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.

REPLY BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations and short forms are used in this brief:

APA	Chapter 120, Florida Statutes (2015) (Florida Administrative Procedure Act)
EVIDENCE CODE	Chapter 90, Florida Statutes (Florida Evidence Code)
FIPUG	Appellant Florida Industrial Power Users Group
FPL	Appellee Florida Power & Light Company
FPL Br. at #	Florida Power & Light Co. Answer Brief at Page #
OPC	Appellant Citizens of the State of Florida (Office of the Public Counsel)
PETROQUEST	PetroQuest Energy, Inc.
PSC	Appellee Public Service Commission (Art Graham, Etc., et al.)
PSC Br. at #	Public Service Commission Answer Brief at Page #
WOODFORD	USG Properties Woodford I, LLC, a Florida Power & Light Co. Affiliate
WOODFORD ORDER	Public Service Commission Order No. PSC-15-0038-FOF-EI, issued January 12, 2015 (Order on Appeal)
TR. at #	Official Transcript of Proceeding Below at Page #

ARGUMENT

I.
STANDARD OF REVIEW

Appellees urge the Court to defer to the PSC in the PSC's determination of the extent of its own authority. As noted by the Court in *United Tel. Co. of Florida v. Pub. Serv. Comm'n*, 496 So. 2d 116, 118 (Fla. 1986), the Court does not owe deference on the issue of jurisdiction:

> We note preliminarily that "orders of the Commission come before this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. ... Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives its power solely from the legislature. As we said in Radio Telephone Communications, Inc. v. Southeastern Telephone Co., 170 So.2d 577, 582 (Fla.1965):
>
> > [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Sec. 364.20, Fla.Stat., F.S.A. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. ***If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested.***

United Telephone, 496 So. 2d at 118 (citations omitted) (emphasis added).

Both Appellees also contest the standard of review applicable to the PSC's denial of FIPUG's motion to strike former Commissioner Deason's testimony on issues of law. FPL argues that *Hildwin v. State*, 951 So. 2d 784, 791 (Fla. 2006),

cited by FIPUG, is inapplicable here because the case involved application of the Evidence Code. The relevant holding in *Hildwin* -- that evidentiary rulings based only on questions of law and not on evidentiary findings are subject to the *de novo* standard of review -- is not premised on the Evidence Code, but on the general principle that when an evidentiary ruling is based on fact-finding, the "abuse of discretion" standard applies; when the ruling is based only on pleadings and argument, as was the case here, the ruling is reviewed *de novo*. *Hildwin*, 951 So.2d at 784; *Parker v. State*, 873 So. 2d 270, 278 (Fla. 2004). In the cases relied on by the PSC, *McWatters v. State*, 36 So.3d 613, 639 (Fla. 2010) and *Alsobrook v. State*, 600 So.2d 1173, 1174-75 (Fla. 1st DCA 1992), the evidentiary rulings involved the determination of facts, unlike the ruling below, which was based only on legal arguments and thus is subject to *de novo* review.

II.
THE PSC LACKS JURISDICTION TO AUTHORIZE FPL TO USE RATEPAYER MONEY TO INVEST IN A THIRD-PARTY GAS EXTRACTION VENTURE IN OKLAHOMA

FPL argues that the PSC has jurisdiction to authorize FPL to invest ratepayer funds in a third-party natural gas extraction company, PetroQuest Energy, Inc., and to earn a rate of return from ratepayers, regardless of any actual cost savings to ratepayers. FPL argues that the PSC has "broad powers to act" and a regulated electric utility should be able to seek recovery for any cost, unless express

legislative language declares that certain actions not be taken or certain costs not recovered. FPL Br. at 12.

FPL's argument contradicts both the detailed legislative language in § 366.04 and also this Court's decisions limiting the PSC's jurisdiction to the specific powers delineated in that statute. Neither FPL nor the PSC avoid (or attempt in earnest to do so) this Court's holding in *Southern Armored Car Service, Inc. v. Mason*, 167 So.2d 848, 850 (Fla. 1964) and *Lee County Elec. Co-op., Inc. v. Jacobs*, 820 So.2d 297, 300 (Fla. 2002), that the Legislature has not conferred upon the PSC any "general authority" to regulate public utilities, and that any reasonable doubt regarding the authority of the PSC should be resolved against the exercise of jurisdiction.

Appellees argue that the proposed PetroQuest investment falls within the scope of the PSC's "hedging" policy and is therefore within the PSC's authority. The PetroQuest project presents a question of first impression and bears no meaningful resemblance to the "hedging activities" previously considered by the PSC. [1] The PSC's order below makes no reference to any quantity of natural gas to be purchased on behalf of ratepayers. Instead, the order authorizes FPL to use

[1] Prior "hedging activities" approved by the PSC involve the payment of a fixed price for a *fixed quantity of fuel or purchased power*. Appellees argue that, as long as the price is fixed, the *quantity* of fuel need not be fixed in order to "manage the price volatility" of fuel. (PSC Br. at 27-28; FPL Br. at 20).

ratepayer money to purchase only "a portion of PetroQuest's working interest in [the] wells in the Woodford Shale Gas Region in Oklahoma." (PSC Order No. PSC-15-0038-FOF-EI). There is no statutory authority authorizing the PSC to approve such arrangements.[2]

III.
THE PSC STAFF'S POST-HEARING COMMUNICATIONS WITH THE COMMISSION VIOLATED MINIMUM DUE PROCESS REQUIREMENTS

Appellees freely admit that documentary information not in the record was provided to Commissioners during unnoticed, private, post-hearing meetings between certain staff and individual Commissioners, and contend that this is an acceptable practice. PSC Br. at 10, 38-40; FPL Br. at 34. According to Appellees, such evidence apparently does not need to be made part of the record, no other party needs to be notified that additional evidence was presented to the trier of fact after the close of the evidentiary proceeding, and no notice of such meetings needs to be given.

[2] The PSC improperly characterizes FIPUG's position on jurisdiction as "merely" disagreeing with certain "factual conclusions" below. PSC Br. at 24. While FIPUG disagrees with certain factual findings, including the PSC's conclusion that ratepayers likely will save money as a result of the PetroQuest project, FIPUG squarely contests the PSC's jurisdiction to approve the third-party investment proposed by FPL, and has not raised as an issue on appeal that the record below does not contain evidence that could support the PSC's findings.

The PSC is admittedly a unique regulatory body; however, its evidentiary proceedings are governed by the Administrative Procedure Act and the PSC's procedural rules. Providing the trier of fact with additional, unnoticed evidence after the record in the evidentiary hearing is closed cannot be reconciled with the key tenets of due process set forth in the APA, namely reasonable notice and an opportunity to be heard. FIPUG received no notice that non-record information was being provided and had no opportunity to review or test the information through inquiry prior to the PSC discussing the information and then approving FPL's petition. A party to a quasi-judicial hearing, by virtue of its direct interest that will be affected by official action, "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts." (emphasis added). *Kupke v. Orange County*, 838 So.2d 598, 599 (Fla. 5th DCA 2003). Only the comments of a Commissioner referring to a "pamphlet on liability" made during the PSC's consideration of the Woodford project alerted FIPUG that the Commissioners had been provided additional information during staff briefings with which FIPUG was not familiar. A subsequent public records request revealed that non-record documents relating to the Los Angeles Department of Water & Power obtaining natural gas reserves in Wyoming was provided to the Commissioners. A "pamphlet on liability," which is the phrase used by Commissioner Brown when commenting on meeting with staff, was not

provided[3]. In addition, there is no way to know or ascertain what additional non-record evidence or information was conveyed verbally. The Court should make clear that the PSC's practice does not comport with the due process tenets of reasonable notice and an opportunity to be heard.

A. The Evidentiary Proceeding Below was Quasi-Judicial and Due Process Protections Attach

Appellees assert that the proceeding below was not quasi-judicial, but was a "less formal" rate-setting proceeding to which the due process claimed by FIPUG does not apply. FPL Br. at 12, 32-34; PSC Br. at 38-39. This Court has held, however, that "[i]t is the character of the hearing that determines whether or not board action is legislative or quasi-judicial," and that "[g]enerally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy." *Bd. of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). Quasi-judicial proceedings involve notice and a hearing, and the judgment of the body is contingent upon an evidentiary showing made at the hearing. *De Groot v. L.S. Sheffield*, 95 So 2d. 912, 915 (Fla. 1957).

[3] Given that FIPUG had no notice or opportunity to inquire, exactly what was being referenced as a "pamphlet of liability" remains unclear; the documents produced pursuant to FIPUG's public records request did not contain a document clearly marked as such.

The instant proceeding arose from a petition that was initially filed in the annual fuel clause proceeding but was later carved out and tried separately from the other fuel clause matters in a two-day evidentiary proceeding. The jurisdictional question presented in this case involves the application of law and not the formulation of policy. In addition, this case involves a constitutionally protected property right, namely ratepayer money that FPL seeks to obtain for the PetroQuest investment. [4]

Appellees cite *South Florida Natural Gas Co. v. PSC*, 534 So. 2d. 695 (Fla. 1988) and *Legal Environmental Assistance Foundation v. Clark*, 668 So. 2d 982 (Fla. 1996) ("*LEAF*") in support of their argument that this proceeding is "less formal" and that the due process claimed by FIPUG does not apply. In *South Florida*, the relevant due process issue presented, and answered in the affirmative, was whether PSC staff may "make inquiry of utility witnesses and assist in evaluating the evidence" during a rate-setting hearing to test the validity,

[4] While the Commission relied in its order below on FPL's assertions that ratepayers could save money over the next 50 years, should the PetroQuest investment be approved, the Commission also acknowledged evidence of record that approval could result in ratepayers saving no money and potentially losing money. Tr. at 182, 259, 1071; Woodford Order, p. 6. This Court has found that "[p]roperty rights are among the basic substantive rights expressly protected by the Florida Constitution," and that the property rights of a party will be affected by rates it pays to a public utility. *Moser v. Barron Chase Securities, Inc*., 783 So. 2d. 231, 236 note 5 (Fla. 2001); *Florida Water Services Corporation v. Robinson*, 856 So.2d 1035, 1039 (Fla. 5th DCA 2003).

credibility, and competence of evidence presented by a utility in support of an increase. *South Florida*, 534 So.2d at 697. The question whether the same staff also can later engage in post-hearing, private meetings with Commissioners, discuss the merits of the case and present additional information and evidence outside of the record, was not before the Court.

The relevant question addressed, and answered in the affirmative, in *LEAF* was whether PSC staff may participate in an evidentiary hearing as contemplated by *South Florida*, and also advise the Commission at a subsequent, *publicly noticed* agenda conference. *LEAF*, 668 So. 2d at 985 (Fla. 1996). The issue of whether the same staff participating in the evidentiary hearing could engage in post-hearing, private meetings with Commissioners, discuss the merits of the case and present additional information and evidence outside of the record, was not before the Court.

The question of whether the same staff participating in the evidentiary hearing may later engage in post-hearing, private meetings with Commissioners, discuss the merits of the case and present additional information and evidence outside of the record was more squarely presented in *Cherry Communications v. Deason, 652 So. 2d 803 (Fla. 1995).* In *Cherry*, the proceeding affected a constitutionally protected right and was quasi-judicial in nature. The Court noted

that the staff attorney "cross-examined witnesses, made objections, and argued against Cherry" at the evidentiary hearing, and that:

> [A]fter the hearing, the same attorney assumed the role of advisor to the Commission, which was now supposedly deliberating as an "impartial" adjudicatory body. In this latter capacity, the prosecutor submitted memoranda to the Commission panel, which were not initially provided to Cherry. In the memoranda, the prosecutor commented on the evidence and made recommendations based on his analysis of the record."
> . . .
> The question we now face is whether the same individual who prosecutes a case on behalf of the agency may also serve to advise the agency in its deliberations as an impartial adjudicator. ... Because the prosecution was given special access to the deliberations, this adjudicatory process "can hardly be characterized as an unbiased, critical review." ... Accordingly, we hold Cherry's rights were violated under the due process clause of our state constitution when the Commission invited the prosecutor to participate in its deliberations. See Art. I, § 9, Fla. Const."

Cherry, 652 So. 2d at 805. In setting forth the rationale for its holding, the Court referenced a relevant opinion issued by the Office of the Florida Attorney General which noted that, "more often than not, when a hearing has become heated due to the adversary nature of the particular proceeding, the natural tendency of the prosecuting attorney is to advise his board in a manner most advantageous to what he anticipates is its particular desire within the law and morality of the issues presented." *Cherry*, 652 So.2d at 804, fn. 3, citing Attorney General Op. 72-64.

The proceeding below, as in *Cherry*, involved constitutionally protected property rights and was adversarial -- the ratepayers represented by OPC and FIPUG vigorously opposed FPL's proposal to invest ratepayer money in PetroQuest and to earn a return on the money invested. In the proceeding below, as in *Cherry*, the Commission's role was to act as an impartial adjudicator. And in a further parallel, the PSC staff participating in the hearing below introduced evidence that supported FPL's petition and engaged in examination of FPL's witnesses. (*See*, Ex. 44, 45, 50, 55-58; Tr. 263-287, 958-961, 1065-1079), then later met privately, without notice, with Commissioners to discuss the merits of the case and present additional information and evidence outside of the record. The "special access" cautioned against in *Cherry* took place here and violated minimum due process requirements.

B. The PSC's Due Process Error Is Not Harmless

Appellees argue that even if providing non-record evidence to the trier of fact during unnoticed, post-hearing meetings was error, "any error would be harmless error because...competent, substantial record evidence [was] presented at the hearing which supported the PSC's findings." PSC Br. at 41; FPL Br. at 34-35. FPL argues that because the Woodford Order does "not refer to investments by the City of Los Angeles or the liability issues apparently referred to in the alleged pamphlet," FIPUG cannot show that the PSC relied upon such information, and the

error therefore was harmless. FPL Br. at 34-35. In making their respective harmless error arguments, neither Appellee calls the Court's attention to the case of *Special v. West Boca Medical Center*, 160 So.3d 1251 (Fla. 2014), in which this Court established the relevant harmless error test and its application:

> To test for harmless error, the beneficiary of the error has the burden to prove that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the error must prove that there is no reasonable possibility that the error contributed to the verdict.

Special, 160 So.3d at 1256. The Court emphasized that the harmless error test does not involve a consideration of whether substantial or sufficient evidence supported the decision of the trier of fact. *Id*. Appellees' argument that competent, substantial evidence supported the PSC's decision, regardless of the alleged error, is misplaced. *Special* at 1256. The beneficiary of the error, in this case the Appellees, must demonstrate that there is "no reasonable possibility" that the error contributed to the PSC's decision. Neither FPL nor the PSC demonstrated "no reasonable possibility" that the error contributed to the PSC's decision.[5]

Finally, a determination that an error is harmless, as urged by Appellees, requires an examination of the "entire record" by the appellate court. *Special*, 160

[5] Even if Appellees had tried to make such demonstration, they would have come up short. Commissioner Brown's reference to and questions about the "pamphlet on liability" at the time the Commission was considering the merits of the case establishes that such information obviously played a role in the PSC's decision. Why else would the "pamphlet" have been referenced and the related questions asked?

So.3d at 1256. Here, the Court cannot even be sure that it has a complete record before it to review. While FIPUG's public records request revealed the presence of non-record documentary evidence in the form of information about the Los Angeles Department of Water and Power securing natural gas reserves in Wyoming, who knows what other non-record information staff may have orally conveyed while meeting with Commissioners in unnoticed meetings? No record exists. Given the current PSC practice, what is to prevent a well-meaning staff member, wanting to ensure the PSC has the latest information, from advising the Commission about a material and relevant development or fact located during a recent Google search? Nothing. "An appellate court's harmless error analysis is not limited to the result in a given case, but it necessarily concerns the process of arriving at that result." *Id* at 1257. This Court is unable to apply its harmless error test in this case given the incomplete nature of the record before it, and based on the due process deficient process that the PSC used in reaching its decision.

C. FIPUG Did Not Waive Its Due Process Rights

FPL's suggestion that FIPUG waived its due process rights by joining in a procedural objection made by OPC during the evidentiary hearing is belied by a careful review of the transcript. (FPL Br. at 31; Tr. 30-31). At the hearing, OPC, relying on Fla.R.Civ.P. 1.310(f)(3)(a), objected to staff's introduction of depositions into evidence and noted in its objection that staff historically has stated

that it is "not a party." Tr. at 30-31 FIPUG joined OPC's "sword and shield" objection. FIPUG's joinder in the objection was not a waiver of FIPUG's due process rights. Overcoming the presumption against wavier of a constitutional right requires a clear showing that there was an intentional abandonment of a known right. *Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245 (1966). ("Where there is doubt as to whether a constitutional right is waived, such doubt should be resolved in favor of the party in whom the right is vested."). There is no basis to conclude that FIPUG waived its due process rights.

IV.
THE PSC ERRED IN ADMITTING FORMER COMMISSIONER DEASON'S INTERPRETATIONS OF LAW

Appellees respond to FIPUG's argument that the PSC erred in admitting the testimony of FPL's expert witness, former Commissioner Deason, for purposes of interpreting the law, by asserting that Florida "civil cases" and the Evidence Code have no bearing on the question. (PSC Br. at 44; FPL Br. at 35-37). It is true that §120.569(2)(g) of the APA sets forth a "reasonably prudent person" standard for the admissibility of non-hearsay evidence. It is a well-established practice, however, for presiding officers in administrative proceedings to look to "civil" case law and the Evidence Code for guidance when applying the APA standard. Indeed, the PSC historically has prohibited expert witnesses from testifying on issues of law, relying on guidance from Florida case law and the Evidence Code:

> The Commission has generally prohibited the admittance of expert testimony on legal issues. ... In addition, Florida case law clearly states that an expert witness should not be allowed to testify concerning questions of law, which are properly reserved for the trier of fact. For these reasons, the following portions of Mr. Armstrong's testimony shall be stricken as improper legal opinion and argument.

In re: Petition for approval of Special Gas Transportation Service Agreement, 2011 WL 2090841, at *9 (PSC Order No. PSC-11-0228-PCO-GU).[6]

The PSC erred in admitting former Commissioner Deason's testimony interpreting the law for the Commission and such error was prejudicial to FIPUG. Moreover, the testimony, offered on behalf of FPL and in opposition to the position of ratepayers in the proceeding below, cannot fairly be said to be evidence

[6] See also, *Luis Gervacio v. JR Group Services, Inc*., Case No. 05-0082DBB (Fla. JCC Sept. 3, 2010) (2010 WL 8470524, at *2) ("In accordance with case law, expert testimony will not be received on issues of law,"); *Department of Education v. Richard U. Cottrell*, Case No. 87-4223 (Fla. DOAH Apr. 27, 1988; Fla. DOE June 18, 1998) (1988 WL 618167, at *7) ("The courts of Florida have held that polygraph test results are not admissible because the polygraph test is not reliable. It follows that the same unreliability which prevents the polygraph's admissibility in court, precludes its admissibility in an administrative proceeding."); *Chateau Chaumont Of Ibis Isle Association, Inc., v. Blackwell Williams*, Case No. 93-0327 (Fla. DBPR Arb. (Case Management Order) (1994 WL 16185462, at *1) (§90.502 applied in administrative proceeding protect attorney-client communications over objection); *Department of Transportation v. Headrick Outdoor Advertising*, Case No. 85-4165 (Fla. DOAH July 31, 1986; Fla. DOT Sept. 2, 2986) (1986 WL 401555, at *2) (§90.104(1)(a) applied to 120.57(1) proceeding re exclusion of evidence); *Russ v. Tallahassee-Leon County and DC*F, Case No. 97-2950 (Fla. DOAH Aug. 22, 1997; Fla. DOT Aug. 28, 1997) (1997 WL 1053408 at *2) (§90.951 applied to 120.57(1) proceeding re evidentiary treatment of electronically transmitted documents) .

"of the type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

CONCLUSION

The PSC lacks jurisdiction to approve FPL's proposal to invest ratepayer funds in a third-party natural gas extraction company venture. The PSC further erred and violated due process by holding post-hearing, private meetings with PSC staff who actively participated at the hearing, during which the merits of the case were discussed and additional information and evidence were provided outside the record of this proceeding. The PSC also erred by admitting prejudicial expert testimony for the purpose of interpreting law. The order below should be vacated.

Respectfully submitted this 23rd day of September 2015.

/s/ *Jon C. Moyle, Jr.*

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CERTIFICATE OF COMPLIANCE

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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