

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application of Forest Utilities, Inc. For Approval of a New Class of Service for Bulk Wastewater Service)
DOCKET NO. 030748-SU
FILED: August 25, 2003

LEE COUNTY'S MOTION TO DISMISS AND
INCORPORATED MEMORANDUM OF LAW

Lee County, Florida ("Lee County") pursuant to Rule 28-106.204(2), Florida Administrative Code ("F.A.C."), and subject to its pending petition to intervene filed herein on August 25, 2003, hereby moves the Commission to dismiss the "Application of Forest Utilities, Inc. for Approval of a New Class of Service for Bulk Wastewater Service" (the "Application").

In summary, the Commission should dismiss the Application filed by Forest Utilities, Inc. ("Forest") because it is an improper attempt to evade the legislatively established regulatory scheme under Chapter 367, Florida Statutes,¹ whereby the Commission has jurisdiction over when and if utilities subject to its authority may extend their service areas. Forest's attempt to accomplish this goal by styling its efforts as a request for approval of a new tariff is no more than an artifice attempting to use "the transparent device of constructing a line into another utility's service area," see Lee

¹ All references to the Florida Statutes in this Motion and in the accompanying Memorandum of Law are to the 2002 edition of the Florida Statutes.

County Electric Co-op, Inc. v. Marks, 501 So. 2d 585, 587 (Fla. 1987), to escape the Legislature's specific mandate that the Commission, and not individual customers, shall decide which utilities provide service in defined, certificated geographic areas. Id. (citing Storey v. Mayo, 217 So. 2d 304, 307-08 (Fla. 1968), cert. denied, 395 U.S. 909 (1969)). Allowing the analysis proffered by Forest Utilities to stand would violate not only the black-letter requirements of Section 367.045, Florida Statutes, but also the policies -- to prevent waste and duplication of facilities, and to ensure the orderly, Commission-supervised determination of service areas -- that the Legislature has adopted thereby. Forest's analysis, if allowed to stand, would allow any customer -- at least any customer having the technical capability to do so -- to choose its own utility, in clear contravention of Section 367.045(2), Florida Statutes, and in clear contravention of the policies and principles recognized by the Florida Supreme Court in Lee County Electric Co-op v. Marks, simply by running a line into an adjacent utility's service area. The Commission cannot allow this to occur, and accordingly, the Commission must dismiss Forest's Application.²

² Forest may, of course, proceed by filing either (a) an appropriate application to extend its service area pursuant to Section 367.045(2), Florida Statutes, and Rule 25-30.036, F.A.C., or (b) a petition for declaratory statement pursuant to Section 120.565, Florida Statutes. Lee County will oppose any such application by Forest on the merits, and will oppose any such petition for declaratory statement on the basis of statutory law and Lee County Electric Co-op v. Marks.

In further support of its Motion to Dismiss, Lee County provides the following incorporated Memorandum of Law.

MEMORANDUM OF LAW

The Commission must dismiss Forest's Application because it fails to comply with the requirements of Section 367.045(2), Florida Statutes, and Rule 25-30.036, F.A.C. The stratagem suggested by Forest and its accomplice, Jamaica Bay West Mobile Home Park ("Jamaica Bay") -- building a line from an area outside a utility's certificated service area into such utility's service area and thereby attempting to evade the Commission's jurisdiction and the Legislature's mandates -- flies directly in the face of the Legislature's policies and specific statutory mandates to the Commission, as well as directly in the face of the Florida Supreme Court's recognition that such efforts are a "transparent device" that contravene "larger policies [that] must be enforced and safeguarded by the PSC." Lee County Electric Co-op, 501 So. 2d at 587. Moreover, Forest's attempt to ask that "the Commission issue their [sic] Order specifically stating that no such extension of service territory is necessary under" the circumstances described in the Application is an improper request for a declaratory statement, for which none of the statutory notice requirements have been followed.

PROCEDURAL BACKGROUND

Forest filed the Application on August 1, 2003. In its Application, Forest has nominally asked the Commission to approve

its proposed new rate schedule for Bulk Wastewater Service (BWS), as shown on its proposed Original Sheet No. 17.1. Forest also asked that "the Commission issue their [sic] Order specifically stating that no such extension of service territory is necessary under" the circumstances described in the Application. Lee County received a copy of the Application by regular United States mail on August 8, 2003. On the same date that this Motion to Dismiss was filed, Lee County also filed a Petition to Intervene in this docket, citing its statutory rights to standing under Section 367.091(2), Florida Statutes, as well as alleging facts sufficient to demonstrate that it is entitled to intervene pursuant to the Agrico standing test,³ if Forest's Application were to be treated for what it really is - an attempt to extend its service area.

FACTUAL BACKGROUND

The facts pertinent to Lee County's Motion to Dismiss Forest's Application are as follows.

1. Forest holds a current certificate (No. 300-S) issued by the Florida Public Service Commission ("Commission"), to provide certain residential and commercial domestic wastewater treatment services within a described service area in Lee County, Florida.
2. Forest has an approved wastewater tariff on file with

³ Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).

the Commission, which provides for retail residential and commercial services rates, fees and charges.

3. Forest currently has no tariff provisions for bulk wastewater treatment service to any class of customer or customers.
4. On information and belief, Lee County states that there are no customers located within the geographic area described in Certificate No. 300-S that would qualify for service under the proposed new Bulk Wastewater Service rate schedule.
5. Jamaica Bay West Mobile Home Park ("Jamaica Bay") is a 1400 unit mobile home park located in Lee County. Jamaica Bay is an exempt wastewater treatment provider pursuant to Section 367.022(5), Florida Statutes, providing wastewater treatment to its tenants without specific compensation therefor. Jamaica Bay is not a governmental authority.
6. Jamaica Bay is not located within Forest's current Commission-certificated service area.
7. Lee County operates, through Lee County Utilities, a comprehensive, regional potable water and wastewater treatment utility system that serves approximately 70,000 customers in Lee County.
8. Both Forest and Jamaica Bay lie within Lee County Utilities service area, and both are existing water

customers of Lee County Utilities and have been so for approximately twenty years.

9. Lee County has operational wastewater main lines located proximate to Jamaica Bay and has both sewer line and wastewater treatment plant capacity available to serve the immediate and future needs of the entire Jamaica Bay development. Specifically, Lee County has a 12-inch sewer force main located approximately 1,100 feet from Jamaica Bay's wastewater treatment plant, and Lee County has obtained the necessary approvals for Jamaica Bay to connect to that sewer main via a right-of-way, known as the Ten Mile Canal right-of-way, that runs between Jamaica Bay's property and Lee County's 12-inch main sewer line.

SUMMARY OF ARGUMENT

The law governing where and under what circumstances a utility may provide service outside its certificated service area is clear. Forest has complied with none of these requirements. Accordingly, as a matter of procedural law, Forest's Application must be dismissed.

Forest's and Jamaica Bay's efforts to circumvent these statutory and rule requirements -- by running a line from Jamaica

Bay's service area into Forest's service area and then trying to claim that such an arrangement constitutes service within Forest's area -- are nothing more than an artifice that will not withstand either logical analysis or legal analysis under applicable precedent of the Florida Supreme Court. Accordingly, as a matter of substantive law and legislative policy, Forest's Application must be dismissed.⁴

Finally, Forest's request that "the Commission issue their [sic] Order specifically stating that no such extension of service territory is necessary under" the circumstances described in the Application is an improper request for a declaratory statement that fails to comply with the requirements of Section 120.565, Florida Statutes. Accordingly, the Application must be dismissed for its failure to follow the procedural requirements of Florida's Administrative Procedure Act.

ARGUMENT

I. Forest Utilities Application Must Be Dismissed As An Improper Attempt to Extend Its Service Area Without Complying With Applicable Statutes and Rules.

The Commission's governing statutes, and the Commission's rules promulgated pursuant to those statutes, establish clear

⁴ If Forest could demonstrate that there were real customers within its certificated service area that would qualify for the proposed Bulk Wastewater Service rate schedule, such would provide a legitimate basis for proceedings as to whether the proposed rates were appropriate. Lee County would still assert its statutory right to intervene in any such proceedings.

requirements for utilities that wish to provide service outside the service areas described in their certificates of authorization from the Commission.⁵ Section 367.045(2), Florida Statutes, states as follows:

A utility may not delete or extend its service outside the area described in its certificate of authorization until it has obtained an amended certificate of authorization from the commission.

Implementing Section 367.045(2), the Commission has adopted Rule 25-30.036, F.A.C. This Rule establishes the procedures to be followed by a utility to extend its service territory in two sets of circumstances. First, subsection (2) of the Rule addresses limited circumstances where applications shall be deemed approved absent a timely protest. Forest Utilities has not satisfied any of these conditions. Second, subsection (3) sets forth the requirements applicable to all other circumstances. Subsection (3) requires a utility that wishes to

⁵ The substantive law applicable to service area extensions is found at Section 367.045(5), Florida Statutes, which declares that the Commission

may not grant . . . an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public, or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

provide service outside its certificated service area to provide extensive information, which is normally provided to the Commission via Form PSC/ECR 008-W (Rev. 2/91), "APPLICATION FOR AMENDMENT OF CERTIFICATE (EXTENSION OR DELETION) (Pursuant to Section 367.045, Florida Statutes)."

However, Forest has not even attempted to comply with the requirements of the applicable statutes and rules. Forest has not complied with the information requirements of Section 367.045(2), Florida Statutes, nor has Forest submitted a completed application form. Moreover, other than notice to Lee County (ostensibly pursuant to Section 367.091(2), Florida Statutes, which is the same as the local government notice requirement of Section 367.045(2)(a), Florida Statutes), Forest has not complied with any of the requirements set forth in Section 367.045(2), Florida Statutes, or Rule 25-30.036, F.A.C.

Accordingly, Forest's Application must be dismissed for failure to comply with the applicable statutes and rules.

**II. Forest's And Jamaica Bay's Proposal
Clearly Involves Service Outside
Forest's Certificated Service Area And
Therefore Requires Compliance With The
Application and PSC Approval
Requirements Of Section 367.045, Florida
Statutes.**

Forest Utilities has effectively asked the Commission for authority to provide "service outside the area described in its certificate of authorization," purportedly under the guise of a request for approval of a new rate schedule. (The new rate

schedule might be appropriate if the customer or customers to be served thereunder were located within Forest's certificated service territory.) It is uncontroverted that the geographic area to be served pursuant to Forest's petition, i.e., the Jamaica Bay West Mobile Home Park, is located outside Forest's certificated service area.

The substance of the transaction proposed by Forest and Jamaica Bay is that Jamaica Bay will build a line into Forest's certificated service area and, using that line, deliver wastewater generated in the Jamaica Bay West Mobile Home Park, which is entirely outside Forest's certificated service area, to Forest's system for treatment. Forest and Jamaica Bay attempt to characterize this artifice -- this sham -- as providing service within its existing service area.

Logically, under any reasonable interpretation of the statutes, this fails because all of the wastewater to be treated will be generated outside Forest's service area.

Moreover, the Florida Supreme Court has, in remarkably similar circumstances, held that "the transparent device of constructing a line into another utility's service area" would not suffice to avoid a territorial agreement. In Lee County Electric Co-op. v. Marks, 501 So. 2d 585, 586-87 (Fla. 1987), Florida Mining and Materials ("FMM" or "Florida Mining"), a large industrial customer of Lee County Electric Cooperative ("LCEC"), attempted to evade a territorial agreement between LCEC and

Florida Power & Light Company ("FPL") by building, with FPL's advice and apparently at FPL's suggestion, a transmission line from FMM's facilities in LCEC's territory into FPL's service area and claiming that such arrangement constituted service within FPL's service area. Id. FPL signed a large power contract with FMM, apparently contingent on a favorable ruling from the PSC, and then sought a declaratory statement from the Commission that the proposed arrangement would not violate FPL's territorial agreement with LCEC. Id. at 587. A sharply divided Commission initially voted 3-to-2 in FMM's and FPL's favor. In Re: Petition of Florida Power and Light Company for Declaratory Statement, 85 FPSC 1:167. On appeal, the Court unanimously (6-to-0) reversed, stating as follows.

This Court has repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities' "racing to serve," and we cannot find that the transparent device of constructing a line into another utility's service area may suffice to avoid the effect of a territorial agreement.

Had FPL and not FMM constructed the line into FPL's territory, the PSC would unquestionably have found a flagrant violation of the territorial agreement to exist. We find that no different result follows from the customer's construction of the line. As noted in Storey v. Mayo, "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC.

501 So. 2d at 587 (emphasis added) (citations omitted).

The analogy is clear: under Florida's laws respecting electric service areas, electric utilities either enter into territorial agreements (as LCEC and FPL had in the Lee County Electric Co-op case) or the PSC resolves territorial disputes. Electric utilities may not violate territorial agreements, and disputes are resolved by the PSC according to statutory criteria. Under Florida's water and wastewater regulatory laws, however, territorial agreements and dispute resolution by the PSC are replaced by certificated service areas and mandatory PSC action to approve any extensions outside certificated areas. Water and wastewater utilities may not serve outside their certificated areas without the Commission's prior approval; whether to grant such approval is subject to the specific legislatively articulated criteria in Section 367.045, Florida Statutes.

Forest's and Jamaica Bay's attempts here are exactly like those of FPL and Florida Mining in the Lee County Electric Co-op case: "the transparent device of constructing a line into another utility's service area" to evade the applicable legal requirements -- a territorial agreement in the Lee County Electric Co-op case -- the statutory requirement to obtain prior Commission approval to extend Forest's service area here. The Commission should not countenance such actions, and accordingly, Forest's Application must be dismissed. If Forest wants to extend its service area to treat the wastewater generated in Jamaica Bay Mobile Home Park, then Forest must comply with the

application and approval requirements of Section 367.045, Florida Statutes.

**III. Forest's Proposal Violates The Policies
Articulated By The Florida Legislature
In Chapter 367, As Well As The Florida
Supreme Court's Specific Interpretations
Of Those Policies.**

In Section 367.045(5) (a), Florida Statutes, the Florida Legislature has declared the policy that the PSC must follow in evaluating requests for service area extensions, as follows.

The commission may not grant . . . an amendment to a certificate of authorization for the extension of an existing system, which will be in competition with, or a duplication of, any other system or portion of a system, unless it first determines that such other system or portion thereof is inadequate to meet the reasonable needs of the public, or that the person operating the system is unable, refuses, or neglects to provide reasonably adequate service.

Thus, the Legislature's policy is that the Commission shall not grant extensions that would be in competition with, or duplicative of, any other existing system unless the Commission first finds or determines that the existing system is unable to serve or refuses to serve.

This policy requires the Commission to evaluate and scrutinize all proposed extensions in accordance with the criteria of Section 367.045(2), Florida Statutes, and Rule 25-30-036, F.A.C. Allowing Forest's stratagem to succeed would plainly and directly conflict with, and violate, these policies by avoiding the required evaluation and scrutiny. Allowing this

stratagem to succeed would allow competition with existing systems and duplication of facilities without the legislatively mandated Commission involvement simply by use of the "transparent device of constructing a line into another utility's service area" that was struck down in Lee County Electric Co-op. Allowing this stratagem to succeed would collide with the Legislature's policies by allowing any customer with the technical capability of doing so to circumvent the requirements of Chapter 367 merely by means of building a line into another utility's service area.

The Commission cannot permit this to occur. As the Florida Supreme Court stated in Lee County Electric Co-op, 501 So. 2d at 587 (citations omitted),

Had FPL and not FMM constructed the line into FPL's territory, the PSC would unquestionably have found a flagrant violation of the territorial agreement to exist. We find that no different result follows from the customer's construction of the line. As noted in Storey v. Mayo, "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC.

IV. If Forest Utilities' Application Is Construed As A Petition For Declaratory Statement, It Must Be Dismissed for Failure to Comply With The Applicable Requirements of Chapter 120.

Forest may attempt to assert that its petition merely asks the Commission to state in its order approving its proposed

tariff that a certificate amendment is unnecessary because Jamaica Bay is proposing to connect to Forest's system within Forest's existing territory. If so, then Forest has asked the Commission for a declaration as to the applicability of Section 367.045, Florida Statutes, to Forest in its particular set of circumstances. This is a declaratory statement, the procedures for which are governed by Section 120.565, Florida Statutes, and which Forest has not followed. (Nor, of course, has the Commission followed the notice requirements of Section 120.565, since Forest did not adequately indicate to the Commission that it was or is seeking such a declaratory statement.)

Section 120.565, Florida Statutes, governs petitions for declaratory statements and provides as follows:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.
- (2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.
- (3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be

final agency action.

Here, Forest has -- at best -- asked the Commission to declare how Section 367.045(2), Florida Statutes, and Rule 25-30.036, F.A.C., apply to Forest in its particular circumstances. Even viewed in this light, Forest's petition must still be dismissed as an improper petition for declaratory statement.


CONCLUSION

WHEREFORE, based upon the foregoing, Lee County, Florida respectfully moves the Commission to DISMISS the Application filed by Forest Utilities, Inc., herein.

Respectfully submitted this 25th day of August, 2003.

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**CERTIFICATE OF SERVICE
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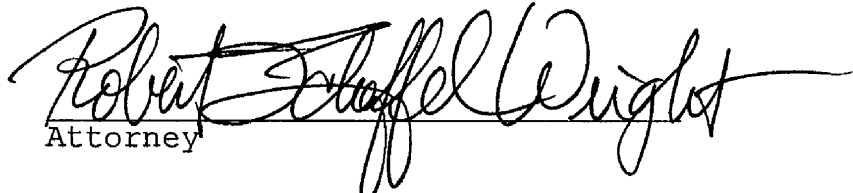
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand-delivery (*), or U.S. Mail, on this 25th day of August, 2003, to the following:

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