

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Gulf Power Company.

DOCKET NO. 110138-EI  
ORDER NO. PSC-11-0563-PCO-EI  
ISSUED: December 8, 2011

ORDER DENYING JOINT MOTION TO STRIKE PORTIONS OF THE REBUTTAL TESTIMONY OF GULF POWER COMPANY WITNESS RHONDA J. ALEXANDER

Joint Motion to Strike

On November 18, 2011, the Florida Industrial Power Users Group (FIPUG), the Office of Public Counsel (OPC), the Federal Executive Agencies (FEA) and the Florida Retail Federation (FRF) (collectively, Intervenors), filed a Motion to Strike portions of Gulf Power Company's rebuttal testimony of Rhonda J. Alexander. The crux of Intervenors' argument is that the rebuttal testimony does not rebut any evidence in the testimony of Intervenors' witnesses, that it constitutes prohibited supplemental evidence, is untimely as it should have been introduced by Gulf in its direct testimony and, if the testimony is allowed, Intervenors' due process rights will be violated.

Specifically, Intervenors argue that witness Alexander's testimony refers to studies which were available at the time Gulf filed its direct testimony. Intervenors characterize the challenged testimony as supplemental rather than rebuttal. Intervenors contend that the testimony of their witness, Helmut Schultz, did not introduce new facts or evidence, but was an observation as to Gulf's lack of evidence of a study, evaluation, or process supporting Gulf's assertion that a nuclear unit is a viable and necessary option. As the Alexander testimony is not rebuttal, Intervenors contend, it is untimely filed in violation of the Order Establishing Procedure (OEP) issued in this case.

Intervenors further argue that the introduction of portions of witness Alexander's rebuttal testimony violates their rights to due process by denying Intervenors an opportunity to test or respond to the new evidence. Intervenors state that neither a deposition nor cross examination at trial will suffice to "cure the procedural harm caused by her [Alexander's] untimely supplemental direct testimony."

Gulf's Response

Gulf's response reviews each of the portions of the Alexander testimony that Intervenors seek to strike. Gulf contends that the Alexander testimony is specifically proffered in response to witness Schultz' statements and that the testimony of the prudence and cost-effectiveness of the purchase of the Escambia site was set forth by Gulf's witnesses Burroughs and McMillan. Gulf argues that the Alexander testimony rebuts Shultz' statement that no studies or technical analysis were conducted prior to the expenditure of funds.

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Gulf further argues that no due process rights are being violated by the filing of the Alexander testimony. Gulf argues that it will be prejudiced by the denial of the opportunity to explain or rebut the matters raised by the Intervenor witnesses. Gulf argues that Intervenor have the opportunity to present evidence challenging the testimony of witness Alexander.

### Decision

Witness Alexander responds to and seeks to rebut testimony of Intervenor's witness Schultz that Gulf expended funds prior to conducting studies and obtaining technical analysis of the prudence, cost-effectiveness and reasonableness of the expenditures. I note that:

A trial court has broad discretion to admit rebuttal testimony. See Dale v. Ford Motor Co., 409 So. 2d 232 (1st DCA 1982). However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See Young-Chin v. City of Homestead, 597 So. 2d 879 (3rd DCA 1992)

Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-441 (3rd DCA 1997).

The rebuttal testimony of witness Alexander fits within the definition of rebuttal testimony as described by the Federal Courts, and adopted by this Commission:

It 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 Circ. 1978), quoting Luttrell v. United States, 320 F.2d 462, 464 (5th Circ. 1963); Order No. PSC-04-0928-PCO-EI, issued September 22, 2004, in Docket No. 030623-EI, In re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power and Light Company concerning thermal demand meter error.

Intervenors contend that a characterization of the Alexander testimony as rebuttal evidence is a violation of their due process rights. The public policy of this state favors traditional due process rights in rate hearings. Citizens of Florida v. May, 333 So. 2d 1, 6 (Fla. 1976). When factual matters affecting the fairness of utility rates are considered by a regulatory commission, the rudiments of fair play and due process require that the parties be afforded a fair hearing and an opportunity to explain or rebut those matters. Florida Gas Company v. Hawkins, 372 So. 2d 1118 (Fla. 1979).

Witness Alexander's rebuttal testimony was timely filed consistent with the OEP. I further note that Intervenors continue to have the opportunity to conduct cross-examination at hearing.

Based on the foregoing, it is

ORDERED by Commissioner Lisa Polak Edgar, as Prehearing Officer, that the Motion to Strike filed by Florida Industrial Power Users Group, the Office of Public Counsel, the Federal Executive Agencies, and the Florida Retail Federation is hereby denied.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 8th day of December, 2011.



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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.

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; or (2) 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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review

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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.