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Recent Developments

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RECENT DEVELOPMENTS

KARA J. BERLIN*

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I. INTRODUCTION

This section highlights recent developments in federal and state environmental and land use case law. In addition to the sources cited in this section, the reader is encouraged to consult the website of the Environmental and Land Use Section of the Florida Bar, <<http://www.eluls.org>>, the website of the Florida Department of Environmental Protection at <<http://www.dep.state.fl.us>>, and the U.S. Environmental Protection Agency at <<http://www.epa.gov>>. Other useful sources the reader may wish to consult include FindLaw Legal News at <<http://www.findlaw.com>>, the Florida State Courts: Opinions, Court Rules, and Other Court Documents at <<http://www.flcourts.org>>, and the Supreme Court of the United States website at <<http://www.supremecourtus.gov>>.

II. FEDERAL CASES

New York v. FERC,
122 S. Ct. 1012 (2002)

The United States Supreme Court combined the cases of *New York* and *Enron Power Marketing, Inc. (Enron)* against the Federal Energy Regulatory Commission (FERC) to determine the FERC's jurisdiction over the transmission of electricity.¹ The Court answered two questions in these cases: (1) if a public utility unbundles the cost of transmission from the cost of electrical energy in billing retail customers, may the FERC require the utility to transmit competitors' electricity over its lines on the same terms as those applied to utilities transmitting their own energy, and (2) is the FERC bound to impose the same requirements on utilities continuing to offer bundled sales.² The FERC addressed these questions in 1996 in Order No. 888, answering yes to the first and

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1. See *New York v. Fed. Energy Reg. Comm'n*, 122 S. Ct. 1012, 1016 (2002).

2. *Id.*

no to the second.³ The Supreme Court, agreeing with the FERC's statutory interpretation, affirmed the court of appeals.⁴

In 1935, when the Federal Power Act (FPA) became law, most electricity was sold by separate, local monopolies subject to state or local regulation.⁵ At this time electricity sales were bundled, which meant that consumers paid a consolidated charge including costs for electric energy and the cost of delivery.⁶ With the enactment of the FPA, Congress authorized federal regulation of electricity for areas that were beyond the state's powers and extended federal coverage to some areas that had been state regulated.⁷ The FPA charged the Federal Power Commission (FPC), the predecessor of the FERC, with the power to "provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce."⁸ Congress has recognized that the FPC's jurisdiction includes both transmission and wholesale distribution of electric energy in interstate commerce.⁹

Due to technological advances, the local networks of the past are mostly gone. Electricity is now generated more efficiently and delivered over three major networks, also called "grids."¹⁰ Most of the electricity that enters the grids today is immediately part of a pool of energy moving through the states.¹¹ This results in the ability of power companies to transmit electricity over long distances at a low cost.¹² This in turn results in the ability of utilities to operate more efficiently by transmitting electricity between plants and regions.¹³ Under this system, the public utilities retain ownership of the transmission lines used by competitors to deliver electricity to both wholesale and retail customers.¹⁴ This retained control gives the utilities the power to refuse to deliver competitors' energy, or to apply less favorable terms and conditions to the competitors.¹⁵

3. *Id.*

4. *Id.*

5. *Id.* at 1016-17.

6. *Id.* at 1017.

7. *Id.* (discussing the previous Supreme Court decision of *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927)).

8. *Id.* (citing *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)).

9. *Id.* (citing 16 U.S.C. § 824(b) (2000)).

10. *Id.* at 1017-18.

11. *Id.* at 1018. Once the electricity enters the grid it becomes part of interstate commerce.

12. *Id.*

13. *Id.* (citing Order No. 888).

14. *Id.*

15. *Id.*

Congress has responded to the changes in the electricity market with two laws: the Public Utility Regulatory Policies Act of 1978 (PURPA) and the Energy Policy Act of 1992 (EPAAct).¹⁶ PURPA's purpose is the promotion of development of new generating facilities as well as conservation of fossil fuels.¹⁷ To this end PURPA required the FERC to promulgate rules that required utilities to purchase electricity from "qualifying cogeneration and small power production facilities."¹⁸ The EPAAct authorized the FERC to require individual utilities to provide unaffiliated wholesale generators with transmission services.¹⁹ The FERC then initiated a rulemaking proceeding that led to the order under review by the Court.²⁰ The rule proposed by the FERC in these proceedings would:

[R]equire that public utilities owning and/or controlling facilities used for the transmission of electric energy in interstate commerce have on file tariffs providing for nondiscriminatory open-access transmission services.²¹

The purpose of this rule was to encourage lower rates through a structured transition to competitive bulk markets.²²

Following the receipt of comments on the proposed rule, the FERC issued Order No. 888.²³ The FERC found utilities were discriminating by providing wholesalers either inferior access, or no access at all, to their networks.²⁴ The FERC remedy included three relevant portions: (1) the FERC ordered "functional unbundling"²⁵ of wholesale generation and transmission services; (2) The FERC imposed an open access requirement on unbundled retail transmissions that went through interstate commerce; and (3) the

16. *Id.* at 1018-19.

17. *Id.* at 1019.

18. *Id.* (citing *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 751 (1982)).

19. *Id.* This authority was exercised by the FERC on a case-by-case basis. Under this authority, the FERC ordered a utility to "wheel" power for a wholesale competitor twelve times. The FERC concluded that these individual proceedings were too costly and time consuming and as such, did not provide an adequate remedy.

20. *Id.*

21. *Id.* (citing Notice of Proposed Rulemaking, 60 Fed. Reg. 17662 (1995)).

22. *Id.*

23. *Id.*

24. *Id.* (citing Order No. 888).

25. Defined as requiring each utility to separate the rates charged for generation, transmission, and ancillary services, as well as to take its own transmission under a single tariff, applicable to itself and others. *Id.* at 1020.

FERC rejected the proposal of applying the open access requirement to bundled retail transmissions.²⁶

Following the issuance of Order No. 888, the FERC received many petitions for rehearing and clarification.²⁷ The FERC responded to the challenges by saying that the open access requirements were issued to remedy the undue discrimination that had been found and as such was within their authority.²⁸ Further, the FERC responded to concerns regarding its failure to assert jurisdiction over bundled services when it had asserted jurisdiction over unbundled services. The FERC explained it did not feel bundled services required regulation and that to do so would raise jurisdictional issues.²⁹ Many of these petitions were consolidated and heard by the Court of Appeals for the District of Columbia.³⁰ The court of appeals upheld most of the Order's provisions, and specifically upheld the jurisdictional rulings raised for review to the Supreme Court.³¹ The Supreme Court granted review on petitions filed by New York and Enron, questioning the FERC's assertion of jurisdiction over unbundled and bundled retail transmissions.³²

New York raised the first question on appeal, arguing that the FERC exceeded its jurisdiction by including unbundled retail transmissions within the open access requirements because retail transactions are subject to state regulation.³³ New York asserted that the FERC/state jurisdictional line fell between wholesale and retail transmissions.³⁴ The Court rejected this argument, agreeing with the court of appeals that the FPA supported FERC jurisdiction.³⁵ The Court emphasized the language of section 210(b) of the FPA, which states that the FERC's jurisdiction includes "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." The Court concluded that since the statute did not limit transmission jurisdiction to wholesale, and did limit sale jurisdiction to wholesale, that the transmission jurisdiction included retail.³⁶

26. *Id.* at 1019-20.

27. *Id.* at 1021.

28. *Id.*

29. *Id.*

30. *Transmission Access Policy Study Group v. Fed. Energy Reg. Comm'n*, 225 F.3d 667 (D.C. Cir. 2000).

31. *Id.* at 681.

32. 122 S. Ct. at 1022. As the petitioners did not raise for review the issue of wholesale transmissions, the Court does not address such. The Court only answers the questions raised as to the FERC's jurisdiction over retail transmissions. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

New York's arguments in support of its position of the line between wholesale and retail markets were three-fold. First, New York argued the court of appeals erred in its standard of review by not considering the presumption against federal preemption of state law.³⁷ Second, that the statutory language and legislative history show an intent to safeguard the preexisting state regulations of retail electric delivery.³⁸ Third, allowing FERC jurisdiction over retail transmissions would not be sound energy policy.³⁹

The Court rejected New York's presumption against preemption argument, stating that the issue was that of defining the proper scope of federal power, not if a federal authority has displaced a state authority.⁴⁰ The latter, the Court said, raises the notion of the presumption against preemption.⁴¹ The former, which is at issue in this case, simply requires that Congress' intent to supercede the powers of the state be clearly manifested.⁴² Through statutory interpretation, the Court determined that Congress authorized the FERC's jurisdiction over transmitting and selling as separate activities.⁴³ Taking it one step further, the Court found that because Congress specifically confined the FERC's jurisdiction over sale to wholesale, yet did not limit the transmission market accordingly, the FERC's exercise of this authority is valid.⁴⁴ As to the legislative history argument, the Court rejects New York's contention that the legislative history was meant to preserve state regulation; at the time of the FPA's enactment all electricity was delivered in bundled packages.⁴⁵ Thus, the Court reasoned, there could not be state regulation of something that did not exist.⁴⁶ Further, the federal jurisdiction is only applicable to unbundled transmission, and the state retains jurisdiction over sales of the energy.⁴⁷ Finally, as to the policy argument advanced by New York, the Court directs New York to make such arguments to the Commission or to Congress, as they are not properly addressed to the Court.⁴⁸

37. *Id.* at 1023.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 1024.

44. *Id.*

45. *See id.* at 1025.

46. *Id.*

47. *Id.* at 1026. The Court also notes that the FERC did not assert jurisdiction over bundled retail transmissions, leaving New York in complete control over even the transmission aspect of bundled sales. *Id.*

48. *See id.* at 1027.

The Court next addressed Enron's petition, which attacked the FERC order from the opposite direction. Enron argued that the FPA granted the FERC the authority to apply open-access to bundled retail transmissions and that since FERC had found undue discrimination, they were obliged to utilize this authority.⁴⁹ FERC explained its reasoning for not extending open-access to bundled transmissions, saying such relief was not necessary and that it raised jurisdictional issues that did not need resolution at the time.⁵⁰ The Court found these to be valid reasons to support the decision not to regulate bundled transmissions.⁵¹

AGG Enter., Inc. v. Washington County,
Nos. 00-35449, 00-35511, 00-35509, 00-35510,
2002 WL 378127 (9th Cir. Mar. 12, 2002)

The Ninth Circuit Court of Appeals reversed the district court, dissolving a permanent injunction preventing Washington County and the City of Beaverton from enforcing trash-hauling regulations against AGG Enterprises (AGG).⁵² AGG is a private collection company, which collects from non-residential customers mixed solid waste (MSW) containing both recyclables and non-recyclables.⁵³ AGG claimed the MSW are "property" preempted from state regulation by the Federal Aviation Administration Act of 1994 (FAAAA).⁵⁴ Washington County asserted that the MSW is garbage, not property, and therefore local regulation is not preempted.⁵⁵

AGG picks up waste materials⁵⁶ from commercial, industrial, and construction sites.⁵⁷ The waste is referred to as "mixed solid waste" because the customers do not sort the garbage from the recyclables prior to pickup. After pickup, AGG delivers the MSW to East County Recycling, which separates and recycles the recyclables and delivers the garbage to a landfill.⁵⁸ This service offers AGG customers a cost-effective mechanism for disposing of their waste without having to sort garbage from recyclables, yet

49. *Id.*

50. *Id.* (citing Order No. 888).

51. *Id.*

52. *AGG Enter., Inc. v. Washington County*, Nos. 00-35449, 00-35511, 00-35509, 00-35510, 2002 WL 378127, at *1 (9th Cir. Mar. 12, 2002).

53. *Id.*

54. *Id.*

55. *Id.*

56. Materials collected include: brick, glass, tile, concrete, wood, cardboard, plastic, and metal. *Id.*

57. *Id.*

58. *Id.*

still allowing the customers to recycle.⁵⁹ This service is not offered by the government-licensed trash-haulers, who do not separate MSW or take it to a facility to be separated.⁶⁰ The exact amount of recyclables recovered from MSW is unknown, but estimates range from 50%-60%, to as high as 80%-90%.⁶¹

Washington County uses exclusive franchises to regulate trash collection, issuing licenses that grant exclusive authority to collect waste in a particular area.⁶² These licenses apply to the collection of both residential and commercial collection, but do not regulate source sorted recyclables.⁶³ Because AGG does not hold one of these exclusive licenses granted by the County, it was cited for the unauthorized collection of waste.⁶⁴ AGG then applied for a license, which the County refused to grant.⁶⁵ AGG then filed a petition for injunctive relief with the United States District Court.⁶⁶

The district court granted AGG's request for injunction, finding that AGG was a motor carrier transporting property and Washington County's licensing scheme was therefore preempted by the FAAAA.⁶⁷ On a de novo review the court of appeals held that the FAAAA did not preempt local regulation of the collection of MSW and dissolved the injunction.⁶⁸

In analyzing AGG's preemption argument the court started with the "presumption that Congress does not intend to supplant state law."⁶⁹ Historic state powers are not superceded by federal law unless that is the clear and manifest intent of Congress.⁷⁰ According to the court:

One could hardly imagine an area of regulation that has been considered to be more intrinsically local in nature than collection of garbage and refuse, upon which may rest the health, safety, and aesthetic well-being of the community.⁷¹

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at *2.

63. *Id.*

64. *Id.*

65. *See id.*

66. *Id.*

67. *Id.*

68. *Id.* at *5.

69. *Id.* at *2 (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995)).

70. *Id.*; *Blue Cross* at 655.

71. AGG, 2002 WL 378127, at *3.

Because of the history of state regulation, the court found it necessary to take a cautionary analysis to determine if Congress preempted local regulation.⁷² Looking at the language of the FAAAA, and considering the absence of a definition of the term "property," the court found it necessary to address the legislative history of the FAAAA to answer the preemption question.⁷³ The court determined that the legislative history evidenced an intent by Congress not to preempt state or local regulation of solid waste collectors.⁷⁴ In so holding, the court rejected AGG's argument that Interstate Commerce Commission case law considers MSW to be "property" and not "garbage" subject to local regulation.⁷⁵

Chevron U.S.A. Inc. v. Mobil Producing Texas,
No. 01-1016, 2002 WL 276781
(Fed. Cir. Feb. 27, 2002)

Chevron U.S.A.. (Chevron) brought a restitution suit against Mobil Oil Producing Texas and Mobil Oil Corporation (Mobil) to recover payments made to the Department of Energy (DOE) for stripper well overcharges attributable to Mobil's working interest in a property owned by Chevron.⁷⁶ The Court of Appeals for the Federal Circuit disagreed with the District Court for the Western District of Texas and held that a consent order entered into between Mobil and DOE in 1979 did not settle Mobil's liability and that Chevron is entitled restitution for the payments made based on overcharges attributed to Chevron's working interest.⁷⁷

Under the Emergency Petroleum Allocation Act of 1973 (EPAA), the United States instituted price controls for crude oil. The EPAA contained an exemption for stripper wells that allowed for crude oil to be sold at free market prices when it was produced at a property with an average daily production not exceeding ten barrels per well over the previous year.⁷⁸ Following a challenge to a Federal Energy Administration (FEA)⁷⁹ ruling prohibiting the counting of injection wells in the calculation of averages, the district court held the

72. *See id.*

73. *Id.*

74. *Id.* at *4.

75. *Id.*

76. *Chevron U.S.A., Inc. v. Mobil Producing Texas*, No. 01-1016, 2002 WL 276781 (Fed. Cir. Feb. 27, 2002). Publication pages references were not available for this case at the time of the writing of this article and therefore no pinpoint cites will be given.

77. *Id.*

78. *Id.*

79. The FEA is the predecessor to DOE.

ruling was void and prohibited its enforcement.⁸⁰ Pending review by the Temporary Emergency Court of Appeals, the district court required the oil companies to deposit the difference between the free market price and the regulated price into an escrow account.⁸¹ The Temporary Emergency Court of Appeals upheld the enforceability of the FEA ruling.⁸²

In 1979, while the appeal was pending, Mobil and DOE entered into a consent order resolving the crude oil sales.⁸³ Then, in 1987, DOE sued Chevron for additional recovery.⁸⁴ Chevron asserted that a portion of this claim included liability of Chevron's predecessor, Gulf, as operator of Mobil's working interest in a property at East Waddell Ranch.⁸⁵ From September 1977 through October 1978, stripper well oil from Mobil's working interest in the ranch was sold to Gulf at free market prices.⁸⁶ This was contrary to the FEA ruling.⁸⁷ These charges were not covered by escrow deposits.⁸⁸

Chevron settled DOE's claims in 1992, and seeks reimbursement from Mobil for the portion due to improper characterization of stripper well sales from Mobil's working interest at the ranch.⁸⁹ The district court held that Mobil's consent order with DOE resolved its compliance related to crude oil sales and therefore Chevron was not entitled to recovery.⁹⁰ The appeals court disagreed.

Chevron argued on appeal that the consent order did not include settlement of Mobil's stripper well liability as at the time of the consent order there was no stripper well liability.⁹¹ Mobil argued that Chevron should have raised this claim against the DOE as a defense against the inclusion of such charges in the assessment against Chevron and that the failure to raise it with the DOE constituted waiver.⁹² Chevron appealed the district court ruling, pointing to a lack of supporting evidence and an inconsistency in the basis of the ruling.⁹³

80. *Id.* (citing *Energy Reserves Group, Inc. v. Fed. Energy Admin.*, 447 F. Supp. 1135 (D. Kan. 1978)).

81. *Id.*

82. *Id.* (citing *In re Dep't of Energy Stripper Well Exemption Litig.*, 690 F.2d 1375 (Temp. Emer. Ct. App. 1982)).

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* Chevron asserts that since stripper liability was not even imposed at the time of

In response to Mobil's claim that Chevron raise the prior payment as a defense to its assessment, the appeals court deemed it "unlikely that the parties [to the consent order] intended to settle Mobil's entire stripper well liability as working interest owner. . . ."⁹⁴ The court further concluded that the working interest violation was not severable from other overcharges arising out of inclusion of injection wells.⁹⁵ The court found that liability was not established until the 1982 Temporary Emergency Appeals Court ruled, and the consent order did not settle such potential liability.⁹⁶

As to the contribution question, because Chevron presented undisputed evidence that it had paid Mobil's overcharges for the East Waddell Ranch and because Mobil's only evidence was the consent order, the court stated that a balancing of the equities would fall in favor of Chevron.⁹⁷ The court held that liability remained with Mobil, despite DOE's collection from Chevron.⁹⁸ Therefore, the court ordered Mobil to reimburse Chevron for the amounts paid to DOE for the overcharges attributable to Mobil's working interest.⁹⁹

III. FLORIDA CASES

Panda Energy Int'l v. Jacobs,
No. SC01-284, 2002 WL 243076
(Fla. Feb. 21, 2002)

In *Panda Energy*, the Florida Supreme Court approved a determination of need for a 530-megawatt electrical power plant to be built in Polk County.¹⁰⁰ The Public Service Commission (PSC) granted the determination of need for the construction of the power plant, known as "Hines 2," in response to a proposal by Florida Power Corporation (FPC).¹⁰¹ Panda Energy International (Panda) challenged the PSC's granting of the determination of need and raised three issues for review.¹⁰² First, was the limiting of Panda's discovery and the denial of Panda's motion for a continuance, after

the order it could not have been meant to include settlement of claims not yet in existence.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See *Panda Energy Int'l v. Jacobs*, No. SC01-284, 2002 WL 243076, at *1, *7 (Fla. Feb. 21, 2002).

101. *Id.*

102. *Id.*

being granted intervenor status, an abuse of PSC's discretion?¹⁰³ Second, whether the standard used by PSC in determining need for the Hines 2 plant was correct under *Tampa Electric Co. v. Garcia*.¹⁰⁴ Third, whether the PSC's finding that FPC had complied with the *Florida Administrative Code* in conducting the bidding process was supported by competent substantial evidence.¹⁰⁵

Prior to seeking approval for the construction of Hines 2, FPC did an internal analysis of its needs and determined that the Hines 2 plant would provide the most cost-effective solution.¹⁰⁶ Following this determination, FPC invited independent power producers to offer proposals of alternatives to Hines 2.¹⁰⁷ Only two bidders submitted bids; one of them was Panda.¹⁰⁸ FPC rejected Panda's proposal as "inferior" to its own self-build proposal, concluding that the Panda proposal would cost FPC customers an additional \$60 million.¹⁰⁹

Following the solicitation of outside bids and the conclusion that self-build was the most cost effective, FPC filed a petition with the PSC for a determination of need and for approval to build Hines 2.¹¹⁰ The PCS granted FPC's determination of need, finding "Florida Power Corporation has a need for additional capacity to maintain the reliability and integrity of its system," and that the Hines 2 was "the most cost-effective alternative over the 25 years during which FPC's ratepayers will be obligated for the costs of the unit."¹¹¹ The PSC also found that FPC complied with the bid rules.¹¹²

In response to Panda's claim that PSC denied it due process as an intervenor by both limiting its opportunity for discovery and denying its request for continuance, the court found that the PSC did not abuse its discretion.¹¹³ Following the FPC's filing of the petition for determination of need the PSC appointed a prehearing officer; the prehearing officer issued a scheduling order that set the final hearing date, set a deadline for intervenors to file prefiled testimony, set the deadline for the PSC to file prefiled testimony and the subsequent deadline for FPC to file rebuttal testimony, and

103. *Id.*

104. *Id.* See *Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000).

105. *Panda Energy*, 2002 WL 243076, at *1.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* (citing such requirement as present in FLA. STAT. § 403.519 (2000)).

111. *Id.*

112. *Id.*

113. *Id.* at *3 (reviews of limitations on discovery and continuance denials are on an abuse of discretion standard).

set the cutoff date for discovery.¹¹⁴ The deadline for filing testimony passed and both FPC and PSC filed their prehearing statements without anyone filing a motion to intervene.¹¹⁵ Panda sought leave to intervene the day after the prehearing conference and filed the motion to intervene two weeks prior to the final hearing.¹¹⁶ PSC granted Panda's leave to intervene and extended the discovery date in order to allow Panda to take requested depositions of FPC consultants.¹¹⁷ Relying on the *Florida Administrative Code* and the allowances made to Panda upon intervening, the court determined the PSC did not limit Panda's opportunity to engage in discovery.¹¹⁸ The court further found that Panda's request for a continuance was not made for "good cause" or within the applicable time limits as required by the *Florida Administrative Code* and therefore, the PSC did not abuse its discretion in denying such request.¹¹⁹

The court rejected Panda's assertion that the PSC used an incorrect standard in conducting its needs analysis for Hines 2.¹²⁰ Panda asserted that *Tampa Electric*¹²¹ changed the PSC's requirements for granting a determination of need to a Florida regulated utility.¹²² The court rejected this argument, clarifying *Tampa Electric's* application to non-Florida retail utilities.¹²³ *Tampa Electric* addressed the issue of the PSC having jurisdiction to grant a determination of need to a non-regulated out-of-state wholesale power company.¹²⁴ Therefore, the court stated, *Tampa Electric* did not alter the need determination standards applicable to Florida utilities.¹²⁵ Because the standards were not changed by *Tampa Electric*, the court held that the PSC properly applied the relevant criteria.¹²⁶

Panda's final challenge reviewed by the court was that the PSC's finding that FPC complied with the *Florida Administrative Code* rules for bidding processes was not supported by competent

114. *Id.* at *2.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at *3 (citing FLA. ADMIN. CODE R. 25-22.039, which says intervenors "take the case as they find it"). Despite the "take it as you find it" rule, the PSC granted Panda extensions and ordered document production by FPC on Panda's behalf in order to facilitate the discovery process. *Id.*

119. *Id.* at *3 (citing FLA. ADMIN. CODE R. 28-106.210).

120. *See id.* at *4.

121. *See Tampa Elec. Co. v. Garcia*, 767 So. 2d 428 (Fla. 2000).

122. *Panda Energy*, 2002 WL 243076, at *5.

123. *Id.*

124. *Id.* (citing *Tampa Electric*, 767 So. 2d at 436).

125. *Id.* at *5.

126. *Id.*

substantial evidence.¹²⁷ Panda asserts the FCP's request for proposals "was flawed in various ways."¹²⁸ Among these were Panda's assertion that the request for proposals did not contain information on the weight to be accorded the price and non-price attributes, did not specifically state the type of production costing models being used, and that FPC did not develop a short list for further negotiation after the initial screening.¹²⁹ On review of FPC's process the court found that the failure to assign specific weights to individual factors was done to stimulate creativity in the proposals and that the failure to specify the production costing model was not fatal as the models used were industry standards.¹³⁰ The court further found Panda's contention of the required short list to be without merit.¹³¹ As FPC only received two bids, both of which were given full and fair consideration, a short list for negotiation was not necessary.¹³² Based on these factors, the court held that competent substantial evidence supported the PSC's determination that FPC's request for proposals was proper.¹³³

Bradfordville Phipps Ltd. P'ship v. Leon County,
804 So. 2d 464 (Fla. 1st DCA 2001)

In *Bradfordville*, the First District Court of Appeal affirmed the circuit court's holding that the imposition of a temporary injunction prohibiting the county from issuing certain development permits did not amount to a temporary regulatory taking.¹³⁴ *Bradfordville Phipps Limited Partnership* (Partnership) appealed to the DCA, challenging the Second Judicial Circuit Court's denial of its motion for summary judgment and the granting of Leon County's (County) summary judgment motion.¹³⁵ The First DCA found that the Partnership's claim was not ripe for review and that the

127. *Id.* See also FLA. ADMIN. CODE. R. 25-22.082 (setting forth what must be included in a request for proposals).

128. *Panda Energy*, 2002 WL 243076, at *6.

129. *Id.*

130. *Id.* at *6-*7.

131. *Id.* at *7.

132. See *id.*

133. *Id.*

134. See *Bradfordville Phipps Ltd. P'ship v. Leon County*, 804 So. 2d 464 (Fla. 1st DCA 2001).

135. *Id.* at 465.

Partnership had not met the requirements of the *Lucas* test¹³⁶ to prove a temporary regulatory taking had occurred.¹³⁷

Following the circuit court's imposition of an order, in another proceeding, prohibiting the County from issuing certain development permits within the Bradfordville Study Area, the Partnership filed an inverse condemnation action against the County.¹³⁸ The Partnership alleged that the County's actions resulted in an inability of the Partnership to continue with the development and use of its property which deprived the Partnership of "all reasonable economic use of its property."¹³⁹ The Partnership further alleged that it submitted a completed application for an Environmental Permit relating to the development of its property, which was a prerequisite to the issuance of any building permits, and that the County rejected this application because of the injunction.¹⁴⁰

In an effort to comply with the court's injunction, the County adopted an Interim Development Ordinance, restricting the issuance of development permits for the Bradfordville Study Area for a seven-month period.¹⁴¹ Following this, the County adopted an ordinance implementing the provisions of the Comprehensive Plan; this ordinance constituted the requisite action of compliance with the injunction and the circuit court dissolved the injunction.¹⁴²

The trial court found that despite the Partnership's financial burden caused by the delay, that under the undisputed facts of the case there was no taking.¹⁴³ Further, the trial judge determined the Partnership's claim did not meet the ripeness test as the Partnership had not made any effort to intervene or otherwise challenge the injunction entered in the other suit.¹⁴⁴ Specifically the court found that the Partnership had actual or constructive knowledge of the likelihood of land use restrictions and as such, the court's action and the County's ordinance were not reasonably

136. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The test for a taking is "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

137. *Bradfordville*, 804 So. 2d at 468.

138. *Id.* In an unrelated proceeding, the circuit court previously imposed upon the County an injunction forbidding issuance of future building permits in the Bradfordville Study Area until the County came into compliance with the Land Use Element of the Leon County Comprehensive Plan. *Id.* at 465-66.

139. *Id.* at 466.

140. *Id.*

141. *Id.*

142. *Id.* at 467.

143. *Id.*

144. *Id.*

unexpected.¹⁴⁵ Furthermore, the restriction was only temporary.¹⁴⁶ Therefore, the financial burden caused by the delay in permitting was not compensable.¹⁴⁷ The Partnership appealed, raising for review the trial court's ripeness analysis and takings law determination.¹⁴⁸

On review, the DCA questioned the need for a ripeness analysis at all, given the nature of the temporary regulatory taking claim.¹⁴⁹ However, the court concluded that to the extent a ripeness analysis was appropriate, the trial court was correct in determining the Partnership's claim was not ripe as the Partnership never tested the injunction or obtained a final determination regarding the extent of the regulation on the use of its property.¹⁵⁰ The court also found that the trial court was correct in its determination that the Partnership had not met the burden of the *Lucas* test to establish a regulatory taking.¹⁵¹

In holding that the Partnership had not met the required elements for a temporary regulatory taking, the DCA relied on a Ninth Circuit decision, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁵² In *Tahoe-Sierra*, the court held that a temporary development moratorium was not a categorical taking under *Lucas* because it did not deprive the landowner of "all" of the value or use of the property.¹⁵³ The DCA stated their agreement with the Ninth Circuit that "a temporary land use regulation could rarely, if ever, completely deprive the owner of all beneficial use."¹⁵⁴ The DCA concluded that the injunction was temporary, designed only to suspend certain development until the County came into compliance with the Comprehensive Plan.¹⁵⁵ The court went on to say that while a moratorium may restrict or delay the use of property, it cannot be said that a moratorium which is temporary from its inception destroys the economic value of property.¹⁵⁶ In conclusion, the DCA stated that a truly temporary

145. *Id.* at 468.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764 (9th Cir. 2000).

153. *Id.* at 782.

154. *Bradfordville*, 804 So. 2d at 471.

155. *Id.*

156. *Id.*

injunction is more similar to a permitting delay than a compensable regulatory taking.¹⁵⁷

Bd. of Tr. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 798 So. 2d 847 (Fla. 1st DCA 2001)

In *Day Cruise*, the First District Court of Appeal addressed a motion for clarification, rehearing, certification, or rehearing en banc (Motion) from the Board of Trustees of the Internal Improvement Trust Fund (Trustees).¹⁵⁸ The Motion stemmed from the court's decision in *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*¹⁵⁹ (*Day Cruise 1*), confirming the invalidation of a proposed Trustees rule.

The Trustees proposed a rule forbidding the use of sovereignty submerged lands for mooring or anchoring cruise ships whose main purpose was to take passengers out to gamble at sea.¹⁶⁰ In *Day Cruise 1*, the DCA reviewed a decision of the Administrative Law Judge that the proposed rule was beyond the Trustees' authority.¹⁶¹ At issue in the DCA's decision was the prohibition's basis not on the use the vessels make of the sovereignty lands, but on the use of the vessels once they have left the shore.¹⁶² The court found that the authority granted to the Trustees by the Legislature was not compatible with adoption of the proposed rule.¹⁶³ The *Florida Statutes* grant the Trustees the authority to adopt rules governing uses of sovereignty submerged lands by vessels, limited to "regulations for anchoring, mooring, or otherwise attaching to the bottom. . . . The regulations must not interfere with commerce or the transitory operation of vessels through navigable water."¹⁶⁴ The court found that the Trustees were not authorized to promulgate a rule prohibiting the use of submerged lands which have no physical or environmental impact on the sovereignty submerged lands.¹⁶⁵

In the Motion, the Trustees assert that the decision in *Day Cruise 1* is in conflict with controlling precedents.¹⁶⁶ The DCA

157. *Id.*

158. *Bd. of Tr. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 798 So. 2d 847 (Fla. 1st DCA 2001).

159. *Bd. of Tr. of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001).

160. *Id.* at 697.

161. *Id.*

162. *Id.* at 697-98.

163. *Id.* at 702.

164. *Id.* (citing FLA. STAT. § 253.03(7)(b) (1999)).

165. *Id.*

166. *Day Cruise*, 798 So. 2d at 847. The Trustees cite Southwest Florida Water

rejected this argument, stating that *Day Cruise 1* is “fully consonant” with previous decisions.¹⁶⁷ The court denied the Trustees’ Motion except to certify the following question as one of great public importance:

Is proposed rule 18-21.004(1)(i) an invalid exercise of delegated authority within the meaning of section 120.52(8)(b) or (c), Florida Statutes (1999)?¹⁶⁸

Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 1999) and Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 743 So. 2d 1121 (Fla. 1st DCA 1999), as being in conflict with the court’s decision in *Day Cruise 1*.

167. *Day Cruise*, 798 So. 2d at 847.

168. *Id.* at 848.

