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November 27, 1996

D. BRUCE MAY
904-426-5607

VIA HAND DELIVERY

**Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850**

Re: Application for Certificate to Operate a Water and Wastewater Utility in Polk County by Garden Grove Water Company, Inc., Docket No. 961299-WS

Dear Ms. Bayo:

Enclosed for filing in the docket referenced above are the original and 15 copies of Emmer Development Corp.'s Petition for Leave to Intervene, Request for Proposed Agency Action Procedures, and Response to Garden Grove Water Company's Application for a Grandfather Certificate. Please note that Emmer has requested that the prehearing officer consider the petition to intervene on an expedited basis. Finally, please acknowledge your receipt of this filing on the enclosed copy of this letter.

Thank you for your consideration.

Sincerely,

HOLLAND & KNIGHT

D. Bruce May

ACK _____
AF1 _____
AF2 _____
CA _____
CL _____
CO _____
E _____
1 Enclosure
DBM/sms

cc: **Alice Crosby, Esq.
Wayne Schiefelbein, Esq.
Honorable Terry Deason, Prehearing Officer
Claude Moulton, Esq.**

1 TAL-96940

DOCUMENT NUMBER DATE

12703 NOV 27 96

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for certificate)
to operate a water and wastewater)
utility in Polk County by Garden)
Grove Water Company, Inc.)
/

Docket No. 961299-WS
Filed: November 27, 1996

EMMER DEVELOPMENT CORP.'S PETITION FOR LEAVE TO INTERVENE, REQUEST FOR PROPOSED AGENCY ACTION PROCEDURES, AND RESPONSE TO GARDEN GROVE WATER COMPANY'S APPLICATION FOR A GRANDFATHER CERTIFICATE

Emmer Development Corp. ("Emmer"), pursuant to Rules 25-22.036(7) and 25-22.039, Florida Administrative Code, hereby petitions the Florida Public Service Commission (the "Commission") for leave to intervene in this proceeding, and responds to Garden Grove Water Company, Inc.'s ("Garden Grove") Application for a Grandfather Certificate (the "Application"). For the reasons below, Emmer respectfully requests: (1) that the Pre-Hearing Officer expeditiously grant Emmer leave to intervene in this proceeding; and (2) that the Commission, using its Proposed Agency Action ("PAA") procedures, deny the Application to the extent that Garden Grove seeks to serve Emmer's property in Polk County, Florida.

PETITION FOR LEAVE TO INTERVENE

Intervenor Information

1. Emmer is a Florida corporation involved in commercial and residential development. Emmer's full name and address are:

Emmer Development Corp.
2801 S.W. Archer Road
Gainesville, FL 32608

DOCUMENT NUMBER DATE

12703 NOV 27 96

FPSC-RECORDS/REPORTING

2. Copies of pleadings, notices and other documents should be served on:

D. Bruce May
Karen D. Walker
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, FL 32302

Claude Moulton, Esq.
General Counsel
Emmer Development Corp.
2801 S.W. Archer Road
Gainesville, FL 32608

Statement of Ultimate Facts

3. Emmer owns approximately 313 acres on Thomas Nursery Road in Section 18 and 19 of Township 29 South, Range 27 East, Polk County, Florida (the "Emmer Property"). Emmer plans to develop a mixed-use subdivision on the Emmer Property including 592 single-family residences, a 300 unit apartment complex, privately maintained roads, and supporting neighborhood commercial development.

4. The City of Lake Wales ("Lake Wales") is ready, willing and able to provide water and wastewater service to the Emmer Property. However, as described below, Garden Grove has requested that the Commission certificate it to serve the Emmer Property.

5. Garden Grove has never provided water or wastewater service to the Emmer Property, nor has it extended its facilities to serve the Emmer Property. Indeed, Garden Grove's facilities are not even in the remote vicinity of the Emmer Property.

6. On May 14, 1996 the Board of County Commissioners of Polk County adopted a resolution pursuant to Section 367.171, Florida Statutes, declaring that water and wastewater utilities in Polk County are subject to the Commission's jurisdiction under Chapter 367, Florida Statutes. The Commission acknowledged the transfer of jurisdiction effective May 14, 1996, by order issued July 11, 1996. In Re: Resolution of Board of Commissioners of Polk County declaring Polk County subject to provisions of Chapter 367, F.S., 96 F.P.S.C. 7:311, 312, Docket No. 960674-WS, Order No. PSC-96-0896-FOF-WS (July 11, 1996).

7. On October 29, 1996, Garden Grove filed its Application with the Commission.¹ Exhibit IV-A to Garden Grove's Application describes the territory to be served. This territory includes the Emmer Property.

8. Water and wastewater service to the Emmer Property by Lake Wales would be more efficient than service by Garden Grove because Lake Wales' facilities are closer to the Emmer Property. Additionally, Lake Wales can provide the Emmer Property with better service at a significantly lower cost. Emmer, therefore, desires that service be provided by Lake Wales, and not Garden Grove.²

¹ As set forth in more detail below, Section 367.171(2), Florida Statutes, and Order No. PSC-96-0896-FOF-WS required an application for a grandfather certificate for a water and/or wastewater utility in Polk County, such as Garden Grove, to be filed within 90 days of the date that Polk County transferred jurisdiction to the Commission. This 90 day deadline expired on August 12, 1996.

² Lake Wales is exempt from Commission regulation under Chapter 367, and therefore, is not required to be certificated to serve the Emmer Property. See § 367.022(2), Fla. Stat. (Supp. 1996).

Substantial Interest Affected

9. Emmer is substantially affected by these proceedings, and thus, is entitled to participate as a party in this docket. In order to have standing, an entity must demonstrate: (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a formal proceeding; and (2) that its injury is of a type or nature which the proceeding is designed to protect. Agrico Chem. Co. v. Department of Env. Reg., 406 So.2d 478, 482 (Fla. 1st DCA 1981), review denied, 415 So.2d 1361 (Fla. 1982). Emmer's substantial interest is affected by this docket because the Commission will determine whether Garden Grove should be certificated to serve the Emmer Property. If Garden Grove is certificated, Emmer will suffer immediate injury because service to the Emmer Property will be less efficient and at a higher cost than if service is provided by Lake Wales. The increased cost for Garden Grove to serve the Emmer Property will be borne by Emmer. As a potential customer of Garden Grove, the injury to Garden Grove is the type that this proceeding is designed to protect. See § 367.045(4), Fla. Stat. (Supp. 1996) (recognizing the right of a consumer who would be substantially affected by the requested certification to participate and request a formal hearing in the certification proceedings). Therefore, because Emmer's substantial interests will be determined by the Commission in this proceeding and such interests are of the very nature which this proceeding is designed to protect, Emmer has standing and is entitled to intervene to protect its interests.

10. As described in detail below, a cloud of uncertainty does now, and will continue to, hang over the Emmer Property until the Commission determines whether

Emmer will have to expend the excessive costs and resources that would be associated with Garden Grove serving the Emmer Property. Prompt resolution of this proceeding is necessary for Emmer to protect its financial interest in the Emmer Property. Emmer stands ready and able to immediately proceed as a party in this docket and desires to initiate discovery as soon as possible. Therefore, Emmer respectfully requests that the Pre-Hearing Officer expeditiously grant Emmer full party status in this proceeding.

REQUEST FOR USE OF PAA PROCEDURES

11. Emmer respectfully requests that the Commission process Garden Grove's Application using its PAA procedures. The PAA process is designed to eliminate unnecessary litigation while preserving the parties' rights to request a hearing. See In Re: Investigation into IntraLATA Presubscription, 95 F.P.S.C. 7:360, 365, Docket No. 930330-TP, Order No. PSC-95-0918-FOF-TP (July 31, 1995).³ Emmer believes that the PAA process could eliminate unnecessary litigation by providing the parties with guidance as to the direction the Commission will take prior to the parties, the Commission, and Commission staff expending time and resources associated with a full-blown evidentiary hearing.

12. In addition, the PAA process will allow the Commission to address Garden Grove's application in a more expeditious fashion. The potential for the Emmer Property to be subject to Garden Grove's high-cost service will continue to negatively impact the Emmer Property until the Commission renders a decision in this docket.

³ By seeking PAA procedures, Emmer does not waive its rights to request an evidentiary hearing in this docket.

Therefore, prompt resolution of Garden Grove's application is necessary to protect Emmer's interest in the Emmer Property.

13. As discussed in detail below, Garden Grove has not followed the appropriate procedures for grandfather certification. Therefore, Garden Grove must either re-apply for original certification, or the Commission must address Garden Grove's Application through the PAA process. Original certification, but not grandfather certification, requires that the utility comply with specific procedures, including certain notice requirements. The Commission has recognized that where an application for original certification is improperly filed as an application for grandfather certification, the notice requirements may be met if the Commission addresses the application through its PAA procedures. In re: Application of Homosassa Utilities, Inc. for water and sewer certificates under grandfather rights, Sumter County, Florida, 88 F.P.S.C. 8:232, Docket No. 880013-WS, Order No. 19848 (Aug. 22, 1988). For these reasons, the Commission should use its PAA procedures in this docket. However, should the Commission decide not to use its PAA procedures to address Garden Grove's Application, Emmer requests that the Commission conduct a formal evidentiary hearing pursuant to Section 120.57(1), Florida Statutes.

RESPONSE TO GARDEN GROVE'S APPLICATION

Jurisdiction

14. Section 367.171, Florida Statutes, provides that Chapter 367, Florida Statutes, becomes effective immediately in a county upon the adoption by the county commission of a resolution transferring jurisdiction to the Commission. As previously

stated, on May 14, 1996, the Board of County Commissioners of Polk County adopted a resolution declaring that water and wastewater utilities in Polk County are subject to Chapter 367. The resolution relinquishing jurisdiction over water and wastewater utilities in Polk County supersedes the preexisting franchise agreement between Polk County and Garden Grove. Florida Public Service Commission v. Florida Cities Water Company, 446 So. 2d 1111, 1113 (Fla. 2d DCA 1984). Accordingly, on May 14, 1996, the Commission obtained exclusive jurisdiction to determine whether Garden Grove or Lake Wales should serve the Emmer Property. ("Chapter 367 provides that when utility regulation is relinquished by the county, the [C]ommission obtains the exclusive jurisdiction over each utility with respect to its authority, service, and rates."). Id.⁴

Garden Grove Is Not Entitled to a Grandfather Certificate

15. Section 367.171(2), Florida Statutes, establishes the procedures that a utility must follow to obtain a grandfather certificate. These procedures require the utility to file an application for a grandfather certificate with the Commission within 90 days after the day that Chapter 367 becomes applicable to the utility. § 367.171(2)(a), Fla. Stat. (Supp. 1996) ("[w]ithin 90 days after the day this chapter

⁴ Although the Commission may consider the preference of a county for a particular utility to serve a disputed area when expressed as part of the county's local comprehensive plan, the Commission is not bound by, nor is it required to give any weight to, the county's preference. See In re: Objections by ST. JOHNS NORTH UTILITY CORP. and GENERAL DEVELOPMENT UTILITIES, INC. to Notice by SUNRAY UTILITIES, INC. to Intention to Apply for Original Certificates Authorizing Water and Sewer Service in St. Johns County, 88 F.P.S.C. 6:41, 62, Docket No. 870539-WS, Order No. 19428 (June 6, 1988). There does not appear to be anything in Polk County's comprehensive plan expressing a preference that Garden Grove serve the Emmer Property.

becomes applicable to it, the utility shall make application for a [grandfather] certificate. . ."). Garden Grove failed to follow the required procedures and failed to meet the statutory deadlines.

16. Chapter 367 became applicable to Garden Grove on May 14, 1996. In Order No. PSC-96-0896-FOF-WS, the Commission acknowledged the resolution of the Board of County Commissioners of Polk County declaring Polk County to be subject to Chapter 367. In Re: Resolution of Board of Commissioners of Polk County declaring Polk County subject to provisions of Chapter 367, F.S., 96 F.P.S.C. 7:311, 312, Docket No. 960674-WS, Order No. PSC-96-0896-FOF-WS (July 11, 1996). The Commission also instructed Polk County water and wastewater utilities to comply with the procedures set forth in the order acknowledging the transfer of jurisdiction. Id. at 313. The procedures described in the order are those established by Section 367.171(2), Florida Statutes. The order states in pertinent part:

Each utility desiring to obtain a grandfather certificate for the area served by such utility as of May 14, 1996, shall make application to this Commission pursuant to Section 367.171(2)(b), Florida Statutes, within ninety (90) days of the date this Commission received jurisdiction, or by August 12, 1996.

Id. at 312 (emphasis added).

17. Garden Grove did not file its Application within 90 days of the date the Commission received jurisdiction which period expired on August 12, 1996. Rather, Garden Grove filed its Application on October 29, 1996 -- 168 days after the date the Commission received jurisdiction.

18. Under the grandfather certification procedures, there is a presumption that a utility is entitled to a certificate for the area served on the day that Chapter 367 becomes applicable to the utility. § 367.171(2)(b), Fla. Stat. (1995). The grandfather certification procedures also relieve a utility from complying with the notice requirements of an original certification proceeding pursuant to Section 367.045, Florida Statutes. Section 367.171(2) clearly provides that the benefits of grandfather certification are only available during the 90 day window following attachment of the Commission's jurisdiction. Outside of this 90 day window, a utility must apply for an original certificate of authority in accordance with Section 367.045. Because Garden Grove did not file its Application with the Commission within 90 days following the date that it became subject to Chapter 367, Garden Grove is not entitled to a grandfather certificate or the presumption and other benefits attendant to a grandfather certification proceeding.

19. Even assuming that Garden Grove complied with the procedures for obtaining a grandfather certificate under Section 367.171(2), Garden Grove is not entitled to a grandfather certificate that includes the Emmer Property. Section 367.171(2)(b) states:

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.

§ 367.171(2)(b), Fla. Stat. (Supp. 1996) (emphasis added).

20. It is undisputed that Garden Grove was not serving the Emmer Property on the day that it became subject to Chapter 367. Indeed, Garden Grove has never

provided service to the Emmer Property, nor has it ever extended its facilities to serve the Emmer Property.

21. The Commission has expressly stated that "a grandfather certificate is specifically limited to the area served when the Commission acquired jurisdiction." In re: Show cause proceedings against ST. JOHNS NORTH UTILITIES, in St. Johns County for violations of Chapter 367, Florida Statutes, 88 F.P.S.C. 12:31, 31, Docket No. 881425-WS, Order No. 20409 (Dec. 5, 1988). Therefore, in accordance with the express language in Section 367.171(2) and Commission precedent, Garden Grove is not entitled to a grandfather certificate that includes the Emmer Property. The only means by which Garden Grove may be certificated to serve the Emmer Property is through the original certification procedures in Section 367.045.

Garden Grove Is Not Entitled to An Original Certificate To Serve the Emmer Property

22. Not only should the Commission deny Garden Grove's request for a grandfather certificate to serve the Emmer Property, but it should also deny a request by Garden Grove for an original certificate to serve the Emmer Property. The Commission's original certification procedures vest the Commission with the authority to deny a certificate of authorization if such denial is in the public interest. § 367.045(5)(a), Fla. Stat. (Supp. 1996). In evaluating whether to grant or deny a certificate of authorization, the Commission may consider the technical and financial ability of the applicant to provide service and whether any other utilities within the area proposed to be served could provide service. Fla. Admin. Code R. 25-30.033(1)(e).

23. The legislature has adopted guidelines for the Commission in determining whether to delete an area previously certificated. These guidelines also provide direction as to whether the Commission should grant certification in the first place.

Section 367.111, Florida Statutes, states in pertinent part:

If the commission finds that any utility has failed to provide service to any person reasonably entitled thereto, or finds that extension of service to any such person could be accomplished only at an unreasonable cost and that addition of the deleted area to that of another utility company is economical and feasible, it may amend the certificate of authorization to delete the area not served or not properly served by the utility, or it may rescind the certificate of authorization. . . .

§ 367.111, Fla. Stat. (1995) (emphasis added). Service by Garden Grove to the Emmer Property can be accomplished only at an unreasonable cost when compared to the cost of Lake Wales serving the Emmer Property. Service by Lakes Wales to the Emmer Property would be both economic and feasible. Accordingly, the Emmer Property would not be properly served by Garden Grove and any application for certification should be denied.

24. The cost differential between Garden Grove and Lake Wales providing service to the Emmer Property is significant. Based on Garden Grove's own information, the cost of Garden Grove serving the Emmer Property is approximately \$2 million greater than the cost of Lake Wales serving the Emmer Property. This means that the cost for Garden Grove to serve the Emmer Property is more than 200% higher than the cost for Lake Wales to serve the Emmer Property. This sizable cost differential evidences the unreasonableness of Garden Grove serving the Emmer Property when service by Lake Wales is feasible.

25. The majority of the estimated cost differential relates to charges that Garden Grove, as a private utility, will pass through to Emmer. These charges include, but are not limited to, Equivalent Residential Connection ("ERC") charges and Allowance for Funds Prudently Invested ("AFPI").⁵ These charges have not been the subject of scrutiny by the Commission and each should be fully evaluated in an original certification proceeding to determine whether they are reasonable and prudent.

26. In addition to evaluating the proposed cost of Garden Grove serving the Emmer Property, the Commission should also scrutinize what appear from the face of Garden Grove's Application to be affiliated transactions. John G. Wood, Sr. is President of Garden Grove. John G. Wood, Jr. is Vice-President. Part II of Garden Grove's Application contains three different deeds where property was sold to Garden Grove by John G. Wood & Associates, Inc. and/or John G. Wood. See Application, at Exhibits II-A-6-b, II-A-6-d, and II-A-6-f. In the past, the Commission has recognized that it is "appropriate . . . to give close scrutiny to transactions between affiliated companies." In re: Application for a rate increase in Marion County by SUNSHINE UTILITIES OF CENTRAL FLORIDA, INC., Docket No. 900386-WU, 92 F.P.S.C. 2:345, 352, Order No. 25722 (Feb. 13, 1992). This approach was affirmed by the First District Court of Appeal. Sunshine Utilities of Central Florida, Inc. v. Florida Public Service Commission, 624 So.2d 306, 309-10 (Fla. 1st DCA 1993). The Commission should closely scrutinize whether the transactions between John G. Wood and/or John G.

⁵ The cost differential also includes the cost to run a line for the utility's facility to the boarder of the Emmer Property.

Wood & Associates, Inc. and Garden Grove were lawful, reasonable and prudent from the perspective of the ratepayer.

Disputed Issues of Material Fact

27. Emmer is aware of the following disputed issues of material fact at this time:

- (a) whether Garden Grove's AFPI is reasonable and prudent;**
- (b) whether Garden Grove's ERC charges are reasonable and prudent;**
- (c) whether Garden Grove's rates are properly structured and not discriminatory;**
- (d) whether the cost of Garden Grove providing service to the Emmer Property is reasonable;**
- (e) whether service by Lake Wales to the Emmer Property is economical and feasible; and**
- (f) whether Garden Grove can provide quality service to the Emmer Property.**

28. Emmer is also aware of disputed mixed issues of fact and law, which include, but are not limited to, the following:

- (a) whether Garden Grove has complied with the procedures in Section 367.171, Florida Statutes, for obtaining a grandfather certificate;**
- (b) whether Garden Grove is entitled to a grandfather certificate that includes the Emmer Property because Garden Grove was not serving the**

- Emmer Property when jurisdiction was transferred to the Commission;**
- (c) whether Garden Grove is entitled to an original certificate to serve the Emmer Property when its cost to serve substantially exceeds that of Lake Wales' cost to serve;**
 - (d) whether Garden Grove was a party to affiliated transactions that were unlawful, unreasonable or imprudent; and**
 - (e) whether it is in the public interest for Lake Wales, and not Garden Grove, to serve the Emmer Property.**

Basic Position

29. Emmer's basic position is that the Commission should not certificate Garden Grove to serve the Emmer Property. Garden Grove is not entitled to a grandfather certificate under Section 367.171, Florida Statutes, because it did not follow the appropriate procedures and Garden Grove was not serving the Emmer Property when jurisdiction was transferred to the Commission. Additionally, Garden Grove is not entitled to an original certificate to serve the Emmer Property because Garden Grove can only provide service to the Emmer Property at an unreasonable cost when service by Lake Wales is both economical and feasible.

WHEREFORE, Emmer respectfully requests that the Commission:

- (a) expeditiously grant Emmer full party status in this proceeding;**
- (b) address Garden Grove's Application through its PAA Procedures;**

- (c) deny Garden Grove's Application to serve the Emmer Property; and
- (d) grant such other relief as the Commission deems appropriate.

Respectfully submitted,



D. Bruce May
Florida Bar No. 354473
Karen D. Walker
Florida Bar No. 0982921
HOLLAND & KNIGHT
P.O. Drawer 810
Tallahassee, FL 32302
(904) 224-7000

**Attorneys for Emmer
Development Corp.**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Hand Delivery to Alice Crosby, Staff Counsel, Florida Public Service Commission 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and Wayne Shiefelbein, Gatlin Woods & Carlson, 1709-D Mahan Drive, Tallahassee, Florida 32308 this 27th day of November, 1996.



Karen D. Walker

TAL-96498.3