

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by City of Parker for declaratory)
 statement concerning City'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)
 private property located within the City, crossing)
 the shoreline of the City, and running across)
 St. Andrew Bay.)
 _____)

Docket No. 030159-EU

REPLY TO GULF POWER COMPANY'S MOTION TO DISMISS

Petitioner, City of Parker, Florida (hereinafter sometimes "City" or "Parker"), replies to Gulf Power Company's Motion to Dismiss as follows:

Gulf Power misapprehends the reason the City of Parker has solicited the declaratory statement from the PSC and misunderstands the City's current position with respect to Gulf Power's proposed aerial line. No vote of the City Council of the City of Parker has been taken with respect to the aerial electric transmission line, nor a decision reached by the City Council, other than for the imposition of a moratorium on all applicable aerial structures. While constituents of the City and other interested persons in Bay County have appeared before the City Council and have been signatories to a petition to express their opposition to the proposed aerial line, those opinions do not equate to any currently declared position of the City of Parker. Had the City Council already voted on Gulf Power's application for development permit, and further had the City Council decided that

the application was inconsistent with the Comprehensive Plan, Land Development Regulations, Codes and Ordinances, the City would not be engaged in this process seeking the PSC's declaratory statement.

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Gulf Power Company argues that the Florida Public Service Commission (“PSC”) does not have jurisdiction to issue the requested declaratory statement and invites the PSC to decline jurisdiction to issue a declaratory statement, suggesting that it is a matter to be decided in litigation. Gulf Power, however, concedes throughout its Motion and further in its Response to the Petition for Declaratory Statement that the PSC does have subject matter jurisdiction pursuant to Section 366.04(1) of the Florida Statutes over public utilities, such as Gulf Power, with respect to their rates and services. It seeks to distinguish that jurisdictional statement from the question of whether that jurisdiction should be invoked to issue a declaratory statement; i.e., to provide guidance to the City of Parker concerning the application of its Comprehensive Plan, Land Development Regulation, Codes and Ordinances to Gulf Power’s proposed aerial line. As such, Gulf Power’s Motion and subsequent response seems to concede the PSC’s jurisdiction and then suggest that the PSC decline it.

Interestingly, in contesting the jurisdiction of the PSC to issue the requested declaratory statement, Gulf Power implicitly contradicts its stated purpose of providing additional electrical power to Tyndall Air Force Base on a timely basis, since, if litigation were involved, an answer to Parker’s question and possible construction of any type of line would take far longer than the time in which a declaratory statement would be issued.¹ If Gulf Power really wants to move forward expeditiously, then why would it delay the process and contest the PSC’s jurisdiction? Instead, it has suggested that Parker simply accept Gulf Power’s understanding of the PSC’s mandates, and,

¹ Gulf Power has indicated that but for the City’s apparent opposition to the aerial line it would expect to complete the proposed transmission line prior to the summer months of 2003.

in essence, “rubber stamp” the proposed aerial line. Of course, if Gulf Power were correct, Parker would not even have the authority to issue a development permit.

Central to the requested declaratory statement is the extent of the jurisdiction of the PSC and whether its statutory jurisdiction preempts the application of the City of Parker’s Comprehensive Plan and Land Development Regulations, promulgated by virtue of statutory and administrative code provisions (not a constitutional grant of power) and approved by the Department of Community Affairs. Gulf Power suggests that the PSC lacks jurisdiction to issue a statement because the matter has already been decided in Florida Power Corporation v. Seminole County, 579 So.2d 105 (Fla. 1991). Quite the contrary.

Seminole County addressed the relocation of an electric line on an expanded right of way and whether a subsequently enacted ordinance mandated that overhead power lines must be replaced by underground power lines. As such, the question centered on a conflict between Sections 337.403(1) and 366.04 of the Florida Statutes. In Seminole County, the PSC in its Amicus Curiae brief recognized that the issue surrounded the ordinance that was enacted requiring the conversion from existing overhead power lines to underground power lines on the right of way.² As pointed out in the City of Parker’s Petition for Declaratory Statement, the fact pattern and laws at issue in our situation are drastically different. In Seminole County, it was the local government mandating, by ordinance, that the power lines must be converted from aerial power lines to underground power lines by virtue of the local jurisdiction’s expansion of the right of way. In our case, Gulf Power has

² Interestingly, the brief included an exhibit containing a discussion that there needed to be further clarification of whether there exists a preemption by the PSC of local codes and zoning requirements.

elected to replace two existing underwater power lines with four lines emanating from locations not on City right-of-way, but instead on private property within the City.

The PSC is specifically authorized under Section 120.565 of the Florida Statutes and Section 28-105.001 of the Florida Administrative Code to issue the requested declaratory statement. In fact, the PSC is the very agency that must determine the application of its statutory grant of jurisdiction and such determination, when made, should only be overturned upon judicial review if clearly erroneous. See Panda-Kathleen, O.P./Panda Energy Corporation v. Clark, 701 So.2d 322 (Fla. 1997); Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). This declaratory statement is sought to provide guidance to the City under a specific factual scenario in an effort to avoid costly administrative litigation and to resolve ambiguities, both goals justifying declaratory statements. Florida Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach, 474 So.2d 374 (Fla. 1999).

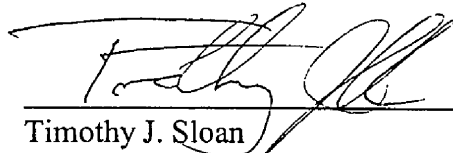
As was pointed out by the Florida Supreme Court in Florida Department of Business and Professional Regulation of Para-Mutual Wagering v. Investment Corp. of Palm Beach, 747 So.2d 374, 384 (Fla. 1999), “the public’s interest is served in encouraging agency responsiveness in the performance of their functions.” See also St. John’s River Water Management District v. Consolidated-Tomoko Land Co., 717 So.2d 72 (Fla. 1st DCA 1998), rev. den. 727 So.2d 904 (Fla. 1999) and Chiles v. Department of State, Division of Elections, 711 So.2d 151 (Fla. 1st DCA 1998).

For the foregoing reasons, the City of Parker requests that the Florida Public Service Commission deny Gulf Power’s Motion to Dismiss and issue the declaratory statement requested by the City of Parker.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by facsimile and by Federal Express to Jeffrey A. Stone and Russell A. Badders, Beggs & Lane, P. O. Box 2950, Pensacola, Florida 32591-2950; and to Richard D. Melson and Douglas S. Roberts, Hopping Green & Sams, P. O. Box 6526, Tallahassee, Florida 32314; and by Federal Express to Susan D. Ritenour, Gulf Power Company, One Energy Place, Pensacola, Florida 32520-0780; on this 19th day of March, 2003.

HARMON & SLOAN, P.A.



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