

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery
clause with generating performance incentive
factor.

DOCKET NO.: 20220001-EI

FILED: October 3, 2022

**CITIZENS' RESPONSES TO FLORIDA POWER AND LIGHT'S MOTION TO STRIKE
AND MOTION FOR EXTENSION OF TIME TO FILE REBUTTAL**

1. In its motion, the Company asks the Commission to suppress valid expert witness analysis and opinion regarding the cost consequences to customers which result from unplanned outages and derates at its nuclear power plants. This goes to the heart of the purpose of the fuel docket, which is to determine the reasonable and prudent costs of fuel used in electric generation. It is evident the Company seeks to deprive the Commission of the ability to weigh all the facts and expert witness testimony on material and relevant factual issues, i.e., fuel costs imprudently incurred by the Company that is charged directly to customers in their electric bills.
2. FPL had the opportunity to present a petition and **two** sets of pre-filed testimony (direct and rebuttal) based on the evidence of its choosing, where it is the party in possession of most of the evidence. It is wrong for the Company to have objected to discovery requests,¹ produced the evidence it deemed relevant, then to claim intervenors' sole opportunity to present pre-filed testimony (which is based largely on FPL's selected evidence) must be struck for an alleged lack of sufficient evidence.
3. The motion demonstrates the Company's reluctance to shoulder its burden of proof in a full and fair hearing. FPL essentially claims the Citizens' expert witness did not "prove" a link between the Company's NRC violations and fines to the specific outages and replacement power costs at issue in the expert's pre-filed testimony. One has to wonder what evidence FPL is trying to shield from the Commission, its staff and the customers. The Company's misguided allegation is an unfortunate attempt to undermine both the administrative hearing structure and due process. Neither the Citizens nor their expert bear

¹ The Company seeks to strike documentation and references in the testimony to the Company's objections to discovery.

the burden of proof in this case; therefore Citizens are not obligated to prove anything, much less *before* the hearing even commences. The Company had the chance to file rebuttal testimony and still has the opportunity to question expert Polich at the hearing.

4. If FPL is granted additional time to file rebuttal, Citizens request an extension of the discovery deadline and the opportunity to file surrebuttal. Notably, FPL's efforts to expand the process that is only scheduled for a three day hearing would tend to turn it into the very type of proceeding that lends itself to a spin-off.

I. The Primary Jurisdiction doctrine does not apply to the instant facts. Even if the doctrine were applicable, it would not require or even allow striking Citizens' testimony or exhibits in this proceeding

The Company spent the bulk of the instant motion misconstruing and misapplying the doctrine of primary jurisdiction. The majority of the case law relied upon by the Company is inapplicable to the facts of the instant case, and if anything, actually supports OPC's position that striking expert Polich's testimony would be error.

The Company built its argument around cases which simply demonstrate the doctrine may apply to instances where there is a chance of overlapping jurisdiction between the **judicial** and executive branches of government. *E.g., Flo-Sun, Inc. v. Kirk*, at 1041 (stating where plaintiff sought injunction in circuit court over environmental matters regulated by state agency, the court could *postpone* its consideration pending an agency decision); *S. Lake Worth Inlet Dist. v. Town of Ocean Ridge*, 633 So. 2d 79, 88 (Fla. 4th DCA 1994)(describing primary jurisdiction as a “. . . policy of **judicial** restraint”). The doctrine is not applicable in the instant case because no party has proposed litigation in the judicial branch.

Moreover, the courts pointedly noted that simply because the doctrine may apply “**does not necessarily mean that it must be applied.**” *Flo-Sun*, at 1039-1040 (also citing the general rule that the burden is on “the party seeking to bypass usual administrative channels to demonstrate that no adequate remedy remains available under chapter 120”). *Flo-Sun* also referenced *Hill Top Developers v. Holiday Pines Service Corp.* at 370, which stated the doctrine was “designed and intended to achieve a proper relationship **between the courts and administrative agencies**” but does not defeat the court's jurisdiction over a case. In fact, the court in *Ocean Ridge* remanded

with instructions **to require the parties to litigate in a chapter 120 proceeding, which is exactly what OPC’s expert witness advocated here** – the Commission should exercise its jurisdiction over the issue which Florida law gives it sole authority to regulate – public utility rates and charges to customers. *Ocean Ridge*, at 91.

Most importantly, not a single “primary jurisdiction” case relied upon by the Company involved a question of striking expert witness testimony for simply expressing an opinion on methods by which the Commission may fulfill its regulatory duty.² No authority in the Company’s misplaced primary jurisdiction argument supports the exclusion or striking of expert testimony. Expert Polich’s opinion testimony is appropriate and admissible for Commissioners to consider and to give the weight they determine to be just. The Commission has the power to insure that neither the case nor its regulatory reach encroaches upon the jurisdiction of the NRC in any event.

The testimony FPL seeks to strike does not seek or recommend judicial relief for a matter within an agency’s purview, so the Company is wrong, as a matter of law, to represent to the Commission that primary jurisdiction should keep the Commission from performing its statutorily-mandated duties. Pursuant to Florida law, rate setting and regulation of costs charged by utilities to customers are squarely the responsibility of the Public Service Commission. Sections 366.04, 366.05, Fla. Stat. In addition to recommending disallowance of at least \$2.6 million in fuel costs, expert witness Polich simply stated that a subset of the numerous cost issues covered in the fuel docket merit closer evaluation by the Commission, due to facts and circumstances readily apparent from the documentary evidence the Company itself produced in discovery. The evidence shows there are operational cost and maintenance issues that warrant the Commission’s additional attention, because they appear to affect the fuel costs charged to customers.

Expert Polich never suggested the Commission should run a parallel investigation of the exact same issues the federal Nuclear Regulatory Commission (“NRC”) oversees, so there is no chance

² The sole Commission order cited in support of deference is inapposite. The order merely denied a petition for reconsideration on multiple grounds; the order **did not strike any testimony**, nor did it state the Commission lacked jurisdiction to address the issues raised. In fact, similar to Citizens’ request for a spinoff docket, the Commission determined to consider the engineering issues in a new docket. *In re: Application of Lannie Rowe Development Corp.*, Order No. 9770, issued Jan. 28, 1981. Moreover, there is no evidence in this case that the NRC is currently involved in reviewing the impact of budget or headcount cuts on the customers’ state electric rates and bills.

for the “inconsistent results” from multiple agencies, as alleged by FPL. The argument is a red herring. Contrary to the Company’s inaccurate claim, expert Polich’s recommendation is to determine whether and to what extent FPL’s cuts to headcounts and operational costs (which appear to have had a negative impact on maintenance and operations) resulted in outages and replacement power costs, thus causing negative impacts on customer fuel charges. The expert’s recommendation is simply for the Commission to fully examine the issue in more detail to determine whether the costs the Company attempts to charge to its utility customers are in fact prudent.

It appears FPL seeks to avoid accountability to Florida’s state utility regulator and to its customers by claiming the NRC has sole or primary jurisdiction over the matters discussed in expert Polich’s testimony; however, FPL is wrong because the NRC has no jurisdiction over state utility rates, charges, or costs passed through from utilities to state ratepayers’ bills. Furthermore, the NRC does not review nuclear plant operations to determine that a utility is operating in the best fiscal interest of ratepayers, but instead the NRC’s charge is to make sure nuclear plants are operated safely. The OPC can stipulate to the Commission that any proceeding in this docket or a spin-off docket must assume that FPL must in all actions adhere to the safety requirements imposed by federal law, including NRC regulations. No effort is being made to test or challenge the FPL’s obligation to comply with these standards. The Commission is, however, entitled to investigate and determine if FPL is acting imprudently in its staffing or management decisions that – while undertaken in a manner that does not violate minimal safety standards, is unreasonably and imprudently increasing fuel costs. It is important to note that FPL has not demonstrated that the NRC, beyond its primary jurisdiction to insure public safety, has any authority or expressed any intent to require FPL to operate in a prudent or lowest cost manner that protects customers from excessive rates. Rather than avoiding a jurisdictional overlap, what FPL is actually advocating is that the Commission should create a regulatory *void* by *abdicating its plenary rate-setting authority in favor of a phantom jurisdictional element of the NRC’s authority.*

FPL failed to cite a single case where a state agency was required to totally forego fulfillment of its core regulatory function because a federal agency held regulatory authority over a tangential issue. In any event, the pleadings suggest FPL is not even prepared to accept the NRC’s evaluation

of its own subject matter, since the Company cites to expert Polich's reference to an NRC report's finding as alleged support for striking his testimony. Mot. at 13.

FPL's maneuvering is an example of a circular "passing the buck" or a finger-pointing designed to deter scrutiny of the consequences of its practices, i.e., higher rates for customers. At its essence, the Company's ploy is simply the proverbial, cynically-constructed "runaround." FPL knows that the NRC cannot ensure that the recovery of replacement power from retail customers is limited to prudent management actions and decisions. This sort of gamesmanship does nothing to serve the hard working ratepaying public, many of whom sacrifice other needs and obligations to make paying their electric bill a top priority in their households, sometimes even above medicine and other necessities.

II. Documented outages, violations, and staffing data from 2017 to 2021 provide context for FPL's claims its actions were prudent, thus costs recoverable from customers

OPC sought discovery about all the unplanned outage events for the month of August 2020. Where there are unplanned outages FPL did not include in its cost recovery request, OPC did not indicate the Commission should investigate the outages for cost recovery, but instead that OPC should reasonably be able to compare circumstances under which the Company determined its decisions and actions related to unplanned outages were imprudent to those where it claims its decisions and actions related to the unplanned outages were prudent. The Commission is entitled to know what steps the Company took to determine the prudence of management decisions and actions and to understand whether the company was acting prudently in avoiding or minimizing such actions as they affect customer rates, including fuel charges. This information is reasonably calculated to lead to the discovery of admissible evidence and is sought for that very reason. *See Fla. R. Civ. P. 1.280(b)(1).*

FPL selectively cited to portions of sentences within Mr. Polich's testimony to make it appear he took positions which he did not. For example, in order to make it appear that Mr. Polich's sole focus is on nuclear operations allegedly regulated by the NRC, FPL invites the Commission to ignore the fact that the thrust of Mr. Polich's testimony is in fact focused on "ratepayer borne fuel cost impacts" which result from imprudent decisions in nuclear operations. FPL does not contend, nor could it, that the NRC regulates the fuel costs paid by FPL's ratepayers, or that FPL's

customers have any recourse whatsoever at the NRC when it comes to the substantial costs FPL passes through to customers' ever increasing electric bills. NRC does not make prudence determinations regarding the costs charged on electric utility customers' bills. For proper context and completeness, all of expert Polich's testimony and exhibits should stand unstricken and available for evaluation by the Commission. *Cf.*, *PG&E v. U.S.*, 73 Fed. Cl. 333, 372 (2006), 2006 U.S. Claims LEXIS 302 (explaining that portions of a statement or writing must be admitted if necessary to provide context or ensure a fair understanding of the admitted portion). To the extent the Commission questions the sufficiency of facts underlying the expert's opinion, the legally compliant practice is to allow that to factor into the weight given the testimony rather than striking portions of expert testimony, which would result in unfairness and reversible error. *See In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-2014-0666-PCO-EI, 2014 Fla. PUC LEXIS 650, at *7-8; *Fla. DOT v. Armadillo Partners, Inc.*, 849 So. 2d 279, 287-288 (Fla. 2003)(an alleged fact deficiency relates to weight rather than admissibility of the expert opinion).

II. Expert Polich's Testimony is Based on Data and Evidence drawn from NRC Reports and from FPL's Own Reports

Expert witness Polich's testimony is properly based on, and corroborated by, the very data, evidence and documents the Company itself produced in discovery. The data contained within the reports is more than sufficient proof to support expert opinion testimony; therefore, the Company's allegation about conjecture is misinformed and inaccurate. Additionally, expert Polich's analysis of the evidence the Company produced is based on his 40 plus years of experience in power plant engineering, operations and maintenance, including nuclear power plants. His expert opinion and recommendation regarding the benefit of a spinoff document is based squarely on the data and findings documented in reports by the NRC, including Notices of Violation and Inspection Reports. The Company spent a large portion of its motion extolling the virtues and importance of the NRC, so there should be no dispute that the NRC evidence Citizens relied on is both relevant and the type commonly relied upon by reasonably prudent persons, thus consistent with the broad expert admissibility standard provided in Florida's Administrative Procedure Act, ("APA") Section 120.569(2)(g), Fla. Stat. *See also In re: Fuel and purchased power cost recovery clause*, 2014 Fla. PUC LEXIS 650, at *7 (explaining the APA's admissibility provision is much broader

than the Florida Evidence Code and allows the consideration of all relevant, non-cumulative evidence of the type commonly relied on by reasonably prudent persons); *Miller v. State*, 796 So. 2d 644, 646 (Fla. 1st DCA 2001). Nonetheless, in a demonstration of the internal inconsistency of its own positions, FPL also seeks to strike the actual NRC reports and fact finding which it alleges has primacy over certain facts in this case, claiming somehow that this evidence constitutes conjecture.

- Where NRC reports document the assessment of fines against the Company, said reports contain evidence of operations deficiencies and imprudence, which the Commission is entitled and obligated to consider and which directly impacts customer rates.
- Documentation of plant employee's intentionally entering false information in plant records is evidence of imprudence which may be reasonably determined by the Commission to lead to unplanned outages and increased customer charges for replacement fuel costs.
- Senior Company employees or officers reassigning contractors for raising safety issues which in turn affect plant efficiency, thus operations costs, which is evidence the Commission is entitled and obligated to consider and is evidence of imprudence.

FPL also seeks to strike its own objections to discovery and to strike expert Polich's performance data chart, which contains information prepared and submitted by FPL in support of costs incurred and to be incurred by customers in this docket. All of the years of the data chart are necessary for context for the years 2020 and 2021, thus fairness requires they should not be stricken from the testimony and exhibits, in order for the Commission to have a complete picture from which to evaluate cost recovery. The evidence from the prior years provides relevant information bearing on the later performance of FPL's nuclear operations as it impacts fuel costs borne by customers.

Moreover, the Commission has every right and obligation to determine within its own broad jurisdiction³ to inquire, investigate and determine if FPL management has prudently operated the

³ See, Section 366.01, Florida Statutes which provides that "The regulation of public utilities as defined herein is declared to be in the public interest and this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose."

nuclear segment and and conducted training to the high standards required to minimize fuel costs. The public – through the Florida Legislature -- expects the Commission to use its broad powers to determine whether the company has implemented and adhered to standards reflecting prudent, cost-effective plant operations. Given the *prima facie* evidence of budget cuts and workforce reductions, it is reasonable to inquire about the level of the remaining employees' experience and resultant training sufficiency or shortfalls. These aspects fall within the scope of the agency's authority and should be evaluated by the Commission in relation to the head count issues raised by expert Polich. It is a fair inquiry to determine whether staff reductions may be exacerbated by a substandard level of training, experience, and proficiency of those who remain. A reasonable inference can be drawn from the force reductions, rash of reactor scrams, and the fact that FPL does not want to explain to the Commission its reasons for foregoing retail rate recovery for the August 2020 replacement power costs.

In its motion, the Company appears to be dismissive of expert Polich's testimony regarding the concept of a company's culture as a factor in performance, thus prudence. However, FPL's own documents most assuredly would be required to devote significant time evaluating the operational culture and its impact on costs related to extended outage time in light of the events discussed in the OPC testimony. Evidence regarding the relation of the outages to the Company's corporate practices, operations (for which the Commission authorizes adequate funding through retail rates), and its culture, as documented in both federal regulatory and internal Company documents is absolutely relevant to fuel replacement charges, thus central to fuel clause litigation.

FPL has the burden of proof. Striking expert Polich's testimony and exhibits regarding the impact of the Company's NRC violations and performance issues on customers' fuel charges would be prejudicial, if not reversible, error. *Fla. DOT v. Armadillo Partners, Inc.*, 849 So. 2d 279, 287-288 (Fla. 2003)(sufficiency of facts underlying opinion should be decided by expert and any alleged deficiency relates to weight rather than admissibility of the expert opinion).

Due process requires ratepayers' expert witness testimony to stand in its entirety. Expert testimony is presumably admissible and experts are permitted wide latitude to offer opinions. *Sabal Trail Transmission, LLC v. 13.386 Acres of Land in Lake Cty. Fla.*, 2018 U.S. Dist. LEXIS 233676, *21-22, 2018 WL 8583439 (M.D. Fla. 2018). It would be an abuse of discretion to

effectively strip ratepayers of expert testimony regarding the fuel charges added to their bills. *See Florida Power Corp. v. Wenzel*, 113 So. 2d 747, 751 (Fla. 2d DCA 1959)(holding it was prejudicial error to exclude a party's expert testimony to the effect the only evidence left on an issue was that of one party).

Citizens do not have to prove the absolute accuracy of their expert's opinion or whether it is more persuasive before the hearing commences, if at all. *See Milward v. Acuity Specialty Products Group*, 639 F.3d 11, 15 (1st Cir. 2011), *cited by, Aaron Peelar, Sr., Employee/Claimant, v. Pierce Manufacture/Travelers Insurance, Employer/Carrier/Servicing Agent*, 2018 Fla. Wrk. Comp. LEXIS 779, *24-25; June 22, 2018, OJCC Case No. 15-019348DBB. That is for the trier of fact to determine after hearing the evidence. FPL has the burden of proof in this case. Nonetheless, the Company's motion seeks place its thumb on the scale and to suppress valid expert opinion testimony to preclude the ratepaying public from having its complete expert testimony evaluated by the full Commission; the action is tantamount to striking the ratepaying public's pleadings. Due process requires a more balanced playing field than the one proposed by the utility.

III. Expert Polich's opinion that a spinoff docket would assist the Commission in carrying out its duties in the public interest is consistent with the purpose of expert witness testimony generally and consistent with applicable Commission Rules.

The scope of expert Polich's experience and expertise encompasses the areas of nuclear power plant engineering, operations and maintenance. He also has significant regulatory policy and methods experience that qualifies as expertise. The fact that he observed evidence in discovery that warranted more in-depth review and investigation is directly tied to his expertise and not an expression of a legal opinion. *See e.g., In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-2014-0666-PCO-EI, issued Nov. 19, 2014 (denying motion to strike witness testimony). Mr. Polich's expertise is sufficiently documented to support his competence to provide an expert opinion about the most efficient and appropriate methods of regulatory oversight for nuclear plant operations factors which affect costs to customers. Moreover, Mr. Polich referenced the abundant documentation in regulatory reports and Company documents which support his opinion.

The Company's claim that a request to establish a spin-off docket is "typically" reserved for counsel through a formal written motion has failed to establish the subject must always be raised in that manner or that a certain type of motion is required to simply discuss the prospect of a spinoff. Commission precedent contains different options for separating issues into different dockets or different hearing schedules within the same docket. *See In re: Investigation of Gulf Power Co.*, Order No. 21459, issued June 28, 1989 (suggesting a petition as a method to spin-off issues). Even if a motion were required, there is time for OPC to file one, and **more importantly for purposes of the instant motion, the lack of a motion provides no basis to strike expert opinion testimony**, but rather may simply result in the lack of a new docket. The Company's arguments against a spin-off docket or investigation are both premature and unfounded. The witness voiced a valid opinion and recommendation; he did not request relief; therefore, there has been no cognizable violation of any Commission rule. The Commission has a long history of recognizing and allowing witnesses to express their opinions on regulatory policy issues, even against allegations the testimony veered into interpretation of legal precedent. *E.g., In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Order No. PSC-2014-0666-PCO-EI; *In re: Evaluation of storm restoration costs for Florida Power & Light Company related to Hurricane Irma*, Order No. PSC-2019-0205-PHO-EI, 2019 Fla. PUC LEXIS 194, *18-19; *In re: Petition on behalf of Citizens of the State of Florida to require Progress Energy Florida, Inc. to refund customers \$143 million*, Order No. PSC-2007-0816-FOF-EI, issued Oct. 10, 2007, at 15-16 (allowing expert testimony on the potential results of a given set of facts). Expert Polich did not engage in *any* legal interpretation or practice, but rather analyzed well-documented facts in relation to his knowledge of nuclear plant operations and costs to render an expert opinion on potential costs factors to result where certain facts are documented. Therefore, there is no legitimate reason to strike any of his testimony, and denying the Company's instant motion is fully consistent with Commission precedent.

As to the expert witness' reservation of right to respond to documents received from the Company subsequent to his testimony, that is the only fair and appropriate method for dealing with information received after testimony has been filed. The discovery deadline had not passed on the date intervenor testimony was due, and the deadline is still pending.

Where it is the witness' opinion that more data and investigation are necessary to fully evaluate the prudence of the Company's actions in relation to replacement power costs and charges to customers, the witness has properly informed the Commission of his view of the evidence. Contrary to the Company's tenuous claim that expert Polich's opinion is somehow improper legal opinion, Mr. Polich has simply done exactly what experts are generally retained to do in any litigation: analyze the evidence within his subject matter expertise and provide an opinion on what the evidence demonstrates. In grasping at straws in its attempt to suppress expert Polich's testimony, the Company has unfortunately lost sight of the exact purpose of the fuel docket and allowable breadth of expert opinion, miscast the role of expert testimony, and invited the Commission to make a decision contrary to both precedent and constitutional due process requirements.

WHEREFORE, the Citizens respectfully request the Commission deny FPL's Motion to Strike Portions of Testimony of OPC's witness Richard Polich.

Respectfully Submitted,

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