

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Complaints by Southeastern Utility Services,  
Inc. on behalf of various customers, against )  
Florida Power & Light Company concerning )  
thermal demand meter error )

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Docket No. 030623-EI

Filed: August 23, 2004

**FLORIDA POWER AND LIGHT COMPANY'S  
MOTION TO STRIKE PORTIONS OF CUSTOMERS'  
REBUTTAL TESTIMONY AND EXHIBITS FILED BY  
GEORGE BROWN AND BILL GILMORE  
AND REQUEST FOR EXPEDITED RULING**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, hereby files this Motion to Strike Portions of the Rebuttal Testimony and Exhibits filed by George Brown and Bill Gilmore. FPL also requests an expedited ruling. In support of this Motion, FPL states the following:

**I. Background**

On June 9, 2004, the Prehearing Officer assigned to this docket issued Order No. PSC-0581-PCO-EI ("Order Establishing Procedure"), setting forth the dates governing the key activities of this case, including the filing of direct and rebuttal testimony. Pursuant to the Order Establishing Procedure, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. (the "Customers") and FPL filed their respective direct testimony and exhibits on July 12, 2004. Such filings were supposed to lay out the parties' respective cases-in-chief. Customers and FPL filed "rebuttal" testimony and exhibits on August 16, 2004. Such rebuttal was intended to give the parties an opportunity to respond to the prefiled direct.

Portions of Customers' rebuttal testimony go well beyond the scope of FPL's direct testimony and contain arguments and analysis that should have been part of Petitioners' case-in-chief. Customers are improperly and belatedly attempting to expand their own direct case by

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masquerading previously undisclosed analysis and exhibits as “rebuttal” testimony. This practice is extremely prejudicial to FPL and is an impermissible expansion of the role and purpose of rebuttal testimony. Customers’ withholding of statistical analyses fundamental to their claims until the submittal of rebuttal testimony is an abuse of the Commission’s hearing procedures and is in violation of the Prehearing Officer’s Order Establishing Procedure. FPL respectfully requests that the Prehearing Officer issue an order striking the improper rebuttal testimony and exhibits.

## **II. Purpose of Rebuttal Testimony**

The purpose of rebuttal evidence is to “explain, repel, counteract, or disprove the evidence of the adverse party.” United States v. Delk, 586 F.2d 513, 516 (5<sup>th</sup> Circ. 1978). It is an accepted principle in Florida that parties must be provided an opportunity to rebut the evidence presented by an opposing party. McFall v. Inverrary, 622 So.2d 41 (Fla. 4<sup>th</sup> DCA 1993)(holding that Plaintiff should be permitted to present expert rebuttal testimony on an issue first raised in defendant’s case in chief). It is well settled that rebuttal testimony should not be cumulative and must be limited in its response to the issues that were brought out by the opposing party’s direct case:

*Generally speaking, rebuttal testimony which is offered by the plaintiff is directed to new matter brought out by evidence of the defendant and does not consist of testimony which should have properly been submitted by the plaintiff in his case-in-chief. It is not the purpose of rebuttal testimony to add additional facts to those submitted by the plaintiff in his case-in-chief unless such facts are required by the new matter developed by the defendant. (Emphasis added)*

Driscoll v. Morris, 114 So2d 314, 351 (3<sup>rd</sup> DCA 1959).

As a general rule, a plaintiff’s rebuttal evidence may not exceed the scope of defendant’s case. Lockwood v. Babtist Regional Health Services, Inc., 541 So.2d 731 (Fla. 1<sup>st</sup> DCA 1989).

Contrary to the well recognized parameters for rebuttal, there are numerous portions of Customers’

rebuttal testimony and exhibits which do not respond to any specific assertions set forth by FPL in its direct testimony, but instead raise new analyses and arguments that are intended to bolster Customers' claims and should have submitted as part of their case-in-chief.

### **III. Customers' Rebuttal Testimony and Exhibits Exceed the Scope Allowed for Rebuttal Testimony**

Rebuttal testimony has been submitted by Customers from two witnesses: George Brown and Bill Gilmore. Mr. Gilmore did not submit direct testimony. His eight page rebuttal testimony and extensive exhibits contain what purport to be a statistical analysis of purported changes in demand registration that occurred following replacement of the meters in this docket. It is significant to note that none of FPL's prefiled direct testimony included any analysis of changes in demand registration. Customers' prefiled direct included general reference to changes in demand following meter changes. (See Brown Direct, p. 11, lines 22-23; Smith Direct p. 12, lines 15-24). Thus, Mr. Gilmore's "rebuttal" testimony does not respond to any analysis submitted by FPL but instead interjects a completely new analysis to support Customers' claim. It is inappropriate to submit such substantive evidence for the first time as "rebuttal" testimony. By submitting this completely new analysis as part of "rebuttal" testimony, Customers have precluded FPL from developing any testimony to respond to the multiple assumptions and extrapolations contained in the analysis. If Petitioners believed that a detailed statistical analysis of the changes in demand registration was relevant, they were obligated to include such an analysis in their direct testimony. See, Driscoll, supra.

On page 2, lines 4-5 of his "rebuttal" testimony, Mr. Gilmore claims that his testimony is intended to rebut the testimony of FPL witness Dave Bromley and FPSC Staff witness, Sid Matlock.

However, neither Mr. Bromley nor Mr. Matlock included any analysis of changes in demand registration in their prefiled direct testimony.

Rather than responding to any specific analysis included in either Mr. Bromley's or Mr. Matlock's prefiled direct, Mr. Gilmore's testimony seeks to meet Customers' obligation under Rule 25-6.103(1), Florida Administrative Code, to establish the cause of the meter error and the fixed date of such cause in order to obtain a refund beyond the twelve months provided in the rule. In other words, this analysis is clearly part of Customers' case-in-chief. The attempt to interject this brand new analysis into the proceeding as "rebuttal" testimony can only be characterized as sandbagging. As discussed below, the Commission has previously recognized that such efforts will not be countenanced.

Mr. Brown's "rebuttal" testimony also attempts to interject an analysis similar to Mr. Gilmore's to support the contention that refunds should be awarded for longer than the twelve month period provided in the Rule. See, Brown Rebuttal, p. 13, lines 8-12, Rebuttal Exhibit GB-7. As with Mr. Gilmore's "rebuttal," Mr. Brown's newly disclosed analysis and exhibits, could have and should have been included in Customers' direct testimony.

Customers' assertion that Mr. Gilmore and Mr. Brown are rebutting the testimony of Mr. Bromley and Mr. Matlock regarding a twelve month refund period is specious. Customers have the burden of proof in this proceeding and, if they believe a refund period longer than the twelve month provided in the rule is appropriate, it is incumbent upon them to provide direct evidence establishing the fixed date upon which the cause of the alleged meter error occurred. Consequently, if Customers contend that the statistical analysis supports their claim, they were obligated to include that testimony as part of their prefiled direct. Withholding testimony regarding an extensive statistical

analysis until submission of “rebuttal” circumvents the goal of the Order Establishing Procedure which intended to ensure both that all issues are fully framed and addressed, and that each party had the opportunity to respond to the contentions in the other party’s case-in-chief. .

In addition, Mr. Brown’s “rebuttal” testimony includes extensive discussion regarding what he contends to be the appropriate testing methodology for meters. See, Brown Rebuttal, p. 1, line 1 through page 3, line 20. Mr. Brown attempts to characterize this analysis as “rebuttal” by referring to the testimony of Mr. Bromley that the meters were tested in compliance with the FPSC Rules. See, Brown Rebuttal, p. 1, lines 1-3. However, neither Mr. Bromley nor Mr. Matlock provided any analysis of the implications or justifications for testing at full scale or any percentage thereof. More specifically, Mr. Brown’s contentions in his rebuttal testimony regarding the manufacturer’s testing recommendations and the ANSI standards do not respond to anything that Mr. Bromley or Mr. Matlock stated in their direct. Mr. Brown addressed the testing issue generally in his prefiled direct testimony. See, Brown Direct Testimony, page 8, lines 11-14. However, his rebuttal testimony includes significant new information that, if Petitioners truly considered important, should have been included as part of the direct testimony. Once again, Customers are attempting to belatedly supplement their claims with analyses and arguments that have not previously been set forth in this docket and to which FPL will not have an opportunity to directly address in its testimony. It is an improper use of rebuttal testimony and circumvents the goals and intent of the Order Establishing Procedure.

#### **IV. Commission Precedent Supports Striking Improper Rebuttal**

The Prehearing Officer before whom a case is pending may issue any order necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of

all aspects of the case. Rule 28-106.211, Florida Administrative Code. It is pursuant to Rule 28-106.211, Florida Administrative Code, that the Order Establishing Procedure is issued in this proceeding.

The relief requested by FPL through this motion, specifically, that the portions of Customers' rebuttal testimony and exhibits that exceed the scope of FPL's case-in-chief be stricken, is supported by Commission precedent. In Order No. PSC-00-1779-PCO-SU, issued September 29, 2000, in Docket No. 991643-SU - In re: Application for increase in wastewater rates in Seven Springs in Pasco County by Aloha Utilities, Inc., the Prehearing Officer agreed with the utility that portions of the Office of Public Counsel's ("OPC") testimony did not constitute proper rebuttal testimony and granted the utility's motion strike those portions of the purported rebuttal testimony. In granting the utility's motion to strike, the Prehearing Officer stated:

Upon consideration, I find that Mr. Bidy's proffered rebuttal testimony is direct testimony that OPC could have or should have filed in its direct testimony. The used and useful calculation and the issue of infiltration and inflow have been identified as issues in this proceeding and should have been addressed in OPC's direct testimony. Therefore, Aloha's Motion to Strike "Rebuttal" Testimony is hereby granted.

Order, at page 2.

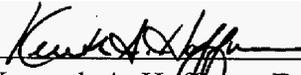
Similarly, in Order PSC-00-0087-PCO-WS, issued January 10, 2000, in Docket No. 960545-WS - In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County, the Commission granted a motion filed by the Intervenors to strike testimony filed by the utility that had been styled as rebuttal testimony, but did not rebut any of the parties' testimony, was not cumulative to any other testimony, and was therefore, not proper rebuttal testimony and exhibits.

**V. Request for Expedited Ruling**

According to the Order Establishing Procedure, the Prehearing Officer retains authority to adjust any time frames regarding motions for good cause shown. Rule 28-106.204(1), Florida Administrative Code, allows a party seven days to respond to a motion. The hearing in this matter is scheduled to take place on September 23, 2004. The disposition of this Motion will have great implications on FPL and on its preparation for the hearing. For that reason, FPL respectfully requests that the Prehearing Officer issue his ruling on this Motion on an expedited basis.

WHEREFORE, for the above-stated reasons, FPL respectfully requests that the Prehearing Officer issue an Order striking Mr. Gilmore's rebuttal testimony and exhibits in their entirety and page 1, line 1, through page 3, line 20; page 13, lines 8-12, and Ex. GB-7 of Mr. Brown's Rebuttal Testimony.

Respectfully submitted,

  
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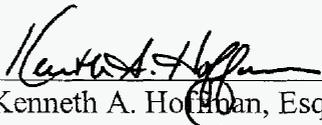
Attorneys for Florida Power & Light Company

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of Florida Power and Light Company's Motion to Strike Portions of Petitioners' Rebuttal Testimony and Exhibits and Request for Expedited Ruling was furnished by hand delivery this 23rd day of August, 2004, to the following:

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