IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC15-95
Lower Tribunal No(s).: 14000-EI

CITIZENS OF THE STATE OF FLORIDA v. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-113
Lower Tribunal No(s).: 150001-EI

CITIZENS OF THE STATE OF FLORIDA v. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-115
Lower Tribunal No(s).: 140001-EI

CITIZENS OF THE STATE OF FLORIDA v. ART GRAHAM, ETC., ET AL.

CASE NO.: SC15-274
Lower Tribunal No(s).: 150001-EI
140001-EI

FLORIDA INDUSTRIAL POWER USERS GROUP v. ART GRAHAM, ETC., ET AL.

INITIAL BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations will be used in this brief. The Florida Industrial Power Users Group will be referred to as FIPUG. Florida Power & Light Company will be designated as FPL. The Florida Public Service Commission will be called the Commission or the PSC. The Office of Public Counsel is called OPC. PetroQuest Energy Inc. will be referred to as PetroQuest.

The Record on Appeal is designated as R. _. The transcript of the hearing below is designated Tr. _. Exhibits introduced at the evidentiary hearing will be designated as Ex. _. Citations to the Florida Statutes will be referred to as F.S. and will refer to the 2014 version of the statute unless otherwise noted. Citations to the Florida Administrative Code will be referred to as F.A.C. The Florida Administrative Procedure Act will be abbreviated as APA.

STATEMENT OF THE CASE AND OF THE FACTS

Preliminary Information and Background

This case involves FPL seeking and obtaining Commission approval to become involved in the natural gas drilling, extraction, and production business in Oklahoma. The Commission is the first regulatory body in the nation to allow an investor-owned electric utility to venture into the natural gas business in this way. Tr. 388, 593, 644, 651.

Appellant, FIPUG, represents the interest of numerous large customers of FPL whose rates will be affected by the Commission's decision to allow FPL to recover approximately $191 million in capital costs and profits related to the Woodford project, described below. Tr. 107, 642.

Natural gas is an important energy source that is used to power approximately 65% percent of FPL's power plants. Tr. 85. Investor-owned utilities, such as FPL, must seek authorization from the Commission to recover from ratepayers the cost of the natural gas used to generate electricity. The process of seeking authorization is known as the fuel clause proceeding and is conducted as a quasi-judicial administrative proceeding pursuant to the provisions of section 120.57(1), and 120.569, F.S. T. 72. In the fuel clause proceeding, which is held annually, FPL and other utilities present evidence about monies spent to date and projected monies likely to be spent in the future on fuel, such as natural gas, to

operate their respective power plants. Tr. 686. After consideration of the evidence about the historical and forecast price of fuel, the Commission issues a final order which grants or denies authorization for the utility to adjust the utility's fuel recovery rate charged to ratepayers on their monthly bills. Tr. 679, 680, 686.

The rates charged to ratepayers for fuel itself is a "pass through" cost, in that ratepayers pay just the cost of fuel. Tr. 680. Regulated utilities do not earn a return on, or profit from monies spent to purchase fuel. Tr. 680. The costs of "hedging contracts" are also a "pass through" cost. Utilities do not earn a return on, or profit from, the cost of hedging positions that the utility purchases. Tr. 474, 475. "Hedging" involves locking in a future price to avoid the adverse effects of price fluctuations. Tr. 684. Utilities hedge by entering into financial agreements to secure natural gas at a future point in time at a fixed price. Tr. 127. Hedging occurs because the natural gas market is competitive, volatile and risky. Tr. 91, 96, 611. The Commission has authorized utilities, including FPL, to mitigate the price risk associated with natural gas markets through hedging. Tr. 92. The Commission must review and approve utility hedging plans, including FPL's hedging plan. Tr. 1008.

The Woodford Project

In the 2014 fuel clause proceeding, FPL filed a Petition asking the Commission to approve FPL's proposed participation in a gas reserve project in

Oklahoma known as the Woodford project.[1] The Woodford project involves hydraulic fracturing to drill, extract, and process natural gas from 38 Oklahoma wells. Tr. 106. Tr. 226. Hydraulic fracturing or "fracking" involves injecting water, sand and chemicals into the ground to enhance the production of natural gas hydrocarbons, and is the extraction process that will be used to obtain the natural gas in the Woodford project. Tr. 513, 528, 529; Ex. 57, p. 84; Ex. 66; Ex. 45, Ans. to Staff Interrogatory 95 and 102.

To pursue this venture, FPL teamed with a company called PetroQuest to extract and produce natural gas in the Woodford project. Tr. 99. PetroQuest is an oil and natural gas company engaged in the exploration, development, acquisition and production of oil and natural gas properties in the United States. Tr. 99. PetroQuest, a publicly traded company, is rated "below investment grade" by key rating agencies. Tr. 201, 202, 475, 1051. FPL's Petition asked the Commission to find that FPL's investment in the competitive natural gas extraction business in

[1] FPL's Petition also asked the Commission to approve FPL-authored "guidelines" to permit FPL to spend up to $750 million per year to take positions in other future oil and gas reserve projects in Oklahoma, Texas, Louisiana, Arkansas, Mississippi, Alabama, West Virginia, Ohio and Pennsylvania without seeking further Commission review or approval. R. 212-215. While FPL proposed the Woodford project and the proposed guidelines for future projects in the same Petition, and these matters are tethered to the same evidentiary record, the Commission bifurcated consideration of the Woodford project from consideration of the guidelines. Tr. 1087-1100. The Commission is presently scheduled to consider the proposed FPL guidelines at its June 18, 2015 Agenda Conference. Thus, FIPUG's present appeal only involves the Woodford project.

Oklahoma, via the Woodford project, is prudent and should be recovered from ratepayers through the fuel adjustment clause. However, unlike other fuel expenses, FPL requested that the Woodford project costs be recovered not as a pass-through, but as an expense for which FPL would collect both its actual costs as well as a return on its investment – that is, a profit, from ratepayers for all capital dollars invested in the Woodford project. R. 127-156. Tr. 226.

Under FPL's proposal, ratepayers (not FPL) bear the risk of natural gas market price volatility, and all production risks associated with the Woodford project. Tr. 680, 96. If the production cost of extracting natural gas from the Woodford wells, including profit paid to FPL on its capital investment, is less than the natural gas market price, the ratepayers will benefit. Tr. 96. However, if the production cost of extracting natural gas from the Woodford wells is more than the natural gas market price, the ratepayers do not benefit, but instead will suffer a loss. Tr. 201, 202. The monies spent on the Woodford project are not a mere pass-through, like other fuel expenses, because FPL will earn a return or profit on its capital expenditures. Tr. 474, 475.

FPL's petition proposes an extreme expansion of the traditional use of the fuel clause proceeding. Tr. 680. Because FPL would be permitted to earn a return (profit) on its capital costs spent on the Woodford natural gas wells, this expansion of the fuel clause presents additional opportunities for FPL to expand its earnings

and rate base. Tr. 680, 959. To date, other than FPL and the Commission's final order[2] on appeal approving the Woodford Project, no investor-owned electric utility in the country has been permitted to participate in the natural gas extraction business as proposed by FPL. Tr. 388, 593, 644, 651.

Facts and Procedural History of Issues on Appeal

FIPUG puts forward three issues on appeal: 1) a challenge to the Commission's jurisdiction to consider and grant FPL's petition; 2) a due process challenge; and 3) a challenge to the admission of expert testimony of a former PSC Commissioner which addressed legal issues.

Procedural History Related to Challenge to Commission's Jurisdiction

OPC argued below that the Commission does not have subject matter jurisdiction to consider FPL's Petition, and filed a motion to dismiss FPL's Petition on that basis. R-678-701; Appendix at 17-40. FIPUG joined in OPC's Motion to Dismiss regarding lack of subject matter jurisdiction. R. 1291-1293; Appendix at 41-43. The Commission denied the motions to dismiss for lack of subject matter jurisdiction. R. 1478-1482; Appendix at 11-16.

Procedural History Related to FIPUG'S Due Process Arguments

At the hearing, the Commission designted an attorney as advisory counsel. Tr. 2, 7. Staff, as a party to the proceeding, was represented by separate counsel.

[2] Order No. PSC-15-0038-FOF-EI.

Tr. 2, 7; R. 1318-1344. Staff actively participated as a party in the hearing by propounding interrogatories, noticing and deposing witnesses, cross-examining witnesses, and advocating for the introduction of evidence into the record over objection. Ex. 44-48; Tr. 16, 67-76; Ex. 55, p. 114-161; Ex. 56, p. 4, 5, 90-96; Ex. 58, p. 2, 4, 67-85; Ex. 59. In addition, after the evidentiary record in the proceeding was closed, Commissioners received unnoticed, private briefings by the party known as staff during which factually relevant material was provided. R. 1530, 1531, 1537, 1541, 1546, 1547. The Commission itself had separate advisory counsel independent of the party known as staff or its counsel. Tr. 2, 7; R. 1318.

The meetings and exchange of documents between the party known as staff and the Commission were not disclosed to other parties until, during the Commission's publicly noticed consideration and discussion of the Woodford project at the post-hearing December 18, 2014 agenda conference, Commissioner Brown referenced a "pamphlet" provided to the Commission by the party known as staff that addressed "liability." Commissioner Brown said:

> So there was another issue that staff provided in this pamphlet that they handed out to us on liability, and I would like you to discuss it, if you could, on the -- what the -- or what the project would provide for in terms of liability even for dry wells, for example, what is the liability that's hanging out there?

R. 1546, 1547. Appendix at 106-107.

Alerted that certain materials had been provided to the Commission that were not part of the record or provided to the parties, FIPUG immediately made a public records request for "all documents used or provided to the Commission regarding the FPL gas reserve petition that were not admitted into evidence in the proceeding". R. 1833; Appendix at 112.

At the hearing, extensive testimony was elicited about the precedent-setting effect of FPL's request and the Commission's action. Tr. 131-135, 206, 207, 388, 593, 644, 651; Exh. 60. Extensive evidence was also adduced about liability associated with the Woodford project and the risks of natural gas drilling, extraction and production. Tr. 245-247, 273, 319, 677, 696, 704; Ex. 66.

After the Commission voted to approve the Woodford project, the Commission responded to FIPUG's public records request and furnished FIPUG with more than 400 pages of responsive material. R. 1830-2237. Included within this information was factual information about action taken by the Los Angeles Department of Water and Power to secure gas natural gas reserves in Wyoming. R. 2015; Appendix at 113. This information was not part of the record in the case.

Procedural History Regarding the Testimony of FPL Witness Deason

FPL offered the testimony of former PSC Commissioner Terry Deason. Tr. 873. Mr. Deason served on the Commission for 16 years and served twice as Chairman of the Commission. Tr. 878. Mr. Deason, a non-lawyer, now works

generally in the area of public utilities as a special consultant to the Radey Law Firm. Tr. 877; Ex. 58, p. 939. Mr. Deason testified at length in this proceeding about his interpretation of previous Commission orders and his interpretation of Florida statutes. Tr. 883-892; Tr. 903-905. Mr. Deason admitted that FPL and FPL's counsel assisted him in researching and obtaining prior Commission orders that he relied upon in preparing his testimony. Ex. 58, p. 97-99.

FIPUG filed a motion to strike Mr. Deason's testimony on the grounds that it was inadmissible expert testimony on legal matters. R. 1201-1226; Appendix at 52-94. The Commission denied this motion. R. 1310 -1313; Appendix at 48-51.

Following the two-day evidentiary proceeding conducted pursuant to s.120.57(1) F.S. and s.120.569 F.S., and after the Commission voted 4-1 at its December 18, 2014 agenda conference to approve the Woodford project, the Commission entered its Final Order on January 12, 2015 granting FPL's Petition for the Woodford gas reserve project. R. 1344, 1495, 1496, 1609-1618l; Appendix at 1-10. FIPUG filed its Notice of Appeal on February 10, 2015. R. 2240 -2252.

SUMMARY OF ARGUMENT

Jurisdiction

The Commission exceeded its jurisdiction when it considered and authorized FPL to use ratepayer money to become involved in natural gas extraction, drilling, and production activities in Oklahoma. The Florida Legislature has enacted a

detailed statute, s. 366.04, F.S., which explicitly addresses the Commission's jurisdiction. The Commission only has such authority as granted to it by the Legislature.

The Legislature, neither expressly nor by implication, has authorized Florida investor-owned utilities like FPL to use ratepayer monies to enter into risky, competitive business ventures like the natural gas extraction business. The Commission's statutory mandate to construe public utility statutes to protect the public welfare, and reasonable doubts about whether the Commission has jurisdiction to consider this matter, should lead to the conclusion that the Commission lacks jurisdiction in this matter. *Southern Armored Car Service, Inc. v. Mason*, 167 So.2d 848 (Fla. 1964).

Due Process

The Commission denied FIPUG its constitutional and statutory procedural due process rights when, without providing notice or the opportunity to be heard, Commission staff privately met with and briefed Commissioners and provided briefing materials which contained material facts not presented during the evidentiary hearing. Specifically, since FPL's Petition was a matter of first impression for the Commission, and no other regulatory jurisdiction in the country has authorized an investor-owned electric utility like FPL to venture into the natural gas drilling, extraction and production business, the regulatory actions of

other governmental bodies that addressed natural gas reserves were an important and material issue in the case.

FIPUG made a public records request for documents used or provided to the Commission regarding the FPL gas reserve petition that were not admitted into evidence during the proceeding. After reviewing more than 400 documents that the Commission produced, FIPUG discovered certain material factual information improperly shared with Commissioners since the information was not part of the record. Specifically, unbeknownst to FIPUG until after the Commission voted on the FPL's Woodford project, staff furnished Commissioners with information about the City of Los Angeles Department of Water and Power purchase of a portion of a gas reserve project in Wyoming. Staff also furnished information to the Commission about liability associated with the Woodford project that was not part of the record.

Section 120.57(1)(b), F.S., describes the process which must be afforded to parties during an administrative hearing involving disputed issues of material fact. This statute provides in pertinent part that: "If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material." The Commission considered important material of which FIPUG was unaware until after the Commission approved the Woodford project in violation of FIPUG's due process rights.

Additionally, the Commission violated FIPUG's constitutional and statutory procedural due process rights when it permitted the same staff who actively participated in the case during discovery and the evidentiary hearing to meet privately with the Commission to discuss the case. Staff is a party to the proceeding and as a party is represented by its own counsel. A party who helps shape the evidence in the record (and outside the record in this case) should not be permitted to publicly participate in the noticed evidentiary hearing by introducing evidence and cross-examining witnesses, and then later meet privately with Commissioners to discuss the evidence and the case. There is no record of these discussions.

Due process turns on the facts and circumstances of each case, and in this case, the Commission thwarted FIPUG's procedural due process rights. No single rigid test to determine when a procedural due process violation exists, but that the facts of each case must be considered. *Hadley v. Dep't of Admin.*, 411 So.2d 184, 187 (Fla. 1982). In this case, FIPUG's constitutional and statutory due process rights were violated.

Testimony on Matters of Law

Finally, the Commission erred by denying FIPUG's motion to strike the expert testimony of a non-lawyer PSC Commissioner addressing questions of law contained in prior Commission orders and in state statutes. The Commission's

policy is contained in state statutes, Commission rules, and Commission orders. Like a court, the Commission is best equipped to express its legal views. The opinion testimony of a former PSC Commissioner about past Commission orders, and the former Commissioner's opinions about his personal interpretations of state statutes, should not have been admitted into evidence. Lee County v. Barnett Banks, Inc. 711 So2d 34 (Fla. 2nd DCA 1977).

The Commission's Final Order approving FPL's petition to recover gas reserve costs of the Woodford project through the fuel clause should be reversed.

ARGUMENT

Standard of Review.

Whether the provisions of s. 366.04 F.S. confer jurisdiction on the Commission to consider and approve a public utility's use of ratepayer money to participate in the competitive natural gas market by investing in the Woodford project is a question of law subject to de novo review by the Court. *See, Lee County Elec. Co-op., Inc. v. Jacobs,* 820 So.2d 297, 300 (Fla. 2002) (parties agreed that the issue of whether s. 366.04 F.S. vests the Commission with jurisdiction was subject to de novo review). *See also, Johnson v. State,* 78 So. 3d 1305, 1310 (Fla. 2012) (judicial interpretations of statutes are pure questions of law subject to de novo review).

Similarly, questions pertaining to violations of due process are subject to de novo review. *Philip Morris USA, Inc. v. Douglas,* 110 So. 3d 419, 430 n.7 (Fla. 2013) cert. denied, 134 S. Ct. 332, 187 L. Ed. 2d 158 (2013), citing *State v. Myers,* 814 So.2d 1200, 1201 (Fla. 1st DCA 2002) (the de novo standard of review applies to "the trial court's legal conclusion as to whether the facts constitute a due process violation").

The issue regarding the admissibility of expert witness testimony in this case is also a pure question of law subject to de novo review. While rulings on the admissibility of evidence are generally reviewable under an abuse of discretion standard, in this case, the PSC denied FIPUG's Motion to Exclude or Strike Inadmissible Expert Testimony Pertaining to Questions of Law and admitted contested testimony without the required evidentiary hearing and wholly on the basis of legal conclusions drawn in part from prior final orders of the PSC that contain interpretations of s. 90.702 prior to amendment of that statute in 2013. *See, Hildwin v. State,* 951 So. 2d 784, 791 (Fla. 2006) (circuit court ruling on admissibility of expert witness testimony and related material without an evidentiary hearing and based solely on the arguments of the parties and supporting documentation warrants de novo review where question of admissibility transcends any particular dispute).

I.
THE COMMISSION EXCEEDED ITS JURISDICTION TO CONSIDER AND GRANT FPL'S PETITION TO VENTURE INTO THE NATURAL GAS RESERVE BUSINESS IN OKLAHOMA

Administrative bodies or agencies created by the Legislature, including the Commission, are creatures of statute. *See, Advisory Opinion to the Governor,* 223 So.2d 35 (Fla. 1969). Thus, the Commission's powers, duties and authority are limited to those that its enabling statute expressly or impliedly confers. *City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So.2d 493, 496 (Fla 1973); *City of West Palm Beach v. Florida Public Service Commission*, 224 So.2d 322, 325 (Fla.1969). Any reasonable doubt as to the lawful existence of a particular power that the Commission attempts to exercise must be resolved against the exercise of the power in question. *Southern Armored Car Service, Inc. v. Mason*, 167 So.2d 848, 850 (Fla. 1964); *Lee County Elec. Co-op., Inc. v. Jacobs*, 820 So.2d at 300 (Fla. 2002) (the Legislature has never conferred upon the PSC any general authority to regulate public utilitites and any reasonable doubt regarding regulatory power of the PSC should be resolved against the exercise of jurisdiction).

The Legislature's statutory provision setting out the Commission's jurisdiction, s. 366.04 F.S., is not unbounded. Indeed, the Commission's jurisdictional statute, set forth in its entirety in the Appendix for convenience, is quite specific regarding the Commission's jurisdiction. Appendix at 44-47. In sum, the Legislature has provided the Commission with specific jurisdiction over

public utilities that provide electric service to supervise and regulate the following matters:

- rates and service;
- the assumption of liabilities and obligations as a guarantor, endorser or surety;
- the issuance and sale of securities;
- uniform systems and classification of accounts;
- rate structure;
- electric power conservation;
- the approval of or resolution of disputes regarding territorial agreements between utilities;
- the filing of reports as may be necessary to exercise its jurisdiction;
- the planning, development and maintenance of a coordinated electric power grid to assure an adequate and reliable source of energy for operational and emergency purposes in Florida;
- the uneconomic duplication of electric generation, transmission and distribution facilities; and
- the adoption of safety standards for transmission and distribution facilities, including the adoption of standards promulgated by the National Electric Safety Code (ANSI C2).

See s. 366.04 F.S.

The Legislature expressly and explicitly detailed the Commission's jurisdiction to allow the Commission to exercise jurisdiction over specific topics,

such as the issuance of public utility securities and instruments of indebtedness, and the adoption of ANSI safety standards. If the Legislature had envisioned an expansive jurisdictional construct, it surely would have said that the Commission has plenary jurisdiction to consider all matters affecting a public utility's business operations. It did not do so. Instead, the Legislature provided a detailed listing of the specific matters over which the Commission has jurisdiction.

Statutory construction is informed by the canon "*expressio unius est exclusion alterius*" or "to express or include one thing implies the exclusion of the other." *1000 Friends of Florida, Inc. v. Palm Beach County* 69 So.3d 1123, 1127 (Fla. 4th DCA 2011) citing *Black's Law Dictionary* (9th ed. 2009). It is apparent from reading the Commission's jurisdictional statute as a whole that the Legislature did not intend to vest the Commission with unfettered or broad jurisdiction.

In *Lee County Elec. Co-op.*, this Court noted that the Commission held "that the statutes do not 'expressly indicate that this Commission has jurisdiction to prescribe a wholesale rate structure for a rural electric cooperative.'" Accordingly, the Commission found, and this Court agreed with the Commission's reasoning, that it did not have jurisdiction to act absent express statutory language. *Lee County Elec. Co-op.*, 820 So.2d at 300. The same conclusion should be reached in this case.

The existing statutory framework addressing the Commission's jurisdiction embodied in s. 366.04, F.S., does not vest the Commission with jurisdiction expressly or by implication to approve FPL's natural gas drilling proposal. Put simply, the facts and circumstances of this case, granting FPL's request to invest ratepayer monies in the competitive oil and natural gas business in Oklahoma, are beyond the express, detailed statutory jurisdiction of the Commission and far beyond the traditional use of the fuel clause. As made clear in *Mason*, any reasonable doubt about the Commission's jurisdiction must be exercised against the existence of jurisdiction. *Mason*, 167 So.2d at 848. The Court should thus decline the suggestion that the Commission's jurisdiction should be interpreted expansively to permit FPL to engage in the natural gas exploration business in Oklahoma.

FPL, and apparently the Commission, see it differently. R. 706-720; 1478-1483. Overlooking the direction provided in *Lee County Elec. Co-op.*, the Commission concluded it has jurisdiction "over the subject matter of FPL's petition under our broad statutory authority to set rates for a public utility." R. 1482; Appendix at 15; *Lee County Elec. Co-op.*, 820 So.2d at 300. FPL, though its expert witness Deason, apparently supports the Commission's view that, in essence, any activity could fall within the Commission's jurisdiction if a majority of the Commission views the activity to be in the public interest and the activity

can be linked to utility rates. Ex. 58, p. 941, 942. Such a reading of the Commission's enabling statute would unduly expand the specific statutory direction and authority the Legislature has given the Commission.

Former PSC Commissioner and FPL witness Deason testified that, if ratepayers might save money, the Commission's jurisdiction would extend to permit FPL to purchase and put into its rate base the following: a) uranium mines (uranium is used to fuel FPL's nuclear power plants); b) a solar manufacturing facility; and c) an ownership interest in an automobile manufacturing plant, and consistent with the Woodford proposal, to earn a profit on dollars spent on the investment, at ratepayers' expense. Tr. 940-42. In other words, if the broad interpretation urged by the Commission and FPL's expert witness is adopted, the only limitation on activities or business ventures in which a public utility can invest ratepayer money and recover that investment and a return for its shareholders, is whether at least three of five Commissioners vote that the activity is in the public interest and is somehow linked to the public utility's business and rates.

Such a standard is overly broad and contrary to the public interest. If this standard were adopted, ratepayer-funded public utility investments could conceivably be made in steel mills (steel is needed to construct new power plants) or concrete plants (concrete poles are often used for transmission and distribution

poles) as well as almost any other activity or venture as long as there was some tangential link to rates. Surely, when crafting the Commission's jurisdictional statute, the Legislature did not contemplate authorizing a public utility to use ratepayer money to make investments in volatile and competitive markets, and to enjoy a Commission-authorized return/profit on such investments, irrespective of whether ratepayers actually save or lose money.

Further, the expansive interpretation of the Commission's jurisdiction FPL advocates would have the effect of making the Commission arbiters of the likely success or failure of particular business ventures with which they are largely unfamiliar. Using business judgment to evaluate speculative proposals, the Commission would be forced to decide whether or not a proposed public utility investment of ratepayer dollars in a particular venture should be approved based on the likelihood of business success and potential ratepayer savings. Arguably recognizing the new role the Commission is being asked to play, Commission Chairman Graham made the following observation at the start of the hearing: "I know that this is new territory that we are going through, so I want to make sure that we dot as many I's (sic) and cross as many T's (sic) as we can." Tr. 24. The Legislature, however, when detailing the subject matter experience required of prospective commissioners, did not include business as a qualifying field of experience for appointment to the Commission. See, s. 350.031(5) F.S. This

further suggests that the broad statutory construction the Commission espouses, which would require Commissioners to exercise business judgment about future proposed ventures, such as investing ratepayer dollars in future oil and natural gas fields, or uranium mines for that matter, is misplaced.

In sum, the Legislature's directive found in s. 366.01, F.S., states in pertinent part that the regulation of public utilities shall be liberally construed for the protection of the public welfare. A broad statutory construction which authorizes regulated public utilities to invest ratepayer monies in the risky and volatile oil and gas business in Oklahoma, and by logical extension, in all manner of other business ventures only tangentially related to the monopoly provision of electricity to Floridians, does not protect the public welfare and is counter to the judicial direction provided in *Lee County Elec. Co-op.*, 828 So.2d at 297-300. Thus, the Commission's finding of subject matter jurisdiction over FPL's request should be overturned.

II.
FIPUG'S DUE PROCESS RIGHTS WERE VIOLATED WHEN COMMISSION STAFF WHO ACTIVELY PARTICIPATED AS A PARTY AT THE EVIDENTIARY HEARING CONDUCTED PRIVATE BRIEFINGS WITH THE COMMISSIONERS DURING WHICH EVIDENCE NOT INTRODUCED AT HEARING WAS PART AND PARCEL OF THE BRIEFING MATERIALS PROVIDED TO THE COMMISSIONERS

FIPUG, as a party to this proceeding, has constitutional and statutory procedural and substantive due process rights. *See*, Article I, Section 9, Florida

Constitution; s. 120, F.S.; *State Road Dept. v. Cone Bros. Contracting Co.*207 So.2d 489, 491 (Fla. 1st DCA 1968) ("the general purpose of the administrative procedures act is to provide a means by which state agencies charged with regulatory duties involving the supervision of persons or activities operating under their particular jurisdiction may efficiently, economically and expeditiously adjudicate in accordance with procedural due process such person's legal rights, duties, privileges or immunities arising under the law which the agency is given the right and duty to administer.")

It is well-settled that, "[t]he extent of procedural due process protections varies with the character of the interest and nature of the proceeding involved." *Hadley v. Dep't of Admin.,* 411 So.2d 184, 187 (Fla.1982) (citing *In Interest of D.B.,* 385 So.2d 83, 89 (Fla.1980)). This Court has made clear that "[t]he fundamental requirements of due process are satisfied by reasonable notice and a reasonable opportunity to be heard." *Fla. Pub. Serv. Comm'n v. Triple "A" Enter., Inc.,* 387 So.2d 940, 943 (Fla.1980) (citing *Ryan v. Ryan,* 277 So.2d 266 (Fla.1973); *Powell v. State of Ala.,* 287 U.S. 45 (1932); *Dohany v. Rogers,* 281 U.S. 362 (1930)). Due process cannot be compromised "on the footing of convenience or expediency." *United Tel. Co. of Fla. v. Beard,* 611 So.2d 1240, 1243 (Fla.1993) (quoting *Fla. Gas Co. v. Hawkins,* 372 So.2d 1118, 1121 (Fla.1979)).

In the area of administrative law, due process requirements are found in chapter 120, F.S., the Florida APA. The provisions of s. 120.569, F.S, detail the procedure to be followed in determining the substantial interests of a party. Section 120.57, F.S., sets forth the procedures for fact-finding hearings. These sections are pertinent to FIPUG's contention that the Commission improperly infringed upon FIPUG due process rights. *See, Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc.*, 3 So.3d 1220, 1231 (Fla.2009). Further, the Legislature prescribed in s. 120.569(1), F.S., that the additional procedural requirements listed in s. 120.57(1)(b), F.S., and set forth below, apply to proceedings such as this one that involve disputed issues of material fact:

> All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

Furthermore, s. 120.68(7)(c), F.S. requires reversal of agency action when the fairness or correctness of the proceeding "may have been impaired by a material error in procedure or a failure to follow prescribed procedure."

A. The Undisclosed Ex Parte Provision of Documents and Additional Facts to Commissioners after the Hearing was a Material Error and a Violation of Due Process.

In direct violation of the statutory due process procedural requirement the Legislature mandated in s. 120.57(1)(b), F.S., after the evidentiary record in the proceeding was closed, the Commission received factually relevant material during private briefings by a party to the case, namely Commission staff. FIPUG was not provided notice of these briefings or the materials provided during the briefings, nor was it provided with any opportunity to conduct cross-examination about the documents or to provide rebuttal to the documents. As detailed in FIPUG's Statement of the Case and Facts, *supra*, FIPUG only learned that extra-record material was provided to the Commission after making a public records request. R. 1833.

Within the more than 400 pages of material provided was factual information addressing action the Los Angeles Department of Water and Power took to secure gas natural gas reserves in Wyoming. At hearing, the parties delved deeply into the precedent-setting nature of FPL's requested regulatory action and adduced evidence that FPL would be the first investor-owned electric utility in the country to receive regulatory approval to venture into the natural gas industry. Thus, the probative, material information provided to the Commission after the close of the evidentiary hearing regarding the Los Angeles Department of Water and Power was a violation of FIPUG's due process rights. A copy of FIPUG's

public records request and the document described above is included in the Appendix to FIPUG's Initial Brief. Appendix at 112-113.

Additionally, as detailed in FIPUG's Statement of Case and Facts, the parties spent considerable hearing time addressing the risks and liabilities associated with the Woodford project, an important issue in the case. Apparently, after the hearing, staff prepared a "pamphlet on liability" which was privately shared with Commissioners. R. 1546, 1547. It remains somewhat unclear exactly what was being referenced as a "pamphlet on liability", but it does appear not to have been record evidence. R. 1830 – 2237. Again, FIPUG was not provided with this document at hearing and had no opportunity to review it or conduct cross-examination regarding it.

FIPUG had no notice that the information in question, including factual information, was provided to the Commissioners until its public records request was completed. The Commission provided FIPUG with the requested documents after the Commission had already voted to grant FPL's petition to approve the Woodford project. Only FIPUG's subsequent review of the public record documents, provided or used by the party known as staff to brief Commissioners, revealed the existence of the factual information about the City of Los Angeles Department of Water and Power. Obviously, given the timing, FIPUG was not

"given an opportunity to cross-examine or challenge or rebut the material" as s. 120.57(1) , F.S., expressly requires.

Further, as made clear in the *Triple "A"* case, the Court's due process review should consider whether FIPUG received reasonable notice and a reasonable opportunity to be heard. *Triple "A,"* 387 So.2d at 943. It did not. FIPUG's notice was provided after the close of the evidentiary record in the case, after the Commission had voted to approve FPL's petition, and only after FIPUG made a specific request for the documents. Given these facts, FIPUG's procedural due process rights were violated and it did not receive a fair hearing under the requirements of the APA or Article I, Section 9 of the Florida Constitution.

B. The Undisclosed Ex Parte Post-Hearing Meeting of Staff, a Party in the Proceeding, with Commissioners is a Material Violation of Due Process

The unnoticed, post-hearing private briefings with Commissioners that staff conducted, during which key evidence was apparently discussed, presents FIPUG with further due process concerns that should be addressed and rectified. As detailed in FIPUG's Statement of the Case and Facts, the staff is a party to the proceeding. This Court has previously reviewed the role of legal staff at the Commission. In *Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995), the Court found that due process was violated when the staff attorney who prosecuted the case also served as a post-hearing legal advisor to the Commission.

In this case, the Commission had one lawyer serve as the advisor to the Commission, and other lawyers represent Commission staff. FIPUG does not take issue with this arrangement.

Here, however, a party, professional staff, in addition to acting as a bona fide party (that propounded discovery, had its counsel counsel cross examine witnesses, and advocated the introduction of exhibits into the record over objection), was afforded the opportunity to meet privately with the decision-makers post-hearing to discuss the merits of the case. Not only did these private discussions take place, but, unbeknownst to FIPUG until after the Commission decided the matter at issue, the party known as staff selected and presented the Commissioners with reams of substantive information of which other parties were unaware.

Because this proceeding was conducted as a quasi-judicial proceeding and thus required an impartial decision-maker, the ex parte meetings between staff and the Commissioners violated FIPUG's due process rights. *See*, *Cherry Communications v. Deason*, 652 So.2d 803, 804 (Fla. 1995) (in quasi-judicial administrative proceedings, an impartial decision-maker is a basic constituent of minimum due process).

FIPUG recognizes that staff's role may be to cross examine witnesses, introduce exhibits and help shape the evidence that is presented to the Commission, so long as those activities take place at hearing. *See*, *South Florida*

Natural Gas Co. v. Pub. Serv. Comm'n, 534 So.2d 695, 697 (Fla.1988) (Commission may use its staff to test the validity, credibility, and competence of the evidence presented). This Court has held, however, that that the Commission's discretion in its use of staff is not absolute. *Legal Environmental Assistance Fund v. Clark*, 668 So.2d 982, 985 (Fla. 1996) (*LEAF*). As noted by the Court in *LEAF*, it is permissible for a staff attorney to participate at the hearing and also advise the Commission at publicly held agenda conferences. Here, however, the party known as staff met privately with the Commissioners after the close of the hearing and the evidentiary record. It further provided substantial documentation not disclosed to the other parties. These ex parte communications violated minimum due process in this proceeding. *See, Cherry*, 652 So.2d at 805 (due process was violated when the staff attorney who prosecuted the case also assumed role of post-hearing advisor to the Commission and "submitted memoranda to the Commission panel, which were not initially provided to Cherry.").

Section 120.66 of the APA prohibits harmful post-hearing ex parte communications in section 120.569 and 120.57 administrative proceedings. The pertinent text of section 120.66 is set forth below:

> 120.66 Ex parte communications.—
> (1) In any proceeding under ss. 120.569 and 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the presiding officer by:

> (a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.
> (b) A party to the proceeding, the party's authorized representative or counsel, or any person who, directly or indirectly, would have a substantial interest in the proposed agency action.
>
> Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54.

Under the statute, prohibited ex parte communications include private communications between the Commission and "any public employee engaged in prosecution or advocacy in connection with the matter under consideration, or a factually related matter," or between the Commission and "a party to the proceeding." While the APA exempts private communications between an agency head and "advisory staff," in this case the staff that met privately with the Commissioners was not "advisory," but fully participated in the hearing as a "party." Although the Commission may argue that the distinction between "party" and "advisory staff" is a distinction without a difference, FIPUG's constitutionally-based entitlement to minimum due process cannot be be disregarded in the administrative arena. Fundamental fairness has been impaired when participatory staff has private access to the Commissioners to provide documents and other information, but other parties do not.

FIPUG's entitlement to procedural due process is rooted in its members' constitutionally protected property interests as FPL ratepayers. *See, Crocker v. Pleasant*, 778 So. 2d 978, 983 (Fla. 2001) (a party seeking procedural due process must establish the existence of a constitutionally protected property or liberty interest); *Moser v. Barron Chase Sec., Inc.*, 783 So. 2d 231, 236 (Fla. 2001) ("[p]roperty rights are among the basic substantive rights expressly protected by the Florida Constitution.").

The result of the Commission's final order approving FPL's Woodford gas reserve project petition, if left in place, will be that FIPUG members will be charged for the substantial monies that FPL spends on the Woodford project. The property interests of key FIPUG members and other FPL ratepayers will be adversely affected. The Florida Constitution, Article I, Section 9 protects the property interests of FIPUG members. State v. Rose, 114 So. 373, 374 (Fla. 1927) (statutes involving property rights must be construed with reference to due process).

"There is no single test to be applied to determine if the requirements of procedural due process have been met." *Citrus County v. Florida Rock Industries, Inc.*,726 So.2d 383, 388 (Fla. 5th DCA 1999). Thus, due process will be determined based on facts of each case. Allowing Commission staff, a named party in this contested, adversarial proceeding to cross-examine witnesses and

introduce evidence during a contested evidentiary hearing, and then, without notice or process, to meet privately with the trier of fact to discuss the very evidence which staff adduced at hearing, and to supplement the record facts with non-record evidence as was done here, cannot be reconciled with Article I, Section 9 of the Florida Constitution. FIPUG's due process rights were violated.

III.
THE COMMISSION ERRED WHEN PERMITTING EXPERT TESTIMONY ON LEGAL MATTERS

The Commission erred by admitting into evidence the opinions of former commissioner Mr. Deason on questions of law. FPL engaged Mr. Deason, who is employed by a private law firm as a "non-lawyer special consultant," to advise the Commission as to "the regulatory policy basis by which the Commission should consider FPL's proposal," "interpretations of regulatory principles" as they apply to the facts alleged by FPL, and "interpretations of policy" drawn from the Commission's prior final orders. Tr. 875, 879, 939.

The Commission erred in admitting Mr. Deason's opinions as evidence of record. The interpretation and application of statutes, regulations, and prior final orders are legal determinations that must be made by the tribunal. *Lee County v. Barnett Banks*, Inc., 711 So.2d 34 (Fla. 2nd DCA 1997) ("Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'"); *Gyongyosi v. Miller*, 80 So. 3d

1070, 1075 (Fla. 4th DCA 2012), *rev. denied*, 109 So.3d 780 (Fla. 2013) (interpretation of a regulation is a question of law that cannot be the subject of expert testimony); *Edward J. Seibert v. Bayport B. & T. Club*, 573 So.2d 889, 891-92 (Fla. 2nd DCA 1990) (an expert should not be allowed to testify concerning questions of law); *Ocean's Edge Dev. Corp. v. Town of Juno Beach*, 430 So. 2d 472, 474-75 (Fla. 4th DCA 1983) ("The error we perceive in the trial court's findings ... lies in its deviation from the plain definitions within the ... ordinance in favor of after-the-fact expert testimony as to legislative intent to fill in the cracks. Government cannot function in such after-the-fact fashion.").

As a general rule, opinion testimony regarding the interpretation of statutes, regulations, or agency final orders is not admissible. In re *Estate of Williams*, 771 So.2d 7, 8 (Fla. 2nd DCA 2000) (opinion consisting of interpretation of Florida law should have been excluded); *Devin v. City of Hollywood*, 351 So.2d 1022, 1026 (Fla. 4th DCA 1976) (trial court erred in relying upon expert testimony to determine the meaning of terms which were questions of law to be decided by the trial court.). Narrow exceptions to this rule have been made in cases involving the testimony of a qualified lawyer on questions so "complex and obscure" as to be "beyond the ordinary understanding" of the tribunal. *Ciba-Geigy Ltd. v. Fish Peddler, Inc.*, 691 So. 2d 1111, 1121 (Fla. 4th DCA 1997) (affidavit of Ecuadorian legal expert was admissible in case involving Ecuadorian, German and Swiss law regarding shrimp

farming, pesticides, and breach of contract). Here, the Commission's governing statute, regulations, and prior final orders may not properly be deemed so "complex and obscure" as to be "beyond the ordinary understanding" of the Commission.

Moreover, it is well established that the testimony of an individual as to the intent or "mind" of a law- or policy-making body is inadmissible as "evidence" of the purpose or intent of the law or policy, even when offered by someone who served as a member of the law-making body at the time the law or policy was made. *Security Feed & Seed Co.*, 138 Fla. 592, 596 (Fla. 1939) ("We do not overlook the support given appellants contention by affidavits of members of the Senate as to what they intended to accomplish by the act brought in question. The law appears settled that such testimony is of doubtful verity if at all admissible to show what was intended by the Act.").

To the extent the Commission admitted Mr. Deason's testimony as expert opinions on the interpretation and application of law to the facts alleged by FPL, or as evidence of the purpose or intent of the Commission's prior final orders, the Commission erred and its ruling must be reversed.

In its order below, the Commission did not respond to FIPUG's contention that Mr. Deason's opinions are inadmissible improper interpretations of law, but instead applied an obsolete version of s. 90.702, F.S., "as a guide" to conclude that Mr. Deason's non-factual personal opinions are admissible because Mr. Deason's

"specialized technical knowledge" as a former Commissioner "will assist the Commission in determining facts":

> When applying Section 90.702, F.S., as a guide only, witness Deason, as a former Commissioner, possesses specialized technical knowledge, acquired through his experience, training, and employment at the Commission. Witness Deason's testimony is relevant to an issue to be determined in this case, namely, whether FPL's proposed project falls within the framework of the Commission's duty to regulate in the public interest. Moreover, witness Deason's testimony will assist the Commission in the determination of facts to be weighed by the Commission in deciding the issues presented. As such, witness Deason's testimony meets the requirements of expert witness testimony.

R. 1316; Appendix at 50.

As described by Mr. Deason, and as evident from the record, the challenged testimony is not factual, nor "technical" as that term is normally understood in an evidentiary context. The testimony consists of opinions on legal issues, or as described by FPL: "advice from a former Commissioner on how the Commission's regulatory principles and policies, including its prior precedent, should apply in evaluating FPL's proposed gas reserve project." R. 1315; Appendix at 49.

The Commission erred both by ignoring the impermissible nature of the opinions and also by relying on an outdated version of s. 90.702, F.S., (and prior Commission orders applying the outdated statute). In 2013, s. 90.702, F.S., was substantially amended to prohibit the admission of "specialized knowledge" not

based on sufficient facts or data and not the product of reliable principles and methods, even if the testimony "will assist the trier of fact." The amended statute is as follows:

> s. 90.702, F.S. Testimony by experts.—If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:
>
> (1) The testimony is based upon sufficient facts or data;
>
> (2) The testimony is the product of reliable principles and methods; and
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

Section 90.702, F.S. (2014). As amended, the statute prohibits pure opinion testimony based only on "specialized knowledge" and not based on facts, data, and reliable principles and methods. See, *Perez v. Bell South Telecommunications, Inc.*, 138 So.2d 492, 497 (Fla. 3rd DCA 2014) *rev. denied*, 153 So.3d 908 (2014) ("Expert testimony that might otherwise qualify as "pure opinion" testimony is expressly prohibited."). Mr. Deason's opinion testimony interpreting the law and its application to FPL's proposal is not factual, nor is it based on any reliable principle or method. To the extent the Commission relied on former s. 90.702, F.S., as a basis to admit the testimony as "specialized knowledge that will assist the Commission," the Commission erred and its ruling should reversed. *Perez, supra.*

In addition to its use of the incorrect version of section 90.702 as a guide, the Commission concluded that Mr. Deason's testimony is admissible because "[s]ection 120.569(2)(g) F.S. is much broader than the Florida Evidence Code allowing the consideration of all relevant, non-cumulative evidence that is the type commonly relied upon by a reasonably prudent [person] in the conduct of their affairs."

Section 120.569(2)(g), F.S. provides in pertinent part:

> (g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

Contrary to the Commission's assertion, the APA does not authorize the admission of the subjective interpretations of law and policy Mr. Deason offered, which are neither factual in nature nor based on facts "of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." Common sense dictates that a reasonably prudent person whose affairs require reliable information pertaining to the application of law to FPL's proposal would turn to the text of the actual statutes, regulations, and applicable prior orders, if any, and perhaps to a lawyer. Mr. Deason candidly acknowledges that the governing statutes and regulations themselves comprise the best source of information with respect to the questions of law before the Commission, and that with respect to his

own interpretation of these sources, other "experts" can and do disagree. Ex. 58, p. 88-90. The Commission erred in concluding that Mr. Deason's personal interpretations of law are the "type of competent evidence that may support a finding of fact" pursuant to section 120.569(2)(g), Florida Statutes. R. 1316.

The Commission's error is prejudicial and material as it results in the admission into evidence of the opinion testimony of one of the longest-serving former Commissioners in the history of the Commission. In addition to the improper nature of the opinions as interpretations of law, the opinions were offered in the witness' capacity as a privately employed non-lawyer special consultant engaged by FPL, in whose favor the Commission has ruled. The admission of the testimony violates long-standing principles pertaining to the admission of expert testimony, and as a matter of both propriety and law should not have been admitted into the record or relied upon by the Commission in ruling on FPL's petition.

CONCLUSION

For the reasons and arguments set forth above, the Commission's Order granting FPL's Woodford gas reserve project petition should be vacated and reversed.

Respectfully submitted this 8th day of June 2015.

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I HEREBY CERTIFY that this Brief was typed in Times New Roman 14 font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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