IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 69,069

FLORIDA POWER & LIGHT COMPANY,

Petitioner,

v.

VIRGINIA S. ROBERTS, et al.,

Respondents.

REPLY BRIEF OF PETITIONER

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

On September 10, 1986, this Court entered an order in this case and in Florida Power & Light Company v. Jennings, 485 So.2d 1374 (Fla. 1st DCA 1986), Supreme Court Case No. 68,593, stating that the two cases will be considered by the Court at the same time. Entry of this order was entirely appropriate since the single issue in Jennings certified by the First District Court of Appeal as being a question of great public importance:

> IS EVIDENCE OF THE EXISTENCE OF FEAR AND ITS EFFECT ON MARKET VALUE ADMISSIBLE AS A FACTOR IN PROPERTY VALUATION, IF IT IS SHOWN THAT THE FEAR IS REASONABLE

id. at 1379, is identical to one of the three issues raised before this Court in this appeal. Because of the identity of the issue, a substantial portion of the reply brief filed by petitioner Florida Power & Light Company ("FPL") before this Court in Jennings under service date of September 15, 1986, is responsive to the portion of the landowner respondents' brief on the issue. Therefore, where appropriate in this reply brief, FPL will recite verbatim from the reply brief in Jennings. The quotations from the Jennings reply brief will be preceded by reference to the Jennings reply and placed in quotation marks. For clarity indentation and single spacing will not be used. Deviations from Jennings are indicated with bracket [] signs.

STATEMENT OF THE CASE AND THE FACTS

FPL will respond to the statement of facts set forth by the landowners using the headings in their brief.

POINT I. HIGHEST AND BEST USE

Only two comments need to be made in response to the landowners' statement of facts on the issue of the admissibility of the testimony of land planner Tarbox regarding highest and best use. First and most fundamentally, the landowners do not contest, nor could they, the fact that Tarbox's opinion as to highest and best use and physical adaptability of the Whitehead property was never related or linked to the date of valuation in this eminent domain proceeding, August 23, 1983. Second, inexplicably, as if to underline the fact that the Tarbox study depicting a comprehensive multi-use development for the Whitehead land was not related to the date of valuation, the landowners repeat and augment the same point made by FPL in its initial brief - that Phillip Pickens, a well-qualified and experienced real estate appraiser, testified at trial that

> the marketplace 'now' dictated that the (Whitehead) property could be sold in 'forty, fifty, two hundred acre tracts' for development (T. 1016; 1120)1/ all within five years after the date of valuation (T. 1095).

landowners' brief, page 7.

1/ References to pages in the transcript of the trial will be designated by the symbol "T." followed by the page number of the transcript.

POINT II. FEAR OF HEALTH HAZARDS

FPL's response to this portion of the statement of facts provided by the landowners in their brief is virtually identical to comments in the reply brief in Jennings as follows:

"Florida Power & Light Company ("FPL") notes the lengthy recitation of the expert testimony regarding alleged adverse health and physical effects from 500,000 volt (500 kv) electric transmission lines. [L.B. 8-14] 2/ It appears to FPL that the landowners believe that the sheer quantity of the evidence on the subject should somehow justify the admission of the evidence regardless of whether the appropriate legal standard is met. Additionally, FPL notes the attempted distinction by the landowners regarding the testimony of Dr. Wertheimer. With emphasis, the landowners deny that her testimony showed that the high voltage lines "cause cancer", yet [next] in the discussion of Wertheimer's testimony they recite that her study shows a "link" between electric transmission lines and cancer and that the lines "promote(s) cancer" [L.B. 13]. In the judgment of FPL, this presents a remarkable distinction without a difference in consideration of the effect of such testimony on a lay jury."

POINT III. WITNESS FEE

In responding to the landowners' statement of the facts on this point, FPL would only note again that M.A.I. Philip

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2/ "L.B." refers to the landowners' brief.

Pickens, the real estate appraiser so highly regarded by the landowners (L.B. 6) and who produced substantial and detailed written appraisals, sought and was awarded a fee of $30,760. This pales in comparison to the fee of $58,830 based on $65 per hour obtained by Mr. Floyd whose background was succinctly summarized by the Fifth District in FPL v. Reinhold Flichtbeil, et al., 475 So.2d 1250 (Fla. 1985):

> 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.

Nothing set forth by the landowners in their brief enhances Mr. Floyd's appraisal qualifications nor reflects his abandonment of the vocations of insurance and potato farming in favor of a career as a professional real estate appraiser.

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.

FPL reiterates its statement of the first issue because it underlines the fundamental flaw in the presentation of the highest and best use testimony of land planner Tarbox - his failure to relate his opinion to the date of taking. To reiterate the holding in Stubbs v. State Dept. of Transportation, 332 So.2d 155, 157 (Fla. 1st DCA 1976):

> The law of Florida is clear that in eminent domain proceedings the 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.

Since the Tarbox testimony was not related to the date of valuation it was improperly admitted as to the Whitehead parcels.

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.

The discussion contained in the reply brief of FPL in Jennings is substantially responsive to point II of the

landowners' brief. That response is set forth as follows with one significant variation as indicated:

"A. Casey

FPL reiterates its first point on appeal as the basis for responding to the somewhat diffused arguments of the landowners raised on their Point II. The landowners' first attempt to distinguish Casey v. Florida Power Corporation, 157 So.2d 168 (Fla. 2d DCA 1963), on the basis of the quantum of evidence regarding adverse effects from transmission lines presented at trial below in comparison to the apparent absence of any competent evidence on the subject presented at trial in Casey. This approach is simply misguided. As acting Chief Judge Allen stated in concurring specially in Casey "the 'majority rule absolutely excludes consideration of apprehension of fear (emphasis added)'", Id. at 173, and in concluding:

> recapitulating, it might be said that the strict rule with respect to consideration of public apprehension and its affect on value, absolutely prohibits such consideration. This is the view adopted in the instant majority opinion.

Id. at 176.

Casey cannot be distinguished on the basis of the amount of evidence presented. The issue is presented squarely to this Court. The rule in Casey must either be reaffirmed or rejected on this appeal.

B. Alternatives to Casey

As discussed in FPL's brief on the merits, there are two alternatives if Casey is to be abandoned. One of these is the "intermediate rule" which was articulated as follows by the First District in its decision in this case:

> 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.

FPL v. Jennings, 485 So.2d 1374, 1379 (1986). The predicate essential for admission of evidence under this rule is a showing that the "fears are entertained so generally as to enter into the calculations of all who propose to buy or sell the adjacent land." FPL v. Roberts, 490 So.2d 969, 971 (Fla. 5th DCA 1986)."

FPL here deviates from its Jennings reply. In Jennings, some competent evidence was presented regarding buyer resistance based on fear. Here, absent a single passing reference by appraiser Floyd (T. 909), there is no predicate for the admission of the hazard testimony.

To respond to the suggestion that the predicate is supplied by "newspaper advertisements and notices" (L.B. 39) FPL returns to the Jennings reply:

"It is absolutely incorrect, however, to suggest that public awareness of "health problems associated with

transmission lines" is "demonstrated by newspaper notices of FPL advising the public on the dangers of transmission lines." The ... newspaper advertisement[s] contained within the appendix of the landowner's brief deal only with the widely known danger of electric shock resulting from contact with any electric lines, transmission or otherwise. See Richmond v. Florida Power & Light Co., 58 So.2d 687 (Fla. 1952). Nothing in [the] advertisement[s] refers in the slightest way to the alleged health hazards such as "promotion" of cancer which were paraded before the jury below."

Under any interpretation of the "intermediate rule" the testimony of Wertheimer and Norgard was improperly admitted in the absence of an appropriate predicate.

To continue its response to Point II of the landowners, FPL returns to the Jennings reply.

"C. The Prevailing Rule

The appropriate alternative to the rule in Casey is the prevailing rule. [accepted by eleven states and the United States Court of Appeals for the Sixth Circuit. Jennings at 1379]. This rule permits admission of evidence of fear on a simple showing that the fear affects market value without any requirement that the fear be shown to be reasonable. As previously set forth, the logical application of this rule would therefore exclude admission of testimony such as that presented through Drs. Norgard and Wertheimer as being irrelevant to the issue of just compensation and, obviously, highly prejudicial.

While the landowners vehemently protest FPL's advancement of the prevailing rule [L.B. 43] 3/ nowhere do they provide any justification for the admission of the testimony of Drs. Norgard and Wertheimer under the prevailing rule. They claim that FPL is attempting to "avoid the reality of what the owner is confronted with in the market place" [L.B.43] ignoring that the reality of the market place [could easily have been brought out through their appraisers]. There was no suggestion, nor could there be, that the "reality...in the market place" in [Putnam] County, Florida comprehends knowledge of the extensively articulated positions of Drs. Norgard and Wertheimer.

In its initial brief, FPL cited Miller v. State, 458 N.Y.2d (Ct. Claims 1982), as direct support for the exclusion of the testimony of Norgard and Wertheimer. FPL reiterates and paraphrases the statement of the New York Court:

> Statements of (Norgard and Wertheimer) would only be relevant if it was first shown that purchasers in the [Putnam] County market were aware of and affected by (Norgard and Wertheimer's) testimony.

Id. at 976.

The landowners attempt to harmonize the Miller decision by suggesting that the testimony regarding health hazards was

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3/ The position of FPL is hardly a "post hoc change of stripes" [L.B. 43]. FPL has contended throughout this case that the Norgard and Wertheimer testimony should not have been admitted.

rejected by the New York Court because it was hearsay as opposed to the first hand expert testimony in this case. [L.B. 41] This distinction is not correct. The pertinent analysis by the New York Court is made in the context of the statements in question being offered not for their truth or falsity but merely to show that they were made. Lack of relevance was the first basis upon which the statements were excluded. Hearsay was only an alternative basis for the exclusion.

The landowners next complain that the result required by adoption of the prevailing rule would be unfair because they went "the extra mile" in presenting evidence of reasonableness to "meet both the tests of the 'majority rule' and the 'intermediate rule' as set forth in Casey." [L.B. 44] 4/ They then suggest that this point was resolved in Willsey v. Kansas City Power & Light Co., 631 P.2d 268 (Kan. 1981) where the Kansas Court of Appeals, after expressing its preference for the prevailing rule, stated that the facts presented in that case met the test of the "intermediate rule" which the Court identified as being the "most stringent rule which can justifiably be applied against the landowner." Id. at 278. Willsey does not support the proposition that should this Court prefer the prevailing rule, it could nevertheless affirm the

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4/ The majority rule in Casey requires no evidence to meet the test as it requires exclusion of evidence of the nature in question on an absolute basis. See discussion, supra at page 5 and 6.

result here. In Willsey the only testimony presented to the jury regarding fear was that of the landowners' real estate appraiser. The appraiser's testimony on the subject is set forth at page 271 and refers to "buyer resistance to high power or high voltage overhead lines" and "latent fear on the part of buyers due to ... high voltage power line(s)". This testimony ... pales in comparison to the extensive and detailed testimony of Drs. Norgard and Wertheimer." Willsey cannot be read to support the admission of such testimony. See Meinhardt v. Kansas Power and Light Co., 661 P.2d 820 (Kan. Ct. App. 1983).

THIRD POINT

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

In attempting to justify the appraisal fee awarded U.D. Floyd, the landowners suggest that Floyd performed substantial services with respect to FPL appraisals used at the order of taking hearing (L.B. 56). Yet, in what the landowners described as a "three day trial...on the propriety of the entry of an order of taking", (L.B. 56) Floyd did not testify. Also, contrary to the inference of the landowners, the trial court did not identify Floyd as the individual who "dismantled" the FPL appraisals at the hearing.

Remarkably, the landowners cite Division of Administration, State of Florida, Dept. of Transportation v. Condominium International, Inc., 317 So.2d 809 (Fla. 3d DCA 1975) to support their argument that Floyd's fee award should be upheld. FPL views this case as entirely supportive of its

position as it reflects not a single appraisal fee award of $62,572.75 as intimated by the landowners but instead awards of $37,572.75 and $25,000 to two professional real estate appraisers holding designations reflecting their membership in the American Institute of Real Estate Appraisers and the American Society of Appraisers respectively. Mr. Floyd holds neither such designation and the award of an appraisal fee at the rate of $65.00 an hour which totals almost twice the fee awarded to American Institute Member Pickens in this proceeding is simply unjustified.

CONCLUSION

The testimony of land planner Tarbox was improperly admitted and the judgment entered on the Whitehead parcels must be reversed.

The admission of the testimony of Norgard and Wertheimer as to all parcels was highly and unmistakably prejudicial and entirely improper under any version of the three rules identified regarding the admission of such testimony. The final judgments on all parcels must be reversed.

The fee awarded to appraiser Floyd was excessive in consideration of his qualifications and should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to 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 DAVID W. FOERSTER, ESQUIRE, DAVID W. FOERSTER, P.A., 1550 Florida Bank Tower, Jacksonville, Florida 32202 by U.S. Mail this 28 day of October, 1986.

Barry R Baird
Attorney