

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.)
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)
)

Docket No. 961299-WS
Filed: December 21, 1996

**CITY OF LAKE WALES' MEMORANDUM IN OPPOSITION
TO GARDEN GROVE WATER COMPANY, INC.'S MOTION TO DISMISS**

The City of Lake Wales ("Lake Wales"), 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's") Motion to Dismiss Lake Wales' Petition For Leave To Intervene (the "Motion"). Garden Grove asserts that Lake Wales does not have standing to intervene in this proceeding and that Garden Grove is entitled to a grandfather certificate to serve the Emmer Property.¹ These assertions are not supported by the facts, by Florida law or by Commission precedent. Accordingly, Garden Grove's Motion cannot serve to deprive Lake Wales of its right to participate in this certification proceeding.

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

1. 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). Lake Wales satisfies both of these requirements and, therefore, is entitled to participate as a party to this proceeding.

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1. Garden Grove suggests that Lake Wales will not suffer injury in fact as a result of this proceeding and, therefore, has no substantial interest in this proceeding. Garden Grove's assertion is unfounded. Lake Wales will be directly and substantially affected by any action taken by the Commission with regard to Garden Grove's Application. Lake Wales's facilities are closer to the Emmer Property than Garden Grove's facilities. Emmer has requested that Lake Wales serve the Emmer Property and Emmer intends to seek annexation of the Emmer Property into Lake Wales' corporate limits. The Lake Wales City Commission has unanimously approved an

¹ For purposes of this Memorandum, the "Emmer Property" means the approximately 313 acres on Thompson Nursery Road in Section 18 and 19 of Township 29 South, Range 27 East, Polk County, Florida, that is owned by Emmer

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agreement with Emmer to provide service to the Emmer Property depending on the outcome of this proceeding. Lake Wales has the capacity to provide, and desires to provide, service to the Emmer Property. As a potential supplier of water and wastewater service to the Emmer Property, Lake Wales will suffer immediate injury if the Commission certifies Garden Grove to serve the Emmer Property. Clearly, Lake Wales' substantial interests will be affected in this proceeding, and Lake Wales is entitled to participate as a party. In Re: Application for Water and Wastewater Certificates in Sumter County by SUMTER UTILITIES, INC., 93 F.P.S.C. 7:507, 507, Docket No. 930206-WS, Order No. PSC-93-1064-PCO-WS (July 21, 1993) (granting intervention to the City of Bushnell in a certification proceeding).

2. The injury to Lake Wales is the 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. When a utility, such as Garden Grove, seeks to serve area not previously served, the utility must identify other sources of water and wastewater service within the geographical proximity to the area for which the utility seeks to provide service. See § 367.045(1)(b), Fla. Stat. (Supp. 1996); Fla. Admin. Code R. 25-30.033(1)(e). This requirement is intended to prevent a utility from being certificated to serve a particular territory where service could be provided in a more efficient and more economical manner by another utility. See § 367.113(1), Fla. Stat. (1995). Thus, Lake Wales' ability to serve the Emmer Property is precisely the type of injury that this proceeding is designed to protect.

3. Garden Grove seeks to exclude Lake Wales 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 in both respects. 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.

4. The deadline for filing an application for a grandfather certificate is clearly specified in Section 367.171(2)(b), Florida Statutes, and in 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).

5. 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. It is undisputed 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-95-0671-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.

6. In addition, Garden Grove 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).

7. If 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 tha[n] 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.").

8. 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.

9. Assuming for sake of argument that the Commission had the statutory authority to grant Garden Grove a grandfather certificate that includes the Emmer Property, Lake Wales 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 Lake Wales From Participating As a Party to This Proceeding.

10. Garden Grove also suggests that Lake Wales 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.

11. 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.

12. 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).

13. 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.

14. Garden Grove dismisses the principles in Florida Cities and 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. 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).

15. 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, Lake Wales and other interested persons, 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 Lake Wales and other interested parties due process.

16. 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.

17. 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).² Thus, the mention

² 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

of the Commission's ability to retain jurisdiction over cases pending before it involving a utility that becomes 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.

18. 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 turns this well established principle of statutory construction on its head. Further, as described in further detail below, the pending matter became moot because there was nothing left upon which the franchise agreement could operate.

19. In summary, 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.

20. Garden Grove's *res judicata* argument also fails because there is no identity of parties or identity of the cause of action, which are both essential elements of *res judicata*.³ 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. Although Lake Wales presented some comments at the Polk Utilities Commission hearing, Lake Wales was not a party

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.*

³ 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. Zapeda, 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.")

to that proceeding. Further, even if Lake Wales was a party, there is no identity of the causes of action in the two proceedings.⁴

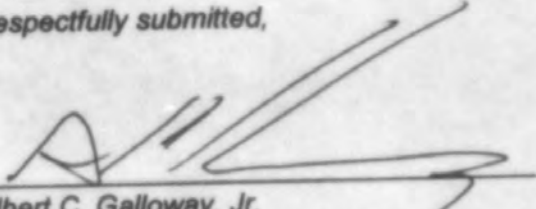
C. Conclusion

21. As a potential supplier of water and wastewater service to the Emmer Property, Lake Wales' substantial interests will be determined in this proceeding. Garden Grove cannot prevent Lake Wales from exercising its right to intervene by characterizing this proceeding as a grandfather certification proceeding. Pursuant to express statutory language, Garden Grove is not entitled to a grandfather certificate that includes the Emmer Property. Further, even if this was nothing more than a grandfather certification proceeding, intervention would be appropriate because Lake Wales has a right to demonstrate that it is not in the public interest for Garden Grove to serve the Emmer Property. Garden Grove's Motion to dismiss Lake Wales from this proceeding must be denied.

WHEREFORE, Lake Wales respectfully requests that the Commission:

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


Respectfully submitted,



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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, and D. Bruce May, Holland & Knight, P.O. Drawer 810, Tallahassee, Florida 32302, this 27 day of December, 1996.



⁴ 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 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).