BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities Services, Inc., on behalf of various customers against Florida Power and Light Company concerning thermal demand meter error.	Docket no.: 030623 Filed: August 30, 2004

CUSTOMERS' RESPONSE TO FPL'S MOTION TO STRIKE PORTIONS OF CUSTOMERS' REBUTTAL TESTIMONY AND EXHIBITS FILED BY GEORGE BROWN AND BILL GILMORE

Ocean Properties, Target, JC Penney, and Dillards ("Customers") hereby file their response to FPL's Motion to Strike Portions of Customers' Rebuttal Testimony and Exhibits Filed by George Brown and Bill Gilmore ("Motion to Strike") and state:

Background

1. In its Motion to Strike, FPL accuses Customers of "sandbagging," and refers to the rebuttal testimony of Bill Gilmore and George Brown as "improper," "inappropriate," and "specious." In reality, Customers' rebuttal testimony is wholly appropriate and proper and FPL is simply trying to avoid the consequences of its litigation strategy by seeking to preclude powerful evidence that is damaging to FPL's case.

Legal Standard

2. FPL quotes United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978) for the proposition that the purpose of rebuttal testimony is to "explain, repel, counteract, or disprove the evidence of the adverse party." Notably, however, FPL fails to include the remainder of the quoted passage which states: "and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution 'accepting the challenge and attempting to rebut the

proposition asserted.'" Id., (quoting, Luttrell v. United States, 320 F.2d 462, 464 (5th Cir. 1963).

3. As stated in Gerber v. Iyengar, M.D., 725 So. 2d 1181, 1186 (Fla. 3d DCA 1998), "[t]he law is clear that a trial court abuses its discretion when it forbids the presentation of rebuttal evidence that negates the theory of the defense." While the trial court has discretion to admit or exclude rebuttal testimony, this general rule does not "stand[ ] for the proposition that the plaintiff must disprove all anticipated defenses in its main case - that is exactly what rebuttal is supposed to accomplish." McFall v. Inverrary Country Club, Inc., 622 So. 2d 41, 44 (4th DCA 1993) (quoting Heberling v. Fleischer, 563 So. 2d 1086, 1087 (Fla. 4th DCA 1990)).

Analysis

4. FPL contends that the rebuttal testimony of Bill Gilmore and George Brown should be stricken because it exceeds the scope allowed for rebuttal testimony. With regard to Mr. Gilmore's testimony, the basis for this contention is laid out by FPL in the following statement: "It is significant to note that none of FPL's prefiled direct testimony included any analysis of changes in demand registration." (Motion to Strike, Page 3). This statement is simply wrong.[1]

5. In his direct testimony, Mr. Bromley testifies as follows (page 20, lines 11 - 21):

Q: How did FPL determine that a one year refund period was appropriate for these meters?

A: FPL reviewed each account's historical demand readings, comparing the month to month readings as well as the year to year readings. As a result of this review, FPL was not able to distinguish, for any of these accounts, a point in time, when an over-registration error might have occurred. A significant factor in this determination is that other factors such as weather, seasonal trends, and the customer's equipment tend to have a greater impact on demand than the 4-5% error determined by the meter test. Additionally,

1 This statement is also internally inconsistent with other statements in FPL's Motion to Strike. On page 4, of its Motion to Strike, FPL attacks Mr. Gilmore's testimony for not "responding to any specific analysis included in Mr. Bromley's of Mr. Matlock's prefiled direct." Customers assert that Mr. Gilmore's rebuttal testimony does just that.

> there was no information brought to us by any customers or their representatives in this docket that demonstrated to us when a meter error might have occurred.

6. Mr. Bromley testifies that FPL conducted a "review" of "historical demand readings," and a "month to month" and "year to year" comparison of these demand readings. From this review and comparison, FPL was not able to determine a "point in time" when over-registration error "might have occurred." Nonetheless, FPL now argues that Mr. Bromley's testimony has not "included any analysis of changes in demand registration." Evidently, in FPL's view, the process of reviewing and comparing available data, and then drawing a conclusion from this review and comparison, does not constitute an "analysis." FPL invites the Commission to enter into the land of "it depends on what the definition of 'is' is;" an invitation which the Commission should refuse.

7. FPL has chosen, through the self-serving testimony of Mr. Bromley, to present the mere skeleton of its analysis in support of its position that Customers are entitled to only 12 month refunds. FPL has identified no objective standard by which it conducted its review and comparison, and supports its conclusion with vague allusions to "factors" which "tend" to impact demand. FPL has opened the door to an objective analysis that specifically compensates for factors which impact demand. The rebuttal testimony of Bill Gilmore provides just such an analysis.

8. FPL wants to have it both ways. First, it supports its position on the appropriate refund length by presenting a vague and superficial analysis; next, it seeks to preclude Customers from presenting rebuttal testimony addressing the short comings of such an analysis by claiming that it never testified about any such analysis.

9. FPL, through the direct testimony of Mr. Bromley, has espoused a "theory of the defense;" namely, that Customers are not entitled to refunds longer than 12 months because it is not

possible to determine a point in time when an over-registration error might have occurred by reviewing historical demand readings, and that other factors also impact demand. FPL chose to include this defense in Mr. Bromley's testimony. FPL chose to present this defense in a vague and perfunctory manner. FPL chose not to support this defense with a detailed analysis. FPL has (apparently) determined that it is not in its interest to present the specifics of this defense. These are all choices FPL is entitled to make. However, these choices "have opened the door to the line of testimony" and Customers have "accepted the challenge to rebut the proposition asserted." Delk, 586 F.2d at 516.

10. Customers are not required to anticipate this defense in their direct testimony. McFall, 622 So. 2d at 44; Mendez v. John Caddell Construction Co., Inc., 700 So. 2d 439, 441 (Fla. 3d DCA 1997) (direct testimony not required to anticipate and disprove the defendant's potential theory of the case); Zanoletti v. Norle Properties, Corp., 688 So. 2d 952, 954 (Fla. 3d DCA 1997) ("plaintiff has no obligation to anticipate the defendant's theory of the case and present evidence during the case in chief to disprove that theory"). Moreover, it is an abuse of discretion for the Commission to preclude rebuttal testimony that is directed to this "theory of defense," and that "goes to the heart" of this defense. Gerber, 725 So. 2d at 1186; Mendez, 700 So. 2d at 441; Zanoletti, 688 So. 2d at 954.

11. Therefore, FPL has stated no basis for the Commission to strike the rebuttal testimony of Bill Gilmore or page 13, lines 8 - 12, of George Brown's rebuttal testimony.

12. FPL also seeks to strike page 1, line 1 through page 3, line 20 of Mr. Brown's rebuttal testimony. This testimony rebuts the following Bromley direct testimony (page 13, lines 6 - 11):

Q: Have the 1V meter demand tests performed by FPL been conducted in compliance with FPSC Rules?

A: Yes. FPL's testing was performed consistent with Rule 25-6.052 as well as FPL's approved meter test procedures. This includes the requirement that testing of the demand be performed at any point between 25% - 100% of full scale. See my Document No. DB-3.

13. Mr. Brown's testimony simply rebuts the misstatements contained in Mr. Bromley's testimony and provides support for his position. This is all proper rebuttal and there is no basis for the Commission to strike this testimony.

WHEREFORE, Customers respectfully request the Commission deny FPL's Motion to Strike.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 30th day of August, 2004.

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