IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 70,703

METROPOLITAN DADE COUNTY,

Appellant,

vs.

KATIE NICHOLS, et al.,

Appellees.
_____/

REPLY BRIEF OF APPELLANT METROPOLITAN DADE COUNTY

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INTRODUCTION TO ARGUMENT

Appellee, Florida Power and Light Company ("FPL") in its answer brief attempts to describe the issue before the Public Service Commission ("PSC" or "the Commission") below as a choice between rates, deemphasizing FPL's substantial burden of proof. As stipulated by the parties and established by the PSC, however, the ultimate issue tried below was whether or not FPL's proposed methodology was acceptable. Both appellees concede herein that FPL carried the burden of proving the acceptability of the proposed methodology by competent substantial evidence.

Similarly, both Appellees concede that the proposed methodology was comprised of a two-step process, one involving expert decisions as to which cost categories might vary from purchases of power from qualifying facilities and the second step being a statistical analysis to test the predicated causal relationship. While both FPL and the PSC in their answer briefs claim a "semantical attack" based on a mischaracterization of step one as engineering judgment, this characterization is consistent with the testimony of FPL's chief witness and consistent with the PSC's findings contained in the Order being reviewed herein. The PSC found FPL's methodology to be based on engineering judgments and the record supports this finding.

FPL also argues that even if the engineering judgments are incorrect, the methodology may still be acceptable. This is irrelevant because the PSC specifically found the engineering judgments to be correct and based the Final Order on these

findings. Therefore, there should have been competent substantial evidence in the record establishing that the judgments were correct.

Initial Briefs filed herein established that the Commission relied exclusively on hearsay evidence consisting of a report containing a summary of the expert engineering judgments and the testimony of a managerial costs witness who had discussions with FPL engineers.

FPL and the PSC argue in their Answer Briefs that Appellants herein have waived their right to judicial review by failing to properly preserve the issues raised herein. As outlined in Section I below, no such waiver has occurred.

Additionally, FPL attempts to establish that certain non-disputed evidence in the record supports the PSC's findings under review. As fully discussed in Section II below, the record does not substantiate this contention.

ARGUMENT

I

APPELLANTS HAVE NEVER WAIVED THEIR RIGHT TO JUDICIAL REVIEW OF COMMISSION FINDINGS BASED SOLELY ON HEARSAY.

A. Failure To Object To The Admission Of Hearsay Evidence Does Not Permit The Commission To Rely Exclusively On Hearsay.

Even assuming there was no timely objection to the admission of FPL's hearsay evidence, the PSC improperly relied exclusively on that hearsay to make findings of fact. The First District Court of Appeals opinion in Harris v. Game and Fresh Water Fish Commission, 495 So.2d 806 (1st DCA 1986) is dispositive of this appeal. In Harris, the court reversed findings of the Game and Freshwater Fish Commission which were based solely on unobjected-to hearsay evidence in violation of §120.58(1)(a), Fla. Stat. (1985). The Harris holding should control here. Harris, an employee of the agency appealed his dismissal based on alleged criminal activity. The dismissal was based upon an investigation conducted by an agency investigator. The investigator testified that in conducting his investigation he interviewed witnesses. A memorandum report of the investigation was admitted into evidence without objection. Upon examining the record in Harris, the First District reversed the agency's findings citing §120.58(1)(a), Fla. Stat. (1985) because the agency relied exclusively on the investigation report in making its findings and the report contained only hearsay. The court, found that Harris' failure to object to the admission of the report did not preclude Harris from

challenging on appeal the agency's sole reliance on hearsay evidence to make its findings:

> In the present case, the information contained in the investigator's report was hearsay. The investigator indicated in his report that his findings were based on his discussions with various persons associated with the appellant's arrest and conviction. Such information is hearsay and does not fall under any hearsay exception. Thus, the material contained in the investigator's report could not be relied upon by the Commission to support it's findings.
>
> The Commission further argues that because appellant did not contemporaneously object to the admissibility of the investigator's report, he cannot now be heard to complain on appeal. However, in view of the provision of Section 120.58(1), such evidence was not inadmissible in an administrative forum. It follows that a party's failure to object to admissibility does not foreclose him from subsequently asserting, under that section, that such hearsay evidence was insufficient because there was no competent evidence introduced which the hearsay evidence could, in the language of the statute, "supplement or explain."
>
> We, therefore, conclude that the Commission's order is not supported by competent substantial evidence and must be
>
> REVERSED.

Harris at 809.

The same result should occur here. Just as the agency did in Harris, the PSC here relied solely on hearsay evidence in finding that FPL's engineering judgments were correct. The PSC relied on a hearsay report and Mr. Whiting's hearsay testimony based on his discussions with FPL engineers. In the same way the investigator's report and testimony in Harris could not be relied on to support findings, FPL's Final Report and Mr. Whiting's testimony cannot be relied on here to support the

PSC's findings. Under Harris, it is irrelevant whether or not contemporaneous objection was made to the admission of the hearsay evidence below since hearsay is admissible in administrative hearings. Therefore, this Court need not consider that issue.

B. Timely Objection Was Made To Mr. Whiting's Expert Opinion Testimony In Engineering.

The only testimony that FPL's report might have supplemented was Mr. Whitings opinions in engineering. These opinions, however, were objected to below, and should not have been considered by the Commission. During Mr. Whiting's testimony in the proceedings below objections to any expert engineering opinions offered were made at the appropriate moments. (R. Vol. IV, Tr. 61-63, 65). It was unnecessary for objection to be made to Mr. Whiting's prefiled testimony at the time it was inserted in the record because there was no opinion testimony on engineering judgments by Mr. Whiting contained in his prefiled testimony. (See R. Vol. IV, Tr. 9-29, 330-350).

In light of the record below, it is inappropriate for FPL to argue that this issue was not properly preserved for review. Appellee FPL refused at the hearing to proffer Mr. Whiting as an expert in engineering yet attempted to utilize him for this purpose. (R. Vol. IV, Tr. 62). To any extent that the record may appear unclear as to the timely objection to Mr. Whiting's opinion testimony in engineering, this is the result of FPL's improper maneuvering and gamesmanship below.

More importantly, the PSC's argument that objections to Mr. Whiting's expert engineering testimony were untimely is

inconsistent with the Commission's treatment of the issue below. Firstly, the PSC heard the objections at the time they were made and decided to allow the testimony as admissible hearsay over objection "giving it the weight it should be given," (R. Vol. IV, Tr. 62). Then, the PSC acknowledged the timeliness of the objections in the final order by attempting to memorialize the ruling on the issue. The Commission referred to the ruling in the Appendix To Final Order in response to Proposed Findings of Fact regarding Mr. Whiting's qualifications. (R. Vol. II, 231-232) (page 12, Order No. 17273, Exhibit A, attached to Appellant Metropolitan Dade County's Initial Brief). The PSC found the objections timely otherwise, an attempt would not have been made to include the ruling in the final order. Since the PSC, as trier of fact found the objections timely, this Court is compelled to do so as well.[1/]

The case of Rinker Materials Corp. v. Hill, 471 So.2d 119 (Fla. 1st DCA 1985) is cited by the PSC to support the PSC's position that the issue of Mr. Whiting's qualifications was not preserved for review. Rinker, however, is inapplicable here. In Rinker, there was no objection whatsoever to the expert

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[1/] Both FPL and the PSC suggest 90.704.1, Fla. Stat. (1985) the rule of evidence governing expert opinions is a method by which Mr. Whiting's testimony can be used to "bootstrap" the judgments of FPL's engineers into the record. Unfortunately, for the Appellees herein, such an effort is improper because of §90.801(2)(c), Fla. Stat. (1985) which prohibits an expert in one field to testify as to the expert opinion given to him by another expert. See Banyak v. Clyde J. Yancey and Sons Dairy, Inc., 438 So.2d 891 (Fla. 2d DCA 1983). Mr. Whiting, not being an expert witness in engineering cannot properly testify as to the engineering opinions given to him by FPL's engineers.

testimony contested on appeal so that neither the trier of fact nor opposing party had any notice of the issue during the hearing. The record in the case sub judice evidences objection, discussion, rulings, and attempts to cure during the proceeding below. (R.Vol. IV, Tr. 61, 66). All parties and the PSC had notice of the objections and the PSC attempted to document the ruling in the final order. Unlike Rinker, the subject expert testimony at issue herein was heard over objection.[2/]

C. FPL And The PSC Have Misconstrued The Issue On Appeal And Therefore, Cite To Inapplicable Case Law.

The issue for determination by this Court is whether or not the PSC's final order violated Section 120.58(1)(a) of the Florida Administrative Procedure Act by relying exclusively on hearsay evidence to support findings of fact.

The answer briefs of FPL and the PSC seem to construe the issue as one of admissibility of hearsay evidence. Appellants herein, however do not contest the admissibility of the hearsay in FPL's Final Report and the hearsay testimony of Mr. Whiting. Under Section 120.58(1)(a), Fla. Stat. (1985) this hearsay evidence is admissible "for the purpose of supplementing or explaining other evidence" but is "not sufficient in itself to support a finding."

[2/] FPL argues that cogenerator counsel's use of the term "weight to be given to the testimony" indicates that no one contested the admissability of the testimony. Viewed in context, however, this language obviously was used to refer to the hearsay nature of the testimony. Therefore, it cannot possibly (Footnote Continued)

The only exception to this rule is if the hearsay evidence "would be admissible over objection in civil actions." (Emphasis added). Section 120.58(1)(a), Fla. Stat. (1985). This language has been construed to mean the hearsay evidence must fall into one of the hearsay exception categories of the Florida Evidence Code §90.803, Fla. Stat. (1985). See e.g., Harris v. Game and Freshwater Fish Commission, 495 So.2d 806 (1st DCA 1986). Nothing in the record below indicates the hearsay evidence relied on exclusively by the PSC herein to support findings fits into any of the hearsay exceptions in §90.803 and neither Appellee so contends.

FPL and the PSC instead argue that any hearsay evidence and testimony could be used for any purpose, even to exclusively support a finding. In support of this proposition, FPL and the PSC cited Tri-State Systems, Inc. v. Department of Transportation, 500 So.2d 212 (Fla. 1st DCA 1986), rev. den., 506 So.2d 1041 (Fla. 1987). In Tri-State, the hearing examiner ruled hearsay testimony inadmissible which the First District ruled should have properly been admitted because the evidence was essential as an element of proof without being used for its truth value. In the case sub judice there is no issue regarding the admissibility of hearsay evidence. The issue here does not involve whether or not hearsay was properly excluded. Therefore Tri-State's holding is inapplicable here. The PSC and FPL erroneously rely on dicta in Tri-State which

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(Footnote Continued)
indicate acquiescence to the admission of the testimony as direct evidence. (R.Vol. IV, Tr. 92-94).

opines that unobjected to hearsay can be used as any other evidence in the case. This Tri-State dicta cannot be construed as Appellees suggest, to mean that hearsay can be solely relied on to support a finding of fact because this would directly conflict with §120.58(1)(a), Fla. Stat. (1985). Clearly, this dicta can only be construed to mean that unobjected to hearsay may be used to supplement or explain other evidence. Under this reading, the First Circuit's dicta in Tri-State does not conflict with §120.58(1)(a), Fla. Stat. (1985) or the First Circuit's holding in Harris cited above. Under the holding in Harris and the only logical reading of the dicta in Tri-State Appellants herein have never waived their right to judicial review of the PSC's findings which are based solely on hearsay.

II

THERE IS NO COMPETENT SUBSTANTIAL BASIS FOR THE PSC'S FINDINGS THAT FPL'S ENGINEERING JUDGMENTS ARE CORRECT.

A. Mr. Whiting Admitted He Was Not Qualified To Offer Expert Opinion Testimony In Engineering.

Both FPL and the PSC argue that Mr. Whiting was qualified to offer expert testimony on all aspects on Step One of FPL's methodology. This contradicts Mr. Whiting's own testimony. As was fully outlined in Appellants initial briefs, Mr. Whiting did not have an engineering background sufficient to qualify him as an expert in this area.[3/] Further, he testified that

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[3/] Both the PSC and FPL argue that the term "engineering judgments" is inaccurate. Once again FPL and the PSC contradict their positions below. FPL's chief witness (Footnote Continued)

Step One of the analysis required both engineers and managerial expertise and that step one required an engineer to provide opinions to the managerial staff. Mr. Whiting admitted he was relying on the opinions of the engineers and while he felt he could substantiate some of the judgments from his own knowledge, he could not substantiate all the engineering judgments underlying the methodology. (R. Vol. IV, Tr. 75-76). In fact, Mr. Whiting did not substantiate all the engineering judgments underlying the methodology. (R. Vol. IV, Tr. 95-97). Therefore, even if Mr. Whiting's opinion testimony and hearsay testimony were properly relied on by the PSC this would not be sufficient to support the PSC's findings.[4/]

B. Attachment IV To FPL's Final Report Does Not Support The PSC's Findings Regarding FPL's Engineering Judgments.

FPL and the PSC also argue that even if Mr. Whiting's opinion testimony in engineering was improper and his testimony regarding the engineering judgments was pure hearsay objected to at the hearing, the PSC's findings are still not based entirely on hearsay because Attachment 4 to FPL's Final Report which summarized the engineering judgments although pure

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(Footnote Continued)
Mr. Whiting used this characterization to describe Step One of FPL's methodology. (R. Vol. IV, Tr. 30-31). Moreover, the PSC's Final Order referred extensively to the procedure as engineering judgments. (Attachment A to Metro-Dade Initial Brief, p.9).

[4/] While FPL argues that Dade County's sponsored witness, Dr. Roy Shanker was not an engineer either, this is of course irrelevant. Firstly, Dr. Shanker's qualifications are not at issue in this appeal and secondly Dr. Shanker did not attempt to offer any opinion testimony in engineering.

hearsay came in without objection and therefore can be used like any other evidence in the case. This argument is fatally flawed.

Firstly, the report cannot be exclusively relied on to support a finding of fact. Harris cited above. Secondly, assuming for the sake of argument that although it was hearsay the report was properly relied on exclusively by the PSC. The report still does not support the findings of fact at issue regarding FPL's engineering judgments because it does not contain an explanation of the engineering judgments it includes. Attachment IV to FPL's report merely documents results of FPL's engineering judgments. Taken for the truth of the matters asserted therein, the report at best simply evidences which costs were included and excluded by FPL but offers no competent discussion as to the substance of the expert engineering decisions. (R. Vol. V, Exhibit 1, pp.44-65). The PSC made findings regarding the judgments underlying the report:

> Attachment IV of the Final Report relied on a set of assumptions and engineering judgments. . . . The process of selecting the accounts to be analyzed is predicated on the assumptions that as - available energy purchases will not alter individual unit generation by a significant amount. With this in mind, FPL engineers reviewed each of its EAC's (Expenditure Analysis Codes) and determined which, if any, would be susceptible to change with small changes in load. . . . We agree with the selection of the EAC's used in Attachment IV and find that these costs currently represent all identifiable O&M costs which vary with small changes in load.

(Page 9, Final Order, Attachment A, Metropolitan Dade County's Initial Brief).

Nothing in FPL's Final Report competently discussed the judgments underlying the selection of costs. In order to support the PSC's findings, expert engineering testimony was required to substantiate the expert engineering judgments underlying FPL's report. Therefore, even assuming that the report as admissible hearsay was properly relied on by the PSC to support findings, this is irrelevant to the issue on appeal because the report alone without expert engineering testimony to establish its basis does not support the PSC's findings of fact regarding FPL's engineering judgments.

C. FPL's Exhibit 16 And The Exhibits Attached To The Testimony Of Cogenerators' Witnesses Do Not Support The PSC's Findings Of Fact Regarding FPL's Engineering Judgments.

FPL's answer brief attempts to find some basis in the record for the PSC's findings regarding FPL's engineering judgments by claiming that exhibits attached to the testimony of the cogenerator's own witnesses when coupled with FPL's Exhibit 16 can be used to support the PSC's findings. This entire line of argument should be disregarded by this Court since there is no testimony in the record regarding material in these exhibits supporting the PSC's findings. Moreover, Exhibit 16, a comparison of FPL's methodology with that of other utilities was used by FPL merely to show the comparative merit of FPL's method. FPL cannot properly "supplement the record" now by effectively "testifying" in its brief as to alleged meanings of these documents that were not established in the record. FPL cites to the record at (R. Vol. IV., Tr. pp.78-79 and 316, 317), but no testimony by either of FPL's

witnesses in those sections of the transcript supports FPL's "testimony" in its Answer Brief on this point.

CONCLUSION

The PSC's findings that the engineering judgments underlying FPL's methodology are valid were not based on competent substantial evidence in the record. Expert engineering testimony as to the correctness of the judgments underlying FPL's study is necessary to support such findings. No such expert engineering testimony was offered by FPL. Therefore, the PSC's order must be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief was mailed this 23rd day of October, 1987, to: WILLIAM S. BILENKY, General Counsel, Florida Public Service Commission, 101 East Gaines Street, Tallahassee, Florida 32399-0850; CHARLES A. GUYTON, ESQUIRE, Steel, Hector & Davis, 201 South Monroe Street, Tallahassee, Florida 32301; and to PAUL SEXTON, ESQUIRE, Richard A. Zambo, P.A., 1017 Thomasville Road, Suite C, Tallahassee, Florida 32303.

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