IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 68,593

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

S. B. JENNINGS a/k/a S. BRYAN JENNINGS, JR., et al.,

Respondents.

BRIEF OF RESPONDENTS

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

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PREFACE

Throughout this Brief, Florida Power & Light Company, the Petitioner/Appellant in this appeal and the Petitioner in the eminent domain trial proceedings below, will be referred to as "FPL." The Defendant-landowners who are Respondents in this appeal GORDON R. SANDRIDGE, JR. (Parcel C-3.3) and SOUTHSIDE PROPERTIES (Parcels C-12 and C-14), will be referred to as "owners." FLORIDA POWER CORPORATION and TAMPA ELECTRIC COMPANY, as Amici Curiae, will be referred to as "FPC" and "TEC," respectively or as Amici. FLORIDA RURAL ELECTRIC COOPERATIVES ASSOCIATION, as Amicus Curiae, will be referred to as "FREC" or as Amicus.

All references to pages in the transcript of the trial will be designated by the symbol "T." followed by the page number of the transcript. References to the record below will be designated by the symbol "R." followed by the page number. References to the term "A" refers to the Appendix to this brief.

Introduction

As pointed out by FPL, the decision on review before this Court is that of the First District in Florida Power & Light Company v. Jennings, 485 So. 2d 1374 (Fla. 1st DCA 1986) (Jennings), copy of which is attached to the brief of FPL. While not officially before this Court for review in this appellate proceeding, the owners herewith bring to the attention of the Court, the decision of the District Court of Appeal of the Fifth District of Florida, dated June 5, 1986, in Florida Power & Light Company v. Roberts, 11 FLW 1275 (Roberts), copy of which is made a part of the owners' appendix to this brief (A. 7) and which is presently before the Court in a separate proceeding, designated as Case No.: 69,069.

Statement of the Case

The Statement of the Case and of the Facts, as set forth by FPL in its Initial Brief, by quoting from the opinion of the First District Court of Appeal in Florida Power & Light Company v. Jennings, 485 So. 2d 1374 (Fla. 1st DCA 1986) is correct. However, because of the Points on Appeal raised by FPL, as well as the several Amici, the owners will herewith submit their supplemental Statement of Facts.

Statement of the Facts

The points on appeal involve severance damages to the owners' remaining property caused by the taking by FPL of a 280 to 300 foot wide right of way for a 500,000 volt (500 Kv) electric transmission line. FPL is a privately held profit making, corporate entity having, by statutory authority, the power of eminent domain (T.66). Specifically, the issue involves whether or not, and the manner in which, proof as to health effects from said lines may be presented in order to shown a depreciation in value of lands immediately adjacent thereto.

The evidence of adverse effects of 500 Kv lines, as it relates to the depreciation in value of lands adjacent to

said lines, took the form of the mechanics of how power transmission lines operate; the invisible electromagnetic field created by the conductors of the transmission line; how this field is transmitted to adjacent lands from the conductors; the manner in which the field is coupled into the human body; and radio and television interference, all of which was testified to by the electrical engineer, Dr. John Dennis Norgard (T. 262-378).

Dr. Nancy Wertheimer, an Epidemiologist, testified concerning her research and epidemiological studies which demonstrated that constant and prolonged exposure to electric transmission lines showed, not that the lines cause cancer, as the FPL's brief suggests (Pet. brief pgs. 9, 10) but that there was a relationship between adverse health effects and the electromagnetic field. (T. 414-415).

The witness Norgard, Professor of Electrical Engineering at the Georgia School of Technology for fifteen years, now in a similar position at the University of Colorado school of electrical engineering, had received Master of Science and Ph.D. degrees from the California Institute of Technology and was a postdoctral Fellow for one year at the University of Oslo in Norway. He has worked as an electronics engineer at the Charleston Navy Yard, the Jet Propulsion

Laboratory in Pasadena, California and was involved with the Martian Lander Program, having helped design the Viking Lander that landed on Mars. In addition, he worked for the Georgia Power Corporation and the Bell Telephone Laboratories involving transmission lines and in addition to teaching the design of electric transmission lines, has been involved in research dealing with electromagnetics which is the study of electric fields and magnetic fields that are emitted from high power electric transmission lines, having written approximately thirty-six scientific papers dealing with the entire subject. Also, he has been involved in research dealing with the coupling of the electric field into the nerve cells of the human body (T. 262-270; Defs.' Exh. 12). His research includes review of other scientific studies dealing with constant exposure to the electromagneticfield (T. 275).

Based on the measurements of actual meter readings of the electric field directly under a 500 Kv line and at the edge of the right of way, Norgard expressed the opinion that human habitation should not take place within four hundred forty feet from the center line of the electric transmission line easement (T. 321), concluding that while the intensity of the electromagnetic field is important, it is that,

combined with the duration of the exposure, which accounts for the very long subtle effects that have been missed in previous scientific research dealing with this subject (T. 323).

The witness Wertheimer received her Bachelor of Science degree from the University of Michigan and her Masters and Ph.D degrees from Harvard and Radcliffe in experimental psychology, dealing primarily in scientific methodology. Also, she took postdoctoral work in epidemiology at the University of Minnesota (T. 385-391; Defs.' Exh. 14).

Wertheimer defined an epidemiologist as one who studies disease "as it occurs out in the real world" as opposed to experimentalists who experiment with animals in the laboratory to determine what happens to them under certain conditions (T. 384).

Presently associated with the Department of Preventive Medicine at the University of Colorado Medical School as a clinical assistant in research on a non-paying status, she has engaged in two published epidemiological studies, each requiring peer review prior to publication. The first was in 1979, entitled "Electrical Wiring Configurations and Childhood Cancer," published by the John Hopkins University School of Hygiene and Public Health in the American Journal of

Epidemiology (Vol. 109, No. 31919, 1979), (T. 397) and the second was in 1982, entitled "Adult Cancer Related to Electrical Wires Near the Home," published by The Oxford University Press in Great Britain in the International Journal of Epidemiology (Vol. II, No. 4, 1982) (T. 403). She is also a member of the American College of Epidemiology and the Bioelectromagnetic Society, which is a society of scientists who study the biological effects of electrical and magnetic fields. Membership in both of these groups is by invitation only (T. 389).

Joining Dr. Wertheimer in the aforesaid studies was Ed Leeper, a physicist with a Masters degree from Columbia University, who has received grants for research from the Woodrow Wilson Foundation and the National Science Foundation.

The result of both of the aforesaid Wertheimer studies showed a definite link between electric transmission lines and cancer with both children and adults who live in close proximity to the lines. This was graphically shown in a chart which demonstrated the major findings of the studies, as well as the kinds of measurements being used to validate that the homes showing a higher rate of cancer had higher magnetic fields (A. 2; T. 401, 404).

Wertheimer also demonstrated a chart showing the

published epidemiological studies, both in the United States and abroad, dealing with the relationship of cancer to the electromagnetic field (A. 3; T. 406, 410-419) pointing out that until approximately 1980, it was the general consensus in the scientific community that the electromagnetic field had no adverse health effect and that most of the prior studies had been funded by the power industry; but that in the last few years there had been "an explosion of information in this field, most of it now coming with positive results" particularly due to the epidemiological studies which show conditions as they occur in the real world as opposed to laboratory experiments (T. 406-408).

Wertheimer also pointed out, as reiterated by the District Court of Appeals in Jennings, that the various studies do not show that the electromagnetic field causes cancer, but the studies do show that it promotes cancer in that the constant and prolonged exposure to the field makes it harder for the body to fight off cancer (T. 415).

In rebuttal, FPL presented Fred M. Dietrich, an electrical engineer who has "published about seven or eight papers in the peer reviewed literature dealing with transmission line effects such as radio interference, audible noises and electric fields" (T. 488). Dietrich testified there was

no substantial problem with noise, radio or televisions interference or lightening from said lines, but that the invisible electromagnetic field which emanates from the subject transmission line could not be shielded from structures close to the power line (T. 528).

It was shown that Dietrich had done work for FPL in the past, having testified in other proceedings as an expert for FPL involving the subject power lines, as well as other matters (T. 543-545). While Dietrich expressed an opinion that the subject lines had no adverse effect, from an engineering point of view, he did acknowledge that he was not qualified to express an opinion on health problems created by said lines (T. 546, 556) and further acknowledged that, while it is not his opinion now, he had stated several years ago in published papers that "the significance, if any, on human health and safety are yet to be determined" (T. 550).

He also acknowledged that there is a "possibility of subtle or long-term effects which are possibly occurring to a small part of the population or are so small that they are not being picked out by the routine public health screening, the epidemiological process." He also stated that "as an engineer, I acknowledge that possibility and feel that research has to be done" (T. 554). In further rebuttal to the

scientific evidence presented by the owners, FPL produced Morton Miller, Associate Professor of Radiation Biology and Biophysics at the University of Rochester, who had obtained Masters and Doctorate degrees in botany and zoology (T. 588-589). Dr. Miller has published a number of scientific papers in the field of radiation biology (T. 490) and has studied the effects of high power transmission lines on plant life, the sensitivity of the human eye to electric fields, anatomical effects from exposure to a DC magnetic field, the laboratory design of an animal exposure facility and the use of ultrasound in clinical practice, all of which was restricted to laboratory experiments (T. 640-642). Miller also stated that other than the aforesaid laboratory experiments, his analysis of the effects of the electromagnetic field from high power transmission lines came solely from the literature in the field, having made no epidemiological studies dealing with transmission lines (T. 642). He also acknowledged statements in his publications to the effect that it is not possible to state that transmission line environment is safe (T. 661) and, in addition, confirmed that this conclusion was set forth in the 1985 report entitled Biological Effects of 60 Hertz Power Transmission Line prepared by the Florida Electric and Magnetic Fields Science Advisory Commission (T. 657).

Also, Miller's experience as an expert witness has been exclusively for the power industry, having previously testified as an expert witness concerning this issue for FPL in Florida, for Rochester Electric Company in New York, for Tuscon Electric Power Company in Arizona, for Montana Power Company in Montana, for Philadelphia Electric Company in Pennsylvania and for Pacific Gas and Electric Company, Department of Water and Power for the City of Los Angeles and San Diego Gas and Electric Company, all in California (T-663-665).

In addition to the scientific evidence as to health effects, evidence was presented by the expert witnesses for the owners, Joseph W. Reidy, Ronald K. Moody and H. A. Yeargin of actual comparable sale studies along power lines of all sizes, in Clay, Putnam and Hernando Counties, showing that lands adjacent to transmission lines sold for less than lands some distance away (A. 4-5, T. 683-694, 708-711, 785-797, 910-912).

In Hernando County, involving similar type residential lands, the power line studies showed a decrease in value, from 40% to 43%, of lands adjacent to existing 500 Kv and 240 Kv lines compared to identical lands some distance away (A. 4-5, T. 683-694). In Putnam County, immediately south of

Clay County, the studies showed a decrease in value from 37% to 41.6% (T. 912). In Clay County, similar studies of lands immediately south of the subject lands showed a decrease from 30% to 44% where the same 240 Kv line was involved (T. 785, 910-911) and when the subject 500 Kv line became known, the difference was 47% (T. 788). There was also evidence that the public is becoming more aware of health problems associated with transmission lines as reflected by numerous lay articles on the subject which have appeared in Readers' Digest, newspapers and appraisal journals (T. 790-791, 878, 895, 927). This was also demonstrated by newspaper notices of FPL advising the public on the dangers of transmission lines (A. 6).

In addition, the aforesaid witnesses investigated, through real estate brokers, land developers in the immediate area of the subject property, real estate closing attorneys, sellers and buyers of similar property at or close to said power lines, what knowledge these people had of the adverse health effects of said lines at the time of specific sales and how the market has reacted to this knowledge (T. 720-722, 789-791, 878, 895, 927). As summarized by the witness Reidy:

> My investigations revealed that there was a definite concern on the part of the buying public in two specific areas, principally two, and these specific areas were the matter of aesthetics, and the matter of the unsightliness of the lines, for one, and secondly, the matter of the health hazards (T. 721).

All of the evidence, enumerated above, was submitted by the owners in order to comply with the existing law on the subject as set forth in Casey v. Florida Power Corporation, 157 So. 2d 168 (Fla. 2nd DCA 1963) and, in addition, as a necessary prerequisite to demonstrate the nature, basis for and extent of depreciation in the value of remaining lands.

While the subject lands were undeveloped as of the date of valuation, there was no issue as to highest and best use for residential development on Parcels C-12 and C-14 owned by SOUTHSIDE (T. 111-112; 123, 151). However, FPL, through its valuation appraiser, contended that the highest and best use for Parcel C-3.3 was agricultural (T. 99), notwithstanding his acknowledgment that residential development was taking place in the immediate vicinity of Parcel C-3.3 (T. 14). The expert witnesses for the owner (SANDRIDGE) testified that the highest and best use was rural residential (T. 768, 883). This was supported by studies and research consisting of the Clay County Comprehensive Plan, Florida Statistical Abstract

from the University of Florida (T. 234) and the Clay County Building Department (T. 243) all of which showed that Clay County grew, during period 1970 to 1979, 190% and from 1980 to 1984, another 20% (T. 236-7). This demonstrated that Clay County is the fastest growing county in the area (T. 238; Defs.' Exh. 8) and that the specific area of Parcel C-3.3, has showed more growth than any other area of Clay County (Defs.' Exh. 10; T. 245, 762), being immediately adjacent to an existing residential development of 1,100 acres known as Fox Meadow (T. 770). The question of highest and best use is not an issue on appeal.

Summary of Argument

The record on appeal in these proceedings is totally different from the situation in the 1963 decision of Casey v. Florida Power Corporation, 157 So. 2d 168 (Fla. 2d DCA 1963). The proof of health hazards in the subject proceedings was not based on unfounded fear, ignorance, conjecture or speculation as was the basis for the holding in Casey. On the contrary, there was creditable, scientific evidence presented by qualified experts clearly showing a direct relationship between adverse health effects and the electromagnetic field, which is emitted from high power electric transmission lines and that, therefore, lands within three hundred feet of the edge of the right of way easement should not be used for human habitation. Such testimony was not based on fear or ignorance, but from recent, actual and supportable scientific research in the field.

Furthermore, the valuation appraisers for the owners satisfied themselves that the health effects were based on creditable evidence and incorporated this scientific evidence in their respective studies pertaining to severance damages which showed that in the market place, based on power line comparable sale studies, there was clear and convincing proof

that lands adjacent to such lines did, in fact, suffer a depreciation in value.

In addition, there was specific proof from the expert appraisers of their independent investigation with real estate brokers, land developers, attorneys, buyers and sellers of property in close proximity to power lines to the effect that people in the market place do, in fact, have knowledge that transmission lines create a health hazard and that this knowledge is reflected in the market place, thus further meeting the requirements of Casey.

The evidence showed that the owner is confronted by this problem in the market place when his property is taken for a 500 Kv transmission line and that, therefore, the evidence of adverse health effects is not some "parade of horrors" or a non-compensable "consequential damage." Accordingly, the owners in the subject proceeding should be placed in no different position before the jury in an Eminent Domain proceeding.

The guaranty of full compensation in eminent domain actions, provided by Article X, Section 6 of the Florida Constitution, requires that courts take into account all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken. Thus, as pointed out by the First District

Court in Jennings, and as confirmed by the Fifth District Court in Roberts, if the adverse health effect has a reasonable basis and it is shown that such has a deteriorating result in the value of adjacent property remaining after the taking, as was amply demonstrated in the subject proceedings, such evidence becomes directly relevant to the issue of full compensation which is the issue being tried.

Point I

THE TRIAL COURT AND THE FIRST DISTRICT COURT OF APPEAL WERE CORRECT IN HOLDING THAT THERE WAS A REASONABLE BASIS FOR THE ADMISSION OF EVIDENCE OF ADVERSE HEALTH EFFECTS AS A FACTOR OR CIRCUMSTANCE, AMONG OTHERS, TO BE CONSIDERED BY THE TRIER OF FACT IN A PROPERTY VALUATION PROCEEDING.

In support of its position that testimony of adverse health effects from high power electric transmission lines should not be submitted to the trier of the fact in connection with the ultimate issue of severance damages, FPL relies on Casey v. Florida Power Corporation, 157 So. 2d 168 (Fla. 2nd DCA 1963) which, under the facts of the subject proceedings, the owners submit is not applicable.

Casey involved only the testimony of a valuation appraiser to the effect that it was his opinion, without any supporting testimony or evidence whatsoever, that there would be a "general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement" and that "[t]his reluctance would be caused by general appearances of the towers and lines and the apprehension of hazard that the towers and power lines would present." The Appellate Court, in Casey, simply ruled that such testimony is too speculative in that it was based on ignorance and fear.

The controlling question is whether, under the circumstances presented by the record in the subject proceedings,

the opinions of the owners' valuation experts were based upon speculation and conjecture or whether their opinions were based on (1) acknowledged and creditable scientific evidence; (2) knowledge thereof by the buying public; and (3) factually supported power line market studies. In both Jennings and Roberts, the respective Appellate Courts found the latter to be present.

In the subject proceedings, not only was the effect of electric transmission lines on adjacent lands supported by market studies, but the effect was corroborated by trained specialists in their respective disciplines who have carried out scientific studies in the field to support their opinions, thus eliminating the problem of speculation or conjecture as was the situation in Casey. The evidence presented by the owners demonstrated that there is clear and convincing proof that extended exposure to electric transmission lines can adversely effect human life and, as a result thereof, create a depreciation in the highest and best use of adjacent lands for residential use. supra.

The decision in Casey, rendered in 1963, is based on the knowledge of the health effects from transmission lines which was known at that time and was, therefore, predicated on "fear" and "apprehension," which falls in the category of

speculation and conjecture, especially when such testimony comes solely from a lay person in the form of a real estate appraiser who offers no proof in support of his opinion. Furthermore, the appraiser, in Casey, provided no evidence of what the market reflected concerning property adjacent to high power transmission lines.

The record in the subject proceedings amply demonstrates that more than twenty years later, the technology and scientific research concerning these lines has advanced far beyond the "blue corona" era of Casey. As referred to by the highly qualified electrical engineer Norgard (T. 323) and confirmed by the equally qualified epidemiologist Wertheimer, there has been an explosion of positive results within the last few years that there is, in fact, a substantial health problem with high power electric transmission lines (T. 406-408). The Wertheimer epidemiological studies, performed in the field, not the laboratory, and published in creditable scientific journals which require peer review, indicate that the health effects are not based on "fear," "apprehension," "speculation" or "conjecture," as was the situation in Casey, but on hard scientific evidence which has been accepted by the scientific community (A. 2, 3; T. 393-404).

In addition to the foregoing, the owners submitted substantial evidence that the buying public now has knowledge of the adverse health effects of the lines and simply will not pay as much for lands immediately adjacent thereto as they will for lands removed from the lines (T. 720-722, 789-791, 878, 895, 927). Again, there was a void of such proof in Casey.

Since the adoption in 1963 by the Second District Court of Appeals of its opinion in Casey, not only has there been a substantial change in the scientific evidence pertaining to the harmful effects of high power transmission lines, (supra), but the more recent decisions from other jurisdictions concerning this issue indicate that the so-called "majority rule" as stated in Casey, is not the majority rule today and that these more current decisions would clearly tilt the scales in favor of the adoption of the "intermediate" rule espoused by Judge Allen in Casey and adopted by the First District in the subject proceeding, as well as the Fifth District in Roberts.

This is pointed out in the power line decision of Willsey v. Kansas City Power, 631 P.2d 268 (Kan. 1981) where the Court sets forth an in depth analysis of the major appellate decisions on this subject. The Court summarized the three views, referred to in Casey, as follows:

1. Fear of danger from power lines based on pure speculation by an ignorant public can never be an element of damage.

2. While conjectural damages are noncompensable, if the fear is shown to be reasonable (or at least not wholly unreasonable) the loss is compensable.

3. The dangerous nature of power lines is a fact proven by common experience and the impact of public fear of such danger on market value may be shown without independent proof of the reasonableness of that fear.

The Willsey analysis showed that four states (including the 1963 Casey decision) follow No. 1, nine states follow No. 2 or the intermediate rule and eleven states follow No. 3. The United States Sixth Circuit Court of Appeals, with its vast experience in federal condemnation for the Tennessee Valley Authority power lines, acknowledged in United States et al. T.V.A. v. Easement and Right of Way, 405 F.2d 305 (6th Cir. 1968), that in 1968 some studies at that time suggested power line structures to be safe, but stated that:

> We are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the property as they otherwise would.

Notwithstanding the power line sales studies in Clay and Putnam Counties, and specifically the 500 Kv power line study in Hernando County, showing actual sales reflecting diminution in value, specifically referred to by the First District Court in Jennings, the owners, in order to further overcome the hurdles of Casey, submitted proof, through valuation appraisers, of their respective independent investigations with buyers in the market place who share the view that transmission lines create a dangerous health hazard. Such proof, was separate, apart and independent of the valuation experts' own opinion. This proof took the form of personal investigation with real estate brokers, land developers, closing attorneys, as well as actual sellers and buyers in the market place who were conversant with knowledge concerning health effects of such lines (T. 720-721, 789-790). As pointed out by the expert witness Reidy, his investigation revealed that, in addition to aesthetics, there is a definite concern on the part of the buying public in "the matter of health hazards" (T.721). Also, the expert witness Moody pointed out that his investigation showed that sales in close vicinity to power lines "are very slow" (T. 789) and that "the most important question that individuals are asking are what are the health consequences" (T. 790). Obviously, health effects are being considered by the buying public as relevant to value.

This evidence comes directly from the market place and does not constitute the personal opinion of the expert witness and certainly cannot be considered to be conjecture or speculation on the part of the expert witness.

Also, how can it be said by FPL in its reliance upon Casey, that the buying public is not aware of the danger when, by FPL's own newspaper advertisements and notices, they advise the public of the dangers of these lines (A. 6). It seems highly inconsistent for FPL to warn the public repeatedly of the danger with which an instrumentality is fraught, and then say that the public fear of that instrumentality is groundless or does not exist. In Willsey, supra (p. 269), it was a similar advertisement by the utility on which the Court relied in showing that the public does, in fact, has knowledge and a justifiable fear of the transmission lines.

The Arizona Appellate Court in the recent electric transmission line case of Selective Resources v. Superior Court of Arizona, et al., 700 P.2d 849 (Ariz. App. 1984), almost identical to the subject proceedings, stated that:

> The condemnee . . . need only establish that the severance or the construction of the improvement in the manner proposed by the condemnor will affect his remaining land in a

> manner which would diminish its value to a prospective buyer who is informed of the conditions resulting from the severance. Such conditions may affect the suitability of the remaining land for the purposes for which it was used or capable of being used prior to condemnation, or may completely change its highest and best use. In either event, evidence of the changed conditions resulting from the severance or the construction of the improvement in the manner proposed [is] directly relevant to the issue of damages. . .and is also admissible to support the conclusions of valuation experts. (Underlines added).

The ruling of Jennings and Roberts, based on the evidence before the trial court concerning knowledge by the buying public of adverse health effects, is totally consistent with the decision of Miller v. State of New York and Power Authority of the State of New York, 458 N.Y.S. 2d 973 (Ct. Claims, 1982), cited by FPL in its brief (Pg. 16). There, the Court was dealing with the hearsay rule concerning the testimony of one Dr. Andrew Marino at a previous PSC hearing. The Court rejected this testimony as hearsay, but said that the owner's case was also deficient for failure to show knowledge of adverse health effects by the buying public, failure to present any scientific expert on the subject and a total absence of any market data in the form of comparable sales, all of which is a necessary pre-requisite to showing severance damages. In the subject proceedings, each of these deficiencies was fully met.

When considered in light of the proof submitted, the owners have not only met the evidentiary tests of Casey, but have gone far beyond in showing that all of this evidence has a direct bearing upon the ultimate issue of severance damages. The District Court, in Jennings, was therefore correct in adopting the so-called "intermediate" view that:

> Evidence of the existence of fear and its effect on market value may be admitted into evidence as a factor or circumstance to be considered by the trier of fact in a property valuation proceeding, so long as it is shown that the fear has a reasonable basis.

In summary, unless the scientific studies and tests performed by experts are so unreliable and scientifically unacceptable that the opinions of expert witnesses who rely thereon have absolutely no credibility, the trial judge must allow such evidence to go to the jury. Coppolino v. State of Florida, 223 So. 2d 68, (Fla. 2nd DCA 1968). As pointed out in Horowitz v. City of Miami Beach, 420 So. 2d 936, (Fla. 3rd DCA 1982), and long ago adopted by this Court, "Florida constitutional guaranty of full and just compensation in eminent domain actions requires that courts take into account all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken. Behm v. Department of Transportation, 383 So. 2d 216 (Fla. 1980); Jacksonville Expressway Authority v. DuPree, 108 So. 2d 289 (Fla. 1959)."

Point II

THE TRIAL COURT AND THE FIRST DISTRICT COURT OF APPEAL WERE CORRECT IN HOLDING THAT SO LONG AS THE EVIDENCE HAS A REASONABLE BASIS, ALL FACTS AND CIRCUMSTANCES WHICH BEAR A RELATIONSHIP TO THE LOSS OCCASIONED AN OWNER SHOULD BE ADMITTED FOR JURY CONSIDERATION.

The argument of FPL to the effect that it is not necessary for the owners to present creditable proof of adverse health effects to support their claim of severance damages is a contradictory, spurious argument and at best is a post hoc change of stripes. This position serves only as an attempt to avoid the reality of what the owner is confronted with in the market place in connection with a portion of his remaining property. It has long been established that the jury, in a condemnation action, must be put in the same position as a willing seller--willing buyer, each having full knowledge of all facts and circumstances which bear on the issue of full compensation. Gwathney v. United States, 215 F.2d 148 (5th DCA 1954); Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company, 100 So. 2d 67 (Fla. 1st DCA 1958).

The First District, in Jennings, pointed out, as acknowledged by FPL in its brief (p. 13), that:

> Florida's constitutional guaranty of full and just compensation in eminent domain actions

> requires the courts to take into account "all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken." Behm v. Division of Administration, Department of Transportation, 388 So. 2d 216, 218 (Fla. 1980); Dade County v. General Waterworks Corporation, 267 So. 2d 633 (Fla. 1972); Jacksonville Expressway Authority v. Henry G. DuPree Company, 108 So. 2d 289 (Fla. 1958); Orange State Oil Company v. Jacksonville Expressway Authority, 110 So. 2d 687 (Fla. 1st DCA 1959).

In effect, FPL suggests that this Court should now adopt the so-called "minority rule" concerning adverse health effects in power line cases, as set forth in Casey, which only requires a simple showing that fear affects market value. The question logically arises as to why the owners in the subject proceedings should suffer a reversal of the final judgment, having "gone the extra mile" in presenting competent evidence to meet both the tests of the "majority rule" and the "intermediate rule," as set forth in Casey.

This specific point was made in Willsey, supra. The Kansas Court of Appeals stated that while it preferred the "misnamed 'minority rule'," it was not necessary to adopt it because the facts in that proceeding met "the test of the 'intermediate' rule, which we believe is the most stringent rule which can justifiably be applied against the landowner."

The Willsey Court also pointed out that:

If the requirement of reasonableness is to be made, we prefer the formulation in Heddin v. Delhi Gas Pipeline Company, 522 S.W.2d 886, 888 (Tex. Civ. App. 1975):

> It is clear that compensation for land taken by eminent domain is measured by the market value of the land at the time of the taking. [Citations omitted] It is equally clear that fear in the minds of the buying public on the date of taking is relevant to the proof of damages when the following elements appear:
>
> 1. That there is a basis in reason or experience for the fear;
> 2. That such fear enters into the calculations of persons who deal in the buying and selling of similar property; and
> 3. Depreciation of market value because of the existence of such fear. [Citations omitted]
>
> To establish that there is a basis in reason or experience for the fear, it is incumbent upon the landowners to show either an actual danger forming the basis of such fear or that the fear is reasonable, whether or not based upon actual experience. Reduction in market value due to fear of an unfounded danger is not recoverable. [Citations omitted] This rule is designed to exclude consideration only of those few situations in which the danger underlying the fear finds its basis in neither reason nor experience but is predicated rather on fancy, delusion or imagination. (Some emphasis added, some original).

The above is precisely what the First District (and now the Fifth District in Roberts) held in the subject proceedings. Further,this test comports with existing Florida law dealing with the subject of severance damages in eminent domain.

As heretofore pointed out, it has been clearly established by this Court that full compensation requires that the courts take into consideration all facts and circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken. Behm v. Division of Administration, Department of Transportation, supra; Jacksonville Expressway Authority v. Henry G. DuPree Co., supra.

It is likewise established that, in the determination of severance damages, consideration may be given to all conceivable uses to which the property taken could be put by the condemnor. 5 Nichols, Eminent Domain §16.1 (rev. 3rd ed. 1981). Any matter in explanation of the way in which the public project is to be constructed, being evidentiary in nature, is admissible to explain the manner in which the property acquired will be utilized. Central and South Florida Flood Control District v. Wye River Farms, Inc., 297 So. 2d 323 (Fla. 4th DCA 1974), cert. denied 310 So. 2d 745 (Fla. 1975); Division of Administration, State of Florida Department of Transportation v. Decker, 408 So. 2d 1056 (Fla. 2nd DCA 1981); Division of Administration, State of Florida Department of Transportation v. St. Regis Paper Company, 402 So. 2d 1207 (Fla. 1st DCA 1981).

This Court, in Belvedere Development Corporation v.

Department of Transportation, Division of Administration, 476 So. 2d 649 (Fla. 1985) recently re-affirmed the basic principle set forth by the Court 54 years ago in Doty v. City of Jacksonville, 142 So. 2d 599 (Fla. 1932), where it was stated that the purpose of allowing evidence of the use to which the property taken is to be put is because it "would have some bearing on the extent and amount of the damage, if any, which would be done to that portion of Defendant's property which would be left after the condemnation proceeding." This principle is also consistent with the Court's decision of State of Florida, Department of Transportation v. Stubbs, 285 So. 2d 1 (Fla. 1973) wherein it was held that use of the property taken for a limited access highway supported a claim for severance damage to the remainder where there was adequate proof of a substantial impairment of access.

Thus, the use of the property taken in the subject proceedings for a 500,000 volt electric transmission line and the effect which such a line has on remaining property in the form of adverse health effects is not remote or collateral to the issue of severance damages, but has a direct bearing on that issue.

§73.071(3)(b), F. S., dealing with severance damages, provides and calls for the recovery by the owner of "any

damage caused to the remainder by the taking." (Underline added). This provision does not limit severance damages, as Amicus FREC suggests, to damages, sustained by the severance of the land only, without consideration of the use to which the part taken is to be put and the manner in which this use impacts the remainder. At no place in this statutory provision is there such a limitation.

As pointed out in Daniels v. State Road Department, 170 So. 2d 846 (Fla. 1964), the declaration of policy of the Legislature with regard to compensation, while not conclusive or binding, is persuasive and will be upheld unless clearly contrary to the judicial view of the matter. This Court also noted that the Legislature may "impose upon itself, and upon those to whom it delegates the right of eminent domain, an obligation to pay more than what the courts might consider just compensation." The words "any damage," as set forth in §73.071(3)(b), F. S., supra, must therefore, have some significance particularly with a private corporation having the power of condemnation which, as stated in Daniels, may be treated differently than a public body.

Furthermore, §73,071(4), F. S., also provides for a set-off of enhancement, against severance damages allowed by §73.071(3)(b), F. S., supra, where the enhancement is "by

reason of the construction or improvement made or contemplated by the Petitioner." Thus, if the "use" by the condemnor may be considered by the jury in determining whether there should be an offset against severance, then it would be patently unfair not to allow the jury to consider the "use" by the condemnor in the determination of severance damages in the first place.

This Court's holding in Kendry v. Division of Administration, State of Florida Department of Transportation, 366 So. 2d 391 (Fla. 1978) is entirely consistent with this reasoning, involving the interpretation of §73.071(3)(b), F. S. and the rulings in both Jennings and Roberts, stating that severance damages may be recovered "upon sufficient proof" that they were caused by the taking. In Kendry, the increase in elevation of the new highway (the use) and the effect of this elevation on the remainder was the basis for the alleged severance on which this Court ruled the owners had a right to submit proof.

The thrust of the argument of FPL, as well as the Amici, is that the damages sought by the Defendants constitute consequential damages.

As pointed out above, the damage to the remaining property of the owners is as a direct result of the taking by

FPL and the use to which the property has been put. Under the Statement of Facts, as present in the subject proceedings, where there was an actual taking of the owners' land, the damages sought can in no way be characterized as consequential. Adverse health effects have been shown to be real, not imaginary or speculative, and have been manifested in the market place.

Amici cites Northcutt v. State Road Department, 209 So. 2d 710 (Fla. 3rd DCA 1968), as support for their position that such damages are consequential and, therefore, not recoverable. This was a proceeding where there was no taking whatsoever from the owner who brought an inverse condemnation action for alleged damages created by noise and vibration emanating from a nearby road, no part of which was built on the owner's property. In Northcutt, the Court, in holding that such a damage is consequential, pointed out that:

> [i]n Florida, in order for the 'taking' or 'appropriation' of private property for public use, under the power of eminent domain, to be compensable, there must generally be a 'trespass or physical invasion.' Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457, 14 L.R.A. 370 (1891) and Weir v. Palm Beach County, Florida, 1956, 85 So. 2d 865."

As pointed out in Weir v. Palm Beach County, Florida, 85 So. 2d 865 (Fla. 1956) cited in Northcutt, "if the damage is not a taking or an appropriation within the limits of our organic law, then the damages suffered are damnum absque

injuria . . ." The owners here do not fall within the category of Northcutt or Weir as there was, in fact, an actual taking or "physical invasion" by the power lines. As pointed out in 4 Nichols, Eminent Domain, §14[1] (rev. 3rd ed. 1981), in distinguishing consequential damages, severance damages may be recovered if there is a physical invasion. The owners in the subject proceeding clearly meet this test.

In the same context, Amici cite Division of Administration, State of Florida Department of Transportation v. West Palm Beach Garden Club, 352 So. 2d 1177 (Fla. 4th DCA 1977) and Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., 476 So. 2d 224 (Fla. 4th DCA 1985). While there was an actual taking in each of these cases, the Fourth District held that severance damages caused by noise and exposure to the highway of a city park in Garden Club and a golf course in Frenchman were, under the facts in each case, not justified.

In Garden Club, the Court simply ruled that the noise from the highway was insufficient to affect the highest and best use as a park, particularly when the park was already surrounded by an airport, railroad and other major highway arteries and the further fact that the City officials were guilty of some degree of estoppel where it was shown that

they had actively urged the location of the subject highway next to the park.

Likewise, in Frenchman, dealing solely with a cost to cure problem, the Court ruled that increased traffic visibility and noise, fumes and dust, where only a part of an existing buffer for a golf course was taken, did not constitute compensable severance damages justifying a cost to cure, where the golf course remains entirely playable after the taking. Also, the Court acknowledged that depreciation in value of remaining property from noise, etc. could be recoverable where the remainder use was something other than a golf course, stating that the legal effect in such a situation would be different.

The subject property does not fall within either of the unique categories of Garden Club or Frenchman, especially where the proof of adverse health effects from high power transmission lines dealt with residential property. Further, there was a total absence of market data to show a depreciation in value in each of those cases. Quite the opposite was present in the subject proceeding. There was ample proof covering market studies of identical property, both before and after the taking showing a depreciation in market value of remaining property after the taking, caused in substantial

part by the adverse health effects of a 500,000 volt transmission line. Furthermore, the claim here, as distinguished from the issue in Frenchman, is not predicated on any alleged negligent method or misconduct in the manner of construction of the power facilities by the contractor within the area of the lands taken. See Division of Administration, State of Florida, Department of Transportation v. Hillsboro Association, Inc., 286 So. 2d 578 (Fla. 4th DCA 1973).

Accordingly, because of the substantially different facts involved, the decisions of Northcutt, Garden Club and Frenchman have no bearing on the basic issue in the subject proceedings. The application of these decisions to the issue here is illusory, to say the least.

If evidence may be adduced to show how the project for which the property acquired is to be used and this forms the basis for severance damages, how can it be logically argued that the effects of that use are not admissible? In Division of Administration, State of Florida Department of Transportation v. Samter, 393 So. 2d 1142 (Fla. 3rd DCA 1981), the Court pointed out that in the field of eminent domain, as well as in every other, "no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underly-

ing reasoning." Accordingly, adverse health effects have to be a necessary part of the chain of "underlying reasoning" and are "circumstances which bear a reasonable relationship to the loss occasioned an owner by virtue of his property being taken." As pointed out in Jennings and Roberts, it is proper (and necessary) in order to demonstrate severance damages to show the scientific reasoning behind the fear which causes the depreciation in the value of remaining property--so long as it has a reasonable basis. As such, it is improper to characterize such evidence as inflamatory, prejudicial or collateral to the basic issue of full compensation. Clearly, as shown by the evidence in the subject proceedings, the seller and the buyer in the market place would have knowledge of such adverse health effect. Why, then, should the jury be prevented, in determining severance damages, from considering the same evidence if it is shown to have a reasonable basis?

Conclusion

The evidence adduced in these proceedings was clearly sufficient to allow the jury to consider the issue of severance damages with facts that would reasonably be given weight in negotiations between a willing seller and a willing buyer. The owners, in presenting their case with creditable testimony on this point more than met their burden of proof as required by Casey.

Further, the evidence of adverse health effects, presented by the witnesses Norgard and Wertheimer, cannot logically be classified as based on unfounded fear, ignorance or conjecture, as was present in Casey, but was the result of current, actual, supportable and acknowledged scientific research in the field, none of which can be characterized as inflamatory or prejudicial when it is shown to have a reasonable basis. In addition, the owners went a step further by presenting comparable sale power line studies of identical lands to demonstrate that the market place has, and is, giving consideration to these adverse effects. Accordingly, the jury in the subject proceedings, was not required to "base its award upon ignorance and fear," as was the situation in Casey.

If the test of full compensation is what information the willing-seller-willing buyer would consider in negotiation with all the facts at hand, it is elementary that the jury should be afforded the same information. As our Appellate Courts have repeatedly said, it is generally better to let the jury have too much information rather than too little.

No prejudice has been shown to have been imposed on FPL in these proceedings and the Final Judgments should accordingly be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to ANITA L. SHEPPERD, ESQUIRE, Post Office Box 2389, Gainesville, Florida 32602, H. REX OWEN, ESQUIRE, Post Office Drawer "O," St. Petersburg, Florida 32731, HARRY A. EVERTZ, ESQUIRE, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733, SHEILA McDEVITT, ESQUIRE, Tampa Electric Company, Post Office Box TE, Tampa, Florida 33601 and BARRY R. DAVIDSON, ESQUIRE, 4000 Southeast Financial Center, Miami, Florida 33131-2398 by U. S. Mail this 15th day of August, 1986.

Attorney