

BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 990696-WS  
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APPLICATION FOR ORIGINAL :  
CERTIFICATES TO OPERATE WATER AND :  
WASTEWATER UTILITY IN DUVAL AND :  
ST. JOHNS COUNTIES BY NOCATEE :  
UTILITY CORPORATION :  
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APPLICATION FOR CERTIFICATES TO :  
OPERATE A WATER AND WASTEWATER : DOCKET NO. 992040-WS  
UTILITY IN DUVAL AND ST. JOHNS :  
COUNTIES BY INTERCOASTAL UTILITIES :  
INC.  
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PROCEEDINGS: SPECIAL AGENDA CONFERENCE

BEFORE: CHAIRMAN JOE GARCIA  
COMMISSIONER J. TERRY DEASON  
COMMISSIONER SUSAN F. CLARK  
COMMISSIONER E. LEON JACOBS, JR.  
COMMISSIONER LILA A. JABER



DATE: Monday, June 19, 2000

TIME: Commenced at 9:30 a.m.  
Concluded at 1:55 p.m.

PLACE: Betty Easley Conference Center  
Room 148  
4075 Esplanade Way  
Tallahassee, Florida

REPORTED BY: KORETTA E. STANFORD, RPR  
Official FPSC Reporter

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## 1 PARTICIPATING:

2 SUZANNE BROWNLESS, 1311-B Paul Russell Road,  
3 Suite 202, Tallahassee, Florida 32301, appearing on behalf  
4 of St. Johns Counties.

5 MICHAEL TWOMEY, P.O. Box 5256, Tallahassee, Florida  
6 32314-5256, appearing on behalf of Collier County and  
7 Citrus County.

8 DONALD R. ODOM, Hillsborough County Attorney's  
9 Office, P.O. Box 1110, Tampa, Florida 33701, appearing on  
10 behalf of Hillsborough County.

11 KATHLEEN F. SCHNEIDER, Sarasota County Attorney's  
12 Office, 1660 Ringling Blvd., Sarasota, Florida 34236,  
13 appearing on behalf of Sarasota County.

14 JOHN L. WHARTON, Rose, Sundstrom & Bentley, LLP,  
15 2548 Blainstone Pines Drive, Tallahassee, Florida 32301,  
16 appearing on behalf of Intercoastal Utilities, Inc.

17 RICK MELSON, Hopping Law Firm, P.O. Box 6526,  
18 Tallahassee, Florida 32314, appearing on behalf of Nocatee  
19 Utility Corporation.

20 KENNETH HOFFMAN, Rutledge, Ecenia, Underwood,  
21 Purnell & Hoffman, PA, P.O. Box 551, Tallahassee, Florida  
22 32302, appearing on behalf of Jacksonville Electric  
23 Authority.

24 SAMANTHA CIBULA and TYLER VANLEUVEN, FPSC  
25 Division of Legal Services.

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## P R O C E E D I N G S

1  
2 CHAIRMAN GARCIA: Good morning. We're going to  
3 bring this hearing to order.

4 Let me give you some parameters. Susan Clark is  
5 leaving at 11:00. That means the rest of us are leaving  
6 at 11:00. Therefore, you should conduct yourself  
7 appropriately so that we can finish this hearing on time  
8 and this agenda on time.

9 Staff?

10 MS. CIBULA: At the May 16th agenda conference  
11 the Commission deferred consideration of the motions to  
12 dismiss filed by Nocatee Utility Corporation in St. Johns  
13 County in order to hear oral arguments pertaining to the  
14 Commission's jurisdiction over Nocatee Utilities and  
15 Intercoastal applications and the petitions for  
16 intervention filed in these dockets.

17 After the May 16th agenda conference, Nocatee  
18 Utility withdrew its motion to dismiss. Also, after the  
19 recommendation for the special agenda conference was  
20 filed, St. Johns County withdrew the portion of its motion  
21 to dismiss pertaining to res judicata and collateral  
22 estoppel.

23 Thus, the portion of St. Johns County's motion  
24 to dismiss found in issue three of Staff's recommendation  
25 pertaining to res judicata collateral estoppel is no

1 longer an issue and need not be considered by the  
2 Commission at this time. However, the portion of St.  
3 Johns County's motion to dismiss arguing lack of  
4 jurisdiction under Section 3671717 remains.

5 Issue one in our recommendation, Staff is  
6 recommending that the Commission has jurisdiction to  
7 consider Nocatee Utilities and Intercoastal's applications  
8 based on the plain meaning of Section 367171 Florida  
9 statutes and the definition of utility found in Section  
10 36702112 Florida statute, which includes proposed  
11 construction of a system and those proposing to ride  
12 service. Staff recommends that the Commission hear oral  
13 arguments on this issue first, as Staff believes that this  
14 is a threshold issue.

15 Staff suggests that each party and interested  
16 person be allowed five minutes to speak on this issue.

17 CHAIRMAN GARCIA: Very good. And if there's no  
18 objection, we'll take Staff's recommended allotment of  
19 five minutes apiece.

20 Who wants to go first? Sure.

21 MS. BROWNLESS: Hi --

22 MR. WHARTON: I have a preliminary matter,  
23 Commissioner Garcia -- Chairman.

24 CHAIRMAN GARCIA: Go ahead.

25 MR. WHARTON: We're here in the motion hearing

1 in a litigation. What I'm seeing on the board behind you  
2 Intercoastal objects to. It's not the law, so it must be  
3 facts. And if it's facts, it's evidence. If you need  
4 evidence to support the motion, the motion is premature.  
5 It's been handed out to all of you.

6 I guess, I could have hired a guy with a  
7 sandwich board to walk back and forth with something I  
8 thought was favorable to my case, but it's evidence. It  
9 shouldn't be part of this argument. It shouldn't be up on  
10 the board.

11 CHAIRMAN GARCIA: All right. It's been noted.  
12 Go ahead and leave it up on the board. That's neither  
13 here nor there. We're not a jury here or anything like  
14 that.

15 Go ahead.

16 MS. BROWNLESS: Due to the nature of this  
17 application, I don't know that five minutes for my  
18 presentation would be adequate. I have presented it so  
19 that I can or worked on it so that I can present it in  
20 13.6 minutes -- 13 minutes, and I'd like to be allowed my  
21 13 minutes.

22 CHAIRMAN GARCIA: Is this the entirety of your  
23 argument?

24 MS. BROWNLESS: That's the whole enchilada right  
25 there. I mean, we are the party who filed the motion on

1 the subject matter jurisdiction. I just don't think five  
2 minutes is going to take me an adequate time to make my  
3 presentation.

4 CHAIRMAN GARCIA: Who are you representing here?

5 MS. BROWNLESS: St. Johns County. And perhaps  
6 we should also enter appearances.

7 CHAIRMAN GARCIA: Hang on one second. Maybe we  
8 can be generous here.

9 MR. TWOMEY: Mr. Chairman, Mike Twomey on behalf  
10 of the Board of County Commissioners of Collier County,  
11 Citrus County. I would echo Ms. Brownless's comments on  
12 the five minutes. We assume that she's going to be  
13 allowed to go first. She's the party.

14 CHAIRMAN GARCIA: Yes, sir.

15 MR. TWOMEY: It's her motion. I would suggest  
16 to you, Mr. Chairman, Commissioners, that this is, as your  
17 Staff's recognized, the matter of first impression. It's  
18 a highly important issue, there are five counties here to  
19 address you. I would urge you, let her go first. We will  
20 commit to trying to be as brief as possible following up  
21 on Ms. Brownless, but not to constrain us as to five  
22 minutes per se.

23 CHAIRMAN GARCIA: Gentlemen, what kind of time  
24 do you need?

25 MR. MELSON: Commissioner Garcia, frankly, it

1 depends on the arguments they make. I had thought 10  
2 minutes would be sufficient. I have a concern, frankly,  
3 about Staff's proposal to take the issues in the order  
4 that they've enumerated.

5 We've got St. Johns County, which has been  
6 granted party status to this proceeding. We've got four  
7 other counties represented by three other counsel who have  
8 filed motion to intervene -- motions to intervene, that  
9 have not been ruled on. We have argued in our response  
10 they do not have standing and should not be permitted  
11 intervenor status.

12 I guess, it's my understanding that the  
13 Commission probably intends to hear from them today, at  
14 least as amicus, but it seems to me their status, as  
15 parties or nonparties, is a threshold question that I had  
16 thought the Commission would resolve first.

17 CHAIRMAN GARCIA: Staff -- hang on. Staff?

18 MS. CIBULA: Staff believes that the threshold  
19 issue is the jurisdiction issue. And if the Commission  
20 decides it doesn't have jurisdiction, then all the other  
21 issues with the petitions for intervention and the motion  
22 to dismiss would become moot. Therefore, we thought that  
23 was the threshold issue.

24 CHAIRMAN GARCIA: Mr. Twomey.

25 MR. TWOMEY: Yes, Mr. Chairman. Furthermore,

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1 you had said in your order that we would have the chance  
2 to speak. Your Staff, in addition, is recommending that  
3 we would be heard, if for no other reason, as amicus. So,  
4 I envision that we'll be allowed to be heard.

5 CHAIRMAN GARCIA: You envisioned correctly.

6 MR. TWOMEY: I would urge you to go ahead and  
7 bring that up at the end whether we have party status or  
8 not.

9 CHAIRMAN GARCIA: It just strikes me --  
10 Mr. Wharton, you wanted to say something?

11 MR. WHARTON: Chairman Garcia, just to surprise  
12 you, I think five minutes is adequate. We've got a  
13 50-page Staff recommendation and five counties singing  
14 from the same song.

15 CHAIRMAN GARCIA: I would agree, Mr. Twomey.  
16 I'm hoping that the counties aren't going to do a choral  
17 presentation of the same material.

18 So let's do this, if all of the Commissioners  
19 are all right with it, let's give each person that's a  
20 party or trying to be a party here 15 minutes. I expect  
21 you not to be repetitive. If you're going to be  
22 repetitive, I'm going to cut you off.

23 COMMISSIONER CLARK: Let me ask a question,  
24 Mr. Chairman. Are you saying 15 minutes --

25 CHAIRMAN GARCIA: Total.



1           COMMISSIONER CLARK: -- per side. You mean per  
2 side, not per party.

3           CHAIRMAN GARCIA: No, I can't do that, because I  
4 think there's a third side here to some degree. There's  
5 one party that's been granted intervention, the party  
6 that's seeking intervention, and then the parties before  
7 us. And if --

8           COMMISSIONER CLARK: I think there are two sides  
9 to the issue, though.

10          CHAIRMAN GARCIA: Yeah, but -- you wanted to say  
11 something?

12          MS. SCHNEIDER: Yes, Mr. Chairman, Kathleen  
13 Schneider of Sarasota County.

14          CHAIRMAN GARCIA: Yes.

15          MS. SCHNEIDER: I believe there are two issues  
16 in this case; one is, obviously, the motion to dismiss and  
17 the other is the petition to intervene. And the counties  
18 have worked together to not be redundant.

19                 However, five minutes per party may work out,  
20 because we have decided which person is going to speak.

21          CHAIRMAN GARCIA: Well, good. I'll hold you to  
22 that.

23          MS. SCHNEIDER: But we would request that we  
24 have 15 minutes per issue.

25          CHAIRMAN GARCIA: I think we can handle this

1 side here with 15 minutes. You've got 11.3, did you say,  
2 13.2?

3 MS. BROWNLESS: 13.2.

4 CHAIRMAN GARCIA: And then, total here we've got  
5 15 minutes over here, because I don't think you're going  
6 to take anymore. Mr. Twomey is known for being succinct.  
7 So him leading off and whatever he misses, which is  
8 rarely, does Mr. Twomey leave any argument on the table.  
9 So I think that's fine. Okay? Very good. You're first  
10 up?

11 MS. BROWNLESS: Yes, sir.

12 CHAIRMAN GARCIA: Go right ahead.

13 MS. BROWNLESS: I hope I'm being heard. Am I?

14 CHAIRMAN GARCIA: Yes.

15 MS. BROWNLESS: Okay, thank you.

16 Suzanne Brownless, appearing on behalf of St.  
17 Johns County.

18 CHAIRMAN GARCIA: Suzanne, you changed the tone  
19 of your voice when you began. You need to speak up a  
20 little bit.

21 MS. BROWNLESS: Okay. Suzanne Brownless,  
22 appearing on behalf of St. Johns County.

23 What I want to do, briefly, with these maps is  
24 just show exactly what is at issue here, which are  
25 original applications for original certificates for water

1 and sewer service.

2 CHAIRMAN GARCIA: Before -- I want to make sure  
3 that there's no mistake here. This is 15 minutes per  
4 group, period. We're not going to come back. You're not  
5 going to argue issue two, issue three, issue four. This  
6 is it, all right? So work your arguments accordingly.  
7 Some of you have to be very specific about intervention,  
8 some of you do not. Okay? Is that all right? We all got  
9 it?

10 MS. BROWNLESS: Thank you.

11 And just to show, this is Nocatee's application.  
12 This is based upon the legal description that they filed  
13 with the Commission. And the area that makes this a  
14 jurisdictional case is this little area right up in here,  
15 which is Duval County, okay?

16 Developed from their application, their legal  
17 description filed with the PSC, this is Intercoastal's  
18 requested service territory from the Commission. Again,  
19 you can see the same area here in Duval County. And  
20 there's a lot of additional service territory being  
21 requested for by ICU that is not being requested by  
22 Nocatee. This area right here is the area that  
23 Intercoastal currently provides service in St. Johns  
24 County.

25 And just for purposes of illustration, this is

1 the service area that Intercoastal requested from St.  
2 Johns County Water and Sewer Authority in which the  
3 authority denied them. And you can see, obviously, that  
4 it does not include that portion in Duval County.

5 I think, I would start with what we all agree  
6 on. What we all agree on is that the applicable law is  
7 3671177, which is the exception to the regulatory scheme  
8 that is found in 367171. It is a very simple regulatory  
9 scheme. Either the Public Service Commission has  
10 exclusive jurisdiction over water and sewer utilities or  
11 the county has exclusive jurisdiction over water and sewer  
12 utilities.

13 The sovereignty of the PSC to grant a  
14 certificate is no greater than the sovereignty of a county  
15 to do so. The sovereignty and the power of the PSC to  
16 regulate water and sewer utilities is no greater or no  
17 less than that of the county to do the same.

18 It is the interaction of your ability to  
19 regulate with your ability to issue an original  
20 certificate, which is the crux of this matter. And it all  
21 comes down to the exception or exemption language in  
22 3671717. And that language is as follows, or at least the  
23 relevant part: Utility systems whose service transverses  
24 county boundaries.

25 Now, we interpret this language on its

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1 plain-face meaning, utility systems whose service  
2 transverses county barriers as being existing utility  
3 systems, existing facilities, whose existing pipes  
4 physically cross county boundaries. Or in the  
5 alternative, systems who are existing, who are  
6 functionally related. And those relationships and those  
7 definitions are based upon the Beard case cited by all  
8 parties and the Hillsborough County case.

9 I would suggest to you that if you just read  
10 this sentence, all the verbs are in the present tense and  
11 it implies that these systems are existing. Your Staff  
12 says that's not the case, and they point to one word in  
13 this phrase, which is utility. And they say since the  
14 definition of utility includes a proposed system, then you  
15 have jurisdiction over proposed systems as well.

16 Anyway, jurisdiction to grant an original  
17 certificate for appearably proposed system. And I would  
18 suggest to you, first of all, that that's not a plain  
19 reading of the statute. And second of all, that every  
20 phrase that's been interpreted by the district courts has  
21 been interpreted to apply to an existing system.

22 I think this is not clear on its face and,  
23 therefore, want you to go legislative intent. Your Staff  
24 has argued the GDU case, a 1990 decision on your part, for  
25 legislative intent. I would make a couple comments about

1 that.

2 First of all, legislative intent has to be  
3 language that was actually developed by the legislature.  
4 And obviously, the GDU order is your order. It was not  
5 written by the legislature. It's not a Staff report, it's  
6 not a legislative tape, it's not a legislative or Staff  
7 recommendation, but it does indicate what you believe the  
8 legislature felt the intent of this exception was an  
9 exception, which under statutory construction must be  
10 narrowly construed, not liberally construed.

11 You listed a series of things -- a series of  
12 evils that you believed this exception was intended to  
13 prevent. And this series of evils had to do with similar  
14 customers in different counties being charged different  
15 rates for the same service, duplicative economic  
16 regulation in that there would be different service  
17 availability charges, different connection fees for the  
18 same existing system in different counties.

19 In other words, different regulatory policies  
20 being applied to an existing utility, which just happened  
21 to be located in several counties. If you look at the  
22 exact details of that case, it's very apparent there,  
23 because you had Charlotte County, Sarasota County, and  
24 Hillsborough County all attempting to regulate GDU system,  
25 a system that had treatment facilities in one county,

1 customers in another county.

2 So the economic harm, the economic duplication,  
3 inherent in that type of scenario is not inherent here in  
4 the grant of an original certificate for a proposed  
5 utility. What are we suggesting that you should do? We  
6 are suggesting --

7 COMMISSIONER DEASON: Ms. Brownless, why would  
8 there not be harm, because the system is not yet  
9 constructed?

10 MS. BROWNLESS: Because the system is not yet  
11 constructed. And the harm that the legislature intended  
12 to prevent was desperate rates. In other words, they were  
13 intending to prevent ongoing regulatory differences  
14 between jurisdiction. And the examples that you cite in  
15 your GDU order are all concerned with differing rates for  
16 the same type of service, administrative inefficiencies,  
17 because of allocations between systems. These are, if you  
18 will, post-certificate concerns.

19 COMMISSIONER DEASON: But isn't it true that  
20 it's conceivable that the most efficient way to provide  
21 service to a group of customers is a system that crosses a  
22 county line?

23 MS. BROWNLESS: I do believe that is a concern,  
24 but I would suggest to you that what is at issue here is  
25 when your jurisdiction attaches. And I would suggest to

1 you that you cannot give the full faith and credit to the  
2 current regulatory scheme, unless you let the  
3 nonjurisdictional county make that initial determination  
4 of service territory, and that is what we are suggesting  
5 be allowed here.

6 In other words, we are suggesting that, in this  
7 case, one would have to go to St. Johns County, ask for  
8 this service territory, and St. Johns County either grants  
9 it to you or doesn't grant it to you. If they grant it to  
10 you that this Commission would treat that service  
11 territory as a grandfathered territory, it would simply  
12 come in and then they would apply here, get their  
13 certificate, make their case, get their rate set, et  
14 cetera, and proceed forward.

15 And I -- obviously, the reason we're in this  
16 case is because that's exactly what Intercoastal did.  
17 They came to St. Johns County, they asked for the service  
18 territory, and they were denied. And clearly, our  
19 position is that that denial should be honored.

20 COMMISSIONER JACOBS: In the event that we  
21 find -- not in the event; we're here now. Aren't some of  
22 those very same concerns that you say the legislature was  
23 focused on now at play in this dispute?

24 MS. BROWNLESS: Not at all. There's been no --  
25 St. Johns County didn't set rates for anybody.



1           COMMISSIONER JACOBS: But these customers --  
2 it's clear now that St. Johns County is not agreeing to  
3 one company, one system serving all of these territories  
4 and that is --

5           MS. BROWNLESS: No. We have taken -- we are  
6 here for the purpose, the sole purpose, of raising this  
7 jurisdictional issue. That's what we intervened in this  
8 case to do, because we believe -- and we're not arguing  
9 the res judicata collateral estoppel issue today. We're  
10 focused purely on the jurisdiction.

11           COMMISSIONER JACOBS: Okay. I'll lay that aside  
12 for now, but you would argue that this development would  
13 not have to deal with the same concern that the  
14 legislature was focused on when it developed the statute.

15           MS. BROWNLESS: Yes, because this has nothing to  
16 do with ongoing regulation. This is the initial decision,  
17 the initial grant of service territory in a  
18 nonjurisdictional county. And I would point out that the  
19 bulk of the territory being requested here is in St. Johns  
20 County.

21           My time is running out. I just want to shortly,  
22 briefly, talk about three cases that were cited by  
23 Mr. Wharton as dispositive of this issue. One is the  
24 United Water case. And, in my opinion, that included the  
25 definition of a system. We are not contesting that actual

1 pipes across the county line does not constitute a system  
2 for purpose of invoking your jurisdiction.

3 One is the St. Johns services case. That can be  
4 distinguished, because it was a bulk water sale and a bulk  
5 wastewater sale, and there were no customers to be served  
6 in Duval County in that case.

7 The case that has the potential to be most  
8 dispositive and the best precedent is the Lake Suzy case  
9 in which an existing utility applied for an original  
10 certificate based on serving a small area in a  
11 jurisdictional county.

12 And I would distinguish that case as being  
13 precedent in support of our position, because in that case  
14 you determined, you accepted the settlement agreement,  
15 which allowed Desoto County to award territory to Florida  
16 City's water. And that award was done during the pendency  
17 of the case; in other words, after Lake Suzy filed an  
18 application with you, and you allowed Charlotte County to  
19 provide sewer service. And that was also done after Lake  
20 Suzy filed their application and, under your staff's  
21 analysis, invoked your jurisdiction.

22 So the settlement agreement that you ultimately  
23 accepted can be read as sanctioning the idea that Desoto  
24 County, a nonjurisdictional county, had continuing  
25 jurisdiction to award the service territory to somebody

1 else, because you approved it. And that Charlotte County  
2 had the ability to serve in the jurisdictional county,  
3 because you, ultimately, approved that settlement, too.

4 So I guess, to bring this to a close what I  
5 would say is if St. Johns County had granted Intercoastal  
6 the right to serve the service territory, how would you be  
7 treating that decision? My suggestion is that you would  
8 honor it.

9 However, because St. Johns County has denied  
10 that -- Intercoastal that ability, the current position  
11 you're taking, you're not honoring that decision of the  
12 county. And we would tell you that in order for  
13 jurisdiction to be properly applied, the decisions of the  
14 county must be honored in both circumstances.

15 Thank you.

16 COMMISSIONER JABER: Mr. Chairman, I've got a  
17 series of questions for St. Johns County. I think it  
18 makes sense to ask them here.

19 CHAIRMAN GARCIA: Absolutely. Go ahead.

20 COMMISSIONER JABER: Ms. Brownless, in response  
21 to questions that Commissioner Deason asked you, it seems  
22 like your suggestion for us is that we start with a  
23 decision that St. Johns County has already made, honor  
24 that, as you say, and then decide on the Duval County  
25 piece. Is my understanding correct?

1 MS. BROWNLESS: Well, you'd start with that and  
2 then decide on the Duval County piece, yes, ma'am. But  
3 you have jurisdiction in Duval County; notwithstanding,  
4 that's your jurisdictional county.

5 COMMISSIONER JABER: What is it we have  
6 jurisdiction over when a facility crosses county  
7 boundaries?

8 MS. BROWNLESS: I think once the pipes actually  
9 get in the ground, you have jurisdiction over everything  
10 that you would normally have jurisdiction over; rates,  
11 service, quality, et cetera.

12 COMMISSIONER JABER: For the pipes to be in the  
13 ground -- you're not -- you make a distinction between a  
14 proposed system and an existing system.

15 MS. BROWNLESS: Yes, ma'am.

16 COMMISSIONER JABER: If either utility went  
17 forward and created the system, put the pipes in the  
18 ground, would you agree that that facility would be in  
19 violation of our statute which says that utilities can't  
20 serve outside their approved territory?

21 MS. BROWNLESS: I would say that until the  
22 utility gets a certificate from the PSC, they cannot put  
23 the pipes in the ground. And that if pipes were put in  
24 the ground prior to your approval, which is essentially  
25 what happened in Lake Suzy, that the jurisdiction is not

1 -- that one cannot bootstrap a jurisdiction in that way,  
2 that they would have to have gone to the PSC first.

3 COMMISSIONER JABER: And isn't that what Nocatee  
4 and Intercoastal are doing now? Aren't they coming to the  
5 PSC first?

6 MS. BROWNLESS: That is what Nocatee is doing  
7 now.

8 COMMISSIONER JABER: That's interesting you  
9 should say that. Explain to me the difference in  
10 philosophy, the county's position with respect to Nocatee  
11 and why it should be different with respect to  
12 Intercoastal.

13 MS. BROWNLESS: Well, first of all, Nocatee  
14 didn't come to St. Johns County and request this service  
15 territory in St. Johns County and get denied; that's one.

16 Second, Nocatee is not seeking to serve service  
17 territories that St. Johns County is currently attempting  
18 to serve; that's two.

19 COMMISSIONER JABER: Okay.

20 MS. BROWNLESS: So those are very significant  
21 differences from our point of view.

22 COMMISSIONER JABER: Intercoastal is trying to  
23 serve territory that St. Johns County itself wants to  
24 serve.

25 MS. BROWNLESS: And is in the process of putting

1 pipes in the ground to serve.

2 COMMISSIONER JABER: Nocatee has worked with you  
3 all on areas that you don't want to serve.

4 MS. BROWNLESS: Nocatee's application, if I  
5 understand it, before this PSC does not include those  
6 areas that St. Johns County has contractually committed to  
7 serve.

8 COMMISSIONER JABER: Okay. From a jurisdiction  
9 standpoint, why aren't the utilities in the same position?  
10 They're both crossing county -- they both will cross  
11 county boundaries. What difference does it make whether  
12 Nocatee has worked out a solution with you and  
13 Intercoastal has not? It's the same jurisdictional  
14 question, isn't it?

15 MS. BROWNLESS: Well, Intercoastal is an  
16 existing utility, and Nocatee is a totally proposed  
17 utility. And that, in our point of view, is a significant  
18 difference.

19 COMMISSIONER JABER: Okay. Nocatee is proposing  
20 to construct the facility that will cross county  
21 boundaries, correct?

22 MS. BROWNLESS: Mm-hmm.

23 COMMISSIONER JABER: And the PSC has  
24 jurisdiction over that. You agree with that.

25 MS. BROWNLESS: I agree that the PSC has

1 jurisdiction once the pipes are in the ground. We are not  
2 talking about the definition of -- this is not one of  
3 those cases where you have functionally-related systems  
4 that have no physical facilities that transverse county  
5 boundaries. It's clear that there are going to be pipes  
6 that transverse county boundaries here.

7           So, all those cases that had to do with  
8 functionally-related systems are really not applicable in  
9 this instance. We're talking about the procedure that  
10 needs to be engaged in, in order to give full faith and  
11 credit to the jurisdiction of the counties prior to the  
12 installation of the facilities.

13           And what we're saying is the counties need to be  
14 consulted first. And whatever decision the counties make  
15 with regard to the service territory in our jurisdictional  
16 county needs to be given faith and credit by the --

17           MR. WHARTON: Commissioner Jaber -- Mr.  
18 Chairman, this is the res judicata argument.

19           CHAIRMAN GARCIA: Mr. Wharton, you'll let the  
20 Commissioner ask whatever questions she wants to ask.

21 Thank you.

22           COMMISSIONER JABER: Ms. Brownless, with respect  
23 to both utilities are you advocating that they go ahead  
24 and construct whatever it is they're able to construct and  
25 then come back to the PSC?

1 MS. BROWNLESS: No, ma'am. We are advocating  
2 exactly the process that Intercoastal did. They came to  
3 St. Johns County, they asked for the service territory in  
4 our county, and that was denied. If they had come to our  
5 county and asked for the service territory and been  
6 granted that territory, I assume, you would have honored  
7 that, and then we would have -- then, they should have  
8 come to the PSC and requested their little piece in Duval  
9 County and said, okay, Duval County is a jurisdictional  
10 county, but it really doesn't matter whether Duval County  
11 is jurisdictional or not. Then, they should go, come  
12 here, and you guys make the decision about the entire --  
13 their ability to serve the entire area.

14 COMMISSIONER JABER: If the Commission were to  
15 somehow agree today to start from the point St. Johns  
16 County left off and just rule on the application as it  
17 relates to the Duval County area, would St. Johns County  
18 have any problem with that?

19 MS. BROWNLESS: No, ma'am.

20 COMMISSIONER JABER: Okay. Let me make sure I  
21 haven't left any questions out here.

22 COMMISSIONER DEASON: And would St. Johns County  
23 recognize our decision and look at it as the most economic  
24 way, then, would be to allow that utility, whatever  
25 utility it would be, then to go over and serve those



1 customers in St. Johns County?

2 MS. BROWNLESS: I need to qualify this, I think.

3 With regard to ICU, we are asking that the  
4 Commission acknowledge the decision of St. Johns County,  
5 okay? And that decision is a negative decision,  
6 obviously. With regard to Nocatee, we are asking -- well,  
7 we are taking no position at this time with regard to  
8 Nocatee.

9 COMMISSIONER DEASON: No, what you're saying is  
10 because Intercoastal went to St. Johns County first, and  
11 you're saying that if St. Johns County had granted that,  
12 then you felt like then the Commission would honor that  
13 and then we would also grant the territory in Duval  
14 County.

15 MS. BROWNLESS: Well, you might have granted it  
16 or not. Then, it would have been appropriate for you to  
17 consider the entire area.

18 COMMISSIONER DEASON: Well, what would have  
19 happened if Intercoastal had come to the Commission first  
20 and asked for Duval County. And then would St. Johns be  
21 obligated to recognize we had granted that territory in  
22 Duval? And since this is going to be one economic entity,  
23 as far as the customers that live in this development,  
24 then they'd be obligated to -- does it work both ways?  
25 That's my question.

1 MS. BROWNLESS: If ICU had gone to Duval County  
2 first and you'd given them that little piece in Duval  
3 County, then they would have still had to come to St.  
4 Johns County initially and get the piece in St. Johns  
5 County.

6 COMMISSIONER JABER: Isn't that dual regulation?  
7 And isn't that exactly what the statute is designed to  
8 protect?

9 MS. BROWNLESS: No. Because dual regulation is  
10 regulation of rates, regulation of service. We are  
11 limiting this totally and distinctly to service territory.

12 COMMISSIONER JABER: With counties that we have  
13 jurisdiction of now, when a county takes back  
14 jurisdiction, you have utilities within that county that  
15 cross county boundaries. That doesn't present a problem  
16 for St. -- United Water, for example. We regulate United  
17 Water, because the utility crosses county boundaries.

18 MS. BROWNLESS: Well, you regulate United Water,  
19 because you have interpreted their system as having  
20 related systems that are functionally related, even though  
21 in some -- even though I don't think United Water actually  
22 physically transverses county boundaries.

23 COMMISSIONER JABER: Regardless, we have  
24 regulation, jurisdiction regulation, over United Water.  
25 That coexists with St. Johns County's regulation of the

1 other utilities that are within the county. How is that  
2 situation different from what Intercoastal and/or Nocatee  
3 are presenting today?

4 MS. BROWNLESS: Because those are existing  
5 utilities, and these are proposed utilities. This is an  
6 original certificate.

7 COMMISSIONER JABER: Okay. So that goes back to  
8 the notion that these utilities should violate our  
9 statute, put lines in the ground, and then come back to  
10 us.

11 MS. BROWNLESS: No. They should come to the  
12 county first and ask for the territory within the  
13 nonjurisdictional county.

14 COMMISSIONER JABER: Okay. Intercoastal, why  
15 did you deny their application?

16 MS. BROWNLESS: Because the plan of service that  
17 they put forward was not an effective plan of service. It  
18 was a plan of service that was essentially made up as they  
19 went along.

20 COMMISSIONER CLARK: I have a question. Are you  
21 saying that -- has United Water ever come to us and asked  
22 for more territories in St. Johns County, and have we  
23 taken the position that we have authority to grant that  
24 territory?

25 MS. BROWNLESS: They've come one time, and

1 that's in the United Water case, that's the Sunray case  
2 that was cited. That is an existing utility over which  
3 you had already pronounced jurisdiction.

4 My belief is that United Water came back and  
5 specifically requested what was essentially a declaratory  
6 statement on that issue, because of the  
7 functionally-related aspect of the definitional system.

8 COMMISSIONER CLARK: Let me just be clear. This  
9 is when they were asking for the authority to serve in a  
10 new territory within St. Johns County.

11 MS. BROWNLESS: No -- well, that's true, but  
12 they were asking to acknowledge a purchase of Sunray  
13 Utilities, an existing utility, that they went to the St.  
14 Johns County Commission --

15 COMMISSIONER CLARK: All right, I appreciate  
16 that. What I want to know is have they ever wanted to  
17 serve additional territory and come to us to ask for that  
18 territory rather than St. Johns?

19 MS. BROWNLESS: No, ma'am. They went to St.  
20 Johns County first.

21 COMMISSIONER CLARK: Thank you.

22 COMMISSIONER DEASON: I have a question. As I  
23 understand the scenario you're laying out, it would be  
24 that -- it would be a utility which is proposing to serve  
25 a development and that development crosses county lines,

1 that it would be requirement of that utility to go to the  
2 regulatory authority in each individual county -- assume  
3 both counties are nonjurisdictional --

4 MS. BROWNLESS: Okay.

5 COMMISSIONER DEASON: -- to go to each county's  
6 regulatory authority and to demonstrate, based upon that  
7 county's regulation, that they are the best choice in the  
8 public interest for that utility to provide service, but  
9 that county can only look at that piece which is  
10 physically within its county to make that determination,  
11 correct?

12 MS. BROWNLESS: Yes, mm-hmm.

13 COMMISSIONER DEASON: So, what about the public  
14 policy that there should be some entity which looks at the  
15 whole of the development, regardless of whether it crosses  
16 the county line, to determine what is the most economic  
17 way for service to be provided to this development which  
18 crosses county lines?

19 MS. BROWNLESS: They would not be precluded from  
20 making that argument; and I'm sure, in fact, would make  
21 it. And as far as I'm concerned, that would be a  
22 consideration in evaluating their request.

23 But obviously, a county only has jurisdiction  
24 over the area that it controls. And a county authority  
25 cannot control another area. But do I think that would be

1 a point that should be raised and a consideration that  
2 should be taken into account? Sure, obviously.

3 COMMISSIONER DEASON: But then, it would be the  
4 burden of the utility seeking the certificate to make two  
5 filings and make two showings and hope that both counties  
6 are forward-looking and look at the integrated whole  
7 development and determine that it's the economic choice.

8 MS. BROWNLESS: In the worst-case scenario where  
9 both were nonjurisdictional counties. In this scenario,  
10 there would be only one such filing, and that would be  
11 with St. Johns County, because Duval County is  
12 jurisdictional.

13 COMMISSIONER CLARK: So there would be two  
14 filings; one with St. John and one with Duval or one with  
15 us.

16 MS. BROWNLESS: But there would only be one  
17 county filing is my --

18 COMMISSIONER CLARK: Okay.

19 COMMISSIONER JACOBS: So, what would we make of  
20 Intercoastal's filing with us now in the wake of your  
21 decision?

22 MS. BROWNLESS: Well, I know what I would have  
23 you make of it. In other words, I would have you honor  
24 the county's previous decision, just as if we had granted  
25 the territory, I assume you would have honored that.

1           COMMISSIONER JACOBS: So Intercoastal amends its  
2 application with us to take away what you would argue is  
3 nonjurisdictional territory?

4           MS. BROWNLESS: I would argue that the county  
5 had already ruled on that and that the Commission should  
6 honor that request, but that is the res judicata  
7 collateral estoppel issue that is not really before us  
8 today.

9           COMMISSIONER JACOBS: But let me step aside from  
10 that for a moment. I think it goes to the very heart of  
11 what we have to understand about this whole debate.

12           If that is the posture that we find ourselves  
13 in, what about jurisdiction? Your argument is that their  
14 application should have never been made here with that  
15 territory.

16           MS. BROWNLESS: Yes.

17           COMMISSIONER JACOBS: Forget about the res  
18 judicata. They should have never applied to us for that  
19 territory.

20           MS. BROWNLESS: They should not be able to come,  
21 right.

22           COMMISSIONER JABER: Procedurally, do we take  
23 administrative notice of your decision? How do we honor  
24 your decision?

25           MS. BROWNLESS: In either case, you mean?

1 COMMISSIONER JABER: Mm-hmm.

2 MS. BROWNLESS: I would assume you would take  
3 judicial notice of it.

4 COMMISSIONER JABER: Okay. Have you required  
5 Nocatee? Has the county required Nocatee to apply for  
6 certificate of territory case for the St. Johns County  
7 area?

8 MS. BROWNLESS: No, ma'am. That would be a  
9 decision of the Water and Sewer Authority.

10 COMMISSIONER JABER: Have they required Nocatee  
11 to make that filing?

12 MS. BROWNLESS: No, ma'am, not to date.

13 CHAIRMAN GARCIA: Very good. Mr. Twomey?

14 MR. TWOMEY: This is not evidence. In fact,  
15 it's not very well done.

16 CHAIRMAN GARCIA: I was pushing the envelope of  
17 technology is always good to see here at the Commission.

18 MR. TWOMEY: Yes, sir. The Army would call this  
19 eyewash. It's always good to have some eyewash to  
20 distract from the -- you can't see it?

21 CHAIRMAN GARCIA: That's why it's called  
22 eyewash.

23 MR. TWOMEY: Commissioners, Mike Twomey. I made  
24 that because I want to focus on the two key elements, I  
25 think, in this case. One is that -- I'm sorry, you either



1 have the jurisdiction here or you don't. As you're well  
2 aware, you're not here to decide whether Nocatee is best  
3 situated to serve this development or Intercoastal. That  
4 comes later, if you have the jurisdiction.

5           Either you have the jurisdiction or you don't.  
6 If our motion to dismiss is deficient for some reason, you  
7 can't get jurisdiction by default or waiver. You have it  
8 or you don't. When -- as you're well aware, it's been  
9 pointed out before many times, your jurisdiction, as a  
10 creature of statute, has to be explicit or necessarily  
11 implicit in the language thereof.

12           Tie ball games, as you all know, go against you  
13 in the exercise of authority. If it's close, if it's  
14 reasonably debatable about whether you have the  
15 jurisdiction or not, you don't do it. That's not me  
16 saying that, it's the Florida Supreme Court and the other  
17 courts, repeatedly.

18           The most recent example has Chairman Garcia's  
19 name on it. Ya'll decided to do the merchant plants.  
20 Supreme Court said you didn't have the authority. When  
21 it's doubtful, you don't do it.

22           Now, your staff says here that it's clear that  
23 you have authority to consider under 367171 paren 7 the  
24 authority to go ahead and grant either Nocatee's  
25 application or Intercoastal's application.

1           We say at the county that you don't have any  
2 authority whatsoever to do that. It's not clear, it's  
3 doubtful, it's debatable. And when you look at it  
4 closely, it should come down against the exercise of  
5 authority.

6           Commissioner Jaber says to Ms. Brownless, "Is  
7 there any difference between Nocatee and Intercoastal's  
8 application?" My answer to you, Commissioner, is not one  
9 wit, okay? I'm not here to speak for St. Johns County or  
10 attempt to, but there's no difference. They protest  
11 Intercoastal's -- their objections, her objections, in a  
12 very well-written motion, in my opinion, are every bit as  
13 applicable against Nocatee. We say both of them can't be  
14 considered.

15           Now, the history -- very briefly, the history of  
16 this jurisdictional service territory thing between the  
17 counties and the PSC; historically, the legislature, all  
18 of it statutory, the legislature has given the initial  
19 decision to the counties to make on whether they want to  
20 do it themselves, nonjurisdictional county  
21 self-regulation, or if they want to give it over to the  
22 Public Service Commission.

23           The decision, as ya'll know, is with the county,  
24 it's not yours. They want to opt in, they give it to  
25 ya'll. They want to opt out after 10 years, they bail

1 out, they take everything with them.

2           Until 1989, the sunset reviews of all the  
3 Commission statutes comes the language that's now in  
4 367171 paren 7, transverses county boundaries. Your staff  
5 would, apparently, have you believe that that's clear,  
6 that it's noncontroversial, and we all know that's the  
7 furthest thing from the truth. If there's any section  
8 that ya'll have jurisdiction over, any utility industry  
9 that is giving you more trouble than that one section in  
10 the last decade, I'm not aware of what it is, okay?

11           First case that came up, pointed out by  
12 Ms. Brownless, was the GDU case. I suggest to you, in my  
13 motion, that was the case that was the basis for the  
14 change in the statute. We don't have any legislative  
15 intent, as Ms. Brownless pointed out, in terms of tapes  
16 and so forth. There was a lot of stuff going on in '89  
17 and '90, and the Commission statutes, the sunset reviews,  
18 she points out --

19           COMMISSIONER CLARK: Let me just -- you're  
20 saying that the statute was changed to address GDU?

21           MR. TWOMEY: I'm suggesting to you that it was.  
22 I can't tell you that -- I can't testify to you that I  
23 know what's going on, but you were general counsel at that  
24 time, I think.

25           COMMISSIONER CLARK: Oh, I can say that's

1 consistent with my recollection was that was the case we  
2 had, sort of, before us that let us -- maybe Mr. Melson  
3 can help us out on that.

4 MR. TWOMEY: Okay, when it's his turn, but I  
5 think you're right, Commissioner Clark, you had that case.  
6 The legislation came up, bam, they come in the door, you  
7 take jurisdiction, as Ms. Brownless pointed out. It's  
8 kind of the tail wagging the dog, because --

9 COMMISSIONER CLARK: We didn't propose that, did  
10 we, do you know? Did the Commission ask for it?

11 MR. TWOMEY: Do you want me to tell you who  
12 proposed it?

13 COMMISSIONER CLARK: Yeah.

14 MR. TWOMEY: Mr. Melson can tell you.

15 COMMISSIONER CLARK: Okay.

16 MR. TWOMEY: You didn't propose it. It was  
17 proposed by a third-party industry group.

18 Anyways, they come in, the tail wags the dog  
19 kind of thing where the Commission takes jurisdiction over  
20 that whole utility, which was an existing utility, as  
21 Ms. Brownless points out, extant, in the ground, lines  
22 already crossing the county boundaries. You take  
23 jurisdiction of it, I think you only had about 8% or 10%  
24 of the jurisdictional customers from revenue. You get the  
25 whole thing, and it goes on.

1 COMMISSIONER JABER: Mr. Twomey?

2 MR. TWOMEY: Yes, ma'am.

3 COMMISSIONER JABER: You were on the house  
4 committee?

5 MR. TWOMEY: I was senior counsel to the house  
6 committee.

7 COMMISSIONER JABER: Do you remember if the  
8 proposed system was discussed at all? Do you know if the  
9 legislative history or the legislative write-up  
10 contemplated a facility that would be created that would  
11 result in crossing of county boundaries?

12 MR. TWOMEY: I'm sorry, say that again.

13 COMMISSIONER JABER: The proposed system, the  
14 notion that a utility can propose a facility, propose to  
15 construct a facility that would result in the crossing of  
16 county boundaries.

17 MR. TWOMEY: Is it my recollection whether that  
18 was considered in that change in the law?

19 COMMISSIONER JABER: Mm-hmm.

20 MR. TWOMEY: I don't recall that it was. I may  
21 be mistaken. I don't recall that it was. The fact of the  
22 matter is that it was, in my opinion when I was there, it  
23 was to address that GDU situation, which was an existing  
24 system.

25 What the legislature -- members of the

1 committee, and the legislature in its entirety intended, I  
2 don't know, okay?

3 Now, existing system -- can we go from that same  
4 section, we go to the Beard case in St. Johns again. The  
5 Beard case, arguably, has been implicitly reversed. We  
6 don't know, but you have the requirement filing from  
7 Hernando where we want to look at existing facilities from  
8 the ground. Commissioner Deason wrote an excellent  
9 dissent in that case, the order leading to that case, we  
10 want to have existing pipes in the ground. That still  
11 doesn't address the proposed system.

12 Now, what I've set up here is there's doubt,  
13 okay? I'll say more about it very quickly in a minute,  
14 but to be clear, what I'm suggesting to you on behalf of  
15 my two counties, and I think the other two counties as  
16 well, is that we're saying to you either you've got the  
17 jurisdiction or you don't and the jurisdiction to go ahead  
18 and do regulation of quality of service, expansion of  
19 service territories within the jurisdictional counties  
20 that you have.

21 Two, if you have existing utilities with  
22 facilities that are crossing county boundaries as of the  
23 -- as of the time that the statute was passed, that's  
24 clearly your jurisdiction. Do you have, and I forget if  
25 Commissioner Deason or Jaber, who asked it, do you have

1 authority, in our opinion, to go ahead and grant  
2 expansions of service territory for a utility that crosses  
3 county boundaries within the nonjurisdictional county?  
4 No, ma'am; no, sir, you don't, not in our opinion.

5           The right to grant service territory expansions,  
6 the dirt in those counties within those political  
7 boundaries, is inviolate. The counties have that power  
8 solely, okay? Now, we go through and you ask yourselves,  
9 okay, is there some kind of inefficiency or some kind of  
10 lack of economy here, Commissioner Deason. I'll have you  
11 to go in two different groups, okay? My response to you  
12 is maybe, maybe not.

13           Even if there is -- perhaps, if it's your desire  
14 for efficiency, in our view, doesn't trump whether you  
15 have jurisdiction or not, okay? We say to you the  
16 jurisdiction is not clear, there's doubt in this whole  
17 thing, you should hold off on that.

18           Now, how do we see that this should be  
19 perceived, okay? In the instant case, as Ms. Brownless  
20 pointed out, both of these utilities want some 22,000  
21 acres, not a small amount of territory, 22,000 acres,  
22 approximately, in St. Johns' nonjurisdictional county.  
23 They want substantially less than Duval.

24           How would I have them proceed to harmonize the  
25 relationship between the Commission's power in 3671717 and

1 the rights of the five counties and the other 25 or so  
2 that are nonjurisdictional -- I'll be brief -- that how do  
3 you harmonize that so the two work together? They have  
4 the ability to plan for their own systems, governmental  
5 systems, to allocate for investor-owned in those counties.  
6 How do you make them harmonize? What you do is you have  
7 any property that a utility wants to be assigned territory  
8 and nonjurisdictional, that utility goes to that county  
9 first and asks for it, okay?

10 In the case of St. Johns, St. Johns may have  
11 given Nocatee all the properties they wanted. They may  
12 have given them half of it, they may have said the same as  
13 they said to Intercoastal, no, you don't get any of it.

14 COMMISSIONER JABER: Mr. Twomey, why can't we  
15 harmonize the statutes by allowing the county to fully  
16 participate in our process and allow the county to tell us  
17 what is and is not, you know, good for the county?

18 MR. TWOMEY: Because -- I don't mean any offense  
19 here -- because you presume too much by that. Either you  
20 have the jurisdiction to do this proceeding or you don't.  
21 And if you don't have it, it's not right to make the  
22 counties come in and be supplicants before you, okay?

23 COMMISSIONER JABER: On nonjurisdiction, how do  
24 you reconcile everything you just said with 367011 sub 2?

25 MR. TWOMEY: Which is the --



1           COMMISSIONER JABER:  It's overall legislative  
2 intent on jurisdiction.  The Commission shall have  
3 exclusive jurisdiction over each utility with respect to  
4 authority, service, and writs.

5           MR. TWOMEY:  Very simply.  You don't get to that  
6 point, under my theory of harmonization, until you get to  
7 who got control of the dirt.  Once you get the dirt -- and  
8 you don't get it, you don't get the territory until the  
9 counties decide that they're going to give it to a utility  
10 with full knowledge that that utility is going to have  
11 something on the other side, which that county or any of  
12 them, when they grant it, they know full well that they  
13 will be voluntarily giving up authority over that acreage,  
14 okay?

15           COMMISSIONER JACOBS:  That argues against the  
16 wording in 1717.  I would expect in the normal course of  
17 events, if that were to happen, there would be some formal  
18 documentation or execution of that; i.e., the county would  
19 do something formally.  They wouldn't just give it away,  
20 they would do something.  And this statute anticipates  
21 that.

22           It says that if you had an interlocal agreement  
23 in effect at the time the statute went into effect that  
24 you would -- that dirt would stay under that same  
25 jurisdiction.  But if you didn't, the county couldn't

1 change those scenarios. The county can't divest -- it  
2 couldn't divest the Commission of jurisdiction over dirt  
3 by an interlocal agreement, according to the expressed  
4 words of the statute. What you're saying is that it could  
5 do it by vote of the County Commission.

6 MR. TWOMEY: What I'm saying is you don't get  
7 jurisdiction until the pipes cross the county boundary.  
8 And that can't happen until the authorities, the agencies  
9 on both sides of the boundary, give them permission to do  
10 it, okay?

11 And let me raise this to you, and I'll stop. I  
12 don't want to take too much of their time, but if you've  
13 got a situation right now where Nocatee and Intercoastal  
14 are both asking for this property, okay, let's say you  
15 grant it to them and what if they don't build? What if  
16 they don't build pipes and service across the county  
17 boundary? Then, you have given away territory on both  
18 sides. And the reality that would give you the  
19 jurisdiction by the agreed upon interpretation of the  
20 statutes would not have occurred, okay? You must go ahead  
21 and get the territory on both sides.

22 And lastly, the GDU case, your own  
23 interpretation of the statutory interpretation intent was  
24 economic regulation. That's what it says, economic  
25 regulation.

1 I thank you for your time, and I think Mr. Odom  
2 will go next.

3 COMMISSIONER DEASON: I've got one quick  
4 question for you, Mr. Twomey.

5 MR. TWOMEY: Yes, sir.

6 COMMISSIONER DEASON: Under your scenario, in a  
7 situation where there's an existing utility with existing  
8 lines to cross county boundaries where the PSC has  
9 jurisdiction, if that existing utility wishes to add  
10 territory to its system and the territory is in a  
11 nonjurisdictional county, to which regulatory authority do  
12 they go to seek that additional territory?

13 MR. TWOMEY: Very clearly, Commissioner Deason,  
14 they would go to the nonjurisdictional, and let me tell  
15 you why. In the case of St. Johns, if you grant Nocatee  
16 or Intercoastal what they've asked for, they get roughly  
17 22,000 acres in the nonjurisdictional county, contrary to  
18 the wishes of the county government. That's a big foot in  
19 the door. That's a big camel nose in the tent.

20 Then you're saying -- and your staff, as I read  
21 the recommendation, is fully in accord with the notion  
22 that once that camel's nose is in there, it's Katie bar  
23 the door on how much else you can take away from that  
24 county that's not nailed down so long as presumably it's  
25 contiguous to the nose already in there.

1           And what you do, if you accept that,  
2 Commissioners, is you gut entirely the ability of counties  
3 to control their own destiny, which was the original basis  
4 for them having the right to opt in and out.

5           You gut the ability of them to control how much  
6 money their going to spend in their budgets on  
7 infrastructure planning for county systems and so forth.  
8 And you gut the ability for them to decide whether those  
9 systems that are investor-owned and, clearly within their  
10 sole jurisdiction, whether they can expand or not or how  
11 they will allocate that territory.

12           COMMISSIONER JABER: Mr. Twomey, on that issue  
13 though, on the growth and gutting the county's opportunity  
14 to figure out where the utilities should go, just because  
15 the Commission grants a certificate, which I remind you,  
16 that's not where we are --

17           MR. TWOMEY: Right.

18           COMMISSIONER JABER: -- but just because the  
19 Commission grants a certificate doesn't mean that the  
20 county can't slow the entire process down with the  
21 permitting? And there are other options that the county  
22 has to control growth.

23           MR. TWOMEY: Well, the -- I'm not going to go  
24 into what county should or shouldn't do in terms of  
25 permitting. And I think people, if they get a certificate

1 from the county government or they get a certificate from  
2 the Public Service Commission, they should be able to  
3 expect equal protection and due process and fair play in  
4 the permitting, and no one should stand in their way for  
5 the wrong reasons. But, again, go back to your earlier  
6 question, I don't think it's incumbent upon the counties  
7 to have to try and maneuver this way to control their own  
8 destiny.

9 CHAIRMAN GARCIA: Okay.

10 MR. ODOM: Don Odom representing the  
11 Hillsborough County Board of County Commissioners.

12 Let me say at the outset that I'm not going to  
13 address the intervention issue at all. Ms. Schneider will  
14 do that on behalf of the three counties here. And any  
15 time that I have remaining, I'd like for it to go to  
16 Ms. Schneider. The two previous speakers have pretty much  
17 covered all of the relevant issues, so I'll try to be very  
18 brief.

19 I'd like, on behalf of my county, to ask you to  
20 consider the issue that's before you in a very, very  
21 careful and serious manner in that this decision, if you  
22 grant these applications, has the potential for turning  
23 the regulation of water and wastewater systems within  
24 Florida on its head.

25 Under the interpretation of the statutes that's

1 being put forth by the applicants, all of that would be  
2 necessary to divest nonjurisdictional counties of their  
3 ability to regulate water and wastewater utilities would  
4 be to just set up shop in a county across state lines and  
5 make a proposal to put in a system. And by that very act,  
6 they imply that the counties would necessarily lose  
7 jurisdiction.

8 Hillsborough County is aware that there is  
9 language in 367021.12 that suggests that these proposed  
10 systems or the mere proposal of a system is sufficient to  
11 trigger your jurisdiction. However, I would respectfully  
12 suggest to you that such an interpretation is inconsistent  
13 with other law, including the language in 367.171, which  
14 clearly gives the -- requires the counties to make an  
15 affirmative action to give up their jurisdiction to the  
16 Public Service Commission.

17 It would be inconsistent with Article 8 of the  
18 Florida Constitution, which grants our charter counties  
19 home rule powers. It certainly would be inconsistent with  
20 chapter 12501k, which gives the county specific authority  
21 to regulate water and wastewater utility activities within  
22 their counties. And lastly, it would be inconsistent with  
23 chapter 153 of the Florida statutes.

24 The only way to harmonize all of these  
25 provisions is to interpret the requirements in 367 to

1 mean, as Mr. Twomey and Ms. Brownless have indicated, that  
2 there must be some permission given initially by a  
3 nonjurisdictional county before the Commission could usurp  
4 the county's authority.

5 All of the cases that have been cited, GDU, the  
6 Beard case, have all dealt with cases of economic  
7 convenience, and none of them have really turned on the  
8 threshold issue of the granting of the jurisdiction of the  
9 ability of the Commission to wrest jurisdiction away. And  
10 I think that that's an important distinction between all  
11 those cases and this case where here we're talking about  
12 your ability to even have jurisdiction.

13 There are many practical problems associated  
14 with what the applicants are suggesting. First of all,  
15 what if this proposed system is not time to go? Does the  
16 jurisdiction automatically revert back to the  
17 nonjurisdictional county? If so, when would that happen?

18 This could wreak havoc with financial plans of  
19 nonjurisdictional counties, it could affect their ability  
20 to serve their citizens, it could affect the rights of  
21 bondholders, if they don't have control over the provision  
22 of water and wastewater service within their jurisdiction.  
23 In some instances, this scenario could even result in  
24 defaulting on certain bonds, if the situation gets  
25 critical enough.

1           The certificate or the application or in the  
2 case of ICU, in my view, is particularly disturbing, given  
3 the facts that have been recited previously by  
4 Ms. Brownless, where they initially applied for a  
5 certificate with the proper regulatory agency, St. Johns  
6 County. They were denied, and so now they forum shop  
7 trying to find a more friendly forum.

8           We don't think that this is efficient. We don't  
9 think that systems should be able to go to one authority  
10 and get a denial and then be able to shop around until  
11 they find a more friendly forum for their goals.

12           The other fact, I think, that makes this  
13 particular application so disturbing is that such a small  
14 percentage of, as Mr. Twomey put it, dirt that they  
15 propose to serve is located in the county that has the --  
16 in the jurisdictional county. Only 8% of the service area  
17 is located in Duval as opposed to 92% of the proposed  
18 service area being located in St. Johns County.

19           Surely, the legislature did not intend to divest  
20 the county of its jurisdiction that it conferred upon the  
21 counties under the previous statutes and constitutional  
22 provisions that I have previously cited.

23           The first district court of appeal in the case  
24 of Hernando County versus the Florida Public Service  
25 Commission, which is at 685 So.2d 48, which I cited in my



1 brief, stated in citing the Cape Coral case, any  
2 reasonable doubt as to the lawful existence of a  
3 particular power that is being exercised by the Commission  
4 must be resolved against an exercise, thereof, and the  
5 further exercise of that power should be arrested.

6 I would contend that the counties jointly have  
7 raised reasonable doubt regarding your authority to invoke  
8 your jurisdiction within St. Johns County. Therefore, I  
9 respectfully request that pursuant to the holding in the  
10 Cape Coral case that you not grant the requested  
11 certificates in this docket.

12 CHAIRMAN GARCIA: Ms. Schneider.

13 MS. SCHNEIDER: Mr. Commissioner, is it your  
14 pleasure that I address the intervention issue now or  
15 after the other side has an opportunity?

16 CHAIRMAN GARCIA: You've got three minutes left  
17 to address the issue that you have to address.

18 MS. SCHNEIDER: Okay. Basically, Commissioners,  
19 I would say that the question before this Commission today  
20 is whether the PSC can obtain jurisdiction by granting the  
21 request or if it must first have the jurisdiction before  
22 it grants the request.

23 And the issue before us today is whether the  
24 Public Service Commission has jurisdiction to consider an  
25 application by a utility to provide service in a

1 nonjurisdictional county. There is nothing in section  
2 3671717 that grants the Commission the right to divide up  
3 a territory in a nonjurisdictional county. The right to  
4 determine who provides service and when is expressly  
5 reserved to the counties and is a legislative discretion  
6 action.

7 Rule 2522039 of the Florida Administrative Code  
8 requires that an intervenor have a substantial interest in  
9 this proceeding. As the petitioning parties, the counties  
10 must demonstrate that they will suffer a real and present  
11 injury, in fact, as a result of the proceeding and that  
12 the nature of the injury is the one under the protection  
13 of the relevant statutes.

14 Collier, Citrus, Hillsborough, and Sarasota  
15 Counties meet both of these requirements. Each of these  
16 counties, as well as every other nonjurisdictional county  
17 in this state, has a vested right to regulate water and  
18 sewer utilities within its respective geographic  
19 boundaries. In Sarasota County, that right was granted by  
20 special act in 1967.

21 Section 3670114, provides that the chapter shall  
22 not impair or take away vested rights other than  
23 procedural rights or benefits. Clearly, the regulatory  
24 jurisdiction of the counties is that -- contrary to the --  
25 I'm sorry. Clearly, the regulatory jurisdiction of the

1 counties is under a protection of Section 367. That's the  
2 first prong of the two-part test.

3 Second, contrary to the arguments of Nocatee and  
4 Intercoastal, the counties will suffer a real and present  
5 injury, in fact, if the Commission determines that it has  
6 jurisdiction to grant utilities a service area  
7 nonjurisdictional counties.

8 If the interpretation of 3671717, proposed by  
9 Nocatee and Intercoastal and recommended by Staff, is  
10 adopted by the Commission, the vested right of the  
11 nonjurisdictional counties to regulate the provision of  
12 water and sewer service within its geographical boundaries  
13 is immediately impaired.

14 There is nothing speculative or hypothetical  
15 about it. It is the interpretation of a statutory  
16 provision that goes to the very core of a county's  
17 legislative right to govern the provision of water and  
18 sewer service.

19 Nocatee and Intercoastal argue that the counties  
20 are not significantly impacted until a utility applies to  
21 the PSC for a certificate of service in that county, and  
22 that precedent, established in the current proceeding, is  
23 not enough to amount to a substantial interest.

24 Interestingly, both Nocatee and Intercoastal, in  
25 making this argument against precedent, rely on PSC

1 precedent in support of their position. The counties  
2 submit, if our vested right to regulate is going to be at  
3 jeopardy by precedent, we should have been granted -- we  
4 should be granted the due process right to protect that  
5 vested right, which is recognized by Section 367.

6           Moreover, anyone who has appeared before the  
7 body, this administrative body or any other administrative  
8 body or judicial body, knows the value of precedent.  
9 Collier, Citrus, Hillsborough County know firsthand the  
10 value of that precedent.

11           As many of you probably remember, along with  
12 Hernando County, we intervened in the 1994 PSC  
13 investigation of jurisdiction under 367171 with respect to  
14 Southern States Utilities, now Florida Water.  
15 Interestingly, the SSU jurisdiction investigation  
16 commenced as a request for declaratory statement by SSU  
17 with respect to only Hillsborough and Polk County.  
18 However, the Commission recognized that the issue under  
19 3671717 had statewide impact and converted it to --

20           COMMISSIONER CLARK: Ms. Schneider, let me ask  
21 you a question on that. Did you have systems in your  
22 county that that decision would have applied to?

23           MS. SCHNEIDER: Sarasota did not. Sarasota  
24 County had purchased the SSU system.

25           COMMISSIONER CLARK: At the time that that --

1 MS. SCHNEIDER: At the time that the original  
2 case was initiated, we did have an SSU system. Later on  
3 during the proceeding we bought it. The issue was raised  
4 by Ken Hoffman, I guess, who represented SSU at the time,  
5 and he said that under Agrico we didn't have jurisdiction,  
6 because we no longer had a system, and the PSC said that  
7 Agrico didn't apply and that we did have jurisdiction to  
8 proceed, and we did. And we remained in the proceeding  
9 throughout.

10 As I said, the Commission, in that case,  
11 recognizing that potential impact of 3671717, converted  
12 that into an investigation. All nonjurisdictional  
13 counties were noticed, and Collier, Hillsborough,  
14 Sarasota, and Hernando were granted leave to intervene.

15 The impact of the Commission's decision in the  
16 current proceeding regarding its jurisdiction under  
17 3671717 has no less an impact on nonjurisdictional  
18 counties than that issue in the SSU investigation.

19 In the SSU investigation, the counties had a  
20 major obstacle to overcome, and that was precedent  
21 established in the Beard case, which has already been  
22 discussed in this -- earlier today. And the Beard case  
23 involved St. Johns County declaratory statement by St.  
24 Johns County. And in the St. Johns County case, none of  
25 the counties took -- bothered to intervene in that case.

1 Why should they? St. Johns County, oh, it's so far away.  
2 They couldn't possibly have any impact on Sarasota,  
3 Hillsborough, or anybody else. Well, low and behold, a  
4 few years later, SSU, armed with the Beard decision, comes  
5 before this Commission and says, we want systems to be  
6 under your jurisdiction statewide.

7 Well, then, finally then, the counties get to  
8 participate in the proceeding after they have Beard to  
9 overcome, where if they had even thought about the issue  
10 of coming before the Commission, the outcome would likely  
11 have been different.

12 COMMISSIONER JABER: Ms. Schneider, that is not  
13 the issue in this case, would you agree with me, because  
14 with both of these utilities there will be physical  
15 delivery. So, am I correct in thinking that that issue  
16 doesn't exist in this case?

17 MS. SCHNEIDER: Well, the issue -- the reason we  
18 think the issue before this case is similar is because the  
19 counties or the utilities, rather, are going to have the  
20 opportunity under 3671717 to simply say, "I want a utility  
21 in these two counties; therefore, I'm going to the PSC,"  
22 that Nocatee or any other utility in this state could  
23 enter into discussions with a developer in Sarasota County  
24 and a developer in Desoto County and enter into developer  
25 agreements with them and say, "Hey, let's have a

1 development that crosses county lines." And as soon as  
2 they agree to that, then they say the jurisdiction goes to  
3 the PSC. The counties, the nonjurisdictional counties,  
4 both of them are nonjurisdictional counties, would have  
5 nothing to say about this.

6 CHAIRMAN GARCIA: Ms. Schneider, you're out of  
7 time, unless you've got -- unless you quickly, because I  
8 gave you three minutes, and you're at about 10 now.

9 MS. SCHNEIDER: I would just like to distinguish  
10 the Agrico case that was relied on for intervention by the  
11 utilities. And in Florida Medical Association, Inc.  
12 versus the Department of Professional Regulation, the  
13 first DCA distinguished the Agrico case from a case where  
14 the lawful exercise of authority was being challenged.  
15 That was a third-party permitting case.

16 Similar to the Florida Medical Association case,  
17 in this proceeding today, the county's allegation is that  
18 the granting of service by the PSC to Nocatee and  
19 Intercoastal within the geographical boundaries of  
20 nonjurisdictional counties is an invalid exercise of  
21 delegated legislative authority. It's well recognized by  
22 the courts that the local governments have the discretion,  
23 legislative authority, to grant franchises and to regulate  
24 utilities within their own boundaries.

25 CHAIRMAN GARCIA: Thank you very much.

1 MS. SCHNEIDER: Thank you.

2 MR. WHARTON: Mr. Chairman, very quickly, first  
3 of all, I want to make clear that it was not the  
4 Commissioner's question earlier. The Commissioner was  
5 asking the 64,000 dollar question, what's the county's  
6 unstated agenda in moving to dismiss us on a  
7 jurisdictional argument? We're both applying for a  
8 development that's 12,000 acres of St. Johns and about  
9 2,000 in Duval.

10 Commissioner Deason got to the meat of the issue  
11 when he said, "How will this apply to the real world?"  
12 Well, we don't need to go very far for an example. That  
13 case is a great example. You might be surprised that the  
14 authority found Intercoastal had the managerial,  
15 operational, and technical ability to provide service and  
16 could initially finance --

17 COMMISSIONER DEASON: Mr. Wharton, you need to  
18 slow down.

19 MR. WHARTON: I'm sorry -- and that Intercoastal  
20 could initially finance the project.

21 But they also found Intercoastal failed to  
22 demonstrate it can commit service to Nocatee in a time  
23 frame and quantity that meets the needs of the developer  
24 due to the multi-county nature of phase I of Nocatee,  
25 Intercoastal cannot provide service under its application



1 to the entire area that has one of the most immediate  
2 needs for service.

3           So -- and understand that Nocatee development  
4 wasn't announced until after Intercoastal filed its  
5 application. So what you had there was St. Johns County  
6 saying we just can't get past the fact that you can't  
7 serve the Duval portion.

8           Let's say that in the real world we file at the  
9 PSC and Duval and at St. Johns. They're both going to be  
10 looking at each other and saying, "Well, it doesn't make  
11 sense to grant this unless St. Johns grants that." That's  
12 exactly what's going to happen. That's the exact kind  
13 of --

14           COMMISSIONER CLARK: Can't they do it at the  
15 same time? Can't they just -- if they want to serve that  
16 kind of territory, can't they put an application in Duval,  
17 which would be to us, and then in St. Johns? And isn't  
18 that the way you would -- they have to do it if it crossed  
19 county lines when they were nonjurisdictional?

20           MR. WHARTON: Certainly. If the argument of the  
21 counties is accepted, that is what you will have to do.  
22 The question is whether --

23           COMMISSIONER CLARK: Let me ask you, if they are  
24 both nonjurisdictional, isn't that what you have to do?

25           MR. WHARTON: I would assume so. Well, no.

1           COMMISSIONER CLARK:  If you have a county that's  
2 not under our jurisdiction, and you have another county  
3 that's not under our jurisdiction --

4           MR. WHARTON:  Right.

5           COMMISSIONER CLARK:  -- and it's a proposal to  
6 cross boun-- that will cross boundary lines, don't they  
7 have to go to each separate county to get --

8           MR. WHARTON:  No, ma'am.  That application would  
9 be filed with this Commission per the clear dictates of  
10 the statute.

11          COMMISSIONER CLARK:  Under what?

12          MR. WHARTON:  Under 367171, whether the counties  
13 involved are jurisdictional or nonjurisdictional.

14          COMMISSIONER CLARK:  But to get the original  
15 certificate, they would come here.

16          MR. WHARTON:  I believe they would, ma'am, I  
17 believe they would.  And I think that's --

18          COMMISSIONER JABER:  Mr. Wharton, you were  
19 outlining for us the decision made at the county, which  
20 I'm very interested in.  You said that they found that you  
21 all had managerial, technical, and financial ability.  So  
22 why -- again, help me understand why your application was  
23 denied.

24          MR. WHARTON:  I really want to leave some of my  
25 time for Mr. Melson.

1           Setting aside the fact that the county was a  
2 party opponent who filed a petition saying our application  
3 should be denied and the county was the judge, which we  
4 filed two motions to recuse them, and they were denied,  
5 the county -- the Nocatee's case was they can't serve  
6 phase I. That's in Duval County. And the authority  
7 member sat up there and said it really bothers us that  
8 they can't serve the part that's in Duval County.

9           COMMISSIONER JABER: Where did the order leave  
10 it? Did the order or the decision then say you need to  
11 apply with the PSC for the remainder?

12           MR. WHARTON: It just says that it's denied, and  
13 it's a very long order. And it says we don't like your  
14 plan of service. It says quite a bit. I wouldn't want to  
15 mischaracterize it. No, it didn't go into that.

16           Let me go very quickly. Again, Mr. Twomey has  
17 really swung for the fence. For him to say that if you've  
18 got pipes in the ground across the county line, but you  
19 still don't have jurisdiction over further extensions, to  
20 me, just flies in the face of the statute. What could the  
21 legislature have said in that provision that would have  
22 made that more clear?

23           Under Ms. Brownless's argument, which doesn't  
24 say you don't have any jurisdiction, even after pipes are  
25 in the ground, she said once pipes are in the ground,

1 traversing county boundaries, you have jurisdiction for  
2 all purposes, and that's the only party in this case.  
3 Think about the reality of that. Did the legislature  
4 really mean that you would have jurisdiction from that  
5 nanosecond over conditions of service and rates and  
6 service availability charges and deletions and extensions?

7 I might come to you the next day and file an  
8 application to extend the territory to the same thing the  
9 county had denied. And you might decide it didn't make  
10 sense what the county did, because you would have  
11 jurisdiction for all purposes.

12 COMMISSIONER JABER: What precautions are there  
13 in place to prevent a utility from forum shopping?

14 MR. WHARTON: Well, I think you could make a  
15 proper res judicata argument. You couldn't do it on an  
16 application that had a \$2.5 million cost and a \$10 million  
17 cost in this case or that proposes to serve part of Duval  
18 County in this case and not in the last one.

19 COMMISSIONER JABER: So you would pick and  
20 choose our application of --

21 MR. WHARTON: Well, certainly, if there was a  
22 proper res judicata argument, I believe, they might be  
23 able to come before you and you might look at that county  
24 decision and say that's everything we would have looked  
25 at, otherwise.

1           COMMISSIONER JACOBS: In your scenario, however,  
2 it leaves open the idea that someone could forum shop,  
3 simply by the conduct. You say, if two nonjurisdictional  
4 counties chose to look at a development that crossed their  
5 boundaries they'd be violating the law.

6           MR. WHARTON: Well, I don't believe there would  
7 be forum shopping in that case, because I think if the  
8 utility knew in advance the proposed service traversed  
9 county boundaries, the only place the application would be  
10 filed was here. Here, the development was announced in  
11 midcase. We had no knowledge that phase I of Nocatee  
12 would be in Duval County and then, if we would have  
13 originally filed the application here.

14           To conclude, what you're being asked to believe  
15 is that when the legislature said notwithstanding anything  
16 to the contrary, and there is nothing, but notwithstanding  
17 anything to the contrary --

18           COMMISSIONER CLARK: Anything in this section.

19           MR. WHARTON: I'm reading 171 -- that you shall  
20 have exclusive jurisdiction; not just jurisdiction,  
21 exclusive jurisdiction, whether the counties involved are  
22 jurisdictional or nonjurisdictional. What they meant when  
23 they put that was, well, nonjurisdictional counties will  
24 have initial jurisdiction to establish service territories  
25 and then ya'll will take it from there.

1           Or in the case of Mr. Twomey, you won't ever  
2 have jurisdiction over service territories. They could  
3 have easily said that, if that's what they meant. The  
4 statute says nothing like that, doesn't intimate anything  
5 like that. 367 often goes on proposals. Do you propose  
6 service? Then, you're jurisdictional. Do you propose a  
7 rate increase? You're jurisdictional.

8           CHAIRMAN GARCIA: Mr. Melson.

9           MR. MELSON: Commissioner Clark, does the  
10 Commission have to finish its deliberations by 11:00?

11          CHAIRMAN GARCIA: Why don't you go ahead and  
12 finish, and we'll see where we're at.

13          MR. MELSON: All right. I think the Commission  
14 has read the statute and thought about it. I think that's  
15 obvious from your questions. I think I'd -- rather than  
16 do any sort of structured argument, I'm going to try to  
17 respond to several points that were made during the prior  
18 arguments or several questions the Commission asked.

19          COMMISSIONER CLARK: I just want to be clear.  
20 Mr. Wharton, you represent whom?

21          MR. WHARTON: Intercoastal.

22          MR. MELSON: I represent Nocatee Utility  
23 Corporation, which is a subsidiary of DDI. DDI is  
24 proposing a multi-county land development with land in  
25 Duval and St. Johns County and has organized Nocatee

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1 Utility Corporation as a proposed provider of service to  
2 that development and only to that development.

3 COMMISSIONER CLARK: Mr. Hoffman?

4 MR. HOFFMAN: Commissioner Clark, I represent  
5 the JEA.

6 MR. MELSON: Two things, procedurally. First,  
7 the only motion that we think has any vitality in this  
8 case is St. Johns County's motion which is directed to  
9 Intercoastal's application, not to Nocatee's.

10 I recognize that, as Commissioner Jaber said  
11 earlier, I think the same legal question applies to both.  
12 And to the extent you're considering jurisdiction, I think  
13 you can consider jurisdiction over Nocatee's application  
14 on your own motion.

15 But at this point we don't believe there's a  
16 viable motion to dismiss against our application raised by  
17 any party because, as I'll deal with very briefly at the  
18 end, we don't think that Collier, Sarasota, Hillsborough,  
19 Citrus Counties have standing or are in a position to file  
20 a motion to dismiss.

21 COMMISSIONER JABER: Do you think Nocatee should  
22 file an application with St. Johns County first?

23 MR. MELSON: No, I don't, because we'll, from  
24 the outset, provide service across the county line. And  
25 as we read the statute and continue to read the statute,

1 you have exclusive jurisdiction over systems whose service  
2 crosses county boundaries.

3 And contrary to Mr. Twomey's suggestion that  
4 even if lines were in the ground, you would get in some  
5 sort of shared jurisdiction situation where the county  
6 still had jurisdiction over the dirt. 3670112 says pretty  
7 plainly you have jurisdiction over authority, which means  
8 the dirt to be served, service, and rates.

9 COMMISSIONER JABER: But you don't have an  
10 existing facility either.

11 MR. MELSON: No.

12 COMMISSIONER JABER: So how is your scenario  
13 different than Intercoastal?

14 MR. MELSON: I don't think it really is.  
15 Procedurally, there's a motion to dismiss in Intercoastal.  
16 Procedurally, there is no motion to dismiss us. But in  
17 terms of applying the standards, whatever you decide the  
18 rule is, probably applies equally to either of us, unless  
19 I get really creative on appeal.

20 COMMISSIONER JACOBS: What if we were looking at  
21 a different scenario. What if phase I were totally within  
22 St. Johns and we were looking at an expansion of phase II  
23 into Duval, how would you deal with that?

24 MR. MELSON: I think that would be like your  
25 Lake Suzy case where you had an existing utility serving



1 in Desoto County and you said we have the jurisdiction to  
2 determine when they can cross that county line and go into  
3 Charlotte. And while you eventually did not show cause  
4 them, you considered show causing them for providing  
5 service to a single connection in Charlotte County before  
6 they got your permission.

7 COMMISSIONER JACOBS: So, in other words, we'd  
8 have jurisdiction there as well?

9 MR. MELSON: Yes.

10 COMMISSIONER JACOBS: I may want to have him  
11 respond to that, if I can, Mr. Chairman.

12 MR. MELSON: Commissioner Deason, I think you  
13 asked a question, why did the county say there was no harm  
14 of the type that the GDU case said the statute was  
15 designed to prevent? There is harm in this case.

16 For one thing, ordinarily, the Commission sets  
17 rates as part of grant answer to a particular application.  
18 Nocatee asked for a waiver of that. Our waiver was  
19 denied. We're going forward to set rates for this small  
20 county system.

21 If we were in front of both the Commission on  
22 the Duval County piece and St. Johns County on the St.  
23 Johns County piece, we could potentially be doing cost to  
24 service allocations, studies resulting in different rates  
25 for two parts of a system that once both certificates have

1 been granted the county's concede would be a single system  
2 and would be subject to your jurisdiction. That's the  
3 type of duplication that we believe 3671717 was designed  
4 to prevent.

5 COMMISSIONER CLARK: Couldn't you prevent that  
6 by saying, you know, we're proposing something crossing  
7 county bounds, we're waiting -- we want to wait to do that  
8 to see if we get a certificate that allows us to serve  
9 that area that is in the nonjurisdictional county?

10 MR. MELSON: Commissioner, if the statute  
11 required two applications, that's certainly what we'd do,  
12 but the statute doesn't require it. The statute says --

13 COMMISSIONER CLARK: Okay.

14 MR. MELSON: -- you know, when you've got a  
15 multi-county system -- the word existing, Ms. Brownless  
16 says existing is implied throughout 367171. Well, it  
17 certainly doesn't appear. The only place existing or  
18 proposed really appears is in the definition of a utility.

19 COMMISSIONER CLARK: I appreciate that.

20 MR. MELSON: All right.

21 The counties also talk about their ability --  
22 about a Commission decision do take jurisdiction of this  
23 case stepping on their ability to do land-planning  
24 decisions. The Nocatee development, in this case, is a  
25 development of regional impact. The county is looking at

1 the impacts of that development.

2 The fact that the Commission has jurisdiction  
3 over the granting of the water and wastewater certificate  
4 doesn't do anything to undercut the county's authority  
5 under that process to consider the growth management  
6 aspects, the transportation infrastructure impacts, all  
7 the other impacts of the decision.

8 COMMISSIONER JABER: And that's correct as it  
9 relates to Intercoastal as well.

10 MR. MELSON: Yes. The two counties, Duval  
11 County and St. Johns County, will both look at the Nocatee  
12 development, regardless of who ultimately serves it.

13 You were posed with a hypothetical by one of the  
14 counties of a utility that forum shops, essentially, by  
15 finding a single customer or, you know, a small group of  
16 customers in an adjacent county and suddenly coming to the  
17 Commission for jurisdiction.

18 Commissioners, that's the kind of thing that  
19 could be addressed at the time of the case. If you  
20 decided that a proposal would cross the county line was  
21 simply a sham to get Commission jurisdiction, there was  
22 not a need for service, this utility was not the best  
23 utility to be serving that entire service territory, you  
24 could, on factual grounds, decline to grant the  
25 certificate. I don't think on legal grounds you could

1 decline to consider it. And that's what the counties are  
2 telling you is you don't have the jurisdiction here, even  
3 to consider.

4 Ms. Brownless also pointed out to you that the  
5 judicial decisions to date have all dealt with the  
6 existing systems. That's because the facts that were in  
7 front of the Commission to date have all involved existing  
8 systems. We don't believe there is anything in either the  
9 language or the logic of those decisions, though that says  
10 you do not have jurisdiction from the outset over a  
11 utility that legitimately proposes it to cross county  
12 boundaries.

13 Finally, let me speak just briefly to the  
14 standing of the counties. You have heard argument from  
15 them today as though they have full standing to  
16 participate in this case. So to the extent due process  
17 demands that you hear from them, you have satisfied that.  
18 And the Florida Supreme Court in Ameristeel sort of noted  
19 approvingly that even when a party doesn't have standing  
20 you, on occasion, still hear from them.

21 The standard in Agrico does apply. That's been  
22 affirmed recently by the Supreme Court, approved in the  
23 Ameristeel case. And the question is, is there an  
24 immediate injury impact, and is it the type of injury that  
25 the statute is designed to protect against?

1           From your decision in this case there is no  
2 immediate injury, in fact, to any county other than,  
3 potentially, St. Johns County. You will grant or deny a  
4 certificate that includes property in St. Johns County.  
5 You will not grant or deny a certificate that has any  
6 impact in any of the other counties.

7           Yes, it will be precedent, but every decision  
8 you make and every decision a court makes is potential  
9 precedent. And courts don't allow Rick Melson to  
10 intervene in a malpractice case, because he's concerned  
11 that some time in the future he may be a victim of  
12 malpractice.

13           Your decision here, as the court said in one of  
14 the cases cited in Mr. Odom's memorandum, your decision  
15 here would be stare decisis, not res judicata. The  
16 distinction there is that in a future case it would be  
17 persuasive authority that you have jurisdiction. Someone  
18 would have to distinguish it, but they are not legally  
19 bound by that decision and have the right to challenge it  
20 if and when there's a case that does immediately affect  
21 them.

22           I'd be happy to answer questions.

23           COMMISSIONER JABER: Mr. Melson, if we interpret  
24 the statute, regardless of how we interpret it, the  
25 counties cannot appeal our decision, unless they're

1 parties?

2 MR. MELSON: That's correct. A nonparty cannot  
3 appeal. And, frankly, one of the practical problems of  
4 granting that intervention, when intervention is not  
5 warranted, is it would give them standing to appeal.  
6 They'd then have an automatic stay, and it slows down the  
7 process of planning for service to a development that is  
8 moving forward, even as we speak in its permitting  
9 process.

10 CHAIRMAN GARCIA: Okay. Mr. Hoffman.

11 MR. HOFFMAN: Mr. Chairman, Commissioners, my  
12 name is Ken Hoffman. I represent the JEA. I will be very  
13 brief.

14 Let me begin by saying that the JEA adopts and  
15 supports the positions that have been taken by Nocatee  
16 Utility Corporation and the responses to the petitions to  
17 intervene and the motions to dismiss that have been filed  
18 in this proceeding. Beyond that, I would just address two  
19 additional points.

20 First, Commissioner Jaber asked Mr. Melson  
21 whether there's any difference between Intercoastal and  
22 Nocatee Utility Corporation, and I believe Mr. Melson  
23 stated that there is none, and I would point out there is  
24 a difference between Nocatee and Intercoastal in that  
25 Intercoastal has filed an application with the St. Johns

1 County Water and Sewer Authority for territory in St.  
2 Johns County, and that application has been denied. And  
3 that is the same territory in St. Johns County that  
4 Intercoastal seeks in this case. That raises the issue of  
5 res judicata collateral estoppel. And that issue is not  
6 before you today, but I wanted to make that point.

7 Secondly, Commissioner Jaber, you asked a  
8 question concerning whether or not nonjurisdictional  
9 counties could appeal this decision. And again,  
10 Mr. Melson answered that question. And I think he's  
11 right, as nonparties they could not appeal.

12 However, I would point out from the standpoint  
13 of practicality that Ms. Brownless's client, St. Johns  
14 County Utility Department, is a party. As a party, I  
15 presume, if she wished, she could appeal. And these  
16 nonjurisdictional counties who have appeared before you  
17 today could file a motion with the appellate court to  
18 appear as an amicus.

19 COMMISSIONER JABER: Mr. Hoffman, in  
20 representing JEA, I know you all are -- you're providing  
21 the service to Nocatee, who is going to provide the  
22 ultimate utility service. You're a reseller.

23 MR. HOFFMAN: Correct. We have a letter of  
24 intent in that regard with Nocatee Utility Corporation and  
25 DDI.

1           COMMISSIONER JABER: Why isn't JEA providing  
2 service directly to the development?

3           MR. HOFFMAN: That's a matter of negotiations  
4 between Nocatee Utility Corporation and JEA, Commissioner  
5 Jaber. At this point, there is a letter of intent that  
6 addresses the terms and conditions and provision of bulk  
7 service to Nocatee Utility Corporation by the JEA, and  
8 that is the arrangement.

9           COMMISSIONER JABER: Okay.

10          CHAIRMAN GARCIA: Okay? All right.  
11 Commissioner Clark is going to fully listen, if not read,  
12 the transcript from 11:00 on, and then we will take this  
13 up again at 1:30. I'm, obviously, losing my touch. I had  
14 hoped to finish this by now, but we'll take it up at 1:30,  
15 and will be finished by 2:00 all right? So, have a good  
16 lunch.

17                   (Recess taken)

18          CHAIRMAN GARCIA: All right. Well, Commissioner  
19 Clark listened to the discussion at the end of the  
20 hearing. That only leaves us with discussion amongst  
21 ourselves or if Commissioners have any questions for the  
22 parties.

23          COMMISSIONER CLARK: Can I ask Staff a question?  
24 I have -- I want to refresh my memory about the two cases  
25 on -- when we have jurisdiction for utilities crossing



1 boundaries. And I know we had the Beard decision, and  
2 then we had the Southern States decision.

3 MS. CIBULA: Yeah, the Hernando County case.

4 COMMISSIONER CLARK: Hernando, thank you. But  
5 we have subsequently had a case where the Court has  
6 indicated its willingness to revisit the notion that there  
7 has to be physical interconnection. Are you aware of that  
8 case?

9 MS. GERVASI: That was another SSU case. The  
10 most recent one that you're referring to where I think the  
11 Court stopped short of saying that you need to have  
12 physical interconnections. So, we're kind of left with  
13 how much is enough in terms of functional-relatedness.

14 MS. CIBULA: Yeah, the Court said it was an  
15 issue in that case, so they never addressed it.

16 COMMISSIONER CLARK: That's right, but they  
17 invited us to come back. And here is my concern. Would  
18 your suggestion on jurisdiction be the same if the Court  
19 came back and said, you know, we were wrong, you don't  
20 have to have physical pipes crossing county lines, that  
21 where there is functional relatedness; as in the Beard  
22 case, you can have a situation where they're applying for  
23 two territories that are not contiguous. Would you still  
24 say we have jurisdiction, because we regulate in one  
25 county and not in the other?

1 MS. CIBULA: Well, I think in the Hernando and  
2 Beard cases, that was dealing with functional relatedness.  
3 And in this case that's not really an issue, because the  
4 lines are going to transverse county boundaries from the  
5 outset.

6 COMMISSIONER CLARK: But if we conclude that we  
7 have jurisdiction because of 171, and if the Court backs  
8 away from the notion of physical interconnection, could  
9 you have a situation where we would have jurisdiction over  
10 an area in a county that was nonjurisdictional, simply  
11 because we have jurisdiction in another county and they  
12 are incorporated in part of the same business operation?

13 MS. GERVASI: I think in that type of a  
14 scenario, which is what we have going on here today, the  
15 Commission would have to reach a conclusion based on  
16 functional relatedness and whether or not those particular  
17 circumstances were such that the utility was a single  
18 system.

19 COMMISSIONER CLARK: And in that case we would  
20 also have jurisdiction over the territory.

21 MS. GERVASI: Yes.

22 MS. CIBULA: Yes.

23 CHAIRMAN GARCIA: Okay? Commissioners?

24 COMMISSIONER JABER: Staff, tell me about the  
25 St. Johns County decision that's pending on appeal. And

1 that's the entire order that's pending on appeal?

2 MS. CIBULA: Yes, but it only includes the area  
3 in St. Johns County that they requested, not -- they  
4 didn't request territory in Duval.

5 COMMISSIONER JABER: I don't know, is this an  
6 appropriate time to share some of my concerns and comments  
7 or should we wait for other questions?

8 CHAIRMAN GARCIA: Commissioner Deason and  
9 Commissioner Jacobs, do you have any questions? You might  
10 as well tell your rationale, if you've got some thinking,  
11 unless Commissioner --

12 COMMISSIONER JACOBS: I don't have any  
13 questions.

14 CHAIRMAN GARCIA: Okay.

15 COMMISSIONER JABER: My concern -- there are a  
16 couple of concerns, obviously. It gives me great pause  
17 that St. Johns County has not required Nocatee to go  
18 through some of the same hoops that Intercoastal has.

19 It gives me great concern that the statute,  
20 whether intentionally or not, can result in forum  
21 shopping. I don't think, and it's not that we can point  
22 to anything in the statute that says this or legislative  
23 intent because I've looked, but I don't think the design  
24 of the statute was to encourage forum shopping.

25 Saying that, there's nothing that prohibits it.

1 And I think to the degree that the counties have a concern  
2 about whether 367171 encourages forum shopping, there are  
3 statutory fixes for them.

4 I think that absent that clarification, the  
5 statute is the statute. And we must go back, in my  
6 opinion, to the definition of utility, which includes  
7 proposing to construct a system.

8 I think that the PSC does have jurisdiction over  
9 this application. That doesn't mean that we will grant  
10 the application. And I'm very careful about that, because  
11 I want to every step of the way, and I don't know who the  
12 prehearing officer is with this case, but every step of  
13 the way I want to hear from St. Johns County, if we go  
14 forward with this application.

15 I say that for our own staff, too, because if  
16 there isn't testimony from St. Johns County, I hope that  
17 you all regroup and work with the prehearing officer,  
18 because I want to see testimony from St. Johns County.

19 I think that's a way to harmonize the processes,  
20 not necessarily that the county has to come to us,  
21 Mr. Twomey, but that we all have to work together. I  
22 think that the statute is designed for the agency and  
23 counties to work together, and there is a way to do that.

24 The way to do it is to hear from the counties on  
25 need for service, on duplication of service, on geographic

1 proximity. There are many, many ways under comprehensive  
2 plan. It's my understanding that counties still have to  
3 go to the Department of Community Affairs to amend their  
4 comprehensive plan. So even if we go forward with this  
5 application because we find we have jurisdiction, it  
6 doesn't mean that either application will get granted.  
7 And I think that that's an opportunity for the county to  
8 make its concerns known.

9           Saying that, where I don't know what to do,  
10 Commissioners, and I'll need your insight and your input,  
11 is I think that Nocatee has not gone through the same  
12 hoops that Intercoastal has. And in a way, Ms. Brownless  
13 says to us that Intercoastal did it right, and we should  
14 honor her opinion.

15           And by the way, I think that that's a good  
16 starting place. I would like to encourage that we take  
17 judicial notice of what the county has already done, but  
18 you're not requiring Nocatee to do the same thing. So  
19 that gives me a lot of pause.

20           MR. MELSON: Mr. Chairman, could I respond  
21 briefly to a concern to give her a perspective on what  
22 happened in St. Johns County?

23           CHAIRMAN GARCIA: Only if she asks you to.

24           COMMISSIONER JABER: I'd like that, actually.

25           MR. MELSON: Commissioner Jaber, I don't think

1 the county has required anybody to go through any hoops.  
2 Intercoastal chose, initially, to file a single county  
3 application that did not include Duval County. Nocatee  
4 chose initially to file a multi-county application, which  
5 we had to come here. We participated in six days of  
6 hearings in front of St. Johns County on the Intercoastal  
7 application for the St. Johns County piece of our project.  
8 The PSC application, multi-county application, that we had  
9 filed was put into that record by Intercoastal as an  
10 exhibit.

11           The county never indicated to us that they  
12 thought they had jurisdiction over a multi-county system.  
13 I think, we were operating on the same wavelength of the  
14 authority that if it was multi-county it would come here  
15 in the first instance. Outside of the res judicata and  
16 collateral estoppel, which we're not here on today, I'm  
17 not sure why the county chose to file one motion to  
18 dismiss and not the other, but I guess I'm grateful.

19           COMMISSIONER JABER: Yeah. The dynamics of  
20 whatever you all have going on, I can't quite get my hands  
21 around, but saying that, I'm ready to move issue one,  
22 Mr. Chair, but I would like to hear from legal on whether  
23 we can take judicial notice of the actions that St. Johns  
24 County has already made --

25           CHAIRMAN GARCIA: All right.

1 COMMISSIONER JABER: -- and, if it's  
2 appropriate, right now.

3 CHAIRMAN GARCIA: Do we have a second?

4 COMMISSIONER DEASON: I will second the motion.

5 CHAIRMAN GARCIA: Very good. Legal?

6 MS. CIBULA: At the hearing, we would probably  
7 determine whether to take judicial notice of the St. Johns  
8 County order.

9 COMMISSIONER CLARK: I don't see -- I mean, it's  
10 an order of the county duly rendered. I don't see why we  
11 wouldn't take it according to the evidence code.

12 CHAIRMAN GARCIA: Very good. We have a motion  
13 and a second. All of those in favor signify by saying  
14 aye.

15 CHAIRMAN GARCIA: Aye.

16 COMMISSIONER DEASON: Aye.

17 COMMISSIONER JACOBS: Aye.

18 COMMISSIONER JABER: Aye.

19 CHAIRMAN GARCIA: Opposed?

20 COMMISSIONER CLARK: Nay.

21 COMMISSIONER JACOBS: If I could make one  
22 brief --

23 COMMISSIONER CLARK: Yeah, you know, this sort  
24 of happened quickly, and I just -- I don't believe the  
25 statute ever intended for us to be able to usurp the

1 ability to set the territory. And I would point out that,  
2 you know, that counties and the Commission, or perhaps it  
3 was the city, granted a franchise that those two  
4 authorities coexisted. And I don't see why they can't  
5 coexist here.

6           And it seems to me I wouldn't grant the motion  
7 to dismiss, because I think we clearly have jurisdiction  
8 over the Duval County piece, but I understand that you  
9 would have to coordinate with the county. But that, in my  
10 mind, I don't believe the statute was ever intended to  
11 address that. And I think I was general counsel when the  
12 GDU case came up on the discussions, and there was never  
13 any discussions, as I recall, that it would in any way  
14 usurp the authority to set territories.

15           I do think that once it's in existence, and I  
16 think you have the situation where you'd have to apply two  
17 places for the territory. And hopefully, there would be  
18 some coordination and understanding that, you know, this  
19 makes sense to do it -- it makes sense to grant the  
20 certificate covering this whole territory.

21           And I'm particularly concerned about -- I think  
22 the Hernando case is wrong with respect to when  
23 jurisdiction attaches. I think it attaches when you have  
24 an entity that provides service as a single functional  
25 entity. And if we make this decision and that case is



1 reversed, I think you will have a situation where we will  
2 have jurisdiction over territories that are not  
3 interconnected in any way. And I don't think that was  
4 ever the intention of the statutes.

5 COMMISSIONER JACOBS: Commissioner Clark, that's  
6 a very good point, if I can maybe just -- because you  
7 stated most of the rationalities on why I voted the other  
8 way. The reason my vote is we're here on jurisdiction.  
9 And the arguments are that as a matter of law, we don't  
10 even get the chance to look at it.

11 COMMISSIONER CLARK: You know, Commissioner,  
12 you're absolutely right. I think we do have the  
13 jurisdiction to hear it, at least with respect to the  
14 Duval portion of it. So maybe I need to --

15 MR. WHARTON: May I ask a question of  
16 clarification. Would your understanding of that,  
17 Commissioner Clark, dismiss just our application or both?

18 COMMISSIONER JACOBS: We're not voting on  
19 dismissal. We're just on jurisdiction.

20 COMMISSIONER CLARK: Jurisdiction.

21 MR. WHARTON: So it would be both? They  
22 couldn't come to you for the 12,000 acres in St. Johns  
23 County?

24 COMMISSIONER CLARK: No, I -- they have filed  
25 for a piece, including Duval County. And to the extent

1 they have filed that, I think we have jurisdiction. With  
2 respect to your piece, if you have only filed for -- the  
3 filing you've made before us now is both.

4 MR. WHARTON: Yes.

5 COMMISSIONER CLARK: Then, I think we do have  
6 jurisdiction, but we would only have jurisdiction with  
7 respect to that piece in Duval County.

8 MR. WHARTON: As to both applications?

9 COMMISSIONER CLARK: Yes, it would be with  
10 regard to both. So I have probably been in error, and I  
11 don't think we can -- I think we still have jurisdiction,  
12 but for different reasons.

13 CHAIRMAN GARCIA: So you're concurring with the  
14 majority.

15 COMMISSIONER CLARK: But for different reasons.  
16 I think we clearly can hear the case.

17 CHAIRMAN GARCIA: All right.

18 COMMISSIONER JACOBS: If I could -- maybe just  
19 before -- very brief point, Mr. Chairman.

20 The idea that we would not have an opportunity  
21 even to look at an application, I think, is what I find  
22 objectionable. I am absolutely clear that I don't think  
23 the statute intended that we usurp the authority of a  
24 nonjurisdictional county.

25 It does not -- it's not clear as to how we

1 resolve this issue, except what helped persuade me is when  
2 I look back at the certification statute, 367045, and it  
3 gave me guidance that in there it provides the opportunity  
4 for counties to come in and challenge a certificate of  
5 application, which would lead me to conclude that that may  
6 be the avenue that unless you anticipated that, if you see  
7 an application which encroaches upon your -- the  
8 nonjurisdictional, and I don't want to begin to prejudge  
9 here, but it led me down a different path of resolution as  
10 opposed to simply, we don't even get a chance to look at  
11 it.

12 In fact, I think that statute would argue that  
13 we, indeed, do look at it and you, indeed, do get a chance  
14 to raise your concerns. And we can resolve those within  
15 the context of the certification proceeding.

16 CHAIRMAN GARCIA: Okay? Do we have a motion on  
17 item two, on issue two?

18 COMMISSIONER CLARK: Mr. Chairman, do I have to  
19 ask for reconsideration so I can vote in the affirmative  
20 for different reasons?

21 CHAIRMAN GARCIA: No, I don't think so. I think  
22 you clarified, but if you want -- you voted with the  
23 majority, but you concurred for a different reason, and  
24 Blanca is telling me that's quite all right.

25 COMMISSIONER CLARK: Okay.

1 CHAIRMAN GARCIA: Issue two, is there a motion?

2 COMMISSIONER JABER: Do we have to vote on issue  
3 two? Let me think here. Staff, do we --

4 MS. CIBULA: Yes, because we still have the  
5 pending --

6 COMMISSIONER JABER: Oh, this intervention for  
7 Sarasota and Hillsborough Counties?

8 MS. CIBULA: Yes, and then on the motions to  
9 dismiss, we're recommending denial of those.

10 COMMISSIONER JABER: Do you agree that counties  
11 cannot appeal issue one, if they're not granted  
12 intervention?

13 MS. CIBULA: Yes, I agree with that. They can  
14 appeal the intervention portion, but not the jurisdiction  
15 portion, if they aren't granted intervention.

16 COMMISSIONER CLARK: Mr. Chairman, I can move  
17 Staff on issue two, but I want to clarify that their  
18 participation at the special agenda, in my view, was as  
19 amicus curiae. And it was under the second recommendation  
20 that they be allowed to participate in that capacity that  
21 I was willing to hear from them.

22 So I want to make it clear that --

23 CHAIRMAN GARCIA: Does this also mean that going  
24 forward?

25 COMMISSIONER CLARK: I have no problem with them

1 appearing as amicus. I want to make it clear, however,  
2 that --

3 COMMISSIONER JABER: Staff needs to clarify for  
4 me that going forward, what would they do as amicus?

5 COMMISSIONER CLARK: They could file legal  
6 briefs the same way that it happens in the courts.

7 COMMISSIONER JABER: Now, I don't know what the  
8 issues are going forward. I don't know what the  
9 prehearing statements have been, but we -- as of today's  
10 vote, we'll dispose of the jurisdiction issue.

11 MS. CIBULA: Correct.

12 COMMISSIONER JABER: So, what really --

13 MS. CIBULA: But someone could, I guess, raise  
14 the jurisdiction issue again somewhere along the line,  
15 even though we've already made a determination.

16 COMMISSIONER CLARK: Well, I would -- they might  
17 pursue the issue that our jurisdiction only extends to  
18 Duval County and we can't grant it in St. Johns County.

19 CHAIRMAN GARCIA: Or they don't have to take up  
20 the offer of amicus and not do anything.

21 COMMISSIONER CLARK: That's true. That's true,  
22 but I agree with Staff that they wouldn't be able to file  
23 motions to dismiss or raise new issues. It's up to the  
24 parties to raise those, and they can participate as  
25 friends of the court on those things that they feel are

1 important.

2 That is the basis on which I think they are  
3 allowed to participate here, because I do not think we  
4 want the precedent of just because it's an agenda that  
5 anyone can participate, because we have previously not  
6 allowed people to participate when they couldn't show an  
7 interest.

8 CHAIRMAN GARCIA: Commissioner Deason.

9 COMMISSIONER DEASON: I believe I might can  
10 second the motion, but I need something clarified,  
11 something that troubles me a little.

12 I believe Staff answered that the counties can  
13 continue to participate as an amicus for purposes of  
14 whatever, even when arguing jurisdiction, and I don't  
15 think that's appropriate. We decided that issue today.

16 MS. CIBULA: Yeah, only if the issue is raised  
17 again by one of the parties.

18 COMMISSIONER DEASON: I'm sorry.

19 MS. CIBULA: Only if the issue were to be raised  
20 again by one of the parties. The amicus couldn't raise  
21 the issue themselves. So, if the issue was raised by one  
22 of the parties, then --

23 COMMISSIONER DEASON: Well, I would anticipate  
24 that the prehearing officer would not allow an issue  
25 that's already been decided to be raised again.

1 CHAIRMAN GARCIA: I happen to know the  
2 prehearing officer's pretty stern about issues that have  
3 already been discussed.

4 COMMISSIONER DEASON: Okay.

5 CHAIRMAN GARCIA: Is there a second?

6 COMMISSIONER DEASON: Second on that.

7 COMMISSIONER JABER: Let me get clarification  
8 from Staff, I'm sorry. I thought you were recommending  
9 parties participation today because we haven't gone to  
10 hearing and that, in fact, we have done before.

11 MS. CIBULA: I don't understand.

12 COMMISSIONER CLARK: That was the reason for my  
13 clarification is because I'm not sure that we have been  
14 consistent. But I think people have come to agenda, and  
15 they haven't been parties, they haven't intervened or they  
16 haven't shown the requisite interest to intervene, and we  
17 have not heard from them. And I think that is the  
18 appropriate standard to apply.

19 And in this case, I think, having them  
20 participate as amicus is and was appropriate. And that  
21 would be the basis on which I think we should deny their  
22 intervention, but allow them to participate, both in this  
23 oral presentation and further as amicus.

24 COMMISSIONER JABER: Does the amicus give them  
25 appellate rights, Staff?

1 MS. CIBULA: No.

2 CHAIRMAN GARCIA: All right. There is a motion  
3 and a second. All of those in favor signify by saying  
4 aye.

5 CHAIRMAN GARCIA: Aye.

6 COMMISSIONER DEASON: Aye.

7 COMMISSIONER CLARK: Aye.

8 COMMISSIONER JACOBS: Aye.

9 CHAIRMAN GARCIA: Opposed?

10 COMMISSIONER JABER: Nay.

11 CHAIRMAN GARCIA: Do you want to tell us why?

12 COMMISSIONER JABER: Yeah, not with respect to  
13 going forward with the amicus I would have granted  
14 intervention. That's the purpose of my dissent.

15 CHAIRMAN GARCIA: Okay. I ask because if not,  
16 Mr. Wharton might ask you, and you might have to clarify  
17 your position for him.

18 COMMISSIONER JABER: No, it's good to clarify it  
19 for the order, too.

20 CHAIRMAN GARCIA: Very good.

21 COMMISSIONER DEASON: I move Staff on issue  
22 three.

23 CHAIRMAN GARCIA: Is there a second?

24 COMMISSIONER JABER: Second.

25 CHAIRMAN GARCIA: Okay. All those in favor,



1 signify by saying aye.

2 CHAIRMAN GARCIA: Aye.

3 COMMISSIONER DEASON: Aye.

4 COMMISSIONER CLARK: Aye.

5 COMMISSIONER JACOBS: Aye.

6 COMMISSIONER JABER: Aye.

7 CHAIRMAN GARCIA: All Opposed? You were for it,  
8 right?

9 COMMISSIONER JACOBS: I'm sorry, I said aye.

10 CHAIRMAN GARCIA: Yes, okay. All right. Issue  
11 four.

12 MS. CIBULA: Issue four we won't have to address  
13 because of issue two, you denied intervention.

14 CHAIRMAN GARCIA: And issue five.

15 COMMISSIONER DEASON: Move Staff.

16 CHAIRMAN GARCIA: Is there a second?

17 COMMISSIONER JABER: Second.

18 CHAIRMAN GARCIA: All those in favor, signify  
19 by saying aye.

20 (Simultaneous affirmative response)

21 CHAIRMAN GARCIA: Opposed? 5-0. Thank you very  
22 much.

23 (Special Agenda concluded at 1:55 p.m.)

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STATE OF FLORIDA)  
:        CERTIFICATE OF REPORTER  
COUNTY OF LEON )

I, KORETTA E. STANFORD, RPR, Official  
Commission Reporter,

DO HEREBY CERTIFY that the Special Agenda  
conference in dockets 990696-WS and 992040-WS was  
conducted by the Florida Public Service Commission at the  
time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically  
reported the said proceedings; that the same has been  
transcribed by me; and that this transcript, consisting  
of 89 pages, constitutes a true transcription of my  
notes of said proceedings.

DATED this 22nd day of June, 2000.

  
KORETTA E. STANFORD, RPR  
Official Commission Reporter  
FLORIDA PUBLIC SERVICE COMMISSION  
850) 413-6734