

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: August 29, 2003
Facilities to Nassau County, and)
Cancellation Of Certificates Nos. 171-W)
and 122-S)
_____ /

**AMERICAN BEACH PROPERTY OWNERS' ASSOCIATION, INC.'S
MOTION FOR RECONSIDERATION**

American Beach Property Owners' Association, Inc. ("ABPOA"), by and through its undersigned counsel, and pursuant to Rule 25-22.060, Florida Administrative Code, respectfully requests that the Florida Public Service Commission ("Commission") reconsider Order No. PSC-03-0948-PCO-WS ("Order"), in which the Prehearing Officer denied ABPOA's Amended Petition for Leave to Intervene in this proceeding ("Amended Petition"). The Order summarily denies the Amended Petition solely on grounds that ABPOA did not "demonstrate a possible injury that is real and immediate and not conjectural" and thus failed to satisfy the "first prong" of the standing test in Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2nd DCA 1981). (Order at 3). The Order contains no analysis supporting this sweeping conclusion. Thus, ABPOA cannot be sure what points of fact or law the Prehearing Officer overlooked or failed to consider when ruling on ABPOA's standing. However, language in the Order indicates that the Prehearing Officer either overlooked or failed to consider that the injuries ABPOA identifies in this proceeding are: (1) not

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conjectural or fabricated, but are injuries that ABPOA members are actually suffering today; and (2) precisely the same injuries alleged by residents of American Beach in an earlier complaint filed against Florida Water Services Corporation (“Florida Water” or “FWSC”) in 2001. The Commission never questioned the sufficiency of those injuries when it addressed the complaint of American Beach residents in 2001. To now dismiss the same injuries as conjectural would deviate from past Commission practice and violate Florida’s Administrative Procedure Act and principles of fundamental fairness.

THE AGRICO TEST

1. ABPOA agrees that in order to have standing, it 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 and nature which the proceeding is designed to protect.

Agrico Chemical Co. v. Department of Environmental Protection, 406 So. 2d at 482.

The first prong of the Agrico standing test deals with the degree of injury; the second prong deals with the nature of the injury. See Ybor III, Ltd., v. Florida Housing Finance Corporation, 843 So. 2d 344 (Fla. 1st DCA 2003). In order to satisfy the first prong of the test, the complained of injury or threat of injury must be “both real and immediate, not conjectural, hypothetical or abstract.” Village Park Mobile Homes Association, Inc. v. Department of Business Regulation, 506 So. 2d 426, 433 (Fla. 1st DCA 1987).

ABPOA'S INJURIES

2. In its Amended Petition, ABPOA described with specificity the injuries that it and its members are suffering and will continue to suffer if FWSC's utility system is transferred to Nassau County:

FWSC has committed to provide water and wastewater service to the residents of American Beach who are members of ABPOA. However, as a result of the transfer of FWSC's water facilities to Nassau County, it is now questionable whether these commitments will be honored. Absent the availability of water and wastewater service from Nassau County, the residents of American Beach will be forced to continue to receive water from wells from questionable ground water sources and to utilize substandard septic tanks for waste removal, creating public health and environmental concerns.

(Amended Petition, ¶ 14).

3. ABPOA further described the immediate injuries that its members will continue to suffer in its Memorandum In Opposition To Florida Water Services Corporation's Response To Amended Petition To Intervene:

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.

(ABPOA's Memorandum in Opposition, ¶ 4).

POINTS OF FACT AND LAW
NOT CONSIDERED BY PREHEARING OFFICER

4. The Prehearing Officer dismisses ABPOA's injuries as conjectural and therefore concludes that ABPOA failed to satisfy the "first prong of Agrico."¹ In so ruling, the Prehearing Officer fails to consider two important points supporting ABPOA's standing. First, the Prehearing Officer fails to consider that ABPOA members are continuing to suffer real and immediate injuries today. By ignoring its commitment to serve and employing other delay tactics, Florida Water has forced ABPOA members to continue to receive water from questionable sources and to utilize substandard septic tanks, both of which pose significant public health and environmental risks. Second, the Prehearing Officer fails to consider that ABPOA's the injuries alleged in this case are precisely the same injuries that residents of American Beach and ABPOA members raised in 2001 when they complained to the Commission that Florida Water's refusal to serve American Beach required them to "receive their water from wells on their lots or other questionable ground water sources." (Amended Petition, Exhibit "B".) When the Commission was advised of the injuries that American Beach residents suffered in 2001, it did not dismiss those injuries as conjectural or speculative. To the contrary, the Commission acknowledged the immediacy and reality of the injuries, vigorously investigated the complaint, and assured the residents of American Beach that it would initiate

¹ The Prehearing Officer's Order did not dispute ABPOA's allegations concerning the nature of its injuries – the second prong of Agrico. Indeed, ABPOA's Amended Petition and Memorandum in Opposition amply explain how the injuries that ABPOA and its members continue to suffer are interests that the Commission is obligated to protect.

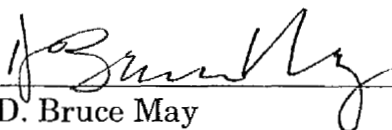
further investigations if the utility failed to provide service within a reasonable time. (Amended Petition, Exhibit "C".)

5. The injuries suffered by residents by American Beach are just as real and just as serious today as they were in 2001. For the Commission to now deny ABPOA standing on the basis that ABPOA's injuries are "conjectural" would deviate "from prior agency practice" and thus violate Section 120.68(7)(e), Florida Statutes and principles of fundamental fairness.

CONCLUSION

Because the Prehearing Officer has overlooked and failed to consider the points of fact and law discussed herein that demonstrate that ABPOA is entitled to intervene in this proceeding, ABPOA moves this Commission to reconsider the Prehearing Officer's Order and, upon reconsideration, grant ABPOA's Amended Petition for Leave to Intervene.

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

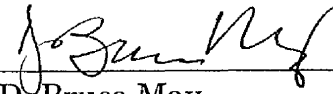


D. Bruce May
Florida Bar No. 354473
Holland & Knight LLP
P.O. Drawer 810
Tallahassee, FL 32302
(850) 224-7000
(850) 224-8832 (facsimile)

Counsel for American Beach Property
Owners' Association, Inc.

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 August, 2003.



D. Bruce May