ORIGINAL
FILE COPY

BEFORE THE PUBLIC SERVICE COMMISSION

In Re: Application for Amendment of Certificates Nos. 306-W and 255-S in Charlotte/Lee Counties by Southern States Utilities, Inc.

Docket No. 960907-WS

CAPE CORAL'S MEMORANDUM IN OPPOSITION TO SOUTHERN STATES UTILITIES, INC.'S MOTION TO DISMISS

Southern States Utilities, Inc. (hereinafter "applicant") has filed a Motion to Dismiss which fails both procedurally and substantively for the following reasons:

Inapplicability of Section Permitting Motion to Dismiss

Applicant has filed a Motion to Dismiss pursuant to Rule 25-22.037(2), Florida Administrative Code, which permits the filing of such a motion in response to certain types of pleadings. However, the section does not apply to permit such a motion in response to a written objection filed under 25-30.031.

Subpart B of Part IV of Chapter 25-22 is entitled "Prehearing Procedures" and encompasses Rule 25-22.036 through Rule 2-22.042 F.A.C. The subpart when read as a whole, outlines procedures to be followed in the initiation of a Sec. 120.57 F.S. proceeding. Rule 25-22.036 F.A.C. starts by stating that, "this rule shall not apply to the extent that a proceeding is governed by rules or statutes that prescribe alternative procedures." Here, the written objection filed by the City of Cape Coral (hereinafter "Cape Coral") on September 9, 1996, was filed pursuant to Rule 25-30.031 F.A.C., which prescribes just such an alternative procedure where a municipality objects to an application for an amendment of a

ACK
AFA
APP
CAF
CMU
CTR
EAG
LEG 1
LIN 3
OPC
RCH
SEC 1
WAS
OTH

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

RECEIVED
96 OCT 10 AM

DOCUMENT NUMBER-DATE
10849 OCT 10 96
FPSC-RECORDS/REPORTING

water or wastewater certificate and desires to initiate a Sec. 120.57 F.S. proceeding. The written objection does not fit within the definition of any type of initial pleading described in Rule 25-22.036 F.A.C., which would otherwise be used to initiate a Sec. 120.57 F.S. proceeding and to which the remainder of Subpart B applies.[1]

Since Cape Coral has not filed an initial pleading under Rule 25-22.036, but rather, an objection to the applicant's application, which as discussed below mandates a proceeding be held, the applicant may not make a motion to dismiss under Rule 25-22.037 F.A.C., because such a motion is reserved only for dismissal of initial pleadings as enumerated in 25-22.036. Here, what Cape Coral has filed can in no way be construed as an initial pleading. The objection is in response to the applicant's initial application, and as such, governed by the procedures of Chapter 25-30.

Mandate of a Sec. 120.57 F.S. Proceeding

As shown above, Cape Coral's objection is governed by Rule 25-30.031 F.A.C., and Sec. 367.045 F.S. As such, the language of Sec. 367.045 F.S., mandates that a Sec. 120.57 F.S., proceeding be held so that a municipality such as Cape Coral can bring to the attention of the Public Service Commission, violations of its comprehensive plan and any other provision of law. Section 367.05 (4) F.S. states,

---

[1] Rule 22-22.036 F.A.C., lists the following initial pleadings as those to which Subpart B is applicable: applications, petitions, complaints, and orders and motions.

> If...the commission receives from a governmental authority... a written objection requesting a proceeding pursuant to Sec. 120.57 F.S., the commission **shall order such a proceeding**...

The Supreme Court of Florida has ruled that the normal meaning of the word "shall" is mandatory. Neal v. Bryant, 149 So. 2d 529 (Fla. 1962). accord Florida Tallow Corporation v. Bryan, 237 So. 2d 308 (Fla. 4th DCA 1970); White v. Means, 280 So. 2d 20 (Fla. 1st DCA 1973); S.R. v. State, 346 So. 2d 1018 (Fla. 1977); and Concerned Citizens of Putnam County for Responsive Government, Inc. v. St. Johns River Water Management District, 622 So. 2d 520 (Fla. 5th DCA 1993).

Reading Sec. 367.045(4) with the above case law interpretation of the word "shall" in mind, it is clear that Legislature has mandated that the Public Service Commission must hear Cape Coral's objection to the applicant's amendment in a Sec. 120.57 F.S., proceeding and that a motion to dismiss Cape Coral's request for such a proceeding can not be granted. Assuming that the applicant's Motion to Dismiss has been properly filed and that the commission is not mandated to hear Cape Coral's concerns, the substantive challenges in the motion to dismiss still must fail.

Standing to Object-Generally and Statutory Bases

The applicant states in his Motion to Dismiss that Cape Coral does not have standing outside of a comprehensive plan violation to challenge the applicant's extension request. Sec. 367.045(4) F.S., states,

> **Notwithstanding the ability to object on any other ground,** a county or municipality has

> standing to object on the ground that the issuance or amendment of the certificate of authorization violates established local comprehensive plans developed pursuant to Sec. 163.3161-163.3211 F.S.

Clearly, the Legislature determined that there could exist other bases besides comprehensive plan violations on which a challenging municipality could achieve standing.

Assuming as the applicant suggests, that Cape Coral in order to achieve standing for a Sec. 120.57 F.S. proceeding outside of a comprehensive plan violation must show that its substantial interests will be affected under Sec. 120.52 (12)(b) F.S., Cape Coral clearly meets this standard. The applicant states that the standard of having substantial interests affected is set out in Agrico Chemical Co. v. Dept. of Environmental Protection, 406 So. 2d 478 (Fla. 2d DCA 1981), where the Second District stated that before one can be considered to have a substantial interest in the outcome of a proceeding he must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a Sec. 120.57 proceeding and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

Here, Cape Coral meets both prongs of the Agrico test. First, the applicant is attempting to extend utility service into Cape Coral municipal boundaries. As mentioned in Cape Coral's written objection, Chapter 71-585, Laws of Florida, grants to Cape Coral the authority, procedures, and power to determine, fix and change rates to be charged and collected by a public utility for its water and sewer services within the municipal jurisdiction of the City of

Cape Coral. Pursuant to this law, Cape Coral has passed ordinances requiring a franchise to be obtained by all utilities prior to providing service within Cape Coral. By considering an amendment of the applicant's service area certificate to permit an extension into the municipal boundaries of Cape Coral, the Public Service Commission will be taking action which has an immediate effect upon Cape Coral's substantial interests in regulating said applicant as provided for by Florida Law.

The second prong of the Agrico test is met because Sec. 367.045 F.S., was created for the exact purpose of allowing a municipality to object to and participate in a hearing on an applicant's extension of service into municipal areas when such an extension could violate a comprehensive plan provision, or as shown above, for "any other ground." Here, Cape Coral clearly has substantial interests that will be effected in the consideration of the applicant's extension request.

The applicant argues in his Motion to Dismiss that Chapter 367 F.S., grants exclusive jurisdiction over each utility within the state to the Florida Public Service Commission. The applicant states that Chapter 367 F.S., supersedes and repeals Chapter 71-585 and that as such, Cape Coral would not be able to argue that its substantial interests granted to it by Chapter 71-585 are affected by the proposed agency action. As support for the proposition that Chapter 71-585 has been repealed, applicant cites, Town of Palm Beach v. Palm Beach Local 1866 of Int'l Association of Fire Fighters, 275 So. 2d 247 (Fla. 1973), in which the Supreme Court of

Florida in examining the effect of a general law over a prior enacted special law stated,

> Normally the maxim of Generalia specialibus non derogant would apply thereby retaining the effectiveness of the special act notwithstanding a subsequent general act on the same subject. However, where the general act is an overall revision or general restatement of the law on the same subject, the special act will be presumed to have been superseded and repealed. at 249

The applicant's reliance on this case is misplaced. In Palm Beach Local 1866, the Court was examining two laws which were not contradictory to each other, but rather, virtually identical to each other. In Palm Beach Local 1866, the Supreme Court was clearly holding that the special law was subsumed by the general law and there was no need to give consideration to the special law.

Here, the case is quite different. Chapter 367 and Chapter 71-585 are contradictory as both seem to grant exclusive jurisdiction over utilities. The standard of law to be applied where two laws are contradictory to one another is well settled in Florida and directly opposite to the principle discussed in Palm Beach Local 1866. The correctly applicable principle was stated in Markham v. Blount, 175 So. 2d 526 (1965), where the Supreme Court of Florida stated,

> The courts in construing a statute must, if possible, avoid such construction as will place a particular statute in conflict with other apparently effective statutes covering the same general field...And where courts can, in construing two statutes, preserve the force of both without destroying their evident intent, it is their duty to do so...repeal by implication is not favored. at 528.

(citations omitted). *See* Goehring v. Broward Builders Exchange, Inc., 222 So. 2d 801 (Fla. 4th Dca 1969) (whenever possible, statutes should be construed to avoid conflict with each other statutes covering same general subject and must allow each a reasonable sphere of operation) *See also* Ellis v. City of Winter Haven, 60 So. 2d 620 (Fla. 1952)(if possible, two statutes must be construed as to preserve force of both).

Here, both statutes can and must be read together. The Legislature has clearly meant for the Public Service Commission to have jurisdiction over utilities in Florida, in Chapter 367 F.S., with an exception carved out for Cape Coral, Florida in Chapter 71-585. Since the Legislature has not repealed Chapter 71-585, it is clear that they have kept Cape Coral's exception in tact despite any subsequent revisions of Chapter 367 F.S. Reading the statutes in this manner properly allows both to be given full effect without repealing one or the other by implication. Since Chapter 71-585 F.S., has full effect, Cape Coral can allege that it has substantial interests in the applicant's application process and has standing to appear at a requested Sec. 120.57 F.S., proceeding.

Comprehensive Plan

In its Motion to Dismiss, the applicant states that the concerns of Cape Coral in its written objection with respect to its comprehensive plan are not ripe for consideration, that the Commission can not consider the objection because it is not the actual granting of the application which will cause a comprehensive plan violation, but rather, potential subsequent design and

permitting concerns, and that the Commission has no authority to interpret a comprehensive plan of a municipality.

First, with respect to the argument that Cape Coral's comprehensive plan concerns are not ripe, this argument must fail. There currently exist many inconsistencies in Cape Coral's comprehensive plan with respect to Southern States Utilities, Inc., providing service to the area in question. As stated in the written objection, these inconsistencies relate to design capability and environmental assurances which have not been met. Being that the applicant is at this time requesting an amendment to extend service into the area covered by Cape Coral's comprehensive plan, surely Cape Coral's concerns with respect to requirements that have not been fulfilled under said plan are ripe for consideration at this point.

Second, the applicant argues that the Commission is being forced to adjudicate whether the design and permitting of the utility facilities in the requested extension are inconsistent with the comprehensive plan, not whether the amendment itself is inconsistent with the comprehensive plan. Although it is not the physical grant of the amendment that violates the comprehensive plan, it is the grant of the amendment which permits the applicant to extend service into an area where inconsistencies currently exist. As such, the amendment itself and the actual violations are so closely related that granting the amendment itself will be inconsistent with Cape Coral's comprehensive plan.

Lastly, the Legislature has mandated that the Commission

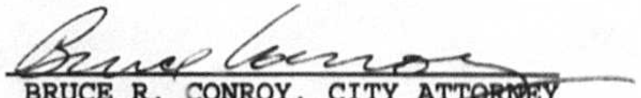
"Shall consider the local comprehensive plan..." Sec. 367.045(5)(b) F.S. Here, if the applicant's argument is accepted, the Commission could not examine whether the applicant's facilities themselves are inconsistent with a local comprehensive plan, but only if the grant of the amendment itself is a violation. This is an impractical reading of the statute. The legislative intent of Sec. 367.045 F.S., is clear that the Commission must consider the effect of the applicant's extension on the comprehensive plan of the locality into which the extension is requested. Prohibiting the Commission from interpreting a comprehensive plan to see if violations exist would essentially render the Commission powerless to do exactly what it has been mandated to do by the legislature. As such, the Commission has the power to consider the inconsistencies with Southern States Utilities, Inc's., extension of service and Cape Coral's comprehensive plan.

Conclusion

Southern States Utilities Inc., has filed a Motion to Dismiss under an inapplicable rule to the above requested proceeding and the applicant's Motion to Dismiss should be denied. Additionally, the applicant's Motion to Dismiss fails substantively because Cape Coral has standing to request a proceeding under Sec. 120.57 F.S., both generally and pursuant to its comprehensive plan.

Certificate of Service

I HEREBY CERTIFY that the original and fifteen (15) copies of this memorandum in opposition to the applicant's Motion to Dismiss has been furnished by Overnight Mail to Director, Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and a copy has been furnished by Overnight Mail to Southern States Utilities, Inc., attn: Brian Armstrong, General Counsel, 1000 Color Place, Apopka, Florida 32703, this 9th day of October, 1996.



BRUCE R. CONROY, CITY ATTORNEY
CITY OF CAPE CORAL
Post Office Box 150027
Cape Coral, FL 33915-0027
(941) 574-0408
Florida Bar #368199