



Utility Regulation 101: Does Rate Regulation Drive Utility Resource Decisions?

By George Cavros¹

I. Introduction

If you are an electricity customer in Florida, it is likely you paid a power bill from an investor-owned utility (IOU) this month. Embedded in your power bill is cost recovery for your utility's expenses and a financial return to utility shareholders, or return on equity (ROE), on a host of utility investments. Did those investments expand the use of lower cost, lower risk clean energy resources, or did they facilitate the continued use of fossil fuels? Is the ROE to shareholders fair and reasonable given the economic fallout from the COVID-19 crisis?² These are just some of the questions that will be asked and answered during upcoming rate cases this year at the Florida Public Service Commission³ – the state agency that regulates Florida's IOUs.

While environmental regulation plays an important role in influencing utility resource decisions, the economic influence of utility rate regulation can play an equally important role. This is especially true in Florida, which has no comprehensive state energy policy.⁴ Yet, the laws and principles governing utility regulation are not widely understood. For those engaged in clean energy, consumer protection and equity issues, understanding utility regulation is key to successfully advocating and litigating for a cleaner and more equitable energy future.

II. What Is A Utility?

There are several utility ownership models in Florida. The state has 5 (IOUs) that generate approximately 75% of the electricity sales in the state of Florida.⁵ These are

shareholder-owned corporations controlled by executives and a board of directors that have a fiduciary duty to maximize shareholder value. The most common form of ownership in Florida is municipal ownership – with 33 utilities.⁶ These are owned by municipal governments and governed by a city commission or an independent board of directors. The other model is a utility cooperative. There are 17 cooperatives in Florida that serve more rural areas and are non-profit enterprises, like municipal utilities, and are governed by a board of directors consisting of member utilities.⁷ IOU rates are set by the state, municipal and cooperative utility rates are set by their boards.

Florida utilities are either vertically integrated, or transmission and distribution utilities. The 4 largest IOUs are vertically integrated utilities. This simply means that they own the power plant, the transformers, the transmission and distribution infrastructure, the meter on the customer's premises and the billing services. The larger municipal utilities, such as JEA, OUC and City of Tallahassee, are vertically integrated as well, while smaller municipal utilities transmit and distribute power to customers that they procure from other sources – generally other utilities.⁸

Florida law defines an electric utility as “every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity ... to or for the public within this state . . .”⁹ In *PW Ventures, Inc. v. Nichols*¹⁰ the Florida Supreme Court affirmed that the term “to and for the public”

means the provision of electricity to *any* member of the public. The Court's 1988 ruling effectively prohibits the sale of power directly to an end use, or retail, customer by any entity other than a utility.

The electric utilities in Florida, as well as the Southeast generally, operate in what is termed a “regulated” market. In this market, electric utilities have a monopoly on the sale of power to all residential, commercial and industrial customers – referred to as a retail sale. The monopoly extends over a specific geographic region, called a service territory, granted to it by the state. Utilities in regulated markets can purchase power from each, other or a third-party non-utility, through bi-lateral contracts for power that will ultimately be provided to retail customers. This is referred to as a wholesale sale of power.¹¹

A number of other states have moved beyond the vertical integration model and restructured their

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From the Chair

by Rachael Bruce Santana

Happy New Year! ELULS is excited about all the hard work by our Committees and Subcommittees in 2020 to bring to life the **Looking Forwards** component of our theme for the year. This Spring, members can look forward to a newly redesigned website, a refreshed and updated Treatise, virtual events for networking, and a series of quality CLEs - including a three-part bundle on Resiliency and Sea Level Rise by our new Resiliency Committee. Our Law School Subcommittee and Public Interest Task Force will also be focusing on reengagement with the next generation of environmental and land use practitioners in Florida

through some upcoming events with law schools.

Last month, as an effort to bring some normalcy to an anything but normal 2020, the ELULS Executive Council meeting on December 11th included holiday sweaters and an ELULS-themed Bingo game. The Bingo card is included in this edition of the Section Reporter if you want to play along at home. While it wasn't the same as getting together in person, it was a fun way to liven up our Zoom call. This was also our first Executive Council meeting which included Past Chairs. We really appreciate their participation and look

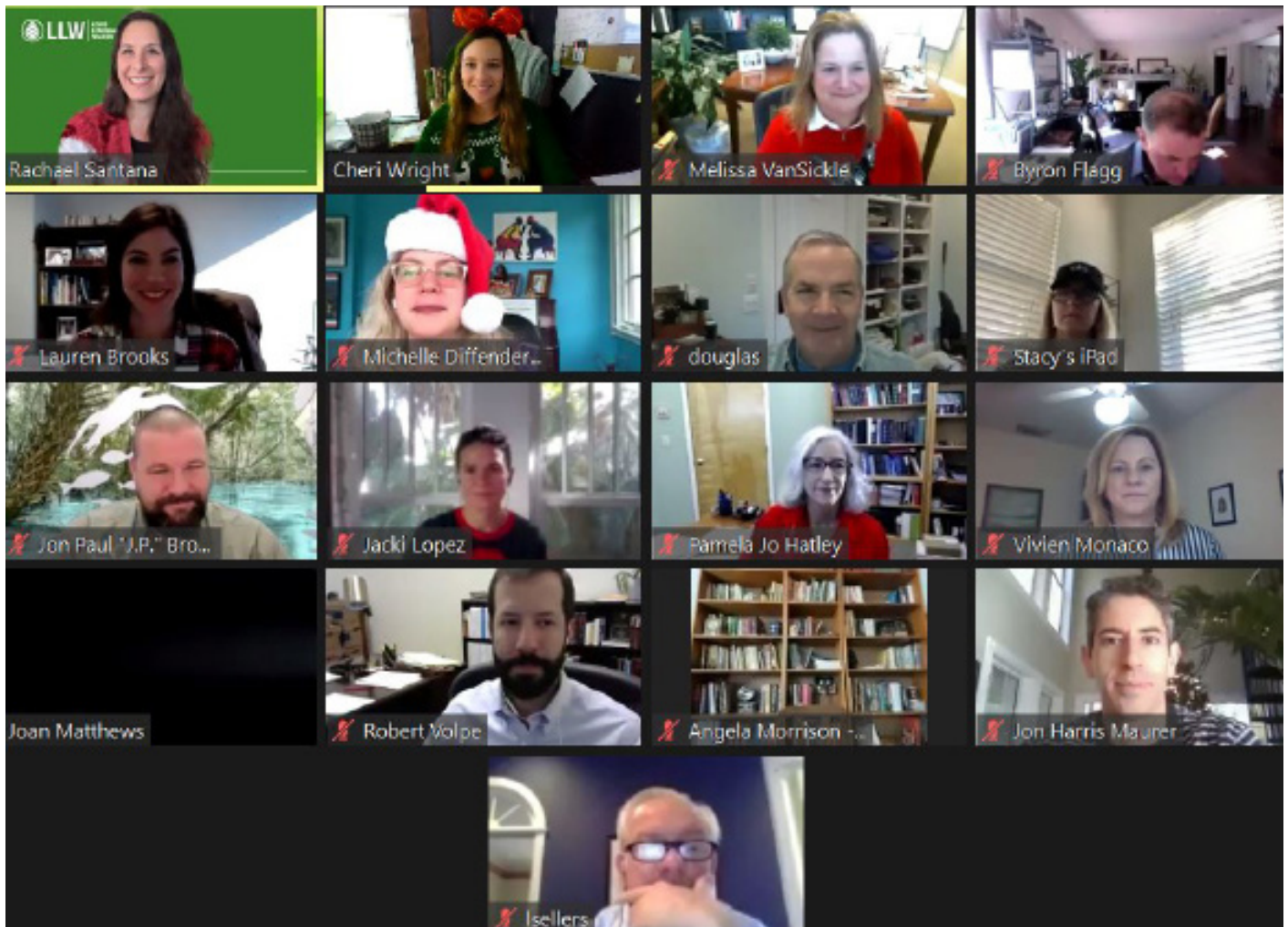
forward to continued conversations and collaboration.

Finally, ELULS's 50th year is right around the corner and we would love to get your feedback on the best way to celebrate and commemorate this historic milestone!

As always, stay safe and warm regards!

Rachael Bruce Santana
ELULS 2020-21 Section Chair

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B I N G O

Submitted an update or article for the ELULS Treatise.	Attended an ELULS networking event during the last 24 months.	Asked a colleague to join ELULS.	Invited a colleague to an ELULS networking event.	Authored a FL Bar Journal article for ELULS.
Been a speaker or moderator for a ELULS CLE in the past 3 years.	Listened to the "Larry/Terry" Show.	Stayed out "all night" in Amelia Island and attended an ELULS meeting the next morning.	Participated in a debate about the infamous "ELULS" list serv.	Attended a Long-Range Planning Retreat in the last 10 years.
Participated in ELULS while it was a Committee (before Section status).	Participated in an administrative hearing before Judge Ffolkes.		"Physically" held a paper copy of the ELULS Treatise.	Heard the "The Non-Essentials" Band play live at an ELULS conference.
Hiked the Florida Trail Ocean to Lake.	Met a good friend while serving on the Executive Council.	Recipient of the Stephens/ Register Award	Spoken at UF Law's Public Interest Environmental Conference.	Participated in an environmental cleanup in the past 3 years.
Recipient of the Bill Sadowski or Judy Florence Award.	Decorated your house for the holidays earlier than usual this year.	Read "The Swamp: The Everglades, Florida, and the Politics of Paradise."	Served as ABA SEER Liaison for ELULS.	Been to the Everglades before.

From the Chair – Historical Messages from Past ELULS Chairs

This year the Section Reporter will be highlighting historical Chair's Messages as part of the "Looking Backwards" element of our theme. We want to give a special thanks to Irene Quincy for providing the compilation of documents. This issue's message comes from Section Chair David Scott Dee during the 1994-1995 fiscal year.

By David Scott Dee, Chair, 1994-1995

The Environmental and Land Use Law Section has become a diverse, relatively large, and active branch of The Florida Bar. The section has approximately 2,000 attorney and 180 non-attorney affiliate members, who represent the entire spectrum of public and private clients, including developers, regulatory agencies, public interest groups, and environmental organizations. To address the members' needs, the section has 15 committees working on a wide variety of issues. This report summarizes some of the on-going activities and describes some of the future issues that the section will address.

The section recognizes that one of its most important goals is to "promote and provide education to the Bar, law students, affiliates and the public on environmental and land use related topics." Accordingly, the section sponsors CLE seminars and workshops, publishes educational materials, works on special projects when appropriate, and works with Florida law schools to encourage scholarship in environmental and land use law.

The section's CLE programs have been popular and informative. The 1994 Annual Meeting and Update Seminar attracted approximately 250 people to Amelia Island for a lively discussion of the most recent cases and developments in environmental and land use law. An even larger group is expected for the 1995 Update Seminar, which will be held on August 17-19 at the South Seas Plantation on Captiva Island. The section also presented programs concerning petroleum and chlorinated solvent spills; the Florida Environmental

Reorganization Act; environmental risk assessments; bankruptcy issues affecting environmental law cases; and the representation of public interest groups. All of these programs received very favorable ratings from the attendees. Parenthetically, the written course materials for these programs are available from the Bar; audio or videotapes are available for some programs.

To reach a broader audience, the section is cosponsoring CLE programs with other professional organizations that share the section's goals. For example, the section is cosponsoring programs with The Florida Bar's Local Government Law Section and the American Bar Association's Section of Natural Resources, Energy, and Environmental Law.

The section continues to publish outstanding educational materials. The section's two-volume treatise on *Environmental Regulation and Litigation in Florida* is the subject of never-ending work. This manual is revised every year to keep pace with the rapid developments in environmental law. The section also publishes monthly articles in *The Florida Bar Journal* and quarterly articles in the section's *Reporter*. The authors and editors of these publications have done an exemplary job.

The section has been working on several special projects. It is developing standard jury instructions for cases involving common law claims based on pollution and is helping the Florida Institute of Certified Public Accountants prepare a handbook for environmental audits. It also is continuing to evaluate the special legal and ethical problems confronting

members when they participate in quasi-judicial proceedings.

The section is trying to ensure that its CLE programs and other activities appropriately reflect the diverse interests of its members. The section not only serves those members who represent private corporations, but also assists those who represent public agencies and public interest organizations. The section encourages its members to work on pro bono cases, issues affecting the public's access to justice, and other public interest matters. The section wants to continue to diversify its membership, Executive Council, and programs.

Each year the section conducts a meeting that focuses on the section's long range plan. The 1995 planning session with evaluate different long range projects that the section could undertake to provide a lasting contribution to its members and the State of Florida. Among other things, the section will consider whether it should establish a scholarship or professorship in environmental and land use law.

In conclusion, it has been a very productive year for the section. The Executive Council, committees, and staff have been working diligently to improve and expand the services provided by the section for its members.



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current?**

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(<https://member.floridabar.org>)
and click the "My Account" tab.**

On Appeal

by Larry Sellers, Holland & Knight LLP

Note: Status of cases is as of December 14, 2020. Readers are encouraged to advise the author of pending appeals that should be included.

FLORIDA SUPREME COURT

The City of West Palm Beach, Inc., v. Haver, et al., Case No. SC20-1284. Notice to invoke discretionary jurisdiction to review the 4th DCA decision in *Haver v. City of West Palm Beach*, 298 So. 3d 647 (Fla. 4th DCA 2020), in which the court certified direct conflict with decisions of other district courts of appeal in *Detournay v. City of Coral Gables*, 127 So. 3d 869 (Fla. 3d DCA 2013), and *Chapman v. Town of Redington Beach*, 202 So. 3d 979 (Fla. 2d DCA 2019). The case presents the question of whether a private party may bring an equitable action against a municipality to compel a local government to enforce municipal zoning regulations. Status: Jurisdiction accepted on October 9, 2020.

FIRST DCA

Kent v. Scheffler, et. al., Case No. 1D20-3428. Appeal from a final order of the Department of Environmental Protection denying an environmental resource permit and state lands authorization for Lot 18 dock and directing the district office to reestablish a boat access channel and the petitioners' rights of navigation. Status: Notice of appeal filed November 30, 2020.

Palafox, LLC v. Diaz, Case No. 1D20-3415. Appeal from a final order denying a motion for attorney's fees pursuant to Section 120.569(2)(e), Florida Statutes (2020). The ALJ concluded that Diaz and her attorney filed the amended petition for an improper purpose, but the motion for fees and sanctions was not timely filed when it came more than six months after the amended petition. Status: Notice of appeal filed November 25, 2020.

City of Destin v. Wilson, et al., Case No. 1D20-2585. Appeal from a final order denying a motion for attorney's fees pursuant to Section 120.569(2)(e), Florida Statutes (2020), in litigation challenging the modification of a DEP permit related to dredging of

East Pass in Destin, Florida. Status: Notice of appeal filed September 3, 2020.

Wilson, Donovan, Sherry & Sherry v. S. Army Corps of Engineers and DEP, City of Destin and Okaloosa County, Case No. 1D20-1434. Appeal from final order adopting a recommended order and approving proposed permit modification for maintenance dredging of East Pass. Status: Notice of appeal filed May 6, 2020; consolidated with Case No. 1D19-4101 for purposes of travel and for assignment to the same panel of judges for disposition on the merits on June 11, 2020.

John S. Donovan, et al., v. DEP and City of Destin, Case No. 1D19-4101. Appeal from DEP final order issuing consolidated joint coastal permit and sovereign submerged land authorization to the City authorizing periodic maintenance dredging of the federally authorized navigation channels in Destin Harbor's East Pass. Status: Notice of appeal filed November 13, 2019.

1000 Friends of Florida, Inc., et al., v. State of Florida, et al., Case No. 1D20-2135. Appeal from final order of dismissal, dismissing an amended complaint challenging section 7, subsection (8)(c), Chapter 2019-165, *Laws of Florida*, that provides for prevailing party attorney's fees and costs in certain land development litigation, as unconstitutional. (This provision is now codified in section 163.3215(8)(c), *Florida Statutes* (2020).) Status: Notice of appeal filed July 17, 2020.

Neely Paul Towe as Trustee v. Fish and Wildlife Conservation Commission, Case No. 1D20-2066. Appeal from an FWC final order dismissing an amended petition for a hearing to challenge the renewal of a marine turtle permit. Status: Notice of appeal filed July 13, 2020.

Delaney Reynolds, et al. v. State of Florida, et al., Case No. 1D20-2036. Appeal from an order granting motions to dismiss with prejudice the first amended complaint by which eight young Floridians seek

declaratory and injunctive relief from "defendants' deliberate indifference to the fundamental rights of life, liberty and property, and the pursuit of happiness, which includes a stable climate system in violation of Florida common-law and the Florida Constitution." The complaint asserts the "fossil fuel energy system" created and operated by the defendants does not, and cannot, ensure the plaintiffs will grow to adulthood safely, enjoying the same rights, benefits and privileges of earlier-born generations of Floridians. The complaint sought declaratory relief and an injunction compelling the defendants to develop and implement a comprehensive plan to bring its energy system into constitutional compliance. Status: Notice of appeal filed July 1, 2020.

Uhlfelder v. DeSantis, Case No. 1D20-1178. Appeal from a trial court order granting a motion to dismiss with prejudice the plaintiff's amended complaint for emergency injunctive relief, which sought to compel Governor DeSantis to close all of Florida's beaches. Status: Summarily affirmed on November 13, 2020.

Edgewater Beach Owners Association, Inc. v. Walton County, Case No. 1D20-0257. Appeal from an order denying the appellant's motion to show cause and for contempt. Appellant alleged the county violated the terms of a final judgment and an injunction included therein by filing a complaint for declaration of recreational customary use of appellant's private beachfront property. Status: Affirmed *per curiam* on December 2, 2020.

Blue Water Holdings SRC, Inc. v. Santa Rosa County, Case No. 1D19-4387. Appeal from a summary judgment denying a Harris Act claim for failure to comply with the Act's procedural requirements to submit a valid appraisal. The claim arises from the denial of a permit for a construction and demolition debris landfill. Status: Oral argument held on September 15, 2020.

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ON APPEAL

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Vickery v. City of Pensacola, Case No. 1D19-4344. Appeal from a trial court order denying a motion to dissolve a temporary injunction to prevent a property owner from removing a live oak tree located in the Northern Hill Preservation District. Part of Pensacola is governed by specific ordinances to protect Heritage trees. Status: Notice of appeal filed December 3, 2019.

GI Shavings, LLC v. Arlington Ridge Community Association, Inc. and Florida Department of Environmental Protection, Case No. 1D19-3711. Petition for review of a DEP final order approving a consent order between GI Shavings and DEP but denying the application for revisions to its air permit for a wood chip dryer. Status: Notice of appeal filed October 14, 2019; motion for oral argument denied August 20, 2020.

City of Jacksonville v. Dames Point Workboats, LLC and Florida Department of Environmental Protection, Case No. 1D19-1728. Petition to review a DEP final order granting a consolidated ERP and sovereign submerged lands lease for a commercial/industrial tugboat and marine barge loading facility on the St. Johns River. Status: Oral argument held on October 12, 2020.

Imhof, et al. v. Walton County, et al., Case No. 1D19-980. Appeal from a final judgment in favor of the county in an action brought by the plaintiffs pursuant to Section 163.3215 challenging the consistency of a development order with the county's comprehensive plan. The trial court followed the 2d DCA's decision in *Heine v. Lee County*, 221 So.3d 1254 (Fla. 2nd DCA 2017), which held that a consistency challenge is limited to whether the development order authorizes a use, intensity, or density of development that is in conflict with the comprehensive plan. Note: Regular readers will recall that the 3d DCA recently affirmed *per curiam* a similar ruling

in *Cruz v. City of Miami*, Case No. 3D17-2708. Status: Oral argument held January 15, 2020.

SECOND DCA

Fetzer B R S, LLC v. DEP, Case No. 2D20-2457. Appeal from a final order on a petition for a declaratory statement on the question of whether the petitioner may apply for an environmental resource permit and sovereign submerged lands authorization to allow for the reconstruction of the Quednau Ice House, which the petitioner maintains is "grandfathered-in to use sovereignty lands" under Section 253.03(7)(c), Florida Statutes (2020). The final order grants the request for a declaratory statement in part and dismisses it in part with leave to file an application for regulatory and proprietary authorization pursuant to Section 253.03, Florida Statutes, and Rule 18-21.004, *Florida Administrative Code*, and Section 373.417, Florida Statutes. Status: Notice of appeal filed August 17, 2020.

FOURTH DCA

Alex Larson and Fane Lozman v. Palm Beach County, Case No. 4D19-3338. Appeal from a summary judgment on the plaintiff's amended complaint. Appellants ask the court "to determine that the County's practice of packing numerous propositions into a consent agenda, and then affording merely [3] minutes to speak on the entirety of the items runs afoul of the statutory guarantee of a 'reasonable opportunity to be heard on a proposition before a board or commission' as established in §286.0114(2), Fla. Stat." Status: Oral argument set for January 12, 2021.

The Board of Trustees of the Internal Improvement Trust Fund of the State of Florida v. Waterfront ICW Properties, LLC and Wellington Arms, A Condominium, Inc., Case No. 4D19-3240. Petition to review a final judgment quieting title in the name of the appellee and against the Trustees as to certain submerged lands constituting a part of Spanish Creek located in the Town of Ocean

Ridge. Status: Oral argument held on December 8, 2020.

FIFTH DCA

Glenda Mahaney v. Garber Housing Resorts, LLC and DEP, Case No. 5D19-3517. Appeal from a DEP final order denying appellant's petition for an administrative hearing with prejudice and approving a site rehabilitation completion order. Status: Notice of appeal filed November 27, 2019.

11th CIRCUIT COURT OF APPEAL

Florida Defenders of the Environment, et al., v. U.S. Forest Service, Case No. 20-12046. Appeal from an order granting the federal defendant's motion to dismiss a complaint alleging that the state has operated the Rodman Dam without a permit. Status: Notice of appeal filed June 3, 2020.

UNITED STATES SUPREME COURT

Maggie Hurchalla v. Lake Point Phase I, LLC, et al., Case No. 20-332. Petition for writ of certiorari to review decision by the Florida 4th DCA upholding a jury verdict finding Ms. Hurchalla liable for \$4.4 million in damages on a claim of tortious interference with a contract for a public project due to her public comments in opposition to the project. 44 Fla. L. Weekly D1564a (Fla. 4th DCA 2019), *rev. denied* Case No. SC19-1729 (Fla. Apr. 13, 2020). Status: Petition for writ of certiorari filed on September 10, 2020.

U.S. Fish and Wildlife Service v. Sierra Club, Case No. SC19-547. Petition to review decision by 9th Circuit. Issue: Whether Exemption 5 of the Freedom of Information Act, by incorporating the deliberative process privilege, protects against compelled disclosure of a federal agency's draft documents that were prepared as part of a formal interagency consultation process under Section 7 of the Endangered Species Act of 1973 and concern proposed agency action that was later modified in the consultation process. Status: Oral argument held on November 2, 2020.



Commercial Urban Agriculture Policy in Florida: Planning, Taxation, and the Right to Farm

Thomas T. Ankersen,¹ Jana Caracciolo,² Raychel Thomas³ & Catherine Campbell⁴

Introduction

Florida is a rapidly urbanizing state with a long agricultural history. Increased urbanization, coupled with the local food movement, has led to an increased interest in food production, sales, and distribution activities that occur in urban and adjacent areas. These activities are commonly referred to as “urban agriculture,” and include commercial farms, home and community gardens, farmers’ markets, and mobile produce markets.⁵ These activities are familiar to Florida residents, and many local governments have addressed them in their comprehensive plans, ordinances, and land development regulations.

New and emerging commercial urban agriculture businesses are producing food and selling food within or adjacent to urban areas and for distribution outside of the community.⁶ These activities take many forms, from small-scale, in-ground farms in vacant lots in the urban core to sophisticated indoor hydroponic and aquaponic operations in warehouse districts.⁷ The goals of these commercial enterprises vary and include increasing food security in limited-resource populations, fostering community resilience, and profitmaking. Whatever the motivation for these commercial urban agricultural activities, common questions arise. Urban farmers want to know what state, county, or city regulations apply to urban agriculture activities, and local governments want to know what discretion they have to regulate urban agriculture in their communities.

Some states,⁸ and some Florida local governments,⁹ distinguish urban agriculture from other forms of agriculture. However, Florida statutes and agency rules do not make that distinction. Florida’s legislature, state agencies, and its local governments do, however, extensively address both urban development and agriculture across a wide swath of

public policy. In terms of urban agriculture, among the most significant areas are land use planning and zoning, property taxation, and public and private nuisance law.

Florida and its local governments are similar to most states in adopting early on a “Euclidean” form of land use and zoning, an approach that intentionally separates different types of land uses,¹⁰ including separating agriculture from urban development. A later policy reinforced this trajectory as Florida followed other states in enacting a “Right to Farm” statute. Right to Farm statutes are designed to ensure that the spread of urban areas does not compromise rural agriculture. Like most other states, Florida also provides a preferential property tax treatment that results in a lower assessment for agricultural lands. Known as the “Greenbelt Law,” this tax treatment is typically exercised on parcels in rural areas that do not require the level of municipal services that urban development demands.

This policy framework has contributed to the geographic separation of farm and city, and creates a conundrum for those wishing to promote their reintegration. At the same time, the many benefits of properly regulated urban agriculture¹¹ suggest the need to reconcile the competing policies that led to the separation of people and their food supply in the first place.

Land Use, Zoning, and Agriculture

In Florida, no overarching state land use policy addresses urban agriculture. However, agriculture is subject to the State’s land use policy, including in urban settings. As a “home rule” state, Florida counties and municipalities have the authority to regulate and promote activities in their jurisdiction, including urban agriculture—provided local regulations are not preempted by, or are otherwise in conflict with, state law.¹²

Chapter 163 of the Florida Statutes, which includes much of Florida’s local government planning law, recognizes the statewide importance of agriculture and the special place it enjoys in state policy through the Agricultural Lands and Practices Act.¹³ This statute includes language that is similar, yet broader than the regulatory preemption of the Right to Farm Act,¹⁴ discussed in Section III below. In addition to the regulatory preemption and limitations on lawsuits provided by the Right to Farm Act, Florida’s Agricultural Land Acknowledgment statute conditions local development approvals for land contiguous to agricultural land on the filing of an acknowledgment by the applicant that the applicant’s contiguous neighbor is a farm or farming operation, as these terms are defined by the Greenbelt Law.¹⁵ Florida law also exempts non-residential farm buildings, farm fences and farm signs on lands classified as agriculture under the Greenbelt Law from the application of the Florida Building Code, which local governments implement, as well as other forms of local regulation of non-residential farm buildings, farm fences and farm signs.¹⁶ Greenhouses are included in the non-exclusive list of building types that are exempt from local regulation.¹⁷ These building code limitations apply in both urban and rural settings, and without regard to the type of agricultural activity.¹⁸ The Agricultural Lands and Practices Act also includes a section on “fiscal preemption,” prohibiting local governments from imposing fees on qualifying agricultural land,¹⁹ including stormwater fees and assessments (with some qualifications).²⁰ The Florida Farm Bureau has created a detailed guide to the many exemptions that agriculture enjoys under Florida law, including areas where local governments

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have been preempted from regulating agriculture.²¹

Florida's Community Planning Act,²² also part of Chapter 163, requires all local governments to plan for future growth and development. Of special significance, the Community Planning Act requires each local government enact a "comprehensive plan" composed of optional and required individual "elements."²³ Among the required elements is the "Future Land Use Element."²⁴ The Future Land Use Element requires the local government to designate the "proposed future general distribution, location, and extent of the uses of land for residential uses, commercial uses, industry, agriculture, recreation, conservation, education, public facilities, and other categories of the public and private uses of land."²⁵ The Future Land Use Element must include a Future Land Use Map or Map Series.²⁶ The requirement to address agricultural land use applies to both fully developed urban areas as well as rural local governments.²⁷ Each element must spell out goals, objectives, policies, and strategies to guide local government decision making.²⁸ The Act also encourages the use of "innovative planning tools" which could be used to promote urban agriculture.²⁹

In addition to addressing agriculture through its Future Land Use Element and associated map, local governments can choose to include or exclude agriculture through zoning, which addresses land use with greater specificity. Local governments may explicitly zone land for agriculture,³⁰ or they may include agriculture as a "lesser included use" in other zones, typically industrial, and sometimes commercial zones. Local governments can also choose to allow agriculture in any zoning district, even residential, as a "conditional use" or "special use," which typically requires further approval. If the zoning district doesn't authorize agriculture as a right through an agricultural zoning district or as a lesser included use, or by conditional or special use, then the zoning must be changed for the parcel or parcels

of land seeking to conduct the agricultural activity. Zoning districts must still be consistent with the Future Land Use Map,³¹ however, or the comprehensive plan must also be amended.³² Because this district-based approach to both land use and zoning is anchored in the Euclidean tradition of separating uses, and promoting agricultural uses as a rural enterprise, agriculture in urban areas is often relegated to the edges of urban areas, if it is allowed at all.

"Agricultural enclave" is another land use term in the Florida Statutes that may affect urban agriculture.³³ Agricultural enclaves are areas that have been largely enveloped by urbanization, and hence are provided special consideration for conversion to non-agricultural use on the theory that farmers within the enclave are disadvantaged by the denial of economic opportunity that results from being zoned agricultural in an area that is clearly undergoing conversion to other forms of development.³⁴ This would also appear to promote the traditional planning policy framework of separation of farm and city and could lead to a reduction in available agricultural land in urbanizing areas.

Without defining the term, Florida land use law has sought to characterize and differentiate what it means to be "urban" in several ways. "Urban service area" is a key term, defined as "areas identified in the comprehensive plan where public facilities and services, including, but not limited to, central water and sewer capacity and roads, are already in place or are identified in the capital improvements element."³⁵ "Urban development boundary" or "urban growth boundary" are related terms. Though not defined by statute, nor necessarily tied to public facilities or services, local governments employ these terms to promote land use density and intensity, discourage urban sprawl and safeguard rural and agricultural land use patterns beyond the boundary line.³⁶ In another context, the Florida legislature has created an elaborate framework for defining "Dense Urban Land Areas" or DULAs.³⁷ These were created in order to exempt these areas from the regulatory process required for "Developments of Regional Impact," development projects that by virtue of their size or activity have the potential to

impact more than one county.³⁸ Many of the areas classified as DULAs include areas that are traditionally known for agricultural production.

While having some implications for agriculture, it turns out that none of these place-based terms are particularly helpful in uniquely characterizing or distinguishing urban agriculture for public policy purposes, and it may not be necessary to draw geographic lines for the purpose of characterizing urban agriculture. But the policies which led to geographic characterizations of urban-ness, as well as the various limitations on local regulation of agriculture, have consequences for whether or how agriculture can be rewoven into the urban fabric of Florida cities.

Property Taxation and Agriculture Under the Florida Statutes

Florida's property tax system is guided by the state constitution, which requires that all property be assessed at its "just valuation," unless an exception is made by the constitution.³⁹ The Florida Supreme Court has interpreted "just valuation" to mean the "fair market value" of property, or the amount a purchaser, willing but not obligated to buy, would pay a seller who is willing but not obligated to sell.⁴⁰ In arriving at fair market value, a property appraiser must consider, the eight factors listed in section 193.011 of the Florida Statutes.⁴¹ These factors include the present cash value, the highest and best use, location, size, previous sale price, condition, income, and net proceeds of the sale of the property.⁴² There are several constitutional exceptions to this requirement, and among them is one for agriculture.⁴³ According to this exception, agriculture can be assessed "solely on the basis of character or use" and the constitution directs the legislature to enact legislation to give meaning to the valuation of agricultural property for assessment purposes.⁴⁴ This has been accomplished through what is known as Florida's "Greenbelt Law." The Greenbelt Law allows agricultural lands to be taxed at a lower rate than other land uses.

The Greenbelt Law makes no distinction between urban and non-urban agriculture. The law states that

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“only lands that are used primarily for bona fide agricultural purposes shall be classified agricultural.”⁴⁵ The section goes on to explain that “[t]he term ‘bona fide agricultural purposes’ means good faith commercial agricultural use of the land.”⁴⁶ The following factors help determine if the agricultural use is bona fide:

- a. The length in time the land has been used for the current purpose.
- b. Whether the current use has been continuous.
- c. The purchase price paid for the property.
- d. The size of the property as it relates to the specific agricultural use. A minimum acreage is not required for an agricultural assessment.
- e. Whether “an indicated effort” has been made to care sufficiently and adequately for the land in accordance with accepted commercial agricultural practices, including, without limitation, fertilizing, liming, tilling, mowing, reforestation, and other accepted agricultural practices.
- f. Whether the land is under lease and, if so, the effective length, terms, and conditions of the lease.
- g. Such other factors as may become applicable.⁴⁷

For urban agriculture, subsection d. and g. are of particular importance. Subsection d. ensures that there is no minimum size for a property to be considered agricultural, and subsection g allows for consideration of “other factors.” While there is no mandated minimum size, some local Florida counties do provide guidance to property appraiser regarding farm size, as we will discuss below.

Subsection g leaves room for administrative discretion to expand upon the list. This has been done by the State Department of Revenue (“DOR”), which exercises oversight over the State’s property appraisers.⁴⁸ Florida Administrative Code Rule 12D-5.004 states:

(1) Other factors property appraiser may consider..., but to which he [or she] is not limited to in their valuation:

a. Opinions of experts in the appropriate fields;

The property owner’s business or occupation; (Note this cannot be considered over and above ... the actual use of the property)

d. The economic merchantability of the agricultural product; and,

e. The reasonable likelihood the particular agricultural product will sell within a reasonable future time.

(2) Other factors that are recommended to be considered are:

- a. Zoning ... of the property;
- b. General character of the neighborhood;
- c. Use of adjacent properties;
- d. Proximity of the ... property to an urban or a metropolitan area and services;
- e. Principal domicile of the owner and family;
- f. Date of acquisition;
- g. Agricultural experience of the person conducting agricultural operations;
- h. Participation in governmental or private agricultural programs and activities;
- i. Amount of harvest for each crop;
- j. Gross sales from the agricultural operation;
- k. How long hired labor has been employed; and
- l. Inventory and condition of buildings and machinery.⁴⁹

Most of the factors described in these statutory and administrative listings are largely agnostic as to whether agriculture is urban or non-urban. However, factors a – d in subsection 2’s additional list of factors appears to tilt toward the traditional land use policy preference for separating agriculture and urban development. These include consideration of zoning, neighborhood character, use of adjacent properties, and proximity of the property to an urban or metropolitan areas and services. However, with respect to zoning, a particular concern for agriculture in urban areas, the Florida Supreme Court held that a property’s agricultural classification for tax purposes is not determined exclusively by the zoned use of the land.⁵⁰

For a property owner to have their

property classified as agricultural, the property owner must apply to the county property appraiser, an elected official in Florida.⁵¹ Although property appraisers enjoy considerable discretion in valuation and assessment,⁵² the DOR provides detailed technical guidance for property appraisers to follow when assessing specific categories of agricultural land: woodlands, pastures, citrus groves, and cropland.⁵³

Urban agriculture is not an enumerated category identified in the DOR guidelines. Most urban agriculture involves vegetable farming, which falls under the cropland category.⁵⁴ However, the guidelines in this category are tailored to more traditional vegetable farming with established methods of valuation. When a form of agriculture is not well-represented by the categories of specific guidance the DOR suggests appraisers fall back on the methodologies provided by the General Provisions of the Agricultural Guidelines, or a combination of the detailed and general provisions.⁵⁵

Individual property appraisers often offer their own guidance to their constituents. Despite the state statute specifically providing there is no minimum farm size, some counties suggest a minimum acreage for the crops most likely to be farmed in an urban context.⁵⁶ These can range from one to five acres depending on the county, which exceeds the size of many urban farm. Some appraisers also require an agricultural business plan,⁵⁷ something that is not imposed by the statute or DOR regulations.

To simplify the value assessment of urban agriculture, California has created a blanket valuation for this land use within its “urban agriculture incentive zones” that is “based [simply] on the average per-acre value of irrigated cropland in California.”⁵⁸ In Florida, if a property owner is dissatisfied with their appraisal, they can discuss the assessment with the property appraiser’s office; file a petition with the county value adjustment board; or file a lawsuit in circuit court to challenge the appraiser’s assessment or the value adjustment board’s decision.⁵⁹

continued...

The Florida Right to Farm Law: Limitations on Nuisance Lawsuits and Preemption of Local Regulation⁶⁰

“Right to Farm” laws are designed to insulate agriculture from nuisance claims—lawsuits brought to address disputes between neighbors (private nuisance), or to protect the public from some more general harm to the public health, safety, and welfare (public nuisance).⁶¹ Although they differ in many and important ways, all 50 states have some form of Right to Farm legislation.⁶² These arose in the late 1970’s and early 1980’s as a direct response to the pressures created by urban encroachment on rural farmlands.⁶³ They offer a legislative remedy to the legal maxim that “coming to the nuisance is no defense.”⁶⁴ This maxim essentially holds that it does not matter that your farm was there before your neighbor built a house in the country, your neighbor can still sue to stop you from conducting operations that constitute a nuisance—private or public—such as smells and noise.⁶⁵ To protect existing agriculture as cities expanded into rural areas, states—including Florida—passed Right to Farm laws. These laws essentially limit the ability to sue existing agricultural operations under nuisance law, and in some cases, such as Florida, to also preempt local government regulation of agriculture.

Florida enacted its Right to Farm law in 1979.⁶⁶ The law precludes lawsuits under nuisance theory (public or private) against any bona fide farm or farming operation that has been in existence for more than one year and was not already a nuisance,

provided the operation conforms to generally accepted agricultural and management practices.⁶⁷ Some exceptions are made for public health type violations.⁶⁸ This limitation on nuisance suits applies even in cases when there is a change in farming operation ownership; a change in the type of farm product; or changes required to bring the farm or farm operation into compliance with best management practices adopted by the federal, state or local government.⁶⁹ Another exception is made for changes that make an existing farm a “more excessive farm operation with regard to noise, odor, dust or fumes” where the operation is adjacent to an established homestead or business as of March 15, 1982.⁷⁰

In addition to preventing bona fide agricultural operations from being subject to nuisance suits, the Florida law also preempts local governments from adopting “any ordinance, regulation, rule, or policy to prohibit, restrict, regulate, or otherwise limit an activity of a bona fide farm operation on land classified as agriculture pursuant to s. 193.461,” Florida’s Greenbelt Law.⁷¹ The preemption only applies where the operation is “regulated through implemented best management practices or interim measures adopted by the Department of Environmental Protection, the Department of Agriculture and Consumer Services, or water management districts and adopted ... as part of a statewide or regional program.”⁷² Thus, it appears under this statute that local governments are able to regulate agricultural operations that are not regulated by best management practices or interim measures. An exception is made for locally created wellfield protection areas, provided there is no relevant adopted best management practice or interim measure that addresses

wellfield protection.⁷³ However, as noted in Section I, a similarly worded preemption in Chapter 163 appears to be broader, and includes “regulations adopted as rules under chapter 120,” in addition to “best management practices, [and] interim measures”.⁷⁴ It also adds “or if such activity is expressly regulated by the United States Department of Agriculture, the United States Army Corps of Engineers, or the United States Environmental Protection Agency.”⁷⁵

Conclusion

Florida law does not distinguish urban agriculture from other types of agriculture. Thus, urban agriculture is subject to the same statutes and regulations that as any other form of agriculture. However, the social and geographic distinction implicit in the term “urban” can lead to differences in the way the laws governing agriculture are applied to urban agriculture. These distinctions can also influence the effects those laws have, creating both challenges and opportunities for urban farming and the local governments that regulate it.

Endnotes

- 1 J.D., Legal Skills Professor & Director, Conservation Clinic, University of Florida Levin College of Law.
- 2 J.D. Candidate & Student Associate, Conservation Clinic, University of Florida Levin College of Law
- 3 J.D. Candidate & Student Associate, Conservation Clinic, University of Florida Levin College of Law
- 4 Ph.D., M.P.H., Assistant Professor, Family, Youth and Community Sciences Department, University of Florida, Institute of Food and Agricultural Sciences
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Environmental Case Law Update

by Gary Hunter, Hopping Green & Sams

***Yacht Club by Luxom, LLC. v. Village of Palmetto Bay*, 45 Fla. L. Weekly D1525 (Fla. 3d DCA 2020)**

The Appellant Yacht Club by Luxom, LLC (“Yacht Club”) appealed a denial of declaratory relief after the trial court held that a claim against the Village of Palmetto Bay (“Palmetto”) comprehensive plan amendment procedure must be brought before the Florida Division of Administrative Hearings (“DOAH”). On appeal, the Third District Court of Appeals was asked to consider whether Yacht Club may challenge Palmetto’s comprehensive plan amendment process in a trial court under § 82.601, Fla. Stat. regardless of available remedies.

In late 2018, Yacht Club purchased a 71-acre parcel classified as “institutional use” under the land development code and zoned as “interim,” a temporary zoning classification allowing any use so long as it is similar to the surrounding development. While Yacht Club planned to develop a hospital campus, the Palmetto tried to thwart the project by proposing two ordinances which would change the land use and zoning designations. Palmetto’s code of ordinances typically requires an application for amending the comprehensive plan. However, Palmetto itself is exempt from the application requirement.

Regardless, Yacht Club submitted its hospital plan for approval five days before the proposed ordinances were to be heard for the first time. On that same day, Yacht Club filed a complaint against Palmetto seeking a declaration that Palmetto’s exemption ran afoul of § 163.3183, Fla. Stat., which requires that municipalities “provide affective public participation.” Subsequently, Palmetto moved to dismiss, alleging that the action was not ripe, lacking standing, and must be brought before DOAH before proceeding to circuit court. On June 20, 2019, the trial court granted Palmetto’s motion holding that DOAH was the more appropriate venue for this claim.

On appeal, Yacht Club contends that the trial court erred in dismissing

merely because other remedies were available. In response, Palmetto contends that the “tipsy coachman” doctrine requires the court to affirm the holding as the claim lacked standing and ripeness. While the court expressed no opinion on the merits of this claim, it disagreed with Palmetto and held that a cognizable claim existed. Yacht Club’s complaint did not challenge the proposed ordinances, rather it challenged Palmetto’s exemption. Since the current amendment structure affects Yacht Club’s rights, the claim and injury are ripe for adjudication and redress via a declaratory judgment. Accordingly, the court held that Yacht Club has a right under Chapter 86, Florida Statutes, to have a trial court determine the validity of Palmetto’s amendment scheme. Subsequently, the court reversed the order and remanded for further proceedings.

***City of Miami Beach v. Nichols*, 45 Fla. L. Weekly D2206 (Fla. 3d DCA 2020)**

Appellant, City of Miami Beach (the “City”), challenged a nonfinal order granting injunctive relief in favor of appellee Natalie Nichols (“Nichols”) which barred subsection to substantial mandatory fines. At issue is whether the City’s alternative code enforcement system allows the levying of fines against certain property code violators under § 162.03 Fla. Stat., Fla. Stat., in excess of those already authorized under the Local Government Code Enforcement Boards Act (the “Act”). Ultimately, the court concluded that the City may only prescribe fines within the statutorily prescribed limits.

In 2010, the City enacted an ordinance prohibiting short-term rentals of apartments in specified districts, levying substantial mandatory fines against violating property owners under an “alternative code enforcement system” adopted pursuant to Chapter 162. Nichols owned two properties subject to regulation by the ordinance, and filed suit claiming that the alternative code system violated the Act. The lower court granted injunctive relief finding that the ordinance violated the Act. Subsequently, the City

appealed to the Third District Court of Appeals.

Under Chapter 162, municipalities may adopt administrative code enforcement systems, with additional supplemental methods of enforcement within the judicial system. While a city may create special administrative enforcement procedures, the amounts of fines imposed are strictly limited by two statutory provisions. Section 162.09, Fla. Stat., defines both baseline fines and heightened fines for more populous cities. For all cities a fine shall not exceed \$250 per day for a first violation and shall not exceed \$500 per day for a repeat and in no way shall exceed \$5,000 per violation. However, the City, as a municipality with a population over 50,000 people, could adopt fines in excess, so long as they do not exceed “\$1,000 per day per violation for the first violation, \$5,000 per day per violation for a repeat violation, and up to \$15,000 per violation” based on the findings of the code enforcement agents. The City adopted an alternative code enforcement system under this provision but prescribed extraordinary penalties of \$20,000 for the first offense, \$40,000 for the second, \$60,000 for the third, \$80,000 for the fourth, and \$100,000 for each subsequent offense.

The court stated that municipal ordinances are inferior to state law and cannot authorize what the legislature has expressly forbidden. The City contended that § 162.03, Fla. Stat., contained an ambiguous provision which allowed the city to “opt-out” of the statutory fine schedule. The court disagreed and held that the plain language of the statute merely authorized an alternative code enforcement system but does not authorize excessive monetary fines. Alternatively, the City argued that the wording of § 162.13, Fla. Stat., allowed “nothing contained in [the Act to] prohibit a local governing body from enforcing its codes by other means.” However, the court rejected this argument and stated that while enforcement may be pursued

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CASE LAW UPDATE

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by cumulative remedies, this does not authorize excessive fines. Notably, the Court allowed the City to sever the offending fines provision and preserve the validity of the remaining ordinance. Yet the excessive fines against Nichols were deemed prohibited under provisions of the Act.

***Okefenoke Rural Electric Membership Corp. v. Dayspring Health, LLC*, 300 So.3d 371 (Fla. 1st DCA 2020)**

Dayspring Health LLC (“Dayspring”) brought an inverse condemnation claim against Okefenoke Rural Electric Membership Corporation (“Okefenoke”) alleging that an asserted prescriptive easement over Dayspring’s land was instead an attempt to take property without just compensation. While the trial court initially found no prescriptive easement and ruled in favor of Dayspring, the First District Court of Appeals found in

favor of Okefenoke. While Okefenoke has the power of eminent domain, at issue was whether a prescriptive easement was proven on the land and the disputed element of adversity.

Since the 1950s, Okefenoke has erected power lines on a right-of-way along Route 301. However, Okefenoke inadvertently placed several poles on private property. These poles went unnoticed for almost twenty years, until the property was eventually sold to Dayspring. Shortly after the sale, Dayspring revoked Okefenoke’s permission to use the property, but no corrective action was taken. In the initial complaint, it was alleged that the poles stood without the consent of either Dayspring or their predecessors. This was supported by evidence at trial, as all parties and predecessors mistakenly believed that the poles were placed on the right-of-way. Thus, the trial court ruled that no prescriptive easement existed, as the poles placement was never openly adverse, and was instead done with the consent of the property owners.

At issue on appeal was the element of adversity in finding a prescriptive easement. While Dayspring argued that previous owners consented to the pole placement, Okefenoke showed by the record evidence that no private owner had either objected or consented to the poles being placed, even though they had been placed inadvertently. The court determined that it would be illogical to conclude that the landowners both did not know of and yet consented to poles being placed on their land. In fact, the court noted that all circumstances of this case and evidence demonstrate that no consent or permission was ever granted. Additionally, Okefenoke’s position was supported by the court’s rejection of an earlier argument that power poles were not adverse as they delivered electricity and thus benefited the property. Accordingly, the court reversed the trial court’s order, holding that Okefenoke’s use of the land was adverse to the owners, thus demonstrating an entitlement to a prescriptive easement.

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Fall 2020 Update from the Florida State University College of Law

by Erin Ryan

The U.S. News and World Report (2021) has ranked **Florida State University** as the nation's 15th best **Environmental Law Program**, tied with George Washington University. FSU College of Law ranked 50th overall. This column highlights recent accomplishments of our College of Law students and alumni. It also lists the rich set of programs the College of Law hosted this semester and reviews recent faculty activities.

Recent Alumni Accomplishments

- **Ahjon Garmestani** ('01) is a research scientist at the U.S. Environmental Protection Agency, Office of Research and Development. He was recently appointed as Associate Faculty at Emory University, Department of Environmental Sciences, and as Fellow at the Utrecht Center for Water, Oceans, and Sustainability Law.
- **Ashley Englund** ('20) was awarded the 2020 Law Student Achievement Award from The Florida Bar Animal Law Section. She also won the Eighth Annual Animal Law Writing Competition with her article *Canines in the Courtroom: A Witness's Best Friend Without Prejudice*.



(L-R) Ahjon Garmestani, Ashley Englund

Recent Student Achievements and Activities

- President of the FSU Animal Legal Defense Fund, **Catherine Awasthi**, recently co-authored an article with alum **Ralph DeMeo** ('85) that was published in the September/October issue of *The Florida Bar Journal* entitled *The Fading Color of Coral: Anthropogenic Threats to Our Native Reefs*.
- Vice President of the FSU Animal Legal Defense Fund **Mallory Umbehagen** was selected for a clerkship with National ALDF for this fall.
- **Holly Parker Curry** and Erin Tuck won first place in the 2020 Appellate Lawyers Association National Moot

Court Competition held virtually last November 6-7. The FSU Law Moot Court Team beat the University of California-Hastings in the finals.

Faculty Achievements

- Professor **Shi-Ling Hsu** published *Prices Versus Quantities*, in *POLICY INSTRUMENTS IN ENVIRONMENTAL LAW* (Richards, K.R. & J. Can Zeben eds., 2020). Forthcoming symposium *Anti-Science Policies*, 75 U. Miami. L. Rev. __ (2021)
- Associate Dean **Erin Ryan** published *A Short History of the Public Trust Doctrine and its Intersection with Private Water Law*, 39 VIRGINIA ENVTL. L.J. __ (2020) as well as *Rationing the Constitution vs. Negotiating It: Coan, Mud, and Crystals in the Context of Dual Sovereignty*, 2020 WISC. L. REV. 165 (2020). Forthcoming publications include *The Twin Environmental Law Problems of Preemption and Political Scale*, in *ENVIRONMENTAL LAW, DISRUPTED* (Keith Hirokawa & Jessica Owley, eds.),
- Professor **Mark Seidenfeld** published a book review entitled *The Limits of Deliberation about the Public's Values: Reviewing Blake Emerson, The Public's Law: Origins and Architecture of Progressive Democracy*, 199 MICH. L. REV. __ (2020) He also published *Textualism's Theoretical Bankruptcy and Its Implications for Statutory Interpretation*, 100 B. U. L. REV. __ (2020).
- Assistant Professor **Sarah Swan** has two forthcoming publications: *Running Interference: Local Government, Tortious Interference with Contractual Relations, and the Constitutional Right to Petition*, 36 J. LAND USE & ENVTL. L. __ (2021) and *Exclusion Diffusion*, 70 EMORY L.J. __ (2021).
- Dean Emeritus **Don Weidner** has a forthcoming publication in the Winter 2020 Issue of *THE BUSINESS LAWYER* titled *LLC Default Rules Are Hazardous to Member Liquidity*. Dean Weidner was also recently honored as the recipient of the campus-wide Dr. Martin Luther King, Jr. Distinguished Service Award at Florida State University.

Environmental Law Lecture

The College of Law hosted a full slate of impressive environmental law events and activities this semester.

Fall 2020 Environmental Distinguished Lecture: Visibility and Indivisibility in Resource Arrangements

Max Pam Professor of Law **Lee Fennell** of the University of Chicago Law School presented the Fall 2020

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FSU COLLEGE OF LAW

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Environmental Distinguished Lecture on October 21. Her lecture shed light on dilemmas in which value resources, such as highways, bridges, pipelines, and wildlife corridors, only retain value if left undivided. Fennell is the author of two books, most recently publishing *Slices and Lumps: Division and Aggregation in Law and Life* (University of Chicago Press 2019).

The Longest Oil Spill in History

On September 28, **Dr. Ian MacDonald**, Professor of Oceanography in the Department of Earth Ocean and Atmospheric Science at Florida State University, presented his lecture *The Longest Oil Spill in History: How Hurricane Ivan Created an Environmental and Legal Dilemma*.



Deepwater horizon response

- Spill of National Significance designates National Incident Commander
- BP named Responsible Party
 - Financially capable – paid in excess of the \$75 million limit of liability mandated by the OPA
- BP entered into a \$20.8 billion settlement
 - Payments for all penalties under current legislation (CWA and OPA), state damage claims
 - 20% of civil penalties to the OPA Oil Spill Liability Trust Fund

SUMMARY OF PAYMENTS	
CWA Civil Penalty	\$5.5 billion
Natural Resource Damages	\$7.1 billion
Early Restoration BP previously committed (partially paid.)	\$1 billion
NRD Assessment Costs (States and U.S.)	\$350 million
Unknown Injury and Adaptive Management	Up to \$700 million
False Claims Act; Royalties on oil; Response and other costs	\$250 million
State and Local Economic Claims (Separate Agreement)	Up to \$5.9 billion
TOTAL	\$20.8 billion



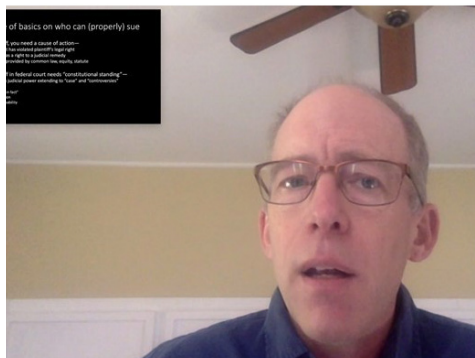
Professor Lee Fennell



Professor Ian MacDonald with FSU Environmental Law Certificate Students

Standing For Climate Change: Lessons from Juliana vs. United States

Richard Murphy, AT&T Professor of Law, Texas Tech University, presented his lecture on Thursday, October 8. His lecture reflected on the rulings made for *Juliana vs. United States*.



Professor Richard Murphy discussing the *Juliana vs United States*



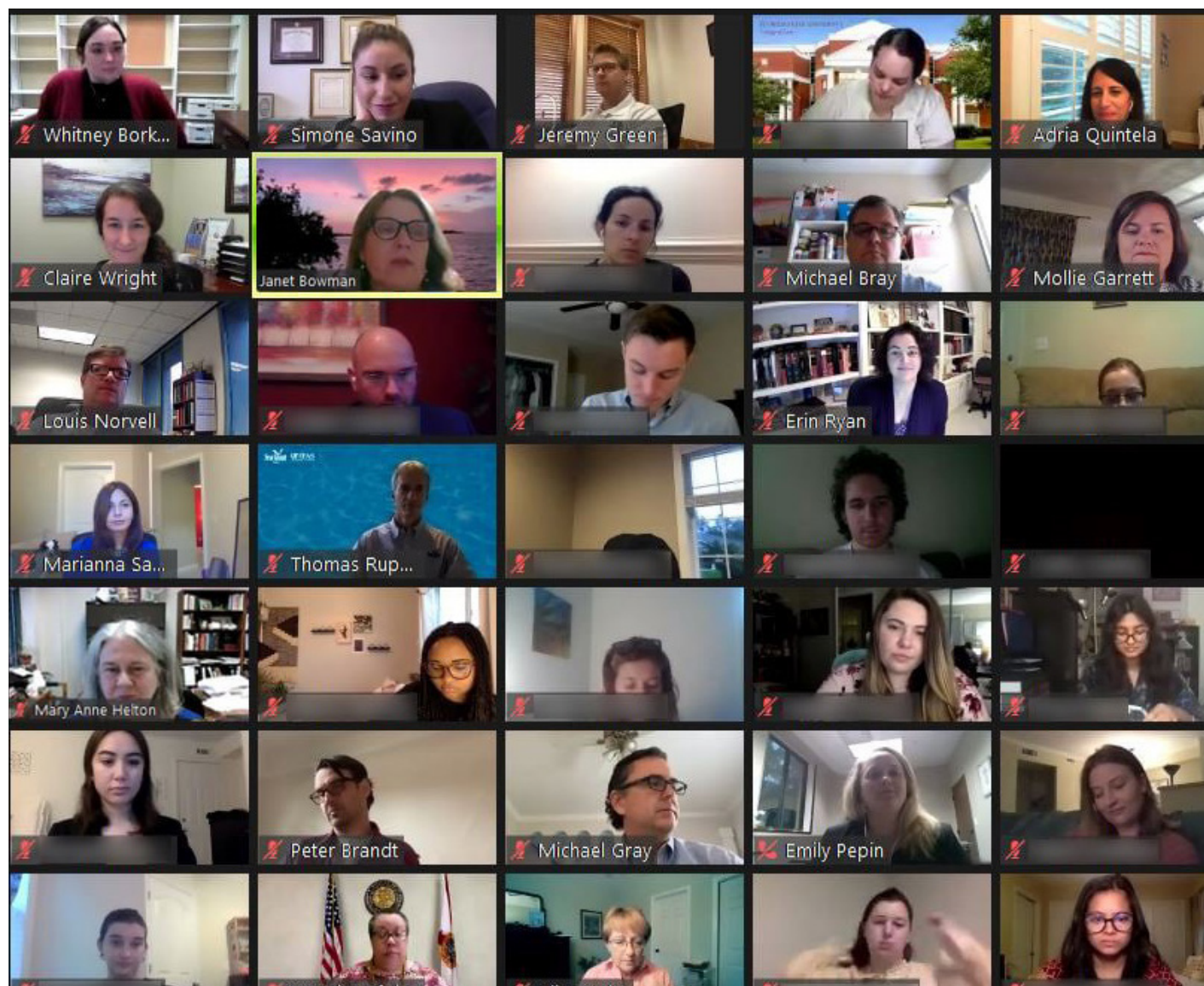
Conservation of Sea Turtles in a Changing World

Mariana Fuentes, Assistant Professor for the Department of Earth, Ocean, and Atmospheric Science at Florida State University, presented her lecture on Tuesday, November 3.

The FSU Environmental Law also hosted an Environmental Externships Event for students interested in learning about externship and volunteer opportunities not just in environmental, energy, and land use law, but also in fields relating to agricultural, water, ocean, wildlife, animal law, and related fields. Students had the opportunity to hear from 18 different legal employers, including alumni Janet Bowman ('87), of The Nature Conservancy; Michael Gray ('02), of the U.S. Department

of Justice, Environment & Natural Resources Division; Jeremy Green ('17), of Green Point/Hemp Industry Association of Florida; Mary Anne Helton ('91), of the Florida Public Service Commission; Emily Pepin ('11), of the Leon County Attorney's Office; Marianna Sarkisyan ('08), of the Florida Department of Environmental Protection; Simone Savino ('15), of the City of Tampa Attorney's Office.

Upcoming events include an **Energy Law Panel 2021: Rooftop Solar Issues**, moderated by **Robert Schef Wright** on January 27, 2021, and **Spring 2021 Distinguished Environmental Lecture** by **Sheila Foster** of Georgetown Law. For more information, please contact Jella Roxas at jroxas@law.fsu.edu.



Environmental Externships Zoom Meeting

electricity market to provide more competition in the wholesale market, and in some cases, the retail electricity market as well.¹² Those states have functionally decoupled their utilities' generation assets from their transmission assets, and have a non-profit independent system operator (ISO) oversee the competitive wholesale market to reliably operate the transmission system. In competitive markets, resource choices are driven by market price signals. There was a move last year in Florida to place a question on the ballot to transition the state to a restructured market with wholesale and retail competition, but the ballot language failed to pass Florida Supreme Court review.¹³

III. Regulated Industries

We have come a long way since 1882 when Albert Edison flipped a switch at the Pearl Street Station to bring 400 incandescent bulbs to a soft glow.¹⁴ The newfound ability to generate and transmit electricity famously launched a competition between Thomas Edison and George Westinghouse in the late 1800's to develop the most efficient way to deliver power over long distances, through either alternating current (AC) or direct current (DC). Ultimately, Westinghouse's AC current prevailed and the rush was on to provide power to population centers by Westinghouse and other private companies.¹⁵ As privately owned utility companies began to grow and consolidate, states grappled with how to regulate them. The current regulation of IOUs grew out of a rich history of case law on the regulation of rates of certain industries, like utilities. The key was to set rates that were fair and reasonable for customers, but not so confiscatory to the regulated company as to violate the 5th amendment's prohibition of the taking of private property for public use without just compensation.¹⁶ But what was the economic and legal basis for state regulation of private industry?

There is a well-established rationale for regulating certain industries, including private utilities. IOUs are in an industry that requires significant investment to enter the market. This significant upfront investment

is a major barrier to market entry. Due to the high cost of market entry, it is more economically efficient for one entity to provide service. Imagine for a moment, five different utility companies running five distinct transmission and distribution poles and lines to provide the same electricity service to a community. This would be economically wasteful, and also may not allow any one company to achieve the economies of scale necessary to recover its capital investment through sales to customers. This gives rise to the "natural monopoly" – when it is most economically efficient to have one utility company as the sole provider of electricity in a geographic region.

The availability of reliable and reasonably priced electricity is critically important to customers. Such critical services in the past have been deemed to be "affected with a public interest."¹⁷ Courts have recognized this public interest doctrine going back to cases that predate the establishment of the United States. Given the critical nature of the service provided by IOUs and the lack of competition, its customers would ultimately be subjected to monopolistic pricing. This is clearly not a desirable societal outcome, which leads to the need to regulate the monopoly's rates.

The US Supreme Court recognized the need to regulate such industries in the 1876 *Munn v. Illinois* case.¹⁸ In *Munn* the Court affirmed the right of state governments to regulate a private industry – when that industry is affected with a public interest.¹⁹ Munn owned a grain warehouse where Illinois farmers would store their grain for later shipment to market. Munn was charged by the state with violating a provision of the Illinois Constitution by exceeding the maximum price that could be charged for grain storage. Munn claimed that the rate limits on the company constituted a violation of the 5th Amendment of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law.

The Court found the argument unconvincing because Munn owned a grain warehouse that was the hub of commerce in Chicago and exercised a monopoly on grain storage services. Therefore, the Court reasoned that if Munn enjoys the benefit of a monopoly of a critical service, it should accept

the duty attached to it on reasonable terms.²⁰

Several hundred years later, Florida utility law recognizes the importance of the state regulation of utilities as being in the public interest. As stated in Section 366.01, Florida Statutes:

The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose.

IV. The Evolution of Cost of Service Ratemaking

This regulation of electric utilities ultimately created a framework where an IOU agreed to abide by limits on its rates, and to provide reliable, non-discriminatory service in exchange for monopoly control of a system within a geographic area, which is often referred to as the "regulatory compact." Early on though, establishing the value of a utility's assets and the appropriate return on the investment, or ROE, to shareholders generated controversy.

Bluefield Water Works v. PSC provided more clarity to states on the return that utility shareholders should receive on their investment.²¹ As with the previous US Supreme Court cases regarding state regulation of an industry, the Court was asked by an aggrieved regulated company to strike down a decision made by a state agency to limit the rates it can charge customers. Bluefield, a wastewater utility, claimed that an order by the West Virginia Public Service Commission prescribing rates was confiscatory and deprived it of property without just compensation and due process. In agreeing with Bluefield, the Court set out the following test for public service commissions to consider when setting returns on investments for utilities.

A public utility is entitled to such rates as will permit it to earn a return upon the value of the property which it employs for the convenience of the public

continued...

equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures.

The return on investment, which a public utility should be permitted to earn, should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit, and enable it to raise money necessary for the proper discharge of its public duties.²²

A later holding in *Federal Power Comm'n v. Hope Nat. Gas* determined the basis for valuing the assets upon which a return is earned by utility shareholders.²³ In that case, the Federal Power Commission (FPC)²⁴ established an asset valuation based on Hope's actual initial capital investment amount minus depreciation. This net amount of capital investment was the value upon which the utility would earn its ROE. Hope argued the valuation was too low and argued for a replacement cost valuation, which was three times higher than the value established by the FPC. The Court ruled that the actual capital investment minus depreciation was a reasonable basis, building on earlier cases that regulated industries were not entitled to predetermined asset valuations or returns, but rather to a process that produces fair and reasonable rates to both it and the public.²⁵ This valuation methodology is used today by the Florida Public Service Commission. The Court also held that the ROE established by commissions "should be sufficient to assure confidence in the enterprise so as to maintain its credit and to attract capital."²⁶

It is important to note that the

utility is not guaranteed a return on all investments. What if, for instance, a utility investment is abandoned for economic reasons and is no longer useful to the public? The seminal case law on whether non-useful investments should be granted a return for shareholders developed most recently around half-built nuclear reactors that were abandoned in the 1980's because of spiraling construction costs and lack of demand for the power that would have been generated by the reactors.²⁷ Two prevailing arguments developed. The first was that abandoned investments were not "used and useful" and therefore not eligible for a return. The second argument focused on the prudence of the investment at the time the decision was made. The Florida Public Service Commission has primarily adopted the prudent investment standard to resolve such issues. To resolve disputes, the Commission asks the following question: what was known, or should have been known, from the perspective of the decision maker at the time the decision was made? The Commission has stated that the utility should not be charged with knowing facts that were not known or expected when the investment decision was made.²⁸ If the decision on the investment was prudent at the time it was made, the investment will likely be allowed to earn an ROE.

The above cases led to today's Cost of Service ratemaking methodology, and is represented by the basic formula below.

$$R = (B \times r) + O$$

R = revenue requirement

B = rate base (actual capital investment – depreciation)

r = return on equity (ROE)

O = expenses

The revenue requirement (R) is the revenue the utility needs from customers annually to earn a reasonable return on its investments and pay its operating expenses. It is a function of the value of the utility's investments represented by (B) – referred to as its rate base -- multiplied by the its ROE (r). Lastly, the utility's operating expenses (O) are passed through to customers at the utility's cost, dollar for dollar. The specific values for the factors are established in a rate case. The revenue requirement is subsequently

allocated to residential, commercial and industrial classes of customers and recovered through various rates. The rates are referred to as "tariffs."²⁹

V. Florida Public Service Commission

The Florida agency charged with striking a balance in rates between the utility and the customer is the Florida Public Service Commission.³⁰ The Commission has regulatory authority over the telephone and telegraph industry, water and wastewater industry, and investor-owned electric utilities. It assumed authority over IOUs in 1951.³¹ The Commission is an agency comprised of 5 commissioners and its technical, legal, and support staff.³² The commissioners are appointed by the governor for a 4-year term, from a pool of candidates submitted by a legislative Florida Public Service Commission Nominating Council.³³

The Commission is tasked with setting fair, just and reasonable rates³⁴ consistent with Chapter 366, Florida Statutes. Its charge also includes approving the need for new power plants of 75 MW and above,³⁵ and setting energy conservation goals for the state's largest utilities.³⁶ The Florida Administrative Procedures Act governs proceeding at the Commission.³⁷ The Florida Supreme Court hears judicial review of agency final orders regarding rates or service of electric utilities.³⁸

The basic Cost of Service formula above has been modified in Florida through legislatively approved cost recovery clauses that allow a utility to recover certain operating expenses (O) through annual cost recovery clauses dockets. Cost recovery clauses provide for an annual review of expenses that are subject to frequent and short-term changes. Approximately 60% of utility costs are recovered through these clauses.³⁹ Cost recovery clauses have been established to recover fuel costs, purchased power costs, costs associated with energy conservation, costs of complying with governmentally mandated environmental programs and standards, and costs of new nuclear power plants.⁴⁰ In recent years, the volume of capital investment items flowing through cost recovery clauses has also grown. The Generation Base

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Rate Adjustment (GBRA) is another method of recovery that permits utilities to add future capital investment into the rate base (B) in between rate cases. Only charges deemed prudent, and related to the utility's obligation to provide service to customers may be recovered through these clauses.⁴¹

VI. The 2016 FPL Rate Case

It may be instructive to examine the 2016 FPL rate case to see the above concepts in action, and as an example of how policy can be forged through rate case settlement agreements. The first step in a rate case is often the filing of a petition by a utility with the Florida Public Service Commission alleging a need for an increase in the utility's rates to generate more revenue in order to maintain an adequate ROE. A utility may not earn a ROE on an investment that has not been approved as prudent by the Commission. Therefore, if a utility makes additional investments between rate cases, its ROE can effectively drop and it may require more revenue to maintain its ROE. The same is true if electricity demand is significantly lower than projected.

On March 15, 2016, FPL filed a petition to increase rates to generate an additional \$1.33 billion in revenue to meet its desired revenue requirement.⁴² It was a multi-year plan that requested 886 million in 2017, subsequent year increases of \$262 million in

2018, \$209 million in 2019 (invoking the GBRA precedent). If granted, FPL stated it would not seek another rate increase through at least January 2021.⁴³ The impact on the average residential customer was estimated to be an extra \$13.28 per month. In requesting the increase, FPL argued that without it, its ROE would fall below the level approved in its previous 2012 rate case and endanger its financial integrity. FPL stated:

Absent rate relief, the Company projects that it would earn a substandard ROE of only 7.88 percent in 2017 and 6.95 percent in 2018. These ROEs are well below the level needed to "assure confidence in [FPL's] financial integrity ... so as to maintain and attract capital" and thus fail the test prescribed in *Hope*.⁴⁴

The rate increase covered a number of new investments made by the company since it was last granted a rate increase and included a \$1 billion 1,622 MW combined cycle gas plant in Okeechobee County,⁴⁵ and investment of nearly 800 million in new gas combustion turbine technology to improve reliability, and \$400 million for three large scale solar projects totaling 224 megawatts.⁴⁶

FPL proposed an 11.5% return on equity consisting of an ROE of 11% percent and a 0.5 "percent performance adder" to "reflect FPL's accomplishments in delivering superior customer value."⁴⁷ If granted, this

would reflect a full one percent increase over its then-current ROE of 10.5%. The additional ROE would mean more profit for the company and would cause another \$240 million of revenue requirement to be borne by customers.⁴⁸

A number of parties intervened in the proceeding including the Office of Public Counsel (OPC),⁴⁹ the Florida Retail Federation, and the Sierra Club. The interveners opposed the rate increase with OPC stating that its request was excessive and asking for a return higher than what Florida utilities and those around the country were earning. It's expert believed that it should be earning a rate of 9% or less.⁵⁰

Sierra Club argued that FPL's investment in upgrading its combustion turbines was not prudent because the company presented no competent evidence that it considered lower risk non-fossil fuel alternatives to meet the demand for power, such as solar installations coupled with battery storage.⁵¹ This major investment in upgrades to FPL's generation would continue its reliance on fossil fuels well into the future.

There was extensive discovery in the docket and the case lasted much of 2016. A number of "field hearings" were held throughout FPL's service territory where a majority of customers opposed the rate increase with some stating that they would have

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to sacrifice food, medicine or clothing due to the rate increase,⁵² highlighting equity concerns of increased bills on vulnerable customers.

Several of the parties subsequently reached a settlement agreement that was approved by the Commission on December 15, 2016.⁵³ Rather than ruling on the prudence of individual investments and other distinct issues in the case, the Commission ruled that the settlement agreement in its entirety was “in the public interest.”⁵⁴

The terms of the agreement included that FPL’s ROE would effectively increase 1/10 of 1% to 10.6 – which would allow it to earn in a range of 9.60% to 11.6% during the term of the agreement (through December 31, 2020), and FPL’s requested revenue requirement request was scaled back from \$1.33 billion to \$811 million.⁵⁵

The agreement also included future investments that were never part of FPL’s petition. For instance, FPL was permitted to construct up to 1,200 MW of solar installations prior to December 2021 if those installations were constructed below a specific price point. The agreement allowed for an expedited prudence review and placement of these projects into the rate base through a Solar Base Rate Adjustment (SOBRA) mechanism. This mechanism was also approved for subsequent rate case settlement agreements with Duke Energy Florida and Tampa Electric in 2017.⁵⁶

In a state with no overarching energy policy, the SOBRA mechanism effectively represented a clean energy policy that accelerated the development of solar power in Florida. It has

been one of the driving forces in helping Florida become a leading state in utility-scale solar development in the Southeast.⁵⁷ The opportunity to potentially shape future rate case settlement agreements should be a consideration to clean energy and equity advocates as they consider intervention in such proceedings.

VII. Takeaways

By its very nature, Cost of Service ratemaking encourages continued growth in capital investments in order to maintain and maximize utility shareholder value. Those investments may be in utility-scale, utility-owned solar installations, or may consist of upgrading and constructing fossil fuel units. With no overarching clean energy state policy, there is no assurance that utility resource decisions will focus on clean energy resources.

Additionally, Cost of Service ratemaking is a disincentive for the utility to employ certain clean energy resources. For instance, IOUs resist clean energy resources that erode electricity demand – such as meaningful level of energy efficiency, and rooftop solar. Florida is near the bottom of state rankings for the amount of energy savings its utilities capture for customers through efficiency programs.⁵⁸ Several IOUs recently proposed efficiency goals of zero or near zero at the Commission’s five-year conservation goal setting proceeding.⁵⁹ Likewise, Florida IOUs attempted to undermine the state’s cornerstone policy for distributed rooftop solar – net metering – by bankrolling a political committee that aimed to pass a ballot initiative that would lay the groundwork for the imposition of fees or penalties on solar rooftop customers.⁶⁰ That effort failed at the ballot box in 2016.

Meanwhile, the climate crisis

continues to bear down on us unabated. The science indicates that we must make significant reductions in annual greenhouse gas emissions (GHG) and be at net-zero GHG emissions by 2050 if we are to avert the worst impacts of climate change.⁶¹

Cost of Service ratemaking was developed to regulate rates of IOUs in a fair, just and reasonable manner. It was never designed to address pressing issues such as climate change or energy equity. This highlights the need for policy intervention to make the full range of clean energy resources available to the utility and its customers. Performance-based ratemaking is an emerging regulatory framework that ties utility revenue to performance metrics rather than capital investments. Such metrics can include performance in delivering customer service, energy efficiency for customers, and GHG reductions.⁶²

Given the climate crisis, and the need to address energy burden among the utility’s most vulnerable customers, it may be time to decouple capital investment from shareholder value in favor of transitioning to performance-based metrics that reward utility shareholders for addressing customers’ and society’s desire for cleaner and more equitable energy choices. In the meantime, the outcome in rate cases before the Florida Public Service Commission early this year may significantly influence the trajectory of energy resource decisions by the state’s largest power companies for years to come.

Endnotes

1 George Cavros, Esq. is the Florida Energy Policy Attorney for Southern Alliance for Clean Energy, Co-chair of the Florida Bar Environmental Land Use Section Energy Committee,

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and has advocated and litigated before the Florida Public Service Commission for over a decade.

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3 It is expected that the state's largest IOU, Florida Power and Light Co. (FPL) and second largest, Duke Energy Florida will file petitions for base rate increases in early 2021. The outcome of these cases will impact more than 6.8 million customers (approximately 60% of the state's residents).

4 In response the Governor Crist's Executive Orders, the Legislature passed a 2008 law that provided authorization for to the Florida Public Service Commission to develop a renewable portfolio standard rule requiring a certain portion of power generated or procured come from clean energy sources by a certain date; and for the Department of Environmental Protection to develop a cap & trade rule to significantly reduce carbon emissions within the state. See Ch. 227, 2008 Fla. Laws 46. That authorization was deleted from statute in subsequent years.

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7 *Id.*

8 In order to facilitate the generation and distribution of power, the Florida municipal utilities formed the Florida Municipal Power Agency (FMPA). The FMPA is a wholesale power agency where several of the larger municipal utilities pool their generation resources and enter into contracts with participating distribution utilities for the sale of power.

9 \$366.02, Fla. Stat.

10 *PW Ventures, Inc. v. Nichols*, 533 So.2d 281 (Fla. 1988).

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14 Gilbert Kind, *Edison v. Westinghouse, a Shocking Rivalry*, Smithsonian Magazine, October 11, 2011.

15 *Id.*

16 U.S. CONST, amend. V.

17 *Munn v. Illinois*, 94 U.S. 113, 126 (1876); See also *26 Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)

18 *Munn v. Illinois*, 94 U.S. 113, (1876).

19 *Id.* at 126.

20 *Id.* at 128.

21 *Bluefield Waterworks v. PSC*, 262 U.S. 679 (1923); see also *Smyth v. Ames*, 169 U.S. 466 (1898) ("[t]he utmost that any corporation operating a public highway can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just both to it and to the public.")

22 *Id.* at 692-3.

23 *Federal Power Comm'n v. Hope Nat. Gas* 320 U.S. 591 (1944).

24 The Federal Power Commission was the precursor to the Federal Energy Regulatory Commission that has jurisdiction over interstate wholesale of natural gas and electricity.

25 *Smyth v. Ames*, 169 U.S. 466 (1898).

26 *Federal Power Comm'n v. Hope Nat. Gas* 320 U.S. 591, 603 (1944).

27 See e.g. *Duquesne Light Co. v. Barasch, et. al*, 488 U.S. 299 (1989); *New Jersey Central v. Federal Energy Regulatory Comm'n*, 810 F.2d 1168 (D.C Cir.1987).

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34 \$366.05, Fla. Stat.

35 \$403.59, Fla. Stat.

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43 *Id.* at 7.

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45 See Florida Power and Light Co. Petition, *In re: FPL's Petition for Need Determination of Okeechobee Clean Energy Center Unit 1*, Docket No. 20150196, September 30, 2015.

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51 Florida Public Service Commission, Docket No. 20160021, *Sierra Club Post-Hearing Brief*, November 10, 2016.

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53 Florida Public Service Commission, Order No. PSC-16-0560-AS-EI (December 15, 2016)

54 *Id.* at 4. Florida statute provides that "unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order." §120.57(4), Fla. Stat. The Commission is not precluded by statute or case law from approving non-unanimous settlements. *Citizens v. Graham*, 146 So.3d 1143, 1152-54 (Fla. 2014); see also *South Fla. Hosp. & Healthcare Ass'n v. Jaber*, 887 So.2d 1210, 1212-13 (Fla. 2004) (affirming Commission's approval of a non-unanimous settlement despite absence of full evidentiary hearing). The Commission's determination of whether to approve a settlement agreement is based on the public interest standard. *Sierra Club v. Brown*, 243 So.3d 903, 910-913 (Fla. 2018) (citing *Graham*, 146 So. 3d at 1164).

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