

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Generic investigation
into the aggregate electric
utility reserve margins planned
for Peninsular Florida.

DOCKET NO. 981890-EU
ORDER NO. PSC-99-1884-PCO-EU
ISSUED: September 22, 1999

ORDER GRANTING EXTENSION OF TIME
TO FILE REBUTTAL TESTIMONY

I. CASE BACKGROUND

On June 30, 1999, a status conference and preliminary prehearing conference was held pursuant to Order No. PSC-99-1229-PCO-EU, issued June 22, 1999. During the conference, several of the parties raised issues challenging the nature of this docket as an investigation being conducted as a formal evidentiary hearing. By Order No. PSC-99-1274-PCO-EU, issued July 1, 1999, the Prehearing Officer¹ ordered that the docket proceed as a formal evidentiary proceeding. That Order defined the scope of the proceeding; established the issues in the docket; and revised the filing dates for testimony so that utility and intervenor testimony would be filed on August 16, 1999, staff testimony on August 31, 1999, and rebuttal testimony on September 13, 1999.

On July 9, 1999, Florida Power Corporation ("FPC") filed a motion for reconsideration of Order No. PSC-99-1274-PCO-EU and a request for oral argument. On July 12, 1999, Florida Power & Light Company ("FPL") filed a motion for reconsideration of the Order and a request for oral argument. Both FPC and FPL requested reconsideration on those portions of the Order concerning the Commission's authority to conduct this investigation as a formal evidentiary proceeding and defining the scope of the proceeding. On July 20, 1999, Duke Energy New Smyrna Beach Power Company Ltd., L.L.P. and Duke Energy North America, L.L.C. (Duke) filed a consolidated response to the motions for reconsideration. At the Commission's July 27, 1999, agenda conference, FPC and FPL's

¹Commissioner Julia L. Johnson was assigned as the Prehearing Officer for this docket at the time Order No. PSC-99-1274-PCO-EU was issued. Chairman Joe Garcia has since replaced Commissioner Johnson as Prehearing Officer for this docket.

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requests for oral argument were granted and oral argument was heard. After oral argument, the Commission denied both FPC and FPL's motions for reconsideration. The Commission's decision is memorialized in Order No. PSC-99-1716-PCO-EU, issued September 2, 1999.

Pursuant to the filing schedule set forth in Order No. PSC-99-1274-PCO-EI, Commission staff members Tom Ballinger and Robert L. Trapp filed testimony in this docket on August 31, 1999. On September 3, 1999, FPL filed a motion for extension of time to file rebuttal testimony. On September 9, 1999, FPC filed a notice of joinder in FPL's motion, and Tampa Electric Company ("TECO") filed a separate motion for extension of time to file rebuttal testimony. On September 13, 1999, the Florida Reliability Coordinating Council, Inc. (FRCC) filed a motion for extension of time, joining in the motions of FPL and TECO. Through these motions, FPL, FPC, TECO, and FRCC (collectively, "Movants") request that the filing deadline for rebuttal testimony be moved from September 13, 1999, to October 4, 1999, a three-week difference.

II. MOTIONS FOR EXTENSION OF TIME

Pursuant to Rule 28-106.204(5), Florida Administrative Code, a motion for extension of time shall state good cause for the requested relief. As discussed below, the Movants have not shown good cause why they should be granted a three-week extension to file rebuttal testimony in this proceeding.

First, FPL states that it has been prejudiced in this proceeding by the Commission's decision to conduct this investigation as a proceeding to determine substantial interests under Section 120.57, Florida Statutes, and that FPL is attempting to protect whatever interests it may have determined as a result of this proceeding. Through their respective pleadings, FPC and FRCC join in this statement. As stated above, FPL and FPC's arguments concerning the nature of this proceeding have been argued before a prehearing officer and before the full Commission. In each case, the Commission denied these arguments and found that the Commission has authority to conduct an investigation as a formal evidentiary proceeding.

Second, FPL asserts that it "is now prejudiced by being confronted with adversarial Staff testimony filed on a schedule that gives a special status to Staff." FPL suggests that the Commission's legal staff, by drafting a procedural order with the

testimony filing schedule set forth above, undermined an agreement among the parties to establish a common filing date for all testimony. FPL suggests that the Commission's legal staff created this filing schedule to secure some special benefit for staff by allowing staff 15 days to review utility and intervenor testimony prior to filing its own testimony. Further, FPL complains that while parties wishing to rebut testimony filed by FPL and other parties have 28 days to prepare their testimony, parties desiring to rebut staff testimony are given only 13 days. Through their respective pleadings, FPC and FRCC join in these statements. Further, FRCC claims that it, as a collective agency, must engage in extended communications among its members and staff to reach a consensus about any rebuttal testimony filed on FRCC's behalf. Thus, FRCC asserts, the time established for review prior to filing rebuttal testimony concerning staff's testimony is insufficient. TECO, in its motion, echoes FPL's complaint that parties desiring to rebut staff testimony are given only 13 days.

FPL's suggestion of improprieties on the part of the Commission's legal staff are entirely misguided. The Commission's standard practice for years has been to establish testimony filing schedules that provide an opportunity for staff to review parties' prefiled direct testimony to determine if it should also file testimony. This practice is consistent with the role of staff as defined in the Commission's Statement of Agency Organization & Operations (1999), subsection entitled "Parties," page 11:

The Commission staff may participate as a party in any proceeding. Their primary duty is to represent the public interest and see that all relevant facts and issues are clearly brought before the Commission for its consideration.

* * *

When advocating a position, Commission staff may testify and offer exhibits, and such evidence shall be subject to cross-examination to the same extent as evidence offered by any other party.²

²Until May 3, 1999, these provisions existed in substantially the same form in Rule 25-22.026, Florida Administrative Code.

If staff believes that all of the relevant facts and issues have not been clearly brought before the Commission through the prefiled testimony of the parties, staff may choose to file testimony to help provide a more complete record for the Commission's consideration. This practice has been used without objection in virtually every formal evidentiary proceeding involving the Movants. Further, it is entirely consistent with past Commission practice that rebuttal testimony is scheduled to be filed two weeks after staff testimony.

More importantly, the testimony filing dates at issue were approved by the Prehearing Officer in this docket and set forth in a procedural order subject to challenge by any party. In fact, FPL and FPC filed motions for reconsideration of that order, Order No. PSC-99-1274-PCO-EU, as discussed above. Neither FPL nor FPC challenged the testimony filing dates set forth in the order. Neither TECO nor FRCC requested reconsideration of the order.

Third, FPL claims that because staff's testimony is "deceptively brief," is "conclusory," and does not disclose all supporting data, FPL should be given time to conduct discovery concerning staff's data sources and analyses prior to filing rebuttal testimony. FPL also claims that it should be permitted additional time prior to filing rebuttal testimony to review past Commission orders for inconsistency with staff's prefiled testimony. Through their respective pleadings, FPC and FRCC join in these statements. TECO, in its motion, echoes FPL's claim that additional time is necessary for discovery concerning staff's data sources and analyses prior to filing rebuttal testimony.

These requests are without precedent and do not establish good cause for an extension. The hearing in this docket is scheduled to begin over seven weeks from the time rebuttal testimony is due and over nine weeks from the time staff testimony was filed. The Movants have more than sufficient time to conduct discovery concerning staff's testimony in preparation for hearing. Further, there is no requirement that any party be provided time to conduct discovery concerning the direct testimony of any party or staff prior to filing rebuttal testimony, nor has the Commission made it a practice. Likewise, the Movants have more than sufficient time to research relevant Commission orders in preparation for hearing.

Finally, FPL asserts that staff has included in its testimony matters that are beyond the scope of this proceeding. Thus, FPL claims, it needs additional time to determine whether to seek a

Commission ruling on the appropriateness of this testimony. Through their respective pleadings, FPC and FRCC join in these statements.

This request is without precedent and does not establish good cause for an extension. At any time prior to staff's testimony being inserted into the record at hearing, FPL, FPC, or FRCC may move to strike any portion of staff's testimony that it believes to be outside the scope of this docket. Such a motion is unrelated to the timing of filing rebuttal testimony.

III. CONCLUSION

Although the Movants have not shown good cause for an extension of time to file rebuttal testimony in this proceeding, I find that granting a limited extension will move this proceeding along more efficiently and will not prejudice the parties. No party has expressed an objection to the requested extension, provided that a reasonable time is permitted for discovery related to rebuttal testimony.

Rule 28-106.211, Florida Administrative Code, provides that a presiding officer in a formal evidentiary proceeding "may issue any order necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Pursuant to this authority, I find that all parties shall be permitted to file rebuttal testimony concerning staff's prefiled testimony no later than September 27, 1999. Rebuttal testimony concerning the prefiled direct testimony of any utility or intervenor shall be filed by September 13, 1999, as stated in Order No. PSC-99-1274-PCO-EU. This filing schedule should allow reasonable time for discovery related to all rebuttal testimony. Requests for expedited discovery related to rebuttal testimony concerning staff's prefiled testimony may be considered on a case-by-case basis.

Based on the foregoing, it is


ORDERED by Chairman Joe Garcia, as Prehearing Officer, that all parties shall be permitted to file rebuttal testimony concerning staff's prefiled testimony no later than September 27, 1999. It is further

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ORDERED that all rebuttal testimony concerning the prefiled direct testimony of any utility or intervenor shall be filed by September 13, 1999, as stated in Order No. PSC-99-1274-PCO-EU. It is further

ORDERED that requests for expedited discovery related to rebuttal testimony concerning staff's prefiled testimony may be considered on a case-by-case basis.

By ORDER of Chairman Joe Garcia, as Prehearing Officer, this 22nd day of September, 1999.



JOE GARCIA
Chairman and Prehearing Officer

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.