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b. Docket 110138-EI

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

c. Document being filed on behalf of Gulf Power Company

d. There are 10 pages to Gulf's Response

e. The document attached for electronic filing is Gulf's Response to Joint Motion to Strike Portions of Rebuttal Testimony of Rhonda J. Alexander

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

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**Docket No.: 110138-EI
Filed: November 28, 2011**

**GULF POWER COMPANY'S RESPONSE TO JOINT MOTION TO
STRIKE PORTIONS OF REBUTTAL TESTIMONY OF RHONDA J. ALEXANDER**

Gulf Power Company ("Gulf") hereby responds to the Joint Motion to Strike Portions of the Rebuttal Testimony of Gulf Power Company Witness Rhonda J. Alexander filed on November 18, 2011 by the Office of Public Counsel, the Federal Executive Agencies, the Florida Industrial Power Users Group and the Florida Retail Federation (the "Joint Movants").

1. The Joint Motion raises four legal arguments as a basis to strike:
 - a. The testimony is not proper rebuttal but supplemental direct testimony;
 - b. Gulf has the burden of proof;
 - c. The testimony violates the Procedural Order; and
 - d. The testimony violates due process.

As will be shown in the following paragraphs, arguments a, c and d are legally infirm and factually inaccurate, and argument b, while accurate, is irrelevant to the motion. All of Witness Alexander's testimony and exhibit is provided in rebuttal to testimony filed by the Intervenor. It does not introduce new evidence or new theories of recovery; its scope is within the scope of the evidence presented by Witnesses Burroughs and McMillan on direct. Alexander's rebuttal testimony simply responds to points raised by Intervenor.

Alexander's Testimony is Rebuttal Testimony.

2. A review of each of the passages the Joint Movants seek to strike shows that in each instance Gulf was responding to testimony from an Intervenor. In the following paragraphs

Gulf addresses each passage that the Joint Movants seek to strike and shows the testimony to which Witness Alexander is responding.

Page 5 line 20 through page 16

3. The Joint Movants seek to strike Witness Alexander's rebuttal testimony beginning at page 5, line 20 and continuing through the end of page 16. There is no mention of this passage in the motion, which only discusses the absence of "studies" in Gulf's direct case; it is only addressed in Attachment A, where it is stated, "Provides a rational [sic] for Nuclear Option which should have been presented on direct; this was known at the time direct testimony was filed."

4. There are at least two parts of Witness Schultz's testimony that is rebutted by the passage in Witness Alexander's testimony at pages 5 through 16. Gulf addresses each in turn.

5. First, Witness Schultz testifies that it is "unclear as to whether the costs other than land costs have been incurred or are instead projected to be incurred." Schultz direct at page 3, lines 20 and 21. The passage at page 5 line 20 through page 16 addresses this very point. It shows that the costs have been incurred and how they were incurred. This is not new evidence; these are the same costs set forth by Witness Burroughs and Witness McMillan in their direct testimony. This passage simply puts to rest Witness Schultz's surprising uncertainty as to whether these funds had been incurred. Gulf notes Witness Schultz's "surprising uncertainty" because the level of detail provided in discovery about these activities and costs, which included detail down to invoices, work orders and journal entries (not to mention MFR B-17 showing deferred nuclear site costs), should have left no doubt that these costs had been incurred.

6. Second, Witness Schultz provides an opinion that "the acquisition of the Escambia site does not appear to be a reasonable and prudent investment that will be used for

Gulf's system purposes in the reasonably near future." Schultz direct at page 11, lines 12-14. The passage at pages 5 through 16 of Witness Alexander's testimony is offered to rebut this opinion. It shows the prudence of Gulf's conduct in (a) responding to potential resource need both from forecasted load and potential coal retirements, (b) assessing alternatives, (c) initiating nuclear licensing and permitting when nuclear appeared to be the superior alternative, (d) investigating potential sites for nuclear, (e) deciding to purchase the only site available for nuclear in Northwest Florida to preserve a nuclear option for its customers, and (f) deferring pursuit of nuclear licensing and permitting when circumstances changed.

Page 23, lines 11-13

7. The next passage the Joint Movants seek to strike is at page 23, lines 11-13 of Alexander's testimony. The rationale offered on Attachment A is that "this cost-effectiveness was known at the time direct testimony was filed and should have been presented on direct." Initially, it should be noted that the Joint Movants do not dispute this cost-effectiveness; they acknowledge it! They only argue it should have been presented on direct. It was. Witness Burroughs testified that "Gulf's decision to purchase land as a site suitable for new generation, including possible nuclear generation, is reasonable, prudent and necessary to continue to provide our customers with *the most cost effective generating resources* in the future." Burroughs direct at 23, lines 4-7 (Emphasis added). Once again, Gulf is only offering testimony to rebut Witness Schultz who erroneously testified that Witness McMillan had acknowledged "that the review of generation technologies has not taken place," (Schultz direct at 16, lines 6 and 7) and that Witness Burroughs' basis for including significant costs in rate base was "speculative" (Schultz direct at 16, lines 17 and 18). This testimony is responsive and necessary to correct Witness Schultz's erroneous and misleading conclusions.

8. The next passage the Joint Movants seek to strike is at page 25, line 22 through page 27, line 15 of Witness Alexander's testimony. In this passage Witness Alexander is responding to Witness Shultz for repeatedly criticizing Gulf for not presenting studies on direct. However, Witness Shultz goes beyond what Gulf did or did not present on direct and raises the issue of whether Gulf had even conducted any studies. He states:

If Gulf has participated in such studies with its parent company, Southern Company, those studies have not been presented to the Florida Public Service Commission. It would not be appropriate for the Commission to include substantial PHFU costs in rate base solely by what can only be described as the Company's speculative overreaching.

Witness Schultz put the existence of studies at issue with his insinuation that Gulf had conducted no analysis and his pejorative and unsupported conclusion that Gulf was engaged in "speculative overreaching."

9. In what can only be described as a measured response, Witness Alexander states she is "presenting in my rebuttal representative studies that Gulf conducted." She goes on to introduce studies that show that Witness Schultz's pejorative accusations are simply wrong. This is clearly rebuttal to Witness Schultz.

10. It should also be noted that the Joint Movants argue on their Attachment A that these studies were available when Gulf's direct was filed and "should have been presented on direct." Apparently, OPC and the rest of the Intervenors are now taking issue with Witness Schultz who testified that "a base rate case is not the appropriate forum in which to examine plant growth and needs." Schultz direct at 17, lines 1 and 2. This is one of the few instances where Gulf and Witness Schultz agree. These studies are not necessary to prove Gulf was

prudent, but they have been offered in response to Witness Schultz's suggestion that no such studies have been performed. As such, they are proper rebuttal.

Page 28, lines 6-11

11. The next passage the Joint Movants seek to strike is at page 28, lines 6-11 of Witness Alexander's testimony. This paragraph is a rebuttal of Witness Schultz's mischaracterization of Witness Burroughs' testimony in which Witness Schultz suggests that Witness Burroughs testified that Gulf spent \$27 million prior to any technical analysis. Schultz direct at page 14, line 25 through page 15, line 3. Alexander first points out that Witness Schultz mischaracterizes Witness Burroughs' testimony; then she goes on to state that the purchase was the result of technical analyses, not made in advance of technical analyses. This is clearly rebuttal of not only facts, but also a Witness Shultz mischaracterization.

Page 31, lines 22 through page 32, line 7

12. This passage is merely a summary of earlier rebuttal testimony offered by Witness Alexander. It is responsive to and rebuts Witness Schultz's testimony that the purchase of the North Escambia site was not reasonable and prudent. Gulf addressed the reasonableness and prudence of the purchase in its direct, but Witness Schultz took issue and offered a differing opinion. Gulf was entitled to rebut Witness Schultz's erroneous conclusion.

Schedules 2-12

13. These schedules, several of which the Florida Public Service Commission ("Commission") could officially notice, are offered in rebuttal to Witness Schultz's suggestion that Gulf purchased the North Escambia property without having conducted any technical analysis. At page 14 lines 7 and 8, he suggests no analysis had been done, and at page 15 , line 2 he states Gulf spent \$27 million before "any technical analysis." From the discovery provided to

OPC, he should have known better, but he nonetheless criticized Gulf for not including such studies in its direct (while at the same time saying a base rate case was not the forum for such studies). Gulf provided these representative studies in rebuttal to put this factual misstatement to rest. They are proper rebuttal to Witness Schultz's erroneous suggestion that Gulf spent \$27 million without technical analysis.

**REBUTTAL TESTIMONY IS CONTEMPLATED UNDER
BOTH THE APA AND THE ORDER ESTABLISHING PROCEDURE.**

14. The Administrative Procedure Act ("APA"), which governs proceedings before the Commission, explicitly provides the right for the filing of rebuttal testimony. *See* § 120.57(1)(b), *Fla. Stat.* Not surprisingly, the Order Establishing Procedure set forth a date for the Company to file rebuttal testimony. As shown above, Gulf complied with both the APA and the Order Establishing Procedure in filing rebuttal testimony that fairly met the allegations set forth in the Intervenor's testimony. This was purely defensive, and each passage the Joint Movants seek to strike has been shown to be responsive to Intervenor testimony.

**THE MOVANTS HAVE NOT BEEN DENIED DUE PROCESS;
BUT GULF WOULD BE IF ITS TESTIMONY WERE STRICKEN.**

15. The Joint Movants provide no authority for their proposition that a failure to strike Alexander's rebuttal testimony would be a denial of due process. Parties to administrative proceedings are entitled to due process, but the Joint Movants cite no case law in Florida stating that the denial of a motion to strike rebuttal testimony is a violation of due process. The Florida Supreme Court has recognized that procedural due process protections apply in rate hearings: "The public policy of this state favors traditional due process rights in rate hearings, whether permanent or interim." *United Tel. Co. of Florida v. Beard*, 611 So. 2d 1240, 1243 (Fla. 1993); *see Scull v. State*, 569 So.2d 1251, 1252 (Fla. 1990) ("One of the most basic tenets of Florida law

is the requirement that *all proceedings* affecting life, liberty, or property must be conducted according to due process.”) (Emphasis added). The court also emphasized the “minimal requirement of a fair hearing” in the rate hearing context. *Beard*, 611 So.2d at 1243. This built upon earlier cases in which the Florida Supreme Court had explained: “When factual matters affecting the fairness of utility rates are being considered by a regulatory commission the rudiments of fair play and due process require that the Company must be afforded a fair hearing and an opportunity to explain or rebut those matters.” *Florida Gas Co. v. Hawkins*, 372 So. 2d 1118, 1121 (Fla. 1979); *see, e.g., Florida Power Corp. v. Hawkins*, 367 So.2d 1011, 1013 (Fla. 1979) (holding that PSC’s revocation of rate increase without a hearing violated due process). Florida courts have also found that application of the APA affords due process. However, none of the Florida court’s due process decisions go so far as the Joint Movants urge.

16. There are a number of reasons the Joint Movants have not been denied due process. They have an opportunity to present evidence, even evidence full of unsupported opinions and inaccuracies that require rebuttal. They have been afforded discovery, even though they ignored the discovery that showed that the funds in questions had been spent and that Gulf conducted extensive analyses before deciding to purchase North Escambia. They can conduct cross examination. They have been and will be afforded due process, and their suggestion that not striking of rebuttal testimony filed to respond to the misstatements by their witness is a denial of due process is less than credible.

**GULF'S DIRECT CASE MET ITS BURDEN OF PROOF;
GULF'S REBUTTAL CASE REBUTS THE INTERVENOR CASE
AND IS CONSISTENT WITH GULF'S DIRECT CASE.**

17. Gulf has the burden of proof in this case. Gulf met its burden of proof on North Escambia with the direct testimony of Witnesses Burroughs and McMillan. Witness Alexander's

testimony was not needed to backfill Gulf's direct case. Even OPC's Witness Schultz testified that studies of need are not appropriate in a base rate proceeding. Gulf has not offered them because there were holes in Gulf's direct case. Gulf offered them because Witness Schultz put their existence at issue by irresponsibly suggesting that studies had not been performed before expenditures were made. This required rebuttal. It is not supplemental direct. The issue before the Commission is not whether the studies were correct; they are unchallenged. The issue is whether Gulf performed studies. Both Witness Burroughs and Witness McMillan testified that such studies were performed. Witness Schultz raised doubts about those assertions, so Gulf rebutted Witness Schultz. If the Intervenor did not want to face the specific studies, then they should have stopped short of offering testimony that Gulf was engaged in "speculative overreaching." The Joint Movants' attempt to stop Gulf from defending itself from irresponsible Intervenor allegations would deny Gulf its due process right to defend itself.

Respectfully submitted this 28th day of November, 2011.

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically and via U.S. Mail this 28th day of November, 2011 to all counsel of record as indicated below:

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