

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application of Forest )  
Utilities, Inc. for approval )  
of a new class of service for ) Docket No. 030748-SU  
bulk wastewater service )  
\_\_\_\_\_ )

RESPONSE TO LEE COUNTY'S MOTION TO DISMISS

COMES NOW Forest Utilities, Inc. ("Forest" or the "Utility"), pursuant to Rule 28-106.204(1), Florida Administrative Code, and hereby responds to Lee County's ("the County") Motion to Dismiss the Application of Forest for Approval of a New Class of Service for Bulk Wastewater Service, and in support thereof states as follows:

Lee County's Motion to Dismiss is based on three basic arguments: (1) That Forest's Application for Approval of a New Class of Service is effectively a request for extension of service territory under the provisions of Section 367.045(2), Florida Statutes; (2) that Forest's attempts to provide service to the Jamaica Bay West Mobile Home Park ("Jamaica Bay") is barred without an extension of service territory pursuant to the findings espoused by the Florida Supreme Court in Lee County Electric Co-Op, Inc. vs. Marks, 501 So. 2d 585 (Fla.1987); and (3) that Forest's request for the Commission's Order approving the new rate to "specifically state that no extension of service territory is necessary..." for the provision of this bulk wastewater service to an exempt entity

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is an attempt to obtain a Declaratory Statement without complying with the provisions of Chapter 120.565, Florida Statutes. Each of these issues is addressed separately below:

**ISSUE I**

**Forest's Application for Approval of a New Class of Service is not effectively a request for extension of service territory under the provisions of Section 367.045(2), Florida Statutes.**

The County is attempting by this argument and by the issues raised in its Petition to Intervene, to allege that Forest's Application in this proceeding is something other than simply an application for the approval of a new class of service rate. Instead the County alleges that this is effectively a request for extension of service territory. It is clear from the wording of both Forest's Application and from the rules under which that Application is filed that no such proposal has been made by Forest. To do so would entail not only additional filing requirements but would also impose upon Forest additional obligations and responsibilities related thereto with regard to service within the new area. No rule, statute, or precedent requires Forest to seek such an extension as part of its request for approval of a new class of service and Forest has not done so.

The Florida Public Service Commission has for over 25 years approved bulk service arrangements between entities regulated by

the Commission and by retail providers such as Jamaica Bay. In one of the dozens of such cases approved by the Public Service Commission has the Commission ever suggested that the utility must have the area served by the bulk customer included within the service territory of the regulated utility requesting such bulk rate approval. In fact, in at least one case of which the undersigned is aware the Commission has specifically approved of an arrangement whereby an extension application to provide retail service was withdrawn after negotiation of a bulk service arrangement and approval of a new class of service rate. In Application for Amendment of Certificates by Lake Utilities, Inc. 98 FPSC 6:86, June 3, 1998, an agreement between the regulated utility and the protestant (an unregulated governmental entity) to withdraw the extension application and to instead authorize bulk service between the regulated utility and an exempt retail provider of service was approved by the Commission.

Not only does the Commission's precedent clearly demonstrate that no extension of service territory is required for a regulated entity to provide bulk service to a retail provider of service, Forest has in fact requested no such extension of service territory and has instead requested only the approval of a rate for bulk service. An intervenor cannot, through the filing of a motion to

dismiss, impose upon Forest an obligation to file such an application for extension and then request dismissal for failure to meet the applicable filing requirements.

## ISSUE 2

**Forest's attempts to provide service to the Jamaica Bay West Mobile Home Park ("Jamaica Bay") is not barred pursuant to the ruling espoused by the Florida Supreme Court in Lee County Electric Co-Op, Inc. vs. Marks, 501 So. 2d 585 (Fla.1987).**

Lee County has alleged that the case of Lee County Electric Co-Op, Inc. vs. Marks, 501 So. 2d 585 (Fla.1987) is applicable to the instant circumstances. In doing so, the County has ignored the clear and unequivocal distinctions between the Lee County Electric Co-Op, Inc. vs. Marks case and the instant case as follows:

1. The case involved a ruling on a dispute concerning a territorial agreement. The Supreme Court's opinion clearly notes that their ruling is based on the actions of one of the parties and a finding of a violation of a territorial agreement entered into between the parties. No such territorial agreement exists between Forest Utilities and Lee County. The Petition filed with the Public Service Commission in that case was also clearly directed toward a request by the parties for a ruling by the PSC on whether such territorial agreement was violated.

2. In the Lee County Electric Co-Op, Inc. vs. Marks case the alleged "customer" was an end use customer requesting permanent service. The arrangement proposed between Forest and Jamaica Bay is simply a request for temporary service and to take only a portion of the flows generated by Jamaica Bay's customer base for treatment. The facts outlined in that case are wholly inapplicable to the instant situation involving an exempt utility such as Jamaica Bay and its attempts to obtain temporary partial bulk wastewater services for redistribution to the individual customers within Jamaica Bay's territory.

### ISSUE 3

**Forest's request for the Commission's Order approving the new rate to "specifically state that no extension of service territory is necessary..." for the provision of this bulk wastewater service to an exempt entity is not an attempt to obtain a Declaratory Statement without complying with the provisions of Chapter 120.565, Florida Statutes.**

The County claims that Forest Utilities has sought a Declaratory Statement under the provisions of Chapter 120.565, Florida Statutes without following the specific statutory requirements for such a Declaratory Statement request. Forest has sought no such declaratory action by the Commission, but rather simply a statement from the Commission of its longstanding policy as evidenced by 25 years of approval of bulk service arrangements.

Such precedent shows without exception that a utility need not amend its service territory to include the territory of the retail provider when offering bulk service to that retail provider. The County's own permitting department has specifically denied Jamaica Bay a building permit, to construct the facilities to interconnect to Forest's system, based solely upon an allegation that the provision of bulk service would be outside the territory of Forest Utilities and apparently has convinced the Florida Department of Environmental Protection to take a similar stance on permitting matters currently pending before them. Forest has simply asked the Commission for a restatement of longstanding Commission policy and statutory interpretation within this Order, under the apparently mistaken belief that the County simply wanted clarification of this issue rather than to attempt to overturn such Commission precedent.

To the extent that the Commission deems the request by Forest for this additional language within the Order, does constitute a Request for Declaratory Statement, Forest Utilities hereby specifically withdraws such request.

To the extent there is an entity herein attempting to utilize the wrong proceeding in which to obtain a declaratory statement, it is the County. Its action in protesting a Request for Approval of New Class of Service and attempting to draw in the extension

requirements from Section 367.045(2), Florida Statutes, demonstrate that it is the entity who is seeking declaratory action without following the proper procedure and that it is attempting to utilize a simple tariff filing proceeding to request a Commission ruling on what it contends is a territorial dispute.

WHEREFORE based upon the above, Forest Utilities, Inc. specifically requests that the Commission deny the Motion to Dismiss filed by Lee County and to require Lee County to raise the issues unrelated to a request to establish a new rate for bulk service through the filing of an appropriate Petition for Declaratory Statement should it wish to do so, and to grant such other relief as the Commission may deem appropriate.

Respectfully submitted on this  
*2nd* day of September, 2003 by:

ROSE, SUNDSTROM & BENTLEY, LLP  
2548 Blainstone Pines Drive  
Tallahassee, Florida 32301  
Tel.: (850) 877-6555  
Fax: (850) 656-4029

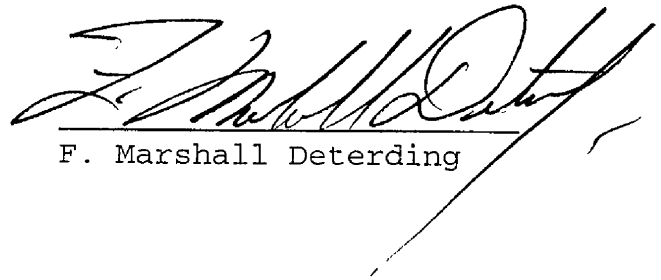
BY:   
F. MARSHALL DETERDING

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail or Hand Delivery (denoted by \*) on this 1<sup>st</sup> day of September, 2003, to the following:

Lee County  
David Owen-Chief Asst. County Attorney  
P.O. Box 398  
Ft. Myers, FL 33902-0398  
Fax: 239-335-2606

Jennifer Rodan, Esquire\*  
General Counsel  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0873



F. Marshall Deterding