

# SUPREME COURT OF LOUISIANA

*No. 98-C-1235*

ENTERGY GULF STATES, INC.

Versus

LOUISIANA PUBLIC SERVICE COMMISSION

LEMMON, J., Dissenting in Part

With regard to Assignment of Error No. 9, the majority essentially rules that the trial judge's exclusion of evidence, which was arguably admissible and referable back to the Commission under La. Rev. Stat. 45:1194, was right for the wrong reasons. I have difficulty in according deference to a discretionary ruling of the trial judge when the ruling was not based on the exercise of discretion, but on an erroneous application of law.

The evidence offered in the trial court was admissible under the rules of evidence unless the judge based a ruling on La. Code Evid. art. 403, which involves the exercise of discretion. The judge did not exclude the evidence on the basis of Article 403, but on the basis that the Commission had sufficient evidence before it to make a decision. In my view, the judge, under La. Rev. Stat. 45:1194, should have admitted the evidence and sent the transcript of the evidence to the Commission before rendering judgment.<sup>1</sup>

The exclusion of this evidence is particularly significant in light of the fact that this court is also ruling, under Assignment of Error No. 6, that there is no compelling support for the positions of either party. The excluded evidence may well have swung

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<sup>1</sup>This view is consistent with the votes by Justice Marcus and me to grant the Company's application for supervisory writs that was presented to this court immediately after the trial judge ruled.

the balance in favor of the Company and should have been admitted.