State of Florida

Public Service Commission

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

DATE: December 4, 2003

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (BELLAK)
DIVISION OF ECONOMIC REGULATION (BIGGENS, RENDELL)

RE: DOCKET NO. 031020-WS - PETITION FOR DECLARATORY STATEMENT BY FOREST UTILITIES, INC. AND JAMAICA BAY WEST ASSOCIATES, LTD., TO DETERMINE WHETHER AN EXTENSION OF SERVICE TERRITORY PURSUANT TO SECTION 367.045(2), F.S., IS NECESSARY TO PROVIDE BULK WASTEWATER SERVICE TO JAMAICA BAY, AN EXEMPT ENTITY.

AGENDA: 12/16/03 - REGULAR AGENDA - DECISION ON DECLARATORY STATEMENT - PARTIES MAY PARTICIPATE AT THE COMMISSION'S DISCRETION

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\031020.RCM

CASE BACKGROUND

Forest Utilities, Inc. (Forest or utility) is a Class B wastewater only utility providing service to approximately 2,068 wastewater customers in Lee County. On August 1, 2003, the utility filed an application pursuant to Section 367.091, Florida Statutes, for approval of a new class of service to provide bulk wastewater service to Jamaica Bay Mobile Home Park (Jamaica Bay) in Lee County. The application asserted that Jamaica Bay needed immediate assistance in treating its wastewater while it repairs its sewage treatment plant and ponds, as the Department of Environmental Protection has ordered it to do. On August 25, 2003, Lee County filed an unopposed motion to intervene, which was granted. On September 26, 2003, Lee County informed the Commission that it had

executed a contract with Jamaica Bay for temporary bulk wastewater service. On October 13, 2003, Forest's proposed tariff to add a new class of service to provide bulk wastewater service was suspended by Order PSC-03-1140-PCO-SU pending further investigation.

On October 15, 2003, Forest filed a Petition for Declaratory Statement (Petition) requesting that the Commission declare that, contrary to Lee County's arguments, no extension of service territory is required in order for Forest to provide bulk service to Jamaica Bay because Jamaica Bay will connect to Forest's facilities within Forest's certificated territory. Petition, p. 3. Forest notes that the Lee County Building Permitting Department denied Jamaica Bay the authority to construct a line to interconnect to the facilities of Forest based on the supposition that an extension of Forest's service territory was required. Petition, p. 4. According to Forest, the Florida Department of Environmental Protection also denied a permit for the Jamaica Bay/Forest interconnection based in part on that same reasoning. Petition, p. 4. Therefore, Forest's need for the Declaratory Statement arises because the same permitting impediments will recur if Jamaica Bay seeks to end its temporary bulk service agreement with Lee County for the purpose of then obtaining bulk service from Forest. On November 14, 2003, Lee County filed a petition to intervene.

DISCUSSION OF ISSUES

ISSUE 1: Should Lee County's Petition to Intervene be granted?

RECOMMENDATION: In its discretion, the Commission may either grant Lee County's Petition to Intervene or deny it. (Bellak)

STAFF ANALYSIS: The Commission previously granted Lee County's unopposed Motion to Intervene in related Docket No. 030748-SU, Application for Approval of New Class of Service for Bulk Wastewater Service in Lee County. Consistent with that, the Commission may wish to exercise its discretion to allow Lee County's intervention in order to present its position.

Intervention may also be denied as a matter of Commission discretion.

Staff further notes that Lee County's Petition to Intervene argues that it has a right to intervene because its substantial interests may be injured, based on the standards of Agrico Chemical Co. v. Department of Env'l Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). The problem with this claim is that it assumes that Lee County has a cognizable dispute with Forest's provision of bulk service to Jamaica Bay based on Lee County Electric Co-op v. Marks, 501 So. 2d 585 (Fla. 1989).

In Marks, an end use (retail) customer of the Co-op located in its agreed service territory, tried to evade the territorial agreement by building a line into the adjoining territory in order to receive less expensive retail service from Florida Power & Light Co. (FPL) This attempt by the customer to circumvent the territorial agreement between the Co-op and FPL was rejected by the Florida Supreme Court in Marks.

As reasoned by Lee County, Forest is analogized to FPL and Jamaica Bay is analogized to the Co-op's customer trying here to extend a line into Forest's territory to secure less expensive service, even though Jamaica Bay is asserted to be located in Lee County's service territory. This is the claimed basis for Lee County's supposed right to serve Jamaica Bay and the injury it will suffer if this "substantial interest" is not upheld.

There is no merit to this analysis in staff's view. Thirty-two years ago, in Order 5255, Docket Nos. 71340 and 71341-EU concerning applications by Florida Power Corporation and Tampa Electric Company for modification of territorial orders, the Commission excluded bulk service from its existing territorial orders, and has done so ever since. While there is no territorial agreement in this case similar to the territorial agreement at issue in Marks, even if there were such an agreement, it would not affect Forest's provision of bulk service to Jamaica Bay. There is, therefore, no injury to Lee County's substantial interests that can have its source in an analysis based on Marks, which is not on-point with the facts of this case and, therefore, legally inapposite.

The relevant on-point case, Town of Jupiter v. Village of Tequesta, 713 So. 2d 429 (Fla. 4th DCA 1998), confirms Lee County's

lack of any substantial interest in this matter. In Jupiter, the Town of Jupiter provided potable water bulk service to the Village of Tequesta at a point of delivery within Jupiter. Thus, the Town of Jupiter was in the analogous position claimed by Forest, i.e., providing bulk service by means of an interconnect within Jupiter's service area to another utility, the Village of Tequesta, outside Jupiter's certificated area.

When the Town of Jupiter argued that the Village of Tequesta was, therefore, within Jupiter's "service area" and the Village's expansion plans would compete with and duplicate Jupiter's service, the 4th DCA rejected the argument:

> Jupiter neither hooks up nor disconnects any customers within Tequesta; it has no pumps or meters within Tequesta; it reads no customer meters there; it sends no bills there; indeed it has no contact of any kind in Tequesta with any consumer of potable water [e.s.]
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> . . .
>
> Providing Tequesta with bulk potable water at a point of delivery does not, in our opinion, constitute actual operation by Jupiter within Tequesta's consumer service area.

713 So. 2d at 431.

Lee County's attempt to commingle the apples and oranges of law and policy applicable to providing service to consumers in service areas with bulk service inter-utility arrangements, which have been explicitly excluded from the Commission's territorial orders for 32 years, simply ignores that precedent and the on-point precedent of the 4th DCA in Town of Jupiter. Moreover, the resulting negative policy implications are apparent. The construction of bulk service facilities like gas pipe lines, electric transmission lines, as well as bulk service water and wastewater connections would, under Lee County's theory, trigger spurious and unnecessary "territorial disputes" with every distribution facility along the route, even though no actual race to serve or uneconomic duplication was present which required resolution. Here, Jamaica Bay wishes to obtain Forest's bulk service, which Lee County cannot claim to have ever "planned" to provide. Even Jamaica Bay itself did not "plan" the environmental

exigency requiring it to obtain such service. Moreover, since Lee County has never served any consumers in the Jamaica Bay mobile home park, there are no customers of Lee County at issue in this case which Lee County has a right to serve. The bulk service Jamaica Bay wishes to obtain from Forest would not be covered by a Commission-approved territorial agreement even if there were such an agreement in place, which there is not.

Finally, Lee County's substantial interests cannot be predicated on the fact that it currently provides bulk service to Jamaica Bay, where that provision of service is the direct result of permit denials based on the Marks argument previously mentioned and that argument is legally inapposite. Nor are Lee County's arguments about exemption in any way relevant to the bulk service issues in this case or the Fourth DCA's analysis in Town of Jupiter. Accordingly, Lee County's arguments in support of intervention as of right should be denied.

ISSUE 2: Should Forest's Petition for Declaratory Statement be granted?

RECOMMENDATION: Yes. Forest's Petition for Declaratory Statement should be granted. (Bellak)

STAFF ANALYSIS: Forest asks the Commission to declare that no extension of its service territory pursuant to Section 367.045 is necessary for it to provide bulk wastewater service to Jamaica Bay by means of an interconnect in Forest's current service territory, notwithstanding that Jamaica Bay itself is not located therein.

Section 367.045(2), Florida Statutes states in pertinent part:

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

Section 367.045(5)(a) states in pertinent part:

> The Commission may not grant a certificate of authorization for a proposed system, or 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, pursuant to these subparts of Section 367.045, an amendment would be necessary if Forest's provision of bulk wastewater service to Jamaica Bay by means of an interconnection within Forest's current service territory constituted "service outside the area described in its certificate of authorization". Moreover, assuming that to be the case, arguendo, the Commission would be unable to grant such an amendment if the resulting extension of service duplicated or competed with any other system, absent special circumstances.

Staff incorporates herein by reference the analysis in Issue 1. As demonstrated in that discussion, the Fourth District Court

of Appeal's opinion in Town of Jupiter v. Village of Tequesta, 713 So. 2d 429 (Fla. 4th DCA 1998), negatively disposes of any such claims. Substituting Forest for Jupiter in the Court's discussion of Jupiter's bulk service yields the following:

> Forest neither hooks up nor disconnects any customers outside its certificated service area; it has no pumps or meters outside its area; it has no customer meters there; it sends no bills there; indeed it has no contact of any kind with any consumer of wastewater service outside its certificated area.

Given that Forest is a provider of bulk service in circumstances indistinguishable from those of the Town of Jupiter, the Fourth District's conclusion would follow as to Forest also:

> Providing Jamaica Bay with bulk wastewater service at a point of delivery does not constitute actual operation by Forest in a consumer service area outside its certificated area.

Based on the authority of Town of Jupiter, Forest will not be providing "actual operation", i.e., "service" outside its certificated area, and accordingly needs no amendment increasing its service area. While it is therefore unnecessary to reach the question of whether such an amendment could be granted, since none is needed, the analysis in Issue 1 as to the non-relevance of Lee County v. Marks, 501 So. 2d 585 (Fla. 1989), is pertinent. That analysis noted that, in Marks, a retail customer tried to evade a territorial agreement by extending a line into an adjacent territory in order to get less expensive retail service, and that the Florida Supreme Court disallowed the evasion.

However, the staff analysis also noted that the Commission's territorial orders exclude bulk service from the coverage of territorial agreements. Therefore, any analogy based on Marks would be inapposite to the facts of this bulk service case. Not only is there no territorial agreement here that anyone can claim is being violated, even if there were such an agreement, it would exclude bulk service from the provisions thereof. In short, no amendment is needed to Forest's service area certificate, and the provision of bulk service in this case does not raise territorial dispute issues concerning competition and duplication.

It should also be noted that the Florida Supreme Court's opinion in Marks does not necessarily "outrank" the 4th DCA's opinion in Jupiter. While statutes providing for direct appeal to the Florida Supreme Court of telephone and electric rate related cases may cause that tribunal to seem to be the most familiar final word as to utility cases, the Florida Supreme Court is actually a court of limited jurisdiction under special circumstances. The district courts of appeal are, for most matters, including water utility territorial cases, the highest state courts. Arguing against the Fourth DCA's holdings in Town of Jupiter is, therefore, arguing contrary to the authoritative pronouncement of the highest court of the state to have addressed the issues in this case. As noted, Marks concerned other facts not on-point with this case.

The Jupiter opinion is not only an authoritative pronouncement by the highest state court that could adjudicate these issues, but also an opinion that is consistent with decades of Commission precedent. This is so even though the Jupiter case involved two municipalities and did not involve the Commission or Commission-regulated entities. Thus, Jupiter is independent confirmation that the Commission's precedents are both reasonable and correct.

For example, in Docket No. 961231-WS, the Commission approved a new class of service for Florida Cities Water Company (Florida Cities). See Order No. PSC-97-0019-FOF-WS, issued January 6, 1997, In Re: Application for approval of agreement for treatment and disposal of reclaimed water with Lee County and for approval of rate-making treatment for revenues received, by Florida Cities Water Company - Lee County Division. Florida Cities had filed an application for approval of an agreement for treatment and disposal of reclaimed water with Lee County. The Commission, consistent with past cases, treated this request as an application for a new class of service pursuant to Section 367.091, Florida Statutes. Lee County had approached Florida Cities regarding treatment and disposal of reclaimed water from its Ft. Myers Beach wastewater treatment plant as a short-term response to an emergency situation which had developed at the plant. While Lee County planned to construct a deep well injection system as a permanent solution, Florida Cities agreed to receive and dispose of reclaimed water from Lee County as a temporary measure. Similarly, in this case, Forest proposes to provide bulk wastewater treatment to Jamaica Bay on a temporary basis, so that Jamaica Bay may repair its sewage facilities.

In Docket No. 940303-WS, the Commission approved a new class of service for bulk water and wastewater for Southlake Utilities, Inc. (Southlake). See Order No. PSC-98-0764-FOF-WS, issued June 3, 1998, In Re: Application for amendment of Certificate Nos. 533-W and 464-S to add territory in Lake and Orange Counties by Southlake Utilities, Inc. The case started out as a request for a territory expansion, which Orange County contested only as it related to the territory in Orange County. The parties resolved the dispute by entering into a wholesale water and wastewater agreement under which Orange County agreed to become a bulk customer of the utility, and the utility withdrew the portion of its application for amendment of territory situated within the county. The Commission stated that:

> We believe that the agreement, as amended, is consistent with our rules, regulations, and policies regarding bulk service agreements. Moreover, we note that because the County will become a bulk water and wastewater customer of Southlake under the terms of the agreement, the agreement obviates the need for Southlake to seek to amend its water and wastewater certificates in order to serve the requested area within the County.[1]

Order No. PSC-98-0764-FOF-WS, page 4.

In Order No. 99-2034-DS-WS, in Docket No. 982002-WS, In Re Petition of St. Johns Service Company for declaratory statement on applicability and effect of Section 367.171(7), F.S., the Commission issued a declaratory statement explaining that a utility does not become subject to Commission regulation if it provides bulk service to another utility across county lines because the utility would not be providing retail service to end use customers in the county outside its territory. In that case, St. Johns Service Company's utility activities were regulated by St. Johns County. Two of the utility's customers were homeowners

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[1]See also Order No. 11616, issued February 15, 1983, in Docket No. 820435-S, In Re Joint Application by Kingsley Service Company and Du-Lay Utility Company, Inc., for approval of a Bulk Wastewater Treatment, Transmission, and Disposal Rate (The Commission approved a bulk service tariff for Kingsley Service Company to provide bulk wastewater treatment to Du-Lay Utility Company, outside of Kingsley's retail service territory.)

associations that take bulk water and wastewater service from the utility. The homeowners associations served customers in Duval County, but St. Johns Service Company's point of delivery to the associations was in St. Johns County. The utility provided service exclusively to customers in St. Johns County and only the homeowners associations owned distribution and collection facilities in Duval County. 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 County and the utility other than the delivery of bulk service to the homeowners associations in St. Johns County.

The Commission found that since St. Johns Service Company had no direct relationship with actual consumers in Duval County, the utility did not provide service in Duval County.[2]

Finally, as noted in the analysis in Issue 1, territorial agreements are favored as a way of avoiding such undesirable phenomena as races to serve, unsafe and unsightly commingling of facilities and uneconomic duplication, all of which are the likely result of unfettered competition to serve retail customers. It is in the public interest to avoid those results.

In contrast, the Commission's territorial orders have, for decades, excluded utility to utility bulk service arrangements from the restrictions imposed by territorial agreements. Order 5255. Moreover, no findings have been made that the ill effects of retail competition will also occur unless bulk service is subject to territorial restraints that exceed the requirements in the orders discussed above. Indeed, the unnecessary application of such

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[2]See also Order No. PSC-01-0882-DS-WS, issued April 6, 2001, in Docket No. 010113-WS, In Re Petition for declaratory statement by Florida Water Services Corporation that proposed provision of emergency backup water service to residences of St. Johns County by the Flagler County systems of Florida Water Services Corporation does not constitute service which transverses county boundaries under Section 367.171, F.S. (The Commission stated that the emergency interconnect did not invoke its jurisdiction because service transversing county boundaries was not involved. Florida Water had no direct relationship with actual consumers in St. John County and thus did not provide service in St. Johns County.)

additional restraints would, as noted in the analysis in Issue 1, be contrary to the public interest. The Commission has interpreted the requirements of Section 367.045(2) to be met if providing bulk service is accomplished by means of interconnections within a regulated utility's certificated area. Deference by the courts is due this statutory interpretation, which is already in harmony with the appellate court's analysis of these issues in Town of Jupiter.

In short, staff recommends that, based on the foregoing, Forest's Petition for Declaratory Statement should be granted.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes, if the Commission votes to dispose of the petition for declaratory statement, the docket should be closed. (Bellak)

STAFF ANALYSIS: If the Commission answers the petition, a final order can be issued and the docket be closed.

RCB