

ORIGINAL

LANDERS & PARSONS, P.A.

ATTORNEYS AT LAW

DAVID S. DEE
RONALD A. LABASKY
JOSEPH W. LANDERS, JR.
JOHN T. LAVIA, III
FRED A. McCORMACK
PHILIP S. PARSONS
ROBERT SCHEFFEL WRIGHT

310 WEST COLLEGE AVENUE
TALLAHASSEE, FL 32301

MAILING ADDRESS:
POST OFFICE BOX 271
TALLAHASSEE, FL 32302-0271

November 14, 2003

BY HAND DELIVERY

TELEPHONE (850) 681-0311
TELECOPY (850) 224-5595
www.landersondparsons.com

Blanca Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

RECORDED-PPSC
NOV 14 PM 4:19
COMMISSION
CLERK

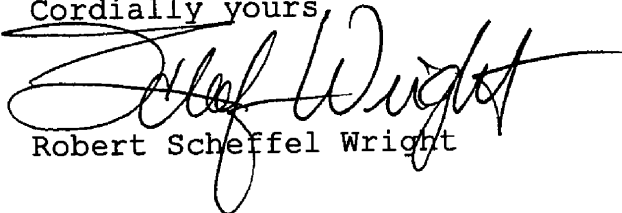
Re: Lee County's Petition to Intervene, FPSC Docket No. 031020-WS, In Re: Petition for Declaratory Statement by Forest Utilities, Inc.

Dear Ms. Bayo:

Enclosed for filing are the original and fifteen copies of Lee County's Petition to Intervene in the above-styled docket. I have also enclosed a 3.5" diskette containing this pleading in WordPerfect format. I will appreciate your confirming receipt of this pleading by stamping the attached filing copy thereof and returning same to my attention.

As always, my thanks to you and to your professional Staff for their kind and courteous assistance. If you have any questions, please give me a call at (850)681-0311.

Cordially yours,



Robert Scheffel Wright

- AUS _____ Enclosures
- CAF _____
- CMP _____
- COM _____
- CTR _____
- ECR _____
- GCL _____
- OPC _____ RECEIVED & FILED
- MMS _____
- SEC R.V.D
- OTH _____

FPSC-BUREAU OF RECORDS

original to Hong

DOCUMENT NUMBER-DATE

11418 NOV 14 3

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Declaratory)
Statement Before the Florida Public)
Service Commission for Forest) DOCKET NO. 031020-WS
Utilities, Inc. and Jamaica Bay) FILED: November 14, 2003
West Associates, Ltd. in Lee County,)
Florida)
_____)

LEE COUNTY'S PETITION TO INTERVENE

Lee County, Florida ("Lee County"), pursuant to Chapter 120, Florida Statutes,¹ and Rules 25-22.039 and 28-106.201(2), Florida Administrative Code, hereby petitions to intervene in the above-styled docket. In summary, Lee County petitions to intervene to protect its substantial interests as those interests would be directly and adversely affected by the declaratory statement requested by the Petition for Declaratory Statement (hereinafter, the "Petition") filed by Forest Utilities, Inc. ("Forest") and Jamaica Bay West Associates, Ltd. ("Jamaica Bay") that initiated this proceeding. The requested declaratory statement would violate Chapter 367, Florida Statutes, by declaring non-jurisdictional a transaction that is clearly jurisdictional within the plain meaning of the applicable statutes. The requested declaratory statement would thereby frustrate the express intent of the Legislature regarding the extension of service areas pursuant to Section 367.045(2), Florida Statutes, and directly injure Lee County's substantial interests that are

¹ All references in this Petition to the Florida Statutes are to the 2003 edition thereof.

DOCUMENT NUMBER-DATE
11418 NOV 14 8
FPSC-COMMISSION CLERK

entitled to protection by Section 367.045(5) (a), Florida Statutes. Accordingly, Lee County seeks to intervene to protect its interests in any proceedings conducted herein. In further support of its Petition to Intervene, Lee County states the following.

PROCEDURAL BACKGROUND

1. The name, address and telephone number of the Petitioner is:

Lee County, Florida
ATTN: James G. Yaeger, Esquire
Lee County Attorney
and
David M. Owen, Esq.
Chief Assistant Lee County Attorney
2115 Second Street, 6th Floor (ZIP 33901)
Post Office Box 398
Fort Myers, Florida 33902
(239) 335-2236 (Telephone)
(239) 335-2606 (Facsimile)

2. All pleadings, orders and correspondence should be directed to Petitioner and Petitioner's representatives as follows:

Robert Scheffel Wright
John T. LaVia, III
Landers & Parsons, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
(850) 681-0311 (Telephone)
(850) 224-5595 (Facsimile)

3. The agency affected by this Petition to Intervene is:

Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

4. The facts preceding this Petition are as follows.
 - a. Forest holds a current wastewater utility certificate (#300S) issued by the Florida Public Service Commission ("PSC" or "Commission"), to provide certain residential and commercial domestic wastewater treatment services within a described service area in Lee County, Florida.
 - b. Forest also has an approved wastewater tariff on file with the Commission, which provides for retail residential and commercial services rates, fees and charges.
 - c. Forest currently has no tariff provisions for wholesale ("bulk") wastewater treatment service to any class of customer or customers.
 - d. On August 1, 2003, Forest filed an application for approval of a new class of service, thereby initiating PSC Docket No. 030748-SU, In Re: Application of Forest Utilities, Inc. For Approval of a New Class of Service for Bulk Wastewater Service. In the Application, Forest requested, inter alia, (i) Commission approval of a new class of service in order to provide wholesale wastewater treatment services to the Jamaica Bay West Mobile Home Park, a 1400 unit mobile home park located in Lee County; and (ii) that the Commission state in an order approving the new class of service for Forest, that no extension of Forest's existing service

territory is necessary, because the only proposed customer (Jamaica Bay) will allegedly connect to the Forest system inside a portion of Forest's currently certificated area.

- e. Jamaica Bay is not located within Forest's current Commission-certificated service area.
- f. Jamaica Bay is an exempt wastewater treatment provider pursuant to Section 367.022(5), Florida Statutes, providing wastewater treatment to its tenants without specific compensation therefor. Jamaica Bay is not a governmental authority.
- g. Lee County owns and operates water and wastewater utility systems in Lee County; these systems are known as and collectively referred to herein as "Lee County Utilities." Lee County Utilities presently provides water service to Jamaica Bay as a customer of Lee County Utilities, and wastewater treatment service to Jamaica Bay pursuant to that certain Agreement for Temporary Connection of Jamaica Bay West to Lee County Utilities that became effective upon its approval by the Lee County Board of County Commissioners on September 23, 2003 ("Agreement").
- h. Lee County moved to dismiss Forest's application in Docket No. 030748-SU. Following the Commission's suspension of the proposed tariff and deferral of

ruling on Lee County's motion to dismiss, Forest withdrew its application and the docket was closed. See Order No. PSC-03-1286-FOF-SU.

- i. Within the meaning of Section 367.045(5)(a), Florida Statutes, Lee County Utilities' wastewater treatment system is "adequate to meet the reasonable needs of the public," including Jamaica Bay and all of Jamaica Bay's occupants, and Lee County Utilities is fully able to "provide reasonably adequate service" to all of those whom it serves.

LEE COUNTY'S RECEIPT OF NOTICE

5. Lee County was not served with a copy of the Petition for Declaratory Statement filed by Forest and Jamaica Bay. Lee County obtained a copy of the Petition from the Commission on November 3, 2003.

LEE COUNTY'S SUBSTANTIAL INTERESTS

6. Lee County has a substantial interest in the outcome of this proceeding. Lee County is a political subdivision and charter county of the State of Florida. Lee County owns and operates a comprehensive, regional potable water and wastewater utility serving approximately 70,000 customers throughout Lee County. Both Forest and Jamaica Bay lie within Lee County Utilities Service Area and are both existing water customers of Lee County Utilities and have been so for approximately twenty

years. Lee County has operational wastewater main lines located proximate to Jamaica Bay and, as noted above, is already providing wastewater treatment service to Jamaica Bay by contract. Lee County has wastewater treatment capacity available to serve the immediate and future needs of the entire Jamaica Bay development.

7. In this proceeding, the Commission is being requested by Forest and Jamaica Bay to declare "that no rule, statute, or Commission precedent requires Forest to seek an extension pursuant to Section 367.045(2), F.S. as a prerequisite to providing the intended bulk service to Jamaica Bay." Petition at 5.

8. Forest's contemplated extension of service to Jamaica Bay would compete directly with the wastewater treatment system of Lee County Utilities. Forest's proposed extension would also be duplicative of Lee County Utilities' system. These facts alone provide the statutory basis, pursuant to Section 367.045(5)(a), Florida Statutes, for Lee County's right to intervene herein as a substantially affected person. In addition, the Petition's request for the Commission's declaration that no service territory extension is required, contravenes the concepts of franchises, service areas, and non-duplication of facilities for both public and private utilities.² Accordingly,

² In this regard, the instant situation is similar to that addressed in Lee County Electric Co-op v. Marks, 501 So. 2d 585

Lee County has a direct, substantial, and legislatively recognized interest in the outcome of the subject docket.

9. To have standing to intervene in proceedings under the Florida Administrative Procedure Act, a party must satisfy the two-prong standing test first articulated in Agrico Chemical Co. v. Department of Env'l Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). This test requires that the party must demonstrate (a) that its interests will be determined by the proceedings, or that it will suffer an injury in fact of sufficient immediacy to entitle the party to a hearing, and (b) that the party's substantial injury is of a type against which the proceeding is designed to protect. Here, Lee County has invested substantial public funds to provide wastewater service to the citizens and

(Fla. 1987), which involved a dispute regarding electric service territories under a territorial agreement between two electric utilities. There, the Florida Supreme Court stated that "[t]his Court has repeatedly approved the PSC's efforts to end the economic waste and inefficiency resulting from utilities' 'racing to serve,' and we cannot find that the transparent device of constructing a line into another utility's service area may suffice to avoid the effect of a territorial agreement." Id. at 587 (citations omitted). The Court went on to state that "[a]n individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself," id. (citing Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968)), and that "[l]arger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the PSC." Here, although no territorial agreement is at issue, the Legislature has clearly articulated the policies that are to govern such cases as this: the public interest and the avoidance of duplication of efforts, like those of Forest here, to extend service areas to compete with the systems of other, existing utilities with more than sufficient capacity to serve.

businesses of Lee County, and Lee County has specifically invested funds to provide service directly to Jamaica Bay. The requested declaratory statement would, if granted, allow Jamaica Bay to switch suppliers of wastewater service at its whim and convenience. This would inflict a direct injury to Lee County's substantial interests; accordingly, Lee County meets the first prong of the Agrico standing test. Moreover, Section 367.045(5) (a), Florida Statutes provides that the Commission

may not grant 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.

The contemplated service by Forest to Jamaica Bay would both compete with and duplicate the service already being provided to Jamaica Bay by Lee County Utilities. Lee County asserts without fear of contradiction that Lee County Utilities' system is more than adequate to meet the reasonable needs of the public, that Lee County Utilities is fully able to provide such service, and that Lee County Utilities has never refused nor neglected to provide reasonably adequate service to any customers desiring same. Because the declaratory statement requested herein by Forest and Jamaica Bay would enable them to circumvent this provision of statute, this proceeding clearly implicates Lee

County's rights under Section 367.045(5) (a), and Lee County thus satisfies the second prong of the Agrico standing test.

10. Intervention in declaratory statement proceedings is authorized under the Florida Administrative Procedure Act, Chapter 120, Florida Statutes. Chiles v. Department of State, Division of Elections, 711 So. 2d 151, 155 (Fla. 1st DCA 1998); see also Florida Dep't of Business Reg. v. Investment Corp. of Palm Beach, 747 So. 2d 374, 375, 384 (Fla. 1999) (approving Chiles and recognizing that the notice provision in Section 120.565, Florida Statutes, accounts for the fact that declaratory statements may affect the rights of other parties) and Florida Optometric Ass'n v. Department of Professional Reg., 567 So. 2d 928, 935 (Fla. 1st DCA 1990) ("Thus, persons whose substantial interests may be affected by agency decision, such as the . . . issuance of a declaratory statement, must be provided a clear point of entry into formal proceedings . . .") (Footnote omitted.)

11. Statement Explaining How the Facts Alleged By Lee County Relate to the Above-Cited Statutes In Compliance With Section 120.54(5)(b)4.f, Florida Statutes. Rules 25-22.039 and 28-106.205, F.A.C., provide that persons whose substantial interests are subject to determination in, or may be affected through, an agency proceeding are entitled to intervene in such proceeding. As explained above, within the meaning of Section 367.045(5) (a), Florida Statutes, Lee County Utilities' wastewater

treatment system is "adequate to meet the reasonable needs of the public," including Jamaica Bay and all of Jamaica Bay's occupants, Lee County Utilities is fully able to "provide reasonably adequate service" to all of those whom it serves, and Lee County Utilities has never refused or neglected to provide service to any potential customer within its service area. Accordingly, the Commission may not approve an extension of Forest's service area unless the transaction contemplated by the Petition herein is determined to be a non-jurisdictional transaction. By the plain language of Section 367.022(12), Florida Statutes, the Forest-Jamaica Bay transaction would be jurisdictional, triggering all applicable Commission statutes, including Section 367.045, Florida Statutes. Lee County is entitled to the protection of that section, and accordingly, the cited statutes provide the basis for the relief requested -- i.e., intervention with full party status - by Lee County herein.

DISPUTED ISSUES OF MATERIAL FACT

12. Lee County believes that there are no disputed issues of material fact in this proceeding. The legal status of Lee County, Forest, and Jamaica Bay are all clearly established, and it is their respective statuses that will determine this matter when subjected to analysis pursuant to the substantive provisions of Chapter 367, Florida Statutes, and other applicable precedent.

(Lee County does not believe that its ability to provide reasonable and adequate service to Jamaica Bay is subject to challenge as a matter of fact.)

ULTIMATE FACTS THAT ENTITLE LEE COUNTY TO RELIEF

13. The ultimate facts that entitle Lee County to relief are as follows:

- a. Forest is a utility subject to the Commission's regulatory jurisdiction under Chapter 367.
- b. Jamaica Bay is neither a governmental authority nor a utility regulated pursuant to Chapter 367 by either the Commission or Lee County.
- c. Lee County, through Lee County Utilities, presently provides wastewater treatment service to Jamaica Bay.
- d. Service of Jamaica Bay by Forest would result in Forest's system competing with, and duplicating, Lee County Utilities' wastewater collection and treatment system.
- e. Lee County Utilities' system has ample capacity to provide reasonably adequate service to Jamaica Bay, and Lee County Utilities stands fully ready, willing, and able to provide such service. Lee County Utilities has never neglected to provide reasonably adequate service to the users of its water and wastewater services in Lee County.

STATUTES AND RULES THAT ENTITLE LEE COUNTY TO RELIEF

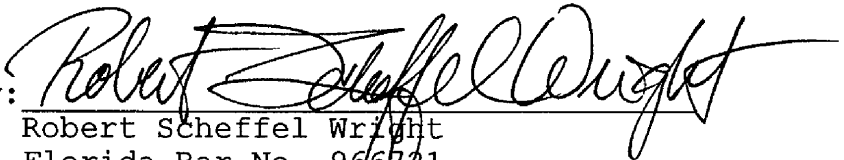
14. The applicable statutes and rules that entitle Lee County to relief include, but are not limited to, Sections 120.565, 367.022(12), 367.045(2), and 367.045(5)(a), and Chapters 25-30 and 28-106, Florida Administrative Code.

RELIEF REQUESTED

WHEREFORE, Lee County respectfully requests the Florida Public Service Commission to enter its order GRANTING this Petition to Intervene and authorizing Lee County to intervene in this proceeding with full party status.

Respectfully submitted this 14th day of November, 2003.

James G. Yaeger
Lee County Attorney

By: 

Robert Scheffel Wright
Florida Bar No. 966721
John T. LaVia, III
Florida Bar No. 853666
Landers & Parsons, P.A.
310 West College Avenue (ZIP 32301)
Post Office Box 271
Tallahassee, Florida 32302
(850) 681-0311 (Telephone)
(850) 224-5595 (Facsimile)

AND

James G. Yaeger, Lee County Attorney
David M. Owen, Chief Assistant
Lee County Attorney
Florida Bar No. 380547
Office of the Lee County Attorney
2115 Second Street, 6th Floor (ZIP 33901)
Post Office Box 398
Fort Myers, Florida 33902
(239) 335-2236 (Telephone)
(239) 335-2606 (Facsimile)

CERTIFICATE OF SERVICE
DOCKET NO. 031020-SU

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand-delivery (*), or U.S. Mail, on this 14th day of November, 2003, to the following:

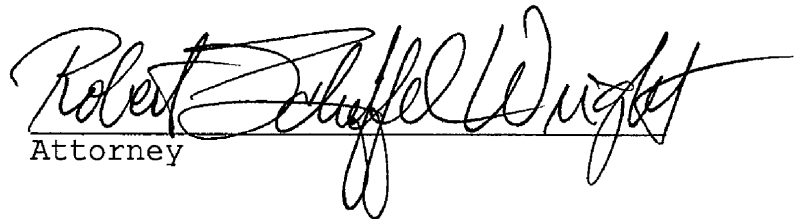
Jennifer Rodan, Esq.*
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

F. Marshall Deterding, Esq.*
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301

Ken Plante, Esq.*
Roetzel & Andress
225 South Adams Street
Post Office Box 10369
Tallahassee, Florida 32302

Charles Beck, Esq.*
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street,
Room 812
Tallahassee, Florida 32399-1400

Richard W. Cantrell
Director, South District
Florida Department of Environmental Protection
2295 Victoria Avenue, Suite 364
Fort Myers, Florida 33901


Attorney