

BEFORE THE GOVERNOR AND CABINET
OF THE STATE OF FLORIDA

IN RE:

FLORIDA POWER AND LIGHT COMPANY
LEVEE-MIDWAY 500 kV TRANSMISSION
LINE CORRIDOR CERTIFICATION
APPLICATION NO. TA89-07

DOAH CASE NO. 89-0279
OGC FILE NO. 89-8907

FINAL ORDER

On April 12, 1990, this matter came before the Governor and Cabinet, sitting as the Siting Board pursuant to the Transmission Line Siting Act, Section 403.52 et seq., Florida Statutes (1989), for final action concerning a Recommended Order dated March 2, 1990, attached as Exhibit 1, which recommends certification of the Florida Power and Light Company Line Corridor Application. As allowed by Rule 17-17.682, F.A.C., timely written exceptions to the Recommended Order were filed by the Florida Sugar Cane League (FSCL) on behalf of itself and affiliated companies (New Hope Sugar Company, Okeelanta Corporation, Sugar Cane Growers Cooperative of Florida, South Bay Growers, Inc., United States Sugar Corporation, and S.D. Sugar Corporation); by Metropolitan Dade County (Metro Dade); and jointly by A. Duda and Sons, Inc./Allapattah Properties Partnership (Duda).

FSCL's primary exceptions are directed at a series of findings by the hearing officer (Paragraphs 48-64) of the Recommended Order) entitled "System Reliability and Separation from Existing Transmission Lines." (Exhibit 1, pp. 24-28) Specifically, FSCL excepts to finding 52 that a one-mile

separation between the existing 500 kV line and the proposed Levee-Midway line is appropriate to prevent a simultaneous outage of both lines caused by fire. In the same vein, FSCL excepts to finding 58 that the Levee-Midway 500 kV line be located "at least four [sugar cane] field lengths or one mile, whichever is shorter, from the existing transmission lines to avoid the simultaneous outage of these transmission lines from a sugar cane wildfire." (Exhibit 1, p. 27)

Review of the record discloses that these key findings with respect to transmission line spacing are supported by competent substantial evidence and are therefore binding on the Siting Board and all parties. FSCL selectively criticizes certain aspects of the findings it challenges, but this amounts to no more than quibbling in light of the evidentiary support for the findings, taken as a whole. For example, FSCL correctly notes that finding 57 erroneously specifies 1979 as a year in which uncontrolled sugar cane fires occurred; record testimony indicates that these fires occurred in 1989: an obvious scrivener's error of no actual significance to the decision. No party questions that the burning of sugar cane fields is a regular agricultural practice within the Everglades Agricultural Area which sometimes results in uncontrolled fires. It is immaterial whether such fires are properly characterized as "wild fires", as FSCL asserts in its Exception 3. FSCL exceptions 1-5 are without merit, except as to the scrivener's error noted above, and are rejected.

FSCL next excepts to several findings on the expected environmental impact of the construction of the Levee-Midway line within the segment of the proposed transmission line corridor initially proposed by the Treasure Coast Regional Planning Council (TCRPC). FSCL objects to finding 121 that construction of the line in the TCRPC segment will not adversely effect short-term or long-term water quality. FSCL also objects to finding 125 that construction in the TCRPC corridor will not adversely impact vegetation or wetlands. Contrary to FSCL, the Board concludes that each of these challenged findings is supported by competent substantial evidence. FSCL exceptions 6 and 7 are rejected.

FSCL excepts to finding 152 and finding 174 because Water Conservation Area 2B has been designated by the U.S. Fish and Wildlife Service as critical habitat for the endangered snail kite. Record evidence establishes, however, that notwithstanding the official designation of this area, drainage and drought has rendered this area unsuitable for snail kite nesting as a practical matter. FSCL exceptions 8 and 13 are therefore rejected.

In finding 163, the hearing officer identified certain effects on sugar cane production which might be expected from location of the transmission line within the segment of the corridor proposed by the South Florida Water Management District (SFWMD):

Impacts listed include interference to drainage and irrigation systems, less efficient burning of sugar cane under the transmission lines, less efficient aerial spraying of sugar cane, and more difficult access to roads and fields. None of these impacts were quantified as to dollar impact or loss of production, even though 500 kV transmission lines currently exist over sugar cane fields from which quantifiable data could have been developed.

(Exhibit 1, p. 54)

FSCL exception 9 complains that it is irrelevant whether the expected impacts of a transmission line on sugar operations can be quantified. Yet, in FSCL exception 10, FSCL also complains that the hearing officer erred in failing to find that co-location of the Levee-Midway line with existing 500 kV lines would quantifiably reduce the listed impacts on sugar operations. See finding 164 (Exhibit 1, p. 54). Review of the record discloses that findings 163 and 164 are supported by the record, considered as a whole. FSCL exceptions 9 and 10 are therefore rejected.

FSCL excepts to several findings relative to the environmental impact of line construction within the SFWMD segment of the proposed Levee-Midway corridor. Exception 11, similar to FSCL exception 6 rejected above, contests a finding (Paragraph 166) that short-term and long-term water quality will not be adversely affected by the line. Exception 12 contests finding 170, which finds that freshwater marsh impacts will be minimized by construction adjacent to the numerous levees within the SFWMD corridor. Both of the challenged findings are supported by competent substantial evidence.

While FSCL correctly suggests that there are segments of the SFWMD corridor area where existing levees cannot be used, nothing in finding 170 implies that all construction will be adjacent to levees. Exceptions 11 and 12 are rejected.

FSCL exceptions 14-20 are, in essence, directed at the legal significance of the conditions of certification and do not implicate the sort of evidentiary issues associated with ordinary factual exceptions. These exceptions will be discussed below in more detail in connection with the resolution of the legal issues of the case.

Turning next to Duda's exceptions to findings of fact contained in the recommended order, these exceptions take issue with findings of the Recommended Order which explicitly reject the position taken by Duda at the hearing: that the Levee-Midway transmission line should pass through one of the Duda proposed alternate corridors rather than the TCRPC corridor, as recommended by the hearing officer. Duda exceptions 1, 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 17, 18, 19, 20, 23, and 25 contest, in whole or in part, a variety of findings which, although adverse to Duda's position, are supported by competent substantial evidence. For example, Duda excepts to findings 187, 188, and 200, all of which share the common factual base that a large mixed hardwood forest associated with the Allapattah Flats extends across the width of the Duda 1/LA corridor. Duda suggests (exception 10) that the forest does not extend across the corridor; that the forest does not

provided "excellent" habitat for wildlife (exception 11); and that only "minor destruction" of the forested area would be necessary for construction of a transmission line there (exceptions 20-23). Review of the record discloses, however, an ample evidentiary basis for the challenged findings. The hearing officer, as is obviously her prerogative, elected to credit testimony which was contrary to the view espoused by Duda's witnesses. Such a determination cannot be disturbed by the Board. Accordingly, Duda exceptions 10, 11, 20, and 23 are rejected.

The remainder of Duda's exceptions to findings contained in the Recommended Order also lack merit. No factual issues material to the outcome of the proceeding are implicated by these exceptions and no purpose would be served by a detailed discussion of them. Duda exceptions 1, 2, 4, 5, 6, 7, 8, 12, 13, 17, 18, 19, and 25 are rejected.

As to the 8 exceptions to findings of the Recommended Order submitted by Metro Dade, it must be noted that Metro Dade, unlike FSCL or Duda, entered into a stipulation for settlement with Florida Power and Light (Appendix F) with conditions of certification that were recommended for imposition by the Recommended Order. In light of the fact of this agreed, voluntary disposition of the disputed issues raised by Metro Dade, it is inappropriate for Metro Dade to except to the Recommended Order. It is axiomatic that a party may not lawfully be heard to complain about matters subsumed

within its own stipulation. Moreover, none of the exceptions warrants separate discussion, for each not only assails a finding which is supported by competent substantial evidence, but also raises no issue of consequence to the outcome of the proceeding which is not discussed fully elsewhere in this order. Metro Dade exceptions 1-8 are therefore rejected.

FSCL, Duda, and Metro Dade also have lodged exceptions to the failure of the Hearing Officer to adopt certain findings of fact which each proposed. Turning first to Metro Dade, it is unclear why Metro Dade proposed findings at all, given the detailed stipulation adopted by the recommended order.

Nevertheless, Metro Dade has excepted to the hearing officer's failure to adopt in verbatim form some 17 proposed findings which were denominated by the hearing officer as "subordinate to the facts actually found in the Recommended Order."

(Exhibit 1, Appendix L) It has also excepted to the fact that two Metro Dade proposed findings - one dealing with the "average wind in South Florida" and one dealing with the importance to planning of a "look into the future" - were dismissed by the hearing officer as "unnecessary." (Exhibit 1, Appendix L) Finally, Metro Dade excepts to the rejection as "irrelevant" of its proposed finding that

It is conceivable that a power line which initially cost more may have less maintenance for repair and might be a better cost savings to FPL than one constructed at a higher height and lower initial cost and in which may require repeated repairs.

The Board has determined that no reason exists to disturb the hearing officer's correct disposition of Metro Dade's proposed findings. Metro Dade's exceptions 9 through 31 are rejected.

FSCL excepts to the hearing officer's rejection as "unnecessary" of three of its proposed findings. Because none of these rejected findings is necessary or material to the outcome of this case, FSCL exceptions 21 and 22 are rejected.

The hearing officer rejected eight findings proposed by FSCL as "unsupported by the competent substantial evidence." FSCL has excepted to each of these rejections. The rejected proposed findings, however, mirror the litigation position of FSCL which was rejected as unproven by the hearing officer's findings. For example, FSCL exceptions 27 and 28 press for adopted of four proposed findings whose gist is that a one-mile separation of transmission lines is neither required nor appropriate: a factual premise specifically rejected in the recommended order based upon competent substantial evidence, as noted above. See Exhibit 1, pp. 24-28. Having specifically sustained the hearing officer's findings against exception by FSCL, the Board must also reject the same reciprocal proposed findings of FSCL which the hearing officer rejected in formulating her own findings. FSCL exceptions 22-28 are rejected.

Duda has also excepted to the hearing officer's failure to adopt certain factual findings offered in its proposed order. Duda, however, has failed to identify with any specificity where in its proposed order the omitted proposed findings were

advanced. This failure substantially complicates the review process for the Board because the hearing officer (Exhibit 1, Appendix L) rejected specific numbered proposed findings of Duda. On review, however, it is clear that the rejected findings which Duda presses the Board to adopt were rejected by the hearing officer because they represented a view of the evidence which the hearing officer declined to credit. For example, as discussed above, the hearing officer correctly found that the Allapattah Flats hardwood forest extends completely across the Duda 1/1A corridor. Consequently, it was not error on the part of the hearing officer to reject a proposed finding which is contrary to her view of the evidence. Duda exceptions 9, 14, 15, 16, 221, 22, 24, and 26 all complain about the hearing officer's failure to adopt findings diametrically opposite to those of the recommended order. Having sustained the recommended order's findings, the Board also rejects Duda's exceptions 9, 14, 15, 16, 21, 22, 24, and 26.

Both FSCL and Duda except to the conclusions of law of the recommended order in some detail. The Board has considered all of the arguments advanced in these exceptions, as well as those interspersed within the other, ostensibly factual exceptions of Duda and FSCL. The Board finds these arguments to lack merit, and therefore rejects all exceptions to the recommended order's conclusions of law for the reasons discussed below.

The Transmission Line Siting Act, as the Recommended Order correctly states, establishes a balancing test by which the Board must select one from among alternate proposed corridors to receive certification under Section 403.531, Florida Statutes (1989). The Recommended Order carefully analyzes the extensive factual record in the case with reference to the five criteria specified in Section 403.529(3)(a-e), Florida Statutes, which comprise the elements of this test:

The Board shall consider whether, and the extent to which, the location of the transmission line corridor and the construction and main of the transmission line will:

- (a) Ensure electric power system reliability and integrity;
- (b) Meet the electrical needs of the state in an orderly and timely fashion;
- (c) Comply with nonprocedural requirements of agencies;
- (d) Be consistent with applicable local government comprehensive plans, and
- (e) Effect a reasonable balance between the need for the transmission line as a means of providing abundant low-cost electrical energy and the impact upon the public and the environment resulting from the location of the transmission line corridor and maintenance of the transmission lines.

In her analysis of whether any of the proposed corridors provided sufficient system reliability and integrity for the Levee-Midway line, the hearing officer expressly relied on her finding that "a one-mile separation or a substantial firebreak is required to prevent a multiple outage of transmission lines due to fire." Exhibit 1, p. 96. Although FSCL excepts to the

hearing officer's rationale on this topic, the Board concurs with and adopts the discussion of the Recommended Order as to the compliance of the proposed corridors with Section 403.529(3)(a), Florida Statutes. FSCL's exception 30 is rejected.

No party disputes the hearing officer's analysis of the application of Section 403.529(3)(b), Florida Statutes, to the recommended corridors. The Board approves and adopts the Recommended Order on this point.

As far as the issue of the Levee-Midway line's compliance with nonprocedural requirements of agencies is concerned, FSCL assails the hearing officer's conclusion that the corridor alignment preferred by Florida Power and Light (TCRPC/SFWMD) will comply with applicable requirements. In particular, FSCL points to the undisputed fact that all dredge and fill impacts of line construction within the corridor have not been determined. FSCL claims that this state of affairs is an insurmountable barrier to a conclusion that agency wetland mitigation requirements have been complied with. FSCL, however, misconceives the nature of the TLSA corridor determination process, where specific wetland mitigation measures are necessarily determined after certification rather than before it. At issue here is not a refusal by an applicant for certification to accept the need for wetland mitigation measures satisfactory to affected agencies. Rather, what is involved is the understandable inability of agencies such as

DER to define precisely appropriate mitigative measures before the specific wetland impacts associated with transmission line construction are known. This is not to say that DER cannot now project where impacts requiring mitigation are likely to occur; DER representatives testified, and the hearing officer found, that approximately 1200 acres of direct and indirect wetland impacts may be expected from the construction of the Levee-Midway line within the entire corridor.

FSCL objects to the indeterminate nature of the water conservation and wetland mitigation measures to be funded pursuant to the \$28 million dollar fund which Florida Power and Light has agreed to establish via the conditions of certification specified in Appendix E of the Recommended Order. Contrary to FSCL, however, the Board agrees with the hearing officer that the fund will be more than adequate to defray the cost of necessary wetland mitigation measures as well as to provide enhancement measures for the Water Conservation Areas through appropriate Everglades SWIM plan implementation measures to be devised by SFWMD in consultation with DER. The Board approves and adopts the Recommended Order's discussion "Compliance with Section 403.529(3)(c), Florida Statutes", found at pages 98-100 of Exhibit 1.

The Board also approves and adopts the Recommended Order discussion "Compliance with Section 403.529(3)(d), Florida Statutes," found at pages 100-101 of Exhibit 1. Duda Exception 27 is rejected.

Turning to the last criterion of the statutory balancing test, Section 403.529(3)(e), Florida Statutes, both FSCL and Duda except to aspects of the hearing officer's rationale for concluding that the TCRPC 1 and SFWMD alternate corridors best balance the need for the line and impacts upon the public and upon the environment. In this context, FSCL suggests that the record contains insufficient evidence to allow a determination as to the environmental impacts of the proposed transmission line. FSCL alleges that this supposed insufficiency of information renders it impossible for the Board to balance environmental impacts against the need for the line. The Board disagrees. FSCL's exception on this point is rejected.

For its part, Duda excepts to certain aspects of the hearing officer's rationale which depend on findings of fact with which Duda takes issue. Duda exceptions 28-34 are without merit because they are based on a selective view of the evidence which is not sustainable in light of the record considered as a whole.

Contrary to FSCL and Duda, the Board approved and adopts the Recommended Order's well-reasoned discussion "Compliance with Section 403.526(3)(e), Florida Statutes," found at pages 101-106 of Exhibit 1. The Board also adopts the Recommended Order's discussion of the ramifications of Section 403.529(4), Florida Statutes, found at pages 106-108. The hearing officer succinctly and correctly analyzed the ultimate issues as to

corridor certifiability in reaching the conclusion that only the TCRPC 1 and SFWMD alternatives were certifiable as a matter of fact and law. Duda exception 35 is rejected.

Finally, the Board approves and adopts the discussion "Conservation Substation" found at pages 108-109 of Exhibit 1. For the reasons found by the hearing officer, the proposed substation site is an appropriate general location for an intermediate substation, as specified in Section 403.522(15), Florida Statutes.

Having considered the Recommended Order, exceptions, argument of counsel, and otherwise being fully advised in the premises, it is ORDERED:

1. The Recommended Order (Exhibit 1) is approved and adopted in its entirety by the Board, with the exception noted on page 2 of this order.
2. The application of Florida Power and Light Company for certification of the Levee-Midway transmission line corridor is granted, as recommended in Exhibit 1, subject to the conditions of certification contained in Appendices C, D, E, F, G, H, I, and K, as specifically modified at pages 98 and 99 of Exhibit 1.
3. The exceptions of the Florida Sugar Cane League and affiliated companies are rejected for the reasons set forth above.
4. The exceptions of A. Duda and Sons, Inc./Allapattah Properties Partnership are rejected for the reasons set forth above.

5. The exceptions of Metropolitan Dade County are rejected for the reasons set forth above.

DONE AND ORDERED this 17th day of April, 1990, in Tallahassee, Florida, pursuant to the vote of the Governor and Cabinet, sitting as the Siting Board, at a duly noticed and constituted Cabinet meeting on April 12, 1990.

FILING AND ACKNOWLEDGEMENT

FILED, on this date, pursuant to S120.52 Florida Statutes, with the designated Department Clerk, receipt of which is hereby acknowledged.

[Signature]
Clerk

4-20-90
Date

FOR THE GOVERNOR AND CABINET
SITTING AS THE SITING BOARD

By

[Signature]
The Honorable Bob Martinez, Governor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Final Order has been furnished by U.S. Mail this 24th Day of April, 1990, to each of the parties listed on the attached "Appearances" list.

A handwritten signature in cursive script, reading "RT Donelan, Jr.", positioned above a horizontal line.

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