



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

COMMISSION  
CLERK

SEP 18 AM 9:48

RECEIVED FPSC

DATE: SEPTEMBER 18, 2003

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

FROM: DIVISION OF ECONOMIC REGULATION (BIGGINS) *dp*  
OFFICE OF THE GENERAL COUNSEL (RODAN, BROWN) *JAR* *NCB* *Wet* *JDT*

RE: DOCKET NO. 030748-SU - APPLICATION FOR APPROVAL OF NEW  
CLASS OF SERVICE FOR BULK WASTEWATER SERVICE IN LEE COUNTY  
BY FOREST UTILITIES, INC.  
COUNTY: LEE

AGENDA: SEPTEMBER 30, 2003 - REGULAR AGENDA - TARIFF FILING AND  
MOTION TO DISMISS - ORAL ARGUMENT HAS NOT BEEN REQUESTED  
ON ISSUE 1; INTERESTED PERSONS MAY PARTICIPATE ON ISSUE  
1 AT THE COMMISSION'S DISCRETION; INTERESTED PERSONS MAY  
PARTICIPATE ON ISSUE 2 AND 3

CRITICAL DATES: 60-DAY SUSPENSION DATE: September 30, 2003

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\030748.RCM

CASE BACKGROUND

Forest Utilities, Inc. (Forest or Utility) is a Class B  
wastewater only utility in Lee County. As of December 31, 2002,  
the utility served 2,068 wastewater customers and reported  
operating revenues of \$658,336 and operating expense of \$620,559

Pursuant to Section 367.091, Florida Statutes, on August 1,  
2003, Forest filed an application for approval of new class of  
service for bulk wastewater service in Lee County. According to  
the application Forest and Jamaica Bay Mobile Home Park (Jamaica  
Bay) have agreed to enter into a written agreement pursuant to  
which Forest will provide bulk wastewater service to the customer.  
This arrangement is being undertaken to assist Jamaica Bay in

DOCUMENT NUMBER-DATE

08871 SEP 18 03

COMMISSION CLERK

DOCKET NO. 030748-SU

DATE: September 30, 2003

meeting requirements being imposed upon it by the Florida Department of Environmental Protection (DEP) to upgrade its wastewater treatment facility without any interruption in service to the individual tenants within the customer property. Forest herein has the additional wastewater capacity and is willing to provide that service on a temporary and perhaps permanent basis.

On August 25, 2003, Lee County filed a petition to intervene and dismiss the application of Forest Utilities, Inc. for approval of a new class of service for bulk wastewater service. On September 2, 2003, Forest filed a motion to strike Lee County's motion to dismiss, stating that Lee County was not a party to this proceeding. In addition, Forest provided a response to Lee County's motion to dismiss. On September 4, 2003, the Commission granted Lee County's petition to intervene, making Forest's motion to strike Lee County's motion to dismiss moot.

The Commission has jurisdiction pursuant to Section 367.091, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission deny Lee County's Motion to Dismiss?

RECOMMENDATION: Yes, the Commission should deny Lee County's Motion to Dismiss. Forest has adequately stated a cause of action for approval of a tariff for a new bulk wastewater class of service upon which the Commission may grant relief. (RODAN, BROWN)

STAFF ANALYSIS: Forest filed its Application for Approval of a New Class of Service for Bulk Wastewater Service so that it can provide bulk wastewater treatment to Jamaica Bay Mobile Home Park (Jamaica Bay), located in Lee County. The Application asserts that Jamaica Bay needs 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. Forest states that Jamaica Bay will connect to Forest's facilities in Forest's certificated territory. Forest asserts that it will provide bulk wastewater treatment to Jamaica Bay for resale, but it will not serve any Jamaica Bay retail customers. Forest invokes Commission jurisdiction under Section 367.091, Florida Statutes, which governs rates, tariffs, and new classes of service.

In its Motion to Dismiss, Lee County argues that an agreement to provide bulk wastewater treatment to Jamaica Bay would mean that Forest would be serving customers outside of its certificated service territory in the territory of Lee County. According to Lee County, Forest's application is really a request to extend its service territory and should have been filed as a certificate amendment petition pursuant to Section 367.045, Florida Statutes, or as a declaratory statement petition pursuant to Section 120.565, Florida Statutes. Lee County claims that since Forest did not comply with the provisions of either statute, the application should be dismissed. Lee County also argues that it is ready and able to provide service to Jamaica Bay and therefore the line that Jamaica Bay will build to connect to Forest is duplicative of its system contrary to Section 367.042, Florida Statutes, governing Commission certification of retail service territory. Lee County states that Jamaica Bay and Forest are trying to avoid established territorial divisions by building a line to connect with Forest's system inside Forest's territory. In addition, Lee County argues that Lee County Electric Co-op, Inc. v. Marks, 501 So. 2d 585 (Fla. 1987) prohibits Forest's efforts.

Forest responds that it has not requested an extension of service territory and has instead requested only the approval of a rate for bulk wastewater service. Forest argues that Marks was a ruling on a dispute concerning a territorial agreement between electric utilities. According to Forest, the opinion is based on the fact that the terms of the territorial agreement were violated. Forest states that no such territorial agreement exists between Forest and Lee County. Forest also argues that the customer in the Lee County case was an end use customer requesting permanent retail electric service. The arrangement proposed between Forest and Jamaica Bay is simply a request to provide temporary wholesale wastewater service for only a portion of Jamaica Bay's wastewater needs. Forest argues that the facts in Marks are inapplicable to this case. Forest also argues that it has not sought declaratory action by the Commission, but simply a statement from the Commission confirming its longstanding policy to approve bulk service arrangements without requiring the utility to amend its retail service territory.

The purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. The standard to be applied in addressing a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Varnes v. Dawkins, 624 So. 2d 349 (Fla. 1<sup>st</sup> DCA 1993). See also; Meyers v. the City of Jacksonville, 754 So. 2d 198 (Fla. 1<sup>st</sup> DCA 2000), and City of Gainesville v. State of Florida, Department of Transportation, 778 So. 2d 519 (Fla. 1<sup>st</sup> DCA 2001).

Under this standard, staff recommends that the Commission should deny the motion to dismiss. Forest's application requests a new class of service so that it can provide bulk wastewater service to Jamaica Bay. The application states that Jamaica Bay will connect to Forest's facilities in Forest's certificated territory. These facts are sufficient to sustain the application for Commission approval pursuant to Section 367.091, Florida Statutes. There is no requirement in regulatory statutes or past Commission precedent that a regulated water utility can only provide wholesale water or wastewater service to other utilities for resale when the other utility is located in its retail service

area. In fact, the Commission has often approved wholesale service tariffs without amendments to retail service territory.

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.<sup>1</sup>

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 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.

---

<sup>1</sup>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.)

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.<sup>2</sup>

In light of this precedent, Lee County's reliance on Lee County Electric Co-op v. Marks is misplaced. That case involved a retail electric service customer of Lee County attempting to take service from another electric utility to avoid the restrictions of a territorial agreement. Retail service is not involved here. The case that is most relevant is Town of Jupiter v. Village of Tequesta, 713 So. 2d 429 (Fla. 4<sup>th</sup> DCA 1998), where the Court had to address whether the city of Jupiter operated a water system in Tequesta when Jupiter supplied Tequesta bulk potable water at a point of delivery. The Court found that Jupiter was not providing service to customers in Tequesta's territory. The court noted:

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.

\* \* \*

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.

---

<sup>2</sup>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.)

DOCKET NO. 030748-SU

DATE: September 30, 2003

For these reasons, taking the allegations of the application as true, and interpreting them in the light most favorable to Forest, staff recommends that Forest has adequately stated a cause of action under Section 367.091, Florida Statutes, over which the Commission has jurisdiction, and upon which it can grant the relief requested. Therefore, Lee County's Motion to Dismiss should be denied.



**ISSUE 2:** Should Forest Utilities, Inc. request for a new class of service for bulk wastewater service be approved?

**RECOMMENDATION:** Yes, Forest's request for a new class of service for bulk wastewater service should be approved. The utility should be allowed to charge \$3.14 per 1,000 gallons as discussed in the staff analysis. The utility should file a new tariff sheet which is consistent with the Commission's vote within 30 days of issuance of the Consummating order. Staff should approve the tariff sheet upon verification that the tariff is consistent with the Commission's decision. If the new tariff sheet is filed and approved, the new class of service for bulk wastewater service should become effective on or after the stamped approval date of the tariff sheet. (BIGGINS)

**STAFF ANALYSIS:** On August 1, 2003, Forest Utilities, Inc. filed an application to request approval for a new class of service for bulk wastewater treatment service to Jamaica Bay. Jamaica Bay is a 1,400 unit mobile home park. A letter of intent was submitted by Forest and Jamaica Bay pursuant to which Forest will provide temporary and possibly permanent service for a part of the raw or treated sewage flows generated by Jamaica Bay. The agreement was based on connections for temporary or permanent basis. Jamaica Bay will pay the cost of extending a line from Jamaica Bay's sewage treatment facility to Forest's force main at an automotive dealership on US Highway 41, which appears to be the closest point for connection.

DEP is requiring Jamaica Bay to upgrade its wastewater treatment facility immediately without any interruption in service to its individual tenants. Residents of Jamaica Bay will start returning this fall, and the sewage flow will start to increase. DEP would like these repairs done as soon as possible.

Jamaica Bay will be sending only part of its raw sewage flows to Forest for treatment. Since bulk wastewater charges must be based upon actual sewer flows, a sewer flow meter is being installed. Jamaica Bay will be sending an average flow of 100,000 gallons per day to Forest for treatment and disposal. This amount will vary per day, due to the fact Jamaica Bay will continue to operate its own plant to the extent it is not overloaded. It is uncertain if 100,000 gallons per day will actually be diverted to Forest's plant. Staff is recommending the proposed rate of \$3.14 per 1,000 gallons of wastewater flow through the flow meter. Staff

DOCKET NO. 030748-SU  
DATE: September 30, 2003

believes the proposed rate of \$3.14 is reasonable, based on the cost justification that Forest submitted pursuant to Section 367.091(6), Florida Statutes.

The letter of intent Forest, and Jamaica Bay submitted, in this case, contains additional charges for a temporary or permanent connection. Any other amount outside of the rate specified in this recommendation should be addressed by the Commission in another proceeding. Staff is only recommending the approval of the proposed rate of \$3.14 per 1,000 gallons.

Pursuant to Rule 25-9.055(4), Florida Administrative Code, the utility estimated annual revenues of \$85,958. The utility also estimated an increase in expenses of approximately \$88,258. Based upon the utility's estimation, staff does not believe these additional revenues will cause potential over earnings.

Staff recommends that Forest's request for a new class of service for bulk wastewater service in Lee County be approved. The utility should be allowed to charge the recommended rate of \$3.14 per 1,000 gallons of measured wastewater flow. The utility should file a new tariff sheet which is consistent with the Commission's vote within 30 days of issuance of the Consummating Order. Staff should approve the tariff sheet upon verification that the tariff is consistent with the Commission's decision. If the new tariff sheet is filed and approved, the bulk wastewater rate should become effective on or after the stamped approval date of the tariff sheet.

DOCKET NO. 030748-SU  
DATE: September 30, 2003

**ISSUE 3:** Should this docket be closed?

**RECOMMENDATION:** Yes. If Issues 1 and 2 are approved, the new tariff should become effective on or after the stamped approval date on the tariff sheet, pursuant to Rule 25-30.475, Florida Administrative Code. If a protest is filed within 21 days of the issuance date of the Order, the tariffs should remain in effect with common bulk wastewater charges held subject to refund pending resolution of the protest, and the docket should remain open. If no timely protest is filed, the docket should be closed upon the issuance of a Consummating Order. (RODAN, BROWN, BIGGINS)

**STAFF ANALYSIS:** If Issues 1 and 2 are approved, the new tariff should become effective on or after the stamped approval date on the tariff sheet, pursuant to Rule 25-30.475, Florida Administrative Code. If a protest is filed within 21 days of the issuance date of the Order, the tariffs should remain in effect with common bulk wastewater charges held subject to refund pending resolution of the protest, and the docket should remain open. If no timely protest is filed, the docket should be closed upon the issuance of a Consummating Order.