IN THE SUPREME COURT OF FLORIDA

FLORIDA GAS TRANSMISSION COMPANY, Appellant, v. FLORIDA PUBLIC SERVICE COMMISSION, et al., Appellees.	)	Case No. 81,296 PSC Docket No. 920807-GP

ON APPEAL FROM A FINAL ORDER OF THE
FLORIDA PUBLIC SERVICE COMMISSION

CONSOLIDATED REPLY BRIEF OF APPELLANT FLORIDA GAS TRANSMISSION COMPANY

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

Statutes and Rules:

Other:

PREFACE

As in the Initial Brief, Appellant Florida Gas Transmission Company shall be referred to throughout this Reply Brief as "FGT." Appellee Florida Public Service Commission shall be referred to as the "PSC." Appellee SunShine Pipeline Partners shall be referred to as "SunShine," and SunShine's proposed intrastate natural gas pipeline, which was the subject of the proceeding below before the PSC, shall be referred to as "the SunShine Pipeline." Appellee Florida Power Corporation shall be referred to as "FPC." The Natural Gas Pipeline Siting Act, §§ 403.9401-.9425, Fla. Stat. (1993) shall be referred to as the "Siting Act."

I. INTRODUCTION.

Appellees in this case filed a total of three Answer Briefs to Appellant FGT's Initial Brief. Since the arguments raised in these three briefs are quite similar in form, FGT will reply with this single consolidated brief.

As we warned in our Initial Brief, Appellees have attempted to trivialize FGT's arguments by misstating them. They raise only four points. On the constitutional question put to this Court, Appellees argue that section 403.9422(1)(b), Florida Statutes, contains sufficient standards to comply with the nondelegation doctrine. Alternatively, Appellees contend that section 403.9422(1)(b) is an expression of the state's police power, and therefore does not require standards. But to support both these points, Appellees can only cite to inapplicable case law and unrelated passages in the statute.

On the APA issue put before this Court, Appellees argue that the challenged order passes the standard first used in Occidental Chemical Company v. Mayo, 351 So. 2d 336 (Fla. 1977). Yet Appellees fail to inform this Court that recent amendments to chapter 120 have obviated the Mayo standard. Finally, Appellees defend the adequacy of the PSC's response to FGT's proposed findings, acting as apologists for the inadequate order.

We stand by our fundamental point, first stated in our Initial Brief: Someone, either the Legislature or the agency, is required to announce what policy choices will determine whether Florida has a "need" for additional natural gas pipeline capacity. Either the

statute must be made more clear, through the application of Florida's nondelegation doctrine, or the PSC must expose its policy choices in its Final Order. We believe that the Florida Constitution requires the former, see Fla. Const. art., II § 3, while the APA requires the latter. See §§ 120.57(1), 120.59(2), 120.68, Fla. Stat. (1993); McDonald v. Department of Banking & Finance, 346 So. 2d 569, 583 (Fla. 1st DCA 1977).\[1] A review of Appellee's four main arguments shows how it cannot be otherwise.

II. SECTION 403.9422(1)(B) VIOLATES FLORIDA'S NONDELEGATION DOCTRINE

Appellee SunShine meets our first argument by suggesting that Florida's nondelegation doctrine has been abandoned in recent case law. For this, they cite to a concurring opinion from a lower court and this Court's opinions in Microtel, Inc. v. Public Service Commission, 483 So. 2d 415, 418-419 (Fla. 1986), and Department of Insurance v. Southeast Volusia Hospital Dist., 438 So. 2d 815, 819 (Fla. 1983), appeal dismissed, 466 U.S. 901 (1984). The suggestion that Florida has abandoned the nondelegation doctrine must be soundly rejected.\[2] Nothing in the opinions of this Court show a desire to abandon the nondelegation doctrine. Indeed, this Court

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[1] The arrival of the new official Florida Statutes during this appeal allows us to cite the 1993 statutes. The relevant law remains the same.

[2] This Court already declined at least one invitation to relax the nondelegation doctrine: "Should this Court, then, accept the invitation of Appellants to abandon the doctrine of nondelegation of legislative power which is not only firmly embedded in our law, but which has been so continuously and recently applied? We believe stare decisis and reason dictate that we not." Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1979) (citations omitted).

has repeatedly voiced its concern over improper legislative delegation of authority. E.g., Chiles v. Children A, B, C, D, E & F, 589 So. 2d 260, 264 (Fla. 1991).\[3]

Appellees also cite to Graham v. Estuary Properties, Inc., 399 So. 2d 1374, 1378 (Fla. 1981), cert. denied, 454 U.S. 1083 (1981), for the proposition that the Legislature may give an agency the authority to weigh competing statutory criteria. SunShine Brief at 16-17. This is a puzzling conclusion, particularly because nothing in Graham even remotely addresses the nondelegation doctrine. The issue before this Court in Graham involved the Takings Clause of the federal and state constitutions. Nor did this Court use Graham to overrule its opinion in Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1979), which disapproved of a legislative scheme (similar to the one at hand) that failed to order and prioritize various statutory criteria. Id. at 919 (quoting lower court with approval).

We agree with the proposition in Graham that an agency may be given "[f]lexibility . . . to administer a legislatively articulated policy." Graham, 399 So. 2d at 1378 (emphasis added) (quoting Askew, supra). But there must be a "legislatively

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[3] Appellee PSC attempts to draw a distinction between nondelegation cases and separation of powers cases, suggesting thereby that a different standard must attend the two. This is erroneous, since separation of powers cases and nondelegation cases both find root in article II, section 3 of the Florida Constitution. Whether the Legislature gives its powers to a legislative or an executive agency is of little moment if the delegation does not have proper standards and allows the agency to declare what the law shall be. See State ex rel. Taylor v. City of Jacksonville, 133 So. 114 (Fla. 1931)(noting that nondelegation doctrine comes from separation of powers).

articulated policy" in the first place. And so we stand by what we said in our Initial Brief: section 403.9422(1)(b), Florida Statutes, fails to order or rank various priorities and therefore impermissibly allows an agency to determine what the law shall be.

Appellee SunShine effectively concedes the argument in answering our objections to the "catchall" provision of section 403.9422(1)(b). We asserted that a statute that allows an agency to make decisions based on "factors within its jurisdiction [that the agency] deemed relevant" gave too much authority to an agency to comport with article II, section 3 of the Florida Constitution. SunShine agreed that in theory there was some merit to our argument but for the catchall provision's following other listed criteria. Appellee SunShine's Brief at 18. Whether standing alone or at the end of a list of other criteria, however, this catchall still vests the agency with unbridled discretion to declare what the law shall be in violation of the nondelegation doctrine.

In defense of this clause, Appellee SunShine cites to four other similar statutes where the Legislature allowed the consideration of "other factors deemed relevant." Significantly, Appellees cite to no case law or authority from this Court. Furthermore, just because a problem is widespread does not make it acceptable, and this Court should not adjust a constitutional doctrine to accommodate poor draftsmanship by the Legislature. Nor should the prevalence of such a clause make the constitutional requirements any less clear. If anything, the Legislature's use of the "catchall clause" in other statutes requires this Court to

speak clearly to the issue. An agency cannot be delegated the power to base its decisions on whatever it finds relevant or appropriate. Section 403.9422(1)(b) allows the PSC to justify its actions based on whatever it deems relevant, and for that reason alone it offends the nondelegation doctrine.\[4]

As its second argument, Appellee SunShine asserts that section 403.9422(1)(b) is an exercise of the state's police powers and therefore constitutes an exception to the nondelegation doctrine. See, e.g., North Broward Hospital District v. Mizell, 148 So. 2d 1, 4, n.11 (Fla. 1962). As proof, SunShine cites to section 403.9402, the Legislature's statement of intent for the Siting Act. Much of the Siting Act contained in chapter 403 does implicate police power concerns--i.e., the location and engineering specifications of the pipeline. Section 403.9422(1)(b), however, is concerned entirely with economic regulation--that is, whether there is an economic or market need for a particular pipeline.

That section 403.9422(1)(b) concerns only economic regulation is evident from reading Appellees' briefs. FPC, for example, states with confidence in their Answer Brief that "the idea of [economic] competition necessarily lies at the heart" of the challenged statute. FPC Answer Brief at 3. With that much we agree, and for that reason, there is no police power exception to section 403.9422. There are simply no issues of public safety

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[4] SunShine has argued that the catchall provision merely modifies the previous clause. Such a reading does not give effect to every part of the legislation, nor does it comport with its plain meaning. See Dept. of Legal Affairs v. Sanford-Orlando Kennel Club, Inc., 434 So. 2d 879, 882 (Fla. 1983).

implicated by section 403.9422(1)(b) such that Florida's nondelegation doctrine should be relaxed.

It would be quite easy, of course, to find that the determination of need process for an intrastate natural gas pipeline is a complicated and perhaps arcane process which defies easy description in the legislative forum. Therefore, the thinking goes, the people's experts, in this case the PSC, should be left to decide in their judgment what factors are appropriate and necessary for determining whether there is a need for SunShine's proposed intrastate natural gas pipeline. Such a conclusion, however, would be an abdication of the Court's duty to enforce the principles underlying article II, section 3 that no branch may encroach upon the powers of another and that no branch may delegate to another branch its constitutionally assigned powers. Chiles, 589 So. 2d at 264.

This Court must not shirk its responsibility to patrol the Legislature's delegation merely because PSC matters are complex, arcane, and often require a background in economics to understand. As Judge Wright noted two decades ago:

> [W]hen (the legislature) is too divided or uncertain to articulate policy, it is no doubt easier to pass an organic statute with some vague language about the "public interest" which tells the agency, in effect, to get the job done. But while this observation is no doubt correct, it seems to me to argue for a vigorous reassertion of the delegation doctrine than against it. An argument for letting experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy.

Wright, Beyond Discretionary Justice, 81 Yale L.J. 574, 584-5 (1972). Here, too, it would be easy to let the PSC decide in the

first instance what the law shall be. The Court, after all, is not equipped to make such a determination. Such a decision, however, would effectively gut the provisions of article II, section 3 of the Florida Constitution (at least as it applies to the statutes entrusted to the PSC's care), a result which this Court, at least, has repeatedly affirmed it will not tolerate. See, e.g., Chiles v. Children A, B, C, D, E & F, supra; Cross Keys Waterways v. Askew, supra.

III. THE PSC's FINAL ORDER FALLS SHORT OF APA REQUIREMENTS.

In the second issue on appeal, FGT asks that the agency's order show the same degree of precision that the Florida Constitution requires of the Legislature. In other words, if this Court is unwilling to constitutionally hold that the Legislature must draft a more definite statute, then it must require that the agency's order better display its policy rationale. And if the Legislature is to be excused from declaring the policy, then the agency must accept this responsibility. This is particularly true here where the PSC failed to use the rulemaking authority given to it by the Legislature.\[5] See § 403.9422(2)(a), Fla. Stat. (1993);

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[5] Appellees have failed to seriously challenge our assertion that an agency that proceeds in the absence of rules must display its reasoning in its final order. Indeed, we found this principle so well founded in the case law that even this footnote can only sample the authorities: Southpointe Pharmacy v. Department of Health & Rehabilitative Servs., 17 Fla. L. Wkly. D720 (March 11, 1992); Health Care and Retirement Corp. v. Department of Health & Rehabilitative Servs., 593 So. 2d 542 (Fla. 1st DCA 1992); Anglickis v. Department of Professional Regulation, 593 So. 2d 298 (Fla. 2d DCA 1992); Florida League of Cities, Inc. v. Administration Commission, 586 So. 2d 397 (Fla. 1st DCA 1991); Home Builders & Contractors Ass'n v. Department of Community Affairs, 585 So. 2d 965, 970 (Fla. 1st DCA 1991) (requiring agency to

accord General Telephone Co. v. Public Service Commission, 446 So. 2d 1063, 1067 (Fla. 1984) (noting that the Court will conduct a more searching review of the PSC's orders than its rulemaking).

Accordingly, FGT argued as its second point that the order did not comply with the requirements of chapter 120, Florida Statutes. FGT noted that the order did not display the agency's reasoning, as required by section 120.59(2), prevented this Court from conducting a review of the record under section 120.68, and deprived FGT of its right to a meaningful review. All of these deficiencies clearly impair the fairness of the proceedings below. Answering this charge, Appellees essentially argue two points: (1) that the contested order complies with the requirements of Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977); and (2) that this Court cannot weigh the sufficiency of the evidence. Both of these arguments should be soundly rejected.

"establish its policies . . . [and] expose and elucidate its reasons for its discretionary action"); Beverly Enterprises-Florida, Inc. v. Department of Health & Rehabilitative Servs., 573 So. 2d 19 (Fla. 1st DCA 1990) ("The agency may apply incipient or developing policy . . . provided the agency explicates, supports and defends such policy"); National Healthcorp v. Department of Health & Rehabilitative Servs., 560 So. 2d 1184 (Fla. 1st DCA 1990); Health Care and Retirement Corp. v. Department of Health & Rehabilitative Servs., 559 So. 2d 665 (Fla. 1st DCA 1990); St. Francis Hospital, Inc. v. Department of Health & Rehabilitative Services, 553 So. 2d 1351, 1354 (Fla. 4th DCA 1989); Cf. Upjohn Healthcare Services, Inc. v. Department of Health & Rehabilitative Servs., 496 So. 2d 147 (Fla. 1st DCA 1986) (after agency rule had been invalidated in another proceeding, agency reliance on the rule was incipient policy, which must be supported by expert testimony). See generally Johnny C. Burris, "The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking," 18 Fla. St. L.Rev. 661 (1991).

A. The Standard in Mayo is No Longer Applicable, and Assuming It Still Is, Has Not Been Met.

In arguing about the thoroughness and adequacy of the disputed order, Appellees put all their weight behind this Court's opinion in Occidental Chemical Co. v. Mayo, 351 So. 2d 336 (Fla. 1977). In Mayo, this Court stated that agency orders need not provide "a summary of the testimony it heard or a recitation of every evidentiary fact on which it ruled." Id. at 341, 341 n.5; see also H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913, 915 (Fla. 1979) (quoting Mayo, supra). Under this standard, Appellees argue, the PSC's order was sufficient. Appellees neglect to inform this Court, however, that recent legislative changes have displaced the standard in Mayo.

1. Mayo Has Been Legislatively Superseded.

At the time this Court rendered its opinion in Mayo, section 120.59(2) merely stated that agency orders "shall include a ruling upon each proposed finding and a brief statement of the grounds for denying the application or request." § 120.59(2), Fla. Stat. (Supp. 1990), amended, ch. 91-30, § 5, Laws of Fla. This Court's opinion in Mayo evidently interpreted the term "shall" as directory or permissive rather than mandatory. See generally Rich v. Ryals, 212 So.2d 641, 643 (Fla. 1968) ("[M]andatory language used in a statute may, in a proper case, be construed as permissive only.") (quoting 30 Fla. Jur 2d, Statutes § 8). Thus, the term "shall" meant only that the agency's order had to contain "a succinct and sufficient statement of the ultimate facts" upon which it relied. Mayo, 351 So. 2d at 341. Under the lenient Mayo standard, agencies

were only required to render their orders with a brief statement of their reasoning.

In 1991, however, the Florida Legislature amended section 120.59(2) to replace the word "shall" with "must." See ch. 91-30, § 5, Laws of Fla. In light of this change we believe that this Court can no longer read section 120.59 as a permissive directive to the agencies. The substitution of the word "must" shows the Legislature's desire that agency orders fully explicate their reasoning. Such a reading would comport with the fundamental tenet of statutory construction, which "requires that we give statutory language its plain and ordinary meaning, unless the words are defined in the statute or by clear intent of the legislature." Green v. State, 604 So.2d 471, 473 (Fla. 1992). Such a mandatory reading of section 120.59 is also the only means of giving full effect to the legislative amendment.

Appellees' reliance on Mayo, and other cases that interpreted the old section 120.59, is therefore misplaced. Palma Del Mar Condominium Ass'n # 5 of St. Petersburg, Inc. v. Commercial Laundries of West Florida, Inc., 586 So. 2d 315, 317 (Fla. 1991) (holding that Court should give effect to amendment particularly "since there had been a judicial interpretation after the original enactment of [the statute] which the legislature believed was contrary to its original intent.") With these statutory changes, and the expressed desire of the Legislature to have agencies expose their policy choices, this Court should no longer tolerate incomplete, general or cursory orders as being 'good enough for

government work.' Each point raised by a party must be answered; every proposed statement of policy deserves a response. See § 120.59(2), Fla. Stat. (1993).

2. Mayo Did Not Consider Adjudication in the Absence of Rules.

Even if this Court finds that the principle in Mayo survived the recent legislative enhancement to section 120.59(2), the PSC's order is still faulty because Mayo does not apply. The opinion in Mayo was predicated on an agency's need to structure ratemaking. Here, however, the PSC's order concerns a single certificate of need, not a changing rate.

This point is not merely a means of distinguishing Mayo from the present case. It is essential to preserving the fairness and due process the APA was built upon. See Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, March 1, 1974, reprinted in 3 England & Levinson, Florida Administrative Practice Manual, (App. C, at 20) (noting that APA provides essential due process). If this Court affirms the PSC's order, then it will have approved of process that features (1) a statute that does not inform the public of what policy choices lead to a determination of need, and (2) an agency that likewise refuses to discuss its policy choices in either its rules or orders.

At some point, the public has a right to know what policy choices have been made. The case law is clear that if the agency has not been willing or able to announce these choices in its rules, then its duty to explicate the policy in its orders is that much greater. See cases cited, supra, in footnote 5. Accordingly, cases such as Mayo are inapposite.

B. FGT Does Not Ask This Court To Reweigh the Evidence.

Finally, Appellee's second point of contention must be rejected as well. As could be expected, SunShine and the PSC suggest that we have asked this Court to reweigh the evidence and come up with a different holding. That is clearly not the case. FGT merely asks that the agency be required to weigh the evidence in the first place, and not simply stamp a conclusion on its Final Order by summarily rejecting all contrary evidence without a reasoned explanation for doing so.

IV. CONCLUSION.

Appellee's inability to bring serious argument against FGT's points and authorities forces them to resort to obfuscation and diversion. Yet the central question on appeal remains very simple: Has the government sufficiently explained to the public how it will determine an economic need for a particular pipeline? FGT believes it has not.

The statute has not made the underlying policy choices clear enough to comply with Florida's nondelegation doctrine and vests too great an authority in an agency. Section 403.9422(1)(b) fails to prioritize or rank its priorities and gives the PSC too much authority in a catchall provision. Since the need determination statute is only concerned with economic regulation, there are no issues of public safety that would relax this standard.

Failing this, FGT stands by the formula for agency orders set forth in the Initial Brief: chapter 120 requires that there be (1) a "ruling upon each proposed finding," § 120.59(2), Fla. Stat.

(1991); (2) "a brief statement of the grounds for denying the application or request," id.; and (3) a "statement of reasons" for all policy decisions. Id. at § 120.68(5)(a) (emphasis added). Lacking these three elements, the PSC's Final Order is incomplete and incapable of meaningful review. This impairs the fairness of the proceeding, depriving both this Court and FGT of a meaningful record on review. The 1991 changes to section 120.59(2), see ch. 91-30, § 5, Laws of Fla., only serve to underscore the mandate that the PSC meaningfully explicate its non-rule policy in its final orders. This it failed to do, and that failure necessitates a remand for further consideration by the PSC.

REQUEST FOR RELIEF

Florida Gas Transmission Company requests the following relief: (1) that section 403.9422(1)(b), Florida Statutes (1993) be declared unconstitutional under article II, section 3 of the Florida Constitution (1968); and/or (2) that this cause be remanded to the PSC with directions that it meaningfully expose and elucidate the reasons for its discretionary action.

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