IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA, ETC.,
Appellant(s),

Case No.: SC18-213
Lower Tribunal No. 20180007-EI

vs.

JULIE IMANUEL BROWN, ETC., ET AL.
Appellee(s).

CITIZENS' REPLY BRIEF

J.R. KELLY
Public Counsel
Florida Bar Number: 768359

STEPHANIE A. MORSE
Associate Public Counsel
Florida Bar Number: 0068713

CHARLES J. REHWINKEL
Deputy Public Counsel
Florida Bar Number: 0527599

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm. 812
Tallahassee, FL 32399-1400

Attorneys for the Citizens of the State of Florida

Table of Contents

TABLE OF AUTHORITIES

Florida Cases

Florida Statutes

Florida Public Service Commission Orders

PRELIMINARY STATEMENT

OPC will employ the abbreviations that it identified in its Initial Brief. OPC will refer to the PSC's Answer Brief as "PSC Br.__" and FPL's Answer Brief as FPL Br. __." The OPC cannot – in fifteen pages – respond to each point raised in the 100 pages of answer briefs and does not concede or waive its positions set out in the Initial Brief or in the tribunal below.

The ECRC Order under appeal is this Court's first opportunity to review the ECRC statute and the PSC's implementation of it. This case is about whether § 366.8255, Fla. Stat., authorizes cost recovery outside of, and separate from, base rates for the costs of cleaning up past, unlawful utility plant pollution.

ARGUMENTS

I. REPLY TO ARGUMENTS REGARDING THE STANDARD OF REVIEW AND STATUTORY CONSTRUCTION.

It is well-established that issues of law are subject to the *de novo* standard of review. § 120.68(7)(d), Fla. Stat.; *Citizens of the State v. Graham,* 191 So. 3d 897, 900-901 (Fla. 2016); *Brown v. Comm'n on Ethics*, 969 So. 2d 553, 556 (Fla. 1st DCA 2007)(the applicable administrative rule incorporating the *de novo* standard of review is codified at § 120.68(7)(d), Fla. Stat.). In the same way that the PSC misconstrued the statutory definition of "electric utility" in *Citizens 2016*, here the Agency has misconstrued (and actually *failed to construe at all*) the statutory

meaning of the threshold provision "designed to protect the environment." *Citizens 2016*, at 900-901.

PSC contends on page 17 of its Brief that the statutory construction matter at issue does not relate to its authority, which if true would allow it to "end-run" the Court's *de novo* review. However, the PSC's authority to grant ECRC cost recovery is limited by law as agencies only have the authority granted to them by the Legislature in statute. *See e.g., Cape Coral v. GAC Utilities, Inc.*, 281 So. 2d 493, 496 (Fla. 1973) (further stating "any reasonable doubt as to the lawful existence of a particular power that is being exercised by the [PSC] must be resolved against the exercise thereof"). The PSC's "logic" would allow an agency to completely evade a court's review of its organic authority by suggesting that its history of acting – even if *ultra vires* – would allow it to bootstrap its actions into the "deference" category. This approach is unfounded in Florida law.[1] A contention that an agency incorrectly expanded or misconstrued a statute which specifically dictates the limits of its authority (i.e., the authority to grant ECRC cost recovery *only* for compliance with regulations designed to protect the environment) is properly the subject of *de novo* review, as is the agency's construction of the statute.

[1] The PSC has recognized this in a recent ECRC decision. *See In re: ECRC*, Order No. PSC-2014-0714, p. 6, 14 F.P.S.C. 12:346 (2014) ("WOTUS Order").

Both Appellees offer the adage that orders of agencies are generally granted deference by appellate courts; however, that is an incomplete and entirely misguided explanation of the principles which govern this appeal. PSC failed to recognize the body of law concerning the degree of deference, *if any*, that an agency's order would be due in circumstances applicable to the instant appeal.

No deference is required where an agency misconstrued or failed to construe the law, particularly where said misinterpretation results in an unlawful expansion of the agency's authority. *See Citizens 2016* at 900; *Doyle v. Dep't of Bus. Regulation,* 794 So. 2d 686, 690 (Fla. 1st DCA 2001); *I.B. v. Agency for Health Care Admin.,* 87 So. 3d 6, 9 (Fla. 3rd DCA 2012)(stating, "no deference is due an error of law").

Additionally, appellate courts need not defer to agencies' interpretations of laws that do not require the expertise specific to the agency which rendered the order. *E.g., Doyle* at 690; *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000) (construing §120.68(7)(d), Fla. Stat.[2] and stating that appellate courts are free to disagree with an agency on a point of law).

[2] § 120.68(7)(d), Fla. Stat., requires agency action be set aside where the "agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action."

FPL posits alternatively that either DEP's expertise should govern interpretation of the term at issue or that no expertise is required as any English-speaker can interpret the ECRC statute. FPL Br. 24, 26-27. FPL further suggests PSC's economic expertise is inapplicable to a statute referencing the environment. FPL Br. 40.[3] Either way, PSC's second-hand interpretation of the statute's wording, based on DEP's purported expertise, is due no deference here. *See Brown*, at 557 (agency's second-hand interpretation was "evidence that it was not operating within its area of expertise"). No deference is required when an agency applies a misconstrued law to the facts, and a court need not inquire if competent substantial evidence supports the fact finding as the error of law obviates the latter. *Brown*, at 557; *Seneca v. Fla. Unemployment Appeals Comm'n*, 39 So. 3d 385, 387 (Fla. 1st DCA 2010).[4]

To aid their deference pitch, Appellees' ask the Court to re-draft the statute by shuffling the words around and changing their syntax. This Court has steadfastly rejected the proposition that a court should rearrange words in a statute to make them

[3] PSC's expertise is limited to cost allocation pursuant to generally accepted accounting principles. PSC Br. 27.

[4] "Although appellate courts generally uphold administrative agency decisions if they are supported by competent, substantial evidence, '**the same standards of review do not apply to an erroneous application of the law to the facts** … [n]o deference is due an error of law'" *Seneca*, at 387, *quoting, City of Coral Gables v. Coral Gables Walter F. Stathers Mem'l Lodge 7, Fraternal Order of Police*, 976 So. 2d 57, 63 (Fla. 3d DCA 2008)(emphasis added).

fit a given theory on legislative intent. *Wagner v. Botts*, 88 So. 2d 611, 613, (Fla. 1956)("…we are not permitted to apply our own construction **or re-arrange the words** or add punctuation marks ….")(emphasis added).

Appellees further contend that the statute *should* be reimagined as if it includes what they view as the more expansive term "environmental protection," (as only they define it) so the statute can, in turn, be interpreted in the broadest possible way. FPL Br. 31. FPL's assertion that the Legislature "meant" to use the more wide-ranging term "environmental protection," and thus this Court should pretend that its co-equal branch did so, contradicts precedent, as clearly expressed by this Court:

> It is not allowable to bend the terms of an Act of the Legislature to conform to our view as to the purpose of the Act where its terms are expressed in language that is clear and definite in meaning. ***Certainly it is not permissible to strike out words of plain, definite meaning and substitute others*** in order that the purpose of the Act ***after such remodeling*** may more nearly conform to our notions as to its purpose and be congruent with our views as to what language ***should have been used*** to accomplish such purpose of the statute.

Fine v. Moran, 77 So. 533, 536 (Fla. 1917)(emphasis added). The words "designed to protect the environment" cannot be deleted to support FPL's theory of how the statute *should* be read. Any change from the plain language, in the word order chosen by the Legislature can only be made by it. *See Calhoun, Dreggors & Assocs. v. Volusia County*, 26 So. 3d 624, 628, (Fla. 5th DCA 2009); *see also Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962)("It should never be presumed that the legislature intended to enact purposeless and therefore useless, legislation.")

The ECRC statute granted the PSC limited authority to allow utilities to pass certain costs to ratepayers between rate cases. The Court should decline to gut the limitation found in the ECRC's narrowly tailored legislative *exception* to base rate recovery of costs. In an FPL-remodeled statute, post violation projects to fix FPL's damage it admittedly caused would nonsensically qualify as "designed to protect the environment." Appellees failed to show that their sweeping substitute, "environmental protection," is expressly recognized **anywhere** in Florida Statutes.[5] They encourage the Court to ignore the face of the statute, in favor of an interpretation which is not only legally wrong, but also bad public policy that could actually provide an unintended incentive for utilities to pollute the environment and provide a vehicle to make their ratepayers fund the cleanup.

Appellees also suggest this Court either adopt a long-defunct legal definition[6] or use a term of art created for an international trade organization's glossary. FPL Br at 25. However, precedent requires the use of an ordinary dictionary definition,

---

[5] Per Appellee's own argument, the Legislature was presumably familiar with the alleged broader, wholly malleable usage of the phrase "environmental protection." Yet, the Legislature made the pointed choice in the economic regulatory statute at issue not to use or define that very different term, but instead to dictate that customers' funds may only be collected between rate cases "to protect" public assets.

[6] PSC cited the 1910 second edition of Black's Law Dictionary to come up with their version of "environmental protection," but did not show it recognized by Black's in recent decades – especially at the time of the ECRC law's 1993 enactment. Nonetheless, the correct inquiry is whether the language chosen by the Legislature is clear enough for an average person to understand, not an expert. *See National Deaf Academy, LLC v. Townes*, 242 So. 2d 303, 309 (Fla. 2018).

not an obscure glossary term an Appellee selectively picked, and especially not one that the PSC has shown no history of ever relying upon. *Southwest Fla. Mgmt. Dist.*, at 599 (favoring use of an "**ordinary dictionary** definition")(emphasis added). The appropriate standard is the meaning a person of ordinary knowledge would use. *E.g.*, *National Deaf Academy, LLC v. Townes, 242 So. 2d 303, 309 (Fla. 2018)*. FPL is incorrect to urge that all English-speakers know that when the Florida Legislature used the words "to protect" what it really meant was "environmental protection" in the broadest sense conceivable. FPL's wishful assertion that everyone knows that the phrase "to protect" also means "to remediate" or "to remove pollution" runs afoul of the most basic rule of statutory construction, i.e., the directive to follow the plain language of the statute.[7]

FPL's reliance on *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281 (Fla. 1988), which construed a statute within PSC's expertise is also misplaced. There, the court relied on the meaning of the term "to the public" as it was used in its jurisdictional statute sections relating *directly to utility regulation*, and also rejected the use of a purported term of art from Black's Law Dictionary. The well-established requirement to follow the plain, ordinary language does not support the insertion

[7] Presumably, the Legislature has exhibited awareness of more expansive terms, and obviously **eschewed them in favor of** limiting language in the ECRC statute. *See Holly v. Auld*, 450 So. 2d 217, 220 (Fla. 1984)(stating courts can assume the Legislature balanced various policy considerations).

into the statute of a new, separate term of art used by experts. *See State Farm Mut. Auto. Ins. Co. v. Shands Jacksonville Med. Ctr., Inc.*, 210 So. 3d 1224, 1230-1231 (Fla. 2017)*; Silva v. Southwest Florida Blood Bank, Inc.*, 601 So. 2d 1184, 1187 (Fla. 1992).

The ECRC statute limits non-base rate cost recovery to new, unanticipated regulations between rate cases. The regulations prohibiting degradation of the aquifer date to 1972. (See Initial Brief at 9-12; 15-17). For 40-plus years (before and after FPL's violation), that regulation continuously prohibited FPL from polluting the aquifer with saline CCS water. FPL was found in violation of <u>that</u> longstanding regulation. FPL fundamentally failed to comply with the regulation, and later arranged with DEP a way FPL thought would help it avoid imposition of financial responsibility by the economic regulator (PSC). Now, FPL wants its customers to pay it to stop violating the regulation, and to clean up the damage it caused from its prior violation. To do this, FPL asks this Court to re-arrange the words in the ECRC statute. Effectively, such a re-write would read that utilities may recover from customers through the ECRC any costs for projects "designed to <u>abate, clean-up, remediate and mitigate pollution, and then restore and eventually</u> protect the environment." Under this interpretation, no Florida utility would have any incentive to comply with environmental regulations. They could simply ignore the laws, wait to get caught, contrive a consent agreement to clean up its mess, and then

file with the PSC for ratepayers to pay. The primary purpose of the Aquifer Repair Project (and the reason it was necessary) was not part of a design to protect the aquifer at issue, but rather one of repair to belatedly begin cleaning up the damage to the aquifer caused by FPL. Any purported "protection" would, at best, be a secondary by-product of first removing the unlawful pollution. Under FPL's own definition of "protection," the utility has already failed and that ship has sailed.[8] The "design" woven into the 1970's-era salinity limitation regulations was the prophylaxis to protect the environment by keeping salinity out of the aquifer *in the first place*.

FPL's assertion that DEP and the PSC have "authoritatively" determined the Aquifer Repair Project was designed to protect the environment" (FPL Br. 31) is fundamentally incorrect, beside the point, and is based on a faulty premise. DEP did not issue the order under appeal and § 366.8255, Fla. Stat. is not a statute that DEP is charged with enforcing; as such, DEP's view is not before this Court and not due any deference. Appellees argue that PSC's *post hoc*, second-hand interpretation,[9]

[8] After arguing that ECRC recovery is not about the prevention of pollution, FPL incredibly argues the Aquifer Repair Project qualifies for recovery *because* it will supposedly protect the environment by "*preventing*" the hypersaline plume from spreading beyond the CCS boundary. FPL. Br. 24. FPL fails to mention the plume is already over a mile past the boundary.

[9] Notably, FPL and the PSC do not acknowledge that the PSC failed to interpret the ECRC statute in its Order below, leaving this Court to review the interpretational inferences to be drawn from the agency's non-action.

based on DEP's damage repair goals (which are different from the policy underlying Ch. 366, Fla. Stat.) is somehow owed deference in the interpretation of § 366.8255, Fla. Stat. *based merely on the fact that § 366.8255, Fla. Stat. contains the word "environment."* This Court has rejected similar reasoning. *See Townes*, at 314 (medical facility location alone does not turn a wrongful act into medical malpractice).

Having failed to show that the statute, as written, could not mean what it plainly says, and failed to create ambiguity where there is none, FPL's final resort is to the concept of canons of statutory construction. The canons are inapplicable to this case given the statute's clarity, and should be rejected. *See Florida Dep't. of Envt'l. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) ("there is no need to resort to statutory construction" when the statute is clear); *Knowles v. Beverly Enterprises-Florida, Inc*., 898 So. 2d 1, 12-13 (Fla. 2004)(concurrence stating that when the statute is plain, a court "has no prerogative" and "may not go outside the statute to give it a different meaning").

FPL describes PSC as an economic regulator (FPL Br. 40) so even if an "*in pari materia*" comparison to the ECRC statute was necessary (which it is not), such

a comparison should be made with fiscal, or financial abuse, statutes.[10] However, the proper comparison of the phrase "to protect" is to other parts of § 366.8255, Fla. Stat. and Ch. 366, Fla. Stat. not statutes governing DEP.

Appellees' tortured analysis[11] would remove the limitation the Legislature adopted in the ECRC statute by granting utilities who demonstrate cynical disregard of existing law an equal place alongside utilities who exercise active, prospective, careful, and *willing* compliance with new laws and regulations *specifically* designed to protect, not to repair or remediate damage. Such argument should be rejected.

II. REPLY TO ARGUMENTS REGARDING PSC DEVIATION FROM PRIOR POLICY.

PSC's citation to *In re: ECRC*, Order No. PSC-1998-1764,[12] is entirely irrelevant and does not stand for the proposition contained in PSC's parenthetical. PSC Br. 30. This order makes no mention of fuel oil discharges, does not state FPL violated the law, and does not state FPL was engaged in fuel oil cleanup activity.

---

[10] In this vein, "to protect" the state's treasury, would not mean the regulator should allow violations of law. Similarly, it would be unthinkable for a financial regulator to argue that allowing the theft of public funds that it will then try to recover actually "protects" the larger body of money, which is essentially Appellees' argument on protecting the Biscayne Aquifer.

[11] Appellees' statutory re-engineering argument is an exercise in psychological projection: FPL wrongly accuses OPC of doing the very thing that FPL is *actually* doing by urging the Court to change the text of the statute to its own amorphous conception of "environmental protection." FPL Br. 31. That is literally the "re-write." Nonetheless, in purely Orwellian fashion, FPL criticizes OPC for conforming, *verbatim*, to the letter of the law.

[12] The PSC cited this as *In re ECRC*, 1998 WL 968520 (1998).

Surely, had FPL admitted to a violation of law in that simple rule-compliance case and obtained ECRC recovery for cleaning up that unlawful damage, either the PSC or FPL would have mentioned that in their briefs as precedent for the instant appeal. However, the quotation listed in PSC's parenthetical **is** instructive for purposes of distinguishing it from the Order under appeal here in that the statewide oil tank rule to which PSC referred was a statewide, comprehensive regulatory compliance scheme not involving law violations – admitted or otherwise.

The 1998 ECRC Order refers to an approved "Pollution Prevention Plan," (Order No. PSC-1998-1764, p. 6) and mostly focuses on various Clean Air Act (CAA) compliance activities. Most CAA costs recovered under the ECRC have related directly to updating or replacing equipment in order to squarely protect the environment by preventing hazardous emissions. Appellees cannot point to an air pollution removal requirement in any ECRC approval. That 1998 order is a good example of the faithful application of Legislative intent – approving prospective emission reduction (not retraction) projects contemplated in the statute.[13]

PSC further missed the mark regarding OPC's citation to *In re: ECRC,* Order No. PSC-2005-1251,[14] regarding a then-new arsenic groundwater standard. By focusing on the change in the standard, PSC glossed over an equally important point

[13] This is especially true as to CAA compliance activities. See, Initial Brief, 38-39.
[14] PSC cited this order as *In re ECRC*, 2005 WL 3598119 (2005)

– that the only costs approved for ECRC recovery were for *assessment or evaluation* of whether the arsenic levels were in fact above the limit. PSC Br. 30. That order does not approve the recovery of funds from ratepayers for clean up or removal of any arsenic damage, post violation or otherwise.

PSC also cited to previous ECRC orders related to the abatement of pollution. PSC Br. 30. However, PSC erroneously conflates the terms "abate," "remove" and "clean up."[15] The operative regulation prohibited FPL from polluting the aquifer for decades immediately before FPL entered into the consent documents. The mere fact the PSC previously said there may be a "wide variety" of compliance costs which qualify for ECRC recovery (PSC Br. 32) does not mean that every project whose description contains a thirteen letter word starting with an "e" is eligible for ECRC treatment.

FPL misstated OPC's argument regarding PSC's deviation from policy. FPL Br. 47. In citing to *In re: ECRC*, Order No. PSC-2007-0922, 07 F.P.S.C. 11:118 (2007) ("Martin Plant Order"), FPL obscured the dispositive point, i.e., that the face of the order describes the "corrective action plan" as a test plan (or study) to

[15] PSC Br. 7, 22, 30. The words abate and remediate are not synonyms. This is apparent in the fact that the SFWMD lists each separately – if each had the same meaning, there would be no need for the redundancy of listing both in the same sentence. PSC Br. 7-8. OPC has previously stated FPL may eventually qualify for costs to keep its hypersaline water contained on its own property (to actually protect the Aquifer); however, repairing the Aquifer, i.e., cleaning up past pollution, is a separate issue, despite both Appellees' intentional efforts to confuse the two.

"determine" the best method to comply with a drinking water standard. Nowhere does it state that FPL admitted a violation of that consent order, or that PSC required customers to pay to remove contaminants from the water after the utility admitted its violation caused the pollution. Had FPL admitted to a violation of its permit, a rule or statute in the Martin Plant Order docket, and as a consequence, PSC surreptitiously required customers to pay to fix the damage caused by the violation, one of the Appellees would assuredly have brought this to the Court's attention here.

FPL's further miscasting of OPC's position via its strawman argument that none of the orders it cited expresses a policy that ECRC recovery is unavailable in those cases is wrong. FPL Br. 47. OPC reiterates it is the statute itself that makes ECRC recovery unavailable to a utility which admits to a violation of law that caused the damage the subsequent project is supposed to remedy.[16] Where PSC has applied the law incorrectly, any resulting order would be null and cannot be bootstrapped as precedent. PSC admits this. *See In re: ECRC,* Order No. PSC-2014-0714, p. 6.

[16] Similarly, FPL misrepresented both OPC's argument and the case law regarding Notices of Violation (NOVs). FPL Br. 41-42. Discussing *Florida Power Corp. v. Public Service Commission*, 424 So. 2d 745 (Fla. 1982), FPL glosses over that the NRC's NOV was deemed not dispositive as the NRC's purpose in issuing the NOV related solely to its safety mission and was not concerned with prudence and negligence issues the PSC would adjudicate in determining who should bear the costs of the accident. The Court did not hold categorically that an NOV can never be proof of imprudence.

CONCLUSION

In this case, FPL by its own admission violated long-standing regulations, which polluted the aquifer. Subsequently, upon getting caught, FPL responded that its ratepayers should pay the as-yet unlimited millions of dollars necessary to repair the damage caused by FPL. This was not the design, nor intent, of the Legislature when it enacted § 366.8255, Fla. Stat. This case begins and ends with the exact wording of the ECRC statute. Because PSC has misinterpreted the ECRC statute, the application of its purported findings of fact to its own incorrect misconception of the law is not due any deference from this Court. Appellees' reading would take a straight-forward statute narrowly tailored to accommodate unanticipated, new regulations, and turn the law on its head so that a utility can saddle its customers with the costs of rectifying the utility's violations which were conveniently dispatched via the briar patch of an "enforcement action." This Court should reject any such interpretation.

The Order below should be set aside with instructions consistent with OPC's conclusions in its Initial Brief.

Respectfully submitted,

J.R. KELLY, PUBLIC COUNSEL
Florida Bar No. 768359

/s/*Stephanie A. Morse*
Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713

Charles J. Rehwinkel
Deputy Public Counsel
Florida Bar No. 527599

Office of Public Counsel c/o
The Florida Legislature
111 West Madison St., Room 812
Tallahassee, FL 32399-1400
(850) 488-9330

Attorneys for the Citizens of
the State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing copy of **CITIZENS' REPLY BRIEF** has been furnished by electronic mail on this 28th day of August, 2018, to the following:

John T. Butler
Maria J. Moncada
Florida Power & Light Company
700 Universe Blvd.
Juno Beach, FL 33408-0420
John.Butler@fpl.com
Maria.moncada@fpl.com

Rosanne Gervasi
Samantha Cibula
Suzanne Brownless
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-1400
rgervasi@psc.state.fl.us
scibula@psc.state.fl.us
sbrownle@psc.state.fl.us

Stuart H. Singer, Esq.
ssinger@bsfllp.com
Pascual A. Oliu, Esq. poliu@bsfllp.com
BOIES SCHILLER FLEXNER LLP 401 East Las Olas Blvd., Suite 1200 Fort Lauderdale, FL 33301
Counsel for Appellee FPL

/s/Stephanie A. Morse
Stephanie A. Morse
Associate Public Counsel
Florida Bar No. 0068713

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that the **CITIZENS' REPLY BRIEF** was prepared using a Times New Roman 14-point font.

/s/Stephanie A. Morse
Stephanie A. Morse
Associate Public Counsel