IN THE SUPREME COURT OF FLORIDA

CASE NO. SC16-2277

IN RE: STATE OF FLORIDA SITING BOARD, et al.,

Petitioners,

vs.

MIAMI-DADE COUNTY, et al.,

Respondents.
_____/

L.T. Case Nos.: 3D14-1451, 1465, 1466, 1467

PETITIONER'S MOTION TO STAY MANDATE

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Petitioner, Florida Power & Light Company ("FPL"), pursuant to Florida Rules of Appellate Procedure 9.310 and 9.340(a), moves to stay the Mandate that issued in this action on December 29, 2016 (the "Mandate"). FPL has asked this Court to review an opinion of the Third District Court of Appeal (the "Opinion") that (1) reversed a final order of certification issued by the Governor and Cabinet sitting as the Siting Board; and (2) remanded to the Siting Board for further review. On November 22, 2016, the Third District denied FPL's Motion for Rehearing, Rehearing *En Banc*, or Certification of Questions of Great Public Importance. On December 29, the Third District denied FPL's request to delay issuance of the Mandate pending further review proceedings.

A stay of the Mandate is warranted because: (1) this Court is likely to accept jurisdiction given that the Opinion conflicts with a prior decision of this Court and affects two separate classes of constitutional or state officers; (2) denying the stay would result in confusion, an unnecessary waste of resources, and potential parallel proceedings; and (3) a stay would cause Respondents no harm.

BACKGROUND

In 2009, FPL applied for certification of two new 1,100-megawatt nuclear generating units at FPL's Turkey Point Power Plant, along with about 89 miles of transmission lines. Such applications are governed by the Florida Electrical Power Plant Siting Act ("PPSA"), Chapter 403, Part II, Florida Statutes. Various local

governments, including the Respondents here, opposed some aspects of the project. Opposition to the transmission lines continued at an eight-week hearing before an administrative law judge ("ALJ"). After the hearing, the ALJ issued a 323-page recommended order containing 787 findings of fact, 110 conclusions of law, and 178 pages of conditions to certification. Many of the conditions reflect the 30 stipulations that FPL reached with multiple parties and governmental entities.

The parties filed nearly 200 exceptions to the recommended order. After a long public hearing, the Siting Board unanimously approved certification, subject to the ALJ's recommended conditions and several additional ones. It issued an order approving certification and ruling on each exception.

On appeal, the Third District reversed and remanded for further proceedings. It held that the Siting Board: (1) misinterpreted the "development" exception in section 380.04, Florida Statutes; (2) erroneously concluded that it lacks authority to require undergrounding of transmission lines at FPL's expense; and (3) erred in analyzing FPL's obligation to comply with Miami-Dade County's East Everglades Zoning Ordinance.

FPL seeks review in this Court because the Opinion expressly conflicts with this Court's opinion in *Florida Power Corp. v. Seminole County*, 579 So. 2d 106 (Fla. 1991). The Opinion also affects the powers of the Siting Board, the PSC, and local government entities that apply land-use regulations to construction of

transmission lines. Together these entities constitute two separate classes of constitutional or state officers. The Governor and Cabinet, sitting as the Siting Board, joined the review proceeding.

ARGUMENT

When deciding whether to stay a mandate, courts weigh the following factors: (1) the likelihood that the Supreme Court will accept jurisdiction; (2) the likelihood that the movant will prevail; (3) the likelihood of harm if the stay is not granted; and (4) the likelihood that, in the absence of a stay, the harm will be irreparable. *State v. Miyasato*, 805 So. 2d 818, 825 (Fla. 2d DCA 2001). No one factor carries more weight than the others, and one or two especially strong factors may counterbalance weak ones. *See id*. at 826. As we show below, these factors weigh strongly in favor of staying the Mandate.

I. This Court is likely to accept jurisdiction and Petitioners are likely to succeed on the merits

As noted above, FPL and the Siting Board have sought review: (1) based on a conflict with this Court's opinion in *Seminole County*; and (2) because the opinion affects two separate classes of constitutional or state officers.

A. The Opinion conflicts with *Seminole County*

This Court is likely to accept jurisdiction, and Petitioners will likely succeed on the merits, because this Court's opinion conflicts with *Seminole County*. There, in a non-ratemaking case (like this one), this Court invalidated a local ordinance

that required an electric utility to "relocate its power lines underground." *Seminole Cty.*, 579 So. 2d at 106. The Court reasoned that the PSC has "exclusive and superior" jurisdiction over the issue because the expense of undergrounding invariably affects utility rates. *Id.*; *see also* § 366.04(1), Fla. Stat. ("jurisdiction conferred upon the [PSC] shall be exclusive and superior to all other boards").

Like *Seminole County*, this is not a ratemaking case, but—by potentially requiring 89 miles of transmission lines to be placed underground—the Opinion certainly affects rates. In contrast to this Court's holding in *Seminole County*, however, the Third District held that the PPSA "empowers the Siting Board to *require* FPL to bury these transmission lines." Slip Op. at 14 (emphasis added). The Opinion therefore conflicts with *Seminole County*.

B. The Opinion expressly affects a class of constitutional or state officers

This Court is likely to accept jurisdiction because the Opinion affects two separate "classes of constitutional or state officers" – those with oversight over the undergrounding of transmission lines and those charged with implementing the development exception in section 380.04.

Before this case, the undergrounding of transmission lines fell within the exclusive purview of the PSC. Under the Opinion, however, the PSC – one collegial body – shares that jurisdiction with the Siting Board – another collegial body. Together these two collegial bodies constitute a class. *See Fla. State Bd. of*

Health v. Lewis, 149 So. 2d 41, 43 (Fla. 1963) (holding that a class of constitutional officers is comprised of "two or more constitutional or state officers who separately and independently exercise identical powers of government"). Siting Board members hold offices of trust under the Florida Constitution. *See* Art. III, § 4, Fla. Const. PSC members hold "offices of trust created by statute"—specifically section 350.01, Florida Statutes. Harry L. Anstead, *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida,* 29 Nova L. Rev. 431, 510 (2005).

This Court is also likely to accept review because of the Opinion's effect on all those charged with implementing section 380.04, Florida Statutes. Under the PPSA, local land-use regulations do not apply where linear "associated facilities" do not "constitute a 'development,' as defined in s. 380.04." § 403.50665(1), Fla. Stat. Section 380.04(3)(b) provides in pertinent part that operations that do *not* constitute "development" include "[w]ork by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on *established* rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like." (Emphasis added). The Opinion interpreted the term "established rights-of-way" as rights-of-way that already exist (at some undefined point in time); and

held that transmission lines constructed outside *existing* rights-of-way do not qualify for the exemption. Slip. Op. at 10.

The Opinion's narrow interpretation of the development exception in section 380.04 has repercussions far beyond the construction of transmission lines. That section applies not just to applications under the PPSA, but to electric utilities regardless of whether they seek approval of linear facilities under the PPSA or through individual permitting processes applicable to smaller linear facilities; to wastewater utilities; to potable water utilities; to natural gas transmission companies; and to other entities siting linear facilities.

The Opinion suddenly requires the Siting Board—together with Florida's 67 counties and 410 municipalities—to apply land use regulations to linear facilities such as transmission lines. The Siting Board and local governments constitute a class because they must "separately and independently exercise [the] identical powers" of applying land use regulations to those facilities. *Lewis*, 149 So. 2d at 43. Both members of the Siting Board and of city and county commissions are constitutional officers. *See* Art. III, § 4, Fla. Const.; Art. VIII, §§ 1 (e) (referencing county commissioners) and 2(b) (referencing "municipal legislative body"); *Lewis*, 149 So. 2d at 43 ("a decision defining the duties of a board of county commissioners may affect all other boards of county commissioners and thereby fall within the reviewable category").

The Opinion's interpretation of the exception, which equates "established rights-of-way" with *existing* rights-of-way, is contrary to the plain language of the statute; contradicts a companion statute in section 403.524(2)(c) ("[e]stablished rights-of-way include rights-of-way established *at any time.*" (emphasis added)); fails to defer to and ignores agency precedent, *e.g., In re: Petition for Declaratory Statement filed by Hughes and Knowles*, Case No. DCA-03-DEC-295, *6-7 (Apr. 9, 2004) ("The creation of a right-of-way falls within section 380.04(3)(h)."); and relies on an opinion from the First District that this Court quashed. *See Clipper Bay Invs., LLC v. Fla. Dep't of Transp.*, 117 So. 3d 7 (Fla. 1st DCA 2013), *quashed*, 160 So. 3d 858 (Fla. 2015). Thus, FPL and the Siting Board are likely to prevail on the merits.

II. Petitioners will be irreparably harmed if the Mandate is not stayed, but a stay will not prejudice Respondents

If the Mandate is not stayed while this Court hears the Petition, the result will be confusion and an unnecessary waste of resources. The chance of parallel proceedings—one before the Governor and Cabinet sitting as the Siting Board on remand, and another before this Court on discretionary review—is substantial.

The Siting Board itself must also decide how best to "further review [the proposed project] consistent with local development regulations, comprehensive plans and the applicable environmental regulations, as discussed in [the Court's] opinion." Slip Op. at 27. Proceedings on remand will entail the briefing before the

Siting Board of several questions the Opinion leaves unanswered. For example, in discussing the undergrounding issue, the Opinion notes that the "holding in this regard should not be interpreted as requiring that additional hearings be held or additional evidence taken, only that the Siting Board is within its authority to consider such an issue and should exercise that authority as it deems appropriate." *Id*. at 15 n.5. And when discussing the phrase "established rights-of-way," defining it as an "existing" right-of-way, the Opinion does not explain *when* a right-of-way becomes an "existing" right-of-way—whether before an application is submitted, before the Siting Board issues a final order, or before construction begins. *Id.* at 10, 13. The Siting Board will need to address these questions; but they could well be rendered moot if this Court accepts jurisdiction and agrees with the Siting Board's initial conclusions.

A stay is especially prudent because it would not prejudice the Respondents. The Respondents are ultimately concerned about FPL's construction of transmission lines. *See* Slip Op. 2-27. But FPL will not construct any transmission lines for the Turkey Point 6 & 7 Project during the stay. In fact, construction of the Davis-Miami portion of the transmission line as specified for the Turkey Point Project—the portion of the eastern corridor of concern to the municipal Respondents—is expressly conditioned on obtaining "all other regulatory approvals . . . ." Condition of Certification C.XVI.G. Similarly, lines in a western

corridor also require further federal permitting, including a permit from the U.S. Army Corps of Engineers. Therefore, a stay of the Mandate pending further review will cause no harm to the Respondents.

CONCLUSION

For these reasons, this Court should enter a stay of the Mandate pending this Court's review of the Petition.

RULE 9.300(a) CERTIFICATION

Before filing this motion, counsel for FPL consulted with counsel for Respondents. Miami-Dade County, the City of Miami, the City of South Miami, and the Village of Pinecrest all oppose the motion. The Siting Board and the Department of Environmental Protection take no position.

Respectfully submitted on January 18, 2017: By: /s/ *Raoul G. Cantero*
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CERTIFICATE OF SERVICE

I certify that a copy of this motion has been served electronically via the Florida EPortal Court System to the following on this 18th day of January 2017:

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