

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for
Dania Beach Clean Energy Center Unit 7, by
Florida Power & Light Company.

DOCKET NO. 20170225-EI
ORDER NO. PSC-2018-0040-PCO-EI
ISSUED: January 16, 2018

ORDER DENYING SIERRA CLUB'S MOTION TO STRIKE REBUTTAL TESTIMONY
OF FLORIDA POWER & LIGHT COMPANY'S WITNESS HECTOR J. SANCHEZ

BACKGROUND

On January 10, 2018, pursuant to Rule 28-106.204, Florida Administrative Code (F.A.C.), Sierra Club filed a Motion to Strike the Rebuttal Testimony of Florida Power & Light Company's (FPL) Witness Sanchez (Motion). The Motion was filed several hours after the prehearing conference in this docket. On January 12, 2018, FPL filed its Response in Opposition to Sierra Club's Motion (Response). Section 403.519(4), Florida Statutes (F.S.), requires the Florida Public Service Commission (Commission) to render a final decision in this docket in a compressed timeframe.

Rule 28-106.211, F.A.C., grants the presiding officer before whom a case is pending broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Based upon this authority, and having considered the Motion and Response, my findings are set forth below. *See Dale v. Ford Motor Co.*, 409 So.2d 232 (Fla. 1st DCA 1982) (a trial court has broad discretion to admit rebuttal testimony).

I. Good Cause for Late-Filed Motion

A. Sierra Club's Motion

In its Motion, Sierra Club argues that the Order Establishing Procedure¹ provides that for good cause this Commission may accept a motion to strike that is filed after the prehearing conference and cites several examples of this Commission accepting untimely materials. Sierra Club asserts that its filing was filed on the same day as the prehearing. Sierra Club also argues that its ability to file on time was affected by the compressed schedule of this docket, recent holidays, the timing of discovery in the docket, and FPL using the compressed schedule to its advantage by "hiding information."

FPL's Response

In its Response, FPL argues that the Order Establishing Procedure mandates that "any motions to strike any portion of the prefiled testimony and related portions of exhibits of any

¹Order No. PSC-2017-0426-PCO-EI, issued in this docket on November 6, 2017.

witness shall be made in writing no later than the Prehearing Conference.” FPL avers that the prehearing conference ended at approximately 9:47 a.m. on January 10, 2018, and that the Motion was filed at 4:33 p.m. on that date. FPL avers that the Motion is legally deficient because Sierra Club failed to comply with the Order Establishing Procedure and has not established good cause for failing to file its Motion by the procedural deadline.

FPL asserts that it has been extremely forthcoming in being responsive to Sierra Club, including responding to numerous interrogatories, production of document requests, and requests for admissions, under the expedited time frames in this proceeding, as well as four depositions of FPL witnesses.

B. Analysis and Decision on Late-Filed Motion

Having reviewed the parties arguments, and given the compressed schedule in this matter, I find that Sierra Club has shown good cause for this Commission to accept the late filing of its Motion on the afternoon of the prehearing conference.

II. Motion to Strike Testimony

A. Sierra Club’s Motion

In its Motion, Sierra Club argues that rebuttal testimony is permitted to refute a theory from an adverse party but that adverse testimony does not open the door to rebuttal testimony which should have properly been submitted by a party in its case-in-chief. Sierra Club notes that this Commission has recognized that while some new information may come in through rebuttal, it is inappropriate in rebuttal for a utility to fundamentally change its case to correct what appear to be material errors in the utility’s initial filing. Sierra Club argues that when determining whether a late disclosure warrants preclusion, courts have considered the following aggravating factors: a lack of justification for the late disclosure, the impact on the court’s docket, and the difficulty for other parties to overcome the adverse effects.

Sierra Club argues that by the rebuttal testimony of witness Sanchez, FPL inserts “novel reliability criteria” into the record that heretofore has not been recognized by this Commission. Sierra Club avers that in its direct case, FPL referred to just two reliability criteria in support of its case. These two reliability criteria are (1) system-wide reserve margins and (2) load-generation balance in Southeast Florida. Sierra Club asserts that FPL specified two types of system-wide reserve margins, a 20% margin and a 10% margin for generation-only resources. Sierra Club contends that witness Sanchez’s testimony introduces entirely new reliability criteria that appear nowhere in FPL’s direct case. Namely, the “robust area reliability margin” which is based on whatever “operational realities and risks” witness Sanchez “deems relevant.” Sierra Club argues that the new criteria is the basis for a reserve capacity of 30.2% more capacity than FPL’s projected service obligation in Southeast Florida and that this Commission has not recognized the 30.2% reliability margin for that area. Sierra Club concludes that rebuttal testimony is not the proper stage of the proceeding and a need determination is not the appropriate forum to raise new reliability criteria.

Sierra Club argues that witness Sanchez's testimony does not respond to the testimony proffered by Sierra Club to explain, repel, counteract, or disprove Sierra Club's evidence. Sierra Club argues that its witness has not testified regarding the new reliability criteria nor could he have since the criteria were unknown to him. Sierra Club argues that its witness questioned FPL's insistence on a four-year period since that period is not required by the reliability criteria that FPL presented in its direct case. Sierra Club argues that by witness Sanchez's testimony, FPL attempts to correct this flaw highlighted by Sierra Club's testimony; namely, that FPL had no apparent justification for designing Plans 4 and 5 to only allow a four-year window between retiring the existing Lauderdale units and bringing the Dania Beach Energy Center (Dania Beach) into service. Sierra Club contends that FPL's "cure" goes beyond any criticism offered by Sierra Club and beyond FPL's direct case; instead, FPL describes new reliability criteria. Sierra Club concludes that these criteria create a fundamental change to FPL's case.

Sierra Club also asserts that the testimony by witness Sanchez constitutes impermissible "trial by ambush." Sierra Club argues that FPL should have disclosed its reliance on new reliability criteria in its direct case and failed to do so in response to discovery. Sierra Club contends that this precluded Sierra Club from presenting contrary evidence or otherwise checking the reliability of FPL's information. Sierra Club argues that FPL has provided no justification for the late production of testimony introducing reliability criteria that are neither recognized by this Commission nor discussed in FPL's direct case. Sierra Club contends that FPL "concealed" the "guidance from [witness] Sanchez" for a crucial period in this fast-moving docket. Sierra Club argues that "[t]he guidance from FPL's system operators first came to the attention of the parties in this proceeding more than a month after FPL's filing of its petition and direct case." Sierra Club asserts that it was not until December 22, 2017, that FPL attempted to inject the new criteria into the record.

Sierra Club argues that admitting witness Sanchez's testimony "would violate the established procedures for this proceeding . . . and subvert the evidentiary safeguards to develop a robust record to inform agency decision-making."

B. FPL's Response

In its Response, FPL asserts that the testimony of witness Sanchez has been filed to explain, repel, counteract, or disprove the evidence of an adverse party and refute a theory from an adverse party. FPL argues that this Commission has denied motions to strike rebuttal testimony similar to Sierra Club's Motion. FPL avers that a trial court has broad discretion to admit rebuttal testimony and that a court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense.

FPL asserts that it properly submitted rebuttal testimony from witness Sanchez to rebut and refute Sierra Club witness Hausman's "magic number" and "arbitrary" delay claim, his assertion that there is no reason why Dania Beach could not be delayed one or more years beyond the four years recommended by FPL, and to explain how witness Hausman's testimony fails to take into account important operational considerations for the FPL system.

FPL argues that, in its October 20, 2017, petition and the prefiled direct testimony it discussed the need to address regional reliability including load to generation balance for Southeastern Florida. FPL avers that the load to generation balance concept has two calculation components: (1) first account for all of the generation and transmission import capability in Southeastern Florida minus the load in that area, and then (2) examine numerous contingencies which could impact the result of part (1). FPL argues that both parts of these calculation components are carried out in load flow analyses using sophisticated computer modeling as described in witness Sim's direct testimony. FPL contends that the concept is not new and has been presented to this Commission in FPL's Ten Year Site Plan filings and a need determination proceeding. FPL asserts that witness Sanchez's nomenclature for the part (1) calculation component is his "area reliability margin" calculation.

FPL avers that in his rebuttal testimony, witness Sanchez describes the "area reliability margin" calculation, which looks at the available generation and transmission import capability necessary to serve load requirements in Southeastern Florida. FPL argues that witness Sanchez uses this calculation to operate the FPL system in a way that will minimize operational risk, and that bringing Dania Beach online as soon as practicable following retirement of the Lauderdale units will minimize that risk. FPL asserts that, while witness Sim relies on guidance from witness Sanchez for input on any delay of a project such as Dania Beach, he is not, and FPL is not, relying on witness Sanchez's area reliability margin calculation to support FPL's need and associated resource plan proposed in this proceeding. FPL notes that witness Sanchez is simply providing support for his guidance to witness Sim that any delay of the new unit should have a commensurate delay for the retirement of the old units to minimize operational risk. FPL asserts that witness Sanchez's area reliability margin is not a new reliability criterion that forms the basis of FPL's resource planning and need advocated by FPL in this proceeding. FPL states that it has continued to use the three resource reliability criteria it has used in recent years which are (1) the 20% minimum reserve margin, (2) the 10% minimum generation only reserve margin, and (3) the 0.1 Loss of Load Probability.

FPL contends that everything has been thoroughly explained by FPL and its witnesses, and Sierra Club has had opportunity to conduct discovery on these issues since it intervened in the case. FPL also contends that it stressed the importance of load flow analysis concerning the regional imbalance issue, but that Sierra Club refused to sign the standard confidentiality agreement with the Florida Reliability Coordinating Council, to obtain the necessary confidential information to analyze the regional imbalance issue.

FPL argues that witness Hausman was aware of the four-year period from retirement to commercial operation date and the guidance FPL's system operators provided to Dr. Sim in that regard, but simply disregards it. FPL contends that, after witness Hausman dismisses the specific guidance provided by FPL's system operators regarding a delay scenario, it can be no surprise that witness Sanchez's testimony provides support for the guidance he provided to witness Sim regarding system operations and a delay of Dania Beach.

FPL argues that it has been "extremely forthcoming" and responsive to Sierra Club. FPL asserts that Sierra Club began propounding discovery in this docket on November 7, 2017, prior

to the Commission's November 17, 2017 Order granting Sierra Club intervention. Between November 7, 2017 and December 8, 2017,² FPL responded to 31 interrogatories, 66 production of documents requests, and 24 requests for admissions from Sierra Club, which included questions about regional imbalance issues in Southeastern Florida addressed in FPL's petition and prefiled direct testimony. FPL contends that its responses were made under the expedited time frames in this proceeding, that it has provided all discovery documents related to witness Sanchez's testimony, and that there have also been four depositions of FPL witnesses.

FPL argues that it is disingenuous for Sierra Club to claim it was deliberately kept in the dark with regard to the load imbalance concept addressed by witness Sim and the related guidance he received from FPL Director of Operations, witness Sanchez, regarding the operational risks caused by a delay of Dania Beach beyond the four year period. FPL argues that, at his November 29, 2017 deposition, with witness Hausman listening in, witness Sim was asked by both Sierra Club and the Office of the Public Counsel about guidance he received from FPL system operations regarding this four-year period. In response, witness Sim stated that maintaining the four-year period was necessary to minimize risk of unforeseen circumstances and the impact they would have on reliability in Southeastern Florida. Similarly, FPL asserts that at his December 4, 2017 deposition when questioned by Sierra Club, Dr. Sim again stated that you would not want a period longer than four years from the date of retirement of Lauderdale Units 4 and 5 to add replacement/additional generation capacity in Southeastern Florida, and in fact you would want that period as short as possible to minimize operational risk.

C. Analysis and Decision

I have reviewed Sierra Club's Motion and FPL's Response. I find that witness Sanchez's testimony does not constitute improper rebuttal testimony. Pursuant to Section 120.57, F.S., FPL has the right to submit testimony and evidence in this proceeding. I find that the rebuttal testimony was offered to directly rebut assertions in the testimony of witness Hausman regarding the proposed interval between retirement of existing generation facilities and commercial operation of new generation facilities. The purpose of rebuttal testimony as described by the Federal Courts and adopted by this Commission 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 other party "accepting the challenge and attempting to rebut the presumption asserted." *See e.g.*, Order No. PSC-17-0096-PCO-EI, issued Mar. 14, 2017, in Docket No.20160170-EI, *In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company, and United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978). Upon review, I find that the rebuttal testimony offered by witness Sanchez is consistent with this standard.

In addition, I note that "a trial court has broad discretion to admit rebuttal testimony," and the court "abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense." *See e.g.*, Order No. PSC-17-0096-PCO-EI and *Mendez v. Caddell*

² The date Sierra Club filed the testimony and exhibits of witness Hausman.

Construction Co., 700 So.2d 439, 440-41 (3rd DCA 1997) (internal citations omitted). I find that witness Sanchez has not advanced a “novel reliability criteria,” and that FPL has not engaged in “trial by ambush,” or concealed information from Sierra Club. I also find that admitting witness Sanchez’s testimony will not violate the established procedures for this proceeding or subvert the evidentiary safeguards to develop a robust record to inform agency decision-making. I find that witness Sanchez’s rebuttal testimony is directly rebutting assertions made by Sierra Club’s witness Hausman and does not constitute improper rebuttal. Finally, I note that witness Sanchez will be subject to cross examination by all parties to this proceeding.

Therefore, it is

ORDERED by Commissioner Gary F. Clark, as Prehearing Officer, that Sierra Club has shown good cause for this Commission to accept, on the afternoon of the prehearing conference, the late filing of its Motion to Strike the Rebuttal Testimony of Florida Power & Light Company’s witness Sanchez. It is further,

ORDERED that the Sierra Club Motion to Strike the Rebuttal Testimony of Florida Power & Light Company’s witness Sanchez is denied for the reasons described herein.

By ORDER of Commissioner Gary F. Clark, as Prehearing Officer, this 16th day of January, 2018.



GARY F. CLARK
Commissioner and Prehearing Officer
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 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.