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March 9, 2017

Ms. Carlotta Stauffer, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee FL 32399-0850

RE: Docket No. 160186-EI

Dear Ms. Stauffer:

Attached is Gulf Power Company's Response in Opposition to the Office of Public Counsel's Motion to Strike a portion of the rebuttal testimony of Gulf Witness Jeffrey A. Burleson in the above-referenced docket.

Sincerely,

A handwritten signature in blue ink that reads "Robert L. McGee, Jr." with a stylized flourish at the end.

Robert L. McGee, Jr.
Regulatory and Pricing Manager

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Attachments

cc: Beggs & Lane
Jeffrey A. Stone, Esq.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Gulf Power Company.)	Docket No.	160186-EI
)		
)		
In re: Petition for approval of 2016 depreciation and dismantlement studies, approval of proposed depreciation rates and annual dismantlement accruals and Plant Smith Units 1 and 2 regulatory asset amortization, by Gulf Power Company.)	Docket No.	160170-EI
)	Date Filed:	March 9, 2017
)		
)		

**GULF POWER COMPANY’S RESPONSE IN OPPOSITION
TO OPC’S MOTION TO STRIKE A PORTION OF
REBUTTAL TESTIMONY FILED BY JEFFREY A. BURLESON**

Gulf Power Company (Gulf), by and through its undersigned attorneys, and pursuant to Rule 28-106.204, Florida Administrative Code files this response in opposition to the Office of Public Counsel’s (OPC) motion to strike portions of the testimony of Gulf rebuttal witness Jeffrey A. Burleson. As grounds for its opposition, Gulf states:

Untimely Filing

1. OPC’s motion to strike was untimely filed. The Order Establishing Procedure in this docket (Order No. PSC-16-0473-PCO-EI) requires that: “Motions to strike any portion of the prefiled testimony and related portions of exhibits of any witness shall be made in writing *no later than the Prehearing Conference.*” (Page 8, emphasis added)

2. Pursuant to notice, the Prehearing Conference commenced at approximately 1:40 p.m. on Monday, March 6. As OPC’s counsel, Mr. Rehwinkle, candidly stated during that proceeding, OPC’s motion was filed during, not prior to, the conference.

3. OPC’s motion fails to state good cause for the untimely filing. The motion only

indicates that between the afternoon of February 28 and the morning of March 5, a period of over five days, OPC was apparently pursuing a different strategy – filing supplemental testimony rather than moving to strike – with its expert witness. This does not constitute good cause for the late filing.

Proper Rebuttal

4. OPC's motion claims that the contested portion of Mr. Burleson's testimony is an improper attempt to bolster Gulf's direct case through rebuttal. The thrust of OPC's objection appears to be that because the raw data necessary to perform the study was available earlier, the portion of Mr. Burleson's testimony and exhibit in question *could have been* included in his direct testimony and that therefore it *cannot be* included in his rebuttal. This is incorrect. OPC ignores the fact that Mr. Burleson's testimony directly responds to claims by OPC Witness Dauphinais and Sierra Club Witness Mosenthal and is therefore proper rebuttal under the standards applied by the Commission and the courts. OPC also fails to recognize that almost any rebuttal testimony is based on raw data that was available prior to the filing of the case – but that the data was simply not relevant until it was needed to respond to an issue raised in intervenor testimony. In this regard, OPC's current position is very similar to a motion to strike filed by OPC and others in Gulf's 2012 test year rate case that sought to strike rebuttal testimony regarding a study that existed before the filing of direct testimony. The Commission denied that motion to strike in Gulf's prior rate case, ruling that the earlier existence of the study did not preclude its introduction as rebuttal so long as it properly responded to matters raised in the intervenors' testimony. (Order No. PSC-11-0563-PCO-EI issued December 8, 2011 in Docket No. 110138-EI, In re: Petition for increase in rates by Gulf Power Company.) In the current case, the study or analysis discussed in the contested testimony did not even exist at the time the direct

testimony was filed.

5. The Commission has previously adopted the definition of rebuttal testimony described by the federal courts in United States vs. Delk, 586 F. 2d 513, 516 (5th Cir. 1978) quoting Luttrell v. United States, 320 F. 2d 462, 464 (5th Cir. 1963):

It is well settled that the purpose of rebuttal testimony is “to explain, repel, counteract or disprove the evidence of the adverse party” and if the defendant opens the door to the line of testimony, he cannot successfully object to the prosecution “accepting the challenge and attempting to rebut the presumption asserted.”

See Order No. PSC-10-0426-PCO-WS issued July 2, 2010 in Docket No. 090478-WS, In re: Application for original certificates by Skyland Utilities, Inc. at pages 2-3 and Order No. PSC-04-0928-PCO-EI issued September 22, 2004 in Docket No. 030623-EI, In re: Complaints by Ocean Properties against Florida Power & Light Company, at pages 2-3.

6. Section 120.57(1)(b) gives Gulf the right to submit rebuttal evidence.

Furthermore, the Commission has relied on Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-441 (Fla. 3rd DCA 1997) in recognizing it would be an abuse of discretion for the Commission to disallow proper rebuttal:

A trial court has broad discretion to admit rebuttal testimony. See Dale v. Ford Motor Co., 409 So. 2d 232 (1st DCA 1982). However, a trial court abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense. See Young-Chin v. City of Homestead, 597 So. 2d 879 (3rd DCA 1992).

See Order No. PSC-10-0426-PCO-WS issued July 2, 2010 in Docket No. 090478-WS, In re: Application for original certificates by Skyland Utilities, Inc. at page 3.

7. The bulk of the rebuttal testimony at issue presents the results of an economic analysis of the incremental cost of continuing to own and operate Scherer Unit 3 as an asset serving retail customers versus the incremental cost of constructing and operating replacement

capacity.¹ This testimony and analysis was unnecessary in Gulf's direct case, since the underlying findings of need, cost-effectiveness, and prudence for Scherer 3 were made by the Commission before Gulf acquired its interest in that unit over 30 years ago.

8. There simply was – and is – no need for a current economic analysis of any type *but for* the erroneous claims in the testimony of intervenor witnesses Dauphinais and Mosenthal that Scherer 3 must be subjected to the same type of cost-effectiveness analysis that is required when a utility seeks a need determination for new generating assets. (See Dauphinais Direct at 24-28; Mosenthal Direct at 21-23, 32-33) The rebuttal testimony directly “explains” why the type of analysis advocated by these witnesses is inappropriate and unnecessary. The rebuttal also “counteracts” their testimony by describing and providing the only type of economic analysis that could be appropriate for evaluating the economic impact of including a preexisting unit like Scherer 3 in retail rates. In summary, the challenged testimony properly responds to and rebuts the intervenor witnesses’ claim that the Commission should exclude Scherer 3 from retail without an economic analysis that treats Scherer 3 as if it were a new generating unit. The contested portion of Mr. Burleson’s testimony also presents facts to “disprove” Mr. Mosenthal’s claim that Scherer 3 is not currently used and useful for Gulf’s retail customers. As a result, the contested portion of Mr. Burleson’s testimony is clearly proper rebuttal and should be allowed.

9. OPC’s assertion that it is unduly prejudiced by Mr. Burleson’s rebuttal testimony and exhibit is likewise without merit. Even assuming there could ever be prejudice from proper rebuttal, OPC has had ample opportunity to protect its rights for several reasons. For example, OPC had the opportunity to propound written discovery directed to Mr. Burleson’s rebuttal testimony and in fact did so. (See OPC POD 141) In addition, OPC participated in a deposition

¹ This analysis was performed in January, 2017, in response to Commission Staff Interrogatory No. 376 requesting such a study.

of Mr. Burleson that lasted over eight hours. According to its motion, OPC considered and rejected the option of seeking to file supplemental responsive testimony. (Motion, page 2) Finally, OPC has the right to cross-examine Mr. Burleson at hearing. There simply is no basis for a finding of prejudice.

WHEREFORE, for the reasons stated above, OPC's motion to strike must be denied.

RESPECTFULLY SUBMITTED this 9th day of March, 2017.



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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Petition for Increase in Rates)
By Gulf Power Company)
)

Docket No.: 160186-EI

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by electronic mail this 9th day of March, 2017 to the following:

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