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Here is the actual motion we filed on June 6th. We will keep you updated as we move through process.

Thanks
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NNP Licensing Manager - COLA
"The difference between a successful person and others is not a lack of strength, not a lack of knowledge, but rather in a lack of will." ~ Vince Lombardi
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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA,
THIRD DISTRICT

MIAMI-DADE COUNTY, et al.,

Appellants,

Case Nos. 3D14-1451,
1465, 1466, 1467
L.T. No. 09-3107 & 09-3575

vs.

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

Appellees.
_____/

FPL'S MOTION FOR REHEARING, REHEARING *EN BANC,* OR CERTIFICATION OF QUESTIONS OF GREAT PUBLIC IMPORTANCE

Appellee Florida Power & Light Company ("FPL") moves for rehearing, rehearing *en banc*, or for certification of questions of great public importance.

This case is worthy of further consideration. Of immediate concern is the final certification for FPL's two new nuclear electric generating units, miles of transmission lines, and other associated facilities. Of more lasting concern are the rights and obligations of critical infrastructure providers, state agencies, and the state's highest elected officers – the Governor and Cabinet, sitting as the Siting Board. The panel opinion reversed a decision authorizing expansion of a power plant and associated transmission lines needed to supply electricity to millions of consumers in South Florida. To avoid piecemeal and inconsistent regulation by

local governments and state agencies, the Power Plant Siting Act ("PPSA") authorizes those officials to make necessary permitting decisions. In this case, the application underwent a five-year process, including an eight-week evidentiary hearing before an Administrative Law Judge ("ALJ"), and resulted in a 62,000-page record.

The panel opinion reversing the Siting Board's decision granted no deference to the state agency responsible for overseeing the PPSA, and accepted virtually every argument of the local governments, including one that sought to reroute the transmission lines into other jurisdictions. The panel opinion will frustrate the underlying purpose of the PPSA—to centralize and streamline decision-making for authorizing transmission lines—both in this case and in other cases statewide.

The panel opinion overlooks or misapprehends the law and the factual record in important respects. The panel's first holding—that the Siting Board misinterpreted the "development" exception in Section 380.04, Florida Statutes, as it relates to transmission lines—fails to recognize that, by rule, the Project is automatically consistent with the Cities' local land use requirements, conflicts with another decision of this Court, and ignores agency interpretations of the statute. The panel's second holding—that the Siting Board erroneously concluded that it lacks authority to require undergrounding of transmission lines at FPL's expense—

effectively overrules a decision of the Florida Supreme Court, and is inconsistent with another decision of this Court. The panel's third holding—that the Siting Board erred in its analysis of FPL's obligation to comply with Miami-Dade County's East Everglades Zoning Ordinance—improperly reweighs the evidence presented below. Each of these errors justifies rehearing and rehearing *en banc*. In the absence of panel or *en banc* rehearing, each also presents a question of great public importance that should be certified to the Florida Supreme Court.

Below we (I) provide a short statement of the case; (II) discuss the relevant legal standards; and (III) demonstrate why rehearing, rehearing *en banc*, or at least certification is justified.

I. Statement of the Case

Because of the extensive record in this case—62,000 pages of record, 2,700 pages of briefing, and multiple questions of statutory interpretation that affect local governments, utility companies, state agencies, and a class of constitutional officers—some regulatory and factual background is warranted. Below we discuss (A) the relevant statutes and regulations; and (B) the certification process.

A. Relevant statutes and regulations

The PPSA creates a "centrally coordinated," one-stop licensing process for the licensing of "electric power plants" with a gross capacity of 75 megawatts or more. §§ 403.502, -.506(1), -.510(3), Fla. Stat. "[E]lectric power plants" include

"associated facilities" such as transmission lines. § 403.503(7), -(14), Fla. Stat. The Act "contemplates review by *all* state, regional and local agencies with jurisdiction, provides for participation of third parties and the public, and subjects the entire process to Chapter 120 [Administrative Procedure Act] strictures, with the Siting Board typically responsible for final agency action." *Seminole Elec. Coop., Inc. v. Dep't of Envtl. Prot.*, 985 So. 2d 615, 616 (Fla. 5th DCA 2008) (emphasis added). The PPSA specifically preempts all other forms of "regulation and certification of electrical power plant sites and electrical power plants." § 403.510(2), Fla. Stat. Power plants and transmission lines provide crucial public benefits to people across large geographic areas; but without the PPSA, they would be subject to the jurisdiction of multiple state and local governments with parochial concerns that could stymie planning for these facilities (R. 36742);[1] *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428, 434 (Fla. 2000) (recognizing that the Legislature enacted the PPSA to "to preempt local government action" because a "statewide perspective" was necessary to address the "significant impact upon the welfare of the population, the location and growth of industry and the use of the natural resources of the state").

[1] Citations to the record begin with "R." followed by the page number. Citations to the DOAH and Siting Board transcripts begin with "T." and "SB T.," respectively, followed by volume and page numbers.

Certification under the PPSA begins with the Public Service Commission ("PSC") finding a need for the project, and the utility filing a site certification application with all reviewing state, regional, and local agencies. DEP then creates a comprehensive project analysis report, containing input from the affected entities, and compiles proposed conditions of certification. § 403.507(5), Fla. Stat. An ALJ conducts a hearing to resolve disputed issues. § 403.508(2), Fla. Stat. The Governor and Cabinet, sitting as the Siting Board, review the ALJ's recommended order, consider factors listed in Section 403.509(3), vote at a public hearing to approve or deny certification, and issue a written final order. § 403.509(1)(b), Fla. Stat.

Among the seven factors the Siting Board must "balance" and "consider" are "whether, and the extent to which" a proposed project is "consistent with applicable local government comprehensive plans and land development regulations." § 403.509(3), Fla. Stat. Contrary to the panel's assumption, *see* Slip Op. at 4-5, the Act does not require compliance with any local government land-use requirements; only that the Siting Board *consider* "the extent to which" a project complies with "applicable" requirements. §§ 403.509(3), .511(2)(b), Fla. Stat. A project is deemed consistent with local land use regulations unless a local government files a determination that it is inconsistent. § 403.50665(2)(a), Fla. Stat.; Fla. Admin. Code R. 62-17.121(3). The Siting Board also may "authorize a

variance or other necessary approval to the adopted land use plan and zoning ordinances required to render the proposed site or associated facilities consistent with local land use plans and zoning ordinances." § 403.508(1)(f), Fla. Stat.

Under the PPSA, local land-use regulations do not apply where linear "associated facilities" do not "constitute a 'development,' as defined in s. 380.04." § 403.50665(1), Fla. Stat. Section 380.04 is found in the Florida Environmental Land and Water Management Act of 1972. It provides in pertinent part:

> (3) The following operations or uses *shall not* be taken for the purpose of this chapter to involve *'development'* as defined in this section:
>
> ***
>
> (b) Work by *any utility* and other persons engaged in the distribution or transmission of *gas*, *electricity*, or *water*, for the purpose of inspecting, repairing, renewing, or *constructing* on *established rights-of-way* any sewers, mains, pipes, cables, utility tunnels, *power lines*, towers, poles, tracks, or the like.
>
> ***
>
> (h) The *creation* or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.

§§ 380.04(3)(b), (3)(h), Fla. Stat. (emphasis added). Therefore, Section 380.04 exempts transmission lines on "established rights-of-way" from local land use regulations, and the PPSA recognizes that exemption. § 403.50665(1), Fla. Stat. And the Transmission Line Siting Act ("TLSA")—a companion statute applicable to large transmission lines constructed apart from electric generating facilities—

provides that "[e]stablished rights-of-way include rights-of-way established at any time." § 403.524(2)(c), Fla. Stat.

Even though the PPSA was created to provide a one-stop licensing process, the Legislature carefully crafted the statute to ensure it does not interfere with the PSC's exclusive jurisdiction to regulate public utility rates and services. § 403.511(4), Fla. Stat. (providing that the PPSA does "not affect in any way the ratemaking powers of the Public Service Commission"); § 403.519(3) (stating that the PSC is the "sole forum" for determining need for a power plant).

B. The certification process

The certification order at issue is the culmination of a process that took nearly five years. Briefly, as discussed below, the process included: (1) FPL's receipt of the need determination from the PSC and submittal of a certification application; (2) opposition to FPL's transmission corridors; and (3) the issuance of detailed recommended and final orders, with conditions.

1. The need determination and certification application

In 2008, the PSC issued a determination of public need for FPL's proposed generating facilities and transmission lines (R. 43260-93). FPL filed a site certification application with DEP seeking certification of two new 1,100-megawatt nuclear generating units at FPL's Turkey Point Power Plant, along with about 89 miles of transmission lines. FPL ultimately proposed two transmission

corridors (Eastern and Western) and one Western Back-Up Corridor. The Eastern Corridor spans about 37.6 miles, running from the power plant to the existing Davis Substation in southeast Miami-Dade County, then along U.S. 1 to the existing Miami Substation. The 52-mile-long Western Corridor runs along Everglades National Park's eastern boundary and was developed in consultation with the state and federal agencies overseeing the Everglades and a conservancy group involved in Everglades restoration. Portions of the Western Back-Up Corridor fall within existing park boundaries. The Western Back-Up Corridor was proposed only if FPL could not secure necessary rights-of-way for the Western Corridor (R. 36657, 36894-97, 36972-73, 37057-58, 42766, 50344-53; T1. 68-70, T48. 6663-65).

2. <u>Opposition to transmission corridors</u>

In June 2011, various local governments, including Appellants here, filed their agency reports (R. 19811-900, 20082-209, 20219-291). The Cities of Miami, Pinecrest, and South Miami opposed the Eastern Corridor. The Cities did not issue (or issued and withdrew) land use consistency determinations under Section 403.50665, Fla. Stat., which results in an automatic finding of consistency of the project with local land use regulations. Fla. Admin. Code R. 62-17-121(3). Miami argued that if the Eastern Corridor was approved, FPL should be "required to underground and shield the Transmission Line regardless of the cost" (R. 20153).

Pinecrest and South Miami agreed that transmission lines in the Eastern Corridor should be underground (R. 19816, 20230-31). By proposing that the lines be installed underground at FPL's expense, the municipalities would receive the aesthetic benefits of underground lines in their jurisdictions while inequitably shifting the cost of that expensive, aesthetic upgrade onto all of FPL's customers throughout its entire service territory.

Miami-Dade County opposed the Western Back-Up Corridor, arguing that sections of it fall within, and are inconsistent with, its East Everglades Zoning Ordinance (R. 22669, 22672). The County ignored the exemption of transmission lines from local land development regulations. § 380.04(3)(b), Fla. Stat.; *see also* § 163.3213(2)(b), Fla. Stat. (defining "land development regulation" as any "ordinance . . . for the regulation of any aspect of development" or "concerning the development of land," including "a general zoning code").

Opposition to the transmission lines continued at the administrative hearing, at which seven of the eight weeks of hearing were dedicated to the issue (R. 36653). The ALJ also considered testimony and exhibits related to local land use regulations—which the ALJ concluded were inapplicable—despite repeated relevance objections by FPL and DEP (T1. 13-15, T18. 2475-76, T33. 4754-55, T46. 6527-28).

3. The recommended and final orders

After the hearing, the ALJ issued a 323-page recommended order containing 787 findings of fact, 110 conclusions of law, and 178 pages of conditions to certification (R. 36894-37404). Among many other findings, the ALJ found that the project would not unduly affect local aesthetics because "transmission lines will be just one of many necessary urban features visible to the eye in the current urban landscape," adding to the "[n]umerous similar visible linear features [already] in the U.S. Highway 1 multi-modal transportation corridor" (R. 37014); that transmission lines "will have no quantifiable effect on property values of adjacent properties" (R. 37038-39); that the project is not inconsistent with the Comprehensive Everglades Restoration Plan (R. 36965, 36997-98, 37038, 37103-04); and that the project will maintain surface flows and sheet flow in the Everglades (R. 37104-06).

The final certification applied local government land-use requirements to the electrical generating facilities (R. 34305-06); and applied numerous non-land use related local regulations, including environmental regulations, to the generating facility *and* the transmission lines (R. 34310-11, 34383-84, 34386-90, 34403). Many of the conditions of certification reflect the 30 stipulations that FPL reached with multiple parties and governmental entities (R. 43727-4174, 50344-53).

The parties filed nearly 200 exceptions to the recommended order. After an extensive public hearing, the Siting Board voted unanimously to approve certification subject to the ALJ's (lengthy) recommended conditions and several additional ones. SB T. 139-41. In May 2014, the Siting Board issued a written order approving certification and ruling on each of the 200 exceptions.

On April 20, 2016, a panel of this Court reversed and remanded for further proceedings. The panel held that (1) the Siting Board misinterpreted the "development" exception in Section 380.04, Florida Statutes, as it relates to transmission lines; (2) the Siting Board erroneously concluded that it lacks authority to require undergrounding of transmission lines at FPL's expense; and (3) the Siting Board erred in its analysis of FPL's obligation to comply with Miami-Dade County's East Everglades Zoning Ordinance.

II. Legal Standards

Florida Rules of Appellate Procedure 9.330 and 9.331 govern motions for rehearing and rehearing *en banc*, and certification of questions of great public importance. Rule 9.330(a) allows FPL to file a motion for rehearing identifying any "points of law or fact" that the panel "overlooked or misapprehended." Rule 9.331(d)(1) allows FPL to "move for an en banc rehearing solely on the grounds that the case or issue is of exceptional importance or that such consideration is necessary to maintain uniformity in the [C]ourt's decisions."

The Court may also certify questions of "great public importance" for Florida Supreme Court review. Fla. R. App. P. 9.030(a)(2)(A)(v). Certification is particularly appropriate where an opinion has "far-reaching possible consequences," *Smith v. State*, 497 So. 2d 910, 912 (Fla. 3d DCA 1986), or where the opinion "appear[s] to be in conflict with" Florida Supreme Court precedent. *Walsingham v. State*, 576 So. 2d 365, 366 (Fla. 2d DCA 1991); *see also Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (explaining that courts should follow Florida Supreme Court precedent and certify questions to advocate change); *Fridovich v. State*, 537 So. 2d 648, 650 (Fla. 4th DCA 1989) (certifying question where "there are [Florida Supreme Court] cases containing language that might appear to conflict with our holding").

III. Basis for Motion

The panel opinion misapprehends Florida Supreme Court precedent and is inconsistent with this Court's own precedent. The legal misapprehensions justify rehearing and rehearing *en banc* and raise questions of great public importance that should be certified to the Florida Supreme Court.

A. The Panel Opinion Overlooks Principles of Law Applicable to Administrative Cases in General and the Transmission of Power Lines in Particular

As we explain below, the panel opinion (1) misapprehends the "development" exemption in the statute; (2) misapprehends the PSC's exclusive

jurisdiction to determine rates and service of utilities; and (3) re-weighs the evidence, contrary to the deferential standard for reviewing agency findings of fact.

1. The panel opinion misapprehends the statute's "development" exception

As noted above, local land-use regulations do not apply where linear "associated facilities" do not "constitute a 'development,' as defined in s. 380.04." § 403.50665(1), Fla. Stat. And Section 380.04(3)(b) excludes from the definition of "development" "[w]ork by any utility and other persons engaged in the distribution or transmission of . . . electricity . . . for the purpose of . . . constructing on established rights-of-way any . . . power lines . . ." The panel held that "local regulations should have been applied" because transmission lines constructed outside *existing* rights-of-way fail to qualify for the "development" exemption. Slip. Op. at 10. This holding misapprehends both the record and governing law.

Under the PPSA, a project is deemed to be consistent with local land use requirements *unless* local governments "file a determination" to the contrary. § 403.50665(2)(a), Fla. Stat. (providing that local governments "shall file a determination as to consistency with local land use plans and zoning ordinances"); Fla. Admin. Code R. 62-17.121(3) (providing that failure to file a determination "result[s] in an automatic finding of consistency"). Unlike the County, the Cities of Miami and South Miami, and the Village of Pinecrest did not issue (or issued and later withdrew) land use consistency determinations. FPL Answer Br. at 36-

37. They therefore waived this issue in the administrative process. The panel overlooked this critical fact. Remand for consideration of the Cities' land use regulations is inappropriate and unnecessary.

Further, the panel erroneously interpreted the phrase "established rights-of-way" in Section 380.04 (and did not defer to the agency in doing so). Slip Op. at 10-14. The opinion concludes that the phrase must mean "existing" rights-of-way because the Legislature used the past tense and "Florida courts have held that a plan to create a right-of-way in the future is not a right-of-way." *Id.* at 13. This holding misapprehends the law in several ways.

First, the panel's interpretation of Section 380.04 directly conflicts with this Court's decision in *Board of County Commissioners of Monroe County v. Department of Community Affairs*, 560 So. 2d 240 (Fla. 3d DCA 1990). There, this Court considered whether a county's roadwork qualified for the development exception. *Id.* at 241. A state agency argued that the exception "does not apply when a road agency acquires a *new* right-of-way." *Id.* at 242 (emphasis added). This Court was "unpersuaded by this argument," holding that "[n]othing in the plain language of the statute indicates that the exception applies only to rights-of-way acquired by highway or road agencies prior to a certain date." *Id.* The panel opinion never mentions *Monroe County*.

Further, in quoting Section 380.04(3), the opinion "*defines 'development' as*: 'Work done by an [*sic*] utility . . . engaged in distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or construction on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, poles, tracks, or the like." Slip Op. at 11 (emphasis added). But this is precisely the *opposite* of what the statute provides: the list of "operations or uses *shall not* be taken for the purpose of this chapter to involve 'development.'" § 380.04(3), Fla. Stat. (emphasis added); *see also Monroe County*, 560 So. 2d at 241 (holding that a state agency "lacks jurisdiction over the subject matter because the [c]ounty's road work is *not* 'development,' as that term is defined under section 380.04") (emphasis added).

The panel's interpretation also contradicts the TLSA, a companion statute to the PPSA. It provides that "[e]stablished rights-of-way include rights-of-way established *at any time*." § 403.524(2)(c), Fla. Stat. (emphasis added). Because the TLSA and PPSA are "similar or analogous statutory provisions which give effect to the same public policy," *see Krause v. Reno*, 366 So. 2d 1244, 1252 (Fla. 3d DCA 1979), the phrase "established rights-of-way" should have a consistent meaning in both. Yet the panel did not even consider the TLSA.[2]

[2] In fact, the phrase would have two different meanings within the TLSA itself—one for purposes of Section 403.524(2)(c) and a different one when the Siting

The panel's reading of the phrase "established rights-of-way" is itself ambiguous because it fails to explain *when* a right-of-way becomes an "existing" right-of-way. Slip Op. at 10, 13. "Existing" could mean "pre-existing"—that is, before an application for certification or before the Siting Board issues a final order; or it could also mean before construction begins.

To the extent "established" means "existing," the plain language of Section 380.04(3)(b) provides that the right-of-way must exist before "inspecting, repairing, renewing, or *constructing* on" the right-of-way (emphasis added). Thus, the panel should have affirmed the final order because the certification does not authorize construction of transmission lines until *after* FPL acquires the necessary property interest and identifies the right-of-way. §§ 403.503(11), (27) Fla. Stat. (explaining that the corridor narrows "[a]fter all property interests required for the right-of-way have been acquired by the licensee" and defining "right-of-way" to include "land necessary for construction" that "shall be located within the certified corridor and shall be identified . . . prior to construction"). And the panel overlooked that the acquisition of the right-of-way is also exempt from the definition of "development." § 380.04(3)(h), Fla. Stat. The panel opinion would essentially require utilities to risk perhaps millions of dollars in acquiring rights-of-way *before* seeking certification to fall within the exemption.

Board considers "applicable" requirements under Section 403.529(4)(c)-(d) through implementation of the exemption in Section 380.04(3)(b).

Finally, the panel's interpretation gives no deference to the agencies' interpretation. Courts normally should defer to agencies' interpretations of the statutes they administer. *See, e.g.*, *PW Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988) ("[W]e note the well-established principle that the contemporaneous construction of a statute by the agency charged with its enforcement and interpretation is entitled to great weight."); *Atl. Shores Resort, LLC v. 507 S. St. Corp.*, 937 So. 2d 1239, 1245 (Fla. 3d DCA 2006) ("An agency's interpretation of the guidelines that it is charged with administrating is entitled to judicial deference, and should not be overturned as long as the interpretation is in the range of permissible interpretations"). The panel instead relied on the principle that a "court need not defer to an agency's construction if the language of the statute is clear and therefore not subject to construction." Slip Op. 11-12. But the PPSA is a complex statutory scheme that is administered by the highest elected officials in this State. Such complex statutory schemes are precisely those where most deference is given to the agency. *Cf. Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 865 (1984) ("the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies").

In fact, the Florida Supreme Court has deferred to agency interpretations of the PPSA. *Nassau Power Corp. v. Beard*, 601 So. 2d 1175, 1178 n.9 (Fla. 1992)

(giving "great weight" to the agency's construction of the portion of the PPSA applied by the PSC). The panel's decision to ignore agency interpretations of these laws, with only a passing statement that "the statute is clear and unambiguous," misapprehends the role of the Court in reviewing agency action.

The Siting Board determined that the transmission lines do not qualify as "development" under Section 380.04 and therefore did not apply local land use regulations under the PPSA (R. 36660). The State's land planning agency charged with implementing Section 380.04(3) has interpreted the statute the same way. *See In re: Petition for Declaratory Statement filed by Hughes and Knowles*, Case No. DCA-03-DEC-295, *6-7 (Apr. 9, 2004) ("The creation of a right-of-way falls within section 380.04(3)(h)."). The panel should have deferred to the interpretation of agencies charged with implementing Section 380.04(3) and the PPSA. *PW Ventures*, 533 So. 2d at 283; *see also Bd. of Trs. of the Internal Improvement Tr. Fund v. Levy*, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995) ("If an agency's interpretation of its governing statutes is one of several permissible interpretations, it must be upheld, despite the existence of reasonable alternatives.").

2. The panel misapprehends the PSC's exclusive jurisdiction to determine rates and service of utilities

The panel also concluded that the PPSA's "general grant of power in the PPSA to 'impose conditions' upon certification . . . empowers the Siting Board to

require FPL to bury . . . transmission lines." Slip Op. at 14. The opinion misapprehends that the PSC has "exclusive and superior [jurisdiction] to that of all other bodies" to oversee utilities' rates and service. § 366.04(1), Fla. Stat. Although the Siting Board may "include conditions" in a certification under the PPSA, § 403.511, Fla. Stat., the statute specifically provides that it "shall not affect in any way the ratemaking powers of the [PSC]." § 403.511(4), Fla. Stat.

Because undergrounding is so expensive that it can affect utility rates, the Florida Supreme Court has held that the issue of undergrounding of transmission lines falls within the PSC's exclusive jurisdiction. *See Fla. Power Corp. v. Seminole Cnty.*, 579 So. 2d 105 (Fla. 1991). In *Seminole County*, the Court invalidated a local ordinance requiring an electric utility to "relocate its power lines underground," holding that the PSC has "exclusive and superior" jurisdiction over this very issue. *Id.* at 106.

This Court itself recently rejected a county's attempt to enjoin an electric utility's "installation" of "utility lines." *Roemmele-Putney v. Reynolds*, 106 So. 3d 78, 79-80 (Fla. 3d DCA 2013) (citing *Fla. Pub. Serv. Comm'n v. Bryson*, 569 So. 2d 1253 (Fla. 1990)). This Court explained that "the PSC is to determine its own jurisdiction" and that "[t]he statutory authority granted to the PSC would be eviscerated if initially subject to local government regulation and circuit court injunctions." *Id.* at 81.

The panel's holding that the PPSA empowers the Siting Board to require FPL to "install[] power lines underground[] at FPL's expense" almost completely ignores this body of law. The panel cites Section 403.511 for the proposition that the Siting Board has broad powers to condition a project, but ignores Section 403.511(4), which specifically provides that the PPSA "shall not affect in any way" the PSC's ratemaking powers. The panel also ignores the specific language of Section 366.04(1), that "[t]he jurisdiction conferred upon the [PSC] shall be exclusive and superior to all other boards." By failing to address the specific PSC-related provisions in both Chapter 366 and the PPSA, the panel does not apply a fundamental rule of statutory construction that "when reconciling statutes that may appear to conflict" a "specific statute will control over a general statute." *Fla. Virtual Sch. v. K12, Inc.*, 148 So. 3d 97, 102 (Fla. 2014). The panel also ignores *Roemmele-Putney* and the PSC's own interpretation of its jurisdiction.

The opinion attempts to distinguish *Seminole County*, 579 So. 2d 105, noting that this case does not involve ratemaking. *See* Slip Op. at 18. But neither did *Seminole County*. It involved undergrounding. *Id.* at 106. Undergrounding is undoubtedly at issue here: the panel held, for the first time, that the Siting Board has powers that have been exclusively conferred on the PSC.

To be clear, the issue here is not whether the transmission lines *may* be constructed underground. The Siting Board authorized underground construction

if the requesting municipalities benefitting from the unnecessary expense are willing to fund the incremental cost (R. 36656). The issue is whether *all* of FPL's customers should bear the cost of undergrounding for the sole aesthetic benefit of the requesting party. The panel's language about undergrounding "at FPL's expense" directly implicates the PSC's ratemaking powers. The opinion could be read as allowing the Siting Board to relieve the Cities from paying the costs of undergrounding (which a party normally must pay when it requests that lines be placed underground), instead having the enormous costs of undergrounding be borne by FPL's broader base of rate-paying customers. *See Seminole County*, 579 So. 2d at 107 ("If [the utility] has to expend large sums of money in converting its overhead power lines to underground, these expenditures will necessarily be reflected in the rates of its customers."). But such decisions have always been made by the PSC. The opinion intrudes on the PSC's "exclusive and superior" jurisdiction to regulate "rates and service." *Id.* at 106.

3. The panel re-weighed the evidence, contrary to the deferential standard for reviewing agency findings of fact

Finally, the panel finds the County's East Everglades Zoning Ordinance to be "an applicable, non-procedural environmental requirement of the County." Slip. Op. at 22. But other courts have treated the Ordinance as a zoning—not an environmental—regulation. *See U.S. v. 10.00 Acres of Land*, 2010 U.S. Dist. LEXIS 121149 at *3 (S.D. Fla. Oct. 28, 2010) (referring to East Everglades

Ordinance as "County Zoning Code section 33B"); *U.S. v. 480.00 Acres*, 2004 U.S. Dist. LEXIS 30680 (S.D. Fla. July 30, 2004) (addressing the East Everglades "zoning restrictions"); *see also Bensch v. Metro. Dade Cnty.*, 541 So. 2d 1329 (Fla. 3d DCA) (upholding dismissal of a takings complaint per the County "zoning restrictions" in the East Everglades), *rev. denied*, 549 So. 2d 1013 (Fla. 1989).

After finding that the East Everglades Zoning Ordinance applies, the panel should have deferred to the ALJ, who heard eight weeks of testimony, including testimony on local land use regulations, and made specific findings (R. 34109-10; *see also* R. 34109-12, 34185-86; T1. 13-15, T18. 2475-76, T33. 4754-55, T46. 6527-28). At least, the panel should have remanded factual issues to the agency for determination in light of the opinion. Instead, the panel adopted a substantial portion of the factual allegations in the County's initial brief regarding "the environment and the ecology of the land and its wildlife," even though the allegations contradict the ALJ's findings. Slip Op. at 24; *see also id.* at 24-27.

"Notwithstanding the inapplicability of these restrictions," the ALJ and Siting Board did consider the East Everglades Zoning Ordinance, and they concluded that "the western transmission lines would not conflict with the County's zoning regulations governing the [East Everglades]" (R. 34109-10, 34185-86, 36832-34, 36871). Among many other things, the ALJ found that the transmissions lines: (1) "will not have an impact on natural flow of water or cause

a change in water quality or quantity;" (2) "will not have an adverse impact on wetland flora and fauna;" and (3) "will not adversely impact the population of any threatened or endangered avian species" (R. 34099, 34109-10, 34185-86). The panel's re-weighing of evidence goes beyond its limited review. § 120.68(7)(b), Fla. Stat. (providing that in reviewing administrative findings, the appellate court "shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact"); *see also Padron v. State*, 143 So. 3d 1037, 1040-41 (Fla. 3d DCA 2014) (noting that weighing the evidence is within the province of the ALJ, and "[an appellate] court reviews findings of fact made by the ALJ and adopted by the administrative agency to determine whether they are supported by competent, substantial evidence").

The panel also concluded "it was a violation of due process for the Siting Board to grant [a variance]" from the East Everglades Zoning Ordinance, Slip Op. at 24. But no such variance was granted. The panel's notice argument ignores the PPSA, which specifically requires the *County* to identify any necessary variances in its agency report. § 403.507(3)(a), Fla. Stat. To the extent notice was not provided, such failure "*shall* be treated as a waiver" from the East Everglades Zoning Ordinance. *Id.* (emphasis added).

In addition, the panel incorrectly assumed that the Siting Board must apply all land development regulations and nonprocedural requirements of local

governments. But the statute the panel cites, section 403.509(3), requires only that the Siting Board "*consider*" whether an application meets such local rules. Because local governments may enact rules designed to block transmission lines needed to serve much broader areas, the PPSA allows the highest elected officers in the state to override local regulations when necessary to find a "reasonable balance" and "serve and protect the broad interest of the public." § 403.509(3), Fla. Stat.; *see also* § 403.508(1)(f) (empowering the Siting Board to "authorize a variance or other necessary approval to the adopted land use plan and zoning ordinance requirement to render the proposed site or associated facility consistent with local land use plans and zoning ordinance"); Op. Att'y Gen. Fla. 97-09 (1997) (interpreting an earlier version of the statute to require the Siting Board to only consider local requirements, adding that "any deviation from those substantive requirements and recommendations . . . should only be made after careful consideration"). Local governments also cannot enforce rules that are inconsistent with state law. *Metro. Dade Cnty. v. Chase Fed. Hous. Corp.,* 737 So. 2d 494, 504 (Fla. 1999). By treating compliance with local requirements as mandatory, the panel ignored the flexibility granted the Siting Board under the PPSA.

B. The Panel Opinion Will Have Far-Reaching Effects, Rendering the Case of Exceptional Importance that Justifies *En Banc* Review

The panel's misapprehensions have widespread and significant consequences. Its interpretation of Section 380.04's development exception

applies beyond the PPSA and affects *all* electric utilities, wastewater utilities, potable water utilities, natural gas transmission companies, and the like. Thus, contrary to *all* prior precedent, the panel has redefined the term "development" and imposed a new limitation requiring "any utility" that transmits "gas, electricity, or water," and seeks to construct "any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like" to show that its construction would occur in a right-of-way that already exists at some undefined point in time.

The intent behind the PPSA is to provide "centrally coordinated" review of applications to construct power plants and transmission lines. § 403.502, Fla. Stat. Yet under the panel opinion, approval of applications will depend on the myriad land-use regulations of 67 counties and 410 municipalities. *See, e.g.*, *Seminole County*, 579 So. 2d at 107. The Siting Board expressed these very concerns:

> The testimony of FPL and local government witnesses confirmed that if local governments were permitted to regulate the design, height, size or placement of transmission pole structures, those local regulations could vary or even conflict, causing FPL to be unable to (1) implement transmission line designs that comply with necessary industry standards and safety codes, such as the National Electrical Safety Code ("NESC"), with which transmission lines must comply; (2) provide service to a designated area or substation; or (3) acquire the necessary uninterrupted contiguous [rights-of-way] needed between substations and designated service areas.

R. 36742.[3]

Compelling the Siting Board to review undergrounding of transmission lines similarly has a statewide effect. It violates a basic tenet of statutory construction; alters the powers the Governor and Cabinet, sitting as the Siting Board, at the expense of the PSC's "exclusive and superior" jurisdiction; and undermines the PSC's ability to determine its own jurisdiction.

Finally, the panel's re-weighing of evidence contravenes a venerated principle of Florida administrative law. *See Mobley*, 181 So. 3d at 1236; *Padron,* 143 So. 3d at 1040-41; *N. Port, Fla. v. Consolidated Minerals, Inc.*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) (holding that an even an agency reviewing a recommended order has no authority to make independent or supplemental findings of fact in its final order).

C. Questions of Great Public Importance

If the panel denies rehearing and the court denies rehearing en banc, for the reasons stated above the court should at least certify to the Florida Supreme Court the following questions of great public importance:

1. Whether "constructing on established rights-of-way," as used in Section 380.04(3)(b), requires that the right-of-way exist for some period of time before construction.

[3] The City of Miami's Planning and Zoning Director opined that the proposed transmission line would be compatible only in industrial-zoned areas, but none exist that connect to the Miami substation (R. 36742-43; T49. 6830-36).

2. Whether Sections 380.04(3)(b) and (3)(h) dictate that local government comprehensive plans and land-development regulations apply to transmission lines for purposes of Section 403.509.

3. Whether the Siting Board has jurisdiction to require an electric utility to place its transmission lines underground.

For the reasons stated, the Court should grant rehearing or rehearing *en banc*. In the alternative, the court should certify to the Florida Supreme Court the above questions of great public importance.

Respectfully submitted on June 6, 2016 by:

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STATEMENT OF COUNSEL

We express a belief, based on a reasoned and studied professional judgment, that the case or issue is of exceptional importance. We also express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of this Court: *Roemmele-Putney v. Reynolds*, 106 So. 3d 78 (Fla. 3d DCA 2013), and *Board of County Commissioners of Monroe County v. Department of Community Affairs*, 560 So. 2d 240 (Fla. 3d DCA 1990).

By: /s/ *Raoul G. Cantero*

CERTIFICATE OF SERVICE

I certify that a copy of this motion has been served electronically via the Florida EPortal Court System to the following on this 6th day of June, 2016:

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