BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for original certificates to operate water and wastewater utility in Duval and St. Johns Counties by Nocatee Utility Corporation.	DOCKET NO. 990696-WS
In re: Application for certificates to operate a water and wastewater utility in Duval and St. Johns Counties by Intercoastal Utilities, Inc.	DOCKET NO. 992040-WS ORDER NO. PSC-00-1265-PCO-WS ISSUED: July 11, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER ON JURISDICTION, DENYING PETITIONS FOR INTERVENTION AND MOTIONS TO DISMISS, AND GRANTING AMICUS CURIAE STATUS TO THE COUNTIES

BY THE COMMISSION:

BACKGROUND

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

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

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

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

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

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

May 16, 2000, agenda conference, we deferred consideration of NUC's and DDI's and St. Johns County's Motions to Dismiss to hear oral arguments. We elected to consider the Petitions for Intervention and Motions at a special agenda conference.

By Order No. PSC-00-0980-PCO-WS, issued May 18, 2000, the filing dates for the petitions, motions, and briefs were established for the special agenda conference. On May 23, 2000, Hillsborough and Sarasota Counties timely filed their Motions to Dismiss and Collier and Citrus Counties timely filed their joint Motion to Dismiss. On June 2, 2000, NUC and DDI withdrew their joint Motion to Dismiss Intercoastal's application. On June 6, 2000, NUC timely filed its Response in Opposition to Motions to Intervene and Motions to Dismiss and Intercoastal timely filed its Memorandum Responsive to the Filings of Hillsborough, Sarasota, Collier and Citrus Counties. On June 12, 2000, St. Johns County withdrew the portion of its Motion to Dismiss which pertained the arguments of res judicata/collateral estoppel.

PETITIONS FOR INTERVENTION

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

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

Thus, Sarasota County requests that we grant it intervention "on the ground that a decision in this consolidated proceeding

predicated on a legal interpretation of Section 367.171(7), Florida Statutes, will have a substantial impact on Sarasota County's regulatory authority."

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

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

On May 15, 2000, Collier and Citrus Counties filed a joint Petition for Intervention and Alternative Petitions for Declaratory Statement, for Initiation of Rulemaking, and for Permission to Submit Amicus Curiae Motion on Jurisdiction. In support of their Petition for Intervention, Collier and Citrus Counties state that they are not within our jurisdiction pursuant to Section 367.171(1), Florida Statutes. Further, they state that both Collier and Citrus Counties are bounded by counties within our

jurisdiction, and are thus "susceptible to the same type of petition, and accompanying loss of jurisdiction, facing St. Johns County here." They state that our decision in regard to our jurisdiction over Intercoastal's and NUC's applications may allow us the authority to grant proposed utilities large portions of territory located in nonjurisdictional counties and that the decision will be a "binding precedent in future cases involving similar facts." Thus, Collier and Citrus Counties state that "their input to the decision should be heard," and they request that they be granted full party status to participate in these proceedings.

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

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

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

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

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

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

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

NUC also states that Hillsborough, Sarasota, Collier and Citrus Counties have failed the second prong of the Agrico test because the certificate proceedings under Section 367.045, Florida Statutes, are "designed to protect the interest of the applicant

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

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

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

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

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

AMICUS CURIAE

In the alternative, Collier and Citrus Counties request to participate as amicus curiae[1], for the purpose of, among other things, to file a motion to dismiss Intercoastal's and NUC's

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

applications on the basis that "the Commission lacks the statutory jurisdiction to approve the grant of service territory, at least within the nonjurisdictional county, sought." Collier and Citrus Counties also state that they want to join St. Johns County in opposing Intercoastal's application and want to oppose NUC's application as well, based on our lack of jurisdiction to approve both the applications. Further, they state that

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

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

We note that amicus curiae briefs are generally for "assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues." Ciba-Geigy, Ltd. v. Fish Peddler, Inc., 683 So. 2d 522, 523 (Fla. 4th DCA 1996). Chapter 120, Florida Statutes, Administrative Procedure Act, the Florida Rules of Civil Procedure, the Uniform Rules, and our rules do not

provide for the filing of amicus briefs. Rule 9.370, Florida Rules of Appellate Procedure, addresses amicus curiae and states that:

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

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

Similarly, allowing participation as amicus curiae is within our discretion. Participation by amicus curiae has been allowed in Commission proceedings on a few occasions. We allowed amicus curiae participation in two cases which went to a Section 120.57, Florida Statutes, hearing. See In re: Joint Petition for Determination of Need for an Electrical Power Plant in Volusia County by the Utilities Commission, City of New Smyrna Beach, Florida, and Duke Energy New Smyrna Beach Power Company Ltd., L.L.P., Order No. PSC-99-0535-FOF-EM, issued March 22, 1999, in Docket No. 981042-EM (Louisville Gas & Electric Energy Corporation filed an Amicus Curiae Memorandum of Law in opposition to a motion to dismiss filed by a utility in the case); In re: Investigation of the Rate-Making and Accounting Treatment for the Dismantlement of Fossil-Fueled Generating Stations, Order No. PSC-93-1237-AS-TI, issued August 25, 1993, in Docket No. 890186-EI (Florida Industrial Power Users Group appeared as amicus curiae). There was one case that settled prior to hearing in which a party filed an amicus curiae brief in the proceeding. See In re: Complaint by Telecom

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

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

Collier and Citrus Counties also state that they wish to participate as amicus curiae in support of St. Johns County's Motion to Dismiss Intercoastal's application and to oppose NUC's application, as well. However, Collier and Citrus Counties have failed to file an amicus curiae brief in this proceeding. On May 23, 2000, Collier and Citrus Counties filed a Motion to Dismiss based upon the argument that this Commission lacks jurisdiction to consider Intercoastal's and NUC's applications under Section 367.171(7), Florida Statutes. Because we denied Collier and Citrus Counties' joint Petition for Intervention, Collier and Citrus Counties are not parties and do not have the requisite standing for us to consider their Motion to Dismiss. However, we will allow Collier, Citrus, Sarasota, and Hillsborough Counties to participate as amicus curiae, and we will consider the points raised in their Motions to Dismiss as amicus curiae submissions.

JURISDICTION

St. Johns County's Position:

In its Motion to Dismiss Intercoastal's application, St. Johns County states that we do not have jurisdiction to consider Intercoastal's application. St. Johns County has not stated its position on whether we have jurisdiction to consider NUC's application. St. Johns County states that it is not within the Commission's jurisdiction to award service territory to an existing utility when the utility and territory requested are located in a nonjurisdictional county. Moreover, St. Johns County asserts that the plain meaning of Section 367.171(1), Florida Statutes, which grants counties the right to regulate water and wastewater utilities within county boundaries, combined with the legislative intent behind Section 367.171(7), Florida Statutes, which gives the Commission jurisdiction over utilities that transverse county boundaries, does not support the notion that the Commission can assign territory in nonjurisdictional counties to intercounty utilities. Moreover, St. Johns County contends that if the Commission asserts jurisdiction and grants the territory requested by Intercoastal in its application, all available water and wastewater service territory in St. Johns County will be usurped, which would be contrary to the express right of St. Johns County, under Section 367.171, Florida Statutes, to assert its own regulatory jurisdiction and to reject Commission jurisdiction over its water and wastewater utilities. Citing City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 255 (Fla. 5th DCA 1991) and Lake Utility Services, Inc. v. City of Clermont, 727 So. 2d 984, 988 (Fla. 5th DCA 1999), St. Johns County asserts that in jurisdictional counties, the franchise rights awarded by the Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes," implying that the Commission's jurisdiction would not trump St. Johns County's jurisdiction in nonjurisdictional counties. Thus, St. Johns County contends that the only way Sections 367.171(1) and 367.171(7), Florida Statutes, can be harmonized is to limit the jurisdiction of the Commission to award additional service territory to intercounty utilities to service areas located within jurisdictional counties.

Sarasota County's Position:

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

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

> relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), [Florida Statutes], is the actual interrelationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), [Florida Statutes] over which [the Commission] ordinarily has jurisdiction." The Court [in Hernando County] further stated that the

> requirements of Section 367.171(7), [Florida Statutes], "can only be satisfied by evidence that the facilities forming the asserted system exist in contiguous counties across which the service exists."

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

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

Hillsborough County's Position:

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

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

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

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

Collier and Citrus Counties' Positions:

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

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

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

service territory awarded in nonjurisdictional counties and all nonjurisdictional counties in the state would be at risk."

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

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

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

provisions considering water and wastewater and would be preferred.

NUC's and Intercostal's Positions:

In their responses to Sarasota, Hillsborough, Citrus, and Collier Counties's Motions to Dismiss, both NUC and Intercoastal state that based on a plain reading of Section 367.171(7), Florida Statutes, we have exclusive jurisdiction over all utility systems whose service transverses county boundaries, whether the counties are jurisdictional or nonjurisdictional. Intercoastal states that the Legislature's use of the phrases "Notwithstanding anything in this section to the contrary" and "whether the counties involved are jurisdictional or nonjurisdictional" clearly indicate an intent contrary to that presented by Hillsborough, Sarasota, Collier and Citrus Counties. Further, Section 367.011(2), Florida Statutes, states that we shall have exclusive jurisdiction over each utility with respect to its authority, service, and rates. NUC asserts that as the definition of "utility" found in Section 367.021(12), Florida Statutes, includes "proposed construction of a system" and those "proposing to provide" water and wastewater service, and that under a plain reading of Section 367.171(7), Florida Statutes, and Sections 367.021(12) and 367.011(2), Florida Statutes, the Commission has exclusive jurisdiction over proposed utility systems whose services will transverse county boundaries under Section 367.171(7), Florida Statutes.

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

Conclusion and Findings

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

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

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

transverse county boundaries, thus causing the applications to fall within our exclusive jurisdiction.

Plain Meaning

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

Legislative Intent

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

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

> We do not believe that the Legislature intended ... to perpetuate a situation where a utility would be subject to several regulators. On the contrary, we believe that the Legislature intended to eliminate regulatory problems that exist when utility systems provide service across political boundaries and are subject to regulation by two or more regulatory agencies ... This duplicative economic

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

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

As previously stated, NUC and Intercoastal are proposing to provide service to a development which spans two adjacent counties. Consequently, both of the utilities' service areas will transverse county boundaries. Moreover, similar to the utility in Lake Suzy, Intercoastal is an existing utility located in a nonjurisdictional county and is proposing to extend its service area across county lines. Section 367.171(7), Florida Statutes, grants us exclusive jurisdiction over utility systems whose service transverses county boundaries to prevent the problems and harms of dual regulation discussed in GDU and Lake Suzy. Therefore, the legislative intent behind Section 367.171(7), Florida Statutes, supports the conclusion that we have exclusive jurisdiction to consider NUC's and Intercoastal's applications to serve the Nocatee development.

Reading Statutes as a Whole

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

Logical and Reasonable Construction

When the meaning of a statute is ambiguous, the law favors a rational and sensible construction. Wakulla County v. Davis, 395 So. 2d 540 (Fla. 1981). An interpretation of a statute that would produce absurd results should be avoided if the language is susceptible to an alternative interpretation. Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

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

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

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

In Hernando County v. Florida Public Service Commission, 685 So. 2d 48 (Fla. 1st DCA 1996), the court addressed the issue of whether we had jurisdiction pursuant to Section 367.171(7), Florida Statutes, over a utility whose facilities were located in a number of non-contiguous counties throughout Florida. The court stated that its decision in Beard was distinguishable from the circumstances of this case; that the holding in Beard did not reach the question of whether physical interconnection was necessary

under Section 367.171(7), Florida States; and that Beard was not controlling with regard to the issue of the meaning of 'service' as used in Section 367.171(7). Id. at 51. The court further stated that the relevant inquiry when determining the existence of jurisdiction under Section 367.171(7), Florida Statutes, is "actual inter-relationship of two or more facilities providing utility services in a particular geographic area comparable to the 'service area' defined in Section 367.021(10), over which the PSC ordinarily has jurisdiction." Id. at 52. The court stated that the correct focus is on the relationship between particular identified facilities rather than the general corporate structure of the utility and that this "is supported by the use of the word 'transverses' in the statute, which indicates a legislative intent that the facilities and land forming a system must exist in close geographical proximity across a county boundary." Id. The court further stated that, "jurisdiction under Section 367.171(7) cannot be found upon evidence that the company utilizes an umbrella organizational structure, or the central hub of management offices described by SSU in this case." Id.

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

Likewise, Intercoastal is proposing to provide service to the Nocatee development which will cause its facilities to physically cross the border of Duval and St. Johns Counties. Intercoastal's existing plant is located on the east side of the Intracoastal Waterway, adjacent to the proposed Nocatee development. Intercoastal is proposing to either extend its current plant to serve the Nocatee development or build separate facilities on the west side of the Intracoastal Waterway. If Intercoastal extends its system to provide service to the Nocatee development, then it would be one system whose facilities cross county lines, placing it within our jurisdiction. If Intercoastal builds new facilities on the west side of the Intracoastal Waterway to serve the Nocatee development, its facilities on the west side of the Intracoastal Waterway will still physically transverse county boundaries, placing the utility within our jurisdiction. Whether the existing facilities located on the east side of the Intracoastal Waterway will be subject to our jurisdiction under the second scenario may

depend on whether those facilities are functionally related, which is when the court's analysis in Hernando County would become relevant. Thus, Beard and Hernando County do not restrict our jurisdiction over Intercoastal's application.

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

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

NUC's and Intercoastal's applications can be distinguished from the circumstances set forth in Order No. PSC-99-2034-DS-WS. In both applications, the utilities are proposing to provide service directly to customers located in both Duval and St. Johns Counties. Although NUC is proposing to obtain bulk water service from JEA, it will resell the service to the customers in the Nocatee development. Thus, Order No. PSC-99-2034-DS-WS does not prevent us from invoking our jurisdiction pursuant to Section 367.171(7), Florida Statutes, to consider NUC's and Intercoastal's applications.

Cases Discussing the Relationship Between This Commission and Local Governments

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

NUC's and Intercoastal's applications can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover, in JJ's

Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth the Commission's jurisdiction over these applications. Section 367.171(7), Florida Statutes. Therefore, there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to our jurisdiction.

Based on the foregoing, we find that we have jurisdiction under Section 367.171(7), Florida Statutes, to consider both NUC's and Intercoastal's applications.

ST. JOHNS COUNTY'S MOTION TO DISMISS

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

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

2d 984, 988 (Fla. 5th DCA 1999), the County asserts that in jurisdictional counties, the franchise rights awarded by the Commission are "equal to, not superior to, that of local governments under the regulatory scheme of Chapters 180, 125, and 367, Florida Statutes," implying that the Commission's jurisdiction would not trump the County's jurisdiction in nonjurisdictional counties as well. Thus, the County contends that the only way Sections 367.171(1) and 367.171(7), Florida Statutes, can be harmonized is to limit the jurisdiction of the Commission to award additional service territory to intercounty utilities to service areas located within jurisdictional counties.

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

As previously set forth in this Order, we find that we have jurisdiction to consider Intercoastal's application. Intercoastal is proposing to provide service to the entire Nocatee development, which is proposed to span both Duval and St. Johns Counties. Consequently, the utility's proposed service area would transverse county boundaries. Thus, the relevant statute to determine whether we have jurisdiction over Intercoastal's application is Section 367.171(7), Florida Statutes, which states:

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

> within a county that is subject to [C]ommission jurisdiction under this section. (emphasis added)

As previously discussed, in Section 367.021(12), Florida Statutes, the Legislature defines "utility" as "every person, lessee, trustee, or receiver, [except those exempted under Section 367.022, Florida Statutes] owning, operating, managing, or controlling a system, or proposing construction of a system, who is providing, or proposes to provide, water or wastewater service to the public for compensation." (emphasis added) Further, Section 367.021(11), Florida Statutes, defines "system" as "facilities and land used or useful in providing service." Based on a textual reading of the statute using the definitions provided by the Legislature, we have subject matter jurisdiction to consider Intercoastal's application under Section 367.171(7), Florida Statutes, because it is proposing to construct a utility system whose service will transverse county boundaries, thus causing the application to fall within the exclusive jurisdiction of the Commission. As the statute states that we have exclusive jurisdiction over a utility whose service transverses county boundaries, pursuant to Section 367.171(7), Florida Statutes, only the Commission would have the authority to determine whether to grant additional territory to the utility, contrary to the interpretation of Section 367.171(7), Florida Statutes, set forth by St. Johns County.

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

As previously discussed, Intercoastal's application can be distinguished from JJ's Mobile Homes. JJ's Mobile Homes involved a dispute over franchise zones, and did not involve a question of jurisdiction under Section 367.171(7), Florida Statutes. Moreover,

in JJ's Mobile Homes there was no clear legislative intent regarding the matter at issue. In this case, however, there is a statute which clearly sets forth our jurisdiction over Intercoastal's application. Section 367.171(7), Florida Statutes. Therefore, that there is no need, nor is it appropriate, to resort to other principles to make a determination to resolve any controversies pertaining to our jurisdiction.

Assuming all of the allegations in the application are true and viewing all reasonable inferences in favor of Intercoastal, as required by Varnes, the application falls within our subject matter jurisdiction. Thus, St. Johns County's Motion to Dismiss Intercoastal's application is hereby denied.

These dockets shall remain open to allow these matters to proceed to hearing.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Petitions for Intervention filed by Sarasota and Hillsborough Counties and the joint Petition for Intervention filed by Collier and Citrus Counties are hereby denied. It is further

ORDERED that the Motions to Dismiss filed by Sarasota and Hillsborough Counties and the joint Motion to Dismiss filed by Collier and Citrus Counties are hereby denied. However, these Counties shall be permitted to participate in these proceedings as amicus curiae. It is further

ORDERED that the Motion to Dismiss filed by St. Johns County is hereby denied. It is further

ORDERED that these dockets shall remain open.

By ORDER of the Florida Public Service Commission this 11th day of July, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

SMC

Commissioner Clark concurs in a separate opinion as follows:

I concur that we have jurisdiction to consider NUC's and Intercoastal's applications, but for reasons other than those stated by the majority. NUC and Intercoastal have filed applications to serve territory which spans Duval and St. Johns Counties. I believe we have jurisdiction to consider NUC's and Intercoastal's applications with respect to that portion of territory located in Duval County.

Commissioner Jaber dissents, in part, in a separate opinion as follows:

I respectfully dissent from the decision to deny the Petitions for Intervention filed by Sarasota, Hillsborough, Collier and Citrus Counties. In lieu of granting the Counties intervenor status, the majority has allowed these Counties to participate as amicus curiae in this matter. Granting amicus curiae status to the Counties will help the Commission make an informed decision. However, as amicus curiae, these Counties will not be permitted to appeal our decision. By this Order, we have determined that the Commission has jurisdiction under Section 367.171(7), Florida Statutes, to consider Intercoastal's and NUC's applications because the utilities' proposed service will cross county boundaries. This decision will have an impact on other Counties. Thus, I believe Sarasota, Hillsborough, Citrus, and Collier Counties' Petitions for Intervention should be granted.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.