

STATE OF FLORIDA

COMMISSIONERS:
LILA A. JABER, CHAIRMAN
J. TERRY DEASON
BRAULIO L. BAEZ
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON



OFFICE OF THE GENERAL COUNSEL
HAROLD A. McLEAN
GENERAL COUNSEL
(850) 413-6199

Public Service Commission

February 18, 2003

Mr. Carroll Webb
Joint Administrative Procedures
Committee
Room 120 Holland Bldg.
Tallahassee, FL 32399-1300

Re: Docket No. 030159-EU - Petition for Declaratory Statement from the City of Parker

Dear Mr. Webb:

The Commission received a Petition for Declaratory Statement from the City of Parker on February 11, 2003. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Weekly on February 28, 2003.

Sincerely,

Marlene K. Stern
Senior Attorney

AUS _____
CAF _____
CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
SEC L
OTH _____

MKS
Enclosure
cc: Division of the Commission Clerk
and Administrative Services

DOCUMENT NUMBER DATE
01639 FEB 18 03
FPSC-COMMISSION CLERK

030159webbletter.mks

ORIGINAL

FLORIDA PUBLIC SERVICE COMMISSION

IN RE: REQUEST FOR DECLARATORY STATEMENT
BY CITY OF PARKER, FLORIDA

RECEIVED
FEB 11 AM 10:30
COMMISSION
CLERK
030159

PETITION FOR DECLARATORY STATEMENT

The City of Parker, Florida, whose City Hall is located at 1001 West Park Street, Parker, Florida (Telephone No. 850-871-4104; Telefax No. 850-871-4516), by and through the undersigned city attorney, requests that the Florida Public Service Commission ("PSC") issue a Declaratory Statement based upon the contents of this Petition. A Declaratory Statement is necessary to provide guidance to the City of Parker for pending and future permitting issues and to avoid potential administrative litigation.

QUESTION FOR DECLARATORY STATEMENT

Does the jurisdiction of the Florida Public Service Commission preempt the City of Parker's application of its Comprehensive Plan, Land Development Regulations, and City Codes and Ordinances to Gulf Power Company's proposed aerial power transmission line planned to travel from

DOCUMENT NUMBER
U1387 FEB 11 8
FPSC-COMMISSION CLERK

private property located within the City, crossing the shoreline of the City and running across St. Andrew Bay?

BACKGROUND

Gulf Power Company ("Gulf Power") determined that, given the projected additional power needs of Tyndall Air Force Base ("Tyndall"), Gulf Power needed to install additional lines to provide that power. Gulf Power evaluated various alternatives for supplying those power needs, including installing a subaqueous line under St. Andrew Bay and affixing the line to the DuPont Bridge. Eventually, Gulf Power decided to remove from active service its existing subaqueous dual-circuit, 46,000 volt transmission lines, which were installed in approximately 1962¹, and to replace them with two aerial horizontal circuits (four lines), each circuit carrying 115,000 volts. The lines were designed to be affixed to four poles, two poles being located in shallow water and two embedded in the bottom of St. Andrew Bay at deeper depths.

In facilitation of its plan, Gulf Power, the electric utility also servicing the City², filed a Joint Application

¹ The City of Parker was not incorporated until 1967.

² The City has previously granted a franchise to Gulf Power pursuant to Ordinance No. 97-228 as amended by Ordinance No. 98-234, granting to Gulf Power the ability to operate within public rights-of-way of the City for the purpose of supplying electricity to the City and its inhabitants. The franchise agreement does not address any rights of Gulf Power to install a power line on private property, to cross the shoreline of the City, or to construct an-

with the Department of Army and the Florida Department of Environmental Regulation to install an aerial transmission line over St. Andrew Bay from property within the City to Tyndall. That application is currently pending a decision on compliance with the City's requirements.

Although Gulf Power initially took the position that it did not have to obtain a development permit from the City for the installation of the line, it ultimately submitted an application for a development permit to the City for the entire project. While the development permit application is not yet complete, it can be broken down into an upland part (a construction ramp and certain electric transmission facilities on property in Parker currently designated as a Conservation Land Use District) and an water-borne part (the four concrete poles and the lines from shore to shore).

The Board of County Commissioners of Bay County held public hearings on Gulf Power's plans.³ As a result of public comments, the Bay County Commission enacted Resolution Number 2433, requesting that Gulf Power Company support a subaqueous method rather than aerial method for

aerial power line over St. Andrew Bay, nor does it exempt Gulf Power from compliance with Parker's Comprehensive Plan, Land Development Regulations, Codes or Ordinances.

³ Bay County holds the lease on certain real property at Tyndall where this aerial line is proposed to terminate.

running a proposed transmission line across St. Andrew Bay. Though Gulf Power has requested that the Resolution be rescinded, to date the Bay County Commission has not done so.

In addition, the City held public hearings receiving comments from the public that were overwhelmingly against Gulf Power's proposal, with certain members of the public being concerned about not wanting to pay any increased power bills. The public principally believed that an aerial line would adversely impact the health, safety, and welfare of the public, the value of property, the aesthetic view of the water and shoreline, and would generally be inconsistent with preserving the natural beauty of St. Andrew Bay. Further, the City received evidence from harbor pilots and boat captains that the structures on the water would constitute a hazard to navigation as prohibited under Section 403.813 of the Florida Statutes and Section 61-312.050 of the Florida Administrative Code.

As a result of various public hearings, including several presentations by representatives of Gulf Power Company and a plethora of public and technical comments, the City Council imposed a moratorium of up to six months on the review or issuance of permit applications for the construction, erection, or installation of any uninhabited

aerial structures not on existing rights-of-way that would extend 20 feet or more above ground level or mean high water level in the City, crossing the shoreline of the City or proposed to be located in coastal waters adjacent to the City.⁴

The City Council seeks a declaratory statement from the PSC on whether the City is preempted by the PSC from reviewing Gulf Power's development permit application and, as a result of that review, possibly denying all or a part of Gulf Power's application for the aerial transmission line. If not preempted, Parker's review will require an analysis of the permit application in light of its Comprehensive Plan ("Comprehensive Plan") adopted pursuant to the Local Government Comprehensive Planning and Land Development Regulation Act, Sections 163.3161, et seq., of the Florida Statutes, as implemented by Chapter 9J-5 of the Florida Administrative Code, Land Development Regulations, and other codes.

POSITION EXPRESSED BY GULF POWER COMPANY

As a regulated electric utility, Gulf Power asserts that it is mandated to provide power using the most cost-effective means, a method which it has determined to be by

⁴ The moratorium of the City will terminate on or before April 13, 2003.

an aerial transmission line. It has suggested that, if the residents of the City or Bay County want the power to be provided in a manner other than through an aerial line, the requesting party would have to share the difference in price between the cost of the aerial transmission line and some other form of conveyance of the electrical power from the north side to the south side of St. Andrew Bay. Gulf Power believes that its position is bolstered by In re: Petition for approval of Local Government Underground Cost Recovery tariff by Florida Power Corporation, Docket No. 200993-EI, Order No. PSC-02-1629-TRF-EI, establishing a mechanism for local governments to recover costs of converting from overhead electric service to underground service.⁵ This decision, however, does not seem to provide guidance to the City in the current situation since the City is not asking to convert the power source but has instead been asked to review a decision of Gulf Power of how to provide the power. In addition, that decision does not acknowledge the state-imposed review process of the local government's comprehensive plan and land development regulations.

Gulf Power has also relied upon Florida Power Corporation v. Seminole County, 579 So.2d 105 (Fla. 1991),

⁵ This decision was rendered on November 25, 2002, after the imposition of the moratorium by City ordinance.

for the proposition that the PSC, in its regulation of rates and services of public utilities, preempts the authority of the City to review and potentially require alteration of Gulf Power's application to install certain facilities on private property within the City and to locate overhead power transmission lines above St. Andrew Bay crossing the shoreline and transiting the coastal waters located adjacent to the City of Parker. The City notes, however, that this case was grounded upon the question of whether a city could force the relocation of utility power lines in a particular manner on a city right-of-way and therefore, does not seem applicable to the question raised by the City in this Petition.

CITY OF PARKER'S ISSUES

The City, upon mandate from the State of Florida, enacted a Comprehensive Plan establishing land uses for upland areas and setting forth various requirements and restrictions on the various land use districts within the City. The Comprehensive Plan contains various policies and objectives including, but not limited to, the following:

Policy 1.2.3: The City shall use this Plan and its land development regulations to promote compatibility of adjacent land uses and reduce the potential for nuisances.

Objective 1.7: Include provisions for public utility crossings, easements, or rights-of-way in the Land Development Regulations.

Policy 1.7.1: The City shall establish provisions to allow needed land area for public utilities provided the location of such facilities does not create a threat to public health or safety or otherwise cause a public nuisance. (Emphasis added).

Policy 1.7.2: The City shall coordinate with legally established public utilities or public works consistent with the provisions of Chapter 361 and Chapter 362, F.S., and as provided in local franchise agreements, to provide land needed for location of utilities facilities.

The City has implemented these policies and objectives in its Land Development Regulations, codes, and ordinances.

In addition to upland regulation, the Florida Legislature has indicated that state land and water management policies, to the maximum possible extent, should be implemented by local governments.⁶ Section 380.21(3)(a) of the Florida Statutes states:

(a) The Legislature finds that the coastal zone is rich in a variety of natural, commercial, recreational, ecological, industrial, and aesthetic resources of immediate and potential value to the present and future well-being of the residents of this state which will be irretrievably lost or damaged if not properly managed. The participation by citizens of this state is an important factor in developing, adopting, amending, and implementing a program for management of the coastal zone, and management of the state's coastal zone requires highly coordinated effort among state, regional, and local officials and agencies.

⁶ Section 380.21(1)(c) of the Florida Statutes (State Land and Water Management Act).

In furtherance of the State's policies, the City has enacted codes and ordinances that require structures in coastal waters to be permitted by the City. The permit review process includes a determination that the project is in the public interest.

The Florida legislature enacted the Transmission Line Siting Act, Section 403.52 through 403.5365 of the Florida Statutes (hereinafter "Line Act") setting out important policies desired to be preserved. Gulf Power, however, has apparently not elected to apply for certification under the Line Act and the line is otherwise exempt from the permitting process provisions of the Line Act by being less than 15 miles in length and being proposed solely within Bay County. Nevertheless, even though the proposed line is exempt from the permitting process of the Line Act, we are mindful of the dictates of Section 403.524(3) of the Florida Statutes which states:

"The exemption of a transmission line under this act does not constitute an exemption for the transmission line from other applicable permitting processes under other provisions of law or local government ordinances." (Emphasis added).

Had Gulf Power chosen to go through the permitting procedure set out in the Line Act, that process would have resulted in a multi-jurisdictional review considering the proposal in light of many planning considerations including

various comprehensive plan provisions. That analysis would have to taken into consideration the legislative policies of Section 403.521 of the Florida Statutes to achieve a which states in part:

[C]onstruction and maintenance of transmission lines [should] produce minimal adverse effects on the environment and public health, safety, and welfare while not unduly conflicting with the goals established by the applicable comprehensive plan. It is the intent of this act to fully balance the need for transmission lines with the broad interest of the public in order to effect a reasonable balance between a need for the facility as a means of providing abundant low-cost electrical energy with the impact on the public and the environment resulting from the location of the electric line corridor and the construction and maintenance of the transmission lines. (Emphasis added).

While not directly on point, The City of Riviera Beach v. Florida Department of Environmental Regulation (Fla. 4th DCA 1987), includes an analysis where the appellate court was asked to reverse two orders issued in an administrative proceeding conducted pursuant to the Florida Electrical Power Plant Siting Act. The court's evaluation centered around the application of the Palm Beach County Comprehensive Land Use Plan and Zoning Ordinances. Although the appellate court ultimately affirmed the granting of the request for the resource recovery facilities, it acknowledged the validity of the city's

review which included an evaluation of the zoning ordinances and the local government comprehensive plan.

Finally, the limits on the PSC's jurisdiction were pointed out in the recent decision of In re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy & Jose Gutman, Teresa Badillo, and Jeff Lessera, Docket No. 010908-EI, Order No. PSC-02-0788-PAA-EI (Issued June 10, 2002). In that Notice of Proposed Agency Action and Final Order, the PSC acknowledged that matters relating to diminution of property values, loss of enjoyment of property and aesthetics are not matters the PSC has been authorized by the legislature to consider. In addition, the decision states: " . . . the determination of property rights and the extent of allowable property uses are not within this Commissions's jurisdiction." (Emphasis added). In re: Complaint against Florida Power & Light Company, p. 7. As such, the PSC determined that it lacked jurisdiction to consider that portion of the case before it.

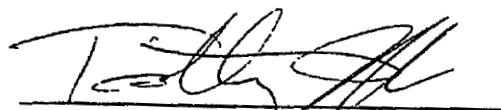
The difficulty of the City comes in trying to reconcile its jurisdiction to review the application for the proposed aerial line under its Comprehensive Plan, Land Development Regulations, and codes, and that of the various state agencies, including the PSC whose directive to Gulf

Power relates to cost. If Gulf Power is obligated to provide the requested power at the lowest legally permitted cost, the question is which governmental entity has final jurisdiction to establish what is permissible - the City or the PSC.

CONCLUSION

The City requests that the Florida Public Service Commission issue the requested declaratory statement and expedite this statement by rendering it no later than April 13, 2003, the date on which Parker's current moratorium expires.

HARMON & SLOAN, P.A.



Timothy J. Sloan
Florida Bar No.: 0562882
Post Office Box 2327
427 McKenzie Avenue
Panama City, Florida 32402
(850) 769-2501
ATTORNEYS FOR THE CITY OF
PARKER, FLORIDA