

FLORIDA PUBLIC SERVICE COMMISSION
Capital Circle Office Center • 2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

MEMORANDUM

APRIL 2, 1997

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (K. JOHNSON) *KmJ LAT*
DIVISION OF WATER & WASTEWATER (GOLDEN, REDEMANN) *per BL*
66M

RE: DOCKET NO. 961299-WS - GARDEN GROVE WATER COMPANY, INC. -
APPLICATION FOR GRANDFATHER CERTIFICATE TO OPERATE A
WATER AND WASTEWATER UTILITY
COUNTY: POLK

AGENDA: APRIL 14, 1997 - REGULAR AGENDA - INTERESTED PERSONS MAY
PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: S:\PSC\LEG\WP\961299WS.RCM

CASE BACKGROUND

On May 14, 1996, the Board of County Commissioners of Polk County adopted a resolution, pursuant to Section 367.171, Florida Statutes, declaring the water and wastewater utilities in Polk County subject to the provisions of Chapter 367, Florida Statutes. The resolution was acknowledged by this Commission on July 11, 1996, by Order No. PSC-96-0896-FOF-WS. Pursuant to Section 367.171, Florida Statutes, a utility subject to the jurisdiction of this Commission must obtain a certificate of authorization. Accordingly, on October 29, 1996, Garden Grove Water Company, Inc. (Garden Grove or utility) filed an application for a certificate under grandfather rights to provide water and wastewater service in Polk County.

Garden Grove is a Class A utility. According to the application, the utility's water system has been in existence since 1965; the wastewater system was established in 1970. The utility currently serves approximately 6,006 water customers and 2,995 wastewater customers.

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On November 27, 1996, Emmer Development Corporation (Emmer) filed a 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's petition). Emmer is not a current customer of Garden Grove, but owns land within the service territory granted to Garden Grove by a franchise agreement with Polk County. The franchise agreement was entered into on October 20, 1987, before Polk County transferred jurisdiction to the Commission. Emmer plans to develop a mixed-use subdivision on the property it owns within Garden Grove's franchise agreement with Polk County.

Subsequent to the filing of the Petition, Garden Grove filed an unopposed Motion for Five-day Extension of Time in which to respond to Emmer's Petition.

On December 9, 1996, Garden Grove filed a Motion to Dismiss Emmer Development's Petition for Leave to Intervene, and response to Emmer Development's "Request for Proposed Agency Action Procedures, and Response to Garden Grove Water Company's Application for a Grandfather Certificate" (Motion to Dismiss). On December 16, 1996, Emmer Development filed a Memorandum in Opposition to Garden Grove Water Company, Inc.'s Motion to Dismiss and a Request for Oral Argument (Emmer's Response).

The City of Lake Wales (Lake Wales) filed a Petition to Intervene in this proceeding on December 11, 1996. Garden Grove then filed a Motion to Dismiss Lake Wales' Petition to Intervene on December 17, 1996, for which Lake Wales filed a Reply in Opposition on December 27, 1996. Also on December 27, 1996, Lake Wales filed a request for Oral Argument and Polk County filed its Petition to Intervene. Finally, on January 7, 1997, Emmer filed a Motion to Dismiss Polk County's Petition to Intervene, and Polk County filed its Reply in Opposition to the Motion to Dismiss on January 16, 1997.

This recommendation addresses the petitions to intervene and other relevant pleadings. The Commission should note that this recommendation does not address the merits of the utility's application for a grandfather certificate. Staff will file a separate recommendation at a later date on the disposition of the utility's application.

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DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Emmer's request for Oral Argument in this proceeding?

RECOMMENDATION: No, the Commission should deny Emmer's request for Oral Argument since interested parties in this item already have an opportunity to participate at the agenda conference. (K. JOHNSON)

STAFF ANALYSIS: Since persons interested in this recommendation are already afforded the opportunity to address the Commission with their comments at the agenda conference dealing with this item, there is no need for a request for oral argument. Therefore, Emmer's request for oral argument should be denied.

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ISSUE 2: Should the Commission grant Emmer Development Corp.'s Petition for Leave to Intervene, Request for Proposed Agency Action, and Request for Hearing?

RECOMMENDATION: No, Emmer Development Corp.'s Petition for Leave to Intervene, Request for Proposed Agency Action and Request for Hearing should be denied. Accordingly, the Commission should find Garden Grove's Motion to Dismiss moot. (K. JOHNSON)

STAFF ANALYSIS: As stated in the case background, Garden Grove filed an application for a grandfather certificate pursuant to Section 367.171, Florida Statutes, on October 29, 1996. On November 27, 1996, Emmer filed a Petition to Intervene. In support of its petition, Emmer states that it is substantially affected by this proceeding, and thus, is entitled to participate as a party in the docket.

In its Petition to Intervene, Emmer states that it will suffer immediate injury if Garden Grove is granted the grandfather certificate to serve the area where Emmer's property is located because service by Garden Grove would be less efficient and at a higher cost than service provided by the Lake Wales utility, a neighboring utility company. Emmer also asserts that, as a potential customer of Garden Grove, its injury is of the type that this grandfather proceeding is designed to protect.

In its Petition to Intervene, Emmer requests that the Commission process Garden Grove's application using Proposed Agency Action (PAA) procedures. In the alternative, Emmer requests a Section 120.57(1), Florida Statutes, hearing.

In its December 9, 1996, Motion to Dismiss, Garden Grove basically asserts that Emmer does not meet the two-pronged Agrico test for standing that requires an immediate injury in fact which is within the zone of interests that the proceeding is designed to protect. Garden Grove further states that the purpose of grandfather certification is to protect the existing and/or future rights of an applicant as jurisdiction shifts from one governmental entity to another. Garden Grove also argues that it is entitled to the grandfather certificate as a matter of right, as conferred by Section 367.171, Florida Statutes.

Emmer's Response to the Motion to Dismiss reiterates some of the arguments in its petition and adds that the grandfather 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.

Emmer also asserts that its injury is exactly of the type a grandfather proceeding is designed to protect. Emmer argues that the certification proceeding is conducted to allow the Commission to fully evaluate whether it is in the public interest to grant a utility the exclusive right to serve a specified area. It is the Commission's responsibility, argues Emmer, to address the impact of a utility's services and rates on customers located within the service area. Emmer also denies Garden Grove's entitlement to the grandfather certificate as a matter of right conferred by the statute since Garden Grove missed the 90 day application time period. Finally, in support of its position on standing, Emmer cites five instances in which the Commission granted third-party intervention into grandfather proceedings.

Statutory Right to a Grandfather Certificate

Section 367.171(2)(b), Florida Statutes, states that on the day the chapter becomes applicable to any county by virtue of a county resolution transferring jurisdiction of water and wastewater utility regulation to the Public Service Commission, "...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." (emphasis added). This language confers a statutory right upon a utility to apply for and receive a certificate pursuant to Section 367.171, Florida Statutes, if the utility is operating in a county which transfers jurisdiction to the Commission. See Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993) (stating that the cardinal rule of statutory construction is that the courts will give a statute its plain and ordinary meaning). Therefore, grandfather application dockets do not provide a point of entry.

Section 367.171, Florida Statutes, does not contemplate intervention or a hearing in a grandfather proceeding since there is no requirement that notice be sent to customers, local governmental entities or nearby utilities. Also, Section 367.171, Florida Statutes, does not require the Commission to make a determination that granting a grandfather certificate is in the public interest. This is in contrast to applications for initial certificates, amendment of certificates, or transfer of certificates, all of which require extensive noticing procedures and a finding of public interest. See Sections 367.045(1)(a), 367.071, Florida Statutes. Noticing requirements are designed to give interested or affected persons a point of entry into the proceeding, as well as the opportunity to object to the application and request a hearing. No such procedures exist under grandfather provisions, thus supporting the belief that the Legislature did not intend third persons, including customers, to participate as a

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party in a grandfather certification proceeding. If the Legislature so intended, it would have provided the same noticing and participation opportunities in grandfather proceedings as it has in all other certification proceedings. See Leisure Resorts, Inc. v. Frank J. Rooney, Inc., 654 So. 2d 911, 914 (Fla. 1995) (stating that when the Legislature has used a term in one section of the statute but omits it in another section of the same statute, the court may not imply it where it has been excluded).

In its Response to Garden Grove's Motion to Dismiss, Emmer cited five orders as precedent for its entitlement to intervene in this proceeding. In staff's opinion, all of these orders are sufficiently distinguishable from Emmer's situation and, as such, do not control the disposition of Emmer's Petition to Intervene. Two of the orders cited involved intervention into a grandfather proceeding by the Office of Public Counsel (OPC). See 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, Order No. PSC-93-1152-PCO-WS, in Docket No. 921098-WS, issued August 9, 1993; In re: Application of Pugh Septic Tank Service, Inc., for a grandfather certificate to operate a sewer system in Highlands County, Order No. 13312, in Docket No. 820531-S, issued May 18, 1984. These orders are clearly distinguishable from Emmer's position because OPC, pursuant to Section 350.0611, Florida Statutes, may appear or intervene in any proceeding before the Commission. No corresponding statutory right applies to any other entity.

Two of the other orders cited by Emmer involve grandfather proceedings in which intervention was requested by another utility. These dockets involved unique fact patterns regarding territorial disputes. The intervening utilities in those cases alleged that the territory applied for in the grandfather application coincided with their respective service areas. In those orders, the Commission found that the intervening utility's substantial interests might have been affected by the proceeding due to the territorial or service area conflict. Unlike the above cited situations, a dispute over territorial rights does not exist in the present proceeding since Emmer is a potential customer, not another utility. See In re: Application for certificate to provide wastewater service in Okaloosa County under grandfather rights by Eastdestin Wastewater Service, Order No. PSC-93-1610-PCO-SU, in Docket No. 930773-SU, issued November 3, 1993; In re: Application for certificate to provide water service in Okaloosa County under grandfather rights by Destin Utility Company, Inc., Order No. PSC-93-1611-PCO-WU, in Docket No. 930772-WU, issued November 3, 1993.

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Finally, 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, Order No. PSC-93-1430-PCO-WS, in Docket No. 921098-WS, issued October 1, 1993, is also sufficiently distinguishable from the instant proceeding so as not to be controlling. Petitioners in the Turkey Creek case were current, paying customers already receiving service from the utility, unlike Emmer, which is only a potential future customer. The customers were permitted to intervene in Turkey Creek because the utility had instituted two unapproved rate increases between the time that Alachua County transferred jurisdiction to the Commission and the time the utility applied to the Commission for a grandfather certificate.

Therefore, these cited orders are not dispositive in the case at hand. In consideration of the foregoing, staff recommends that Emmer's Petition to Intervene be denied.

Request for Proposed Agency Action

Emmer cites In re: Application of Homosassa Utilities, Inc. for water and sewer certificate under grandfather rights, Sumter County, Florida, Order No. 19848, in Docket No. 880013-WS, issued August 22, 1988, as precedent for using PAA procedures in a grandfather certificate case. Staff believes that Emmer's reliance on this order is misplaced. In Homosassa, the Commission found that the utility did not technically meet the criteria of a grandfather certificate because the applicant utility did not own the systems at the time jurisdiction passed from Sumter County to the Commission. The Commission assessed the situation to be more akin to one requiring an original certificate, thus recognizing the need for notice to interested persons and a point of entry. The Commission found that this would be best accomplished in that particular situation by issuing its order as a PAA. As this case is clearly distinguishable and because the statutory scheme does not provide for a point of entry, staff recommends that Emmer's request for PAA procedures and a hearing be denied.

90-Day Application Time Period

With respect to Emmer's argument that Garden Grove lacks the right to the grandfather certificate because the application was filed beyond the 90-day time period, staff notes that Section 367.171(2)(b), Florida Statutes, states that a utility shall be entitled to receive a certificate for the area served on the day the chapter becomes applicable to it. The subsection also states that "Within 90 days after the day this chapter becomes applicable to it, the utility shall make application (to the Commission) for a certificate..." The subsection further provides that if a

utility fails to "register" with the Commission within the prescribed time, the commission may require that the utility apply for an original certificate of authorization. (emphasis added).

When construing a statute, the plain meaning of the language is the first consideration. Moonlit Waters Apartments, Inc. v. Cauley, 666 So. 2d 898 (Fla. 1996). If the language of a statute is plain and unambiguous and conveys a clear and definite meaning, that plain meaning will control. See Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993). The language in Section 367.171(2)(b), Florida Statutes, regarding the Commission's discretion to require a utility to apply for an original certificate, relates only to utilities which fail to "register" with the Commission within the 30 day deadline outlined in Section 367.171(2)(a).

Staff notes that Garden Grove did not "register" with the Commission within the 30 day time period (it registered 84 days after Polk County's resolution transferring jurisdiction to the Commission). However, Staff also notes the utility's reliance on Staff's assistance with the registration and application process. Staff's meeting with affected utilities in Polk County to explain regulatory practices and procedures was not held until August 20, 1996, which was after the 30 day registration deadline and the 90 day application deadline had passed. Since Garden Grove waited to file its registration and application until it received assistance by staff, staff believes that the Commission should view Garden Grove's late filings in light of these mitigating factors. Therefore, staff recommends that the Commission not require Garden Grove to file for an original certificate but instead have the utility continue according to the grandfather certificate process.

In consideration of the foregoing, staff recommends that Emmer's Petition to Intervene be denied. However, in the event that the Commission rejects Staff's recommendation based on the analysis of the statutory scheme, staff recommends denial of Emmer's petition for the reasons offered below.

Determination of Substantial Interests

Rule 25-22.039, Florida Administrative Code, permits persons who have a substantial interest in the proceeding to petition the Commission for leave to intervene. When addressing a Petition to Intervene, the Commission examines whether the petitioner states allegations sufficient to demonstrate that the intervenor is entitled to participate in the proceeding as a matter of constitutional or statutory right or pursuant to Commission rule, or that the substantial interests of the intervenor are subject to determination or will be affected through the proceeding.

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Emmer has not alleged any constitutional right to intervene, nor does staff believe that it has alleged any relevant statutory right to do so. Thus, the only basis remaining on which to analyze Emmer's Petition to Intervene is whether its substantial interests will be affected by Garden Grove's grandfather proceeding. In order for a person or entity to have standing to intervene in a proceeding, it must have a substantial interest in the outcome. In analyzing whether a person has a substantial interest in a proceeding, the courts have applied a two-prong test set out in Agrico Chem. Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), review denied, 415 So. 2d 1361 (Fla. 1982). This test requires an entity claiming a substantial interest to show 1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57, Florida Statutes, hearing; and, 2) that its substantial injury is of a type or nature which the proceeding is designed to protect. Id. (emphasis added). The first aspect deals with the degree of injury suffered and the second deals with the nature of the injury or the so-called "zone of interest". Id.

First Prong of the Test

In its petition, Emmer argues that it meets Agrico's first prong of suffering immediate injury because Garden Grove's service will be of a lesser quality and provided at a higher cost than the Lake Wales utility's service. Emmer is not a current customer receiving service from Garden Grove; it is only a potential customer and therefore cannot have incurred any actual injury at the time it filed its petition. Emmer's alleged injury is only a possibility of future harm which is not of sufficient immediacy to meet this prong. Furthermore, Emmer's allegations and concerns are purely speculative in nature and therefore cannot confer standing to intervene. Further, both the Courts and the Commission have held that allegations of injury based solely on economic detriment are not sufficient to meet the requirements of a substantial interest for standing purposes. See International Jai-Alai Players Assoc. V. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990); In re: Petition of Jacksonville Electric Authority to resolve a Territorial Dispute with Florida Power and Light Company in St. John's County, Order No. PSC-96-0158-PCO-EU, issued February 5, 1996 in Docket No. 950307-EU, appeal pending, Florida Supreme Court Case No. 88427. In addition, the Supreme Court of Florida held that an individual has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself. Storey v. Mayo, 217 So. 2d 304, 307-308 (Fla. 1968).

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Therefore, staff believes that Emmer has not met the first prong of Agrico. The analysis may be ended here because an entity must meet both prongs of Agrico in demonstrating that its substantial interests are affected. However, for the purpose of fully informing the Commission of all facts, Staff provides the following analysis on the second prong.

Second Prong of the Test

In order to satisfy the second prong of the Agrico test for standing, a petitioner must show that its substantial injury is of a type or nature which the proceeding is designed to protect. The courts have interpreted this prong to require an intervenor to be within the "zone of interest" intended by the statute.

Emmer states that, as a customer of Garden Grove's, its alleged injury is of the type that this proceeding is designed to protect. Emmer then incorrectly cites Section 367.045(4), Florida Statutes, for a basis of its right as a consumer who would be substantially affected by the certification to participate in the proceeding. Section 367.045(4), Florida Statutes, addresses original certificates and amendment of certificates, which procedures clearly require extensive noticing and an opportunity to object. The grandfather certificate statute does not contain these provisions.

A grandfather certificate is granted as a matter of right and the procedure is designed to protect the utility by allowing it to continue its service and rates in the area it was serving at the time jurisdiction switched from the county to the Commission. The simplified grandfather procedures permit existing utilities to gain the benefits of continuity of regulation and avoid the more complex and cumbersome original certification process required of utilities just starting up their operations. As evidenced by the lack of noticing requirements in the grandfather provisions of the statute, the economic interests of potential, future customers such as Emmer are not within the zone of interests intended to be protected by proceedings pursuant to the grandfather certification section of the statute. Thus, staff believes that Emmer has not met this prong of the Agrico test of substantial interests.

In consideration of the foregoing, Staff recommends that Emmer's Petition to Intervene be denied. If the Commission denies Emmer's Petition to Intervene, the Commission should find Garden Grove's Motion to Dismiss moot.

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ISSUE 3: Should Polk County's Petition for Leave to Intervene be granted?

RECOMMENDATION: No, since Garden Grove has a statutory entitlement to a grandfather certificate Polk County's Petition to Intervene should be denied. However, if the Commission denies staff's recommendation on this basis, Polk County's Petition to Intervene should be denied for lack of standing. (K. JOHNSON)

STAFF ANALYSIS: In order to keep this recommendation as concise as possible, staff refers the Commission to the discussion of reasons for denying intervention to Emmer based on Garden Grove's statutory entitlement to a grandfather certificate, contained in Issue 2 of this recommendation. Staff recommends that Polk County's Petition to Intervene should be denied on that same basis. If the Commission denies staff's recommendation on the utility's statutory entitlement to a grandfather certificate and finds that the statute does contemplate intervention, Polk County's Petition for Leave to Intervene should be denied on the grounds that it does not meet the standing requirements for intervention. However, staff assures the Commission that even if Polk County's Petition to Intervene is denied, staff will keep the lines of communication open between staff and Polk County. Staff will continue to be open and available to listen to the concerns of the County regarding this proceeding.

Polk County has alleged that it has standing to intervene because its substantial interests are affected by this proceeding based on its alleged entitlement to ensure that its orders are fully and faithfully executed. The County referred to a June 11, 1996 order of the Polk County Commission which denied Emmer's request to determine if Emmer's property would be excluded from Garden Grove's franchise area.

Staff believes that Polk County does not meet the substantial interest test in Agrico because any injury that may occur as a result of the amount of territory granted to Garden Grove in the grandfather certificate would have an affect, if any affect at all, on Garden Grove, not on the County. The amount of territory granted to Garden Grove through a grandfather certificate may affect the utility's rate base and thus the rates charged to the

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customers of the utility. But since the County declared that it was subject to the provisions of Chapter 367, Florida Statutes, as of May 14, 1996, the County no longer has jurisdiction over water and wastewater utilities in the County; the Commission now holds that power. Therefore, staff believes that Polk County will not be substantially affected by these proceedings and lacks the standing to intervene.

Based on the foregoing, staff recommends denial of Polk County's Petition to Intervene into this grandfather proceeding.

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ISSUE 4: Should the City of Lake Wales' Petition for Leave to Intervene be granted?

RECOMMENDATION: No, since Garden Grove has a statutory entitlement to a grandfather certificate Lake Wales' Petition to Intervene should be denied. However, if the Commission denies staff's recommendation on this basis, Lake Wales' Petition to Intervene should be denied for lack of standing. (K. JOHNSON)

STAFF ANALYSIS: In order to keep this recommendation as concise as possible, staff refers the Commission to the discussion of reasons for denying intervention to Emmer based on Garden Grove's statutory entitlement to a grandfather certificate, contained in Issue 2 of this recommendation. Staff recommends that Lake Wales' Petition to Intervene should be denied on that same basis. If the Commission denies staff's recommendation on the utility's statutory entitlement to a grandfather certificate and finds that the statute does contemplate intervention, Lake Wales' Petition for Leave to Intervene should be denied on the grounds that it does not meet the standing requirements for intervention.

Lake Wales has alleged that it has standing to intervene because its substantial interests are affected by this proceeding because if the Commission certifies Garden Grove to serve the Emmer property, Lake Wales will not be able to serve the Emmer property. Lake Wales' allegations of injury are based completely on a possibility of future economic harm as a competing utility, which is not of sufficient immediacy to meet the test for standing. Furthermore, Lake Wales' allegations are purely speculative in nature and therefore cannot confer standing to intervene. Both the Courts and the Commission have held that allegations of injury based solely on economic detriment are not sufficient to meet the requirements of a substantial interest for standing purposes. See International Jai-Alai Players Assoc. V. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990); In re: Petition of Jacksonville Electric Authority to resolve a Territorial Dispute with Florida Power and Light Company in St. John's County, Order No. PSC-96-0158-PCO-EU, issued February 5, 1996 in Docket No. 950307-EU, appeal pending, Florida Supreme Court Case No. 88427.

Lake Wales relies on In re: Initiation of show cause proceedings against, and investigation into possible overearnings by Sebring Country Estates Water Company in Highlands County, Order No. 19443, in Docket No. 871308-WU, issued June 6, 1988, as precedent for their standing in a grandfather certificate proceeding. The cited order involves a completely different fact

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scenario and is readily distinguishable from the present situation. In Sebring, the Commission allowed intervention to another utility who claimed that it was "already serving" the area that Sebring was requesting in their grandfather certificate. Since the area requested could have been in the territory already served by the intervening utility, the Commission found that it had a substantial interest in the proceeding. In contrast, Lake Wales is not "already serving" the Emmer property. Staff believes that Lake Wales' alleged interests do not rise to the level of the substantial interests required in order to confer standing to intervene.

For the reasons stated above, staff recommends denying Lake Wales' Petition to Intervene based on Garden Grove's statutory right to a grandfather certificate and Lake Wales' lack of standing to intervene into this proceeding.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should remain open pending final disposition of the utility's application for a grandfather certificate. (K. JOHNSON)

STAFF ANALYSIS: This recommendation only addresses the Petitions to Intervene filed in this docket. The determination on the utility's application for a grandfather certificate remains pending. Therefore, Staff recommends that this docket remain open pending final disposition of the utility's application for a grandfather certificate.