

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power
Cost Recovery Clause with
Generating Performance Incentive
Factor

DOCKET NO. 150001-EI

FILED: October 19, 2015

**CITIZENS' NOTICE OF AMENDING THEIR PREHEARING STATEMENT TO OBJECT TO
JOHN J. REED'S QUALIFICATIONS TO TESTIFY AS AN EXPERT WITNESS ON THE
SUBJECT MATTER OF HIS REBUTTAL TESTIMONY AND CITIZENS' MOTION TO STRIKE
HIS REBUTTAL TESTIMONY**

The Citizens of the State of Florida (Citizens) hereby file their Notice of Amending Their Prehearing Statement to Object to John J. Reed's Qualifications to Testify as an Expert Witness on the Subject Matter of His Rebuttal Testimony and their Motion to Strike the Testimony of John J. Reed, and as grounds therefore state the following:

1. On October 9, 2015, Florida Power and Light (FPL) filed the Rebuttal Testimony of John J. Reed in this docket related to the extended outage at the St. Lucie 2 Nuclear Unit that occurred in April 2014. Mr. Reed did not file direct testimony in this docket. Mr. Reed stated his testimony addresses “. . . the appropriate standard to be applied to the issue of the recoverability of those costs, and how FPL's actions compare against that standard.” (Reed Rebuttal Testimony at p. 1) According to the Resume attached to Mr. Reed's Rebuttal testimony, Mr. Reed is a financial and economic consultant with more than 35 years of experience in the energy industry. (Reed Resume at p. 1)

A. Notice to Amend Prehearing Statement

2. Citizens hereby give notice of amending our prehearing statement to object to Mr. Reed's qualifications to testify as an expert witness on the subject matter of his rebuttal testimony in the areas of law and nuclear power plant operations. Pursuant to the Order Establishing Procedure (OEP), Order No. PSC-15-0096-PCO-EI, issued February 10, 2015, the parties have until the prehearing to take positions on the issues. Furthermore, since the OEP scheduled the Rebuttal testimony to be filed the same day that prehearing statements were due and FPL filed the Reed testimony approximately one hour after Citizens' Prehearing Statement was filed, Citizens were unable to determine if they had any objections to the qualifications of the rebuttal witnesses until after the initial prehearing statements were filed. Given the impossibility of objecting to unseen testimony, Citizens have good cause to amend their prehearing statement to reflect their objection by the date of the prehearing conference. In addition, the OEP permits the filing of Motions to Strike Prefiled Testimony and Exhibits by the Prehearing Conference.

B. Motion to Strike Reed's Rebuttal Testimony

3. Mr. Reed has been offered by FPL as an expert in rebuttal to OPC's expert Witness Dr. William Jacobs, who is tendered as an expert in the areas of evaluation of nuclear power plant refueling outages and nuclear power plant refueling standards and practices. Dr. Jacobs has a Ph.D. in Nuclear Engineering from the Georgia Institute of Technology that he obtained in 1971. Further, Dr. Jacobs has over 35 years of experience in the electric power industry, the majority related to nuclear power plants.

4. Mr. Reed lacks the expert qualifications to testify on the subject matter of his Rebuttal testimony. Mr. Reed stated that his testimony addresses ". . . the appropriate standard to be applied to the issue of the recoverability of those costs, and how FPL's actions compare against that standard."

(Reed Rebuttal Testimony at p. 1) While OPC advocates disallowance of the \$8 million in replacement costs based on FPL's actions or inactions during the refueling process at the St. Lucie 2 Unit, there are no economic or financial issues raised related to this refueling event. Thus, Mr. Reed's testimony on the appropriateness of FPL's contractual management of Westinghouse (the subcontractor on the refueling project) is irrelevant to the issue in controversy: to-wit, whether FPL's actions related to the extended outage of the St. Lucie 2 nuclear plant were reasonable and who should pay for replacement power.

5. First, it must be determined whether a person has expertise in the area for which his testimony is being offered. Section 90.702, Florida Statutes, Testimony by experts, provides that a witness is "... qualified as an expert by knowledge, skill, experience, training, or education." As the Florida Supreme Court stated in *Jordan v. State*, 694 So.2d 708, 715 (1997), "[a] witness ***may not testify*** to matters that fall ***outside*** her ***area of expertise***. While a trial court has broad discretion in admitting expert testimony, such discretion is not boundless." (Emphasis added, citation omitted) The *Jordan* Court further noted that "[s]imply reading large amounts of scientific literature, all of which falls well outside a person's area of educational expertise, cannot serve to create an expert out of a non-expert." *Id.* at 716. Similarly herein, Mr. Reed's mere participation in numerous regulatory proceedings as a financial or economic expert in utility matters cannot transform him into an expert in a legal capacity or with respect to nuclear power plant refueling standards and practices which are clearly outside his area of expertise. In addition, in FPL's Notice of Witnesses' Subject Matter Expertise, filed October 14, 2015, FPL states that Mr. Reed is qualified as an expert through his knowledge, skill, education, training and experience; however, FPL fails to identify how his financial and economic expertise qualify him to testify on legal standards and nuclear refueling procedures.

6. The first thrust of Mr. Reed's testimony relates to the "appropriate standard to be applied to the issue . . ." Upon review of Mr. Reed's testimony, it becomes clear that he is attempting to

testify to the appropriate **legal standard** for prudence. Further, he attempts to interpret and apply the **legal concept** of strict liability. Section 90.702, Florida Statutes, Testimony by experts, allows testimony in the form of an opinion or otherwise **if** a witness is qualified as an expert by knowledge, skill, experience, training, or education. However, Mr. Reed's resume is completely devoid of any legal education, admissions to practice law, or specific training in the law.

7. As a lay person in legal matters, under the Florida Evidence Code, Mr. Reed's opinion testimony is limited. Section 90.701, Florida Statutes, Opinion testimony of lay witness, states that:

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

Although working in a specific areas may make a lay person familiar with the law, it does not make the person an expert in the legal interpretation of that law and how legal standards should be applied. In the instant case, Mr. Reed has no specialized knowledge, skill, experience, or training in law. Despite the fact he purports to give expert testimony regarding the "legal standard of prudence" that should be applied, he is unqualified to give this type of expert opinion.

8. Secondly, Mr. Reed also purports to testify regarding ". . . how FPL's actions compare against that standard." Mr. Reed's resume indicates that his area of expertise is related to the financial and economic matters as applied to the electric industry. However, in his rebuttal he is attempting to testify about FPL's actions as they related to the nuclear refueling outage. Mr. Reed's resume contains no qualifications related to nuclear power plant operations or refueling standards and practices. He has no nuclear engineering education. He has no experience, skills, or training in operating a nuclear power plant or management of a nuclear power plant refueling operation. Thus,

he is unqualified to offer an expert opinion regarding the appropriateness of FPL's actions related to the St. Lucie 2 extended outage.

9. Second, if a witness is not testifying as an expert, then that witness must demonstrate that he or she has personal knowledge of the subject matter on which he is testifying. Section 90.604, Florida Statutes, Lack of personal knowledge, states that “[e]xcept as otherwise provided in s. 90.702, a witness may not testify to a matter unless evidence is introduced which is sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may be given by the witness’s own testimony.” Mr. Reed in his Rebuttal Testimony does not state that he has any independent, personal knowledge of the events related to the St. Lucie 2 extended outage. All information contained in his testimony is based on hearsay. While expert witnesses are granted more latitude to offer opinion testimony based on information that would otherwise be hearsay, fact witnesses are limited to information within their own personal knowledge. As an expert witness, Section 90.704, Florida Statutes, Basis of opinion testimony by experts, provides that “[t]he facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.” The 3rd District Court of Appeal noted in *Flores v. Miami-Dade County*, 787 So. 2d 955, 959 (Fla. 3rd DCA 2001), that “[e]xperts may rely upon hearsay in forming their opinions if that kind of hearsay is relied upon during the practice of the experts themselves when not in court.” If the witness is not an expert in that subject matter area, they cannot give an expert opinion and cannot rely upon hearsay information. Nor can the witness’ “expertise” in a non-related subject matter area be used to bootstrap in hearsay information through an otherwise lay witness. As such, Mr. Reed’s testimony should also be excluded to the extent it is offered as an expert opinion that relies upon hearsay and contains information beyond his own personal knowledge.

10. Since (1) Mr. Reed is not an expert in the two areas that are the subject matter of his testimony (law and nuclear power plant refueling operations), and (2) he has no personal knowledge of events that transpired with respect to the St Lucie 2 refueling outage, Mr. Reed's Rebuttal Testimony must be stricken. Further, Mr. Reed's Rebuttal testimony is unnecessary to resolve the issue in controversy. No testimony is required for parties to make legal arguments regarding the appropriate legal standard for the Commission to apply in this docket. Further, FPL filed Rebuttal testimony by Mr. Terry Jones, a former FPL employee who worked in its nuclear operations. His testimony addresses the issue of the reasonableness of FPL's actions during the refueling outage. Thus, striking Mr. Reed's testimony for all the reasons stated in this motion is appropriate.

WHEREFORE, Citizens request that (A) OPC's Prehearing Statement be amended to object to Mr. Reed's qualifications to testify as an expert witness on the subject matter of his rebuttal testimony in the areas of law and nuclear power plant operations, and (B) Mr. Reed's Rebuttal testimony be stricken in whole.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 19th day of October, 2015, to the following:

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