IN THE SUPREME COURT OF FLORIDA

FLORIDA INDUSTRIAL
POWER USERS GROUP,

Appellant,

Case No.: SC15-2146

Lower Tribunal No.: 150075-EI

v.
ART GRAHAM, ETC., ET AL.

Appellee(s).

BRIEF OF APPELLEE
FLORIDA POWER & LIGHT CO.

On Appeal from a Final Order of the
Florida Public Service Commission

Alvin Davis
Florida Bar No. 218073
Email: alvin.davis@squirepb.com
Jonathan Weiss
Florida Bar No. 057904
Email: jonathan.weiss@squirepb.com
Squire Patton Boggs, LLP
200 S Biscayne Blvd., Ste. 4700
Miami, FL 33131-2362
Telephone: (305) 577-2835
Counsel for FPL

John T. Butler
Maria J. Moncada
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
john.butler@fpl.com
maria.moncada@fpl.com
Counsel for FPL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ABBREVIATIONS AND PARTIES CITED IN BRIEF

The following abbreviations will be used in this brief:

The Record on Appeal is designated as "R. Vol. # at #." The transcript of the hearing below is designated "Tr. Vol. # at #."

Appellee Florida Power & Light Company will be referred to as "FPL" or "Appellee." Appellee the Florida Public Service Commission will be referred to as the "Commission" or the "PSC." Appellant, the Florida Industrial Power Users Group, will be referred to as "FIPUG" or "Appellant." The Office of Public Counsel will be called "OPC" or "Public Counsel."

The Cedar Bay Generating Facility, which is the subject of this proceeding, will be referred to as "Cedar Bay." The Power Purchase Agreement entered into between FPL and Cedar Bay Generating Company will be referred to as the "PPA." The Settlement Agreement entered into between FPL and OPC will be referred to as the "Settlement Agreement."

STATEMENT OF CASE AND FACTS

In the proceeding underlying this appeal, the PSC approved a settlement between FPL and Public Counsel that mitigates the impact of an unfavorable Cedar Bay power purchase obligation. Somewhat inexplicably, Appellant's Statement of the Case and Facts is devoted almost entirely to a critique of that transaction, which is not the subject of its appeal. Similarly, Appellant does not challenge in any way the settlement agreement from which it is nominally appealing. That is, Appellant does not purport to rebut the PSC's determination that the settlement agreement is "reasonable for all parties, creates customer savings, includes additional protections for customers, and avoids the long-term costs of the PPA." (R. Vol. 4 at 697). No mention is made of the PSC's conclusion that the settlement is "in the public interest." (*Id*.)

Instead, FIPUG seeks reversal on the basis of its untimely and logically insupportable effort, launched for the first time at the outset of the administrative hearing on FPL's Petition, to have the PSC sequester the witnesses being presented by the parties.

The relevant facts are limited and undisputed.

Following the filing of FPL's Petition, the PSC entered its customary Order Establishing Procedure ("OEP"). (R. Vol. 1 at 58-67). It required, among other

things, that FPL would prefile its direct testimony and exhibits on March 6, 2015.[1] This would be followed by the filing of the Intervenors' and the PSC Staff's direct testimony and exhibits three months later, on June 8, 2015. FPL was to file its rebuttal testimony and exhibits on June 17, 2015. FIPUG interposed no objection to the pre-filing requirements of the OEP, which were customary for proceedings of this type. All of the prefiled testimony was submitted to the PSC and served on the Intervenors, including FIPUG, in accordance with this schedule.[2] Thus, all of the parties to the proceeding, including FIPUG, had all of FPL's direct and rebuttal testimony forty-one days prior to the commencement of the hearing on FPL's Petition on July 28, 2015.

The PSC held its Prehearing Conference in this matter on July 6, 2015. In the Prehearing Order that followed on July 20, 2015, the Commission noted that the testimony of all witnesses had been prefiled. [3] (R. Vol. 4 at 484). It further noted that all testimony was subject to timely and appropriate objections. In its Order, the PSC informed the parties that it frequently administers the oath to more than one witness at a time. At the Prehearing Conference FIPUG interposed no objection to the prefiled testimony. Nor did it seek sequestration of the witnesses.

[1] In this instance, FPL prefiled its direct testimony with its Petition.
[2] Additionally, all of FPL's witnesses were deposed prior to the hearing.
[3] The order of witnesses was also established at this time.

At the commencement of the July 28, 2015 hearing on FPL's Petition, FIPUG, without meaningful explanation, requested that the same witnesses who had been deposed, who had prefiled their direct and rebuttal testimony and who had had access to the prefiled testimony of all other witnesses, be sequestered. (Tr. Vol. 1 at 16). The request was understandably denied.

The hearing proceeded. The FPL witnesses commenced their hearing testimony by reaffirming their prefiled testimony of months earlier. Counsel for FIPUG cross-examined each of the FPL witnesses, relying on their prefiled testimony, exhibits and, in some instances, their depositions. His examination of the FPL witnesses even included questions based on FIPUG's own prefiled testimony. (Tr. Vol. 2 at 201).

Notably for purposes of this appeal, at this hearing, with the agreement of the PSC staff and FIPUG, FPL presented both the direct and rebuttal testimony of its witnesses at the same time, prior to the testimony of the FIPUG witnesses. (Tr. Vol. 1 at 8-9). Accordingly, it would have been impossible for the FPL witnesses to have revised or altered or otherwise amended their rebuttal testimony in reliance on the hearing testimony of the FIPUG or OPC witnesses, all of whom followed the FPL witnesses. Intervenor witnesses had months to tailor their testimony to that of the FPL witnesses.

Sequestration was never raised again at the hearing.

Sequestration was never mentioned in FIPUG's post-hearing submission. That submission was devoted entirely to a challenge to the price FPL was paying in the transaction at issue and the manner in which that price was going to be recovered by FPL. In its post-hearing document FIPUG referenced the "mountain of evidence" presented, the documents and testimony of the FPL witnesses, the OPC witnesses and its own witnesses. Disagreements among the witnesses were addressed and argued extensively. FIPUG highlighted four independent sources in support of its positions. There was no suggestion whatsoever that any witness had altered, amended or otherwise revised that witness's testimony based on the hearing testimony of any other witness. FIPUG's post-hearing document never addressed any prejudice to FIPUG flowing from the sequestration ruling. It identified no harm to FIPUG as a consequence of that ruling.

FIPUG had one further opportunity to reiterate its challenge to the sequestration ruling. The PSC scheduled a separate agenda conference to rule on the motion to approve the settlement reached between FPL and the OPC. At that agenda conference, FIPUG chose once again to highlight the "mountain of evidence," available to FIPUG at the hearing. (R. Vol. 4 at 679). FIPUG's counsel essentially rebutted any notion of prejudice by thanking the PSC for providing FIPUG with the opportunity to develop the points it sought to present to the Commission. (R. Vol. 4 at 682). There was no mention of the sequestration

ruling or of any consequent harm endured by FIPUG. Its presentation was entirely to the contrary. The settlement was approved. This somewhat peculiar appeal followed.

SUMMARY OF THE ARGUMENT

Section 90.616, Florida Statutes had no application to these administrative proceedings. Neither the letter nor the spirit of the statute required the sequestration of the witnesses requested by FIPUG. The request was neither sensible nor meaningful in light of the PSC's long-standing procedure of requiring prefiled testimony in proceedings of this nature.

If the exercise of the Commission's discretion in denying the request could somehow be considered error, that error was harmless and does not require reversal of the PSC's ruling. All parties had the prefiled testimony of all other parties prior to the commencement of the hearing at issue here. FPL's rebuttal testimony was submitted prior to the submission of the testimony of the OPC and the testimony of FIPUG. No FPL witness testified after the submission of the testimony of these two parties. FIPUG has identified no instance of any witness altering his or her testimony following the cross-examination of any other witness. Nor has FIPUG even attempted to identify any prejudice it experienced as a result of the PSC's long-established procedure.

FIPUG waived its opportunity to seek sequestration or to object to the PSC's pre-filing requirements long before the hearing began. By the time it sought sequestration, all of the witnesses had had access to the testimony of all other witnesses. In order to be meaningful, effective and sensible, an effort to sequester

witnesses needed to be commenced as soon as the pre-filing requirement was specified. FIPUG, wholly familiar with the PSC's pre-filing procedures, failed to do so.

ARGUMENT

A. Standard of Review.

Commission orders come to this Court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just. *See Gulf Coast Elec. Coop., Inc. v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999). A party challenging an order of the Commission bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law. *Id*. The evidence presented to the Commission is not an issue in this appeal. FIPUG understandably expresses no disagreement with the findings and conclusions of the PSC. The record before the Commission – the "mountain of evidence" to which FIPUG repeatedly referred – contains more than ample, competent, substantial evidence to support its ruling. (R. Vol. 4 at 679). *See Bricker v. Deason*, 655 So. 2d 1110, 1112 (Fla. 1995).

Most significantly for purposes of this narrow appeal, FIPUG's Initial Brief makes no reference whatsoever to any impairment of its ability to address all of the evidentiary issues in the proceedings caused by the procedural sequestration ruling that is the sole basis for its appeal.

A procedural ruling is within the sound discretion of an administrative tribunal. *See Hall v. Career Serv. Comm'n*, 478 So. 2d 1111, 1113 (Fla. 1st DCA

1985). For a court to remand an agency's discretionary decision, an appellant must show that the exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;
2. Inconsistent with agency rule;
3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; *or*
4. Otherwise in violation of a constitutional or statutory provision.

§ 120.68(7)(e), Fla. Stat. (2015).

B. Application of the Evidence Code Was Not Required

At the outset of the hearing on FPL's Petition, citing to his experience at the Division of Administrative Hearings and in circuit court, but making no reference to any PSC precedent, Counsel for FIPUG purported to invoke the "Rule". That is, he sought to preclude the witnesses who were to testify from listening to the testimony of other witnesses. At this point, to be clear, all of the witnesses who were to testify had already prefiled their intended testimony, as required by the OEP. This request caused Commissioner Edgar, the presiding officer, to comment that:

> "…I've been doing this in this room for almost 11 years, and this is the first time that we have had this request made in a proceeding that I have participated in."

(Tr. Vol. 1 at 31).

Counsel for FPL then noted that FIPUG's counsel had had a similar sequestration request denied by the PSC in a proceeding over a decade earlier. That denial was essentially affirmed in a *Per Curiam* Affirmance by this Court.

Pressed by the Chairman, FIPUG's counsel conceded that he had raised this issue previously and that sequestration was "not typically the practice" before the PSC. (Tr. Vol. 1 at 34).[4] He did not agree or disagree with FPL's characterization of the earlier holding, in a PSC proceeding in which he was counsel of record, indicating that it "was a long time since." Significantly, when making this request,

[4] An understatement at best. FPL has identified at least eleven other PSC proceedings to which FIPUG was a party, in which the OEP required prefiled testimony in exactly the same manner as in the OEP in this case. *See In re: Request to opt-out of cost recovery for investor-owned electric utility energy efficiency programs by Wal-Mart Stores East, LP and Sam's East, Inc. and Florida Industrial Power Users Group*, Docket No. 140226-EI, Order No. PSC-15-0149-PCO-EI (2015); *In re: Petition for rate increase by Tampa Electric Company*, Docket No. 130040-EI, Order No. PSC-13-0203-PCO-EI (2013); *In re: Petition for increase in rates by Gulf Power Company, Docket No. 110138-EI*, Order No. PSC-11-0513-PCO-EI (2011); *In re: Review of the continuing need and costs associated with Tampa Electric Company's 5 Combustion Turbines and Big Bend Rail Facility*, Docket No. 090368-EI, Order No. PSC-10-0144-PCO-EI (2010); *In re: Review of the continuing need and costs associated with Tampa Electric Company's 5 Combustion Turbines and Big Bend Rail Facility*, Docket No. 090368-EI, Order No. PSC-10-0252-PCO-EI (2010); *In re: Review of Progress Energy Florida, Inc.'s benchmark for waterborne transportation transactions with Progress Fuels*, Docket No. 031057-EI, Order No. PSC-04-0375-PCO-EI (2004); *In re: Review of Progress Energy Florida, Inc.'s benchmark for waterborne transportation transactions with Progress Fuels*, Docket No. 031057-EI, Order No. PSC-04-0394-PCO-EI (2004); *In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 030001-EI, Order No. PSC-03-1137-PCO-EI (2003); *In re: Proposed revisions to Rule 25-22.082, F.A.C., Selection of Generating Capacity*, Docket No. 020398-EQ, Order No. PSC-02-1514-PCO-EQ (2002); *In re: Calculation of gains and appropriate regulatory treatment for non-separated wholesale energy sales by investor-owned electric utilities*, Docket No. 010283-EI, Order No. PSC-01-0517-PCO-EI (2001); *In re Petition of Tampa Electric Company to close Rate Schedules IS-3 and IST-3, and approve new Rate Schedules GSLM-2 and GSLM-3*, Docket No. 990037, Order No. PSC-00-0114-PCO-EI (2000).

FIPUG's counsel never asserted a right to or reason for sequestration, but "suggested" that the Rule be invoked to permit him to "shape the record a little bit." (Tr. Vol. 1 at 34).

Elevating its earlier "request" to a matter of right, FIPUG now asserts that the Evidence Code, particularly section 90.616, Florida Statutes (2015), must be strictly applied to a Commission proceeding. FIPUG is no more correct here than it was a decade ago: the Florida Evidence Code does not strictly apply in administrative cases. This is apparent from the language of the Administrative Procedure Act ("APA") and the Evidence Code. It is further confirmed in case law and has been broadly recognized by commentators. FIPUG's assertion clearly collides with long-standing PSC practice and, it must be said, with common sense, in light of the PSC's customary pre-filing requirements.

The APA explicitly adopts a more relaxed standard for introduction and use of evidence in administrative proceedings than is reflected in the Evidence Code:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, **whether or not such evidence would be admissible in a trial in the courts of Florida**. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

§120.569(2)(g), Fla. Stat. (2015) (emphasis added). Simply stated, agencies are not held to the requirements of the Evidence Code and may apply more relaxed standards.

Nothing in the Evidence Code is inconsistent with this reading of the APA. Although the Evidence Code does not explicitly establish its application to administrative proceedings, Section 90.103(1), Florida Statutes, (2015) addresses the scope of the Evidence Code:

> Unless otherwise provided by statute, this code applies to the same proceedings that the general law of evidence applied to before the effective date of this code.

The Florida Evidence Code, codified at Chapter 90, Florida Statutes, took effect for civil proceedings on October 1, 1981. *See* § 90.103, Fla. Stat. (2015). Examination of the general law of evidence prior to the Evidence Code's adoption shows that the law of evidence did not strictly apply to administrative cases. "Examiners in administrative hearings are not required to comply with strict rules of evidence and have wide discretion in the admission of . . . evidence by either party." *Odessky v. Six L's Packing Co.,* 213 So. 2d 732, 734 (Fla. 1st DCA 1968). "Generally, adjudicatory boards are not required to adhere to strict rules pertaining to the exclusion of evidence required in trials in a court of law." *Jones v. City of Hialeah,* 294 So. 2d 686, 687 (Fla. 3d DCA 1974), writ discharged, 313 So. 2d 689 (Fla. 1975); *see also Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) ("[W]e are

aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed.").

In fact, prior to the Evidence Code, the sequestration rule was expressly held not to apply in administrative hearings. In *Souls v. De Loach*, 182 So. 2d 304 (Fla. 1st DCA 1966), the First District Court of Appeal denied an appeal based on an alleged witness sequestration violation, stating that: "It is fundamental that the strict rules of evidence followed in formal court actions do not govern in proceedings before administrative bodies." *Id.* at 305.

C. Denial of Sequestration, If Error, Was Harmless Error.

The fundamental purpose of the rule of sequestration is "to avoid a witness coloring his or her testimony by hearing the testimony of another." *Knight v. State*, 746 So. 2d 423, 430 (Fla. 1998); *see also*, *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004); *Jones v. Div. of Admin.*, 351 So. 2d 365 (Fla. 4th DCA 1977). Sequestration is intended to discourage fabrication, inaccuracy and potential collusion. *See Knight*, 746 So. 2d at 430.

The fundamental flaw in the FIPUG appeal is the absence of even a suggestion that any fabrication or inaccuracy or collusion tainted the proceedings below. None is alleged. None occurred. As a practical matter, under the procedures in place, none could occur.

The issues in the FPL Petition were embedded with highly technical, highly complex valuation considerations and were dependent upon extensive expert analyses and evaluations. (R. Vol. 1 at 28-37). They also required sophisticated determinations regarding the manner in which the costs of the transaction were to be allocated within the regulatory framework. For these reasons, the customary PSC practice of requiring all parties to prefile their testimony and exhibits was of particular value.

FIPUG, OPC and the PSC staff had literally months to review, analyze and evaluate FPL's proposal and its supporting materials. That testimony was also available on the PSC's website. FIPUG obviously used that time to prepare its own witnesses and to develop the extensive cross-examination in which it engaged at the hearing. (Tr. Vol. 1 at 66-100; Tr. Vol. 1 at 131-164; Tr. Vol. 2 at 200-235; Tr. Vol. 2 at 264-275; Tr. Vol. 2 at 295-318; Tr. Vol. 2 at 376-386; Tr. Vol. 2 at 403-405; Tr. Vol. 3 at 539-665; Tr. Vol. 3 at 672-676; Tr. Vol. 4 at 725-803; Tr .Vol. 4 at 815-819).

Of particular practical significance here is the fact that at the hearing FPL presented both its direct and rebuttal testimony at the same time, before the direct testimony and exhibits of OPC or FIPUG were presented. Accordingly, its rebuttal testimony could not have been altered or fabricated based on what the intervenors'

witnesses presented at the hearing, since there was no opportunity for the FPL witnesses to do so. Their rebuttal was already in the record.

Perhaps even more to the point, for purposes of this narrow appeal, no FPL witness testified following the testimony of the intervenors' witnesses. FIPUG, in fact, called no live witnesses, but submitted its case based on the prefiled testimony it had submitted on June 8, 2015. Thus, as to FIPUG, sequestration of witnesses at the hearing would clearly have served no purpose. FIPUG relied on its testimony provided in June. No FPL witness testified after the FIPUG submission.

FIPUG filed its direct testimony on June 8, 2015, approximately six weeks before the hearing. FPL had that evidence more than a week before it filed its rebuttal testimony. The procedure established in the OEP was expressly intended to provide for informed rebuttal testimony to be prepared and submitted prior to the hearing. FPL's rebuttal testimony was predicated, as intended, on the prefiled testimony of the intervenors. Sequestration would have no role to play.

In light of these well-established, well-designed PSC procedures and the resulting chronology of evidentiary submissions, it is impossible to discern what legitimate benefit FIPUG expected to derive from its invocation of the Rule, after all the evidence, including its own, was in the record. The Initial Brief fails to address this quandary. More importantly, FIPUG has identified no prejudice it experienced as a consequence of the denial of its request. It has made no effort to

explain, let alone establish, how this ruling had an effect on the outcome of the proceeding.[5] It can hardly be suggested that the Rule was intended simply to allow FIPUG's counsel to "shape the record a little bit," which was the sole rationale provided by FIPUG at the hearing. (Tr. Vol. 1 at 34).

If the failure to exclude some of FPL's witnesses under these circumstances somehow constituted error, the error was demonstrably harmless.[6] Section 59.041, Florida Statutes (2015), provides:

> No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.

The enunciated purpose of the statute is to correct errors that had an impact on the outcome of the case. As recently clarified by this Court, the beneficiary of any

---

[5] FIPUG's counsel cross-examined each of the FPL witnesses at measurable length. He relied on numerous exhibits and on the testimony of OPC's expert. He was given broad latitude by the PSC in pursuing essentially every avenue of opposition available to FIPUG. *See* Record generally. FIPUG's Post-hearing Statement, refers to the "mountain of evidence" admitted at trial and then proceeds to conduct a detailed analysis and assessment of the "data, analysis and sworn testimony" made available at the hearing. That Statement belies any suggestion that FIPUG was hampered by the sequestration ruling and, not surprisingly, makes no assertion to that it had any impact on the outcome of the proceeding in any way.

[6] Even if Section 90.616 of the Florida Statutes applied, one or more of FPL's witnesses could have been permitted under the exceptions provided in the statute. *See e.g.* § 90.616(2)(c), Fla. Stat. (2015).

error must prove that "there is no reasonable possibility that the error contributed to the verdict." *Special v. W. Boca Med. Ctr.,* 160 So 3d. 1251, 1256 (Fla. 2014).

In its recitation of events above, FPL has carried its burden or demonstrating that there was no reasonable, logical or common sense possibility that the sequestration ruling did or could have somehow contributed to the approval of the Settlement Agreement.[7] That can't be shown on this record. *See Greyhound Corp. v. Carter*, 124 So. 2d 9 (Fla. 1960); *Peoples Bank of Indian River Cnty. v. State of Fla., Dept. of Banking & Fin.,* 395 So. 2d 521 (Fla. 1981).

As a direct result of the manner in which this underlying proceeding was structured and conducted, no FPL witness was ever in a position to alter or amend his or her rebuttal testimony, should the witness have been so inclined. Thus, no FPL witness ever did.

Thus, even if the denial of sequestration was an error -- which it was not -- it was entirely, inescapably harmless.

D. FIPUG's Request Was Untimely- FIPUG Had Already Waived Its Opportunity To Object.

FIPUG has participated in numerous proceedings before the PSC.[8] Those proceedings invariably involve the pre-filing of testimony and exhibits. The

[7] On the merits, as demonstrated in this record, that approval of a prudent, well-reasoned settlement agreement, joined by the OPC, could not remotely constitute a miscarriage of justice.

[8] *See* footnote 4.

schedule in the OEP for the pre-filing of all parties' testimony would obviously have come as no surprise to FIPUG. And the purpose of the schedule would have been clear: to allow all parties and the staff to be thoroughly prepared to address the issues in the FPL Petition in order to permit a full and fair resolution based on a complete, comprehensively examined record.

It would have been peculiar indeed or, in FIPUG counsel's words "not typical" for FIPUG to have objected to the submission of its testimony in accordance with the schedule, out of concern that FPL's witnesses might fashion their rebuttal based on FIPUG's prefiled direct testimony. That was, after all, the clear intention and purpose of the pre-filing requirement.

If FIPUG was concerned with this prospect of testimonial "adjustments," that is, the concern for which the Rule was fashioned, then FIPUG needed to raise that concern as soon as it became clear - in the OEP - that its direct testimony was required to be served on FPL before FPL was required to provide its rebuttal testimony. [9] FIPUG failed to raise any such objection. Rather, FIPUG furnished

[9] *See Coba v. Tricam Indus.*, 164 So. 3d 637, 650 (Fla. 2015) (recently reaffirming the Florida Supreme Court's requirement for timely objections explaining that such a policy "discourages gamesmanship by precluding objections that a party sat on, in an effort to obtain a calculated benefit by raising it later" and "enhances the efficiency of judicial proceedings, requiring the error to be raised immediately so that it can be rectified as soon as possible without increasing the likelihood that a new trial will be required. . .").

its direct testimony to FPL on June 8, 2015, as required by the OEP; without any objection to this testimonial sequence.

Accordingly, FIPUG waived any objection to the PSC's procedure and its attempt to invoke the Rule at the July 28, 2015 hearing was untimely. *See Frank v. Pioneer Metals, Inc.*, 121 So. 2d 685, 688 (Fla. 3d DCA 1960) ("we are constrained to point out that by the appellant's failure to timely object to that procedure which she now contends to be irregular, she will be deemed to have waived the objection by acquiescence."); *see also Boling v. Barnes*, 216 So. 2d 804, 805 (Fla. 2d DCA 1968) (affirming the decision of the trial court to allow testimony despite the defendant's objection and ruling that since the information being testified to "had been contained in the affidavit of the plaintiff in support of her motion for summary judgment, the objection under the Dead Man's Statute had been waived and that such a waiver continued throughout the proceedings.") FIPUG would have observed, before the July 28, 2015 hearing on the Petition, that FPL's rebuttal testimony did, in fact, address the direct testimony of both OPC and FIPUG.

Thus, this Court is faced with this thoroughly anomalous situation. Without explaining why it would be necessary or useful, FIPUG sought to exclude at the outset of the hearing, witnesses all of whose testimony had been previously filed. To the extent that there could be said to be prejudice flowing from FPL's witnesses

having access to FIPUG's witnesses testimony, that access occurred some six weeks before the hearing. Additionally, the access occurred as a result of long-established PSC procedures to which FIPUG had acquiesced. Finally, FIPUG offered no new testimony at the hearing and, in any event, FPL witnesses did not testify following the submission of FIPUG's case. As a consequence of these events, FIPUG is understandably unable to articulate in its Initial Brief any harm it suffered as a result of the denial of sequestration. Or any reason why the PSC Order should be overturned.

CONCLUSION

FIPUG has failed to demonstrate any error in the proceeding below. The Evidence Code did not apply. Any error in the PSC's conclusion that it did not, was demonstrably harmless. FIPUG failed to request sequestration in a timely manner. The Commission's Final Order should be affirmed.

CERTIFICATE OF SERVICE

I certify that on April 11, 2016 a copy of this brief was served by e-mail on the following:

Jon C. Moyle, Jr.
Karen Putnal
Moyle Law Firm
The Perkins House
118 North Gadsden Street Tallahassee, FL 32301 Telephone: (850) 681-3828
Facsimile: (850) 681-8788
Attorneys for the Florida Industrial Power Users Group

J.R. Kelly
Charles J. Rehwinkel John Truitt
Office of Public Counsel
111 West Madison Street, room 812
Tallahassee, FL 32301
kelly.jr@leg.state.fl.us
rehwinkel.charles@leg.state.fl.us
truitt.john@leg.state.fl.us
Counsel for OPC

Pamela H. Page
Mary Anne Helton
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399
phpage@psc.state.fl.us
mhelton@psc.state.fl.us
Counsel for PSC

Robert Scheffel Wright
John T. LaVia III
Gardner, Bist, Bowden, Bush, Dee,
LaVia & Wright PA
1300 Thomaswood Drive
Tallahassee, FL 32308
schef@gbwlegal.com
jlavia@gbwlegal.com

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that this Brief was prepared using Times New Roman 14 point type, a font that is proportionately spaced and in compliance with Florida Rule of Appellate Procedure 9.210.

/s/ Alvin B. Davis
ALVIN B. DAVIS