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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Petition by Florida Power & Light Company for Approval of FPL SolarTogether Program and Tariff.	DOCKET NO. 20190061-EI FILED: September 30, 2019

Office of Public Counsel's Corrected Motion to Continue the Hearing Date, Expand the Discovery Period and File Supplemental Direct Testimony, or in the Alternative, to Strike Potions of FPL's Rebuttal Testimony

The Citizens of the State of Florida ("Citizens"), by and through the Office of Public Counsel ("OPC"), with regard to the Order Establishing Procedure in this docket (Order No. PSC-2019-0272-PCO-EI, as amended by Order No. PSC-2019-0272A-PCO-EI), and pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby move to continue the hearing date, expand the discovery period and file supplemental Direct Testimony, or in the alternative, to strike portions of Florida Power and Light Co.'s ("FPL" or the "Utility") rebuttal testimony. **OPC files this Corrected Motion to rectify a scrivener's error in the positions the other parties communicated to OPC before filing, specifically as relates to the Southern Alliance for Clean Energy and Vote Solar.** In support of this motion, OPC states as follows:

1. On March 13, 2019, FPL filed its Petition for Approval of FPL SolarTogether Program and Tariff ("the Petition"). In its Petition, FPL requested the Commission approve a new solar program and tariff. The Petition outlined approximately $1.79 billion in generation and Program administration costs and various elements of customer charges and credits so that FPL could recover costs of the Program. (Pet. at 7.)

2. On July 29, 2019, FPL witnesses Matt Valle, Scott Bores, Juan E. Enjamio and William F. Brannen prefiled Direct testimony containing an economic analysis that showed a cumulative present value revenue requirement ("CPVRR") value associated with the

overall transaction of approximately $139 million over the 30 year life of the program, allocated to different customers on different timelines.

3. Subsequently, OPC, other Interveners and Staff conducted discovery in this docket related to the originally-filed case.

4. On September 9, 2019, OPC's witness Jim Dauphinais, relying on the Program elements and analyses filed by FPL's witnesses, as well as FPL's responses to discovery regarding the original case, submitted prefiled responsive Direct testimony challenging the reasonableness and accuracy of the proposed Program's structure, the analysis presented by the Company during its case-in-chief, and the Company's representations regarding its calculation of the alleged benefits to the various customer groups.

5. On September 23, 2019, FPL filed testimony styled as "Rebuttal" by six witnesses: Matt Valle, William F. Brannen, Juan E. Enjamio, Scott R. Bores, Terry Deason and Lon M. Huber. Neither Mr. Deason nor Mr. Huber filed testimony as part of FPL's case-in-chief.

6. FPL's September 23 testimony included substantive changes to the proposed SolarTogether Program structure and tariff; FPL alternately describes these as program "enhancements" or "changes." (Valle Rebuttal at 3.) As such, FPL's rebuttal testimony supplements the Company's direct testimony rather than merely rebutting the Intervenors' testimonies.

7. Moreover, the rebuttal testimony presented an "updated" or "new" economic analysis that calculates a different CPVRR value result of approximately $ 249 million, which is a $110 million change from the original filing. (Valle Rebuttal at 10, 11.)

8. Portions of the Sept. 23 testimonies of FPL' witnesses constitutes supplemental direct testimony that materially alters FPL's case and, more importantly, supports a new tariff filing that renders the original tariff superseded, obsolete and a nullity.

9. The new CPVRR value is ostensibly the result of updated cost reduction assumptions that FPL claims materialized at some unstated point in time before September 23, 2019. (Bores September 23, 2019 (supplemental direct) testimony at 2-5; Brannen September 23, 2019 (supplemental direct) at 4-5; Valle Sept. 23 (supplemental direct) testimony at 10-13; Exhibit MV-2 (new proposed tariff replacing originally filed proposed tariff).

10. The reduced cost assumptions and the increased apparent CPVRR value appear to be the impetus for a material structural revision in the allocation of costs between voluntary subscribers and the general body of customers from an 80%-20% split to a 55%-45% split, as outlined in the supplemental direct testimony of Mr. Valle. (Vale Rebuttal at 11.)

11. FPL concedes that the structural changes introduced in the supplemental direct portion of its filed rebuttal testimony result in a Program and tariff which are different from the pricing structure outlined in the now superseded and obsolete, originally-filed proposed tariff. (Valle Rebuttal at 11.)

12. FPL's witness described the Program changes proposed in rebuttal testimony as "significant." (Valle Rebuttal at 11.)

13. The significant and material changes made to both the Program and financial assumptions underlying the originally-filed economic analysis mean FPL's "rebuttal" resulted in the filing of a new case and corresponding tariff, which are wholly different from that contained in the originally-filed case and in the now superseded, obsolete tariff filed on March 13, 2019.

14. As a result, FPL has effectively withdrawn and nullified its original tariff and substituted a new program and tariff via the supplemental direct portion of its Rebuttal Testimony, which is more accurately described as Supplemental Direct Testimony. Accordingly, the statutory 8-month clock on FPL's tariff application starts anew. *See* Fla. Stat. § 366.06.

15. FPL has made no showing that there is a requirement for the Commission to hold a hearing or issue a decision in 2019, as the projected in-service date of the first two projects (6 sites) is in the first quarter of 2020, and FPL has further stated that it intends to build Projects 1 and 2 regardless of the Commission's action on the SolarTogether tariff. *See* FPL's Response to Citizens' Interrogatory No. 26.

16. The only way to ensure a fair process going forward is to continue the hearing date, provide adequate time for the parties and Staff to conduct discovery on the new case and new evidence, and to allow Intervenors to address FPL's new case in their own responsive Supplemental Direct Testimony, consistent with the testimony protocol established in the Order Establishing Procedure.

<u>Applicable Law</u>

FPL bears the burden of proving its proposed tariff and rates are fair, reasonable and prudent. *Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (1982)(the "burden of proof in a commission proceeding is always on the utility seeking a rate change.")

Rebuttal testimony is properly limited to explaining or disproving the evidence of the adverse party; the purpose of rebuttal is not to materially change a petitioner's application or program, or to add additional facts to those submitted by the petitioner in its case-in-chief. *See Driscoll v. Morris*, 114 So. 2d 314, 315 (Fla. 3d DCA 1959); *In re: Application for increase in*

water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida, Docket No. 160101-WS, Order No. PSC-17 - 0147-PCO-WS (May 2, 2017) (quoting *United States v. Delk*, 586 F. 2d 513, 516 (5th Cir. 1978)).

In sum, it is improper for a petitioner to use rebuttal testimony as a vehicle for materially "updating" or adding new data, calculations or facts included in a party's direct testimony. Such changes in testimony are more appropriately addressed by, at minimum, requesting leave to file supplemental testimony and allowing adverse parties to file responsive testimony to the supplemental testimony. *See, e.g.*, *In re: Application for Original Certification to Operate Water and Wastewater Utility in Duval and St. John's Counties by Nocatee Utility Corporation*, Docket No . 992040- WS, Order No. PSC00-1202 - PCO- WS (July 3, 2000). FPL made no request to file supplemental testimony in this docket.

The Commission has previously held that a utility should not be able to change its case-in-chief via testimony, regardless of whether the changes were purportedly prompted by changed circumstances, a desire to correct data or calculations, or to respond to information received from staff. *See, In re: Request for Rate Increase by Florida Division of Chesapeake Utilities Corp.*, Order No. PSC-00-1874-PCO-GU, Docket No. 000108-GU, Oct. 13, 2000. In Chesapeake, the Commission denied the utility's motions to supplement its testimony and instead stated that the other options available to the utility included seeking a continuance of the hearing. *Id.*, at 4.

In at least one other case where FPL experienced a material change in the assumptions underlying its data and the need to re-calculate data, FPL properly sought leave to file a supplemental petition and testimony. *See*, *In re: Fuel and Purchased Power Cost Recovery Clause*, Order No. PSC-10-0612-PCO-EI, Docket No. 100001-EI, Oct. 8, 2010.

In the instant case, FPL effectively submitted both supplemental testimony (without requesting leave to do so) and a new case-in chief and a new tariff, in the guise of rebuttal testimony. FPL compounded these acts by filing its supplemental testimony in a way that would deprive OPC of the opportunity to meaningfully analyze and respond to FPL's "new" data, proposed Program, and tariff under the current discovery and hearing schedule.

FPL had sole control of the proposed Program elements and evidence to be submitted as direct testimony during its case-in-chief. When FPL realized this evidence was incorrect or incomplete, it should have, at a minimum, timely requested leave to file supplemental or corrected testimony, and OPC (as well as other Intervenors and Staff) should have been granted leave to respond to FPL's supplemental testimony. FPL failed to take any of these measures, but instead affirmatively chose to file improper rebuttal testimony. If the hearing proceeds as scheduled, it will severely prejudice the Citizens and deny them due process because OPC has not had, nor will it have, an opportunity to provide testimony addressing the new Program elements and new[1] economic analysis **raised for the first time in rebuttal**.

The natural consequence of allowing FPL to file supplemental testimony and a new case-in-chief under the guise of "rebuttal" would be a fundamental unfairness and an express violation of the Citizens' due process rights. The only appropriate remedy is to continue the hearing, provide adequate time for discovery on the new Program and FPL's new economic analysis, and provide the Citizens the opportunity to address FPL's new case through surrebuttal testimony (or its equivalent, e.g., supplemental Intervenor testimony).

[1] Moreover, the changes FPL introduced in rebuttal could have been foreseen during the preparation of its original case-in-chief. It is improper for a utility to claim information is "new" when the data was reasonably foreseeable before it filed its direct testimony [or at minimum, long before it filed rebuttal], but the utility either neglected to or purposefully failed to produce that information in a timely manner.

In The Alternative, Motion to Strike

Portions of FPL's rebuttal testimony and exhibits improperly introduce new program features and cost assumption changes that were not addressed in FPL's direct testimony or the testimony of the Intervenor witnesses. The Utility is attempting to improperly supplement its direct testimony. Therefore, the portions of testimony and exhibits referenced herein should be excluded from the record. *Driscoll v. Morris*, 114 So. 2d 314 (Fla. 3d DCA 1959).

FPL's rebuttal testimony data is materially different from its originally-filed Program, its underlying assumptions and the data filed during FPL's case-in-chief. Therefore, OPC requests that the following portions of rebuttal testimony be stricken from the record:

- Valle Rebuttal: page 2, line 16 beginning with "in addition" through line 20; p. 3, line 15 through line 20 up to and including "initiative;" p. 10, line 14 through all of p. 13; Exhibit MV-2.
- Enjamio Rebuttal: p. 7, line 12 through p. 8, line 16; p. 16, line 6 (containing the phrase "the updated analysis described in this rebuttal"); Exhibits JE-7, JE-8 and JE-9.
- Bores Rebuttal: p. 2, line 8 through line 18 up to an including "customers;" p. 9, line 20 beginning with the words "…and even" through line 21 up to and including "design;" Exhibit SRB-2.
- Brannen Rebuttal, p. 4, line 11 through p. 5, line 8.

Striking the portions of FPL's supplemental direct testimony identified above, which the Utility improperly characterized as rebuttal, is consistent with the Commission's prior decisions where utilities attempted to inject new facts into evidence through rebuttal testimony. *See, e.g.*, *In re: Investigation of Utility Rates of Aloha Utilities, Inc. in Pasco County*, Order No. PSC-00-0087-PCO-WS at 4-5, issued January 10, 2000, in Docket No. 960545-WS (utility presented evidence

in rebuttal which did not rebut any Intervenor or staff testimony, so the Commission properly struck it from the record).

Conclusion

Due process and the provisions of the Florida Administrative Procedure Act require that the Citizens, as parties whose substantial interests will be determined in this case, be afforded a meaningful opportunity to respond to the new information presented for the first time on rebuttal by conducting discovery and presenting testimony to fully address the new Program and tariff that FPL filed in its rebuttal. Fla. Stat. § 120.57(1) (b).

OPC has conferred with its expert and determined that an estimated timeline during which the parties could conduct adequate discovery and supplement Intervenor testimony would result in a hearing date no earlier than mid-January or early February 2020. However OPC's rough, estimated timeline is contingent upon a number of factors, including FPL's responsiveness to discovery requests, access to discovery documents (e.g., whether OPC's counsel and expert must travel to review documents at sites specified by FPL), logistics issues related to performing data runs necessary to evaluate FPL's new economic analysis, and availability of witnesses.

Requirement to Confer

Pursuant to Rule 28-106.204(3), F.A.C., the undersigned counsel contacted the parties to this docket concerning OPC's Motion to Continue the Hearing Date, etc. FPL, Southern Alliance for Clean Energy and Wal-Mart informed OPC they object to the proposed extension. Vote Solar has informed OPC that it takes no position on the Motion. As of the filing of this Corrected

Motion, the undersigned counsel has not heard back from the Florida Industrial Power Users Group.

Respectfully submitted this 30th day of September, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Office of Public Counsel's Corrected Motion to Continue the Hearing Date, Expand the Discovery Period, and File Supplemental Direct Testimony, or in the Alternative, to Strike Potions of FPL's Rebuttal Testimony has been furnished by electronic mail on this 30th day of September, 2019, to the following:

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