D/A - 2-4-91
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

FLORIDA POWER CORPORATION,

Appellant

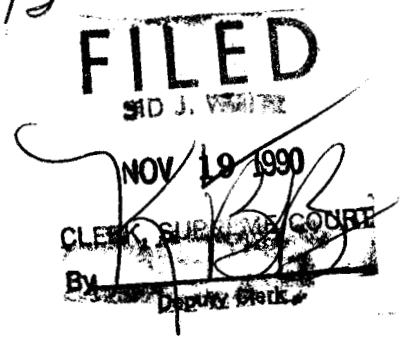
VS.

SEMINOLE COUNTY and CITY of LAKE MARY

Appellees

CASE NO.: 90-01884

76-743



GULF POWER COMPANY'S AMICUS CURIAE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE ORDERS

PRELIMINARY STATEMENT

Amicus Gulf Power Company will be referred to herein as Gulf Power Company "Gulf Power", "Gulf", or "the Company". Appellant Florida Power Corporation will be referred to as "FPC"; Appellees Seminole County and the City of Lake Mary will be referred to jointly as "Appellees" or as "the County" and "the City", respectively. The Florida Public Service Commission will be referred to as "the PSC" or "the Commission".

Transcript references from the trial of this case appear as (Tr. ___.) Exhibits introduced or marked for identification at trial appear as "Pl. Exh. ___" and "Def. Exh. ___." References to the appendix attached hereto appear as A-__.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amicus Gulf Power Company adopts and incorporates herein by reference the Statement of the Case and Statement of Facts of Appellant Florida Power Corporation.

SUMMARY OF ARGUMENT

The resolution of this appeal turns on a single, very simple, legal issue: whether local governments have the authority to order a regulated public utility to bury its overhead electric lines at the utility's own expense when relocating facilities to accommodate the local government's road expansion plan. A plain reading of the relevant statutory provision reveals that this question must be answered in the negative. Not only is the broad authority Appellees seek to exercise in this case not found in the laws of the State of Florida, the attempted exercise of that authority constitutes a blatant usurpation of authority expressly and exclusively vested by statute in the Florida Public Service Commission. In essence, the ordinances sought to be enforced by Appellees infringe the ratemaking powers of the PSC, and unlawfully discriminate against the general body of ratepayers by charging them for extraordinary costs associated with a preferred type of service enjoyed by only a few. This Court should decline to authorize the actions of Appellees herein due to the explicit legislative mandate against such actions and the enormous adverse, even catastrophic practical consequences of allowing local governments to dictate the mandatory undergrounding of electric lines for the sole benefit of, but at no expense to, those local governments.

ARGUMENT

I. THE LEGISLATURE HAS VESTED EXCLUSIVE JURISDICTION OVER COSTS ASSOCIATED WITH UNDERGROUND ELECTRIC LINES WITH THE FLORIDA PUBLIC SERVICE COMMISSION

Based on the explicit grant of exclusive statutory authority over rates and service, it is indisputable that local governments cannot regulate a utility's rates or the type of service to be provided to its customers. The Florida Statutes speak clearly on this point:

> In addition to its existing functions, the 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 case of conflict therewith, all lawful acts, orders, rules and regulations of the commission shall in each instance prevail.

Section 366.04(1), Fla. Stat. (1989). Shortly after the passage of Chapter 366, in fact, this court held that "[w]hen the legislature placed 'exclusive and superior' control in the Commission, no room was left for doubt that it was intended that that body should supervise, to the exclusion of appellee [City of Miami], those phases of the utility Company's operations specified in the Act." Florida Power & Light Co. v. City of Miami, 72 So. 2d 270, 273 (Fla. 1954) Moreover, if Section 366.04(1) were not clear enough, in 1989 the Florida legislature went even further to specify the Public Service Commission's

ultimate authority over the precise point at issue in this case by enacting Section 366.04(7)(a), which reads in pertinent part:

> 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 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.

Section 366.04(7)(a), Fla. Stat. 1989 (emphasis supplied).

By including the above-quoted 1989 enactment with respect to mandatory undergrounding within the same statute giving the PSC jurisdiction "exclusive and superior" over that of local governments, it cannot be seriously argued that the legislature did not intend to preempt the very powers Appellees attempt to exercise in the instant case. Appellees have nevertheless enacted ordinances which purport not only to require undergrounding of "overhead distribution ... facilities when such facilities are...relocated" along road right of way, a matter within the PSC's sole jurisdiction under Section 366.04(7)(a), but to dictate that the utility shall bear the extraordinary cost of such conversion, in direct contravention of the PSC's exclusive ratemaking authority under Section 366.04(1).

Clearly, in 1989 the legislature deemed it appropriate that a cost-benefit analysis be conducted regarding the

undergrounding of electric lines, and that such undergrounding be required if and only if "the installation of underground distribution and transmission facilities is cost-effective...". This cost-effectiveness issue has been completely ignored by Appellees in enacting the ordinances at issue in this case. Clearly, in any event this determination is appropriately made by the PSC, since by statute only the PSC has the authority to make the cost-effectiveness determination and then, if appropriate, to require the undergrounding of utility transmission and distribution facilities on a uniform, statewide basis.[4] While the City and the County may request underground service, as any other applicant, they may not require the underground service at the utility's own expense.

Even prior to the enactment of Section 366.04(7)(a) in 1989, the PSC had articulated a clear policy concerning the extraordinary costs associated with conversion of overhead electric facilities to underground and construction of new underground facilities: the cost-causer pays. Under this policy, a developer or ratepayer requesting underground service

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[4]Indeed, the legislature was very specific in identifying in Section 366.04(7)(a) the types of costs to be evaluated when determining whether to require undergrounding of electric facilities: The cost of accidental electrocutions and corresponding disabilities; vehicular accidents; "ascertainable and measurable" health effects; right-of-way requirements; reduced or eliminated tree-trimming costs; storm damage and resulting outages; and insurance, attorney's fees and settlement costs. Notably, the record here reveals that the Appellees considered only the perceived benefits (i.e. aesthetics and a perceived increase in public safety) (Tr. 118-120, 125-126) while conveniently disregarding costs entirely by simply refusing to assume any cost responsibility. Instead, Appellees address the cost issue by requiring the utility and the general body of ratepayers to shoulder the additional expense.

must bear the cost differential between the far less expensive overhead facilities and the undergrounding of those facilities. The PSC's policy recognized that overhead facilities were indisputably capable of providing safe, reliable electric service, and that a utility's ratepayers as a whole must not subsidize the provision of a more expensive but equally capable type of service requested and enjoyed by only a few. Implementation of this policy has even required payment of the cost differential by the cost-causer in advance of conversion of new construction, see A-13, since otherwise ratepayers not enjoying the luxury of underground service could still shoulder the carrying costs of the underground investment until those costs have been paid by the cost-causer. The ordinances enacted by Appellees in the instant case are in direct contradiction of this philosophy and infringe upon the PSC's exclusive ratemaking authority.

Specifically, the PSC has carried out its statutory responsibility under Section 366.04(7)(a) by conducting proceedings in Docket No. 890833-EU, known as "Investigation into the cost-effectiveness of undergrounding electric utility lines." After gathering testimony and evidence from interested parties, including investor-owned electric utilities, municipalities and individuals, the PSC determined in Order No. 23126 in that docket that there was an insufficient showing of cost-effectiveness to require undergrounding at the present time and determined to institute a rulemaking proceeding to further

refine and evaluate the cost-effectiveness issue. In that same Order, the PSC expressly addressed the argument over whether local governments had the authority to make a determination as to the propriety of undergrounding on a case-by-case basis, stating:

> We find [based on Section 366.04(7)(a)], therefore, that unless or until the statutory language states otherwise, the Legislature contemplated exclusive, not supplemental or complementary, jurisdiction to the Commission concerning the cost-effectiveness of undergrounding.

Order No. 23126, p. 16, Docket No. 890833-EU.

This Court noted in P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988) the "well-established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight." In Docket No. 890388-EU, the very proceeding conducted in response to the legislative mandate in Section 366.04(7)(a), the Commission found its jurisdiction exclusive over this issue. In the face of express statutory delegation of jurisdiction to the PSC and the PSC's own interpretation of its jurisdiction as exclusive, Appellees are only able to rely on statutes generally granting counties and municipalities jurisdiction over their streets and roads. The relevant statute however, provides only that:

> Any utility heretofore or hereafter placed upon, under, over, or along any public road that is found by the authority to be unreasonably interfering in any way with the convenient, safe, or continuous use, or the

> maintenance, improvement, extension, or expansion, of such public road shall, upon 30 days' written notice to the utility or its agent by the authority, be removed or relocated by such utility at its own expense except as provided in paragraphs (a) and (b).

Section 377.403(1), Fla. Stat. (1989). Compare the general grant of authority only to require removal or relocation of utility facilities with the express grant of authority to the PSC under Section 366.04(7)(a) to require "conversion of overhead ... to underground... when such facilities are replaced or relocated", if cost-effective, and it is evident that the legislature could not have intended Section 377.403(1) to be expanded beyond its plain meaning to allow forced conversion, in addition to mere removal or relocation, at the utility's own expense.

The Public Service Commission's exclusive authority over forced undergrounding and the expenses associated therewith is clear. While Appellees and other local governments may require utilities to remove or relocate their facilities at their own expense due to interference with existing or expanded road right of way, they may not require conversion of otherwise adequate facilities upon such relocation, infringing upon the PSC's exclusive authority over rates by mandating that the utility shall bear all costs of conversion. The legislature has spoken clearly on this issue, and this Court should refuse to open the door to Appellees and other local governments to defy express legislative intent and, in so doing, dramatically increase costs borne by all ratepayers.

II. THE NEED FOR A CONSISTENT, UNIFORM STATEWIDE SCHEME OF UTILITY REGULATION REQUIRES THAT LOCAL GOVERNMENTS DEFER COST DETERMINATIONS ASSOCIATED WITH UNDERGROUND ELECTRIC FACILITIES TO THE FLORIDA PUBLIC SERVICE COMMISSION

It is axiomatic that, by enacting Chapter 366, the Florida legislature envisioned a consistent, uniform statutory scheme of utility regulation throughout the State. The PSC is charged with acting "through control and regulation ... to insure to the public, at fair and reasonable rates and charges gas and electricity through reasonably sufficient, adequate, and efficient service, by and through the plant and facilities needed. [Chapter 366 is] ... an exercise by the state of its police power for the public welfare." Peoples Gas System, Inc. v. City Gas Co., 167 So. 2d 577, 582 (Fla. 3d DCA 1964) See also Florida Power & Light Co. v. City of Miami, supra at 273 ("The advantage that results from the uniformity of such a system [of uniform, statewide utility regulation] is obvious"). As this Court acknowledged in Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 (1969), "[t]he established state policy in Florida is to supervise privately-owned electric utilities through regulation by a state agency...the rates and services of the privately-owned electric companies are regulated by the... Commission." In fact, the Court in Storey emphasized the "omnipotent" powers of the PSC over private utility companies in upholding the PSC's approval of a territorial agreement

obviating the very sort of situation the City and County would have this Court approve in the instant case: shifting costs associated with service to only a few to the entire body of ratepayers.

In Storey, the concern was that the provision of electric service by a municipality, in competition with a regulated utility within the City's service area, required unnecessary and expensive duplication and overlapping distribution systems within the area. Id. at 306. By serving customers within that area, who had a choice among service providers, the regulated utility was absorbing the additional cost associated with unnecessary and uneconomic duplication of facilities, which costs would ultimately be borne by the general body of ratepayers not enjoying such a choice. Here, the City and County likewise wish to enjoy a different and far more expensive type of utility service even though the additional cost of providing that service will not be borne by the City and County. In order to avoid such an inequitable and discriminatory result, this Court should rule, as it did in Storey, in favor of the primacy of the PSC's authority in order to ensure that reliable and affordable electric service continues to be provided on a nondiscriminatory basis throughout the State of Florida.

The discriminatory price shifting mandated by Appellees in the instant case is, moreover, expressly prohibited by law. Section 366.03, Florida Statutes (1989) explicitly states:

> Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate and efficient service upon terms as required by the Commission...

> All rates and charges made, demanded or received by any public utility for any service rendered, or to be rendered by it, ... shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect. (emphasis supplied)

See also Williams v. City of Mount Dora, 452 So. 2d 1143, 1145 (Fla. 5th DCA 1984) ("a public utility has a legal duty to provide electric service on an equal basis to all users ... at reasonable and non-discriminatory rates and deposits"). If the ordinances at issue in this case are ultimately upheld, public utilities such as Gulf Power will be caught between the proverbial "rock and a hard place". It cannot be anything other than preferential to provide a more expensive type of electric service to a particular locality at no cost. Thus, utilities such as FPC will have no alternative but to comply with Section 366.03 and violate the local ordinance, or vice versa; they simply cannot comply with both.

The Appellees' response to the cost allocation aspects of the ordinances in question is disingenuous. According to the City and the County, the PSC's authority is not compromised since the utility can merely file for a rate increase at which time the Commission will allocate the costs in whatever way it chooses so long as it does not choose to allocate these costs to the City and County. This position, however, aside from violating the dictates of Section 366.03, would require the utility to absorb

the additional costs caused by the local government at least until the PSC has had the opportunity to evaluate a request for an increase in rates. This inevitable consequence of Appellees' ordinances was expressly rejected in Peoples Gas System, Inc. v. Lynch, 254 So. 2d 371 (Fla. 3d DCA 1971). There, the court determined that a municipal ordinance which charged a franchise fee but precluded the utility from raising existing rates until final determination by the PSC was improper. There, the court held that "the cost of a utility may not be increased by a fee or tax in such a manner that it must be paid from the fixed profits of a utility." Id. at 373. Yet, Appellees' ordinances in the instant case would have that exact result unless and until the PSC authorized a rate increase for the utility, a process which, including the time required for the utility to prepare to file its request, is a process which can take over a year. During that time, the costs would have to be absorbed out of the utility's profits, in direct contravention of the holding in Peoples Gas v. Lynch. As that court stated,

> If a municipality could effect such a result it could by assessing higher and higher franchise fees destroy the entire regulatory system for public utilities. A complete regulatory system for public utilities has been provided by the legislature of this state. See Fla. Stats. Chap. 366. Since a municipal ordinance may not contravene the provisions of a state statute it follows that an ordinance may not indirectly accomplish this result.

Id. The Court's ruling in Peoples Gas v. Lynch is thus directly applicable to the instant case, rendering Appellees' argument --

that the PSC's ratemaking authority is not compromised by the ordinances in question -- unsupportable under the law.

Appellee's argument also fails for the simple reason that the PSC has already made the cost allocation determination by adopting and enforcing the "cost causer pays" philosophy discussed in the previous section, a philosophy which is directly contradicted by the City and County ordinances. In Gulf's case, moreover, the Commission has approved a tariff for underground service which provides that underground service will be provided in an overhead area upon request, but requires that

> [p]rior to such installation, ... the applicant will be required to pay the Company in advance the estimated difference in cost between the underground service and the overhead facilities the Company would otherwise have installed. (emphasis supplied)

Paragraph 3.6, Section No. IV, Seventh Revised Sheet No. 4.14, Gulf Power Company's Retail Tariff for Electric Service. See A-13. Thus, if a precedent is established in favor of Appellees in this case and if local governments in Gulf's service area adopt similar ordinances, those ordinances would be in direct conflict with Gulf Power's tariff for underground service as approved and enforced by the PSC. A-42. Again, this dilemma demonstrates why this Court should preserve the uniformity of utility regulation in Florida and rule that the ordinances at issue invade the exclusive jurisdiction of the PSC over utility rates and service.

Additionally, the Appellees' evasion of cost responsibility in the instant case creates an example which, if approved and followed by other localities, has drastic and

overwhelming consequences which even the PSC's ratemaking and cost-allocation responsibility is not sufficient to address. The record is replete with references to the staggering expense to FPC of converting its overhead distribution lines along the one road at issue in this case. (Tr. 56, 68; Plaintiff's Exhibit as to Relocation Costs) It is inconceivable that other localities would not follow the example of Appellees in this case if the City and County ordinances are upheld, thus exponentially increasing the conversion costs throughout Florida.

For its part, Gulf has in excess of 6,500 miles of overhead facilities currently in place in northwest Florida, including overhead facilities located along each major road within its service territory. Estimated conversion costs range from a minimum of $430,000 per mile to convert an overhead residential feeder, to more than $3.25 million per mile for conversion of overhead transmission lines in urban areas. As recently approved by the Florida PSC in Gulf's 1990 rate case, Docket No. 891345-EI, Order No. 23573, Gulf's entire rate base is only $861,159,000. Additions to rate base resulting from the extraordinary conversion costs which would be necessitated if localities in Gulf's service area decide to follow suit and require undergrounding at the Company's expense must be recognized in the Company's rates and charges. Recognition in rates is necessary in order to continue to meet the regulatory requirements that the Company have an opportunity to earn a fair return on its investment made for the purpose of providing adequate and reliable electric

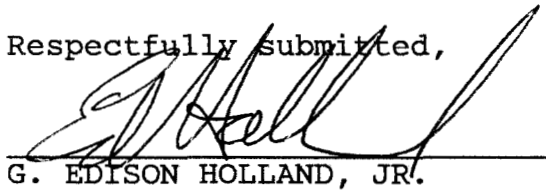
service. This would either force Gulf and the Commission to undertake another lengthy and expensive rate case each time such costs are forced upon the Company, or would require the Commission to design another cost mechanism for more immediate recovery, perhaps similar to the fuel costs recovery clause, to timely protect the Company's ability to earn a fair return. Such an alternative recovery mechanism may become essential if the frequency and magnitude of such conversions is such that the traditional rate making process is no longer adequate and timely. Either recovery mechanism, traditional rate making or special recovery, would have the inevitable and undesired result of sudden severe "rate shock" to the general body of ratepayers.

It is understood that in today's economy, local governments are hard-pressed to finance improvements and services desired by their citizens. The reluctance of taxpayers in a certain area to fund underground facilities for aesthetic purposes, however, should not and must not translate into a requirement that a utility's customers foot the bill. Not only must the PSC make that determination but such a process would have the effect of insulating the elected officials requiring this increased cost from the political consequences of their action. Thus, in order to ensure the maintenance of uniform, nondiscriminatory rates and to keep electricity in Florida affordable to utility customers throughout the state, the Court should allow local governments to require undergrounding of existing overhead facilities only when those governments agree to bear the cost of such conversion.

CONCLUSION

The legislature has vested exclusive jurisdiction by statute in the Florida Public Service Commission to evaluate the cost-effectiveness of requiring conversion of overhead electric facilities to underground upon relocation or removal of the facilities. Likewise, the Florida Public Service Commission's jurisdiction over utility rates and service is expressly made superior to that of municipalities, counties, and all other units of local government. Moreover, courts of this state have clearly articulated the importance of a uniform, statewide system of utility regulation. Consistent with this directive, and based on principles of equity and fairness, the Florida Public Service Commission has implemented a policy under which the party requesting the significantly more expensive underground service bear the additional cost associated therewith. In spite of the indisputable authority of the PSC over this issue, Appellees rely on their statutory power to require removal or relocation of electric facilities and contend that this power entitles them to defy the PSC's ratemaking and cost-allocation authority and to enjoy preferential treatment from the utility at no additional cost. This Court should reverse the trial court and in so doing affirm the jurisdiction of the Florida Public Service Commission.

Respectfully submitted,



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Certificate of Service

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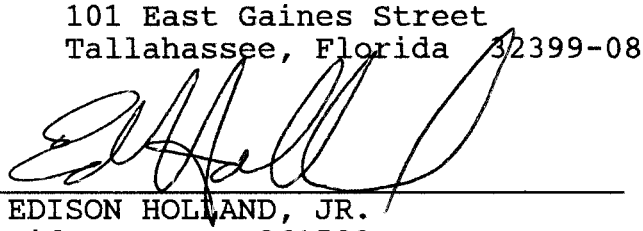

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APPENDIX