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December 16, 1996

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**D. BRUCE MAY**  
904-425-5607

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

**Via Hand Delivery**

Re: 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

Dear Ms. Bayo:

Enclosed for filing in the docket referenced above are the original and 15 copies of Emmer Development Corp.'s Memorandum in Opposition to Garden Grove Water Company, Inc.'s Motion to Dismiss, and Emmer Development Corp.'s Request for Oral Argument. For purposes of our records, please acknowledge your receipt of this filing on the enclosed copy of this letter.

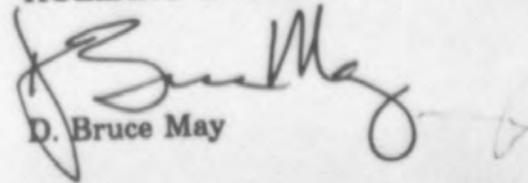
This letter also serves to notify of a typographical error in Emmer Development Corp.'s Petition for Leave to Intervene, Request for Proposed Agency Action Procedures and Response to Garden Grove Water Company's Application for a Grandfather Certificate filed in the above-referenced docket on November 27, 1996. In the third sentence of paragraph 24 on page 11, the phrase "is more than 200%" should read "is more than 130%". Please note this correction.

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
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- RCH \_\_\_\_\_
- SEC \_\_\_\_\_
- WAS \_\_\_\_\_
- OTH \_\_\_\_\_

Thank you for your consideration in this matter.

Sincerely,

HOLLAND & KNIGHT



D. Bruce May

DOCUMENT NUMBER - DATE  
**13365 DEC 16 96**  
FPSC-RECORDS/REPORTING

DOCUMENT NUMBER - DATE  
**13364 DEC 16 96**  
FPSC-RECORDS/REPORTING

Enclosure  
DBM/sms

*Golden  
Copy Cover & etc  
for each filing*

Ms. Blanca S. Bayo, Director  
December 16, 1996  
Page 2

cc: All parties of record  
Claude Moulton, Esq.

TAL-97452

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL  
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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: December 16, 1996

**EMMER DEVELOPMENT CORP.'S MEMORANDUM IN OPPOSITION  
TO GARDEN GROVE WATER COMPANY, INC.'S MOTION TO DISMISS**

Emmer Development Corp. ("Emmer"), by and through undersigned counsel, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code, submits this Memorandum in Opposition to Garden Grove Water Company, Inc.'s ("Garden Grove") Motion to Dismiss ("Motion"). In its Motion, Garden Grove admits that it did not file its Application for Grandfather Certificate (the "Application") with the Florida Public Service Commission (the "Commission") within 90 days after the Commission acquired jurisdiction over Polk County utilities as required by Section 367.171(2), Florida Statutes, and Order No. PSC-96-0896-FOF-WS. [Motion at p. 12, ¶ 36.] Garden Grove also admits that it was not actually serving the Emmer Property<sup>1</sup> on the date that the Commission acquired jurisdiction over Garden Grove, and that it is not serving the Emmer Property today. [Motion at p. 16, ¶ 44b.] Despite these admissions, Garden Grove asserts that Emmer has no standing to intervene in this proceeding and that Garden Grove is entitled to a grandfather certificate to serve the Emmer Property. Both of these assertions are not supported by the facts, by Florida

<sup>1</sup> For purposes of this Memorandum, the "Emmer Property" means the approximately 313 acres on Thomas Nursery Road in Sections 18 and 19 of Township 29 South, Range 27 East, Polk County, Florida, that is owned by Emmer.

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law or by Commission precedent. Accordingly, Garden Grove's Motion cannot serve to deprive Emmer of its right to participate in this certification proceeding.

**A. Emmer Has Standing to Participate as a Party  
in This Proceeding.**

1. Emmer and Garden Grove agree that 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 satisfies both of these requirements and, therefore, is entitled to participate as a party to this proceeding.

2. Garden Grove suggests that Emmer has not suffered any injury in fact because it has no right to compel service by a particular utility. In support of this argument, Garden Grove cites to Storey v. Mayo, 217 So. 2d 304 (Fla. 1968), cert. denied, 395 U.S. 909 (1969). This citation is misplaced. In Storey, customers within the territory of a municipal utility, as established by a territorial agreement approved by the Commission, were attempting to compel service by a privately-owned utility. Id. at 307-08. The court did not hold that the customers did not have standing. Rather, the court held that where the Commission has approved a territorial agreement, customers cannot compel service by a particular utility in contravention of the territorial agreement. Id. at 308. This docket does not involve a territorial agreement approved by the Commission. Rather, it involves a request by a utility for certification by the Commission.

3. Emmer is directly and substantially affected by any action taken by the Commission in response to Garden Grove's Application. Emmer owns property which is wholly within the area for which Garden Grove seeks Commission certification. The action taken by the Commission in this proceeding will directly and substantially impact the provision of safe, adequate, reliable and sufficient water and wastewater service to its property, and will substantially impact Emmer's ability to proceed with the development and sale of its property. Such interests have been found by the Commission to be substantial interests that entitle a developer to intervention in a certification proceeding. See In re: Application for transfer of Certificates Nos. 272-W and 215-S from HARBOR UTILITIES, INC. to BONITA SPRINGS WATER SYSTEM, INC. and transfer of certain assets to the Municipal Service Benefit Unit formed by Lee County, 91 F.P.S.C. 12:449, 450, Docket No. 910901-WS, Order No. 25525 (Dec. 24, 1991). The injury that Emmer will suffer if Garden Grove is certificated to serve the Emmer Property is of sufficient immediacy because Emmer will be required to pay charges to Garden Grove which are significantly higher than charges imposed by the City of Lake Wales. Furthermore, the higher charges will inflate construction costs and thus immediately affect Emmer's ability to move forward with the development of the Emmer Property.

4. The injury to Emmer is the very type which certification proceedings such as this are designed to protect. Certification proceedings are conducted so that the Commission can fully evaluate whether it is in the public interest to grant a water and wastewater utility an exclusive right to serve a particular geographic area. In making

this public interest determination, it is the Commission's responsibility to address the impact of a utility's services and rates on customers located within the requested service area. Thus, the service and rate impacts on Emmer are precisely the type of injuries that this proceeding is designed to protect.

5. Garden Grove seeks to exclude Emmer from participating in this proceeding by arguing that this is a grandfather proceeding and that Garden Grove is entitled to serve the Emmer Property as a matter of right. Garden Grove is wrong. Garden Grove is not entitled to a grandfather certificate to serve the Emmer Property because it did not file its Application within 90 days of the date that the Commission obtained jurisdiction, and because Garden Grove has never provided service to the Emmer Property.

6. The deadline for filing an application for a grandfather certificate is clear in both Section 367.171(2)(b), Florida Statutes, and Order No. PSC-96-0896-FOF-WS. Section 367.171(2)(b) states that: "Within 90 days after the day this chapter becomes applicable to it, the utility shall make application for a certificate. . . ." § 367.171(2)(b), Fla. Stat. (Supp. 1996) (emphasis added). Order No. PSC-96-0896-FOF-WS states that: "Each utility desiring to obtain a grandfather certificate for the area served by the 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." 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, 311, Docket No. 960674-WS, Order No. PSC-96-0896-FOF-WS (July 11, 1996).

7. Garden Grove admits that it did not file its Application within 90 days of the date that the Commission received jurisdiction, but argues that it is still entitled to grandfather certification based on representations made by Commission staff that the submittal of its Application could be deferred until after the August 20, 1996 meeting between staff and Polk County utilities. [Motion at p. 12, ¶ 36.] Although Emmer has great respect for Commission staff, Emmer recognizes that "[s]taff cannot bind the Commission." See In re: Complaint of HUGH KEITH against BEVERLY BEACH ENTERPRISES, INC. d/b/a BEVERLY BEACH SURFSIDE UTILITY CO. for over charge of contributions-in-aid-of-construction in Flagler County, 90 F.P.S.C. 2:440, 450, Docket No. 890450-WS, Order No. 22605 (Feb. 26, 1990); see also In Re: Standard Offer contract for the purchase of firm capacity and energy from a qualifying facility between Panda-Kathleen, L.P. and Florida Power Corporation, 96 F.P.S.C. 5:379, 381, Docket No. 950110-EI, Order No. PSC-96-0671-FOF-EI (May 20, 1996) (Panda's alleged reliance on staff's representations did not authorize Panda to build a 115 MW facility to serve its standard offer contract when such facility would be in violation of the Commission's rules). Additionally, staff cannot waive the requirements of a statutory provision or an order of the Commission, including the requirement that an application for a grandfather certificate shall be filed within 90 days of the date that the Commission acquires jurisdiction.

8. Garden Grove also admits that it was not serving the Emmer Property on May 14, 1996. Again, the language in both Section 367.171(2)(b) and Order No. PSC-96-0896-FOF-WS is clear. Section 367.171(2)(b) states that: "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). Order No. PSC-96-0896-FOF-WS states that: "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. . . ." 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, 311-12, Docket No. 960674-WS, Order No. PSC-96-0896-FOF-WS (July 11, 1996).

9. Garden Grove points the Commission to Rule 25-30.035(9), Florida Administrative Code, in arguing that it can receive a grandfather certificate for area that it was not serving on May 14, 1996. Rule 25-30.035(9) merely requires a utility to identify the territory that it was previously authorized to serve in addition to the territory that it was actually serving when applying for a grandfather certificate. It by no means authorizes the Commission to issue a grandfather certificate for area other than that which the utility was actually serving on the day that jurisdiction was transferred to the Commission. If the rule was intended to provide such authorization to the Commission, it would be in direct contravention of Section 367.171(2)(b) and would also violate Section 120.536, Florida Statutes, which requires a rule to be based



on specific legislative authority. Further, subsection (10) of Rule 25-30.035 requires a utility applying for a grandfather certificate to specifically identify any territory not served. If the Commission had the authority to grant grandfather certification for such area, there would be no need for it to be specifically identified.

10. Garden Grove has conceded that the Commission has historically applied a literal interpretation of Section 367.171(2)(b) and denied requests to extend grandfather rights beyond the area served as of the jurisdictional date. [Motion at pp. 18-19, ¶45c.] The rationale behind limiting grandfather certification to the area already served is tied to the lack of a notice requirement in the grandfather certification procedures. If a customer is already being served by a utility, then there is no need to notify the customer that the utility will be serving it under a certificate issued by the Commission. However, where area is not already being served, there is a compelling need to notify unsuspecting customers of the intent of a utility to provide service to the area. This is reflected in the extensive notice requirements for original certification proceedings, or for extending or deleting a portion of a service area. See § 367.045(1)(a), (2)(b), Fla. Stat. (Supp. 1996).

11. Garden Grove attempts to avoid the clear language of Section 367.171(2)(b) and Order No. PSC-96-0896-FOF-WS by focusing on the fact that Garden Grove at one point in time was a party to a franchise agreement with the Board of County Commissioners of Polk County (the "Polk County Commission") that included the Emmer Property. Garden Grove cites to City of Mount Dora v. JJ's Mobile Homes, Inc., 579 So. 2d 219, 223 (Fla. 5th DCA 1991) for the proposition that a franchise

agreement constitutes a property right. The JJ's case, however, does not indicate that a property right associated with a franchise agreement exists in perpetuity. In addition, the terms of the franchise agreement between the Polk County Commission and Garden Grove indicate that it may be rendered ineffective by operation of the ordinances, rules and regulations of the Polk County Commission, the Polk County Utilities Commission (the "Polk Utilities Commission") or applicable Florida law. Although the franchise agreement between the Polk County Commission and Garden Grove may have constituted a property right when it was valid and effective, as described in further detail below, that franchise agreement was rendered of no force and effect by the resolution adopted by the Polk County Commission providing that all Polk County water and wastewater utilities are subject to Chapter 367, Florida Statutes. Florida Public Service Comm'n v. Florida Cities Water Co., 446 So. 2d 1111, 1113 (Fla. 2d DCA 1984).

12. Had the legislature intended that a grandfather certificate include area that the utility was authorized to serve on the date jurisdiction is transferred to the Commission it would have so stated. It did not. Accordingly, the Commission lacks the statutory authority to issue Garden Grove a grandfather certificate that includes the Emmer Property. In Re: Application for Amendment of Certificates Nos. 298-W and 248-S in Lake County by JJ's MOBILE HOMES, INC.; In Re: Investigation Into Provision of Water and Wastewater Service by JJ's MOBILE HOMES, INC. to its Certificated Territory in Lake County, 95 F.P.S.C. 10:480, 498, Docket No. 940264-WS, Order No. PSC-95-1319-FOF-WS (Oct. 30, 1995) ("[T]he Commission, or in this case the

staff, did not have the statutory authority to grant a grandfather certificate which authorized the utility to serve more than the actual territory being served at the jurisdictional date."); see also, In re: Application by SUNNY HILLS UTILITIES, a division of United Florida Utilities Corporation, for Original Water and Sewer Certificates in Washington County, Florida., 88 F.P.S.C. 2:307, 308, Docket No. 870984-WS, Order No. 18902 (Feb. 22, 1988) ("Since the area sought to be served is larger than the area currently served, a certificate under Section 367.171, Florida Statutes, is not appropriate.").

13. Because the Commission lacks the statutory authority to issue a grandfather certificate to Garden Grove that includes the Emmer Property, the Commission must address Garden Grove's request to serve the Emmer Property through an original certification proceeding pursuant to Section 367.045, Florida Statutes. In Docket No. 921098-WS, Turkey Creek Utilities ("Turkey Creek") requested a grandfather certificate for more territory than was being served by the utility. In addressing Turkey Creek's application, the Commission stated:

According to Section 367.171, Florida Statutes, a utility is entitled to a grandfather certificate for "the area served by such utility on the day this chapter becomes applicable to it." Although the additional territory being requested is adjacent to the area the utility is currently serving, because the utility is not currently serving the area, we do not find it appropriate to grant the utility that territory with the grandfather certificate. In the future, the utility may file for an amendment of certificate pursuant to Section 367.045(2), Florida Statutes, when it wants to serve the territory not granted in this case.

In re: Application for certification to provide water and wastewater service in Alachua County under grandfather rights by TURKEY CREEK, INC. & FAMILY DINER, INC.

d/b/a TURKEY CREEK UTILITIES, 93 F.P.S.C. 2:422, 423, Docket No. 921098-WS, Order No. PSC-93-0229-FOF-WS (Feb. 10, 1993). The same rationale applies to this proceeding. Accordingly, at a minimum, this proceeding should be bifurcated so that Garden Grove's request to serve the area that it was serving on the date jurisdiction was transferred to the Commission is addressed in a grandfather proceeding and its request to serve any additional area, including the Emmer Property, is addressed in an original certification proceeding.

14. Assuming for sake of argument that the Commission had the statutory authority to grant Garden Grove a grandfather certificate that includes the Emmer Property, Emmer still would not be precluded from intervening in a grandfather certification proceeding. Indeed, the Commission has granted third-party intervention in numerous grandfather proceedings. See In Re: Application for Certificate to Provide Wastewater Service in Okaloosa County Under Grandfather Rights by EASTDESTIN WASTEWATER SERVICE., 93 F.P.S.C. 11:75, Docket No. 930773-SU, Order No. PSC-93-1610-PCO-SU (Nov. 3, 1993); In Re: Application for Certificate to Provide Water Service in Okaloosa County Under Grandfather Rights by DESTIN UTILITY COMPANY, INC., 93 F.P.S.C. 11:76, Docket No. 930772-WU, Order No. PSC-93-1611-PCO-WU (Nov. 3, 1993); In Re: Application for Certificates to Provide Water and Wastewater Service in Alachua County Under Grandfather Rights by TURKEY CREEK, INC. & FAMILY DINER, INC. d/b/a TURKEY CREEK UTILITIES., 93 F.P.S.C. 10:4, Docket No. 921098-WS, Order No. PSC-93-1430-PCO-WS (Oct. 1, 1993); In Re: Application for certificates to provide water and wastewater service in Alachua

County under grandfather rights by Turkey Creek, Inc. & Family Diner, Inc. d/b/a Turkey Creek Utilities., 93 F.P.S.C. 8:155, Docket No. 921098-WS, Order No. PSC-93-1152-PCO-WS (Aug. 9, 1993); In re: Application of PUGH SEPTIC TANK SERVICE, INC. for a grandfather certificate to operate a sewer system in Highlands County, Florida., 84 F.P.S.C. 5:151, Docket No. 820531-S, Order No. 13312 (May 18, 1984).

**B. Res Judicata Does Not Bar Emmer's Right to Participate  
As a Party to This Proceeding.**

15. Garden Grove also makes a passing suggestion that Emmer is foreclosed from participating as a party to this proceeding because of the June 4, 1996 Order of the Polk County Commission sitting as the Polk Utilities Commission. This argument, which appears to be based on some strained interpretation of res judicata, is unfounded.

16. The Florida Supreme Court has described res judicata as follows: "The general principle behind the doctrine of res judicata is that a final judgment by a court of competent jurisdiction is absolute and puts to rest every justiciable, as well as every actually litigated, issue. Albrecht v. State, 444 So. 2d 8, 11-12 (Fla. 1984) (emphasis added). It is also well settled that in order for a matter to have res judicata effect, there must be "identity of the thing sued for; identity of the cause of action; identity of the parties; [and] identity of the quality in the person for or against whom the claim is made." Id. at 12. Although res judicata applies to administrative proceedings, the Florida Supreme Court has recognized that it should be applied to such proceedings with "great caution." Thomson v. Department of Env'tl. Regulation, 511 So. 2d 989, 991 (Fla. 1987). This is a case where res judicata cannot, and should not, be applied.

17. Garden Grove's res judicata argument is fundamentally flawed because the Polk Utilities Commission lacked subject matter jurisdiction to render its June 4, 1996 Order. "Res judicata cannot be predicated on the decision of a tribunal lacking jurisdiction." Florida Export Tobacco Co., Inc. v. Department of Revenue, 510 So. 2d 936, 943 (Fla. 1st DCA), review denied, 519 So. 2d 986 (Fla. 1987).

18. Garden Grove asserts that despite its May 14, 1996 resolution, the Polk County Commission retained jurisdiction over water and wastewater utilities with matters pending before the Polk Utilities Commission. Garden Grove's Motion states that the Polk County Commission transferred jurisdiction to the Commission "with the 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." [Motion at p. 3, ¶ 10.] However, there is no mention of the Polk County Commission's reservation of jurisdiction over pending cases in the resolution adopted by the Polk County Commission on May 14, 1996, the Commission staff's recommendation issued in Docket No. 960674-WS on June 13, 1996, or in the Commission's order acknowledging the transfer of jurisdiction issued on July 11, 1996. See 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). Indeed, the Commission's order expressly states that: "[T]he provisions of Chapter 367, Florida Statutes, became applicable in Polk County, effective May 14, 1996. All utilities as defined by Chapter

367, Florida Statutes, shall comply with the provisions of this Order." Id. at 311 (emphasis added).

19. As noted above, staff cannot bind the Commission. There is no evidence that the issue of the reservation of jurisdiction over pending cases by the Polk County Commission was ever presented to, or voted on, by the Commission. There was also no notice to the public of any intent by the Commission to allow the Polk County Commission to retain jurisdiction over some aspects of the regulation of Polk County water and wastewater utilities. Had such notice been provided, interested persons, such as Emmer, would have had an opportunity to intervene in Docket No. 890450-WS. For the Commission to now recognize any alleged reservation of jurisdiction by the Polk County Commission after the fact, as urged by Garden Grove, would deny Emmer and other interested parties due process.

20. Further, regardless of the alleged intention of the Polk County Commission to reserve jurisdiction over pending matters, or the assurance of Commission staff, there is no authority under Florida law for the retention of jurisdiction of pending cases by the Polk County Commission or the Polk Utilities Commission once the Polk County Commission adopted the May 14, 1996 resolution transferring jurisdiction to the Commission. The transfer of jurisdiction by a county to the Commission under Section 367.171, Florida Statutes, is an all or nothing proposition. There is no statutory authority providing for a partial transfer of jurisdiction by a county to the Commission or providing for the continued exercise of

jurisdiction by a county over cases pending before it. In contrast, Section 367.171(5) expressly provides:

When a utility becomes subject to regulation by a county, all cases in which the utility is a party then pending before the [c]ommission, or in any court by appeal from any order of the commission, shall remain within the jurisdiction of the commission or court until disposed of in accordance with the law in effect on the day such case was filed by any party with the commission or initiated by the commission, whether or not the parties or the subject of any such case relates to a utility in a county wherein this chapter no longer applies.

§ 367.171(5), Fla. Stat. (Supp. 1996). Clearly, there is no corresponding statutory provision that would enable a county to retain jurisdiction over a pending utility case after regulatory jurisdiction over the utility is transferred to the Commission.

21. The Florida Supreme Court has consistently recognized as a general principle of statutory construction, that "the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*." Thayer v. State, 335 So. 2d 815, 817 (Fla. 1976); see Capers v. State, 678 So. 2d 330, 332 (Fla. 1996); Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898, 900 (Fla. 1996); Diversified Services, Inc. v. Avila, 606 So. 2d 364, 366 (Fla. 1992).<sup>2</sup> Thus, the mention of the Commission's ability to retain jurisdiction over cases pending before it involving a utility that becomes

<sup>2</sup> The Commission has recognized and applied the principle of *expressio unius est exclusio alterius*. In Re: Petition for expanded interconnection for alternate access vendors within local exchange company central offices by INTERMEDIA COMMUNICATIONS OF FLORIDA, INC., 95 F.P.S.C. 9:306, 310, Docket No. 921074-TP, Order No. PSC-95-1188-FOF-TP (Sept. 21, 1995); In re: Resolution of Toll Settlement dispute between General Telephone Company of Florida and Southern Bell Telephone and Telegraph Company, 83 F.P.S.C. 4:117, 118, Docket No. 810474-TP, Order No. 11824 (April 11, 1983). The Commission has also recognized and applied the related principle of statutory construction, *expressum facit cessare tacitum*, meaning "that which is expressed makes that which is implied to cease." *Id.*



subject to regulation by a county implies that a county cannot retain jurisdiction over cases pending before it involving a utility that becomes subject to regulation by the Commission.

22. Garden Grove ignores the principle of *expressio unius est exclusio alterius* and suggests that the absence of legislative authority for the Commission to hear matters pending before a county on the date that jurisdiction is transferred to the Commission implies that the county must retain jurisdiction over such matters. Garden Grove not only turns this well established principle of statutory construction on its head, it overlooks entirely the position Emmer is asserting. Emmer is not arguing that the Commission should have picked up where the Polk Utilities Commission left off in the matter involving Emmer's request to amend the franchise agreement between the Polk County Commission and Garden Grove. Instead, as described in further detail below, the pending matter became moot because there was nothing left upon which the franchise agreement could operate. as described in further detail below.

23. The Polk Utilities Commission did not have jurisdiction to amend the franchise agreement after May 14, 1996 because the franchise agreement was superseded by the resolution transferring jurisdiction. Florida Cities, 446 So. 2d at 1113. ("[T]he [C]ommission argues that the enactment of the 1970 Lee County resolution relinquishing the regulation of water and sewer utilities in the county had the effect of superseding the preexisting franchise agreement between the county and Florida Cities. We agree."). The Court in Florida Cities, went on to state:

Chapter 367 provides that when utility regulation is relinquished by the county, the commission obtains exclusive jurisdiction over each utility

with respect to its authority, service, and rates. . . . When the county transferred its authority over Florida Cities to the commission, there was nothing left upon which the franchise agreement could operate.

Id. Accordingly, the Polk Utilities Commission lacked subject matter jurisdiction to render its June 4, 1996 Order for two reasons: (1) as of May 14, 1996 it had relinquished all jurisdiction over all Polk County water and wastewater utilities, including Garden Grove; and (2) it did not have jurisdiction to decide whether to amend the franchise agreement between the Polk County Commission and Garden Grove which had been rendered of no force and effect as a result of the Polk County Commission's resolution. Because the Polk Utilities Commission lacked jurisdiction to issue the June 4, 1996 Order, res judicata cannot be predicated on that Order so as to deprive Emmer of its right to participate in this certification proceeding. Florida Export Tobacco, 510 So. 2d at 943.

24. Garden Grove's res judicata argument also fails because the cause of action before the Polk Utilities Commission was not identical to the cause of action in this proceeding. The court in Albrecht made it clear that in order for a matter to have res judicata effect, there must be identity the causes of action in the two proceedings. Albrecht, 444 So. 2d at 12. This is an action by Garden Grove to obtain Commission certification. The proceeding before the Polk Utilities Commission was an action by Emmer to amend a franchise agreement. There is no identity of the causes of action in the two proceedings.<sup>3</sup> Thus, an essential element of res judicata is absent.<sup>4</sup>

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<sup>3</sup> The use of similar evidence does not necessarily mean that res judicata attaches. In fact, res judicata does not apply where "two separate and distinct governmental units independently consider similar factual allegations but for different purposes." Newberry

### C. Conclusion

25. Garden Grove's Motion to dismiss Emmer from this proceeding must be denied. Garden Grove insists that Emmer has no standing to participate in this proceeding despite Emmer's clearly established substantial interest. Garden Grove also claims, in the face of substantial law to the contrary, that it is entitled to a grandfather certificate that includes the Emmer Property despite the fact that Garden Grove's Application does not comport with 367.171(2). Why is Garden Grove so opposed to Emmer's participation? Why is Garden Grove so opposed to obtaining original certification to serve the Emmer Property? One can only hypothesize that it is because Garden Grove does not want the Commission to fully evaluate its rates, charges, quality of service, and ability to serve. Regardless, Garden Grove cannot change the law which entitles Emmer to participate in this proceeding and prevents the Commission from issuing a grandfather certificate to Garden Grove that includes the Emmer Property.

WHEREFORE, Emmer respectfully requests that the Commission:

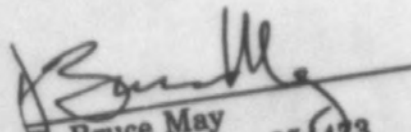
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v. Florida Dep't of Law Enforcement, Criminal Justice Standards and Training Comm'n, 585 So. 2d 500, 501 (Fla. 3d DCA 1991); see Walley v. Florida Game & Fresh Water Fish Comm'n, 501 So. 2d 671, 674 (Fla. 1st DCA 1987); Todd v. Carroll, 347 So. 2d 618, 619 (Fla. 4th DCA 1977).

<sup>4</sup> Garden Grove's res judicata argument also fails because the Polk Utilities Commission appears to have acted in a quasi-legislative, and not a quasi-judicial, capacity when it rendered its June 4, 1996 Order. Res judicata only applies to administrative proceedings to the extent that an administrative agency is acting in a judicial capacity and the parties had an adequate opportunity to litigate. See University of Miami v. Zepeda, 674 So. 2d 765, 765 n.2 (Fla. 3d DCA 1996); see also Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 653 n.10 (Fla. 3d DCA 1982) ("Where . . . hearings are not conducted with . . . due process guarantees, then the hearing can quite properly be called legislative, and the administrative decision is without res judicata effect.")

- (a) deny Garden Grove's Motion to Dismiss; and  
(b) grant such other relief as the Commission deems appropriate.

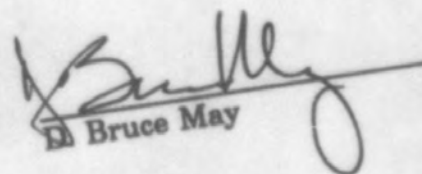
Respectfully submitted,

  
D. Bruce May  
Florida Bar No. 354473  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by United States mail to Kathleen Johnson, Staff Counsel, Florida Public Service Commission 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850 and Wayne Schiefelbein, Gatlin Woods & Carlson, 1709-D Mahan Drive, Tallahassee, Florida 32308 this 16th day of December, 1996.

  
D. Bruce May

TAL-97560