

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Evaluation of storm restoration costs for
Florida Power & Light Company related to
Hurricane Irma

Docket No. 20180049-EI

Filed: May 24, 2019

**FLORIDA POWER & LIGHT COMPANY'S
OBJECTION TO OFFICE OF PUBLIC COUNSEL'S
USE OF DEPOSITIONS AT THE HEARING**

Florida Power & Light Company (“FPL”), by and through its undersigned counsel, pursuant to the Florida Public Service Commission (“Commission”) Order Establishing Procedure, Order No. PSC-2018-0290-PCO-EI (“OEP”), and at the direction of the Prehearing Officer, hereby files this Objection to the Office of Public Counsel’s (“OPC”) use of depositions at the evidentiary hearing for any purpose other than impeachment.

On November 15, 2018 and December 13, 2018, OPC conducted a two-day deposition of a panel of three FPL witnesses, and thereafter included copies of the transcripts and associated exhibits from this panel deposition as Exhibit HWS-3 to the direct testimony of OPC witness Helmuth Schultz III (hereinafter identified as “HWS-3”). OPC has failed to timely submit the Notice of Intent to Use Deposition (*i.e.*, HWS-3) required by the OEP and, therefore, should be precluded from using any portion of these depositions at the hearing for any purpose other than impeachment.

FPL is filing this Objection to preserve its right to object to the use of HWS-3, but notes that FPL and OPC are actively engaged in efforts to reach a mutually agreeable resolution of this issue, and have committed to continue to work together and use best efforts to attempt to resolve this matter without the need for any further use of the Commission or Commission Staff’s time or attention. FPL has contacted OPC regarding the filing of this objection, and OPC has authorized FPL to represent that, although OPC maintains its position on the use of HWS-3, OPC understands

that this objection is being filed to preserve FPL's rights and agrees that FPL and OPC will continue to work together in an effort to reach a mutually agreeable resolution of this issue. However, if FPL and OPC are not able to reach a mutually agreeable resolution, FPL asks that this objection be addressed as a preliminary matter at the time of the final hearing scheduled to begin on June 11, 2019.

In support of this objection, FPL states as follows:

1. On February 22, 2018, the Commission opened the above-captioned docket for the limited purpose of evaluating of FPL's storm restoration costs related to Hurricane Irma. On June 7, 2018, the Commission issued the OEP requiring, among other things, the following:

Absent agreement by all parties concerning the introduction of depositions into the record at the hearing, any party wishing to introduce all or part of a deposition at hearing for any purpose other than impeachment, must file a Notice of Intent to Use Deposition no later than the last day to conduct discovery in this docket as set forth in Section VIII of this Order. The Notice shall include the following information for each deposition:

- (1) Name of witness deposed;
- (2) Date deposition was taken; and
- (3) Page and line numbers of each deposition the party seeks to introduce, when available.

Objection(s) to the entry into the record of a deposition or portion thereof at hearing for purposes other than impeachment must be made in writing within three days of filing a Notice of Intent to use Deposition for resolution by the Prehearing Officer.

See OEP, Section V.G., p. 8 (emphasis added).

2. On January 11, 2019, OPC submitted the direct testimony and exhibits of Mr. Schultz. Attached as HWS-3 to Mr. Schultz's direct testimony was the entire transcript and associated exhibits from a two-day deposition of a panel of three FPL witnesses, which is approximately 1600 pages in total, consisting of more than 500 pages of actual sworn testimony

and voluminous exhibits.

3. Section V.G., p. 8 of the OEP required parties wishing to introduce depositions into the record for any purpose other than impeachment to file a Notice of Intent (specifying by page and line those portions of the deposition the party intends to offer) no later than the last day to conduct discovery, which in this case was May 20, 2019. No such Notice of Intent was filed by any party with respect to HWS-3.

4. During the May 20, 2019 Prehearing Conference, FPL objected to OPC's introduction of HWS-3 into the record at the hearing. The Presiding Officer directed FPL and OPC to attempt to resolve the issue and, if unable, for FPL to file a written objection by May 24, 2019.

5. As of the date of this filing, FPL and OPC have not reached an agreement regarding the use of HWS-3, though as indicated above FPL and OPC are continuing to work together to attempt to reach a mutually agreeable resolution. Accordingly, pursuant to Section V.G. of the OEP and at the direction of the Prehearing Officer, and to avoid waiver of its position as more fully described herein, FPL hereby submits this Objection to preserve its right to oppose OPC's use of HWS-3 at the hearing for any purpose other than impeachment.¹

6. OPC has failed to timely submit the Notice of Intent required by the OEP and, therefore, should be precluded from using any portion of these depositions at the hearing for any purpose other than impeachment.

¹ Pursuant to Rule 28-106.211, F.A.C., "[t]he presiding officer before whom a case is pending may 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." Even when a Notice of Intent to Use Deposition is timely filed in accordance with the OEP, the Commission has the discretion to deny a Notice of Intent to Use Deposition where the notice fails to demonstrate that the deposition will be used at the hearing for purposes other than impeachment. *See In Re: Application for Increase in Wastewater Rates in Monroe County by K W Resort Utilities Corp.*, Docket No.150071-SU, Order No. PSC-2016-0509-PHO-SU, 2016 WL 6600489 (FPSC Nov. 3, 2016) (denying Notice of Intent to Use Deposition where it did not adequately demonstrate how the specified portions of the deposition will be used at the hearing for purposes other than impeachment).

7. If HWS-3 is simply admitted to the record without the notice required by the OEP, this will raise serious due process and evidentiary concerns. The parties expressly agreed during the depositions that “all objections except as to form will be reserved.” See OPC Exhibit HWS-3, p. 9. Many of the questions asked during the depositions are, in FPL’s opinion, objectionable. However, no objections were made by FPL at the time of the depositions because the parties agreed to reserve those objections for the hearings. If these same questions were asked at the hearing, FPL would formally object to the questions, and the testimony elicited in response to those questions may or may not have come into the record during the hearing. At the time of this filing, FPL has not waived its right to object to any portions of HWS-3. As such, if HWS-3 is admitted into the record simply because it is attached as an exhibit to Mr. Schultz’s direct testimony, this could substantially prejudice FPL by *de facto* admitting testimony that was the product of an improper and objectionable question and may not have otherwise been admitted into the record during cross examination at the hearing.

8. Additionally, to the extent that OPC claims that portions of HWS-3 is being offered for purposes of impeachment, FPL submits that offering complete copies of deposition transcripts and associated exhibits, including as an exhibit to OPC’s direct testimony, is not the proper method for impeachment of witnesses. If OPC intends to use portions of HWS-3 to impeach FPL’s witnesses, any such attempts should be properly done through cross-examination of the witness with questions where the witness is both confronted with and has the opportunity to respond to the claimed impeachable testimony.² If done in accordance with these appropriate procedures, FPL has no objection to OPC using the deposition transcripts at the hearing for impeachment purposes

9. Based on the foregoing, OPC has failed to submit the Notice of Intent to Use

² See Order No. PSC-2016-0509-PHO-SU, *supra* (denying Notice of Intent to Use Deposition but allowing the deposition to be used to cross-examine witness for impeachment purposes during the hearing subject to appropriate objections).

Deposition as required by the OEP and, therefore, no portion of HWS-3 attached to Mr. Schultz's direct testimony should be admitted into the record unless and until those portions are properly used for impeachment purposes at the hearing.

WHEREFORE, for all the reasons stated above, Florida Power & Light Company respectfully requests that the Florida Public Service Commission enter an order that precludes the parties from using HWS-3 at the hearing for any purpose other than impeachment.

Respectfully submitted this 24th day of May, 2019

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished

by electronic service on this 24th day of May, 2019 to the following:

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