IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,069

FLORIDA POWER & LIGHT CO., :

Petitioner, :

v. :

VIRGINIA S. ROBERTS, et al., :

Respondent. :

PETITIONER'S BRIEF ON THE MERITS

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

PREFACE

Throughout this Brief, Florida Power & Light Company, the petitioner in this appeal, and in the eminent domain proceedings below, will be referred to as "FPL". The defendant landowners who are respondents in this appeal are (1) members of or associated with the Roberts family with respect to Parcels P-1.88, P-4, P-6 and a substation site and (2) members of or associated with the Whitehead family with respect to Parcels P-76, P-79.1, P-79.2 and P-79.3. They will be referred to as "Roberts" and "Whitehead".

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 transcript of the hearing on fees and costs will be designated by the symbol "F.T." followed by the page number.

STATEMENT OF THE CASE AND OF THE FACTS

In March of 1982, FPL brought a condemnation action against Roberts to acquire a 60 acre parcel of land necessary for a substation site known as the Rice Substation. (FPL v. Roberts, 7th Judicial Circuit, Case No. 82-233-CA-J) (R. 1-12). In June of 1983, FPL brought a condemnation action against Whitehead and Roberts to acquire an electric transmission easement across their lands for the construction, operation and maintenance of 500,000 volt ("500 kV") transmission lines linking coal fired electric plants in Georgia with Florida in what was known as the "Coal By Wire Project". (FPL v. Flichtbeil et al., 7th Judicial Circuit Case No. 83-598-CA-M) (R. 18-60). Orders of Taking on the substation site and transmission line easements were entered on April 8, 1982 and August 22, 1983, respectively. (R. 15-17, 70-90).

Pursuant to motion by Roberts the two cases were consolidated for trial of the compensation issues. (R. 91). The trial commenced on December 10, 1984 before the Honorable Robert Perry in Palatka, Florida. Valuation with respect to Roberts involved three transmission easement parcels: (1) Parcel P-1.88, 280 feet wide containing 41.28 acres; (2) Parcel P-4, 300 feet wide containing 15.76 acres; (3) Parcel P-6, 300 feet wide containing 12.18 acres; and (4) the substation site consisting of 60 acres. (R. 1-12, 18-60). The location of the easements can generally be described as running to

the substation site. (Plaintiff's Exhibit 3, R. 2156; Roberts Exhibit 3, R. 2194). The valuation of the taking from Whitehead involved a contiguous transmission easement broken into four separate parcels: (1) Parcel P-76, 300 feet wide containing 9.12 acres; (2) Parcel P-79.1, 300 feet wide containing 43.85 acres; (3) Parcel P-79.2, generally 300 feet in width and containing 40.81 acres; and (4) Parcel P-79.3, partially 225 feet in width to the extent it was located adjacent to an existing FPL transmission easement and otherwise 300 feet in width, and containing 55.22 acres. (Plaintiff's Exhibit 6, R. 2158). The location of this easement can generally be described as running through the Whitehead parent tract from its eastern border on the St. Johns River to its western border. (Plaintiff's Exhibit 5, R. 2157). The dates of valuation were April 8, 1982 for Rice Substation and August 23, 1983 for the transmission line easements, which were the dates FPL made its deposits under Section 74.061, Florida Statutes (1983). (Pre-Trial Compliance, ¶1(b), R. 176).

At trial, FPL first presented the testimony of James Yontz, an electric transmission line engineer, regarding the use to be made of the property and the property rights acquired. (T. 292). Yontz also testified as to other FPL 500 kV transmission lines in the State of Florida and the fact that FPL has had such lines in operation running from Ft. Myers to Ft. Lauderdale since 1977 (T. 300-01, 303, 305). FPL then presented the expert

testimony of two real estate appraisers: Walter Lampe, M.A.I., a real estate appraiser from Jacksonville (T. 328) and Billy Turner, a realtor from Palatka who had performed numerous appraisal assignments (T. 448). Both testified that the highest and best use of the Roberts and Whitehead parcels was agricultural/timber -- their use historically and as of the date of taking -- and that there would be no severance damages to the remainder of their land because of this highest and best use. (T. 364-65, 371-72, 434-36, 468, 475).

The landowners' case first featured testimony and exhibits regarding alleged adverse effects which were said to result from 500 kV lines including radio static, shocks, audible noise, and cancer. (T. 626, 628-29, 631, 633, 713, 714). The landowners presented expert testimony from electrical engineer John Norgard and epidemiologist Nancy Wertheimer as to these alleged effects. (T. 575-649, 675-718). FPL had filed motions in limine prior to trial objecting to the qualifications of Norgard and Wertheimer and the propriety of their testimony in the absence of any showing that the alleged adverse effects had any relationship to the value of land adjacent to these lines in Putnam County. (R. 114-27, 148-51). The motions were heard as objections during the trial and were denied. (T. 643, 645, 688, 1065-73).

Next, a land planner named Richard Tarbox testified regarding the highest and best use of the Whitehead property. (T. 775-866). In support of his

opinion that the highest and best use was for a mixed use development which included residential, commercial, and industrial uses, Tarbox presented numerous multi-colored "Highest and Best Use" exhibits culminating in a so called "Preliminary Master Plan" for the Whitehead property (Whitehead Exhibits 8-12, R. 2188-92), all of which had been prepared solely for purposes of the trial (T. 836). As with the testimony of Norgard and Wertheimer, FPL had filed a motion in limine prior to trial objecting to the testimony of Tarbox on the basis of the absence of any predicate as to a market demand for his proposed use as of the date of taking, intention of the owner to develop the property in the manner depicted by the exhibits, and evidence of the probability of rezoning to allow such a development. (R. 103-07; T. 196-216). Again, the motion was heard as an objection during trial and denied. (T. 774, 812, 814, 815-16, 818, 821-22, 1073-78).

Finally, the landowners presented testimony from two real estate appraisers: a M.A.I. from Lake City, Phillip Pickens (T. 987), and a local realtor who had performed appraisal assignments, U. D. "Denny" Floyd. (T. 867). With respect to Roberts Parcel P-6, Floyd agreed with Lampe and Turner that the highest and best use was agricultural and therefore testified that no severance damages should be awarded as a result of the easement

taking of that parcel. (T. 933, 935-36, 971-72).1/ As to the remainder of the parcels Pickens and Floyd determined that the highest and best use was residential with particular emphasis on future development of the Whitehead property, and therefore in each instance testified that severance damages should be awarded. (T. 877, 882, 908-35, 943-51, 1016, 1020-21, 1024-53, 1102, 1109).

FPL's case on rebuttal consisted of the testimony of Doctor Morton Miller who stated unequivocally that there were no health hazards associated with the transmission lines.2/

The table on the following page sets forth the testimony of each appraiser and the verdict reached by the jury as to each of the parcels in question.3/

1/ Pickens also agreed, grudgingly, that the placement of these lines across land for which the highest and best use was agricultural/timber would not cause severance damages. (T. 1091).

2/ It should be noted that FPL's rebuttal was limited by the trial judge's refusal to allow Doctor Miller to explain that one of the bases for his conclusion that the lines presented no threat to health was the determination by the State of Florida Department of Environmental Regulation and the Governor and Cabinet that no health hazard resulted from the lines. (T. 1153-59).

3/ In two instances the verdict exceeded the highest value testified to by any witness, Parcels P-79.2 and P-79.3. At the hearing on the motion for new trial, counsel for the parties agreed that an appropriate amended final judgment should be entered reducing the awards on the two parcels in question. The amended final judgment has not yet been entered since the notice of appeal was filed immediately after the hearing on the motion for new trial.

ROBERTS

Parcel	Acres	Lampe	Turner		Floyd	Pickens	Verdict
1.88	41.28	$59,600	$73,200	Taking	$82,760	$56,898	$82,560
				Damage	43,000	37,546	8,256
					125,760	94,444	90,816
4	15.76	22,694	28,000	Taking	28,140	31,602	31,520
				Damage	32,000	26,915	7,880
					56,883	58,517	39,400
6	12.18	17,550	21,600	Taking	14,616	27,405	14,616
				Damage		21,315	
					14,616	48,720	14,616
Rice Sub-station	60.00	96,000	4/	Taking	135,000	150,000	135,000
				Damage	48,533	61,250	33,750
					184,533	211,250	168,750
Total	129.22	195,844	122,800	4/	381,792	412,931	313,582

WHITEHEAD

76	9.12	13,200	13,400	Taking	27,390	25,536	14,592
				Damage	23,966	18,242	
					51,356	43,778	14,592
79.1	43.85	63,200	101,000	Taking	153,475	122,780	114,010
				Damage	147,000	90,370	45,604
					300,475	213,150	159,614
79.2	40.75	58,700	115,000	Taking	142,625	114,000	142,835
				Damage	133,000	79,640	64,276
					275,625	193,740	207,111
79.3	55.22	79,500	159,700	Taking	148,350	154,140	183,352
				Damage	105,450	81,690	64,173
					253,800	235,830	247,525
Total	148.94	214,600	389,100		381,256	686,498	628,842

TOTALS

Acres	Lampe	Turner		Floyd	Pickens	Verdict
278.26	$410,444	$511,900	4/	$1,263,048	$1,099,429	$942,424

4/ Turner did not appraise Rice Substation. (T. 454, 530).

FPL filed timely notices of appeal from the final judgments in both cases. (R. 684, 685). Orders awarding attorney's fees and costs were entered on April 8, 1985 and a timely notice of appeal from those orders was also filed.5/ (R. 688-93).

The Fifth District Court of Appeal affirmed the judgment below, Florida Power & Light Company v. Roberts, 490 So.2d 969 (1986), and adopted the so-called "intermediate rule" with respect to the admissibility of testimony regarding alleged adverse health and other effects related to high voltage transmission lines. In doing so the Fifth District agreed with the First District which adopted the identical rule in Florida Power & Light

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5/ The order awarding attorney's fees of $275,000 was appealed because of the stated relationship of the amount of the fee awarded to the benefits resulting to the client as reflected by the jury verdicts and final judgments thereon. (R. 688-90). Should these judgments be reversed it is the position of FPL that the fee award should likewise be reversed for reassessment based on the outcome in a subsequent retrial. Division of Administration, State of Florida Department of Transportation v. Frenchman, Inc., 476 So.2d 224 (Fla. 4th DCA 1985). FPL does not otherwise appeal the attorney's fee award.

The appeal of the cost order was taken for similar reasons with regard to the taxation of costs for Tarbox in the amount of $19,576.52 and Norgard in the amount of $3,307.40. (R. 691-92). Should this Court determine that the testimony of those individuals should not have been admitted then FPL would ask that the taxation of the costs of their services be reversed or reassessed in light of that decision. FPL does, however, appeal specifically and substantively the award of appraisal fees of $58,830 on account of services rendered by U. D. Floyd, which is the subject of point three, infra.

Company v. Jennings, 485 So.2d 1374 (1986) now pending before this Court as Case No. 68,593. The Fifth District also certified conflict with Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2d DCA 1963), which provides the proper basis for this Court's jurisdiction in this case.

SUMMARY OF ARGUMENT

FPL seeks reversal of the final judgments entered on jury verdicts on the ground that the jury was permitted to base its verdicts on inadmissible opinion testimony.

I. HIGHEST AND BEST USE OF WHITEHEAD PROPERTY

The Whitehead land consists of raw unimproved acreage, which is utilized for agriculture, timber and pasture use. It is zoned for agricultural use and designated as an "urban reserve" area under the controlling Putnam County future land use plan, which precludes its use for urban development until after 1995, if ever.

Despite timely objections, the jury was permitted to determine the fair market value of the Whitehead property based on opinion testimony that the highest and best use of the property was a prospective urban development consisting of a combination of industrial, commercial, residential, office and recreation areas, in the absence of a predicate establishing a market need for the proposed urban development as of the date of taking.

II. EVIDENCE OF FEAR OF DANGER ASSOCIATED WITH HIGH VOLTAGE TRANSMISSION LINES

In its opinion the Fifth District Court of Appeal identified and discussed three divergent views on the admissibility of fear of danger associated with high voltage transmission lines. The so-called "majority rule"6/ followed in Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2nd DCA 1963), prohibits admission of such testimony and therefore application of this rule would require reversal of the judgments below.

> The "Intermediate Rule"
>
> permits evidence establishing the effect of fear and apprehension of hazard as a factor diminishing the value of land adjacent to the (power line) easement, provided it is established that such fears are reasonable, and that such fears are entertained so generally as to enter into the calculations of all who propose to buy or sell the adjacent land.

Roberts, 490 So.2d at 971.

In adopting this rule and upholding the judgment below, the Fifth District erroneously concluded that there was evidence presented at trial to establish that fear and

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6/ This label and the label "minority rule" are misnomers as more specifically discussed below. See Point II infra.

apprehension of hazard was known to or considered by prospective purchasers and therefore had an effect on market value. In the absence of such a predicate, the judgments below must be reversed should the "intermediate rule" be adopted by this Court.

Finally, the "minority rule" permits consideration of fear so long as it is shown that it affects market value. "The reasonableness of the fear is either assumed or is deemed irrelevant." Roberts, Id. at 971. Again, the record below is devoid of a showing that the fear of danger affects market value. Additionally, a proper application and interpretation of the "majority rule" would eliminate the basis for admission of the testimony of Drs. Norgard and Wertheimer since there would be no issue as to the reasonableness of the fear. It is patent that this testimony was highly prejudicial and verdicts rendered by a jury exposed to this testimony cannot be allowed to stand.

III. WITNESS FEE

The fee awarded the owners' valuation witness, U.D. Floyd, is challenged as excessive and arbitrary under the circumstances reflected by the record.

ARGUMENT

FIRST POINT

IT WAS REVERSIBLE ERROR TO PERMIT THE JURY TO DETERMINE THE FAIR MARKET VALUE OF UNIMPROVED RURAL LAND ON THE BASIS OF OPINION TESTIMONY THAT AN URBAN DEVELOPMENT PROJECT CONSTITUTES THE HIGHEST AND BEST USE, IN THE ABSENCE OF A PREDICATE ESTABLISHING A MARKET NEED FOR THE PROPOSED DEVELOPMENT AS OF THE DATE OF TAKING.

WHITEHEAD LAND

The easement on the Whitehead land was designated as four parcels (P-76, P-79.1, P-79.2, and P-79.3) to conform to the ownership of the subject land by various members of the Whitehead family. The easement consisted of 148.94 acres taken from a much larger parent tract. (Plaintiff's Exhibits 5 and 6, R. 2157 and 2158). As of the date of valuation, August 23, 1983, the entire tract was unimproved raw acreage and used for timber and pasture purposes. (T. 368, 469, 1120-21). It was zoned for agriculture. Approximately half of the land was low wetland unsuitable for any development. (T. 1010). The subject land was already encumbered by transmission easements. (Plaintiff's Exhibits 5 and 6, R. 2157 and 2158). The witnesses who testified agreed that if the highest and best use of the Whitehead land was "for

agricultural, timber and cattle raising" no severance damage was incurred. (T. 971-72, 1091).

Whitehead contended the historical and existing use did not represent the highest and best use. To support this claim the jury was presented with the opinion of Richard Tarbox, a planning and design consultant, as to a future highest and best use, over the objections of FPL. (R. 103-07; T. 196-216, 774, 812, 814, 815-16, 818, 821-22, 1073-78).

Tarbox expressed the opinion that the Whitehead land could be made adaptable, at some unspecified time in the future, as a site for a comprehensive urban type development consisting of proposed residential, commercial and industrial development depicted on a map. (Whitehead Exhibit 12, R. 2192). The wetlands (half of the Whitehead land) were depicted for use as "a bird sanctuary, or a natural area." (T. 825-26). As to profitability, Tarbox testified "I would assume that any successful development would be profitable, or else it wouldn't be undertaken." (T. 850). He could not even speculate as to the cost of his proposed development. (T. 851-52).

Tarbox candidly conceded that no market research had been done, and that he did not know whether a market existed or was likely to exist for his proposed urban development of the Whitehead property either as of the

date of taking or in the near future. (T. 846-48). This made his opinion of highest and best use inadmissible for jury consideration. Before the owner can show adaptability to a use he must show a market exists or is reasonably likely to exist in the near future. See St. Joe Paper Co. v. United States, 155 F.2d 93, 97 (5th Cir. 1946). To permit such evidence would open a flood-gate of speculation and conjecture that would convert an eminent domain proceeding into a guessing contest. Yoder v. Sarasota County, 81 So.2d 219, 221 (Fla. 1955).

The testimony of the witness did not establish that, as of August 23, 1983, it was reasonably probable that the subject land would be devoted to such proposed development. In fact, Tarbox testified "there would be additional information required before this project would be implemented." (T. 850).

Mere speculation as to what could be done with the land after making improvements will not be permitted. Doty v. City of Jacksonville, 142 So. 599, 601 (Fla. 1932). The planning must proceed beyond the preliminary stage, and not be merely speculative. Coral Glade Co. v. Board of Public Instruction, 122 So.2d 587 (Fla. 3d DCA 1960). Most importantly it must be shown that the proposed use will be implemented within the immediate future or within a reasonable time. Board of

Commissioners of State Institutions v. Tallahassee Bank and Trust Company, 100 So.2d 67 (Fla. 1st DCA), cert. denied, 101 So.2d 817 (Fla. 1958); Swift & Company v. Housing Authority of Plant City, 106 So.2d 616 (Fla. 2d DCA 1958). No evidence was presented to show that the use proposed by Tarbox would be implemented within a reasonable time. In fact the evidence was to the contrary.

The testimony of Phillip Pickens, a qualified real estate appraiser called as an expert witness on behalf of the owners to testify as to the highest and best use of the Whitehead land, is instructive. Pickens stated that his opinion of the highest and best use of the Whitehead land "is to cut it up in forty, fifty, two hundred acre tracts and sell it off to people to hold it for development" -- "not developed in lots." (T. 1102-06, 1108). Pickens added that "We're talking about down the road somewhere, and a number of years from now." (T. 1108) (emphasis added).

Pickens' testimony affirmatively established the absence of a market need for the proposed development of Tarbox at the time of taking, or that a market was likely to exist in the near future. The Tarbox opinion concerning highest and best use of the subject property was improper for jury consideration as a basis of valuation as a matter of law. See Yoder v. Sarasota County, 81 So.2d at 221.

Finally, Tarbox did not relate his opinion to the date of taking. In Stubbs v. State Department of Transportation, 332 So.2d 155 (Fla. 1st DCA 1976), the opinion of the condemnor's appraiser as to severance damages was not related to any particular date or time. On appeal, the First District reversed the trial court's denial of a motion to strike that opinion:

> [T]he law of Florida is clear that in eminent domain proceedings a property owner's damages must be related to the time of taking, and the testimony of the expert appraisers must be related to that time.

Id. at 157.

Thus, Tarbox's testimony and exhibits should have been excluded or stricken on this ground alone. See also Yoder v. Sarasota County, 81 So.2d at 221.

SECOND POINT

> UNDER ANY OF THE THREE IDENTIFIED RULES REGARDING THE ADMISSIBILITY OF EVIDENCE OF FEAR OF DANGER ASSOCIATED WITH HIGH VOLTAGE TRANSMISSION LINES IT WAS REVERSIBLE ERROR TO ADMIT EXPERT TESTIMONY REGARDING ALLEGED ADVERSE EFFECTS FROM THESE LINES.

I. "Majority Rule"

Prior to trial in this matter, FPL filed a motion in limine regarding the admissibility of testimony regarding alleged adverse effects related to high voltage transmission lines. This motion was filed with the expectation that the landowners would present witnesses

Norgard and Wertheimer as referenced in the Statement of the Case and Facts. The motion sought an order prohibiting testimony and evidence regarding purported adverse effects of transmission lines and relied principally upon the only Florida case on point, Casey v. Florida Power Corp., 157 So.2d 168 (Fla. 2d DCA 1963).

In Casey, the condemnee sought to introduce evidence that the presence of the transmission lines would result in a general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement, thereby reducing the land's market value. The trial court refused to allow the jury to consider the evidence presented at trial concerning the alleged apprehension and fear caused by transmission lines and the resulting impact on the value of the remaining land.

In analyzing the trial court's ruling, the Second District Court of Appeal noted that the testimony of the landowners' witnesses

> would tend to show that the presence of towers and power lines upon the property would result in a general reluctance on the part of prospective purchasers to purchase the land adjacent to the easement,

and that this alleged reluctance would be caused by the general appearance of the lines and the apprehension of hazard that the lines would present. Id. at 169.

Simply stated, the issue raised in Casey was whether opinion evidence as to value in a condemnation

case, based upon fear and apprehension caused by the alleged adverse effects of transmission lines, is too speculative and conjectural to be considered as an element of damage to the remainder. Adopting the "majority rule"7/ as the rule in Florida, the Second District held that evidence of this nature is too speculative and conjectural to be considered in determining the amount of compensation to be awarded to the landowner. As the court stated:

> That a prospective purchaser of the land of the respondents will be so timid or so ignorant that he either will not buy at all or will offer less than the true value because of the transmission lines and towers is too highly speculative in regard to this particular land to be taken into consideration. This court, like the majority of other courts, recognizes the owners' right to full and just compensation; but when a jury must base its award upon ignorance and fear, we must draw the line; such a basis cannot possibly result in fair and just compensation.

Id. at 170-71.

Other courts considering this issue have reached the same conclusion and have refused to allow the jury to consider such evidence. See, e.g., Alabama Power Company v. Keystone Lime Company, 67 So.833 (Ala. 1914);

7/ See discussion infra at page 21.

Deramus v. Alabama Power Company, 265 So.2d 609 (Ala. Civ. App. 1972); Central Illinois Light Company v. Nierstheimer, 185 N.E.2d 841 (Ill. 1962). This Court should do the same and reverse the decision by the First District and reaffirm Casey.

II. "Intermediate Rule"

If Casey is to be abandoned it is the position of FPL that the so-called "minority rule" should be adopted in Florida. To address these rules in logical sequence, however,8/ FPL next discusses the "intermediate rule" and the proper application of that rule in this case.

Under the "intermediate rule" endorsed by the First District in Florida Power & Light Company v. Jennings, 485 So.2d 1374 (1986), and the Fifth District in this case below two predicates must be established before evidence regarding fear and apprehension of hazard relating to high voltage transmission lines can be admitted: 1. It must be shown that the fears are reasonable; 2. It must also be shown that the fears are entertained so generally as to enter into the calculations of all who propose to buy or sell land adjacent to high voltage transmission lines.

8/ Recognizing that the sequence should actually be reversed. See page 21 infra.

Here the Fifth District determined that the evidence sufficient to "establish a relationship between the apprehensions pertaining to the proximity of electric transmission lines and market values", id. at 971, was provided by a study based on sales of realty adjacent to transmission lines in Hernando County, Florida. (T. 1030-1033, 1038-1043) While this study may support the conclusion that land adjacent to transmission lines is depreciated in value there is no suggestion whatsoever, either from the study, or any other evidence introduced below, that the depreciation reflected by the study is due to "fear and apprehension of hazard". In fact, the study fails to provide any reasons at all for the depreciation and certainly does not provide a basis to conclude that purchasers of real estate in North Central Florida are aware of or affected by the claims of Drs. Norgard and Wertheimer.

In the absence of a proper predicate under the "intermediate rule", the testimony of Drs. Norgard and Wertheimer was improperly admitted to the substantial prejudice of FPL. If the "intermediate rule" is to be adopted, the judgments rendered upon verdicts reached in consideration of this evidence must be reversed.

III. "Minority Rule"

As stated by the First District in FPL v. Jennings, 485 So.2d 1374 (1986):

> 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." (citations omitted)

Id. at 1377-1378

In view of this well established principle of Florida law regarding full and just compensation, if Casey is to be abandoned, then the misnamed "minority rule" which permits admission of evidence of fear on a simple showing that it affects market value should be adopted. This rule is the most logical alternative to Casey since evidence which is shown by competent testimony to affect market value should be admissible regardless of whether there is an underlying "reasonable basis" for the evidence.

It should be noted that the "minority rule" is, in fact, the majority rule. As recited by the First District, four states including Florida follow the Casey rule, nine states follow the intermediate rule, and eleven states and the United States Court of Appeals for the Sixth Circuit follow the rule labeled minority but properly identified as majority. Jennings, 485 So.2d at 1379; see also Roberts, 490 So.2d at 971.

The most comprehensive recent review of the three rules is found in Willsey v. Kansas Power & Light Co., 631 P.2d 268, 274 (Kan. Ct. App. 1981). The discussion by that court regarding the misnamed minority rule is instructive and entirely consistent with Florida law regarding full and just compensation.

> We therefore regard the question as an open one in this jurisdiction. As we see it, in any condemnation case the objective is to compensate the landowner for damages actually suffered. Remote, speculative and conjectural damages are not to be considered; the owner cannot recover today for an injury to his child which he fears will happen tomorrow. Logic and fairness, however, dictate that any loss of market value proven with a reasonable degree of probability should be compensable, regardless of its source. If no one will buy a residential lot because it has a high voltage line across it, the lot is a total loss even though the owner has the legal right to build a house on it. If buyers can be found, but only at half the value it had before the line was installed, the owner has suffered a 50% loss. If this kind of lost market value is proven to the satisfaction of the jury we see no reason why the landowner should bear the loss rather than the customers for whose benefits the loss is inflicted.
>
> This rationale obviously leads to the third, misnamed "minority" rule, which is the one we prefer.

Id. at 277-278.

Similarly, the Sixth Circuit, which has extensive experience in Tennessee Valley Authority power line condemnation, in reaffirming its adoption of the

"minority" approach originally articulated in Hicks v. United States, 266 F.2d 515 (6th Cir. 1959), stated:

> Since the Hicks case was decided nearly ten (10) years ago, TVA has conducted numerous safety studies and has concluded from them that apprehension of injuries is not founded on practical experience and should not be considered in awarding incidental damages. The TVA studies conducted on this issue are also creditable. However, in final analysis, we are concerned only with market value. Although these studies may show objectively the complete safety of these structures, 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.

Willsey, 631 P.2d at 274-275 (citing United States, ex rel. TVA v. Easement and Right-of-Way, 405 F.2d 305, 309 (6th Cir. 1968)).

The logic of this approach is unassailable. Analyzed in the context of the instant case, if property buyers and real estate brokers in Putnam County are concerned about the possible adverse health effects of high voltage lines, and that concern is reflected in real estate prices in Putnam County, then evidence of that concern which is shown to have a direct effect on property values should properly be admitted with regard to the question of whether there is severance damage to remainders.

The corollary to adoption of this rule, which eliminates the requirement of a showing of a reasonable basis for the fear or concern, should be that independent and wholly collateral evidence detailing the alleged hazard which gives rise to the fear should not be admissible. Under this rule, such evidence has no relevance and serves only to inflame and improperly prejudice a jury given the nature of such evidence which suggests, among other things, that living near transmission lines, or even distribution lines, may "promote" cancer.

In a New York case upholding the rejection of the testimony of Dr. Andrew Marino offered to show the "source of purchaser apprehension" as to land adjacent to high voltage transmission lines, the reviewing court, stated as follows:

> However, if claimants were attempting to show that prospective purchasers were affected by the mere fact that these statements were made, said statements would only be relevant if it was first shown that purchasers in the Massena market were aware of, and affected by, Dr. Marino's testimony. There was no evidence to this effect and, moreover, it is highly unlikely that anyone outside the scientific community would have had contact with Dr. Marino's testimony. (emphasis added)

Miller v. State, 458 N.Y.S.2d 973, 976 (Ct. Claims 1982). The situation here is identical.

The Fifth District did not find nor was there the slightest suggestion that buyers or real estate brokers, or for that matter, anyone else living in Putnam County, had ever heard of Dr. John Norgard or Dr. Nancy Wertheimer or any of their extensive and detailed declarations regarding the supposed adverse physical and health consequences relating to high voltage transmission lines. Under these circumstances their testimony was entirely irrelevant. See also Meinhardt v. Kansas Power and Light Co., 661 P.2d 820 (Kan.Ct.App. 1983).

The logical alternative to Casey is the "minority" rule discussed above and its proper application requires reversal of the judgments below since the testimony of Drs. Norgard and Wertheimer was improperly admitted to the substantial prejudice of FPL as reflected in the jury verdicts and final judgments.

THIRD POINT

THE AWARD OF $58,830 AS APPRAISAL FEES TO U.D. FLOYD WAS EXCESSIVE AND AN ABUSE OF DISCRETION.

U.D. Floyd, the real estate appraiser who was awarded a fee of $58,830 for his services, was known to the Fifth District. In one of the two earlier appeals in this matter, Florida Power and Light Company v. Reinhold Flichtbeil, et al., 475 So.2d 1250 (Fla. 5th DCA 1985), it reversed the award of a $25,740 appraisal fee to

Floyd. The court first stated the applicable standard of review as follows:

> [S]uch costs, however, as are expended, are subject to the close scrutiny of the court for the purpose of determining that such costs are reasonable and were necessarily incurred in the defense of the proceeding, and should be allowed only in an amount the court determines necessary and proper.

Id. at 1252; See also Cheshire v. State Road Department, 186 So.2d 790, 791 (Fla. 4th DCA 1965), cert. denied, 192 So.2d 493 (Fla. 1966). The Fifth District's discussion of Floyd's background in the previous case is pertinent here.

> The appraiser was a real estate broker. He had taken some correspondence courses involving real estate appraisal and had attended at least one course in person, but had no formal training as an appraiser. He had testified once in federal court and once in the state court as an expert. The 423 hours claimed were amassed during a four-month period during which he also operated his insurance business and oversaw the operation of his potato farm.

Id. at 1252.

The fee awarded to Floyd here was based on his hourly rate of $65.00 an hour (F.T. 93) and his claim that he expended 852 hours of appraisal work from April 1983 through the trial of this matter in December 1984. During this same period of time he had testified that he spent 421 hours on appraisal services for other parcels in this same proceeding (F.T. 93-94), the 421 hours being the

basis for the award of $25,740.00 reversed by the Fifth District.

As to the fee in question on this appeal Floyd did appear for deposition three times, testified at trial, and prepared three written "appraisals" totalling 106 pages, 47 of which are duplications of legal descriptions, and 36 of which contain data as to one comparable sale per page. These appraisals were placed into the record of these proceedings at the fee hearing as were the appraisals of the other real estate appraiser who testified on behalf of Roberts and Whitehead, Phillip Pickens, M.A.I. (R. 2195-2951).

Even the briefest review of the documents prepared by Floyd as compared with the detailed appraisals prepared by Pickens will reflect the impropriety of awarding an appraiser of Floyd's limited background and experience a fee of $58,830.00 while a highly qualified and extensively experienced Pickens only sought a fee of $30,760.00, which was awarded and is not in question on appeal.

In light of the failure of the Fifth District to even discuss this point in its opinion ordinary appellate practice principles would suggest that the point should have been abandoned on the appeal to this Court. It is raised again, however, because of the continuing public outcry over the expense of condemnation proceedings in this State. FPL submits that the award to Floyd in this

proceeding exemplifies an over-generous attitude and that this Court should speak to this point in order to restore a sense of balance to the system.

CONCLUSION

The final judgments entered on verdicts awarding compensation on the basis of inadmissible and prejudicial opinion testimony presented on the issue of the highest and best use of the subject land, and on the basis of prejudicial and inadmissible opinion testimony that the electric transmission lines would reduce the value of the remaining land due to public apprehension of hazard, should be reversed and remanded for a new trial, with directions as to the controlling and applicable rule of law governing the highest and best use issue and the severance damage issue. The reasonable amount of attorney's fees should be reconsidered by the trial judge on remand. The fees awarded the witness, U. D. Floyd, should be reversed as excessive and arbitrary. The fees awarded witnesses Tarbox and Norgard should be reversed or reconsidered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished to David W. Foerster, Esquire, 653 Florida National Bank Building, Jacksonville, Florida 32202, Attorney for Appellees, by mail, this 28th day of August, 1986.

Barry R. Davidson

BARRY R. DAVIDSON

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