

STATE OF FLORIDA
PUBLIC SERVICE COMMISSION

ORIGINAL

IN RE FRIENDS OF THE AQUIFER, INC.,)

Petitioner.)
)
)

Docket No. 991754-GP

**BRIEF IN SUPPORT OF AMENDED
PETITION TO INITIATE RULEMAKING**

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STATEMENT OF FACTS

The Petitioner, Friends of the Aquifer, Inc., has filed an Amended Petition to Initiate Rulemaking in which the Petitioner requests that the Public Service Commission ("PSC") adopt the rules necessary to establish safety and environmental standards and regulatory programs for intrastate and interstate natural gas pipelines and pipeline facilities located within the State of Florida. Specifically, the Petitioner asks that the PSC adopt the rules necessary to accept the federal delegation, granted in the Federal Hazardous Liquid Pipeline Safety Act ("FHLPSA"), 49 U.S.C.A. § 60101 et seq. (West 1997 & Supp. 1999), to regulate intrastate and interstate pipelines and pipeline facilities located in Florida or, in the alternative, to enter into an agreement with the Secretary of the United States Department of Transportation to enforce federal hazardous liquid pipeline safety standards.

Buccaneer Gas Pipeline Company, L.L.P. ("Buccaneer") intervened in this matter on the basis of its interest in a proposed natural gas pipeline project to be constructed and operated in the State of Florida. Buccaneer then filed a Response in Opposition to the Amended Petition to Initiate Rulemaking, in which Buccaneer argues that the Amended Petition should be denied. Buccaneer's argument is three-fold. First, it asserts that the PSC has no statutory authority to adopt the rules sought by the Petitioner. Second, Buccaneer claims that the PSC has already issued regulations that address "each and every topic upon which the Commission is authorized by statute to adopt rules." (Response in Opposition to Amended Petition to Initiate Rulemaking ¶ 3). Third, Buccaneer argues that its proposed pipeline project is already subject to a plethora of federal and state regulations and, by implication, that the regulations sought by the Petitioner are unnecessary. The Petitioner will prove herein that, as it has shown in its Amended Petition to Initiate Rulemaking, the PSC

has statutory authority to prescribe the rules sought in this proceeding, that existing regulations do not address the risks of harm that would be controlled by the regulations required by the FHLPSA, and that the PSC should not abstain from adopting the rules sought by the Petitioner merely because the proposed pipeline project is subject to other federal and state regulations that do not address the risks of harm recognized by the FHLPSA.

ARGUMENT

I. THE PSC HAS STATUTORY AUTHORITY TO ADOPT THE RULES SOUGHT BY THE PETITIONER.

While it is axiomatic that a regulatory agency may not prescribe rules that are in excess of the legislature's statutory delegation of authority to the agency, an agency's implementation of its specific powers and duties may be effected through the agency's implied powers. *See Peoples Gas System, Inc. v. City Gas Co.*, 167 So. 2d 577 (Fla. 3d DCA 1964), *aff'd*, 182 So. 2d 429 (Fla. 1965). An express grant of power to an agency is deemed to include such powers as are necessary or reasonably incident to the powers expressly granted. *Hall v. Career Service Commission*, 478 So. 2d 1111 (Fla. 1st DCA 1985). Such implied powers include the power to make rules. When the legislature authorizes an agency of the state to enforce a statute enacted under the police power, the legislature is not required to prescribe specific rules of action or to cover every conceivable situation that may confront the agency. *Astral Liquors, Inc. v. Florida Department of Business Regulation*, 463 So. 2d 1130 (Fla. 1985); *Board of Dentistry v. Payne*, 687 So. 2d 866 (Fla. 1st DCA 1997). Rulemaking authority may be implied to the extent necessary to implement properly a statute governing the agency's statutory duties and responsibilities. *Payne*, 687 So. 2d at 868;

Cortes v. State, Board of Regents, 655 So. 2d 132 (Fla. 1st DCA 1995) (while executive-branch agencies may not usurp legislative prerogatives, rulemaking authority may be implied to extent necessary to implement a statute properly; an administrative agency must have some discretion when a regulatory statute is in need of construction in its implementation). Not only does an administrative agency have such implied rulemaking authority, but an agency is accorded wide discretion in the exercise of lawful rulemaking authority that is fairly implied and that is consistent with the statutory duties of the agency. *Florida Commission on Human Relations v. Human Development Center*, 413 So. 2d 1251 (Fla. 1st DCA 1982).

The PSC is an administrative agency that partakes of these implied rulemaking powers that courts have recognized. The powers and duties of the PSC are those that are conferred expressly or that are implied by statute. *E.g.*, *State, Department of Transportation v. Mayo*, 354 So. 2d 359 (Fla. 1977); *City Gas Co. v. Peoples Gas System, Inc.*, 182 So. 2d 429 (Fla. 1965) (Public Utility Commission's powers include both those expressly given and those given by clear and necessary implication from the provisions of the enabling statute; neither category of power is possessed of greater dignity or effect than the other). Moreover, the powers of the PSC to regulate the operation of utilities may, in proper instances, be exercised on the initiative of the Commission. *See Peoples Gas System, Inc. v. Mason*, 187 So. 2d 335 (Fla. 1966). The PSC itself has the authority to interpret the statutes that empower it, including jurisdictional statutes, and to make rules and to issue orders accordingly. *Florida Public Service Commission v. Bryson*, 569 So. 2d 1253 (Fla. 1990). In *Gulf Coast Electric Cooperative, Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999), the Florida Supreme Court held

that the ultimate measuring stick to guide the PSC in its jurisdictional decisions is the public interest.

Applying these principles to the proceedings at hand, it is clear that the PSC has statutory authority to adopt the rules set forth in the Amended Petition to Initiate Rulemaking. While *Buccaneer* argues that the PSC's issuance of the proposed rules would be impermissible, the Florida Administrative Procedure Act makes clear that such action is appropriate and within the jurisdiction of the PSC. Fla. Stat. Ann. § 120.52(8) (West Supp. 2000) provides that an "invalid exercise of delegated legislative authority" consists of "action which goes beyond the powers, functions, and duties delegated by the Legislature." This section goes on to state that a proposed or existing rule is an invalid exercise of delegated legislative authority if the agency has exceeded its grant of rulemaking authority or the rule enlarges, modifies, or contravenes the specific provisions of law implemented. *Id.* § 120.52(8)(b), (c). Finally, § 120.52(8) provides

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

Section 120.58 does not paralyze an administrative agency or render the agency useless by making it impossible for the agency to act if an enabling statute does not contain language expressly granting authority to make rules on a precise subject. As noted by the

court in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998),¹ it is unlikely that the legislature intended "to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable." *Id.* at 79. The court reasoned that "a standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power." *Id.* at 80. It noted that a standard based upon the sufficiency of detail in the enabling statute "would be difficult to define and even more difficult to apply," given that specificity cannot be neatly divided into identifiable degrees. *Id.* The court correctly observed that an argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the legislature attempted to be in describing the powers delegated to the agency. *Id.*

For these reasons, the case-law principles discussed above, holding that an agency possesses implied rulemaking powers sufficient to enable it to implement its governing statute properly, have not been abrogated by the adoption of § 120.52(8). It is unreasonable to conclude that the legislature intended to sweep away decades of agency practice under enabling statutes that the legislature has not made more detailed in order to allow an agency to satisfy any purported requirements for exactitude under § 120.52(8). Accordingly, while an agency has the power to adopt only rules that implement the specific powers and duties

¹While § 120.52(8) has been amended since the *St. Johns* decision, the reasoning of that decision remains valid. The purpose of an administrative agency is to free the legislature from having to anticipate precisely every situation that might conceivably arise under the enabling statute, when the intent of that statute is clearly to regulate a certain range of activities.

granted by the enabling statute, an agency still may accomplish this result within its implied authority to apply its enabling statute properly.

The legislature has given the PSC the specific duty to regulate natural gas pipelines in the manner sought by the Petitioner in the present case. Fla. Stat. Ann. § 368.03 authorizes the PSC to establish standards for the installation, operation, and maintenance of natural gas transmission and distribution systems, including gas pipelines. Fla. Stat. Ann. § 368.03 states that it is intended that the requirements of the rules and regulations promulgated by the PSC be adequate for safety under conditions normally encountered in the gas industry. With respect to the scope of the PSC's rulemaking powers, the legislature stated that "[t]his law, and the rules and regulations adopted pursuant to it, are declared to be in the public interest and are deemed to be an exercise of the police power of the state for the protection of the public welfare and *shall be liberally construed for the accomplishment of that purpose.*" *Id.* (emphasis added). Fla. Stat. Ann. § 368.05 confers jurisdiction upon the PSC over all persons, corporations, partnerships, associations, public agencies, municipalities, and other legal entities engaged in the operation of gas transmission or distribution facilities with respect to rules and regulations governing standards established by the PSC pursuant to Fla. Stat. Ann. § 368.03. The PSC is also statutorily authorized to determine the need for natural gas transmission pipelines in the State of Florida. Fla. Stat. Ann. § 403.9422 (West 1998); see *Florida Gas Transmission Co. v. Public Service Commission*, 635 So. 2d 941 (Fla. 1994).

In light of the foregoing statutory authority, the PSC is authorized to adopt rules accepting federal delegation to regulate, pursuant to the FHLPSA, intrastate and interstate natural gas pipelines located in Florida or to enter into an agreement with the federal

government to enforce federal standards under the FHLPSA. Such regulation is within the specific, comprehensive grant of power to the PSC in Fla. Stat. Ann. § 368.03. The PSC possesses express and implied power to implement the specific duties set forth in that statute. For these reasons, the PSC has the authority to prescribe the rules sought in the Amended Petition to Initiate Rulemaking.

II. EXISTING REGULATIONS DO NOT ADDRESS THE RISKS OF HARM COVERED BY THE FEDERAL ACT.

In addition to claiming that the PSC does not have the authority to issue the rules sought in the Amended Petition to Initiate Rulemaking, Buccaneer argues by implication that existing regulations are sufficient to control the risks of harm presented by natural gas pipelines like Buccaneer's proposed project. However, while Fla. Admin. Code Ann. r. 25-12.001 et seq. sets forth some regulations relevant to natural gas pipelines and incorporates by reference the federal regulations in 49 C.F.R. Parts 191, 192, and 199 (1998), neither the state rules nor the incorporated federal regulations address any environmental risks presented by natural gas pipelines in Florida. Such risks are specifically covered in the FHLPSA. *See* 49 U.S.C.A. § 60109(a), (b). As the Petitioner has discussed in its Amended Petition to Initiate Rulemaking, other states with regulatory systems similar to that of Florida have recognized that the FHLPSA addresses concerns different from those in the state regulations and have accepted the delegation granted by the federal Act to regulate hazardous liquid pipelines within their borders. While Buccaneer correctly argues that the fact that other states have adopted regulations similar to those sought by the Petitioner does not empower

the PSC to do so, what Buccaneer neglects to mention is that the PSC's enabling statute itself provides for such regulation, as discussed above.

In arguing that the PSC should deny the rulemaking sought by the Petitioner, Buccaneer lists a number of regulations that allegedly already affect its proposed natural gas pipeline project. (Response in Opposition to Amended Petition to Initiate Rulemaking ¶ 8). Such an argument is not responsive to the issue in this matter. The question is not whether there are some regulations currently applicable to the project. If this were the test, there would never be any concurrent regulation of an industry by different federal or state agencies whose statutory responsibilities are distinct yet may, at times, coincide. Experience shows that such multiple regulation is the rule, rather than the exception. The Petitioner is not attempting to suggest that the Buccaneer project or any other natural gas pipeline will avoid regulation if the PSC does not grant the Amended Petition. Rather, the true issue is whether the PSC, which is authorized to adopt the rules sought by the Petitioner in discharging its statutory duty to protect the public welfare by regulating the installation, operation, and maintenance of natural gas pipelines, should decide not to accept the delegation to regulate under the FHLPSA merely because some other regulations currently exist. While Buccaneer argues that existing federal and state regulations will undertake an environmental analysis of its proposed project, Buccaneer does not claim that such an analysis will address the identical matters encompassed by 49 U.S.C.A. § 60109. Despite the existence of the federal environmental regulations to which Buccaneer refers, Congress deemed the environmental risks associated with natural gas pipelines sufficiently serious to have also enacted 49 U.S.C.A. § 60109. For these reasons, the fact that a natural gas pipeline project like

Buccaneer's is already subject to federal and state regulation is irrelevant in determining whether the PSC should regulate natural gas pipelines under the FHLPSA.

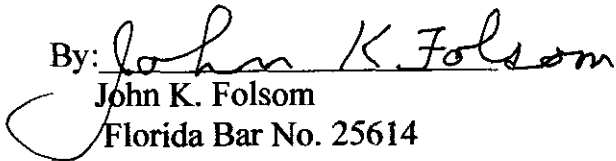
CONCLUSION

The PSC possesses statutory authority to adopt the rules set forth in the Amended Petition to Initiate Rulemaking. The PSC's enabling statute expressly grants the PSC authority to regulate natural gas pipelines in the public interest and in the manner required by the FHLPSA. Moreover, the PSC has implied authority to implement its enabling statute properly. Because the type of natural-gas pipeline regulations required by the FHLPSA fall within the PSC's statutory grant of rulemaking authority, the PSC has the power to adopt the proposed rules set forth in the Amended Petition to Initiate Rulemaking.

The existence of some regulations already applicable to natural gas pipelines does not preclude the PSC from discharging its statutory duty to regulate natural gas pipelines in the public interest and for the public welfare. The FHLPSA authorizes the regulation of natural gas pipelines with respect to environmental concerns that are distinct from the subject of other existing regulations.

For all the foregoing reasons, the Petitioner, Friends of the Aquifer, Inc., respectfully requests that the Public Service Commission grant its Amended Petition to Initiate Rulemaking.

Respectfully submitted,

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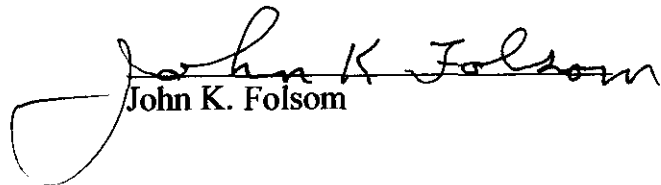
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief in Support of the Amended Petition to Initiate Rulemaking has been provided via regular U.S. Mail on this 24th day of February, 2000, to the following:

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