

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
Filed: March 10, 2003

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GULF POWER COMPANY'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, RESPONSE IN OPPOSITION TO CITY OF PARKER'S PETITION FOR DECLARATORY STATEMENT

Gulf Power Company ("Gulf," "Gulf Power," or the "Company"), by and through its undersigned counsel, submits its Motion to Dismiss the City of Parker's Petition for Declaratory Statement ("Petition"). In the alternative, and solely in the event any portion of the Petition survives the Motion to Dismiss ("Motion"), Gulf Power files its Alternative Response in Opposition ("Response") to the Petition. As grounds therefor, Gulf Power states:

MOTION TO DISMISS

1. Gulf moves to dismiss the Petition on the grounds that the City is asking the Commission to resolve issues over which it has no authority and which require a balancing of constitutional considerations involving state supremacy and municipal home rule powers, as well as the interplay between various Florida statutes, including chapters 366, 163, 166 and 380. That this is a judicial matter is demonstrated by the fact that the question which is actually presented by the Petition has already been decided by the Florida Supreme Court in Florida Power

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Corporation v. Seminole County, 579 So.2d 105 (Fla. 1991). The Commission therefore lacks subject matter jurisdiction to make the broad declaration requested by the Petition.

2. The City characterizes the “question for declaratory statement” as :

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

(Petition, pp. 1-2; emphasis added). The Petition then goes on to reveal the true issue, disclosing that the City is opposed to the transmission line being constructed aerially, seeks to apply its local codes, ordinances and regulations to require that the line be constructed under water rather than overhead, and indeed has already attempted to do so by imposing a temporary moratorium that prohibits the aerial construction of the line as planned by Gulf Power.¹

3. The Petition, in essence, asks the Commission to decide whether its exclusive jurisdiction under chapter 366, Florida Statutes, *preempts* application of the City’s land use and zoning powers under chapters 163, 166 and 380, Florida Statutes, to require that an electric transmission line not be constructed aerially as planned by Gulf Power pursuant to the Company’s obligation to furnish “reasonably sufficient, adequate and efficient service upon terms as required by the commission,” (§366.03, *Fla. Stat.*), but instead be constructed underground (here, underwater).

¹ But for the moratorium, and the City’s apparent opposition to an aerial line, Gulf Power likely would have been able to complete the proposed transmission line segment as planned prior to the peak load conditions expected during the summer months of 2003.

4. The City's question improperly asks the Commission to pass upon constitutional considerations involving state supremacy and municipal home rule powers, and the interplay between chapter 366, Florida Statutes, on the one hand, and chapters 163, 166 and 380 on the other. This clearly implicates issues beyond the subject matter jurisdiction of the Commission, or for that matter, any administrative agency. Moreover, the issue presented by the Petition *has already been decided* in *Florida Power Corporation v. Seminole County*, 579 So. 2d 105 (Fla. 1991) (*Seminole*), in which the Supreme Court of Florida held, *as argued by the Commission in its amicus brief in that case*, that "the jurisdiction of the Public Service Commission to regulate rates and services of public utilities preempts the authority of the city and county to require FPC to place its lines underground." 579 So. 2d at 107.

5. Pursuant to section 120.565, *Florida Statutes*, a declaratory statement may be issued only as it relates to the specific facts and circumstances at issue. The City has made it clear, both in the Petition and through other actions, that its intent is to force the subaqueous installation of the line, with no apparent intention of paying the increased cost. Thus, the true question presented is whether there can be any application of the City's municipal powers to force the underground (or underwater) installation of the transmission line at the Company's expense.

6. The City cannot genuinely contend it has any doubt as to "the applicability of a statutory provision, or of any rule or order of the agency, as it applies to [the City's] particular set of circumstances," as required for a declaratory statement under section 120.565(1), Florida Statutes. The matter has already been decided by the Supreme Court. Instead, the City's transparent goal is to have this Commission issue a declaratory statement pertaining to, and in

conflict with, the Florida Supreme Court's determination of the judicial question in *Seminole*, which was made in accordance with the Commission's position as stated in that case. The Commission cannot and should not issue such a statement.

7. Section 120.565(1) allows substantially affected persons to "seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances." Implicit in this grant of authority is that the subject matter of the declaratory statement cannot go beyond the statutory provisions, rule or orders within the agency's subject matter jurisdiction. Indeed, even if this were not stated in the statute, it is a fundamental tenet of administrative law that an agency's jurisdiction is strictly limited to its legislative grant of authority, and agencies have no power to adjudicate claims involving matters outside their jurisdiction. *East Central Reg. Wastewater Facilities Board v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th DCA 1995). Nor can agencies adjudicate constitutional matters, or exercise other powers that are fundamentally judicial in nature. *Myers v. Hawkins*, 362 So.2d 926, 928 (Fla. 1978) (administrative agency is not generally the appropriate forum in which to consider questions of constitutional import).

8. The Commission has the subject matter jurisdiction to declare whether Chapter 366 gives it jurisdiction over activities of a party who is, or may be, a public utility. *PW Ventures vs. Nichols*, 533 So.2d 281 (Fla. 1988). It is quite a different matter, however, for the Commission to declare whether its jurisdiction over a particular entity or activity *preempts* a local government (or any other agency) from applying its own laws, rules and regulations to that same entity or activity. The question of when, and the extent to which, one agency's jurisdiction

preempts that of another is a judicial matter that can only be resolved by the courts. Moreover, the question of whether the local home rule powers of a municipality are preempted by state law is fundamentally a constitutional question under Article VII section 2 of the state constitution.² As noted, deciding such constitutional issues is the exclusive role of the courts.

9. In the past, the issue of preemption has not been resolved by the Commission as an adjudicative body, but instead has been resolved in judicial proceedings -- in which the Commission may participate -- to prevent the governmental agency from enforcing whatever ordinance or other local requirement is encroaching on the Commission's exclusive jurisdiction. *See, e.g., Seminole.*

10. The City's Petition improperly asks the Commission to contravene a constitutional decision by the state's highest court, in the guise of a declaratory statement. To do so the Commission would not only have to exercise judicial power to determine the issue of preemption, it would also have to consider the scope of the City's constitutional and statutory powers. A full answer would also have to consider constitutional issues presented by Gulf Power's rights under its Franchise Agreement with the City. *See, e.g. Brevard County v. Florida Power & Light Company*, 693 So.2d 77 (Fla. 5th DCA), *rev. den.* 699 So.2d 1371 (Fla. 1997).³ All of these are judicial questions that are beyond the Commission's jurisdiction and expertise.

² Moreover, the Commission has no delegated authority to pass on the extent of a municipality's home rule powers. And any reasonable doubt about the lawful existence of a particular power that is being exercised by an administrative agency is to be resolved against its exercise. *United Telephone Co. v. Public Service Commission*, 496 So.2d 116 (Fla. 1986); *Florida Bridge Co. v. Bevis*, 363 So.2d 799 (Fla. 1978).

³ It should be noted that Gulf Power does not agree with the City's characterization (in footnote 2 of its Petition) of Gulf's rights under the Franchise Agreement and the impact of that agreement on the potential applicability of the City's land development regulations. That issue is beyond the scope of the Commission's jurisdiction in any event.

The Petition, as framed, inappropriately asks the Commission to answer a question over which it does not have subject matter jurisdiction.

WHEREFORE, Gulf Power requests that the Commission enter its order dismissing or denying the City's Petition on the grounds that the Commission lacks subject matter jurisdiction to issue the statement requested in the Petition.

ALTERNATIVE RESPONSE IN OPPOSITION

11. In the event the Commission does not grant Gulf Power's motion to dismiss, Gulf Power hereby responds to the merits of the City's Petition as follows.

Issue To Be Resolved

12. The real issue in this case is whether application of the City's local laws to require Gulf's transmission line to be placed underwater or underground at the utility's expense would interfere and conflict with the Commission's exclusive jurisdiction over Gulf's rates and service under chapter 366. The City has made it clear, both in the Petition and through other actions, that its intent is to force the subaqueous installation of the line, with no apparent intention of paying the increased cost. To accomplish this, the City has presented its declaratory statement request hoping that the Commission will stray from the Supreme Court's resolution of this issue in *Seminole*. This is completely improper and the Commission should decline the City's request to go against the decision of the Supreme Court. If it decides to issue a declaratory statement in this case, the Commission should limit itself to stating, consistent with its position in *Seminole*, that any application of the City's municipal powers to force the underground (or underwater) installation of the transmission line segment interferes and conflicts with the Commission's exclusive jurisdiction over Gulf Power's rates and service.⁴

13. This case involves a proposed aerial transmission line segment to be constructed by Gulf Power across St. Andrew Bay, originating from a bay-front parcel owned by Gulf in the City. This transmission line segment, the Military Point Transmission Line Crossing, will be part of Gulf's transmission grid (that is subject to the Commission's jurisdiction under

⁴ In the event the Commission decides to go beyond this narrow issue, the parties should be afforded the opportunity for additional briefing on any additional issues to be considered.

§366.04(5), Fla. Stat.) and will support continued reliable service to Gulf’s customers, including Tyndall Air Force Base and an advanced wastewater treatment facility partly-owned by the City of Parker itself.

14. The Petition makes clear the City’s intent to seek the subaqueous installation of the transmission line by utilizing its zoning and land use authority. The City describes a permit review process that would “include[] a determination that the project is in the public interest”⁵ (Petition, p. 9) and foreshadows its intent to “possibly deny[] all or a part of Gulf Power’s application for the aerial transmission line.” (Petition, p. 5). In sum, the City contends that its local regulations give it the authority to require Gulf Power to install a subaqueous line at the general expense of its customers. Thus, the crux of the matter and the sole issue that should be addressed is whether the City has the powers it contends.

15. The issue framed by the City of Parker is overly broad in light of the narrow fact pattern alleged and the City’s obvious intention to require (but not pay for) a subaqueous installation under the guise of its zoning powers. If the Commission decides to answer the City’s Petition on the merits, it should limit itself to the particular situation at issue, as required by section 120.565(1), and address solely the precise question that is implicated:

If the City of Parker applies its local laws to prohibit construction of Gulf Power’s proposed Military Point Transmission Line Crossing and associated structures within its municipal boundaries unless the line is installed subaqueous (underwater) at Gulf Power’s expense, would that interfere and conflict with the

⁵ The City’s claimed power to determine whether a proposed transmission line is “in the public interest” clearly invades the Commission’s exclusive jurisdiction under the grid bill provisions in Chapter 366.

Commission's exclusive jurisdiction to regulate Gulf's rates and services?⁶

16. For the reasons discussed in the analysis below, Gulf Power urges the Commission to limit any response on the merits of the City's Petition to a declaration that application of the City's local laws to prohibit construction of the Military Point Transmission Line Crossing ("Proposed Crossing") and associated structures within its municipal boundaries unless the line is installed underwater (subaqueous) at Gulf Power's expense, interferes and conflicts with the Commission's exclusive jurisdiction over the rates and service of Gulf Power under chapter 366.⁷ In fact, the Commission can come to no other result, as the precise issue presented has already been squarely decided in this manner by the Supreme Court in *Seminole*, at the urging of the Commission.

⁶ Gulf does not believe that the City has authority to require undergrounding/subaqueous installation of transmission lines, even at the City's expense, if such would interfere and conflict with the Commission's regulation of Gulf's rates and service. For example, even if the City offered to pay the cost differential, subaqueous construction may not be feasible under environmental regulations or the delay associated with permitting or construction of such facilities may impair Gulf's ability to continue to provide adequate and reliable service to its customers in a timely fashion. However, the Commission does not need to address these situations in order to resolve the City's Petition, since the City expects Gulf to bear the cost of undergrounding/subaqueous installation. *See also* footnote 11, below.

⁷ Gulf Power maintains that the City lacks the underlying legal authority to adopt comprehensive plan provisions or land development regulations that control the placement of transmission lines. Both the creation of utility easements and the construction of utility lines in established rights-of-way are exempted from the definition of development under the Local Government Comprehensive Planning Act. §163.3164(6), 380.04(3)(b),(h), Fla. Stat. The Commission is not the proper body to interpret these definitional provisions, and need not do so to answer the question posed by the City of Parker. Regardless of the definition of development under Chapter 163, the Commission's jurisdiction under Chapter 366 still preempts the City's authority to require undergrounding of transmission lines at Gulf's expense.

FACTUAL BACKGROUND

17. The City's Petition omits a number of facts which are important to the context and particular set of circumstances in which the declaratory statement is sought, as well as to understanding the potential impact of granting the City's request. Gulf will therefore fully state the background facts⁸ to facilitate a complete and fully informed decision on the issue:

A. The Proposed Crossing is a 3600 foot, dual-circuit (six-conductor) transmission line segment that will traverse St. Andrew Bay. It will be capable of operating at 115 kV in the future, but it will be initially operated at 46 kV. The crossing will operate as a segment of two existing 46 kV circuits that connect Gulf Power's Wewa Road Substation located north of the City of Parker to the Company's Military Point Substation located on the south side of St. Andrew Bay. A map showing the vicinity of the Proposed Crossing is attached as Exhibit A.

B. The Proposed Crossing will be constructed as an aerial line, and will augment the existing two circuit, subaqueous 46 kV transmission line segment under St. Andrew Bay which has been in service since approximately 1962.

C. The northern end of the Proposed Crossing will originate at two new "dead-end" steel structures to be located on a narrow strip of property owned by Gulf Power between U.S. Highway 98 and St. Andrew Bay in the City of Parker. The new dead-end structures will be located adjacent to the existing structures at which the current subaqueous cables emerge from the bay and are connected to the existing aerial transmission lines that cross over U.S. Highway 98 and then extend back to the Wewa

⁸ See the attached Affidavit of M.W. Howell.

Road Substation. The new circuits will be cross-connected from the new dead-end structures to tie into the existing 46 kV aerial circuits. Two similar dead-end structures and cross-connections will be installed at the southern terminus of the Proposed Crossing on Military Point.

D. The Proposed Crossing will traverse St. Andrew Bay on four steel poles to be placed on submerged lands owned by the State of Florida. The City of Parker city limits extend into the bay, and two of the four poles in the bay will be located within the City's boundaries. The poles supporting the Proposed Crossing will be located adjacent to the existing subaqueous line. A diagram showing relevant details of the Proposed Crossing is attached as Exhibit B. The installation of the Proposed Crossing will not involve any change to the existing 46 kV aerial circuits on the land-side of U.S. Highway 98.

E. The existing subaqueous crossing of St. Andrew Bay is the limiting factor in the power carrying capacity of the 46 kV Wewa Road-Military Point transmission lines. The current subaqueous circuits are rated at 24 MVA each. Under single contingency planning criteria, electric load served by the line is at risk whenever the total load on the two circuits exceeds 24 MVA. In that event, if one of the existing lines fails, the remaining line would be unable to handle the total load. The new aerial circuits will be rated at 62 MVA each when operated at 46 kV. The upgrade will thus more than double the power carrying capacity of the St. Andrew Bay crossing and will prevent the loss of load in the event a single line fails.

F. The Proposed Crossing is required to meet increasing electric demands at Tyndall Air Force Base, to augment the aging facilities currently in service, and to enhance reliability and integrity of Gulf's transmission grid in the area. The demands at Tyndall Air Force Base are increasing as the result, among other things, of the establishment of the Department of Defense's F/A-22 training facility, including the deployment to the base of a squadron of F/A-22 jet fighters. With these increased demands, by Fall 2003 the load on the existing subaqueous circuits will exceed 24 MVA in an increasing number of hours, and will thus violate the single contingency planning criteria.

G. The new transmission line segment needs to be in service by the Fall of 2003 to enable Gulf to continue to provide adequate, reliable power to its customers served by the Wewa Road-Military Point lines, including Tyndall Air Force Base, the Bay County Advanced Wastewater Treatment Plant ("AWTP") in which the City of Parker is a part-owner, the Tyndall Elementary School, and a St. Joe Telephone Company switching facility.

H. Gulf has determined that the proposed aerial line is the best and most cost-effective means of meeting the transmission needs of its customers, in accordance with Gulf's obligations under section 366.03, Florida Statutes. It is also consistent with the design of transmission lines which cross waterways elsewhere in the territory served by Gulf.

I. The estimated capital cost for the Proposed Crossing is \$2.7 million and the line will take approximately four months to construct after receipt of all required

governmental approvals. Approximately 50% of the costs have been incurred to date as a result of engineering activities and materials purchases. Any further delay in the start of construction beyond approximately June 1, 2003, could increase the project cost significantly. The project has already been delayed because the City of Parker refuses to issue a letter stating that the project is consistent with its local land use regulations and has enacted a moratorium (scheduled to expire on April 13) on this type of project. The existence of the jurisdictional dispute between the City and Gulf has interfered with Gulf's ability to obtain permission from the state to place the poles on state-owned submerged lands.

J. The additional capital cost of constructing a subaqueous line under St. Andrew Bay versus continuing with the proposed aerial line is estimated at approximately \$7 million to \$9 million. The installation of a subaqueous line would take approximately 18 to 36 months from completion of permitting, assuming that all needed environmental permits could be obtained.⁹ During this extended permitting and construction period, the customers served by the existing subaqueous cable, including Tyndall Air Force Base and the Bay County AWTP facility, would be at substantially increased risk of power curtailments or interruptions.

K. The fundamental dispute between the City of Parker and Gulf Power is whether the City can apply its local comprehensive plan and land development

⁹ A redesign of the line as a subaqueous crossing would require new environmental applications and would raise additional environmental concerns. Gulf has no assurance that a subaqueous line could obtain all required permits. Thus it is possible that even if the City were to agree to pay the cost of subaqueous installation, Gulf might not be able secure the approvals necessary for a subaqueous crossing. *See also* footnote 7.

regulations to require Gulf to install a subaqueous line under St. Andrew Bay at Gulf Power's expense. The City has not offered or agreed to pay the incremental cost of subaqueous construction. Gulf believes that the City does not have the financial capability to do so with its current revenues.

L. The City's Petition refers to Bay County Commission Resolution Number 2433 requesting that Gulf Power support a subaqueous installation of the line (Petition, p. 3-4). Notwithstanding this Resolution, the County has subsequently provided Gulf Power a letter confirming that the aerial crossing does not contravene local zoning requirements or the relevant provisions of the Bay County Comprehensive Plan. A copy of this letter is attached as Exhibit C.

LEGAL ANALYSIS

Statutory Provisions

18. The Florida Legislature has declared that regulation of public utilities is in the public interest and has therefore exercised "the police power of the state" to accomplish such regulation on a statewide basis. §366.01, *Fla. Stat.* Accordingly, Section 366.04(1), *Florida Statutes*, expressly confers on the Commission exclusive and plenary jurisdiction over the rates and service of public utilities such as Gulf Power:

[T]he commission shall have jurisdiction to regulate and supervise each public utility with respect to its rates and service; The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in the case of conflict therewith, all lawful acts, orders, rules and regulations of the commission shall in each instance prevail.

In addition to its authority over rates and service, the Commission has the express power to

“require electric power conservation and reliability within a coordinated grid” and jurisdiction “over the planning, development, and maintenance of a coordinated electric power grid throughout Florida, to assure an adequate and reliable source of energy for operational and emergency purposes.” §366.04(2)(c), (5), *Fla. Stat.* In the exercise of its jurisdiction, the Commission also has the power “to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto.”¹⁰ §366.05(1), *Fla. Stat.* See also §366.05(8), *Fla. Stat.*

19. In describing this pervasive regulatory scheme, the Florida Supreme Court has stated that:

The established state policy in Florida is to supervise privately owned electric utilities through regulation by a state agency. . . . The powers of the Commission over these privately-owned utilities is omnipotent within the confines of the statute and the limits of organic law.

Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968).

20. Public utilities are to discharge the statutory obligation placed on them to furnish “reasonably sufficient, adequate and efficient service upon terms as required by the commission.” §366.03, *Fla. Stat.* The fact that the Commission is called on to exercise some aspects of its authority only when it determines that a public utility is not taking appropriate steps

¹⁰ As recognized by the Commission and the Florida Supreme Court in *Seminole*, the conflict between the Commission’s jurisdiction and the potential application of local land development regulations is manifest. Assume that the Commission, in order to maintain reliability, ordered a utility to install a transmission line between two substations located within a single municipality but that the municipality refused to permit the line. Alternatively, assume the Commission required construction of a transmission line crossing the boundary between two different local governments, each of which wanted the line built in a different manner or location. Application of local authority in either situation would interfere and conflict with the Commission’s authority under the grid bill provisions in chapter 366.

to meet its obligation to serve does not detract from either the scope or exclusive nature of the Commission's jurisdiction.¹¹ To ensure that they have the means to discharge this statutory duty to serve, the Legislature has conferred on public utilities the power of eminent domain to take any land, private or public, necessary for the construction of their facilities, including any facilities required by the Commission to assure the development of adequate and reliable transmission grids. §§ 361.01 and 366.05(8), *Fla. Stat.* It would be incongruous on the one hand to give a public utility the authority to condemn public land for transmission lines (including those required by the Commission in the exercise of its exclusive jurisdiction), and on the other hand to allow a local government to trump that authority by application of local zoning and land development regulations. *Cf. Department of Transportation v. Lopez-Torres*, 526 So.2d 674 (Fla. 1988) (state's plenary power for a state transportation system preempted local government from utilizing the local comprehensive plan to control the construction of state roads and bridges).

Judicial Decisions and Commission Orders

21. The Florida Supreme Court held in *Florida Power Corporation v. Seminole County*, 579 So.2d 105 (Fla. 1991) (*Seminole*) that a local government has no power to impose a requirement to convert existing aerial distribution lines to underground lines at the utility's expense.

Requiring FPC to place its power lines underground clearly affects its rates if not its service. . . . We believe that the jurisdiction of the

¹¹ For example, sections 366.05 (7) and (8), Florida Statutes, manifest the Legislature's intent that, while the electric utility industry develops the statewide energy grids that fall within the Commission's jurisdiction, the Commission has the power to require reports from the industry to assure their adequacy and reliability and to require installation or repair of necessary facilities if the Commission determines that inadequacies exist.

Public Service Commission to regulate rates and services of public utilities preempts the authority of the city and county to require FPC to place its lines underground.

Id. at 107.

In reaching that conclusion the Court quoted the Missouri Supreme Court's graphic explanation of why statewide regulation of the subject is necessary:

If 100 such municipalities each had the right to impose its own requirements with respect to installation of transmission facilities, a hodgepodge of methods of construction could result and costs and resulting capital requirements could mushroom. As a result, the supervision and control by the Public Service Commission with respect to the company, its facilities, its method of operation, its service, its indebtedness, its investment and its rates which the General Assembly obviously contemplated would be nullified.

Id. at 107, quoting *Union Electric Co. v. City of Crestwood*, 499 S.W.2d 480, 483 (Mo. 1973)(*Crestwood I*).

22. After the Missouri Supreme Court in *Crestwood I* invalidated the City of Crestwood's ordinance which prohibited future construction of overhead transmission lines, the city tried again, this time applying local zoning ordinances to deny a permit for the overhead lines. Upon review, the Missouri Supreme Court would not let the city do indirectly, through local zoning and permitting processes, what it could not do directly through an outright prohibition. *Union Electric Co. v. City of Crestwood*, 562 S.W.2d 344 (Mo. 1978) (*Crestwood II*). The court reasoned that it did not matter whether the city's attempted regulation of transmission lines was pursuant to a general police power ordinance or a zoning ordinance, or whether it was prohibitory or permissive:

Calling something "zoning" cannot cloak a municipality with power to act in a field and in a way which is otherwise foreclosed to it by supervening state legislation or policy.

Id. at 346, quoting *In re Public Service Electric and Gas Co.*, 35 N.J. 358, 173 A.2d 233 (1961).

The City of Parker likewise cannot avoid the effect of the Florida Supreme Court's ruling in *Seminole* by attempting to use its local zoning authority to do indirectly what it cannot do directly – require undergrounding at Gulf Power's expense.

23. The Commission filed a brief as Amicus Curiae in *Seminole*. Describing the extent of its jurisdiction over undergrounding issues and the rationale underlying its policy that the cost-causer pays, the Commission stated that:

- “The Commission’s statutory jurisdiction over [public utility] rates and service is exclusive, not concurrent. The City and County cannot assert a right to demand underground service for free without invading the FPSC’s exclusive jurisdiction over both of those subjects.” (Brief, p. 2)
- “The [local governments’] position and the [Circuit Court’s] Final Judgment contravene the Commission’s policy that cost causers pay the direct costs of undergrounding rather than the general body of ratepayers.” (Brief, p. 3)
- “If local governments need not bear the costs of undergrounding, a race to underground for free will ensue resulting in the uncontrolled transfer of billions of dollars into the ratebase borne by ratepayers statewide, regardless of whether they derive any benefit from the local governments’ undergrounding decisions or the cost-effectiveness of those decisions.” (Brief, p. 3-4)
- “The City and County are the cost causers under the facts of this case. Their refusal to bear the direct cost of undergrounding runs counter to Commission policy.” (Brief, p. 10)

The legal and policy positions stated by the Commission in its Amicus Brief are as valid today as when they were made. Because the Commission's undergrounding policy reflected in its Amicus Brief resulted from a lengthy hearing process and a formal rulemaking proceeding (*see* paragraphs 26-27, below), the Commission is foreclosed from changing that policy via a declaratory statement. Agency policy can be changed only in a proceeding in which the policy

shift is supported by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved. *Florida Cities Water Company v. State of Florida, Public Service Commission*, 705 So.2d 620, 626 (Fla.1st DCA 1998). In responding to the Petition in this case, the Commission must therefore reiterate that its policy has not changed, and that under *Seminole* the City is powerless to require subaqueous installation of the Proposed Crossing at the expense of Gulf and its general body of ratepayers.

24. . In an effort to avoid the Court's holding in *Seminole*, the City states that this case does not seem applicable to the present controversy because it was grounded on the question of whether a city could force the relocation of utility power lines in a particular manner on a city right-of-way. (Petition, p. 7) This attempt to distinguish *Seminole* must fail. If anything, a local government has more control over activities that occur in its right-of-way than over activities that occur on private property or in adjacent waters.¹² Further, the Court's conclusion that the Legislature gave preemptive authority to the Commission in order to avoid a multiplicity of potentially inconsistent local requirements is fully applicable to the current situation. If the City of Parker can dictate how, when, where and at what cost Gulf Power can construct transmission lines, every other city and county in the state can claim the same authority, destroying the Legislature's mandate of statewide regulation of rates and service by the Commission for the benefit of all Florida citizens.

¹² A city has the power to adopt reasonable rules and regulations to ensure that utility facilities on public road and public railroad rights-of-way do not interfere with the traveling public and to coordinate use among the various utilities. § 337.401(1), Fla. Stat. A city also has the power (subject to certain exceptions and notice and review requirements) to require a utility to remove, rearrange or relocate linear facilities on road right-of-way that are unreasonably interfering with the use, maintenance, improvement or expansion of the public road. §§ 337.403, 337.404, Fla. Stat.

25. As further support for its holding, the Court in *Seminole* looked to the provisions of Section 366.04(7)(a), *Florida Statutes* (1989), which provided in pertinent part that:

By July 1, 1990, the commission shall make a determination as to the cost-effectiveness of requiring the installation of underground electric utility distribution and transmission facilities for all new construction, and for the conversion of overhead distribution and transmission facilities to underground distribution and transmission facilities when such facilities are replaced or relocated. . . . Upon a finding by the commission that the installation of underground distribution and transmission facilities is cost-effective, the commission shall require electric utilities, where feasible, to install such facilities.

Id. at 108.

The Court then stated that “permitting cities or counties to unilaterally mandate the conversion of overhead lines to underground would clearly run contrary to the legislative intent that the Public Service Commission have regulatory authority over the subject.” *Id.*

26. In response to the legislative mandate in Section 366.04(7)(a), the Commission held hearings in 1990 on the cost-effectiveness of undergrounding. *In re: Investigation into the Cost-Effectiveness of Undergrounding Electric Utility Lines*, Docket No. 890833-EU, Order No. 23126 (issued June 28, 1990). During the course of those proceedings, the Commission considered and rejected the argument that local governments are “best able to determine at the local level, on a case-by-case basis, when the characteristics of the area and the objectives of the city and utility management require undergrounding.” *Id.* at 16. In doing so, the Commission expressly held that:

[U]nless or until the statutory language states otherwise, the Legislature contemplated exclusive, not supplemental or complementary, jurisdiction of the Commission concerning the determination of the cost-effectiveness of undergrounding.

Id.

Despite the “broad range of evidence” considered by the Commission during its cost-effectiveness investigation, *id.* at 2, it found insufficient evidence to require undergrounding of any transmission or distribution lines. Instead, the Commission opened a rulemaking docket to focus specifically on undergrounding of distribution lines in new residential subdivisions, the only case in which it appeared that undergrounding might be feasible. *Id.* at 16-17.

27. At the conclusion of the subsequent rulemaking proceeding, the Commission determined that it could not require across the board undergrounding, since “the data did not demonstrate it to be cost-effective on a statewide-basis.” *In re: Adoption of Rule 25-6.0115, Underground Electric Facility Costs*, Docket No. 910615-EU, Order No. PSC-92-0975-FOF-EU (issued September 10, 1992). Nevertheless, to “better accommodate applicants’ requests for underground facilities,” the Commission did adopt Rule 25-6.0115 (subsequently renumbered as 25-6.115) which allows underground installation of electric distribution facilities in new residential subdivisions, ***provided that*** the cost of such underground installation is paid by the person requesting the undergrounding. This rule, and subsequent tariff filings by the utilities, make it clear that the Commission does not permit a utility to install underground facilities at its own expense at the request of a local government – the person requesting the underground installation must bear the incremental cost of underground versus overhead facilities.

28. Rule 25-6.115 does not provide for the undergrounding of transmission lines in any situation. The Commission has never found that it is cost-effective to underground transmission lines – which involve much greater cost and technical issues than distribution lines

– and has never exercised its exclusive jurisdiction to require the undergrounding of such a line.¹³

29. The City of Parker relies on *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) (*Gutman*) as evidence of what it calls “limits on the PSC’s jurisdiction.” (Petition, p. 11) The Commission’s findings in the *Gutman* order arose in the context of a customer complaint asking the Commission to require relocation of a transmission line, not in the context of an effort by local government to apply local regulations to prohibit or restrict construction of a line. The Commission merely found that it did not have jurisdiction to adjudicate property-owner claims for diminution of property values or loss of enjoyment from the aesthetic impacts of the transmission line, nor to resolve a property law issue regarding FPL’s right to place the line on SFWMD property. *Id.* at 6-7. None of these issues, however, involved a local government seeking to apply local regulations to prohibit or restrict the placement of a line, or to require its undergrounding. Moreover, the Commission’s finding in *Gutman* that it lacked jurisdiction to adjudicate claims reserved for the judicial branch supports Gulf’s motion to dismiss the instant Petition.

30. The City of Parker is seeking to mandate a special service – the installation of underground transmission facilities – that it would ultimately expect to be paid for by Gulf and Gulf’s general body of ratepayers. If the City succeeds in this effort, it will result in Gulf’s

¹³ After the Commission found that undergrounding of transmission and distribution lines was not cost-effective, and would not be required except in new residential subdivisions where the applicant pays the added cost, its work under Section 366.04(7) was complete. Accordingly, that section was removed from the statute as obsolete by a Reviser’s Bill enacted in 1995. *See* §13, Chapter 95-146, Laws of Florida.

customers in Pensacola and other locations paying for the City of Parker's mandate. As made clear by the Supreme Court of Florida in the *Seminole* case discussed above, the City of Parker has no authority to issue such a mandate, as it interferes and conflicts with the exclusive jurisdiction of this Commission. Indeed, the *Gutman* order reaffirmed the Commission's long-standing policy that the additional costs of requests for special services, such as facilities relocations, "should be borne by those customers who request such services and thus cause those costs." *Id.*, at 8.

31. While admitting that the case is not directly on point, because it arose in the context of permitting a resource recovery facility under the Florida Electrical Power Plant Siting Act ("PPSA"), the City of Parker cites *The City of Riveria Beach v. Florida Department of Environmental Regulation*, 502 So.2d 1337 (Fla. 4th DCA) as support for the appropriateness of a permitting review that includes an evaluation of local government zoning ordinances and comprehensive plans. (Petition, p. 10-11) What the City of Parker fails to recognize is that the PPSA expressly requires (for power plants) a hearing on local zoning and land use matters and requires that the power plant either conform to local zoning regulations or obtain a variance from the Siting Board. §403.508, *Fla. Stat.* Unlike the PPSA, the Transmission Line Siting Act (TLSA) does not call for a land use or zoning hearing (*compare* §403.508(2) *with* §403.527), and the role of local governments is limited to holding informational public meetings and submitting reports as to the impact of the proposed transmission line or corridor on matters within its jurisdiction. §§ 403.5272, 403.526(2)(a)5. Although the Proposed Crossing line in this case is exempt from the TLSA, the statutory scheme for jurisdictional transmission lines shows that such lines are not required to conform to local land use and zoning regulations. Thus the *City of*

Riveria Beach case concerning power plants does nothing to support the City of Parker's request for relief in this case concerning transmission lines.

SUMMARY

32. Chapter 366 gives the Commission exclusive and superior authority over the rates and service of public utilities and over the planning, development and maintenance of a coordinated power grid in the state. The Florida Supreme Court in *Seminole* -- at the urging of the Commission -- held that this jurisdiction preempts local government authority to require the undergrounding of electric power lines. The decision in *Seminole* controls, and any attempt by the City to require the undergrounding of Gulf's transmission line interferes and conflicts with the Commission's jurisdiction under Chapter 366.

WHEREFORE, in the alternative, in the event the Commission denies the Motion to Dismiss, Gulf Power Company requests that the Florida Public Service Commission answer the City's Petition by entering an order which declares that any application of the City's local laws to prohibit construction of the line and associated structures within its municipal boundaries unless the lines are installed underwater (subaqueous) at Gulf Power's expense, interferes and conflicts with the Commission's exclusive jurisdiction over Gulf's rates and service under chapter 366.

RESPECTFULLY SUBMITTED, this 10th day of March, 2003.

Jeffrey A. Stone / RO

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Florida Bar No. 0559466

Hopping Green & Sams

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Tallahassee, FL 32314

(850) 425-2313

Attorneys for Gulf Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by Hand Delivery this 10th day of March, 2003 on the following:

Marlene Stern
Office of General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Timothy J. Sloan
Harmon & Sloan, P.A.
427 McKenzie Avenue
Panama City, Florida 32402



Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION
Affidavit of M. W. Howell on behalf of Gulf Power Company

Comes the Affiant, M. W. Howell, and having first been sworn, states as follows:

1. My name is M. W. Howell and my business address is One Energy Place, Pensacola, Florida, 32520. I am employed by Gulf Power Company as the Transmission and System Control Manager.
2. I have reviewed the information in paragraphs A through L of the Factual Background in Gulf Power Company's Motion to Dismiss, or in the Alternative, Response in Opposition to City of Parker's Petition for Declaratory Statement, and aver that those factual statements are true and correct to the best of my knowledge and belief.

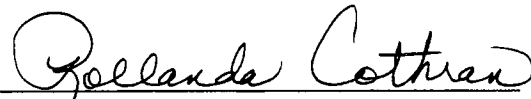
Further, affiant saith not.

This 6 day of March, 2003.

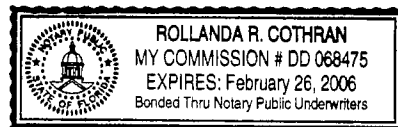


M. W. Howell

Sworn to and subscribed before me this 6th day of March 2003, by M. W. Howell, who is personally known to me.



Notary Public, State of Florida at Large



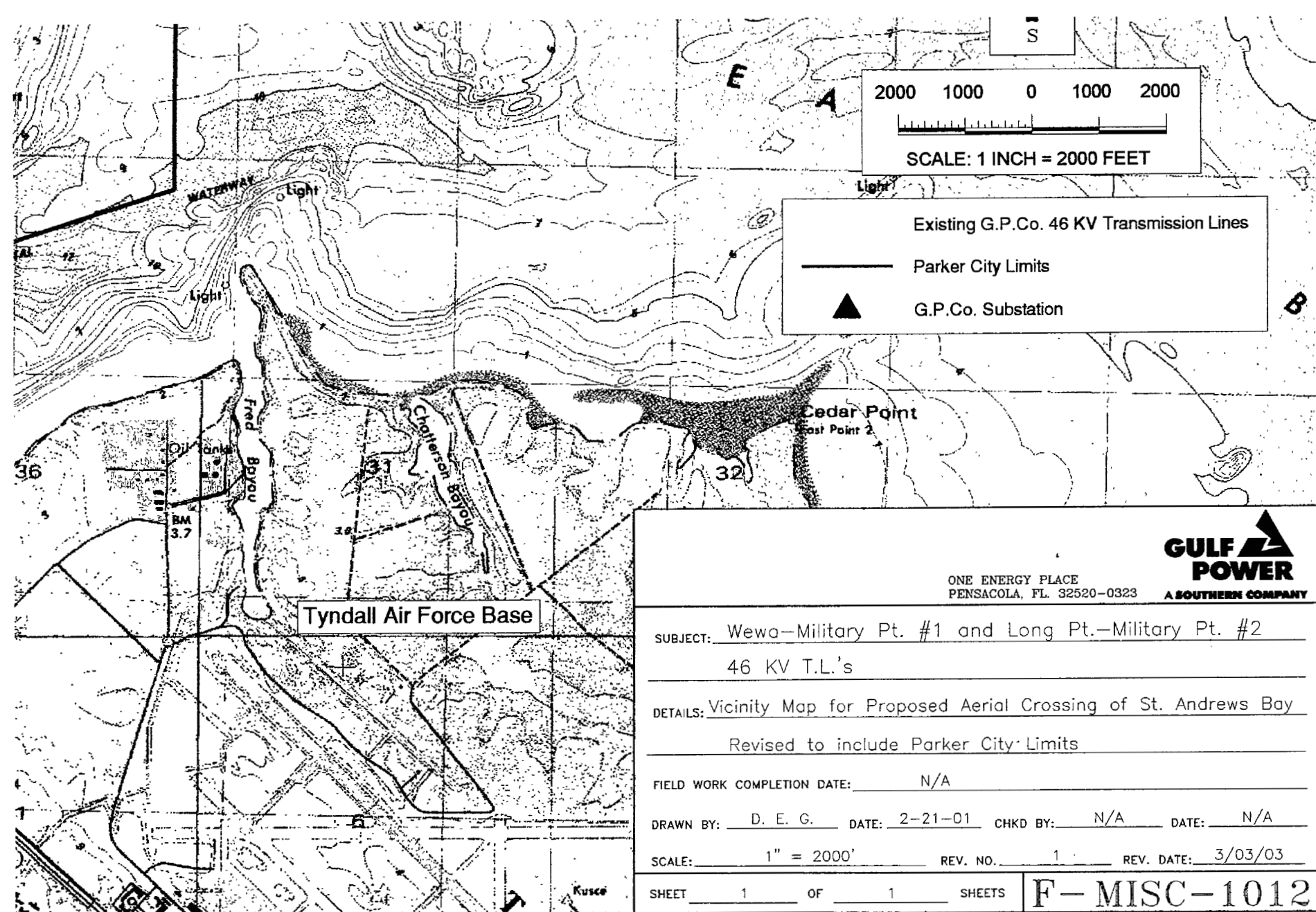
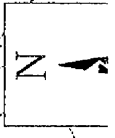
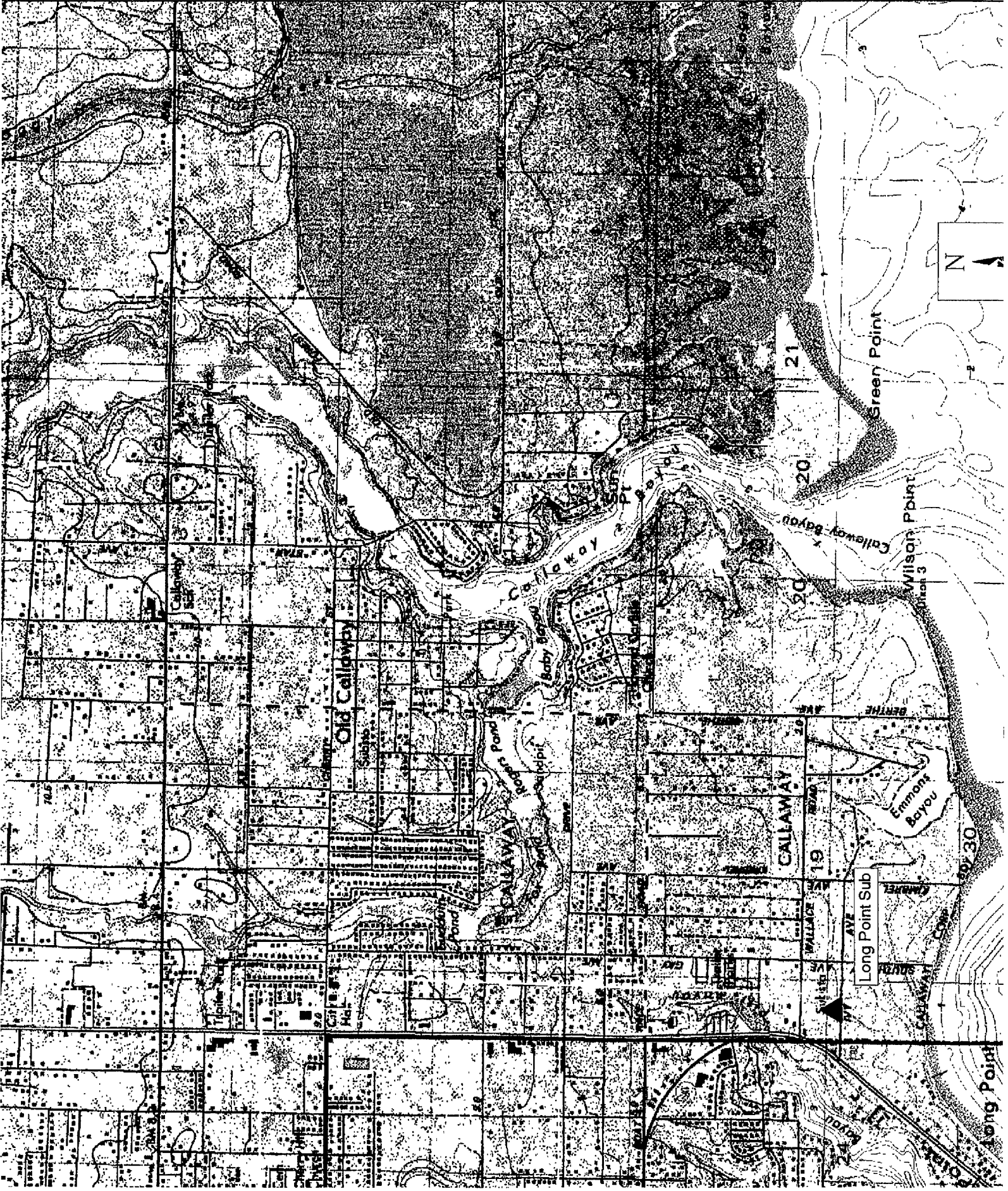


Exhibit A



Green Point

Wilson Point
Mile 3

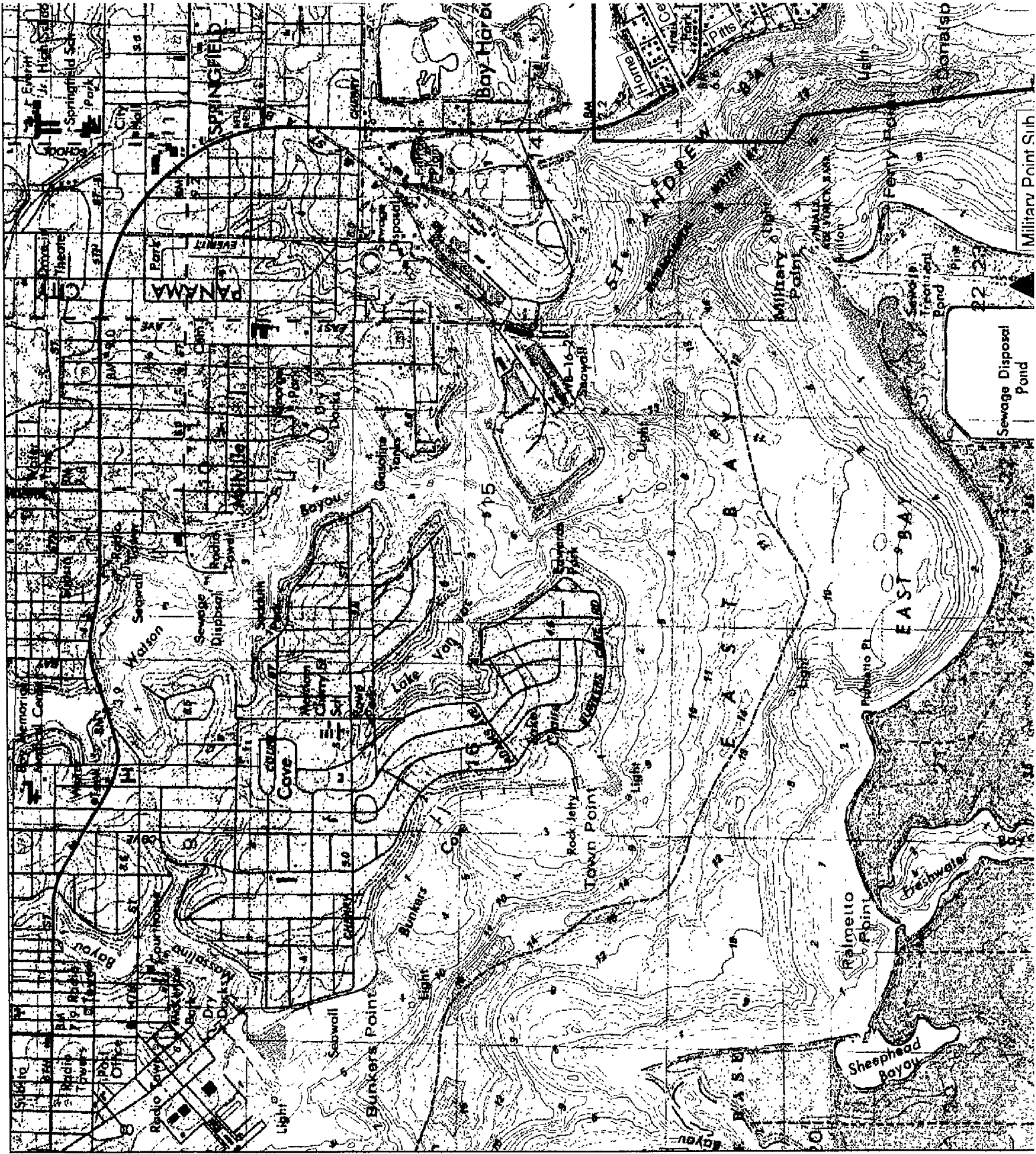
Callaway Bayou

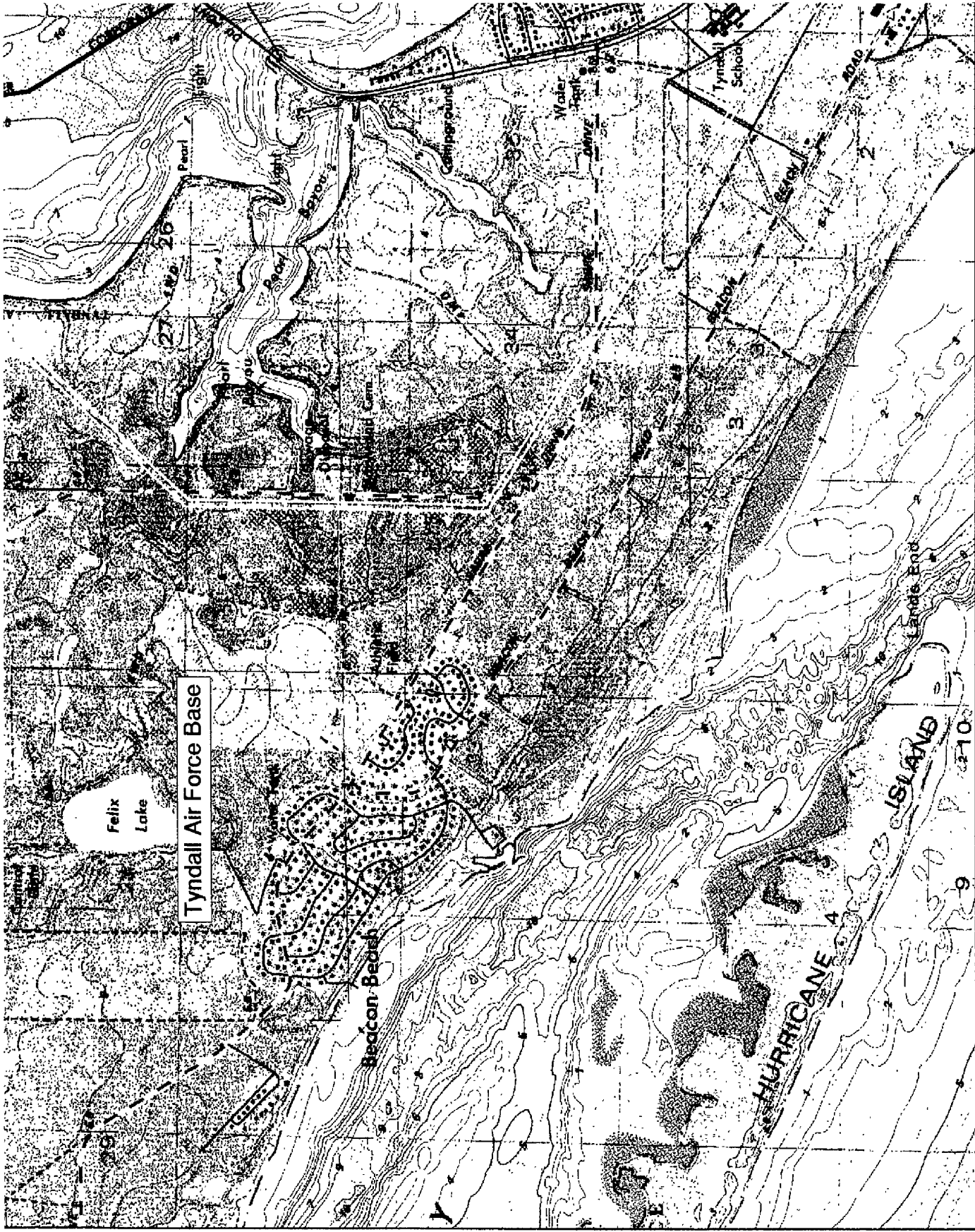
Old Callaway

CALLAWAY

Long Point Sub

Long Point





Tyndall Air Force Base

Felix Lake

Beacon Beach

HURRICANE

ISLAND

Lands End

Tynahli School

Water Park

Campground

ROAD

Pearl

27-12-26

27-10

9

10

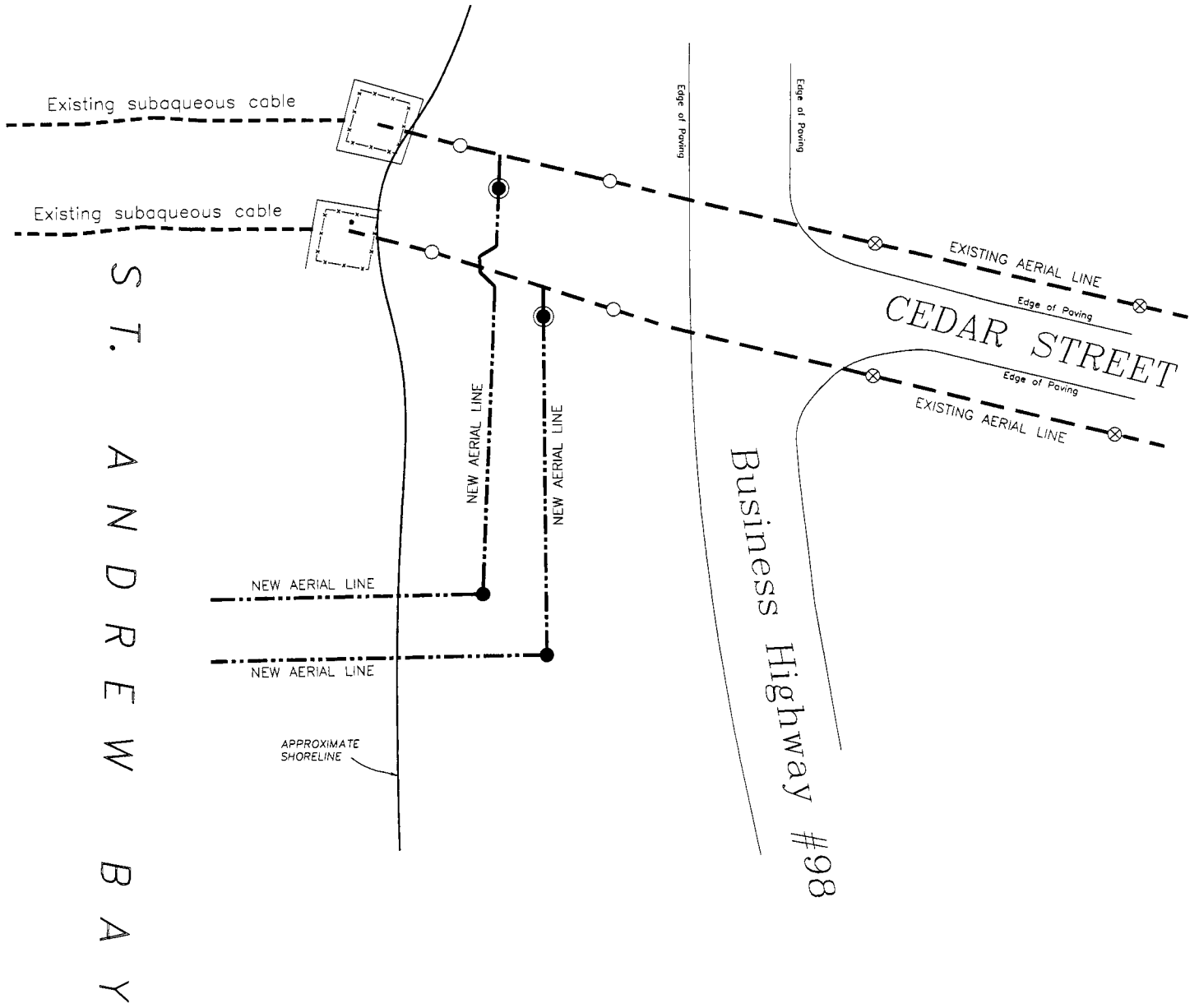
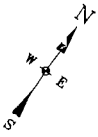


A SOUTHERN COMPANY

ONE ENERGY PLACE
PENSACOLA, FL. 32520-0323

LEGEND

- ⊗ - DENOTES EXISTING WOOD POLES
- - DENOTES EXISTING WOOD POLES TO BE REPLACED WITH CONCRETE POLES
- - DENOTES NEW CONCRETE POLES
- - DENOTES NEW DEAD-END STEEL POLES



SIMPLIFIED SCHEMATIC MILITARY POINT TRANSMISSION LINE CROSSING

Exhibit B

3-06-03 BY w.w.b.



DEVELOPMENT SERVICES DEPARTMENT
PLANNING AND ZONING DIVISION

634 Mulberry Avenue
Panama City, FL 32401
Phone: (850) 784-4024
Suncom: 777-4025
Fax: (850) 914-6400

October 2, 2002

BOARD OF COUNTY
COMMISSIONERS

Ms. Rachel Terry, Environmental Affairs Specialist
Gulf Power
One Energy Place
Pensacola, FL 32520

**SUBJECT: Proposed 115 KV Power Line Crossing Over East
Bay/St. Andrew Bay**

Dear Ms. Terry:

As requested, this will confirm that the above referenced construction does not contravene local zoning requirements or relevant provisions of the Bay County Comprehensive Plan. The proposed crossing location is in the unincorporated County only for that portion west of the Intracoastal Waterway. This area is designated as Conservation/Recreation in the Future Land Use Element of the Comprehensive Plan. Public utilities are permitted uses in this designation.

Sincerely,


J. Gary Ament,
Planning and Zoning Manager

xc: Joy Bates, Interim County Manager
Don O'Donniley, Development Services Director
Ted Spangenberg, Gulf Power Regional Manager ✓

POST OFFICE BOX 1818
PANAMA CITY, FLORIDA 32402

COMMISSIONERS:

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DISTRICT I

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DISTRICT III

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