

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for recovery of intrastate costs)
and expenses relating to repair, restoration) Docket No. 060300-TP
and replacement of facilities damaged by Hurricane)
Dennis by GTC, Inc. d/b/a GT Com) Date: May 30, 2006
_____)

GT COM'S MOTION FOR LEAVE TO FILE REBUTTAL TESTIMONY

GTC, Inc. d/b/a GT Com ("GT Com"), pursuant to Rule 28-106.204, Florida Administrative Code, and §120.57(1)(b), Florida Statutes, hereby files this Motion for Leave to File Rebuttal Testimony, and in support of its Motion, states as follows:

1. GT Com filed its Petition in this docket on March 31, 2006. As the Petitioner herein, GT Com bears the burden of proof in this proceeding. *Florida Dept. of Transp. v. J. W. C. Co., Inc.*, 396 So.2d 778, 788 (Fla. 1st DCA 1981); *Environmental Trust v. State, Department of Environmental Protection*, 714 So.2d 493, 498 (Fla. 1st DCA 1998). Further, as a matter of law GT Com is entitled to respond to arguments raised by Staff and Public Counsel and present rebuttal thereto pursuant to §120.57(1)(b), Florida Statutes.

2. The Office of Public Counsel ("OPC") filed its Notice of Intervention on April 4, 2006. On April 27, 2006, the Prehearing Officer issued the *Order Establishing Procedure*, Order No. PSC-06-0362-PCO-TL. The procedural schedule in this docket was flawed from the standpoint that it was not set up, consistent with Commission practice and the requirements of law, to allow the petitioning party, the sole opportunity to file rebuttal testimony. *Compare, e.g.*, Order No. PSC-06-0069-PCO-EI issued January 25, 2006 in Docket No. 060038-EI (*Petition for Issuance of a storm recovery financing order by Florida Power & Light Company*). Instead, the procedural schedule was set up in a manner akin to a generic docket whereby all parties were

given the same date for filing direct testimony (May 4, 2006) and the same later date for filing rebuttal testimony (May 26, 2006). *Order Establishing Procedure*, at 8. Counsel for GT Com discussed this procedural issue with Staff Counsel who advised that in the event Staff or an intervenor filed direct testimony, Staff would support GT Com's request to file testimony rebutting the testimony of the Staff and/or intervenor(s).

3. GT Com filed the direct testimony and exhibits of R. Mark Ellmer on May 9, 2006.¹ Thereafter, on May 25, 2006, Staff filed the Direct Testimony of Michael E. Buckley and OPC filed the Direct Testimony of Hugh Larkin, Jr.

4. GT Com met its initial burden of going forward with evidence by filing the Direct Testimony of R. Mark Ellmer. Staff and OPC exercised their right to file direct testimony addressing GT Com's Petition and the prefiled direct testimony of Mr. Ellmer.

5. In a decision cited by this Commission, the Fifth Circuit Court of Appeals explained the purpose of rebuttal testimony:

[I]t is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" 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 presumption asserted."

United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978), quoting *Luttrell v. United States*, 320 F.2d 462, 464 (5th Cir. 1963), cited by the Commission in Order No. PSC-04-0928-PCO-EI issued September 22, 2004. The right of rebuttal in administrative proceedings has been codified by the Florida Legislature in Section 120.57(1)(b), Florida Statutes.²

¹ GT Com sought and was granted a five day extension of time for the filing of its Prefiled Direct Testimony and Exhibits. Order No. PSC-06-0402-PCO-TL issued May 12, 2006.

² The Third District Court of Appeal has held that a trial court abuses its discretion when it limits non-cumulative rebuttal that goes to the heart of the principle defense. *See, Mendez v. John Caddell Const. Co., Inc.*, 700 So.2d 439, 440-441 (Fla. 3rd DCA 1997). In light of the *Mendez* decision, denying GT Com the opportunity to file rebuttal testimony would appear to be reversible error.

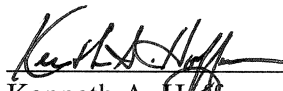
6. In this case, GT Com, as the petitioning party bearing the burden of proof, is entitled as a matter of law to file or otherwise submit rebuttal testimony explaining, counteracting, disproving and otherwise responding to the assertions offered by Staff witness Buckley and OPC witness Larkin in their respective direct testimonies. Accordingly, GT Com seeks leave to file rebuttal testimony on or before June 9, 2006.

7. GT Com is authorized to represent that Staff Counsel supports this Motion and has agreed that permitting GT Com to file rebuttal testimony as requested herein will not delay the prehearing conference or final hearing in this docket.

8. This motion is submitted in good faith and not for delay or any other undue purpose.

WHEREFORE, GT Com respectfully requests that the Commission grant this Motion and permit GT Com to file rebuttal testimony as set forth herein.

Respectfully submitted this 30th day of May, 2006.



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ATTORNEYS FOR GTC, INC.
d/b/a GT COM

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. and electronic mail this 30th day of May, 2006, to the following:

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