

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

EMMER DEVELOPMENT CORPORATION,
Petitioner, Appellant.

Case No. _____

Filed: June 25, 1997

v.

JULIA L. JOHNSON, as Chairman,
Florida Public Service Commission;
DIANE K. KIESLING, as Commissioner,
Florida Public Service Commission;
J. TERRY DEASON, as Commissioner,
Florida Public Service Commission;
SUSAN F. CLARK, as Commissioner,
Florida Public Service Commission;
JOE GARCIA, as Commissioner,
Florida Public Service Commission;

Respondent, Appellees.

and

GARDEN GROVE WATER COMPANY, INC.,

Respondent, Appellee.

In re: Application of grandfather
certificate to operate a water and
wastewater utility in Polk County,
by Garden Grove Water Company, Inc.

Docket No. 961299-WS

- ACK _____
- AFA _____
- APP Smith _____
- CAF _____
- CMU _____
- CTR _____
- EAG _____
- LEG _____
- LIN _____
- OPC _____
- RCH _____
- SEC I _____
- W/S I _____
- JTH _____

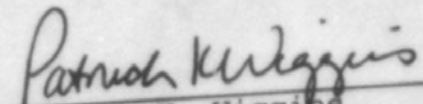
EMMER DEVELOPMENT CORPORATION'S NOTICE OF APPEAL

NOTICE IS GIVEN that Emmer Development Corporation ("Emmer"),
appeals to the District Court of Appeals, First District, Order No.
PSC-97-0615-FOF-WS of the Florida Public Service Commission
rendered on May 29, 1997, a copy of which is attached. The nature

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of the order is a final order denying Emmer's petition to intervene
in this docket as a party.

Respectfully submitted this 25th day of June, 1997.



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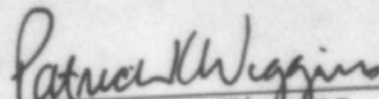
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Emmer Development Corporation's Notice of Appeal was furnished by U.S. Mail to the following this 25th day of June, 1997:

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Patrick K. Wiggins

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 961299-WS
ORDER NO. PSC-97-0615-FOF-WS
ISSUED: May 29, 1997

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
SUSAN F. CLARK
J. TERRY DEASON
JOE GARCIA
DIANE K. KIESLING

ORDER ON PETITIONS TO INTERVENE

BY THE COMMISSION:

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. We acknowledged this resolution 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.

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'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 Emmer's 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's Petition (Motion to Dismiss). On December 16, 1996, Emmer 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 order addresses the Petitions to Intervene and other relevant pleadings. It does not address the merits of the utility's application for a grandfather certificate. A separate order will be issued at a later date on the disposition of the utility's application.

ORAL ARGUMENT

Both Emmer's and Lake Wales' requests for oral argument are denied since all interested parties had an opportunity to participate in this proceeding by addressing their comments to us at the May 6, 1997 agenda conference.

PETITIONS FOR LEAVE TO INTERVENE AND MOTIONS TO DISMISS

In its Petition to Intervene, Emmer stated 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 asserted that, as a potential customer of Garden Grove, its injury is of the type that this grandfather proceeding is designed to protect. Also in its

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

In its December 9, 1996, Motion to Dismiss, Garden Grove basically asserted that Emmer does not meet the two-pronged test for standing which requires an immediate injury in fact which is within the zone of interests that the proceeding is designed to protect. See 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). Garden Grove further stated 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 argued 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 reiterated some of the arguments in its Petition and added 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 asserted that its injury is exactly of the type a grandfather proceeding is designed to protect. Emmer argued 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, argued Emmer, to address the impact of a utility's services and rates on customers located within the service area. Emmer also denied Garden Grove's entitlement to the grandfather certificate as a matter of right conferred by the statute because Garden Grove missed the 90-day application time period. Finally, in support of its position on standing, Emmer cited 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).

We find that Section 367.171, Florida Statutes, does not contemplate intervention or a hearing in a grandfather proceeding because 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 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. We find that 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. 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 the Office of Public Counsel, 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 because 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.

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. 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.

In consideration of all of the foregoing, Emmer's Petition to Intervene is denied. For the same reasons, the Petitions to Intervene filed by Polk County and Lake Wales are denied. Accordingly, the Motions to Dismiss are moot.

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 proposed agency action procedures in a grandfather certificate case. We find 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 proposed agency action. As this case is clearly distinguishable and because we find that the statutory scheme of Section 367.171, Florida Statutes, does not provide for a point of entry, we deny Emmer's request for proposed agency action procedures and a hearing.

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, we note 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).

We realize 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, we recognize the utility's reliance on Commission staff's assistance with the registration and application process. Commission 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 both the 30-day registration deadline and the 90-day application deadline had passed. Because Garden Grove waited to file its registration and

application until it received assistance by staff, we considered Garden Grove's late filings in light of these mitigating factors. Therefore, we will not require Garden Grove to file an application for an original certificate.

Although we have found it appropriate to deny the Petitions to Intervene, we direct staff to continue to communicate with all petitioners in this process. In addition, all interested parties may address this Commission at the agenda conference which addresses the disposition of Garden Grove's grandfather certificate application.

This docket shall remain open pending final disposition of Garden Grove's application for a grandfather certificate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Emmer Development Corporation's Petition For Leave to Intervene is denied. It is further

ORDERED that Polk County's Petition For Leave to Intervene is denied. It is further

ORDERED that the City of Lake Wales' Petition For Leave to Intervene is denied. It is further

ORDERED that Garden Grove Water Company's Motions to Dismiss are moot. It is further

ORDERED that Emmer Development Corporation's Motion to Dismiss is moot. It is further

ORDERED that Emmer Development Corporation's Requests for Proposed Agency Action Procedures and a hearing are denied. It is further

ORDERED that this docket shall remain open pending final disposition of Garden Grove's application for a grandfather certificate.

By ORDER of the Florida Public Service Commission, this 29th day of May, 1997.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

(S E A L)

KMJ

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.