ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Applications For An Amendment Of Certificate For An Extension Of Territory And For an Original Water And Wastewater Certificate (for a utility in existence and charging for service)	)	**Docket No. 992040-WS**

INTERCOASTAL UTILITIES, INC.'S RESPONSE
IN OPPOSITION TO ST. JOHNS COUNTY'S MOTION TO DISMISS

Intercoastal Utilities, Inc. ("Intercoastal"), by and through its undersigned attorneys and pursuant to Rule 28-106.204, Florida Administrative Code, files this response in opposition to that Motion filed by St. Johns County to dismiss Intercoastal's application for water and wastewater certificates, or in the alternative, to preclude re-litigation of issues.

1. Two things are immediately noticeable about the County's Motion To Dismiss ("Motion"). The first is that the County has finally dropped the elaborate ruse it maintained during the prior (St. Johns County) proceeding and has finally acknowledged that the County is Intercoastal's competitor for some of these same service areas and that it is opposed to Intercoastal's application. It is no coincidence that the same counsel who represented the "County Utility Department" - who was the opponent in the St. Johns County proceeding - now openly represents the "County" - who was the judge in the St. Johns County proceeding - and that the ludicrous suggestion that opponent and judge were "different" parties has now been effectively abandoned. In fact, St. Johns County opposed Intercoastal's application from the moment it was filed, participated in the proceeding as a party opponent

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adverse to Intercoastal, presented witnesses, evidence, cross-examination, and argument opposed to Intercoastal's application, and also had the singular pleasure of being the adjudicator of all issues in the proceeding! St. Johns County is no more opposed to Intercoastal's application in this case than it was in the prior case. The only difference is that, in this case, the County has acknowledged that it is an opponent of and competitor with Intercoastal's proposal.

2. The second immediately noticeable aspect of St. Johns County's Motion to Dismiss is that the filing of the Motion is the only activity in which the County intends to engage as a "party" to this case. St. Johns County has requested "that it be allowed to intervene in this proceeding for the limited purpose of filing a Motion to Dismiss." In other words, St. Johns County merely wants to come in, lob a single grenade at Intercoastal, and then forever retreat. Thus, St. Johns County's witnesses and the County itself will not be subject to discovery and deposition, or inquiry from the Commission or its staff, as to what really occurred in the prior proceeding that both the County and Nocatee hold so precious in their Motions To Dismiss. If the County wants to participate in this case on the facts and demonstrate that it is in the public interest that Intercoastal's application be denied, then it should do so. The Commission should not tolerate a party who states up front that its only purpose for coming into the proceeding is to persuade this Commission to summarily dismiss an application that Intercoastal clearly has authority to file under the Commission's rules and statutes.

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3. St. Johns County engages in a protracted argument that under § 367.171, Fla. Stat., that this Commission does not have the jurisdiction to "assign" service territories within non-jurisdictional counties. The County's Motion speaks several times to the County's "express right" to assert its own regulatory jurisdiction and to reject Commission regulatory jurisdiction. The problem with this "express right," purportedly based on § 367.171(7), Fla. Stat., is that the same Legislature that created the "right," in fact, limited that right with language that is clear and unequivocal when it stated,

> Notwithstanding anything in this section to the contrary, the Commission shall have exclusive jurisdiction over all utility systems whose service traverses county boundaries, whether the counties involved are jurisdictional or non-jurisdictional ...

The Legislature took care to point out that this directive was "notwithstanding anything in this section to the contrary" and that it applied to counties "whether the counties involved are jurisdictional or non-jurisdictional." The Legislature could hardly have more definitively worded the subdivision of § 367.171 so as to indicate an intent contrary to that urged by St. Johns County. If the Legislature had intended Chapter 367.171 to be read as St. Johns County suggests, it could easily have worded the statute accordingly.

4. In essence, what is suggested by the County is that any utility which traverses County boundaries cannot expand in the non-jurisdictional county. After all, such an action would be contrary to the "express right" of the County to reject

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Commission regulatory jurisdiction over "its" water and wastewater utilities, as the County suggests in its Motion. Such a construction would necessarily be based on fantasy rather than on any of the Legislature's directives as clearly reflected in § 367.171, Fla. Stat. The Commission not only has jurisdiction over ***all*** utility systems whose service ***traverses county boundaries***, but that jurisdiction is ***exclusive***. See § 367.171(7), Fla. Stat.

5. The County opines at length about the number of acres covered by Intercoastal's application and suggests that if the Commission grants Intercoastal's application that "all available water and wastewater service territory in St. Johns County will thereby be usurped." Not only is this statement obviously incorrect under applicable case law involving the extent of exclusivity of a Commission certificate when the utility holding that certificate is in competition with a governmental entity, the statement also begs the following question: Why has the County not chosen to oppose the application of Nocatee Utility Corporation? That application also covers many thousands of acres in St. Johns County. To the extent the County has a hidden agenda in this regard, it will apparently remain hidden from the Commission since the County, rather extraordinarily, has only intervened in this proceeding "for the limited purpose of filing a Motion to Dismiss."

6. Additionally, for the Commission to determine at this point that Intercoastal's application at the Commission has been filed for the purpose of "seeking to circumvent adverse County regulatory rulings" is absurd. By definition, the application before the Commission is not the same application that was before St. Johns County by and

through the very fact that it includes a portion of Duval County, over which St. Johns County has no jurisdiction, regulatory authority, or oversight responsibilities. The County, DDI, and Nocatee displayed creative genius in loudly complaining to the "judge" (St. Johns County) in the St. Johns County case that Intercoastal's application was fatally flawed because it did not include all of the Nocatee development (i.e., that portion in Duval County) and in now asserting (conversely) before this Commission that the application before St. Johns County was, in fact, the same application which is now before the Commission. However, any such assertions melt under an examination of what occurred in St. Johns County, both in terms of the application Intercoastal filed and in terms of the uniformity of identity between opponent and judge, and what will occur under the Commission's rules and statutes in this case.

7. The argument in St. John County's Motion regarding the issue of *res judicata* and collateral estoppel does not simply assert that certain facts should not be "re-litigated" in this case, but actually swings for the fence and suggests that Intercoastal's application *should be dismissed* based on the principles of collateral estoppel and *res judicata*. One would suppose that in order to decide that Intercoastal's application should be ***dismissed*** on this argument, that the Commission would need to be, as an initial matter, made aware of what actually occurred in the St. Johns County proceeding. As it is, not one shred of evidence from that proceeding has ever been made known to this Commission. The Motion, stripped to its essence, essentially requests this Commission to determine that based upon a pattern of facts and circumstances, which are unknown to the Commission except for the fact that

they are alleged by the applicant's opponents, Intercoastal does not have the right under Florida law to file its application. If Intercoastal's application is dismissed at this point, that is precisely the determination the Commission will be making. Additionally, the Motion is not really a Motion to Dismiss. It is tantamount to the administrative equivalent of a Motion for Summary Judgment. Any suggestion that, at this point in the application process or in this newly established proceeding, there are "undisputed material facts" which would justify the summary dismissal of Intercoastal's application is contrary to the public interest and to Florida law.

8. At the outset, the law is clear that a Motion to Dismiss, such as the one filed by St. Johns County is an inappropriate procedure to raise the defenses of *res judicata* and collateral estoppel. *Bess v. Eagle Capital, Inc.*, 704 So.2d 621(Fla. 4th DCA 1997). As the Court in *Swinney v. City of Tampa*, 707 So.2d 765 @ 766 (Fla. 4th DCA 1998) stated:

> (R)es judicata is an affirmative defense, pursuant to Florida Rule of Civil Procedure 1.110(d), and cannot be raised in a motion to dismiss unless the allegations of a prior pleading demonstrate its existence. See Fla. R.Civ.P. 1.140(b); *Byrd v. City of Niceville*, 541 So.2d 696 (Fla. 1st DCA 1989).

No prior pleadings filed in this docket disclose any factual basis upon which St. Johns County could assert the defenses of *res judicata* or collateral estoppel. As the Court in *Swinney v. City of Tampa, supra*, further stated:

> Therefore, the trial court erred by considering an affirmative defense that does not appear on the face of the prior pleading. See *Temples v. Florida Indus. Constr. Co.*, 310 So.2d 326 (Fla. 2d DCA 1975).

This principle is equally applicable to a Motion to Dismiss based upon *res judicata* and collateral estoppel filed in an administrative proceeding. *University Hospital, Ltc. v. Agency for Health Care Administration,* 697 So.2d 909 (Fla. 1st DCA 1997).

It would be error for this Commission to address the issues of *res judicata* and collateral estoppel based upon the pleadings filed in this docket to date. As St. Johns County acknowledge in a footnote, an evidentiary hearing must be held in order to determine whether the elements of *res judicata* and collateral estoppel are met. If St. Johns County remains a party to this proceeding, then it may raise these points in its prehearing statement for litigation at the final hearing.

9. A point which St. Johns County glosses over for obvious reasons is that the essential element of both collateral estoppel and *res judicata* is that the issues be identical. *United States Fidelity & Guaranty Co. v. Odoms,* 444 So.2d 78 (Fla. 5th DCA 1984). The relief sought must also be the same. See *Daniel v. Department of Transportation*, 259 So.2d 771 (Fla. 1st Dca 1972), which, while also ruling that *res judicata* and collateral estoppel are not appropriate matters to be addressed in a Motion to Dismiss, includes an excellent analysis of *res judicata* and collateral estoppel, including the distinctions between them.

10. A review of the substantive facts leads to the clear conclusion that neither doctrine is applicable to this proceeding. It is particularly interesting that St. Johns County would raise this issue in light of the position that they took in the proceeding before St. Johns County Water and Sewer Authority ("Authority"). In that proceeding,

St. Johns County complained that Intercoastal should not be allowed to extend its service area to serve its prospective development because the first phase of that development was located in Duval County and St. Johns County did not want two separate providers of water and sewer service for its development. Now, those same parties conveniently argue that the St. Johns' portion of Intercoastal's application should be summarily denied by this Commission. These two arguments, in and of themselves, reveal that Intercoastal's application before the Commission is not the same application Intercoastal pursued before St. Johns County. In actuality, this is only one of dozens of factual matters that differ between the instant application and the prior application of Intercoastal in St. Johns County which are unknown to the Commission at this point in time.

11. In fact, the Authority in its Preliminary Order (which was confirmed by the Board of County Commissioners) gave "great weight" to the specific fact (that Intercoastal's application did not include Nocatee's property in Duval County) in making its determination. See paragraph 9 of Preliminary Order attached to St. Johns County's Motion. Now, because Intercoastal has taken action to alleviate that objection (or objective), St. Johns County claims that Intercoastal is forum shopping. Had Intercoastal known that DDI's development area was also in Duval County, it would have applied to this Commission instead of to St. Johns County. Intercoastal did not arbitrarily include land in Duval County for the sole purpose of coming within this Commission's jurisdiction. The property in Duval County is a part of the development which DDI proposes in St. Johns County. The Nocatee development,

which encompasses a large tract of land in both St. Johns and Duval County, was not even known or announced at the time Intercoastal filed its application in St. Johns County.

12. It is axiomatic that in order for the issue litigated before the Authority to be identical, the applicable substantive law must be identical. *The Florida Bar v. Clement*, 662 So.2d 690 at 697 (Fla. 1995). That is clearly not the case in these proceedings. In the prior case, St. Johns County was not operating under Chapter 367. In the prior case, St. Johns County was not operating under the Commission's Administrative Code Rules. In the prior case, St. Johns County was not operating under the Commission's precedents, case law and policies. In this case, the Commission will not be operating under the St. Johns County Ordinance applicable to the Authority. In this case, the Commission will not be operating under the rules, precedents and policies of the Authority or of the St. Johns County Board of County Commissioners. And perhaps most importantly, in this case, the Commission will not be wearing two hats – the hat of "judge" and the hat of "competition" to the applicant, as the Board of County Commissioners of St. Johns County did in the prior proceeding. Additionally, the Authority was advised by its counsel as follows:

- "Briefly, a word about the substantive rules that apply to this case. First of all, you look to your ordinance, and then to your rules to your interpretations. For example, you are not bound by Chapter 367. You're not bound by Public Service Commission interpretations of that statute. You, in effect, are writing on a clean slate insofar as your interpretations of this ordinance goes."

- "So, I don't want you to feel that your hide-bound by decisions that are made by an agency with a different statute. You're not. You clearly are

not. You are free to make your own interpretations of your own ordinance."

At another point in the prior proceeding, this exchange occurred:

- Board Member Friedman: - "Whether it's Mr. Hartman or Mr. Cloud. Mr. Hartman mentioned that if this was before the PSC, there would be different rules and regulations. . ."

  . . .

  "So our rules, David, are different from the PSC's" -

  Mr. Conn: "There are differences between the rules" -

  . . .

  Mr. Conn: "The requirements are more general of this Authority and less specific than the PSC."

These are only two examples of many, many discussions which occurred in that hearing in which all parties agreed that the Commission rules, statutes, policies and precedents had nothing to do with that proceeding.

13. Further, as noted by the Court in *University Hospital, Ltd. v. Agency for Health Care Administration, supra,* collateral estoppel does not apply where unanticipated subsequent events create a new legal situation, and *res judicata* cannot bar a subsequent application for a permit if the second application is supported by new facts, changed conditions or additional submissions by the applicant. These theories apply to the relitigation of an application before the same agency. Thus, even if the earlier application had been before this Commission, Intercoastal could have filed the instant application since these principles would apply. However, in the instant case,

the application is before a different agency, applying different rules, policies and objectives and for a different "permit."

14. The instant application differs from the one which Intercoastal filed with the Authority in its scope, its projected costs, its specific implementation of Intercoastal's plan of service, etc. The Commission is not even aware of all of the nuances of Intercoastal's present application at this point, so how could it compare the issues which will be presented in this proceeding (which are not even framed as yet) with the issues which were involved in the prior proceeding?

Clearly, there is no identity in relief sought by Intercoastal in the St. Johns County proceeding and the instant proceeding. See *Brock v. Associates Finance, Inc.*, 625 So.2d 135 (Fla. 1st DCA 1993).

The territory which Intercoastal seeks an original certificate is uncertificated by either St. Johns County or this Commission, except that territory which has been certificated by St. Johns County to Intercoastal. Nocatee currently has an application pending before the Commission in Docket No. 990696-WS for the same territory requested by Intercoastal, and Intercoastal is a party to that proceeding in opposition to the application. The resulting litigation from both applications has now been consolidated into a single case. These cases should go forward so that a record can be developed on both applications and the Commission may exercise its jurisdiction to determine which application should be granted in the public interest.

WHEREFORE, Intercoastal requests this Commission enter an Order denying St. Johns County's Motion.

DATED this 7th day of February, 2000.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by the method indicated below to the following on this 7th day of February, 2000.

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