IN THE SUPREME COURT OF FLORIDA

FLORIDA INDUSTRIAL POWER
USERS GROUP,

Appellant,

Case No.: SC15-2146

v.

Lower Tribunal No.: 150075-EI

ART GRAHAM, ETC.,
ET AL.

Appellee(s)

CITIZENS' ANSWER BRIEF

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PRELIMINARY STATEMENT

Within this Answer Brief, the Appellee will be identified as "Citizens," "Public Counsel," or the "Office of Public Counsel," which will be shortened to "OPC." OPC will refer to the Order on Appeal, *In re: Petition for approval of arrangement to mitigate impact of unfavorable Cedar Bay power purchase obligation, by Florida Power & Light Company*, Order No. PSC-15-0401-AS-EI (Sept. 23, 2015), as the "Cedar Bay Order" and Docket No. 150075-EI as the "Cedar Bay Docket." OPC will refer to the other Appellees, Florida Public Service Commission as the "PSC" or the "Commission" and Florida Power & Light Company as "FPL." OPC will refer to the Appellant, Florida Industrial Power Users Group as "FIPUG." Commission Orders available on the Commission's website will be cited as Order No. PSC-XX-XXXX, as well as X F.P.S.C. X:X.

OPC will refer to the volumes of the consolidated record on appeal as "R.V.__,p.__." The hearing transcript is referenced as "Tr. V.__, p.__." Florida Statutes will be referred to as "F.S." and will refer to the 2015 version of the statute unless otherwise noted. Chapter 90, F.S. will be referred to as the "Evidence Code." The Florida Administrative Code will be referred to as "F.A.C." The Florida Administrative Procedure Act will be abbreviated as "APA."

STATEMENT OF THE CASE AND OF THE FACTS

On March 6, 2015, FPL filed a "Petition for Approval of Arrangement to Mitigate Impact of Unfavorable Cedar Bay Power Purchase Obligation" ("Petition") with the Commission. (R.V. 1, p. 27). FPL's Petition requested the Commission approve FPL's purchase of a power plant, Cedar Bay, so FPL could cancel an economically unfavorable, from the ratepayers' perspective, existing power purchase agreement. *Id*. On March 12, 2015, OPC intervened in the Cedar Bay Docket (R.V. 1, p. 50) followed by FIPUG's "Motion to Intervene" on March 16, 2015 (R.V. 1, p. 52). The Commission acknowledged OPC's intervention and granted FIPUG's "Motion to Intervene." (R.V. 1, pp. 57, 68-70).

On July 24, 2015, after voluminous discovery by both intervenors, FPL and OPC filed a "Joint Motion for Approval of Settlement Agreement" ("Settlement Agreement"). (R.V. 3, pp. 508-23). On July 28, 2015, the Commission convened an evidentiary hearing under Chapter 120, F.S., to address FPL's Petition. During a discussion of preliminary matters, the Commission accepted the parties' proposal to conduct the evidentiary hearing on FPL's Petition even though a proposed settlement had been filed. (Tr. V. 1, p. 8). The Commission decided to hold oral argument on the proposed Settlement Agreement at a later date, after the conclusion of the hearing and post-hearing briefs. (Tr. V. 4, pp. 828-38). The Commission approved the Settlement Agreement in Order No. PSC-15-0401-AS-EI issued September 23,

2015. (R.V. 4, pp. 696-706). FIPUG appealed the Cedar Bay Order on October 21, 2015 (R.V. 4, pp. 707-20), which resulted in this appeal after being transferred to this Court from the First District Court of Appeal (R.V. 4, p. 721).

The sole procedural action that resulted in this appeal is FIPUG's request to sequester witnesses pursuant to Section 90.616, F.S., made at the beginning of the July 28, 2015, hearing (Tr. V. 1, p. 16), and the Commission's denial of FIPUG's sequestration request finding a request for sequestration under Section 90.616, F.S., to be discretionary (Tr. V. 1, pp. 35-36).

SUMMARY OF ARGUMENT

The Evidence Code applies to administrative proceedings at the Commission, and Section 90.616, F.S., is mandatory. Historically, the Commission follows the Evidence Code. *In re: Application for increase by General Development Utilities, Inc.*, Order No. PSC-92-0326-PCO-WS, 92 F.P.S.C. 5:174 (1992); *Greyhound Corp., Se. Greyhound Lines Div. v. Carter*, 124 So. 2d 9 (Fla. 1960). The Rule of Sequestration is mandatory unless an exception applies per the plain language of the statute. § 90.616, F.S. The record is clear that the Commission did not exercise discretion in considering any exceptions; therefore, the Commission erred in failing to follow the plain, mandatory, language of the statute.

The fairness of the proceeding below was not affected in any way, and the Commission committed harmless-error by finding FIPUG's request for

sequestration discretionary and denying said request. Although the Rule of Sequestration is mandatory, unless exceptions are applied, the fairness of the proceeding below was not impaired in any way, because all direct and rebuttal testimony was filed before the hearing. Moreover, none of the witnesses deviated from their pre-filed testimony during cross-examination. Therefore, the pre-filed testimony and lack of deviation from the pre-filed testimony clearly shows there was no "coloring of a witness's testimony," which is the purpose of the Rule of Sequestration. *Chamberlain v. State*, 881 So. 2d 1087, 1100 (Fla. 2004). The harmless-error rule embodied in Section 120.68(7)(c), F.S., should be applied here. When procedural errors lead to review of agency action, the courts apply a harmless-error analysis. *Carter v. Dep't of Prof'l Regulation*, 633 So. 2d 3, 6 (Fla. 1994). Furthermore, even in criminal cases with their heightened protections, sequestration issues are still resolved under a harmless-error analysis. *Hernandez v. State*, 4 So. 3d 642, 663-64 (Fla. 2009).

STANDARD OF REVIEW

A failure to follow prescribed procedure, including the Rule of Sequestration, is subject to review under the harmless-error standard. Section 120.68(7)(c), F.S.; *Carter v. Dep't of Prof'l Regulation*, 633 So. 2d at 6 (Fla. 1994); *Hernandez v. State*, 4 So. 3d at 663-64 (Fla. 2009).

ARGUMENT

I. THE EVIDENCE CODE APPLIES TO ADMINISTRATIVE PROCEEDINGS AT THE COMMISSION, AND SECTION 90.616, F.S., IS MANDATORY.

Although the Commission has never specifically cited Section 90.616, F.S., precedent and lengthy Commission history regarding the Evidence Code clearly indicate Section 90.616, F.S., is applicable in Chapter 120, F.S., proceedings before the Commission. Moreover, no precedent holds the Evidence Code inapplicable in proceedings under the APA. Proceedings before the Commission are conducted under Chapter 120, F.S., which sets forth a unique standard on admissibility and hearsay evidence. See §§120.57, 350.01, F.S. Although Section 120.569(2)(g), F.S., grants a broader scope of admissibility than that found in Chapter 90, F.S., it only governs admissibility of evidence in administrative proceedings. Section 120.57(1)(c), F.S., states hearsay evidence may supplement other evidence but cannot support a finding of fact unless a hearsay exception applies, which are found in Sections 90.801-.805, F.S. This special hearsay clarification is also enumerated in Rule 28-106.213(3), F.A.C. Outside these two Sections, there is no additional language in Chapter 120, F.S., which states the Evidence Code does not apply in Administrative proceedings. Thus, one must examine the applicability of the Florida Evidence Code.

Section 90.103, F.S., defines the applicability of the Evidence Code as applying "to the same proceedings that the general law of evidence applied to before the effective date of this code," which was 1976.[1] Thus, the key question regarding applicability is – Did the Commission rely on the general law of evidence prior to 1976? There is no doubt that the Commission relied on the general law of evidence prior to the adoption of the Evidence Code. In reviewing an Order by the Commission granting carrier extensions, this Court examined the Commission's Rules of Practice and Procedure and quoted:

> Rule I reads: "In general the rules of evidence applicable to hearings before the Florida Railroad and Public Utilities Commission shall be the general rules of evidence applied to the circuit courts of this State, with such exceptions as the Commission may make." *Greyhound Corp.*, 124 So. 2d at 16 (Fla. 1960) (quoting the Commission's Rules).[2]

The Commission has never promulgated a rule enumerating any exceptions to the Evidence Code, nor has the Commission ever issued an Order clearly stating an exception for Section 90.X of the Evidence Code. Furthermore, after adoption of the Evidence Code, the Commission stated, "it is important to note that the Commission does rely on and follow the Florida Evidence Code and the Florida

[1] Chapter 120, F.S., was adopted in 1974, and the Evidence Code contains no language, direct or implied, that the APA is exempt.

[2] The Commission's name has changed several times over the past century, but the name change has reflected changes in the entities that are regulated by the Commission. There are no precedents indicating the name changes affect the applicability of evidentiary laws before the Commission.

Rules of Civil Procedure in proceedings before it." *In re: Application for increase by General Development Utilities, Inc.*, Order No. PSC-92-0326-PCO-WS, p. 2.

Aside from following Sections 90.201-.203 and 90.801-.805, F.S., as required by Rule 28-106.213, F.A.C., numerous prior Commission Orders apply and cite Sections of the Evidence Code. To define relevance, the Commission cited Section 90.401, F.S. (2006). *In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee*, Order No. PSC-07-0033-PCO-EU, 7 F.P.S.C. 1:57 (2007). To examine admissibility in the context of weighing probative value versus prejudicial impact, the Commission cited Sections 90.402-.403, F.S. (1995). *In re: Application for a rate increase for North Ft. Myers Division in Lee County by Florida Cities Water Company – Lee County Division*, Order No. PSC-96-1133-FOF-SU, 96 F.P.S.C. 9:139 (1996). In examining whether a party was able to meaningfully cross-examine a witness for impeachment purposes, the Commission cited Section 90.608, F.S. (1992), and the Commission granted a Motion to Invoke the Rule of Sequestration. *In re: Initiation of show cause proceedings against Cherry Payment Systems Inc. for violation of Rule 25-4.118, F.A.C., Interexchange Carrier Selection*, Order No. PSC-93-1374-FOF-TI, 93 F.P.S.C. 9:412 (1993). In determining expert witness qualifications, the Commission cited Sections 90.702, 90.704, and 90.705, F.S. (2000). *In re:*

Application for amendment of Certificate No. 106-W to add territory in Lake County by Florida Water Services Corporation, Order No. PSC-01-1919-PCO-WU, 1 F.P.S.C. 9:317 (2001).

These cases clearly illustrate two points. First, the Commission has granted requests for sequestration before, even referring to the request by the common parlance term "Invoking the Rule" in the *Cherry Payment Systems* case. And, second, the Commission has historically applied the Evidence Code.[3] Moreover, these cases show the Commission applies the Evidence Code in all types of cases: 1) rate cases; 2) show cause cases; and 3) certificate cases. Furthermore, a review of proceedings conducted under Chapter 120, F.S., at the Division of Administrative Hearings confirms that Administrative Law Judges frequently apply the Rule of Sequestration and specifically cite to Section 90.616, F.S.[4]

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[3] Two pre-hearing orders exist in which the Commission has stated "the Florida Evidence Code, is not, however, strictly binding in Commission Proceedings," however, the Commission provided no citation to support that statement. *In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers $143 million*, Order No. PSC-07-0270-PCO-EI, 7 F.P.S.C. 3:248 (2007); and *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-14-0666-PCO-EI, 14 F.P.S.C. 11:87 (2014). Of note, both orders are procedural, not final, orders.

[4] *Department of Education v. Kruse*, Case No. 83-2494 (Fla. DOAH Sept. 13, 1998); *Lakeland Regional Medical Center v. Department of Health and Rehabilitative Services, et al.*, Case Nos. 90-7682 and 90-7683 (Fla. DOAH Aug. 6, 1991, Sept. 14, 1991); *Department of Insurance and Treasurer v. Day*, Case No. 94-4317 (Fla. DOAH Apr. 1, 1996, June 3, 1996); *Agency for Health Care Administration v. Murtha, M.D.*, Case No. 96-0567 (Fla. DOAH June 20, 1996); *McCray v. City of Milton*, Case No. 96-1905 (Fla. DOAH Apr. 22, 1997); *D.S. v. Miami-Dade County*

As to whether Section 90.616, F.S., is mandatory or discretionary, the plain language of the statute is perfectly clear. Unless an exception applies, "at the request of a party the court **shall** order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2)." § 90.616, F.S. (emphasis added). Although the Commission's counsel requested clarification about the exceptions, the Commission determined the exceptions did not apply and stated "request [to invoke the rule] denied...because it is my decision and opinion that I have the discretion to do so in this administrative proceeding." (Tr. V. 1, pp. 35-36). The transcript clarifies why the Commission erred on this point.

During the argument regarding the Rule of Sequestration, the Commission was advised that, in *CPV Gulfcoast, Ltd. V. Jaber*, 879 So. 2d 620 (Fla. 2004), this Court concluded "the Commission was within its discretion not to invoke the rule, that the rules of evidence do not apply strictly in administrative proceedings such as this one, and...that the Commission had acted properly in – or within its range of discretion." (Tr. V. 1, p. 32). However, the issues raised in the *CPV Gulfcoast* case included the rule of sequestration, striking witness testimony, and quashing a

School Board, Case No. 99-4774E (Fla. DOAH May 31, 2000); *Broward County School Board v. Kralik*, Case No. 10-0629 (Fla. DOAH Dec. 6, 2010). Again, these cases cover a broad scope of cases that appear before Administrative Law Judges under Chapter 120, F.S.

subpoena. This Court affirmed the decision without a published opinion. Therefore, it is not clear why this Court affirmed the decision below, and it cannot be argued that this Court found the rules of evidence do not strictly apply and further, that sequestration was discretionary. Without a published opinion, the *CPV Gulfcoast* case simply cannot be cited to support those assertions.

Chapter 90, F.S., clearly applies to proceedings before the Commission as evidenced by the Commission's own acknowledgement in its rules quoted in *Greyhound Corp.*, 124 So. 2d at 16, and in the Chapter-90 era case *In re: Application for increase by General Development Utilities, Inc.*, 92 F.P.S.C. 5:174. The plain language of Section 90.616, F.S., makes sequestration mandatory unless an exception applies. No exception was considered in the case below. (Tr. V. 1, pp. 35-36). Therefore, it must be acknowledged that the Commission erred in its determinations regarding the Rule of Sequestration.

II. THE FAIRNESS OF THE PROCEEDING BELOW WAS NOT AFFECTED IN ANY WAY, AND THE COMMISSION COMMITTED HARMLESS-ERROR BY FINDING FIPUG'S REQUEST FOR SEQUESTRATION DISCRETIONARY AND DENYING SAID REQUEST.

Section 120.68(7)(c), F.S., sets forth a clear standard of review for procedural error – "fairness of the proceedings or correctness of the action." See also *Carter*, 633 So. 2d 3. Precedent likewise indicates a harmless-error standard applies in reviewing error resulting from misapplication of Section 90.616, F.S, even in a

criminal trial, which provides heightened procedural protections. *Hernandez*, 4 So. 3d 642. Furthermore, if there is no indication that a witness's testimony was altered or colored by not being sequestered, then FIPUG is not entitled to relief. See *Chamberlain*, 881 So. 2d at 1100. Finally, in the proceedings below, all direct and rebuttal testimony was pre-filed before hearing, and a review of the transcript shows the witnesses did not deviate from their pre-filed testimony. Although the Commission erred as explained above, several procedural aspects of the proceeding below ensured the fairness of the proceeding was not affected in any way, and the Court should find the error was harmless.

The Rule of Sequestration is clearly intended to perform a singular function – "it exercises a restraint on witnesses 'tailoring' their testimony to that of earlier witnesses." *Hernandez*, 4 So. 3d at 661-62 (quoting *Geders v. United States*, 425 U.S. 80, 87 (1976)). Expressed another way, "the rule is designed to aid in ensuring a fair trial by avoiding the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand." *Chamberlain*, 881 So. 2d at 1100 (quoting *Spencer v. State*, 133 So. 2d 729, 731 (Fla. 1961)). However, where a witness is recounting prior recorded statements, and the witness did not deviate from those prior recorded statements, then the dangers of hearing other witness testimony are removed. *Knight v. State*, 746 So. 2d 423, 430 (Fla. 1998).

Since the Rule of Sequestration is a procedural requirement/protection, Section 120.68(7)(c), F.S., sets forth the applicable standard of review. Section 120.68(7)(c), F.S., states that agency action may be set aside or remanded if the court finds "the fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure." Moreover, it is common practice in Florida that "courts have consistently applied the harmless-error rule when reviewing agency action resulting from a procedural error." *Carter*, 633 So. 2d at 6. Despite precedent existing for application of the exceptions to Section 90.616, F.S., there appears to be a lack of precedent on the application of Section 90.616(1), F.S, specifically. However, in a criminal case, this Court applied the harmless-error test for failing to exclude a witness under Section 90.616, F.S., when it was determined that the testimony was not colored by prior witness testimony. *Hernandez*, 4 So. 3d at 663-64. If a harmless-error test was used to review application of the Rule of Sequestration in a criminal case, with its heightened protections for the accused, OPC submits the harmless-error test is also applicable in the proceedings below, which is consistent with *Carter* and Section 120.68(7)(c), F.S. Finally, with both a Florida Statute and Florida precedent on point, this Court need not entertain FIPUG's request to follow the Georgia cases *Hall v. Hall*, 141 S.E. 2d 400 (Ga. 1965), and *Hall v. Hobbs*, 129 S.E. 2d 209 (Ga. App. 1962).

State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986), is frequently cited as the standard for the harmless-error test, which, at its core, is based on the due process right to a fair trial. Although *DiGuilio* is a criminal case, it sets forth the basic tenets of the harmless-error test that are cited in civil proceedings as well. Under the *DiGuilio* explanation of the harmless-error test, the beneficiary of the error must show "the error complained of did not contribute to the verdict." *Id.* at 1135. The record from the proceedings below proves, beyond any doubt, that the error FIPUG complains of did not, and in fact could not, contribute to the outcome of the Cedar Bay hearing.

The Cedar Bay hearing required pre-filed direct and rebuttal testimony by all witnesses. (R.V. 1, p. 59). All direct and rebuttal testimony was filed eleven days before the Cedar Bay hearing began (*Id*. at 66); thus, there was absolutely no possibility of a witness's testimony being colored by those appearing earlier, because at the time of hearing, all testimony was already filed. FIPUG did not request an order prohibiting witnesses from reading other parties' testimony in advance of the deadline for pre-filing testimony. Furthermore, as in the *Knight* case, with pre-filed testimony, one could easily check to see whether a witness deviated from his or her pre-filed testimony during cross-examination. A review of the transcript clearly shows none of the witnesses deviated from their pre-filed testimony during cross-examination. Therefore, there was no coloring of testimony, and the fairness of the

proceeding was unaffected.[5] Since no witness deviated from pre-filed testimony during cross-examination, there was no possibility the failure to sequester witnesses (FIPUG's claimed error) could have contributed to the outcome of the Cedar Bay hearing.

CONCLUSION

As set forth above, although the Commission erred in failing to properly apply the Rule of Sequestration found in Section 90.616, F.S., the error was harmless-error as the fairness of the proceedings below were not affected. Therefore, Citizens respectfully request this Court affirm the Cedar Bay Order.

Respectfully submitted,

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[5] Immediately after requesting sequestration and hearing the decision of the presiding officer that the Commission would take the request under advisement and would rule prior to hearing testimony, counsel for FIPUG nevertheless proceeded with opening argument, wherein he summarized evidence, including the essence of the testimony he sought to sequester. (Tr. V. 1, pp. 16-17, 21-29). To the extent FIPUG did not preserve its objection and effectively "spilled the beans," OPC suggests that such failure could be considered as a waiver of the sequestration request or at least further evidence of harmless error.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **CITIZENS' ANSWER BRIEF** has been furnished by electronic mail on this 11th day of April, 2016, to the following:

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I HEREBY CERTIFY, pursuant to Rule 9.100(l), Florida Rules of Appellate Procedure, that the CITIZENS' ANSWER BRIEF was prepared using Times New Roman 14-point font.

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