

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 27, 1996

BOARD OF COUNTY COMMISSIONERS  
OF POLK COUNTY'S PETITION  
FOR LEAVE TO INTERVENE

The Board of County Commissioners of Polk County (Polk County), pursuant to Florida Administrative Code Rule 25-22.039, hereby petitions the Florida Public Service Commission (the PSC) for leave to intervene in this proceeding, and in support states the following.

1a. Polk County is a political subdivision of the State of Florida. Its address is:

330 W. Church St.  
P.O. Box 9000  
Bartow, Florida 33831-9000

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

Mark F. Carpanini  
County Attorney  
330 W. Church St.  
P.O. Box 9005, Drawer AT01  
Bartow, FL 33831-9005

- ACK \_\_\_\_\_
- AFA \_\_\_\_\_
- APP \_\_\_\_\_
- CAF \_\_\_\_\_
- CMU \_\_\_\_\_
- CTR \_\_\_\_\_
- EAG \_\_\_\_\_
- LEG 1 \_\_\_\_\_
- LIN 5 \_\_\_\_\_
- OPC \_\_\_\_\_
- RCH \_\_\_\_\_
- SEC 1 \_\_\_\_\_
- WAS Solder \_\_\_\_\_
- OTH Don \_\_\_\_\_

2. Polk County is substantially affected by these proceedings and is therefore entitled to participate as a party in 1 this docket.

3. On October 20, 1987, Garden Grove Water Company, Inc. (Garden Grove) and Polk County entered into a fifteen (15) -year

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franchise agreement, whereby Garden Grove was granted exclusive authority to provide water and wastewater service within a specified geographical area within Polk County.<sup>1</sup>

4. 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 designated therein.<sup>2</sup>

5. 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 Garden Grove under the aforesaid franchise agreement.

6. 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.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> See Exhibit B to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene.

<sup>3</sup> See Exhibit C to Garden Grove Water Company, Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene.

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

8. 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 Garden Grove'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.<sup>4</sup>

9. Polk County Ordinance No. 82-11 provides in pertinent part as follows:

Each utility shall provide service to the territory described in this franchise agreement within a reasonable time. 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 territory to that of another utility company is economical and feasible, it may amend the franchise agreement to delete the territory not served or not properly served by the Utility, or it may rescind the franchise agreement.

10. In its request to amend Polk County Ordinance No. 82-11, Emmer asserted that

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<sup>4</sup> See Composite Exhibit D to Garden Grove Water Company Inc.'s Motion to Dismiss Emmer Development Corp.'s Petition for Leave to Intervene.

The key issue for Emmer is not whose service area the property is in but the cost to Emmer for Utility Services. The 1993 Garden Grove Water Company costs estimates (sic) referred to in Item 6 of Appendix A, were high particularly compared to what Polk County would have charged for the same service. Now compared to what Lake Wales would charge, the new Garden Grove costs are excessive. See Schedule B.

Emmer Development Corp. requests it be given the opportunity to show the Polk County Utilities Commission that under Section 14 of Ordinance No. 82-11 the extension of service to PUD 84-38 by Garden Grove Water Company, Inc. could be accomplished only at an unreasonable cost and that the same service by the City of Lake Wales is more economical for the development of PUD 84-35.

11. On May 14, 1996, Polk County adopted a resolution transferring jurisdiction over water and wastewater utilities within its boundaries to the PSC. Polk County did so 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 Polk County.<sup>5</sup>

12. On June 4, 1996, Polk County, sitting as the Polk County Utilities Commission, held a quasi-judicial hearing on Emmer's March 19, 1996 request to amend Polk County Ordinance No. 82-11. After presentations by Emmer, the City of Lake Wales, and Garden Grove, Polk County disposed of the matter as follows:

Based upon all of the testimony presented and

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<sup>5</sup> 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.

other evidence received in this matter, the Polk County Utilities Commission determines as follows:

1. 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.

2. The difference in connection and associated AFPI charges between the City of Lake Wales and Garden Grove was considered but not determined to be conclusive as to the reasonableness of the cost of extension.

3. The amount of income tax that must be paid by Emmer to Garden Grove of \$881,661 which would not be required by the City of Lake Wales is not of itself an unreasonable cost of extension given the size of the proposed development by Emmer. (570 detached singles family units, 300 apartment units, and 1 acre of neighborhood shopping).

4. The Commission concludes and finds that the continued vitality of the Garden Grove utility and its ability to provide quality utility service to its other customers is dependent upon maintaining its customer base and the continued provision of utility service to its other customers might well be adversely prejudiced by exclusion of the Emmer development as a prospective customer.<sup>6</sup>  
(emphasis provided)

13. On July 10, 1996, Emmer filed a Petition for Writ of Certiorari with 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.

14. As stated at paragraph 10 of Emmer's Petition

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<sup>6</sup> 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.

A writ of certiorari is used to review the decision of a quasi-judicial hearing. See *Hirt v. Polk County Commissioners*, 578 So. 2d 415, 417 (Fla. 2d DCA 1991). The Decision was a quasi-judicial decision because: (i) the Decision resulted in the application of a general rule of policy rather than the formulation of a general rule of policy; and (ii) the Decision affected a limited number of persons or property owners, or identifiable parties and interests; and (iii) the Decision represented an election among the distinct alternatives of approving the activity within the protected area, approving the activity with conditions, or denying the activity. *Board of County Commissioners of Brevard County v. Snyder*, 18 F.L.W. 522 (Fla. Oct. 7, 1993). The Respondent readily acknowledged the fact that the hearing at issue was a quasi-judicial hearing when its attorney, County Attorney Mark Carpanini, announced that the hearing was "quasi-judicial." (T.25, 79).

15. The PSC should compare the foregoing undisputed statement by Emmer with its recent characterization of the proceedings before Polk County as "quasi-legislative," in Emmer's Memorandum in Opposition to Garden Grove Water Company, Inc.'s Motion to Dismiss, at p. 17, footnote 4.

16. In any event, Polk County submits that it in fact acted in a quasi-judicial capacity and resolved disputed issues of fact properly before it, which issues the parties had an adequate opportunity to litigate.

17. Polk County and Garden Grove duly filed responses to Emmer's Petition for Writ of Certiorari. The matter was fully briefed and the parties awaited notice from the Circuit Court for scheduling oral argument. On December 3, 1996, Emmer filed a Notice

of Voluntary Dismissal of Petition for Writ of Certiorari, and announced that it "believes that the Public Service Commission has exclusive jurisdiction over the issues before this court. . . ."

18. Thus, the June 11, 1996 Order denying Emmer's request to determine if Emmer's property would be excluded from Garden Grove's franchise area is final. The issues of the respective authority of Garden Grove and the City of Lake Wales and their comparative cost to serve the Emmer property have been fully adjudicated. The doctrines of res judicata and collateral estoppel, as appropriate, apply to these issues.

#### SUBSTANTIAL INTERESTS

19. Polk County is a political subdivision of the State of Florida. Its functions are of a public nature, constituting the machinery and essential agency by and through which many of the powers of the State are exercised.<sup>7</sup> The State has a very vital interest in the proper and efficient functioning of Polk County's government.

20. Polk County properly exercised its powers relative to the health, convenience and welfare of its citizens in its adjudication of Emmer's request to exclude its property from Garden Grove's franchise area. Polk County's substantial interests in the instant proceeding are grounded upon its entitlement to ensure that its lawful orders are fully and faithfully executed.

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<sup>7</sup> Fla. Const. Art. VIII, §1 (a); Keggin v. Hillsborough County, 71 So. 372 (Fla. 1916)

21. Emmer's avenue to challenge the June 11, 1996 Order denying its request to determine if Emmer's property would be excluded from Garden Grove's franchise area was the Courts. It availed itself of that remedy and then abruptly abandoned it. Emmer and the City of Lake Wales now belatedly attempt to relitigate matters that have been properly adjudicated by Polk County.

22. 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)

23. 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 Garden Grove and the City of Lake Wales to serve, and their comparative costs of serving, the Emmer property.<sup>8</sup>

24. Polk County is unaware of any disputed issues of material fact at this time. The purported issues of material fact pertaining to the respective authority to serve and comparative cost of service by Garden Grove and the City of Lake Wales as raised by Emmer and the City of Lake Wales in their respective motions for leave to intervene in the instant proceeding have been previously adjudicated by Polk County and are therefore, immaterial.

#### ISSUES

25. Polk County is aware of the following disputed issues of law:

- a) whether Polk County had the jurisdiction to adjudicate Emmer's March 1996 request to exclude its property from Garden Grove's franchise area;

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<sup>8</sup> 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.

b) whether Polk County's June, 1996 Order is res judicata on the issues of the respective authority of Garden Grove and the City of Lake Wales to serve, and their comparative costs of serving, the Emmer property, and whether the parties are estopped from challenging the findings of such Order;

c) whether the City of Lake Wales is barred from extending service to the Emmer property by Florida Statutes Section 180.06 (1995).

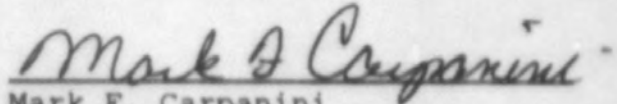
#### BASIC POSITION

26. Polk County's basic position is that it retained and properly exercised jurisdiction over Emmer's March 11, 1996 request to exclude its property from Garden Grove's service area in quasi-judicial proceedings; that Polk County's June, 1996 Order denying that request is final, given Emmer's voluntary dismissal of its Petition for Writ of Certiorari, and that the issues of the respective authority and comparative cost to serve the Emmer property have been fully adjudicated by Polk County.

Wherefore, Polk County requests that the Commission grant it full party status in this proceeding, and grant such other relief as the Commission deems appropriate.

Dated this 23 day of December, 1996.

Respectfully submitted,



Mark F. Carpanini  
330 West Church St.  
P.O. Box 9005, Drawer AT01  
Bartow, Florida 33831-9005  
(941) 534-6438

County Attorney

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to D. Bruce May, Esquire, Holland & Knight, 315 South Calhoun Street, Suite 600, Tallahassee, Florida 32301; Kathleen M. Johnson, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850; Albert C. Galloway, Jr., City Attorney, City of Lake Wales, 225 East Park Avenue, Lake Wales, Florida 33853; and to Wayne L. Schiefelbein, Esquire, Gatlin, Woods & Carlson, 1709-D Drive, Tallahassee, Florida 32308, on this 27<sup>th</sup> day of December, 1996.

  
Mark F. Carpanini