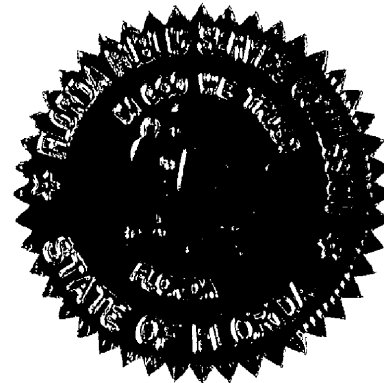


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 031020-WS

In the Matter of:

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.



ELECTRONIC VERSIONS OF THIS TRANSCRIPT ARE
A CONVENIENCE COPY ONLY AND ARE NOT
THE OFFICIAL TRANSCRIPT OF THE HEARING.
THE .PDF VERSION INCLUDES PREFILED TESTIMONY.

PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 2

BEFORE: CHAIRMAN LILA A. JABER
COMMISSIONER J. TERRY DEASON
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON

DATE: December 16, 2003

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

TRANSCRIBED FROM
TAPE BY: TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736

DOCUMENT NUMBER-DATE

FLORIDA PUBLIC SERVICE COMMISSION 00119 JAN-6 3

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 KEN PLANTE, ESQUIRE, Roetzel & Andress, P. O. Box
3 10369, Tallahassee, Florida 32302, appearing on behalf of
4 Jamaica Bay West Associates, Ltd.

5 F. MARSHALL DETERDING, ESQUIRE, Rose, Sundstrom &
6 Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, Florida
7 32301, appearing on behalf of Forest Utilities, Inc.

8 ROBERT SCHEFFEL WRIGHT, ESQUIRE, Landers & Parsons,
9 P.A., 310 West College Avenue, Tallahassee, Florida 32301,
10 appearing on behalf of Lee County.

11 RICHARD BELLAK, ESQUIRE, FPSC General Counsel's
12 Office, 2540 Shumard Oak Boulevard, Tallahassee, Florida
13 32399-0850, appearing on behalf of the Commission Staff.

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CHAIRMAN JABER: That takes us to Item 2.

Commissioners, on Item 2 I need to mention that there is an Issue 1 that involves a petition to intervene. This item has also been noticed, however, as a -- parties may participate at the Commission's discretion.

Staff, let's start this item with a question to you. Help me procedurally on what to do next. If I understand your recommendation correctly, that regardless of how the Commission votes on the intervention, folks can still participate this morning.

MR. BELLAK: I think that's correct.

CHAIRMAN JABER: Commissioners, I think we should start with that. Do you want to have participation on this item? Do you need participation on this item?

COMMISSIONER DEASON: Madam Chairman, I think it would be helpful if we allow participation. I do notice that Issue 1 airs a question of intervention. Is it your intention to address that or just at this point just to address the question of participation?

CHAIRMAN JABER: Participation, because my thought was if you're inclined to have participation, then we need to hear on Issue 1. So I tend to agree with you. I want to have some participation. Okay. Great.

With that, Mr. Bellak, introduce the item.

1 MR. BELLAK: Commissioners, this is a petition for a
2 declaratory statement filed by Forest Utilities, which is
3 seeking a statement that they do not have to extend their
4 certificated area of service pursuant to Section 367.045 in
5 order for them to provide bulk service or more precisely named
6 service for resale to Jamaica Bay as long as they meet the
7 requirement that the service interconnection is accomplished
8 within their current service territory.

9 And the recommendation of the staff, briefly stated,
10 is that wholly aside from their participation this morning at
11 the agenda, the recommendation is that intervention be denied
12 for failure to demonstrate standing or to meet the test in the
13 Commission's formal intervention rule, and as to Issue 2, that
14 the petition for declaratory statement be granted.

15 CHAIRMAN JABER: Mr. Bellak, it was fine for what you
16 just said, but can you bring the microphone closer to you? I
17 think we were having just a little bit of difficulty.

18 And let's see. Mr. Deterding, you're here
19 representing --

20 MR. DETERDING: Yes, Madam Chair. Marty Deterding
21 here representing Forest Utilities. I have with me Ken Plante
22 representing Jamaica Bay.

23 CHAIRMAN JABER: And Mr. Wright.

24 MR. WRIGHT: Thank you, Madam Chairman. Schef Wright
25 representing Lee County.

1 CHAIRMAN JABER: Okay. Let's start issue by issue,
2 and Issue 1 involves Lee County's petition to intervene. So,
3 Mr. Wright, I'll let you start your argument and allow Forest
4 and Jamaica Bay to respond.

5 MR. WRIGHT: Thank you, Madam Chairman. I'll be as
6 brief as I can, Commissioners. The issues here both with
7 respect to Lee County's petition in standing to intervene and
8 with regard to the substance of the requested declaratory
9 statement are really all of the same piece; namely, whether the
10 transaction proposed between Forest and Jamaica Bay, the
11 provision of bulk wastewater service by Forest to Jamaica Bay,
12 is or is not a jurisdictional transaction. If it's not a
13 jurisdictional transaction under the statute, then Lee County
14 is not entitled to the Commission's protection under
15 367.045(5)(a), and accordingly, you know, we would lack
16 standing to intervene. If it's not jurisdictional, then no
17 amendment to Forest's certificate of authorization would be
18 required.

19 Correspondingly, if it is a jurisdictional
20 transaction, the opposite results would obtain. If it's a
21 jurisdictional transaction, Lee County is entitled to the
22 Commission's protection under 367.045(5)(a) which provides that
23 the Commission may not grant an amendment to a certificate to
24 extend service to an area where another utility is already
25 ready, willing, and able to serve and where that utility has

1 not refused or neglected to provide service. I don't think
2 there's any dispute as to the fact that Lee County is ready,
3 willing, and able to serve. We are, in fact, serving Jamaica
4 Bay at this time. And I don't think there's any dispute as
5 regards to Lee County's having refused or neglected to provide
6 service. We have never refused or neglected to provide
7 service.

8 As explained in our pleadings, the plain language of
9 Chapter 367 renders the proposed transaction a jurisdictional
10 transaction. It can't be jurisdictional for one purpose,
11 approving a rate for the service which Forest wants you all to
12 do, and not for another; i.e., not for the purpose of
13 extending -- or whether the service area extension amendment
14 provisions of the statute applies. The exemption provisions of
15 Section 367.022 are real clear. They say the following are not
16 subject to the provisions of this chapter except as expressly
17 provided. If the bulk service contemplated here is not subject
18 to the provision of the chapter, it's not subject to the
19 provision of the chapter. If it is, then it is. We assert, of
20 course, that it is.

21 With regard to our standing and the Agrico test, we
22 lay this out very clearly in our petition at Pages 9 and 10
23 where we said, within the meaning of Section 367.045(5)(a),
24 Florida Statutes, Lee County Utilities' wastewater treatment
25 system is "adequate to meet the reasonable needs of the

1 public," statutory requirement, including Jamaica Bay and all
2 of Jamaica Bay's occupants, Lee County Utilities is fully able
3 to "provide reasonably adequate service" to all those whom it
4 serves, and Lee County Utilities has never refused or neglected
5 to provide service to any potential customer within its service
6 area. Accordingly, the Commission may not approve the
7 extension of Forest's service area unless the transaction is
8 determined to be nonjurisdictional. By the plain language of
9 367.022(12), Florida Statutes, the Forest-Jamaica Bay
10 transaction would be jurisdictional, triggering all applicable
11 Commission statutes. Lee County is accordingly entitled to the
12 protection of that section. The cited statutes, .045(5)(a) and
13 .022(12), provide the basis for the relief requested.

14 We cited to your statutes. We explained why we are
15 entitled to intervene as a matter of right. We're
16 substantially affected. We're providing service now. We have
17 facilities in place to provide the service. Denying us the
18 protection of the statute will substantially affect our
19 interests, and it's potentially an immediate thing. You know,
20 they contemplate canceling the contract that they have with us
21 and switching service from Jamaica Bay -- Jamaica Bay service
22 from Lee County to Forest. There's no question about the
23 immediacy of the injury. The question is, are we within the
24 statute? Under 367.045(5)(a), we're entitled to your
25 protection because we are ready, willing, and able to serve.

1 We satisfy all the statutory requirements.

2 So the question is, is the service contemplated a
3 jurisdictional transaction? We don't think it's arguable -- we
4 don't think this is a close question. 367.022(12) enumerates
5 specific exemptions. Those which are not exempt are
6 jurisdictional. The specific exemptions that the statute
7 enumerates are sale or resale to a governmental authority and
8 sale or resale to a utility regulated pursuant to Chapter 367
9 by the Commission or by the County. Jamaica Bay West is not a
10 governmental authority. Jamaica Bay West is not a utility
11 subject to the Commission's regulation, subject to Chapter 367
12 at all. It's not subject to the Commission's regulation; it is
13 not subject to Lee County's regulation.

14 The staff assert that there are no customers of Lee
15 County at issue in the proposed transaction. We strongly
16 disagree. Jamaica Bay West is the customer at issue. Indeed,
17 Jamaica Bay West is the customer to whom we are already
18 providing service; that Jamaica Bay West is a jurisdictional
19 retail customer is first given away by the fact that Forest
20 Utilities wants you-all to approve a tariff to provide the
21 service. If it's not a jurisdictional transaction, it's not a
22 jurisdictional transaction; no tariff is required. That's what
23 the law says. 367.022 says the following enumerated species of
24 entities and transactions are not subject to the provisions of
25 the chapter except as expressly provided. And there's no

1 express provision that says utilities can provide bulk service
2 to species -- entities such as Jamaica Bay West under a tariff
3 and not have to comply with the certificated service areas.

4 I think -- that's about what I have to say on the
5 standing issue. I'd be happy to go ahead and conclude the rest
6 of what I have to say with regard to the substantive issue in a
7 declaratory statement or save it.

8 CHAIRMAN JABER: Let's hang on to it for a moment --

9 MR. WRIGHT: Sure.

10 CHAIRMAN JABER: -- and go to Forest and Jamaica Bay
11 for a response on intervention.

12 MR. DETERDING: Thank you, Madam Chair.
13 Commissioners, Forest did not raise a concern in part because
14 of the short time period between the filing of the documents by
15 Lee County and the date of the staff recommendation. We did
16 not raise the standing issue, but I do believe that the
17 Commission staff's analysis of that issue is very well done and
18 very thorough in analyzing that standing and concludes that the
19 County does not have standing to participate in this
20 declaratory statement matter. And I don't have anything
21 further to offer.

22 CHAIRMAN JABER: Mr. Bellak, your recommendation
23 statement says that we can either grant or deny, but when I got
24 to Page 5 of the staff analysis, it seems as though you are
25 recommending that the petition for intervention should be

1 denied. So my question to you is, if you are recommending that
2 it should be denied, just walk us through what the legal
3 rationale was as it relates to Agrico. I've read what you've
4 said related to Tequesta and the Lee County Electric Co-op.
5 I'm more interested in an analysis on whether Lee County has
6 met the standard laid out in Agrico.

7 MR. BELLAK: Okay. To begin with, the recommendation
8 that you had discretion to grant or deny only related to this
9 proceeding for the purposes of parties may participate at the
10 Commission's discretion.

11 CHAIRMAN JABER: But they can regardless -- well, we
12 just established that.

13 MR. BELLAK: Right.

14 CHAIRMAN JABER: They could participate regardless.

15 MR. BELLAK: Right. If someone raised the technical
16 issue that they weren't a party, the answer would be, well, in
17 the past the Commission has granted not limited intervention
18 but intervention for a limited purpose. So I would have made
19 that point.

20 But as to the formal intervention, pursuant to the
21 Commission's intervention rule, which depends on meeting this
22 standard of being substantially affected, they can't be
23 substantially affected. The reason for that is they're relying
24 on Lee County versus Marks. The Lee County versus Marks case
25 only related to applicants for service that had end use

1 facilities in a particular area.

2 Now, the service that's being requested is bulk
3 service, which is to say service for resale. Service for
4 resale is not service to end use customers and is treated
5 differently under the statutes, under the case law, and even in
6 the Lee County versus Marks case.

7 Now, for the first time, I've heard the assertion
8 that Jamaica Bay is a retail customer of Lee County. My
9 understanding from everything that's been filed is that the
10 service that's being requested -- the new class of service that
11 Forest wishes to provide to Jamaica Bay is bulk service for
12 resale. That's an entirely different situation. Lee County
13 versus Marks is inapplicable to that. Therefore, the assertion
14 on the part of Lee County under Agrico that they have a right
15 to provide this service and that they may be injured in that
16 right by what we do in this declaratory proceeding or that this
17 is the kind of proceeding meant to protect that right, there's
18 no right to provide service for resale. It doesn't exist under
19 the statutes. And if that's the right they're asserting, then
20 that right doesn't exist. That's prong one of Agrico,
21 nonexistent. So they can't be injured by the lack of a right
22 that doesn't exist. And second of all, this is not a
23 proceeding which protects rights that don't exist.

24 So under Agrico they have no standing whatsoever if,
25 in fact, what we're talking about is service for resale. And

1 everything that I've read and every discussion of this
2 indicates that this is service for resale. And I think the
3 most dramatic demonstration that I can give to the Commission
4 of the difference is to look at Statute 366.03, which is an
5 electric statute, but it's relevant because we're talking about
6 a legal basis in Lee County versus Marks which is an electric
7 case. And the first two sentences of 366.03 make the same
8 point that we made in the recommendation, but they make it in a
9 very dramatic fashion. The first sentence says, "Each public
10 utility shall furnish to each person applying therefor
11 reasonably sufficient, adequate, and efficient service." Now,
12 the word "service" when not modified by any other description
13 means end user, retail service.

14 The second sentence says, "No public utility shall be
15 required to furnish electricity or gas for resale." So the
16 parameter that's applicable to end use service is 180 degrees
17 different, nonapplicable to service for resale. They couldn't
18 be more different. And the attempt which is made here to
19 assume that the same parameters of Chapter 367 apply whether
20 it's end use service such as at issue in 367.045 or service for
21 resale is simply a non-point. If you look at Section 367,
22 they -- at Chapter 367, 367.045 sets out the parameter of
23 service, meaning the first sentence in 366.03, service to end
24 use customers.

25 On the other hand, the Legislature has given a

1 separate statute for service for resale, 367.123, and has
2 appointed the Commission as the sole authority that can require
3 any utility to provide service for resale. And if they're
4 correct, if Lee County is correct, they would read
5 367.123 right out of the book because suppose the Commission
6 decided that Forest should provide bulk service for resale to
7 Jamaica Bay. According to Lee County, if Lee County feels that
8 it wants to provide that kind of service to Jamaica Bay, then
9 whatever order the Commission issued would be nullified.

10 CHAIRMAN JABER: Okay. Commissioners, do you have
11 any other questions or a motion?

12 COMMISSIONER DEASON: I have a question.

13 CHAIRMAN JABER: Commissioner Deason.

14 COMMISSIONER DEASON: This is for Mr. Wright.

15 Mr. Wright, is it your contention that Jamaica Bay is a retail
16 customer?

17 MR. WRIGHT: Yes, sir.

18 COMMISSIONER DEASON: And how do you make that
19 conclusion?

20 MR. WRIGHT: They are a direct purchaser of service
21 from whomever. At this time they are a purchaser of service
22 from Lee County. And I make the conclusion based on the
23 statute that this is a jurisdictional transaction. There is no
24 exemption from the Commission's full panoply of regulatory
25 authority for this transaction. You just can't shoehorn it

1 into any of the specifically enumerated exemptions in 367.022.
2 If it were a governmental authority, we wouldn't be here, if
3 Jamaica Bay were a governmental authority. If Jamaica Bay were
4 a utility regulated pursuant to Chapter 367, we wouldn't be
5 here. If it were either of those species of entity, it would
6 not be subject to the Commission's jurisdiction.

7 The Legislature has been very clear about what is and
8 is not exempt. It has said that with respect to the sale of
9 wastewater service, bulk, resale, whatever, those transactions
10 that are exempt are transactions where the sale is by a
11 regulated entity to a governmental authority or transactions by
12 a regulated utility to another Commission-regulated utility.
13 Jamaica Bay West is neither. This is a jurisdictional
14 transaction, this is retail service, regardless of what they
15 do.

16 What you're doing is looking behind the meter to see
17 what they do. You know, what's the difference between this and
18 a 1400-unit motel? You know, that would be a jurisdictional
19 transaction. You know, and again --

20 COMMISSIONER DEASON: Let me interrupt.

21 CHAIRMAN JABER: Mr. Wright.

22 COMMISSIONER DEASON: Excuse me.

23 CHAIRMAN JABER: Mr. Wright.

24 Commissioner Deason.

25 COMMISSIONER DEASON: What then is -- in your

1 observation or your understanding, what then is Jamaica Bay?
2 What is the entity?

3 MR. WRIGHT: Jamaica Bay is a 1400-unit mobile home
4 park that buys bulk service, in our view of the statute, at
5 retail from whomever, Lee County at the present time, Forest as
6 they hope to, and then provides that service to the occupants
7 of the mobile home park without specific compensation therefor.
8 That fact, that they provide it to them included in their lot
9 rent or however it's structured, is what exempts them from the
10 Commission's regulation. That doesn't change the nature of the
11 transaction as between Lee County and Jamaica Bay or as between
12 Forest and Jamaica Bay.

13 You know, they've asked you to approve a tariff for
14 it. You know, if it's a jurisdictional transaction, you know,
15 they have to have a tariff, but, you know, we believe that the
16 rest of the statute applies. If it's not, you know, then it's
17 not.

18 COMMISSIONER DEASON: I have a question.

19 CHAIRMAN JABER: Go ahead, and then Commissioner
20 Bradley.

21 COMMISSIONER DEASON: Mr. Bellak, how do you base
22 your determination that this is a sale for resale? Is it based
23 upon the fact that even if there's no compensation, direct
24 compensation, it is somehow included within the lot rent and
25 that constitutes a sale for resale?

1 MR. BELLAK: Well, my understanding is that the
2 tariff that was sought by Forest was for bulk service. And the
3 analysis that was done assumed that this was bulk service for
4 resale because the service is going to be resold to the users
5 of the service, which is the customers of Jamaica Bay. Now, if
6 that's incorrect, then we may be talking about a new species of
7 retail bulk service, and that may or may not be the case. But
8 we're not -- for us, the argument about exemption is a
9 strawman. We've never said that the transaction is exempt.

10 What we're saying is that under the facts of what was
11 sought, which was bulk service, that all of the bulk service
12 cases that have been reviewed that the Commission has approved
13 have been bulk service for resale, but that's the assumption
14 that's being made going in. If the Commission draws the
15 conclusion that this is a retail sale, then that's a different
16 issue. But we're not arguing exemption. I mean, I've been
17 listening to ten minutes of conversations about exemption, but
18 we're not taking the position that this is an exempt
19 transaction. We're taking the position that based on the facts
20 that we've been presented, it's a bulk service for resale
21 tariff that was being sought after and was being granted.

22 CHAIRMAN JABER: Commissioner Bradley.

23 COMMISSIONER BRADLEY: Yes. Thank you, Madam Chair.
24 I think I heard Mr. Bellak answer my question. And my question
25 is this. Is Forest providing retail service to end use

1 customers, or did you say that's the determination that --

2 MR. BELLAK: My understanding is the answer is
3 absolutely and clearly no.

4 COMMISSIONER BRADLEY: Okay.

5 MR. BELLAK: Which is the same thing in this Town of
6 Jupiter versus Village of Tequesta. The assumption going in in
7 Jupiter versus Tequesta was that the Village of Tequesta was
8 not a retail customer of the Town of Jupiter. They were just
9 getting bulk service at a point of delivery for the resale of
10 that service to the end use customers in the Village of
11 Tequesta. That's why the Court analyzed that differently than
12 you would analyze a retail sale. And that's why we're -- the
13 staff is relying on that case to demonstrate that they're wide
14 of the mark. They don't seem to be taking on the actual issue
15 that the Commission's analysis has presented. They're aiming
16 at some strawman that we've never brought up. We never said
17 that this was an exempt transaction. We said it was a sale of
18 bulk service for resale.

19 COMMISSIONER BRADLEY: Therefore, the key determinant
20 in whether a company needs a certificate or not is the
21 answer to -- well, is that particular question.

22 MR. BELLAK: Right.

23 COMMISSIONER BRADLEY: Are they providing retail
24 service to end use customers?

25 MR. BELLAK: Right. Bulk service for resale, the

1 Commission deems the location of the service to be the point of
2 interconnection. So, in other words, it's a different test
3 than the test for locating end use consumer service. And in
4 this case, the facts are that the interconnection will be
5 within the certificated service area of Forest even though it's
6 going to be used outside of that area.

7 It's exactly like Jupiter versus Tequesta. In the
8 Town of Jupiter versus Tequesta, the point of interconnection
9 for the bulk service was within the Town of Jupiter. So the
10 Judge said, well, there's no actual service to any end use
11 customer in the Village of Tequesta, so we're going to hold
12 that there's no dispute in the Village of Tequesta. There's no
13 territorial dispute going on because it's not end use service.
14 This is only bulk service for resale, and the interconnection
15 point is within the Town of Jupiter. So the Court was
16 satisfied that that's not the same kettle of fish as if would
17 be the case if the Town of Jupiter were actually hooking up end
18 use customers in the Village of Tequesta, sending those bills
19 to those end use customers, making contact to those end use
20 customers. None of that was happening. It was just service
21 for resale at a delivery point. And that's the nature of
22 all of these service for resale tariffs that the Commission has
23 approved over a period of decades.

24 And, in fact, if you read the actual amended
25 territorial agreement in Lee County versus Marks and its Order

1 850129, what the agreement provided for was that LCEC, the
2 County, and FPL agree that neither supplier will attempt to
3 serve or serve any applicant whose end use facilities are
4 located within the service territory of the other. In other
5 words, if their home or business were located. It doesn't say
6 anything about interconnections between utilities that are
7 going to resell bulk power or bulk service.

8 CHAIRMAN JABER: Mr. Bellak, let me stop --

9 MR. BELLAK: That's not even included.

10 CHAIRMAN JABER: Let me stop you there. Commissioner
11 Bradley, you had follow-up questions or --

12 COMMISSIONER BRADLEY: I'm ready to make a motion.

13 CHAIRMAN JABER: Okay.

14 MR. WRIGHT: Madam Chairman?

15 CHAIRMAN JABER: Hang on one second.

16 COMMISSIONER BAEZ: A question.

17 CHAIRMAN JABER: Commissioner Baez, you had a
18 question?

19 Mr. Wright, I've seen your hand. Let me tell you, if
20 there's no question posed to you, you've had your opportunity
21 to speak.

22 Commissioner Baez, you have a question?

23 COMMISSIONER BAEZ: Mr. Bellak, help me clear up in
24 my mind, do we -- I'm hearing in your explanation that there is
25 some kind of presumption of resale; is that -- you're presuming

1 that it's resale.

2 MR. BELLAK: It looked exactly like the Village of
3 Tequesta.

4 COMMISSIONER BAEZ: Do we ever -- so anything that
5 comes in, we say it's resale until proven -- I'm trying to
6 order in my mind whether there is any analysis or any
7 determination behind the meter.

8 MR. BELLAK: Well, let's say this. I would -- after
9 working on this project, I would say that there is a fair need
10 for more precision in the bulk service area, especially because
11 the treatment of bulk service is so different from the
12 treatment of plain service, end use service. And I sympathize
13 with anyone, whether it's Mr. Wright or someone on the
14 Commission panel or someone on the staff, that finds this area
15 somewhat cryptic because of that. But what we can say is that
16 I haven't seen anything which takes this set of facts and
17 distinguishes it from the Village of Tequesta and the Town of
18 Jupiter or any of the other Commission bulk service orders.
19 And I think it's really the burden of the intervenor, the
20 would-be intervenor to have done that. Instead, they focussed
21 an awful lot of energy talking about exemption when the staff
22 analysis never made that issue even back during the other
23 docket. The staff was never arguing that at all. So they've
24 had ample opportunity to come to grips with the difference
25 between end use service and bulk service, but they've evaded

1 that and avoided it.

2 COMMISSIONER BAEZ: A follow-up.

3 CHAIRMAN JABER: Commissioner Baez.

4 COMMISSIONER BAEZ: If the circumstances were
5 different and what we had was -- I guess the picture that I
6 have in my mind is that, yes, there is some bulk sale going on.
7 Now, what happens after the bulk sale? Where the water goes is
8 of no concern to us, or at least it hasn't been proven that it
9 should be of concern to us. I guess my question is, if the
10 facts were different, if there were actual customers behind the
11 bulk sale --

12 (Tape Ends, Side A; Tape Begins, Side B.)

13 COMMISSIONER BAEZ: There is no fact that we can
14 point to that a sale is going on behind this bulk sale, I mean,
15 is that true?

16 MR. BELLAK: Well, we can because the mobile home
17 park is not like a farm that's trying to buy retail bulk
18 service, let's say, and they're just going to buy a lot of
19 service. And so they're buying bulk. I can imagine bulk
20 service that's retail because a farm needs a lot of water, so
21 they get some kind of different rate that's called bulk
22 service, but that's not -- well, no one ever made an analysis
23 that would indicate that there's anything here except the
24 Village of Tequesta. You've got a lot of end users out there.
25 And like the Village of Tequesta -- and they're all customers

1 of this mobile home park. And just like the Village of
2 Tequesta, Jamaica Bay is a utility that serves those customers
3 with wastewater service.

4 Now, it so happens that because it's self-service,
5 they're exempt, but whatever service they're going to purchase,
6 no matter who they purchase it for, it's not going to be
7 service that's used by the owners of Jamaica Bay. It's going
8 to be service -- it's going to go to the retail customers that
9 are customers of the park. So it's just like the end users in
10 the Village of Tequesta. The village is acting as a kind of
11 utility, even though it's a municipality, and it's buying bulk
12 service from a town, the Town of Jupiter, but it's for the
13 purpose of reselling it to the residents of Tequesta. So --

14 CHAIRMAN JABER: Commissioner Bradley, I'm going to
15 come back to you for a motion, but let me make sure
16 Commissioners have no other questions.

17 Commissioner Bradley. And, Commissioner, let me -- I
18 understand we've probably gotten a little bit into Issue 2, but
19 the only motion I'm asking for is on Issue 1, the intervention.

20 COMMISSIONER BRADLEY: My motion would be to deny Lee
21 County's intervention.

22 CHAIRMAN JABER: Okay. There is a motion to deny Lee
23 County's petition to intervene. Is there a second? Is there a
24 second?

25 COMMISSIONER DEASON: I'll second the motion.

1 CHAIRMAN JABER: There's a motion and a second. All
2 those in favor say "aye."

3 (Unanimous affirmative vote.)

4 CHAIRMAN JABER: Opposed? Anyone opposed?

5 Okay. Motion carries unanimously.

6 Now, getting to Issue 2 though, Mr. Bellak, I think
7 we have confirmed a couple of times now that just because we've
8 denied the petition to intervene doesn't mean parties can't
9 participate in -- interested persons can't participate in Issue
10 2. And I did let Mr. Wright know that there would be comments
11 made for Issue 2. But, Forest, we'll let you go first since
12 it's your petition.

13 MR. DETERDING: Thank you, Commissioners. I don't
14 believe I need to go through the fact scenario, but I will
15 point out one thing that I think was at least briefly touched
16 upon in our previous discussion of the prior issue and that is
17 a couple of points. First of all, Jamaica Bay is a utility.
18 It is not an end user. It provides service to the residents of
19 the mobile home park without specific compensation. If it were
20 not for -- if you were to go along with the position of the
21 County, that this was an end use retail customer, then there
22 would be no purpose in the provision of the exemption within
23 the statute related to systems such as this who provide service
24 without specific compensation to the end use customer. So I
25 wanted to make that point.

1 Second of all, Mr. Wright has raised the issue of the
2 applicability of the Southlake case, wherein he points to the
3 fact that that -- and relies upon the belief that the Southlake
4 case is different in that it agrees with the position taken by
5 the staff and by Forest based upon the fact that there is a
6 bulk service arrangement to a governmental authority in that
7 case and that that is the underlying reason for the
8 Commission's decision. He fails to note, however, that that
9 exemption did not occur until after that case. So his basis
10 for claiming that that type of service, wastewater bulk
11 service, to a governmental authority distinguishes that case is
12 misplaced. There was no exemption for bulk resale wastewater
13 at the time the Commission entered that decision.

14 Forest is simply trying to move forward with
15 discussions with Jamaica Bay for the provision of bulk
16 wastewater service to this exempt entity. We had made all
17 those arrangements with Jamaica Bay and we're prepared to make
18 the interconnect, but because of the need for immediate service
19 and because of glitches in the permitting through DEP and the
20 local building authority we were not able to complete that
21 arrangement for bulk service. Those were in part the result of
22 the County's taking the position that we had to have an
23 extension of service territory. Therefore, this issue is ripe.
24 We need a decision so that if we enter into such an
25 arrangement, that we can move forward without those impediments

1 being put in front of us again. The building department's only
2 basis for denying a building permit to Jamaica Bay was the
3 failure to have an extension of service territory, which in the
4 Commission's 25 years of processing similar bulk service
5 arrangements it is never contended. And, in fact, all the
6 rulings suggest exactly the opposite, though none dealt
7 directly with the issue.

8 One other point I would like to make -- well, I think
9 that basically is our position.

10 CHAIRMAN JABER: Jamaica Bay, do you have anything to
11 add?

12 MR. PLANTE: Yes, Commissioners, I'd like to make one
13 statement. Just as far as background, when we're talking --
14 Lee County, when they've -- we've mentioned it's for settlement
15 agreement with them that allows for a temporary agreement for
16 their accepting wastewater that's already treated. It's reuse
17 quality, but there is capacity, if necessary, and the plant
18 goes down, they could take the untreated effluent and treat
19 that. I think it's interesting to point out that Lee County
20 Utilities is not physically treating this wastewater. It has a
21 contract with the City of Ft. Myers. The pipe that was
22 constructed goes to another pipe that goes to the City of
23 Ft. Myers. And on the certificate that was required for all of
24 the permits, it's the engineer with the City of Ft. Myers that
25 signs off on it. So basically Lee County brokered the deal.

1 It is not their physical plant that purchased the ability from
2 the City of Ft. Myers to process this. That's all.

3 CHAIRMAN JABER: Mr. Plante, I have just a factual
4 question for you, something that wasn't real clear to me from
5 the dec statement. The arrangement you want with Forest and
6 the arrangement you have with Lee County currently is temporary
7 for the purpose of you making improvements to your own facility
8 and meeting all the DEP requirements; is that correct? Am I
9 correct?

10 MR. PLANTE: That's in part correct, yes. The
11 facility of Jamaica Bay is operating; it's functional. Last
12 year they spent a couple hundred thousand dollars upgrading it.
13 It's working. The problem is with the perc ponds. They're not
14 percolating properly. They've overflowed in part because Lee
15 County had a few days last summer with nine inches of rain.
16 That's a lot of rain. Every inch of rain is an extra 80,000
17 gallons in one of these ponds.

18 What we sought was a manner in which to lower the
19 levels of the ponds, clean them out, and see if they could be
20 continued to be used. So the arrangement with Lee County is on
21 a temporary basis to -- and it includes in there the ability to
22 drain the ponds twice. DEP is urging Jamaica Bay to hook up
23 permanently to Lee County. That is an option. However, the
24 purpose of the declaratory statement and why we joined in was
25 to make sure we had the other option also because this is reuse

1 quality water. Forest has reuse customers. In fact, it would
2 be supplied to them as opposed to just going into another
3 treatment plant if there's a way to use that water. So this is
4 a temporary -- as it clearly stated, could become permanent,
5 but it's a temporary way to just drain the ponds.

6 CHAIRMAN JABER: Okay. So really -- and,
7 Mr. Deterding, you can jump in here. The question you pose to
8 us is one of law, which is, if Jamaica Bay temporarily or
9 permanently seeks to enter into an arrangement with Forest
10 Utilities, does that warrant an application for an amendment of
11 your certificate?

12 MR. DETERDING: That's correct.

13 CHAIRMAN JABER: That is solely the legal question.

14 MR. DETERDING: That is correct, Commissioner.

15 CHAIRMAN JABER: Commissioners, do you have questions
16 at this point, or are we ready to move on to Mr. Wright?

17 Mr. Wright.

18 MR. WRIGHT: Thank you, Madam Chairman. Again,
19 Commissioners, with regard to the request of the declaratory
20 statement, we oppose it. We believe that this is a
21 jurisdictional transaction, and accordingly, that all the
22 requirements of 367.045 must be complied with.

23 With regard to some of the specific comments made in
24 the Commission staff's recommendation by Mr. Bellak and by Mr.
25 Deterding and by -- I don't think I have any response to what

1 Mr. Plante said, I would tell you the following: Mr. Bellak
2 referred to all the cases. All the cases except one cited in
3 all the paper here involved sales to specifically exempt
4 entities, governmental authorities or the utilities. The one
5 where it didn't was the St. Johns Service Company case that
6 involved service to a homeowner's association across county
7 lines. That was a cross county line case. It was a case that
8 turned on the Commission's interpretation of 367.171, not with
9 respect to 367.045, not with respect to 367.022. Tequesta
10 turned on Chapter 180 and a contract between the Town of
11 Jupiter and the Village of Tequesta as it incorporated Chapter
12 180. It was not a Chapter 367 case. None of these cases was
13 ever challenged in any event.

14 Contrary to what Mr. Deterding asserts, that Jamaica
15 Bay West is a utility, we would simply say they're not.
16 They're not as a matter of law. By the operation of
17 367.022(5), they are not subject to the provisions of the
18 chapter. The fact that they provide wastewater service as part
19 of their services to their tenants does not make them a
20 utility. What would make them a utility would be being a
21 utility under some form of applicable law, whether Chapter 367
22 or a county ordinance; they are not such.

23 Mr. Deterding attempted to assert that there would be
24 no purpose in the exemption of 367.022(5) if our position were
25 to stand. That's not true. The purpose of 367.022(5), which

1 specifically exempts entities like Jamaica Bay West, mobile
2 home parks and other entities that provide compensation to
3 their occupants or their members without specific compensation
4 therefor, is to avoid the regulatory problems that would occur
5 if you tried to regulate transactions where there were no
6 specific charges for the service. I don't think that argument
7 holds water.

8 With regard to Mr. Deterding's reference to the
9 Southlake case, I think the fact that the Legislature
10 subsequently codified the provisions of 367.022(12) only
11 supports our position. The Legislature has spoken on this.
12 They have said what is jurisdictional and what is not
13 jurisdictional.

14 And with regard to the point of interconnection
15 matter, which is what brings the Lee County Co-op case by
16 analogy only -- and I believe we were really clear on this. We
17 didn't assert that it was binding precedent. We asserted that
18 the binding requirements here are those of 367.045 and 367.022,
19 but we bring Lee County Electric Co-op v. Marks into this case
20 because it addresses the same public policy considerations,
21 albeit in that case in the electric arena, as are addressed by
22 367.045 in the water and wastewater arena.

23 The purpose of these statutes is to avoid the
24 unnecessary, unneeded, unwarranted duplication of facilities.
25 On the electric and gas side pursuant to Chapter 366, you have

1 the territorial dispute and territorial agreement statutes that
2 provide for a resolution of such disputes. There is no such
3 framework on the water and wastewater side. There's a very
4 different regulatory framework on the water and wastewater
5 side, and that framework is the framework of certificated
6 service areas. And the Legislature has made it very clear that
7 you have to have a certificated service area to provide service
8 and the purpose is, very explicitly, you know, .045(5)(a), to
9 avoid duplication where there's another utility that's ready,
10 willing, able to serve and has never neglected or refused to
11 provide service.

12 Forgive me, I've lost one tie on the track of my
13 train of thought there. The analogy of Lee County is that you
14 can't escape the otherwise applicable requirements of law by
15 the artifice of putting the point of interconnection in another
16 service area. Our position is very clear. This is a
17 jurisdictional transaction; accordingly, it's subject to all
18 aspects of the Commission's jurisdiction, rate regulation, and
19 service area certification requirements alike. Accordingly, we
20 believe you should deny the declaratory statement. Thanks for
21 your time.

22 CHAIRMAN JABER: Thank you, Mr. Wright. Mr. Bellak,
23 I'm going to pose a question to you. I just want a yes-or-no
24 answer because I think we're all ready to vote this out,
25 hopefully. I am looking at the very narrow question in

1 deciding this item, the very narrow question of, does Forest
2 have to seek an amendment to its certificate if it engages in a
3 permanent or temporary relationship with Jamaica Bay based on
4 the rationale that Jamaica Bay is wholly contained within
5 Forest's certificated territory? My question to you is, is my
6 view of that very narrow question and the rationale I'm using
7 to get to the answer inappropriate to support your
8 recommendation?

9 MR. BELLAK: I don't understand the question. The
10 facts of the case are --

11 CHAIRMAN JABER: Well, Mr. Bellak, wait. Before you
12 go on, let me try to pose the question to you again.

13 MR. BELLAK: Okay.

14 CHAIRMAN JABER: Set aside Lee County, Tequesta, and
15 the cases you cite. I am wanting to answer the very limited
16 question of, does Forest Utilities have to seek an amendment of
17 their certificate if they engage in a temporary or permanent
18 relationship with Jamaica Bay? And in answering that question,
19 I have relied heavily on the fact represented by staff, which
20 is Jamaica Bay is contained within Forest's certificated
21 territory. Is that not true?

22 MR. BELLAK: That's not true.

23 CHAIRMAN JABER: Okay. Then I need you to explain.

24 MR. BELLAK: The interconnection is within the
25 certificated -- the interconnection is within the certificated

1 territory. And under those facts, as I understand them, they
2 do not need an extension of their territory.

3 CHAIRMAN JABER: Okay. And the interconnection,
4 contrast that with what else there might be. Are you saying
5 there are lines outside of Forest's territory that provide
6 service?

7 MR. BELLAK: Not that Forest is going -- Jamaica Bay
8 is going to construct that line.

9 CHAIRMAN JABER: Okay. Well, I need to understand
10 the distinction you want me to fully appreciate. The
11 interconnection happens on the Forest side. Service of water,
12 the provision of water necessarily will have to be on the
13 Jamaica side.

14 MR. BELLAK: No, because it's service for resale and
15 that's deemed to be where the interconnection is located. Only
16 for service for resale, not for end use service. And that's
17 why in Chapter 367, despite .045 which sets out the parameters
18 of end use service, there's a specific different statute for
19 service for resale. It's two different ways of testing
20 location.

21 And what their argument is, that the Commission
22 doesn't have the discretion and hasn't had the discretion for
23 30 years to deem the point of service to be where the
24 interconnection takes place, only in the instance of service
25 for resale. And the short answer is the Commission does have

1 that discretion.

2 CHAIRMAN JABER: Okay. Commissioners, do you have
3 any other questions or a motion?

4 Commissioner Baez. No? Okay.

5 COMMISSIONER DEASON: I can make a motion.

6 CHAIRMAN JABER: Commissioner Deason.

7 COMMISSIONER DEASON: I move staff's recommendation
8 on Issues 2 and 3.

9 (Inaudible.)

10 CHAIRMAN JABER: And a second. All those in favor
11 say "aye."

12 (Unanimous affirmative vote.)

13 CHAIRMAN JABER: Issues 2 and 3, staff
14 recommendation, are approved unanimously. Thank you. That
15 takes us to Item 5.

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF FLORIDA)
)
COUNTY OF LEON)

CERTIFICATE OF REPORTER

I, TRICIA DeMARTE, RPR, do hereby certify that the foregoing proceedings, Pages 1 through 33, were transcribed from cassette tape.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 6TH DAY OF JANUARY, 2004.

Tricia DeMarte

TRICIA DeMARTE, RPR
Official FPSC Reporter
(850) 413-6736