

Dorothy Menasco

From: ROBERTS.BRENDA [ROBERTS.BRENDA@leg.state.fl.us]
Sent: Friday, November 18, 2011 4:55 PM
To: Filings@psc.state.fl.us
Cc: SAYLER.ERIK; McGLOTHLIN.JOSEPH; MERCHANT.TRICIA; Caroline Klancke; Charles Guyton; Christopher C. Thompson; Jeffrey A. Stone; John Moyle; John T. LaVia (jlavia@gbwlegal.com); Keino Young; Martha Barrera; Richard Melson (rick@rmelsonlaw.com); Russell Badders; Schef Wright (schef@gbwlegal.com); Shari Cornelius; Steve Griffin; Susan D. Ritenour; Vickie Gordon Kaufman (vkaufman@kagmlaw.com); White, Karen
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Attachments: Motion to Strike - Alexander's testimony.FINAL.sversion.docx

Electronic Filing

a. Person responsible for this electronic filing:

Erik L Sayler, Associate Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
sayler.erik@leg.state.fl.us

b. Docket No. 110138-EI

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

c. Document being filed is the Joint Motion to Strike Portions of the Rebuttal Testimony of Gulf Power Company Witness Rhonda J. Alexander.

d. There are a total of 10 pages.

e. The document attached for electronic filing is the Motion to Strike-Alexander's testimony.FINAL.sversion.docx)

Thank you for your attention and cooperation to this request.

Brenda S. Roberts
Office of Public Counsel
Telephone: (850) 488-9330
Fax: (850) 488-4491

DOCUMENT NUMBER-DATE

08496 NOV 18 =

FPSC-COMMISSION CLERK

11/18/2011

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

**DOCKET NO. 110138-EI
FILED: November 18, 2011**

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

The Citizens of the State of Florida, by and through the Office of Public Counsel (“OPC”), Federal Executive Agencies (“FEA”), Florida Industrial Power Users Group (“FIPUG”), and Florida Retail Federation (“FRF”), hereinafter, Intervenors, file this Joint Motion to Strike portions of the Rebuttal Testimony filed by Witness Rhonda J. Alexander on November 4, 2011, on behalf of Gulf Power Company (“Gulf” or “Company”), on the grounds that this testimony exceeds the scope of rebuttal and is an attempt to submit untimely and unauthorized supplemental direct testimony. As grounds in support of this Motion, Citizens state as follows:

Introduction

1. By Order No. PSC-11-0307-PCO-EI (“Order Establishing Procedure” or “OEP”), the Commission established the procedures to be followed in this docket.
2. Pursuant to the OEP, utility direct testimony was due on July 15, 2011, Intervenors’ direct testimony was due on October 14, 2011, and rebuttal testimony was due on November 4, 2011.

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3. On July 8, 2011, Gulf filed its direct testimony,¹ consisting of 15 witnesses, including two witnesses who provided direct testimony to support Gulf's request to include the North Escambia County Site in rate base as Plant Held for Future Use ("PHFU") for the purposes of preserving a so-called Nuclear Option.
4. On October 14, 2011, Intervenors filed testimony addressing, in part, Gulf's request to include the North Escambia County Site in rate base. OPC filed the testimony of Witness Helmut Schultz; Federal Executive Agency ("FEA") filed the testimony of Witness Greg R. Meyer; and Florida Retail Federation ("FRF") filed the testimony of Witness Steve W. Chriss. Mr. Schultz observes, *inter alia*, that Gulf did not refer to nor submit any study, evaluation, or process supporting its assertion that a nuclear unit is a viable and necessary option for Gulf when Gulf filed its direct testimony and exhibits. (Schultz at 15).² Mr. Meyer observes that Gulf has not obtained a determination of need for a nuclear unit or any of the necessary approvals related to the implementation of the special cost recovery mechanism of Section 366.93, Florida Statutes ("F.S."). (Meyer at 21-22). Mr. Chriss questions Gulf's reliance on Section 366.93, F.S. and observes that Gulf has not received a determination of need; like Mr. Meyer, he does not mention the absence of studies, evaluations, or processes. (Chriss at 10-13).
5. On November 4, 2011, Gulf filed its rebuttal testimony. One of the witnesses filing "rebuttal" testimony was Witness Rhonda J. Alexander. Her testimony purports to rebut the direct testimonies of Intervenor Witnesses Helmut W.

¹By Order No. PSC-11-0513-PCO-EI, issued November 2, 2011, Gulf and the Intervenors were granted leave to file supplemental direct testimony related to the Crist turbine upgrade project pursuant to the stipulation of the parties to this docket.

²"There is, however, no study, evaluation or process that the Company has provided to the Commission to justify such a substantial addition to PHFU." Schultz at 15, lines 3-5.

Schultz, III, Greg R. Meyer, and Steve W. Chriss on the matter of the North Escambia County Site and Nuclear Option. (Alexander rebuttal testimony at 2)

Argument

6. While a portion of Witness Alexander's testimony, including Schedule 1 attached to her testimony,³ may be properly characterized as rebuttal to Intervenor Witnesses Schultz, Meyer, and Chriss, the testimony and schedules which the Intervenors request the Commission to strike are instead improper supplemental direct testimony filed in the guise of rebuttal testimony.
7. The testimony and schedules identified in Attachment A are improper supplemental direct testimony because the material does not rebut any testimony of the Intervenor witnesses. Specifically, Intervenor Witness Schultz commented that Gulf did not submit any studies to support Gulf's naked assertion that a nuclear unit would constitute a feasible and desirable addition for Gulf's customers. By seeking to introduce such information at this juncture, Gulf is not rebutting any Intervenor testimony, but is introducing new facts or evidence in rebuttal that belonged in its case in chief. In fact, this information was in Gulf's possession at the time Gulf filed its direct case.⁴
8. The basis for this Motion to Strike is fundamental. The testimony at issue here is not rebuttal. The First District Court of Appeal describes proper rebuttal evidence as follows:

Rebuttal evidence is that which is "offered by a party after he has rested his case and after the opponent has rested in order to contradict the opponent's evidence." Black's Law Dictionary 1267

³ Schedule 1, 1 of 1, attached to Witness Alexander's rebuttal testimony in Exhibit ____ (RJA-1).

⁴ Evidence of this fact is revealed by the dates contained in the schedules attached to Witness Alexander's rebuttal testimony the Intervenors seek to be stricken. See ____ Exhibit (RJA-1), Schedules 2-11.

(6th ed. 1990). The term “rebuttal” denotes evidence introduced by a plaintiff to meet new facts brought out in his opponent's case in chief. 41 Fla.Jur.2d, Pre-Trial Proceedings, § 17 (Citations omitted).

Rose v. Madden & McClure Grove Service, 629 So. 2d 234, 236 (Fla. 1st DCA 1993).⁵ Much of Witness Alexander’s testimony fails to meet this standard as the Intervenors raise no new facts.

9. It necessarily follows that if no “new facts” are brought forth by the Intervenors in their direct case, then the Gulf’s rebuttal witnesses may testify only in response to what has already been introduced as evidence at trial. “The principal objective of rebuttal is to permit a litigant to counter *new, unforeseen facts* brought out in the other side's case.” *Fainin v. Kelly*, 184 F. 3d 67, 85 (1st Cir. 1999) (emphasis added). “Rebuttal is a term of art, denoting evidence introduced by a plaintiff to meet new facts brought out in [the] opponent's case in chief.” *Lubanski v. Coleco Indus.. Inc.*, 929 F. 2d 42, 47 (1st Cir. 1991) (quoting *Morgan v. Commercial Union Assurance Cos.*, 606 F.2d 554, 555 (5th Cir.1979)). Therefore, absent introduction of new facts or evidence by the Intervenors in their direct case, no basis exists for Gulf to introduce new evidence on rebuttal.

10. Witness Schultz simply testified that Gulf submitted no studies in its direct case. This is an uncontroverted observation; it is not a new fact or evidence which requires rebuttal. As described above, the function of rebuttal is to deny or disprove the facts asserted by the opposing party but not to introduce new evidence. It follows from this definition of rebuttal that the only permissible

⁵ The *Rose* case also discusses when surrebuttal is appropriate, but this is not an issue in this case.

rebuttal to this Intervenor testimony would be a statement or argument that the Intervenor witness was mistaken. However, Gulf cannot legitimately rebut the Intervenor witnesses' observations about missing information because the observation is factually correct; Gulf's direct case is devoid of such studies or references to studies.⁶

11. Instead of rebutting this factually correct observation, Witness Alexander improperly attempts to supplement the Company's direct testimony. Witness Alexander does not attempt to deny, contradict, or disprove this observation. Instead, she seeks to alter the situation that the Witness Schultz describes. Her testimony and schedules are designed to backfill Gulf's direct case.⁷ The testimony and exhibits of Witness Alexander that are the subject of this Motion to Strike (identified in Attachment A) properly belong to and could have been presented in the Company's direct case. Allowing Gulf to exceed the proper scope of rebuttal in this manner has serious due process implications. Presenting new evidence at this late juncture prejudicially denies the Intervenor parties and Commission staff an adequate opportunity to test or, more importantly for the purposes of this Motion, respond to the new evidence.⁸ Conducting a deposition

⁶ In attempting to justify the inclusion of the studies allegedly commissioned or developed by Gulf when assessing its Nuclear Option, Witness Alexander asserts in her rebuttal testimony that the Intervenor repeatedly pointed out that Gulf failed to provide any such studies. (Alexander rebuttal testimony at 25, lines 20-23). However, only one witness pointed this out the absence of studies and this in no way opens the door for the Company to augment its direct case on rebuttal.

⁷ The direct testimony of Witnesses McMillan and Burroughs provide the sole support for the Company's rationale for including the North Escambia County Site in rate base as PHFU. The predominant reason, according to their testimonies, for acquiring this land is to preserve Gulf's so-called Nuclear Option. (Burroughs at 22-27; McMillan at 5

⁸ The purpose of the established sequence of filings is to provide an opportunity for Intervenor and Staff to respond to the entirety of the utility's direct case, and for the utility to have an opportunity in rebuttal to respond to Intervenor and Staff. Allowing Gulf to exceed the scope of rebuttal would defeat the fundamental procedural objective of this order of presentations.

or cross-examination of Witness Alexander will not suffice to cure the procedural harm caused by her untimely supplemental direct testimony.

12. It is well established that the Company has the ultimate burden of proof to support its request to change rates. *See Florida Power Corp. v. Cresse*, 413 So. 2d 1187, 1191 (Fla. 1982) (“ ‘Burden of proof in a commission proceeding is always on a utility seeking a rate change. . . .’ ”⁹). Here, Gulf is attempting improperly to introduce new evidence in its rebuttal to help satisfy its burden of proof that the North Escambia County Site should be in rate base. Supplementing its direct testimony in the guise of rebuttal testimony is procedurally improper, harmful, and violates the *Order Establishing Procedure* in this case. The Commission cannot base a decision on information that is not in the record.¹⁰ The development of the record is very important to all parties and it must be done in a manner that protects all parties’ procedural rights. Thus, the Commission has an obligation to limit the scope of Witness Alexander’s rebuttal testimony, thus preventing Gulf from taking a second bite at the proverbial apple, and more importantly avoid a violation of the Intervenors’ due process rights.

13. For the reasons stated above, the untimely and unauthorized supplemental testimony and schedules of Witness Alexander identified by the Intervenors, should be stricken.

⁹ In support for this proposition that the “[b]urden of proof in a commission proceeding is always on a utility seeking a rate change, and upon other parties seeking to change established rates,” the Florida Supreme Court quoted WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION, 638 (Revised Edition 1968).

¹⁰ *See e.g., Florida Power Corp. v. Mayo*, 203 So. 2d 614, 615 (Fla. 1967) (“When submitted for appellate review here, orders of the respondent Commission are clothed with a presumption of validity. The extent of our judicial authority is to determine whether they accord with essential requirements of law and have record support in competent, substantial evidence.”).

WHEREFORE, the Intervenors request that the Prehearing Officer grant this Joint Motion to Strike portions of the rebuttal testimony and schedules of Witness Alexander identified in Attachment A.

J.R. KELLY
PUBLIC COUNSEL

s/ Erik L Saylor
Erik L. Saylor
Associate Public Counsel
Florida Bar No. 29525

Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Rm. 812
Tallahassee, FL 32399-1400

(850) 488-9330

Attorney for the Citizens
of the State of Florida

s/ Christopher C. Thompson, Maj. USAF
CHRISTOPHER C. THOMPSON, Maj, USAF
Staff Attorney

c/o AFLOA/JACL-ULFSC
139 Barnes Drive, Suite 1
Tyndall AFB, FL 324034

Attorney for the Federal Executive Agencies

s/ Vickie Gordon Kaufman
Vickie Gordon Kaufman
Jon C. Moyle, Jr.
Keefe, Anchors, Gordon & Moyle
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Facsimile)

Attorneys for the Florida Industrial
Power Users Group

s/Robert Scheffel Wright
Robert Scheffel Wright
John T. LaVia, III
Gardner, Bist, Wiener, Wadsworth,
Bowden, Bush, Dee, LaVia &
Wright, P.A.
1300 Thomaswood Drive
Tallahassee, Florida 32308

Telephone (850) 385-0070
Facsimile (850) 385-5416

Attorneys for the Florida Retail
Federation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and foregoing **JOINT MOTION TO STRIKE**
PORTIONS OF THE REBUTTAL TESTIMONY OF GULF POWER COMPANY
WITNESS RHONDA J. ALEXANDER has been furnished by electronic mail and/or U.S.

Mail on this 18th day of November, 2011, to the following:

Caroline Klancke, Esquire
Keino Young, Esquire
Martha Barrera, Esquire
2540 Shumard Oaks Boulevard
Florida Public Service Commission
Tallahassee, FL 32399-0850

Jeffrey A. Stone, Esquire
Russell A. Badders, Esquire
Steven R. Griffin, Esquire
Beggs & Lane
P. O. Box 12950
Pensacola, FL 32576-2950

Susan Ritenour
Gulf Power Company
One Energy Place
Pensacola, FL 32520

Charles Guyton
Gunster, Yoakley, & Stewart, P.A.
215 S. Monroe Street, Suite 618
Tallahassee, FL 32301

Richard Melson
705 Piedmont Drive
Tallahassee, FL 32312

s/ Erik L. Sayler
Erik L. Sayler
Associate Public Counsel

Attachment A (1 of 2)

Page	Line	Strike Text	Reason for Striking
3	6	Strike "through 12"	Reference to the stricken schedules should be stricken
5	20-25	Strike-out completely	Provides a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.
6 – 16	All lines	Strike-out completely	Provides a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.
23	11-13	Strike out sentence: "Gulf was entirely prudent in further pursuing nuclear when under most planning scenarios it was the most cost-effective option available to its customers."	Reference to "most cost-effective option available" relates to schedules attached to her testimony which should be stricken; this cost-effectiveness was known at the time direct testimony was filed and should have been presented on direct.
25	22-23	Strike sentence starting "However" ending with "Gulf conducted."	Reference to the studies commissioned by Gulf that should have been presented on direct; these studies were available to Gulf at the time direct testimony was filed.
26	1-24	Strike entire page	Describes the content of studies commissioned by Gulf that should have been presented on direct; these studies were available to Gulf at the time direct testimony was filed.
27	1-15	Strike these two paragraphs	Describes the content of studies commissioned by Gulf that should have been presented on direct; these studies were available to Gulf at the time direct testimony was filed.
28	6-11	Strike this paragraph	Provides a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.
31	22-25	Strike this paragraph	Provides a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.
32	1-7	Strike paragraph down to line 7, ending with "permitting activities."	Provides a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.

Attachment A (2 of 2)

Schedule	Page	Strike Text	Reason for Striking
Schedule 2	1-5	Strike Executive Order of a Former Governor	Supports a rational for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed.
Schedule 3	1	Expansion Case	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 4	1-2	2007 Ten-Year Site Plan, excerpt	The content of a study created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 5	1-2	2008 Ten-Year Site Plan, excerpt	The content of a study created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 6	1	Sites Reviewed	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 7	1	Site Comparison	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 8	1	Cost Impacts 17 Year NPV	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 9	1	Generation Mix Implications	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 10	1	Nuclear vs Nat Gas CC Dated 10-27-2008	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 11	1	Nuclear vs Nat Gas CC Dated 02-10-2009	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.
Schedule 12	1	EPA New Regulatory Actions Timeline (updated 4/11/2011)	The content of a study commissioned or created by Gulf that should have been presented on direct; this study was available to Gulf at the time direct testimony was filed.