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December 17, 1996

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

HAND DELIVERY

Re: Docket No. 961299-WS
Application for Grandfather Certificates to Provide Water and
Wastewater Service in Polk County by Garden Grove Water
Company, Inc.

Dear Ms. Bayo:

Enclosed on behalf of Garden Grove Water Company, Inc., for
filing in the above docket are an original and fifteen copies of
Garden Grove Water Company Inc.'s Motion to Dismiss the City of
Lake Wales' Petition for Leave to Intervene.

Please acknowledge receipt of the foregoing by stamping the
enclosed extra copy of this letter and returning same to my
attention. Thank you for your assistance.

Sincerely,

Wayne L. Schiefelbein
Wayne L. Schiefelbein

- ACK _____
- AFA _____
- APP _____
- CAF _____
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- SEC 1 _____
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- OTH _____

Enclosures

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for Grandfather)
Certificates to Provide Water and)
Wastewater Service in Polk County)
by Garden Grove Water Company, Inc.)

Docket No. 961299-WS
Filed: December 17, 1996

GARDEN GROVE WATER COMPANY, INC.'S
MOTION TO DISMISS
CITY OF LAKE WALES'
PETITION FOR LEAVE TO INTERVENE

Garden Grove Water Company, Inc. (the Applicant) pursuant to Florida Administrative Code Rule 25-22.037(2)(a), by and through its undersigned counsel, moves to dismiss the Petition for Leave to Intervene filed by the City of Lake Wales, and in support of its motion states the following.

BACKGROUND

1. On October 20, 1987, the Applicant and the Board of County Commissioners of Polk County entered into a fifteen (15)-year franchise agreement, whereby the Applicant was granted exclusive authority to provide water and wastewater service within a specified geographical area within Polk County.¹

2. On September 20, 1994, the City of Lake Wales entered into a Water and Wastewater Intergovernmental Service Area Agreement with Polk County. This agreement allowed Lake Wales the right to provide water and wastewater service within a geographic area

¹ See Exhibit A to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

designated therein.²

3. By mistake, Polk County included in said Intergovernmental Service Area Agreement all of Sections 18 and 19 of Township 30 South, Range 28 East, a portion of which sections Polk County had previously granted to the Applicant under the aforesaid franchise agreement.

4. Upon learning of the mistake, Polk County, through its Utilities Division Director, by letter dated February 8, 1996, notified the City Manager of Lake Wales of the error and requested that the City of Lake Wales revise its service area under said Intergovernmental Service Area Agreement.³

5. Prior to said Intergovernmental Service Area Agreement, the Applicant had been in negotiations with Emmer regarding the Applicant's provision of water and wastewater service to approximately 313 acres planned for development by Emmer, which area is within the geographical boundaries of the aforesaid franchise agreement. In fact, such negotiations between the Applicant and Emmer date back prior to the franchise being granted in 1987.

6. Subsequent to the execution of said Intergovernmental Service Area Agreement, Emmer and the City of Lake Wales engaged in negotiations and entered into an agreement by which Lake Wales

² See Exhibit B to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

³ See Exhibit C to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

would provide water and wastewater services to Emmer's property. This was done with the knowledge of those parties that the extension of the City of Lake Wales' utility lines to Emmer's property would infringe upon the Applicant's service area under the franchise agreement.

7. After a February 9, 1996 public announcement was made that the City of Lake Wales and Emmer had entered into such agreement, the Applicant, on February 9, 1996 and February 16, 1996, notified the City of Lake Wales that any negotiation and agreements with Emmer were in violation of Florida Statutes Section 180.06 (1995) and the franchise agreement.

8. On March 19, 1996, the Lake Wales City Commission refused to make the modification requested by Polk County and the Applicant and, instead, deferred the matter to Polk County upon the representation that Emmer was seeking to modify the franchise agreement.

9. On March 19, 1996, Emmer formally requested the Polk County Utilities Commission, pursuant to County Ordinance 82-11, to amend the franchise agreement so as to exclude from the Applicant's franchise area the land owned and planned for development by Emmer. On March 29, 1996, the City of Lake Wales requested Polk County to "favorably consider" Emmer's request.⁴

10. On May 14, 1996, the Polk County Board adopted a resolution transferring jurisdiction to the PSC. It did so with the

⁴ See Composite Exhibit D to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

intention of retaining jurisdiction over cases pending before it at that time, and with the assurance of PSC Staff that such pending cases would be completed by the Polk County Board.⁵

11. On June 4, 1996, the Polk County Board, sitting as the Polk County Utilities Commission, held a hearing on Emmer's March 19, 1996 request to determine if Emmer's property would be excluded from the Applicant's franchise area. Among the witnesses appearing on behalf of Emmer's request was the City Manager of the City of Lake Wales.

12. On June 11, 1996, the Polk County Utilities Commission adopted an Order denying Emmer's request.⁶

13. At its June 25, 1996 agenda conference, the PSC voted to acknowledge the Polk County Board's resolution transferring jurisdiction to the PSC, effective May 14, 1996.

14. On July 10, 1996, Emmer filed a Petition for Writ of Certiorari in the Circuit Court for the Tenth Judicial Circuit in and for Polk County, Florida, seeking review of the June 11, 1996 Order by Polk County.

15. On July 11, 1996, by Order No. PSC-96-0896-FOF-WS, the PSC acknowledged the Polk County Board's resolution transferring

⁵ See Composite Exhibit E to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

⁶ See Composite Exhibit F to Garden Grove Water Company Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

jurisdiction, effective May 14, 1996.⁷ The PSC Order, pursuant to Florida Statutes Section 367.171(2), required utilities seeking grandfather certificates within Polk County to have registered with the PSC by June 13, 1996, and to apply for grandfather certificates by August 12, 1996.

16. By form letter dated July 30, 1996, Charles H. Hill, Director of the PSC's Division of Water and Wastewater, advised the Applicant (and other providers of water and/or wastewater services in Polk County) to "immediately" register with the PSC.⁸ The letter further advised the Applicant (and other providers) that "in order to facilitate the application process," PSC Staff would conduct informal meetings with affected utility providers on August 20-22, 1996, in Bartow, Polk County, where PSC Staff would distribute relevant materials, and explain regulatory practices and procedures. The letter further stated that after an initial informal meeting on August 20

we will be making individual appointments to help utility owners file an application for a grandfather certificate (Section 367.171(2)(b), Florida Statutes) and/or determine whether your system qualifies as exempt from Public Service Commission regulation. Since by law you are required to file an application for grandfather certificate with the PSC within ninety days, it is important that you attend this meeting on August 20, so that you will be able to

⁷ See Exhibit G to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

⁸ See Exhibit H to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

receive your PSC Certificate.

17a. On August 6, 1996, the Applicant, through the undersigned counsel, contacted supervisory technical staff with the PSC Division of Water and Wastewater and a senior attorney with the PSC Division of Legal Services, Bureau of Water and Wastewater. They confirmed that the Applicant should immediately register with the PSC, but that, the PSC Order and statute notwithstanding, submittal of a grandfather certificate application could be deferred until after the August 20-22 meetings with PSC Staff.

b. In reliance thereon, the Applicant, 1) on August 6, 1996, dispatched its registration to the PSC by express mail;⁹ and 2) met with PSC Staff in Bartow on August 20 and 21, 1996. PSC Staff provided the Applicant with the application form, written instructions and other guidance at said meetings.

18a. Applicant thereafter prepared its application for water and wastewater grandfather certificates. The application was duly filed with the PSC on October 29, 1996, using the forms provided by PSC Staff to the Applicant.

b. It bears mentioning that rather than a slapdash venture, every good faith effort was made by Applicant to comply with the PSC's unfamiliar requirements. This is substantiated by the relatively benign "deficiency letter" issued by PSC Staff on December 3, 1996 for the October 29, 1996 application.

⁹ See Composite Exhibit I to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

19. On November 27, 1996, Emmer filed with the PSC its "Petition for Leave to Intervene, Request for Proposed Agency Action Procedures, and Response to Garden Grove Water Company's Application for a Grandfather Certificate" (sic).

20. On December 3, 1996, Emmer filed a Notice of Voluntary Dismissal of Petition for Writ of Certiorari theretofore pending in circuit court.¹⁰ Emmer therein announced that it "believes that the Public Service Commission has exclusive jurisdiction over the issues before this Court" It should be noted that prior to the December 3 voluntary dismissal, briefs had been filed by Emmer, Polk County, and the Applicant, and the parties were awaiting notice from the court for scheduling oral argument.

21. On December 9, 1996, the Applicant filed a Motion to Dismiss Emmer's Petition for Leave to Intervene, and a response to Emmer's other requests included in that pleading.

22. On December 11, the City of Lake Wales filed a Petition for Leave to Intervene in the instant proceeding.

MOTION TO DISMISS THE CITY OF LAKE WALES' PETITION
FOR LEAVE TO INTERVENE

23. Florida Administrative Code Rule 25-22.039 addresses intervention in a pending proceeding before the PSC. The rule limits intervenor status to persons "who have a substantial interest in the proceeding" and requires any petition for leave to intervene to

¹⁰ See Exhibit J to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

include allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

24. This rule is properly considered in conjunction with the long-standing test employed by the Florida courts for third party intervention in agency proceedings. The courts require that the person seeking intervenor status demonstrate (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a section 120.57 hearing, and (2) injury of the type or nature that the proceeding is designed to protect. Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982) (intervention denied where intervenor's "substantial interest was purely economic in that the intervenor simply wanted to preclude competition.")

25. The City of Lake Wales has failed to include allegations sufficient to demonstrate that it is entitled to participate in this proceeding or that its substantial interests are subject to determination or will be affected.

26. The City of Lake Wales asserts that if the PSC certifies the Applicant to serve the Emmer property, the City "will not be able to serve the Emmer Property." (Petition at p. 3)

27a. The issues of the respective rights of the Applicant and the City of Lake Wales to serve the Emmer property, and the comparative cost of extending service to such property, have

already been determined by the Board of County Commissioners of Polk County, sitting as the Polk County Utilities Commission.

b. Acting pursuant to Emmer's March 19, 1996 request for hearing, Polk County has specifically determined, that

The extension of service to land owned by Emmer by Garden Grove can be accomplished at a reasonable cost, therefore, Emmer's request is denied.¹¹

28. Emmer sought certiorari review by the circuit court of the Order denying Emmer's request to amend the Applicant's franchise area. With Emmer's December 3, 1996 filing of a Notice of Voluntary Dismissal of Petition for Writ of Certiorari, the June 11, 1996 Order by Polk County is final. Accordingly the issues of comparative cost to serve and respective authority to serve the Emmer property are res judicata.

29. The City of Lake Wales will of course argue that the Polk County resolution transferring jurisdiction to the PSC impedes the County's exercise of jurisdiction over Emmer's March 19, 1996 request to the Board. Such an argument should be summarily rejected.

30. There is indeed case law that a county resolution relinquishing regulatory powers over water and sewer utilities had the effect of superseding preexisting franchise agreements between a county and a utility. Florida Public Service Commission v.

¹¹ Polk County also made other findings regarding the differences between connection and associated AFPI charges, which it determined to not be conclusive as to the reasonableness of the cost of extension, and the federal income tax gross-up, which has since been repealed and to which Emmer is no longer subject.

Florida Cities Water Company, 446 So.2d 1111 (2nd DCA 1984). That case, however, specifically sustained the utility's post-resolution declaratory action against the County for relief from the obligation to make further franchise fee payments to the County. The case did not at all address the authority of the county to resolve cases properly pending before it at the time of adoption of the jurisdictional resolution.

31. It is well settled by case law that the PSC has only the authority expressly or implicitly conferred to it by statute. City of Cape Coral v GAC Utilities Inc. of Florida, 281 So. 2d 493, 496 (Fla. 1973). In that case, the Court stated

... the Commission's powers, duties and authority are those and only those that are conferred expressly or implicitly by statute of the State. Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof ...
(citations omitted)(emphasis added)

32. Florida Statutes Section 367.171 outlines the effectiveness of Chapter 367 when regulatory jurisdiction passes between a county and the PSC. Nowhere in Chapter 367 does the Legislature provide for the PSC to hear matters pending before a county at the time a county passes general regulatory jurisdiction to the PSC. The fact that the Legislature failed to expressly mention whether the PSC could hear matters pending before a county when general regulatory jurisdiction passes to the PSC shows that there is a reasonable doubt as to the PSC's power to hear such pending matters. Therefore, Cape Coral, supra, requires that the doubt be resolved against finding such PSC jurisdiction. The PSC

has no jurisdiction over the disputed issues of the respective authority of the Applicant and the City of Lake Wales, and their comparative costs, of serving the Emmer property.¹²

33. The City of Lake Wales' allegations as to the second requirement under the Agrico case are also ill-founded. The "injury" alleged by the City of Lake Wales is not of the type or nature that a certification proceeding under grandfather rights is designed to protect.

34. Florida Statutes Section 367.171(2) provides as follows:

(a) Within 30 days after this chapter becomes applicable to a county, each utility shall register by filing with the commission a written statement setting forth the full legal name of the utility, its mailing address, and a brief description of its service area.

(b) On the day this chapter becomes applicable to any county, any utility engaged in the operation or construction of a system shall be entitled to receive a certificate for the area served by such utility on the day this chapter becomes applicable to it. Within 90 days after the day this chapter becomes applicable to it, the utility shall make application for a certificate by filing with the commission:

1. A map of its existing system or system under construction;
2. A description of the area served by the system; and
3. A tariff listing all rates and charges and such other financial information as may be required by the commission.

¹² This precise line of argument is taken virtually verbatim, as made by the PSC, and accepted by the court, in West Charlotte Utilities, Inc. v. the Board of County Commissioners, Charlotte County, in Case No. 94-1839-CA, before the Circuit Court of the Twentieth Judicial Circuit. See Composite Exhibit K to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene, which is incorporated herein by reference.

Such application shall be accompanied by a fee as provided by s. 367.145. If a utility fails to register with the commission within the prescribed time, the commission may require that the utility apply for an original certificate of authorization in accordance with s. 367.045.

35. It is undisputed that the Applicant did not register with the PSC within thirty (30) days after Chapter 367 became applicable to Polk County. It is undisputed that the Applicant did not file an application for grandfather certificates within ninety (90) days after Chapter 367 became applicable to Polk County. The extenuating circumstances described in the Background section of this submittal aside, none of these omissions negate the PSC's authority to grant certification under grandfather rights to what it deems to be a qualifying applicant.

36. The purpose of a certificate under grandfather rights under Florida Statutes Section 367.171(2) is in keeping with traditional notions of grandfather clauses. This type of certification is favored under Florida law because it tends to protect rights either existing or in the process of being obtained as applicable law or regulatory jurisdiction changes. As such, the legislative intent expressed in Section 367.171(2), of entitlement to a certificate, should be liberally construed. This has in fact been consistent PSC practice for many, many years.¹³ That the Applicant did not perfect its rights in strict conformance with the

¹³ See, for example, Order No. PSC-95-0966-FOF-WU (August 8, 1995); Order No. PSC-94-0234-FOF-WU (March 3, 1994); Order No. PSC-93-1380-FOF-WU (September 20, 1993); Order No. PSC-92-0866-FOF-WU (August 25, 1992). Older PSC cases include Order No. 12989 (February 13, 1984) and Order No. 11604 (February 11, 1983).

statute, in reasonable and good faith reliance on Commission Staff's direction, should not impair the Applicant's rights under the statute.

37a. In this regard, the PSC should not overlook, as the City of Lake Wales does, that the franchise granted in 1987 to the Applicant by Polk County is a property right as a matter of law. See, for example, City of Mount Dora v. JJ's Mobile Homes, 579 So.2d 219 (5th DCA 1991), at pp 223-224. As a matter of law, the Applicant, upon filing its application for grandfather certificates, became automatically entitled to certificates authorizing it to operate in the same franchise territory. See Florida Public Service Commission v. Florida Cities Water Company, 446 So. 2d 1111 (2nd DCA 1984), at 1113.

b. These principles may be conditioned upon a determination by the PSC and the Courts to determine among other things whether there is a need for service, and whether the Applicant is ready, willing and able to render service. However, in the instant controversy, Emmer clearly needs service, and it is undisputed that the Applicant is ready, willing and able to provide such service.

38a. The City of Lake Wales cites two prior PSC orders¹⁴ which allowed intervention in grandfather certificate proceedings. These orders are readily distinguished from the instant proceedings.

b. The petitions for leave to intervene granted by both

¹⁴ Order No. 19943 (June 6, 1982); Order No. PSC-93-1610-PCO-SU. (November 3, 1993).

such orders were not opposed. Accordingly, neither order was issued by the full PSC. The 1988 order was issued by the prehearing officer. The 1993 Order was issued administratively by PSC Staff.

c. Further, the substantial interests alleged by the intervenors in both cases was that the territory sought by the respective grandfather certificate applicants was already served by the intervenors.

d. It is undisputed in the instant case that the City of Lake Wales does not serve the Emmer property. Further, it is undisputed that the authority under which the City of Lake Wales purports to justify serving the Emmer property is one which it acquired through a scrivener's error. Most compellingly, the issues of respective authority to serve the Emmer property has, as previously discussed, been litigated before the Polk County Utilities Commission, at the request of the would-be intervenors in the instant proceeding. None of these factors were remotely present in the "precedents" advanced by the City of Lake Wales.

39. This docket was established to consider nothing more or less than Applicant's request under grandfather rights to preserve its entitlement to continue its authority to serve certain territory which Polk County had authorized it to serve, at rates and charges which were lawfully in effect at the time of the jurisdictional transfer. So long as the Applicant does not seek to enlarge that previously-granted authority, the attempt by the City of Lake Wales and Emmer to convert this proceeding into an original certification under Florida Statutes Section 367.045 should be

rejected. The City of Lake Wales does not have standing to seek such relief as a party to this proceeding. This proceeding is not designed or intended to redress the purported "injury" for which the City of Lake Wales seeks redress.

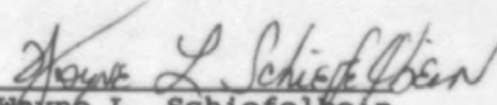
ADDITIONAL COMMENTS

40. In its Petition, the City of Lake Wales "supports and adopts the arguments of Emmer in response to Garden Grove's Application." (petition, at p. 6) Accordingly, the Applicant hereby re-alleges and incorporates by reference its own Response to Emmer Development Corp.'s "Request for Proposed Agency Action Procedures and Response to ... Application for a Grandfather Certificate," in its entirety.

41. The PSC should also be aware that on December 17, 1996, the Board of County Commissioners of Polk County voted to seek leave to intervene in the instant proceeding.

Wherefore, the Applicant, Garden Grove Water Company, Inc., requests that the City of Lake Wales' Petition for Leave to Intervene be denied.

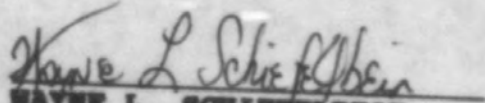
Respectfully submitted,


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(904) 877-7191

Attorneys for
Garden Grove Water Company, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to D. Bruce May, Esquire, Holland & Knight, 315 South Calhoun Street, Suite 600, Tallahassee, Florida, 32301 and Kathleen M. Johnson, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida, 32399-0850, and by facsimile service to Albert C. Galloway, Jr., City Attorney, City of Lake Wales, at (941) 676-3695, with a copy sent by U.S. Mail to Mr. Galloway at P.O. Box 1260, Lake Wales, FL 33859-1260, on this 17th day of December, 1996.


WAYNE L. SCHIEFELBEIN