

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to determine need for Florida
EnergySecure Pipeline by Florida Power &
Light Company.

DOCKET NO. 090172-EI
ORDER NO. PSC-09-0512-PCO-EI
ISSUED: July 21, 2009

ORDER GRANTING MOTION FOR LEAVE TO FILE SURREBUTTAL TESTIMONY

On July 10, 2009, Florida Gas Transmission Company, LLC (FGT) filed a Motion for Leave to File Surrebuttal Testimony in this docket. FGT asserted that surrebuttal testimony is allowed at the discretion of the presiding officer in the proceeding, and appropriate when the party filing rebuttal testimony included new issues, evidence, or positions to which the other party or parties had not had the opportunity to respond. FGT alleged that Florida Power & Light Company's (FPL) rebuttal testimony contains updated and new analyses, exhibits employing new data and assumptions, new information regarding the demand for natural gas, and a refined position regarding the applicability of Chapter 368, Florida Statutes. FGT asserted that surrebuttal testimony would provide FGT the opportunity to address the new matters raised, and thus, provide the Commission with a complete record.

On July 13, 2009, FPL filed its response in opposition to FGT's motion. FPL stated that the Order Establishing Procedure in this docket, Order No. PSC-09-0337-PCO-EI, issued May 15, 2009, established the schedule for filing testimony for FPL, the schedule for Intervenor testimony, and the schedule for FPL rebuttal testimony. FPL asserted that the Order did not contemplate a second set of testimony for FGT. FPL argued that the testimony schedule established in the Order was consistent with prior determination of need proceedings that have given the petitioner with the ultimate burden of proof the "last word" via rebuttal testimony. FPL cited a string of need determination proceedings that structured submittal of testimony as company direct, intervenor, and then company rebuttal testimony. It stated that the Commission cases that have allowed surrebuttal testimony were certain generic telecommunications proceedings where no party bore the ultimate burden of proof. According to FPL, FGT did not identify any instance where FPL's rebuttal testimony raised a point that was not raised by FGT's witnesses. FPL stated that allowing FGT to file surrebuttal testimony at this late date would deprive FPL of the ability to respond, and preclude any meaningful discovery.

Surrebutal testimony provides a way for a party to respond to evidence given on rebuttal that introduces new matter in the proceeding. No party has a right to file surrebuttal testimony, and the decision to grant or deny surrebuttal testimony is clearly within the discretion of the Commission through the Prehearing Officer assigned to the docket. See, generally, 75 Am Jur 2d, Trial, §294. Rule 28-106.211, Florida Administrative Code, also provides that the presiding officer before whom a case is pending may issue any orders necessary to prevent delay and to promote the just, speedy, and inexpensive determination of all aspects of the case. Historically, the Commission has not limited the submission of surrebuttal testimony to generic telecommunications cases. The Commission has permitted surrebuttal in rate cases, show cause

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proceedings and other proceedings where the utility has the ultimate burden of proof.¹ See, for example, Docket Nos. 050045-EI, In re: Petition for rate increase by Florida Power & Light Company, and 050188-EI, In re: 2005 depreciation study by Florida & Light Company, where the Commission permitted the Office of Public Counsel to file surrebuttal testimony in response to changes to its depreciation study that FPL provided in its rebuttal testimony. Similarly here, FPL has presented new information and revised analyses in its rebuttal testimony.

In recognition of the unique nature of this case, and in light of the Commission's predisposition to include information in its administrative proceedings rather than to exclude information, the FGT request for leave to submit surrebuttal testimony is granted.

By this order, I also extend the time to conduct discovery to July 22, 2009, so that FPL will have the opportunity to take depositions of the surrebuttal witnesses before the hearing, which is scheduled for July 27-28, 2009.

Based on the foregoing, it is

ORDERED that Florida Gas Transmission Company's Motion for Leave to File Surrebuttal Testimony is granted. It is further

ORDERED that Order No. PSC-09-0337-PCO-EI is modified to extend the discovery deadline to July 22, 2009. All other provisions of that Order remain in effect.

By ORDER of Commissioner Lisa Polak Edgar, as Prehearing Officer, this 21st day of July, 2009.



LISA POLAK EDGAR
Commissioner and Prehearing Officer

(S E A L)

MCB

¹ I would note that in the need determination proceedings cited by FPL surrebuttal testimony was never requested.

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.