

HOLLAND & KNIGHT LLP ORIGINAL

315 South Calhoun Street
Suite 600
P.O. Drawer 810 (ZIP 32302-0810)
Tallahassee, Florida 32301

850-224-7000
FAX 850-224-8832
www.hklaw.com

Annapolis	San Francisco
Atlanta	Seattle
Bethesda	Tallahassee
Boston	Tampa
Bradenton	Washington, D.C.
Chicago*	West Palm Beach
Fort Lauderdale	
Jacksonville	International Offices
Lakeland	Caracas**
Los Angeles	Helsinki
Miami	Mexico City
New York	Rio de Janeiro
Northern Virginia	São Paulo
Orlando	Tel Aviv**
Portland	Tokyo
Providence	
St. Petersburg	*Holland & Knight LLC
San Antonio	**Representative Office

July 29, 2003

D. BRUCE MAY, JR.
850-425-5607

Internet Address:
dbmay@hklaw.com

Via Hand-Delivery

Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

JUL 29 PM 4:13
COMMISSION CLERK

Re: In re: Application by Florida Water Services Corporation for Acknowledgment of Transfer of Nassau County Land and Facilities to Nassau County and Cancellation of Certificates Nos. 171-W and 122-S, Docket No. 030542-WS

Dear Ms. Bayo:

Enclosed for filing in the captioned matter are the original and seven (7) copies of American Beach Property Owners' Association, Inc.'s Memorandum in Opposition to Florida Water Services Corporation's Response to Amended Petition To Intervene. A diskette containing this filing in Word format is also enclosed.

AUS _____
CAF _____
CMF _____
COM _____
CTR _____
ECF _____
GCL _____
OPC _____
MMS _____
SEC 1 _____
OTH _____

For our records, please acknowledge your receipt of this filing on the enclosed copy of this letter. Thank you for your consideration.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May
D. Bruce May

RECEIVED & FILED

h
FPSC-BUREAU OF RECORDS

DOCUMENT HANDLED DATE

06860 JUL 29 03

FPSC-COMMISSION CLERK

Blanca S. Bayo
July 29, 2003
Page 2

DBM:kjg
Enclosure

cc: Parties of Record
Michael Mullin, Esquire
Ronald Austin, Esquire
The Honorable Henry Lee Adams, President,
American Beach Property Owners' Association, Inc.

TAL1 #268931 v1

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Application by Florida Water) Docket No. 030542-WS
Services Corporation for Acknowledgment)
Of Transfer of Nassau County Land and) Filed: July 29, 2003
Facilities to Nassau County, and)
Cancellation Of Certificates Nos. 171-W)
and 122-S)
_____ /

**AMERICAN BEACH PROPERTY OWNERS' ASSOCIATION, INC.'S
MEMORANDUM IN OPPOSITION TO
FLORIDA WATER SERVICES CORPORATION'S
RESPONSE TO AMENDED PETITION TO INTERVENE**

Florida Water Services Corporation ("Florida Water") has filed a response in opposition to the Amended Petition for Leave to Intervene ("Amended Petition") filed by American Beach Property Owners' Association, Inc. ("ABPOA"). Florida Water claims that ABPOA does not have standing to participate in this proceeding and moves the Commission to dismiss ABPOA's Amended Petition. ABPOA respectfully submits this memorandum in opposition to Florida Water's above-described motion to dismiss.

Florida Water's motion is based on two tenuous arguments. First, Florida Water claims that its exit from the utility business in Nassau County will not harm ABPOA because Florida Water has made no commitment to serve ABPOA and ABPOA has expressed no interest in receiving service from Florida Water. Second, Florida Water claims that ABPOA will not suffer any injury that the Commission can protect against in a utility transfer proceeding. Florida Water's claims are not supported by the facts, by Florida law or by Commission precedent. Accordingly,

DOCUMENT NUMBER DATE

030542 JUL 29 03

FPSC-COMMISSION CLERK

Florida Water's motion cannot serve to deprive ABPOA of its right to participate in this proceeding.

**ABPOA HAS STANDING TO PARTICIPATE
AS A PARTY IN THIS PROCEEDING**

1. ABPOA and Florida Water agree that in order to have standing, an entity must demonstrate:

- (a) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a formal proceeding; and
- (b) that its injury is of a type or nature which the proceeding is designed to protect.

Agrico Chemical Co. v. Department of Environmental Protection, 406 So.2d 478, 482 (Fla. 1st DCA 1981), rev. denied, 415 So.2d 1361 (Fla. 1982). ABPOA's Amended Petition satisfies both of these requirements. Therefore, ABPOA is entitled to participate as a party to this proceeding.

**Florida Water's Exit From the Utility Business in Nassau County Will Cause
ABPOA Injury In Fact**

2. Florida Water claims that its exit from the utility business in Nassau County will not harm ABPOA because (i) Florida Water has made no commitment to serve ABPOA members; (ii) ABPOA members have expressed no desire that Florida Water provide them service. Florida Water's arguments are purely factual in nature and cannot be the basis of a motion to dismiss. For purposes of ruling on a motion to dismiss, the Commission must accept as true all facts alleged in ABPOA's Amended Petition. See St. Francis Parkside Lodge of Tampa Bay v.

Department of Health and Rehabilitative Services, 486 So.2d 32 (Fla. 1st DCA 1986) (“[i]n considering the motion to dismiss the amended petitions the . . . [agency] must accept as true the factual allegations of the petitions”; reversing final order and holding that allegations in petitions were sufficient for standing). See also In re: Petition of Competitive Carriers for Commission Action to Support Competition in BellSouth Telecommunication, Inc. Service Territory, 99 F.P.S.C. 4:512, Docket No. 981834-TP Order No. PSC-99-0769-FOF-TP (April 21, 1999), citing Connolly v. Sebeco, Inc., 89 So.2d 482, 484 (Fla. 1956).

3. Not only does Florida Water improperly base its motion to dismiss on factual arguments, Florida Water gets the facts wrong. Florida Water confuses ABPOA with the owner of the American Beach Water System. These are two entirely distinct entities. Mr. Dollison, who owns the American Beach Water System, does not speak for (and is not even a member of) the ABPOA. ABPOA’s position has been and continues to be that it seeks water and wastewater service from Florida Water.

4. The Amended Petition clearly shows that ABPOA members will suffer an immediate injury in fact when Florida Water exits the utility business in Nassau County and takes no steps to ensure that service will be provided to those customers. By ignoring its commitment to serve and employing other tactics of delay, Florida Water has forced ABPOA members to receive water from questionable sources and to utilize septic tanks for waste removal on a barrier island. Florida Water’s claim that ABPOA members have no interest in receiving

utility service from Florida Water and therefore have suffered no real injury is without merit.

ABPOA's Injury Is One The Commission Is Obligated To Protect

5. Florida Water claims that because the Commission must approve the transfer of Florida Water's utility facilities to Nassau County as a matter of right, ABPOA cannot allege any injury that this type of proceeding is designed to protect. Florida Water's argument is based on the faulty premise that the Commission is essentially powerless to grant any relief in this type of proceeding. This is the same argument that Florida Water raised and that was recently rejected by the Commission in Docket No. 021066-WS, by the Circuit Court for Leon County in Case No. 03 CA 000358, and by the Florida First District Court of Appeal in Case No. 1D03-432.

6. The Florida Legislature has determined that the Commission's regulation of private water and wastewater utilities under Chapter 367 is in the public interest, and that such regulation is an exercise of the police power for the protection of the public health, safety, and welfare. § 367.011(3), Florida Statutes (2003). Moreover, the provisions of Chapter 367 must be liberally construed for the accomplishment of this purpose. *Id.* Clearly, the Commission has the power and the duty in this proceeding to address the harm brought about by Florida Water's attempt to exit the utility business in Nassau County without honoring its service commitments to ABPOA members.

7. Had the Legislature intended for the Commission to have no power to grant relief where a private utility sought to transfer its facilities to a governmental authority, it would never have given the Commission the right and the obligation to approve such transfers in the first instance. The authority of the Commission to approve a utility transfer is crucial in order for the Commission to effectively exercise its police power for the protection of the public health, safety and welfare. The Commission's approval authority is particularly important in cases such as this where a private utility seeks to transfer some of its facilities to an alleged governmental authority, but retains utility facilities and operations in other areas that remain under the Commission's regulatory jurisdiction. Indeed, where a private utility seeks to transfer a portion of its facilities to a governmental authority, the Commission routinely investigates a number of different issues, including whether the transferring utility will record a "gain on sale" of rate base assets and, if so, whether those gains should be allocated to customers. See e.g., In re: Application for Approval of Transfer of Facilities of Florida Water Services Corporation to Orange County and Cancellation of Certificates Nos. 84-W and 73-S in Orange County, Docket No. 971667-WS; In re: Application for Rate Increase in Lee County by Lehigh Utilities, Inc., Docket No. 911188-WS; and In re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; in Collier County by Marco Shores Utilities (Deltona); and in Volusia County by Deltona Lakes Utilities

(Deltona), Docket No. 920199-WS. ABPOA presumes that the Commission will conduct this proceeding in accordance with precedent and evaluate, among other things, whether Florida Water recorded a “gain on sale”.

8. If the Commission is powerless to grant any relief in a proceeding involving the transfer of a private utility’s assets to a governmental authority, then why did the Commission allow 5 competing utility service providers to intervene when Florida Water sought to sell its facilities to the Florida Water Services Authority?¹ The answer is clear – the Commission’s authority in this type of proceeding is much broader than what Florida Water claims. This point is sharpened when one takes Florida Water’s proposed course of action to its logical conclusion. If the Commission were to grant Florida Water’s motion and dismiss ABPOA from the proceeding, the agency would in effect articulate an absurd policy of allowing potentially competing utility service providers to participate while barring current and prospective customers from raising their concerns. This result would directly contravene the Commission’s statutory obligation to protect customers and ensure that regulated utilities like Florida Water fulfill their service commitments.

9. ABPOA recognizes that the Commission’s ability to regulate Nassau County may be limited by statute. However, should the transfer occur, it is undisputed that the Commission would continue to have regulatory jurisdiction over Florida Water. The Commission therefore has a continuing obligation to

¹ See In re: Investigation into the proposed sale of Florida Water Services Corporation, Docket No. 021066-WS.

ensure that Florida Water fulfills its obligations and commitments to serve regardless of whether Florida Water transfers a portion of its facilities to an alleged governmental authority. The harm to ABPOA that results from Florida Water's failure to fulfill its service commitments to ABPOA is precisely an injury that this proceeding is designed to protect.

10. Finally, Florida Water's reliance on Ameristeel v. Clark, 691 So.2d 473, 477 (Fla. 1997) for the proposition that ABPOA lacks standing is misplaced. The court in Ameristeel was presented with a territorial agreement between Florida Power & Light ("FPL") and Jacksonville Electric Authority ("JEA") that simply preserved the status quo and kept Ameristeel, a long-standing FPL customer, as a customer of FPL. Ameristeel challenged the territorial agreement in an effort to leave FPL's system and take service from JEA. The court concluded that Ameristeel lacked standing to challenge the territorial agreement because Ameristeel had been an FPL customer since 1974, would remain an FPL customer under the new territorial agreement, and "[i]ts corporate interest remained completely unaffected and in no way injured by the JEA-FPL territorial agreement." *Id.* at 478. None of the facts, equities or law in Ameristeel apply to this case. Indeed, there is no long-standing policy of the Commission or Florida Water that would bar ABPOA members from receiving service from Florida Water. Quite to the contrary, Florida Water has formally advised the Commission and the

Commission in turn has advised ABPOA members that the utility is prepared to provide service to those members.²

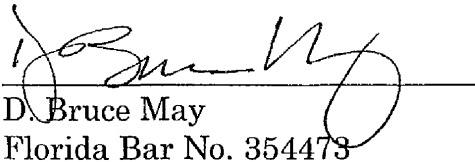
CONCLUSION

11. ABPOA clearly meets the standing requirements as articulated under the Agrico test. Thus, Florida Water's motion to dismiss ABPOA from this proceeding must be denied.

WHEREFORE, ABPOA respectfully requests that the Commission:

- (a) deny Florida Water's motion to dismiss; and
- (b) grant ABPOA's Amended Petition for Leave to Intervene; and
- (c) grant such other relief as the Commission deems appropriate.

Respectfully submitted this 29th day of July, 2003 by:



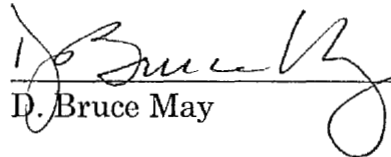
D. Bruce May
Florida Bar No. 354473
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000
(850) 224-8832 (facsimile)

Counsel for American Beach Property
Owners' Association, Inc.

² It is also inconsistent at best for Florida Water to suggest (as it now appears to do) that the American Beach area is subject to the exclusive franchise of another "non-jurisdictional" utility. The Commission orders cited by Florida Water do not support this position. Moreover, Florida Water has never taken this position in the past and in fact has taken the direct opposite position when it represented to the Commission that it stands "ready, willing and able" to provide service to American Beach.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to Kenneth A. Hoffman and J. Stephen Menton, Rutledge, Ecenia, Purnell & Hoffman, P.A., 215 S. Monroe Street, Suite 420, Tallahassee, Florida; and by facsimile to Mike Mullin, Attorney for Nassau County, Post Office Box 1010, Fernandina Beach, Florida 32035; and a true and correct copy has been furnished by U.S. Mail to: Florida Water Services Corporation, P. O. Box 609520, Orlando, FL 32860-9520 and Nassau County Board of Commissioners, P.O. Box 456, Fernandina Beach, FL 32034-5456 all on this 29th day of July, 2003.


D. Bruce May

TAL1 #268707 v6