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).

REPLY BRIEF OF THE FLORIDA INDUSTRIAL POWER USERS GROUP

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PRELIMINARY STATEMENT

The following abbreviations and short forms are used in this brief:

APA	Chapter 120, Florida Statutes (2015) (Florida Administrative Procedure Act)
App.	Appendix
EVIDENCE CODE	Chapter 90, Florida Statutes (Florida Evidence Code)
FIPUG	Appellant Florida Industrial Power Users Group
FPL	Appellee Florida Power & Light Company
FPL Br. at #	Florida Power & Light Co. Answer Brief at Page #
OPC	Appellee Office of the Public Counsel
OPC Br. at #	Appellee Office of Public Counsel Answer Brief at Page #
PSC	Appellee Public Service Commission (Art Graham, Etc., et al.)
PSC Br. at #	Public Service Commission Answer Brief at Page #
Section 90.616 Fla. Stat.	the Rule
TR. at #	Official Transcript of Proceeding Below at Page #

ARGUMENT

I.

APPELLEES HAVE NOT DEMONSTRATED THAT THE COMMISSION'S ERROR IS HARMLESS

Appellees carry the burden to show "that the error complained of did not contribute to the verdict. Alternatively stated, the beneficiary of the 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). The Court explained that the "no reasonable possibility test" properly places the burden on the party who invited and benefits from the error. *See id.* at 1257–61 . Justice Lewis observed that, "[p]lacing the burden on the party that introduced the error serves not only to penalize the offending party, but also discourages future efforts to introduce error into proceedings." *Id.* at 1272 (Lewis, J., concurring in part, dissenting in part). Here, contrary to the PSC legal counsel's advice that the rule of sequestration should be applied, FPL invited error by wrongly telling the Commission that this Court had previously concluded that the Commission had discretion to not invoke the rule of sequestration.[1] This Court had not done that.

[1] FPL's counsel told the Commission at the recent Cedar Bay hearing that "the Court ended up concluding that the Commission was within its discretion not to invoke the rule, and the rules of evidence do not apply strictly in administrative proceedings such as this one, and that the Court had – I mean, I'm sorry, that the Commission had acted properly in – or within it range of discretion in not choosing to invoke the rule of sequestration for the witnesses in that proceeding. So I think

FPL's misstatement was also contrary to this Court's opinion in *Hernandez v. State*, 4 So. 3d 642, 662-63 (Fla. 2009) in which the Court recognized that section 90.616, Florida Statutes, addressing exclusion of witnesses provides sequestration is demandable as a matter of right. The penal effects of inviting error properly rest with Appellee FPL, not FIPUG.

FPL also argues that no instance of witness coloring occurred or that FIPUG's case was not harmed, a contention FIPUG disputes.[2] As recognized by the U.S. Supreme Court, sequestering witnesses serves two purposes: (1) it acts as a restraint on witnesses tailoring or coloring their testimony to align with earlier witnesses; and (2) it helps detect "testimony that is less than candid." *Geders v. United States*, 425 U.S. 80, 87 (1976).

Obviously, the ability to use sequestration to ferret out testimony "that is less than candid" is removed when a motion to invoke the Rule is denied. One can hardly demonstrate that certain answers were less candid or less forthright after the request to sequester witnesses was denied; all testifying witnesses remained in the hearing room, listening to the cross examination questions and testimony of fellow

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you have precedent and actual support from the state's highest court for using that discretion as I suggested earlier." App. p. 6.

[2] FPL apparently overlooked portions of FIPUG's cross examination testimony of FPL witnesses Barrett and Hartman in which both witnesses sidestepped with remarkably similar testimony, questions about the benefits FPL customers would realize by a reduction in the $520.5 million dollar purchase price, a position FIPUG supported. Tr. 86-88, 146

witnesses. Thus, FPL's misplaced suggestion that the party deprived of the right to sequester witnesses must show the consequences of the erroneous ruling requires FIPUG to prove a negative, an impossible burden. This is not and should not be the test. *See State v. Kahler*, 232 So. 2d 166, 174 (Fla. 1970) (noting the wisdom of not placing a nearly impossible burden upon a party to affirmatively prove the negative of the absence of a prescription).

Case law supports the presumption that harm is presumed when the rule of sequestration is not invoked. *See Fernandez v. Guardianship of Fernandez*, 36 So. 3d 175, 176 (Fla. 3d DCA 2010) (pursuant to statutory language in section 90.616 that, "[a]t the request of a party the court shall order," a party requesting sequestration of witnesses is entitled to application of the rule); *see also Hall v. Hobbs*, 129 S.E. 2d 209, 210 (Ga. App. 1962) ("Under this mandate, we think that the parties are entitled to the benefit of this rule at all stages of the proceedings in the trial of a case, regardless of the purpose of the testimony, and the error in depriving the plaintiff in this case of this substantial right rendered all subsequent proceedings nugatory, requiring the grant of a new trial."); and *Hall v. Hall*, 141 S.E. 2d 400, 402 (Ga. 1965) (The right to sequestration of witnesses is "a right conferred by statute, and its denial is presumptively injurious, unless the contrary appears.").

Even setting aside consideration of FPL's invited error, Appellee's efforts to

show no reasonable possibility exists that the failure to sequester witnesses contributed to the Commission's decision still come up short. Appellees point to "the record," to argue that the error was harmless so long as competent, substantial evidence supports the Commission's decision. PSC Br. # 18. That is not the harmless error test to be used. *See*, *Special*, *supra*. OPC provides a sweeping conclusory argument that the record below proves, "beyond any doubt", that the error did not affect the result of the proceeding. OPC Br. # 13. The Commission's failure to apply the rule of sequestration when invoked by FIPUG, however, automatically casts doubt upon the correctness of the record on which the PSC, FPL and OPC rely.

Appellants suggest that the prefiling of the direct and rebuttal testimony of FPL's witnesses immunizes Commission proceedings from the need to apply the rule of sequestration and thus the Commission's failure to adhere to the Evidence Code and sequester witnesses did not affect the Commission's final decision in this case. OPC Br. at # 13; PSC Br. at # 15-17; FPL Br. at # 15-16. As FIPUG pointed out in its Initial Brief, the harm accrued not with regard to prefiled testimony, but during FIPUG's live cross-examination of FPL's witnesses, the purpose of which was to show inconsistencies and weaknesses in the prefiled testimony. Both the fairness and correctness of the proceeding was impaired because the Commission refused to apply the rule of sequestration, and consequently, all the FPL witnesses

remained in the room and listened to the cross-examination of all other FPL witnesses and the answers given, which is precisely the harm that the mandatory rule of sequestration is designed to prevent.

At bottom, under *Special, supra*, the beneficiary of the error has the burden to demonstrate that the error did not affect the outcome of the proceeding. Neither FPL, nor the PSC, nor OPC have adequately demonstrated harmless error in accord with *Special, supra*. Further, because FPL wrongly invited the error in this case, it should not benefit from its actions, but be penalized.

II.

THE EVIDENCE CODE APPLIES TO ADMINISTRATIVE PROCEEDINGS UNLESS AN EXCEPTION APPLIES AND SHOULD HAVE BEEN FOLLOWED WHEN RULING ON FIPUG'S MOTION TO SEQUESTER WITNESSES

The PSC and FPL argue that the Florida Evidence Code does not apply to proceedings before the Commission and does not have to be followed. See, PSC Br. at #8-12; FPL Br. at #10-14. Notably disagreeing with the other Appellants, OPC concedes that the Florida Evidence Code applies to proceedings before the Commission. OPC also rightly notes that the plain language of section 90.616, Florida Statutes, mandates that a motion to invoke the Rule must be granted; whether to invoke the Rule is not a matter of discretion, but statutorily required. *See* OPC Br. at # p. 5-10.

FPL argues that, "[a]lthough 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.

See FPL Br. at # 13**.** FPL relies on cases handed down before the Legislature enacted the Evidence Code to point out that the rules of evidence were not strictly applied in administrative proceedings. However, FPL disregards the prefatory clause of section 90.103(1) Florida Statutes, namely, "Unless otherwise provided by statute….". One only needs to read section 90.103(2) Florida Statutes below to see that the Evidence Code applies to "civil actions and all other proceedings pending or brought after October 1, 1981":

> This act [Chapter 90, the Florida Evidence Code] shall apply to criminal proceedings related to crimes committed after the effective date of this code and to civil actions and all other proceedings pending on or brought after October 1, 1981.

Section 90.103(2), F.S. (emphasis added). The clear language of section 90.103(2), Florida Statutes, leads to the inescapable conclusion that the Evidence Code applies to administrative proceedings.

The language of section 90.103, Florida Statutes, is plain and needs no interpretation. Nevertheless, legislative history relating to section 90.103, Florida Statutes, is instructive and undergirds the plain language of section 90.103(2),

Florida Statutes. The 1976 Supplement to Florida Statutes 1975 adopted section 90.103(2) without the language that applied the act to "other proceedings." See App. p. 2. Subsequently, the Law Revision Council,[3] a legislatively created body charged with making recommendations to the Legislature about areas of law in which change was warranted, provided telling comments to the Legislature dated June 16, 1977. The Law Revision Council commented:

> § 90.103 does not cover administrative proceedings. One of the great defects of present Florida evidence law is that many administrative agencies have no applicable rules of evidence at all. Anything that is said and any documents that are produced are accepted as part of the record. Some administrative boards even permit a showing of the persons in the audience who are for or against a proposal as part of the record.

See App. p. 3. After the Law Revision Council's submission of these comments, the Legislature passed legislation which became Chapter Law 78-361, Laws of Florida (1978) and explicitly included language stating that the Evidence Code "shall apply…to other proceedings brought after the effective date of this code." This Court addressed the "other proceedings" language in a clarifying opinion

[3] Section 13.95 Fla. Stat. (1973) created the Law Revision Council. Its duties were to "(a) examine the common law, constitution and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms; (b) recommend, from time to time, such changes in law as it deems proper to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions; (c) conduct such surveys or research of the law as the Legislature may request."

dated November 8, 1979. The Court's clarifying opinion stated in pertinent part that:

> We read this provision [s.90.103(2) F.S.] to mean that the Evidence Code, including the procedural portion adopted by this Court, shall apply…to other proceedings brought after July 1, 1979.

See *In Re Florida Evidence Code,* 376 So. 2d 1161 (Fla. 1979).

FIPUG pointed out in its Initial Brief the import of section 90.103(2) Florida Statutes, directing that the Evidence Code apply to "other proceedings" such as administrative proceedings. FIPUG Initial Brief at 13-14. The Appellees did not refute FIPUG's argument that by its terms section 90.103(2) Florida Statutes applies the Florida Evidence Code to administrative proceedings (unless a statutory exemption exists). The argument of FPL and the PSC that section 90.103(1) acts to make the Evidence Code not applicable to administrative proceedings is undercut by the clear language of section 90.103(2), Florida Statutes, and the direction within section 90.103(1) that it yield to statutes which "otherwise provide."

Disregarding the import of section 90.103(2), the PSC and FPL cite to a string of cases for the proposition that the formal rules of evidence were not strictly applied in administrative proceedings. PSC Br. at # 9-11; FPL Br. # 13-14; All of the cases cited predate the Florida Legislature codifying the Evidence Code in Chapter 90, Florida Statutes, and importantly, the enactment of dispositive language within section 90.103(2) applying the Evidence Code to "other

proceedings." Instructively, the Commission has applied the rules of evidence in numerous proceedings, as pointed out by OPC.[4] OPC Br. at # 6-8. Additionally, OPC correctly noted this Court's acknowledgement that a predecessor to the Commission used the general rules of evidence as used in the State's circuit courts. OPC Br. at # 6, citing *Greyhound Corp. v. Carter*, 124 So. 2d 9, 16 (Fla. 1960). The plain language of section 90.103(2) applying the Evidence Code to civil, criminal and other proceedings; the legislative history of the "other proceedings" language; and the historical use by the Commission of the general rules of evidence and reliance upon the Evidence Code establishes that the Evidence Code applies to administrative proceedings.

Section 120.569(2)(g), F.S. does not exempt administrative hearings from the Evidence Code

The PSC and FPL suggest that section 120.569(2)(g), Florida Statutes exempts administrative hearings from the Evidence Code. ("However, FIPUG

[4] *In re: Application for increase by General Development Utilities, Inc.*, Order No. PSC-92-0326-PCO-WS, p. 2.; *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).; *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 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 re: Application for amendment of Certificate No. 106-W to add territory in Lake County by Florid Water Services Corporation,* Order No. PSC-01-1919-PCO-WU, 1 F.P.S.C. 9:317 (2001).

fails to consider § 120.569(2)(g), Florida Statutes, which expressly exempts administrative hearings from the Evidence Code.") PSC Br. at # 11. FPL, relying on 120.569(2)(g), posits generally "that agencies are not held to the requirements of the Evidence Code and may apply more relaxed standards." FPL Br. at # 13.

FPL and the PSC confuse the admission of evidence in an administrative proceeding with the applicability of the evidence code to administrative proceedings. The admission of evidence is an important component of the Evidence Code; however, the Evidence Code addresses more than the admission of evidence; for example, the Evidence Code sets forth presumptions which affect the burden of proof, lists privileges, provides for interpreters and translators and gives litigants the right to have witnesses sequestered. See, generally, Chapter 90, Florida Statutes. Section 120.569(2)(g), Florida Statutes, only applies to the admissibility of evidence in administrative proceedings, a component part of the Evidence Code. The statutory right to sequester witnesses is not the same question as whether a piece of evidence should be admitted into evidence.

Indeed, a close reading of section 120.569(2)(g), Florida Statutes, suggests that the only variance from the Evidence Code is that "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." FPL's and the Commission's contention that Section

120.569(2)(g), Florida Statutes, "expressly exempts" administrative proceedings from the Evidence Code is further undermined by language in that same sentence that the fully aligned appellants rely upon which states "irrelevant, immaterial or unduly repetitious evidence shall be excluded …." The Evidence Code has specific provisions that speak to relevancy and materiality. *See* sections 90.401 and 90.402, F.S. This suggests that the Evidence Code be used when tackling questions about relevancy or materiality in an administrative proceeding. Section 120.569(2)(g), Florida Statutes, has no language that expressly, or by implication, exempts administrative proceedings from the Evidence Code.

CPV Gulfcoast, Ltd. is not binding precedent.

The issue of witness sequestration, along with other issues, was raised in a previous appeal to this Court, as FIPUG noted in its Initial Brief. *CPV Gulfcoast, Ltd. v. Jaber,* 879 So. 2d 620 (Fla. 2004). However, the Court affirmed the Commission without publishing an opinion or explaining the basis for the decision. This is tantamount to a per curium affirmed opinion, something that FPL recognized in its Answer Brief when it characterized this Court's *CPV GulfCoast* decision as a "Per Curiam Affirmance". FPL Br. at # 10. A per curiam affirmance should not be relied upon as precedent. *See Dept. of Legal Affairs v. District Court of Appeal, Fifth Dist.,* 434 So.2d 310, 311-12 (Fla. 1983) (A per curium decision without a written opinion has no precedential value; "The rationale and basis for

the decision without opinion is always subject to speculation."). Consistent with *Dept. of Legal Affairs*, the *CPV Gulfcoast* decision contains no rationale or basis for the Court's affirmance. The matter should have no precedential authority. Further, the issue of whether the Evidence Code applies to administrative proceedings, a key issue raised in this appeal, was not before the Court in the *CPV Gulfcoast* matter. The *CPV Gulfcoast* case should have little to no sway in the Court's consideration of this appeal.

Prefiled Testimony is not an Exception to Section 90.616, Florida Statutes

The PSC, OPC and FPL suggest that because witnesses prefile written testimony in Commission proceedings, sometimes months before the evidentiary hearing, there is no need to invoke the rule of sequestration of witnesses; the Appellants suggest that the prefiling process somehow acts to exempt the Commission from adhering to section 90.616, Florida Statutes. PSC Br. at # 16; FPL Br. at # 15-17; OPC Br. at # 11. Any exemption from the applicability of the Evidence Code must be set forth in statute. See section 90.103(1) F.S.

Moreover, it is precisely because the direct and rebuttal testimony is pre-filed and typically admitted into evidence in summary fashion, that cross examination, a key strategic litigation tool for intervenors like FIPUG, consumes the overwhelming amount of time spent at the evidentiary hearing. "Cross-examination is the principal means by which the believability of a witness and

the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

FPL takes issue with the reasons FIPUG moved to invoke the rule. FPL Br. at # 16. While the reasons for invoking the Rule are apparent to most, a party is not required to detail its reasons for invoking the Rule as a precondition to invoking the Rule. Sequestering witnesses is a statutory right. *Hernandez v. State, supra*. Nevertheless, in addition to the reasons noted by the U.S. Supreme Court in *Geders, supra*, for invoking the Rule, trial strategy, lines of questioning, witness concessions, and witness explanations of certain matters are all readily apparent to subsequent testifying witnesses if those witnesses are permitted to remain in the hearing during the evidentiary proceeding. This disadvantages a party like FIPUG, who often relies heavily on cross examination. FIPUG was prejudiced as all testifying witnesses were able to observe FIPUGs' cross examination questioning and the answers of the other preceding witnesses. In sum, the prefiling of testimony does not justify disregarding the statutory right to sequester witnesses embodied in section 90.616, Florida Statutes.

III.

FIPUG Did Not Waive Its Right to Invoke the Rule

FPL argues that FIPUG waived its right to invoke the rule because it did not attempt to invoke the Rule during the prefiled testimony phase of the proceeding. FPL Br. at # 18-21. OPC suggests that FIPUG, after moving to invoke the Rule,

should have not proceeded with its opening statement, despite the presiding officer directing that opening statements proceed while staff considered its legal advice[5] in response to the motion to invoke the Rule. OPC Br. at # 14, footnote 5.

Waiver is the intentional relinquishment of a known right, or the voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right. *Fireman's Fund Ins. Co. v. Vogel,* 195 So. 2d 20, 24 (2d DCA 1967). "When a waiver is implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." *Id.* citing *Gilman v. Butzloff, 155 Fla. 888, 22 So. 2d 263 (1945); Masser v. London Operating Co., 106 Fla. 474, 145 So. 72 (1932).* A waiver does not arise from forbearance for a reasonable time. *See Vogel*.

Here, FIPUG timely moved to invoke the Rule before the witnesses were sworn. As instructed by the presiding officer, it provided its opening statement after moving to invoke the Rule while Commission legal staff researched the matter, a reasonable forbearance. Tr. p. 35.

FIPUG did not intentionally waive its right to sequester witnesses. The record facts as outlined above and contained in the record can hardly "make out a clear case" of waiver based on conduct. FIPUG did not waive its right to invoke

[5] Commission staff, relying on legal treatises authored by Professor Charles Ehrhardt and Judge Phil Padovono, recommended that the motion to invoke the Rule be granted. App. at p. 4.

the Rule of sequestration.

CONCLUSION

Because the error was invited and the Appellants have not met their burden to prove no reasonable possibility exists that the error contributed to the Commission's decision, the error is not harmless. The Florida Evidence Code applies to administrative proceedings before the Commission by the plain meaning of section 90.103(2), Florida Statutes, legislative history and the Commission's past practice. FIUPG did not waive its right to invoke the Rule and the Commission erred by denying FIPUG its section 90.616, Florida Statutes, statutory right to have testifying witnesses sequestered.

FIPUG respectfully requests that the Commission's Final Order be reversed and the case be remanded.

Respectfully submitted this 23rd day of May 2016.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief was typed in Times New Roman 14 font in compliance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail to the following on this 23rd day of May 2016:

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