decisions which holds that Commission jurisdiction over a proposed multi-county utility does not attach until water or wastewater begins to flow." NUC contends that Sarasota County's reliance on Lake Suzy for the proposition that the Commission's jurisdiction does not vest until the time of connection, when service actually transverses county boundaries, is misplaced. NUC states that, in Lake Suzy, the utility was serving one connection in Charlotte County without prior Commission approval. NUC asserts it was "in this context that the Commission stated that it 'was vested with jurisdiction at the time of the connection.'" NUC states that there would have been "no basis for the Commission to consider a show cause proceeding unless, as a result of the prior approval requirement, the Commission believed that jurisdiction had attached at the stage when the cross-county service was proposed."

NUC states that Sarasota County's interpretation of Lake Suzy would mean that the Commission would not have jurisdiction until the lines physically extend across a county boundary; however, "those lines could not be used to provide service unless and until the Commission subsequently granted a multi-county certificate." NUC asserts that such an interpretation would "require a utility to extend lines, at the risk of never being permitted to serve, just in order to be able to apply for a certificate." NUC states that Section 367.171(7), Florida Statutes, "should not be construed to produce such an absurd result," and that it is more logical that the Commission's jurisdiction attaches as soon as a utility proposes to extend its facilities across county boundaries.

As for Hillsborough, Sarasota, Collier and Citrus Counties' contention that Hernando County requires that service must actually transverse a county boundary before the Commission's jurisdiction is invoked, NUC asserts that Hernando County involved the question of whether the Commission has jurisdiction over an existing utility with facilities in multiple counties and "did not involve a proposed utility that will, from the outset, provide physical service across a county boundary."

Both Intercoastal and NUC state that the Commission has exclusive jurisdiction over both of their applications pursuant to Section 367.171(7), Florida Statutes. Thus, both state that Sarasota County's and Hillsborough County's Motions to Dismiss and Collier and Citrus Counties' joint Motion to Dismiss should be denied.

Staff's Analysis

Intercoastal states that Hillsborough, Sarasota, Collier and Citrus Counties' Motions to Dismiss are untimely, as they were not filed within 20 days after service of Intercoastal's application. While Rule 28-106.204, Florida Administrative Code, states that "motions to dismiss the petition shall be filed no later than 20 days after service of the petition on the party," the rule also contains the exception "unless otherwise provided by law." The law allows subject matter jurisdiction to be raised at any time in a proceeding. Cunningham v. Standard Guaranty Insurance Company, 630 So. 2d 179, 181 (Fla. 1994). Thus, staff believes that the Motions to Dismiss do not fail on timeliness grounds.

Staff agrees with Intercoastal and NUC that the Commission has jurisdiction pursuant to Section 367.171(7), Florida Statutes, to consider both NUC's and Intercoastal's applications. Moreover, staff's analysis of the Commission's jurisdiction over Intercoastal's and NUC's applications found in Issue 1, applies to Sarasota, Hillsborough, Collier and Citrus Counties' Motions to Dismiss.

Staff agrees with Intercoastal and NUC that based on a plain reading of the statute, the Commission has jurisdiction over NUC's and Intercoastal's applications pursuant to Section 367.171(7), Florida Statutes. In Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [except those exempted under Section 367.022, Florida Statutes] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for

compensation." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, the Commission has subject matter jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes, because both are proposing to construct a utility system whose service would transverse county boundaries, thus causing the application to fall within the exclusive jurisdiction of the Commission. As the statute states that the Commission has exclusive jurisdiction over a utility whose service transverses county boundaries, pursuant to Section 367.171(7), Florida Statutes, staff believes jurisdiction rests solely with the Commission to rule upon NUC and Intercoastal's applications, contrary to the interpretation of Section 367.171(7), Florida Statutes, offered by Collier and Citrus Counties.

Sarasota, Hillsborough, Collier and Citrus Counties all rely on Hernando County for the proposition that service must actually transverse a county boundary before the Commission's jurisdiction attaches. Staff agrees with NUC that the facts in this proceeding should be distinguished from Hernando County because this case involves an application for proposed service that, as NUC stated, will provide physical service across a county boundary from the outset. The issue in Hernando County was whether the Commission had jurisdiction pursuant to Section 367.171(7), Florida Statutes, over a utility whose facilities were located in a number of non-contiguous counties throughout Florida, or in other words, whether the facilities were functionally related such that they constituted a single system.

Staff also agrees with NUC that Sarasota County's reliance on Lake Suzy for the proposition that the Commission's jurisdiction does not vest until service actually transverses county boundaries, is misplaced. In the portion of the Lake Suzy order to which Sarasota County is citing, the Commission was determining whether one of the utilities in that case should be ordered to show cause pursuant to Section 367.161, Florida Statutes, for its apparent violation of Section 367.031, Florida Statutes, by providing service to a lot in Charlotte County prior to obtaining the Commission's approval. The utility argued that it was under the jurisdiction of DeSoto County at the time of connection to the lot located in Charlotte County and stated that it was not aware of any rule or regulation that prohibited such connection. The Commission stated that based on Section 367.171(7), Florida Statutes, the Commission, not DeSoto County, was vested with jurisdiction at the time of the connection since the lot was located in Charlotte

County, which resulted in the utility's facilities transversing county boundaries from DeSoto County into Charlotte County. The Commission concluded that the utility was required to obtain prior Commission approval before serving the lot.

In their Motion to Dismiss, Collier and Citrus Counties state that there is no prior history supporting the Commission's grant of service territory in a nonjurisdictional county, and that they are unaware of any cases in which the Commission has granted additional territory to a utility located within a nonjurisdictional county, even when the utility has already been found to be jurisdictional on the basis of Section 367.171(7), Florida Statutes. Staff notes that in In re: Application by United Water Florida Inc. for Amendment of Certificates Nos. 236-W and 179-S for a Limited Proceeding to Adjust Rates in St. Johns County, Order No. PSC-97-0929-FOF-WS, issued August 4, 1997, in Docket No. 970210-WS, the Commission reaffirmed its jurisdiction, under Section 367.171(7), Florida Statutes, over United Water Florida Inc.'s facilities and granted it additional territory in St. Johns County, which was a nonjurisdictional county at the time.

Assuming all of the allegations in the applications are true and viewing all reasonable inferences in favor of Intercoastal and NUC, as required by Varnes, the applications fall within the Commission's subject matter jurisdiction. Thus, staff recommends that Sarasota and Hillsborough Counties' Motions to Dismiss and Collier and Citrus Counties' joint Motion to Dismiss should be denied.

ISSUE 5: Should these dockets be closed?

RECOMMENDATION: No. These dockets should remain open to allow these matters to proceed to hearing. (CIBULA, VAN LEUVEN)

STAFF ANALYSIS: These dockets should remain open to allow these matters to proceed to hearing.