

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase 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  
ORDER NO. PSC-17-0096-PCO-EI  
ISSUED: March 14, 2017

ORDER DENYING THE OFFICE OF PUBLIC COUNSEL'S MOTION TO STRIKE  
A PORTION OF REBUTTAL TESTIMONY FILED BY JEFFREY A. BURLERSON

On August 12, 2016, Gulf Power Company (Gulf) filed a test year letter, as required by Rule 25-6.140, F.A.C., notifying this Commission of its intent to file a petition between October 11 and October 28, 2016, for an increase in rates effective 2017. Pursuant to the provisions of Chapter 366, Florida Statutes (F.S.), and Rules 25-6.0425 and 25-6.043, F.A.C., Gulf filed its Minimum Filing Requirements and testimony on October 12, 2016. On November 9, 2016, Docket No. 160170-EI (2016 Depreciation and Dismantlement Studies) was consolidated into the rate case docket, Docket No. 160186-EI.<sup>1</sup> The Office of Public Counsel (OPC), Federal Executive Agencies, Southern Alliance for Clean Energy, Florida Industrial Power Users Group, League of Women Voters of Florida, Wal-Mart Stores East, LP and Sam's East, Inc., and Sierra Club are parties to this proceeding.<sup>2</sup>

On October 12, 2016, Gulf filed the direct testimony of its witnesses, which included Witness Burlerson. On October 20, 2016, Order No. PSC-16-0473-PCO-EI (Order Establishing Procedure), was issued, setting out the controlling dates and scheduling this matter for an administrative hearing on March 20–24, 2017. On January 13, 2017, the Intervenor, including OPC, and Commission staff filed direct testimony. On February 8, 2017, Gulf filed rebuttal testimony on behalf of its witnesses, which included Witness Burlerson.

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<sup>1</sup> Order No. PSC-16-0511-PCO-EI, issued on November 9, 2016, in Docket No. 160186-EI, In re: Petition for rate increase by Gulf Power Company; and Docket No. 160170-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.

<sup>2</sup> "Order Acknowledging Intervention," Order No. PSC-16-0466-PCO-EI, issued on October 14, 2016; and "Orders Granting Intervention," Order No. PSC-16-0546-PCO-EI, issued on December 2, 2016; Order No. PSC-16-0550-PCO-EI, issued on December 8, 2016; Order No. PSC-16-0568-EI, issued on December 19, 2016; Order No. PSC-16-0585-PCO-EI, issued on December 30, 2016, Order No. PSC-17-0013-PCO-EI, issued on January 4, 2017, and Order No. PSC-17-0035-PCO-EI, issued on January 26, 2017, in Docket Nos. 160186-EI and 160170-EI.

The Order Establishing Procedure provides that motions to strike prefiled testimony and exhibits of a witness “shall be made in writing no later than the Prehearing Conference.” At the Prehearing Conference held on March 6, 2017, OPC informed the Prehearing Officer and the Parties of its intent to file a Motion to Strike a Portion of the Rebuttal Testimony of Gulf Witness Jeffery A. Burleson. OPC’s motion was filed with the Commission Clerk during the course of the Prehearing Conference. On March 10, 2017, Gulf filed a Response in Opposition. Neither OPC, nor Gulf requested oral argument on the motion.

### OPC’s Motion to Strike<sup>3</sup>

In its motion, OPC seeks to strike or exclude from inclusion in the record page 14, line 7, through page 20, line 14, and Exhibit JAB-3 Schedule 2 (Excerpt from response to Staff ROG 376 – comparative analysis between Scherer 3 and replacement CT), of Gulf Witness Burleson’s Rebuttal Testimony. OPC asserts the information contained in the contested portion of Witness Burleson’s rebuttal testimony and related exhibit are not “newly discovery facts” that were unknown at the time Gulf filed its direct testimony. Rather, OPC contends that the contested portion of Witness Burleson’s rebuttal testimony is “actually testimony that could have and should have been addressed” in Witness Burleson’s direct testimony. OPC argues the contested portion of testimony is an attempt by Gulf “to bolster its direct case on rebuttal,” which is an evasion of the Commission’s procedures and the parties’ due process rights, and unduly prejudicial to OPC. For those reasons, OPC requests that the identified portion of Witness Burleson’s Rebuttal Testimony and related exhibit be stricken.

### Gulfs Response in Opposition<sup>4</sup>

In its response to OPC’s motion, Gulf argues that OPC’s motion is untimely and that the contested portion of Witnesses Burleson’s rebuttal testimony is proper. Gulf contends that, because OPC’s motion was filed during the course of the Prehearing Conference and not prior to the conference, the motion is untimely. In addition, Gulf argues that the portions of Witness Burleson’s rebuttal testimony that OPC seeks to exclude directly responds to claims made in the testimonies of OPC Witness Dauphinais and Sierra Club Witness Mosenthal and is proper rebuttal under the standards applied by this Commission and the courts. Furthermore, Gulf argues that the existence of an analysis or study prior to the filing of direct testimony does not preclude the introduction of the analysis in rebuttal testimony, “so long as it properly responds to matters raised in intervenors’ testimony.”<sup>5</sup> In this case, however, Gulf asserts that the contested testimony and analysis did not exist at the time Witness Burleson’s direct testimony was filed because the underlying findings of the testimony subject matter (i.e., findings of need, cost-effectiveness, and prudence of Scherer Unit 3) were determined by the Commission 30 years ago. Rather, Gulf states “the analysis was performed in January 2017,” in response to a

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<sup>3</sup> Document No. 03141-17.

<sup>4</sup> Document No. 03472-17.

<sup>5</sup> Citing, 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.

discovery request propounded by Commission staff.<sup>6</sup> Finally, Gulf argues that OPC's prejudice argument is without merit. Gulf asserts that no due process rights are violated by the proper rebuttal testimony of Witness Burleson. Gulf asserts that OPC had ample opportunity to challenge the contested testimony when it propounded discovery on the rebuttal testimony and deposed Witness Burleson on the testimony.

### Ruling

Pursuant to Rule 28-106.211, F.A.C., as Prehearing Officer in this proceeding, I am tasked with the duty of issuing rulings on prehearing motions. I have carefully considered OPC's motion and Gulf's response, and reviewed the rebuttal testimony and exhibits of Gulf Witness Jeffrey A. Burleson, and my findings are set forth below.

Pursuant to Section 120.57 (1)(b), Florida Statutes, Gulf has the right to submit rebuttal testimony and evidence in this proceeding. The definition of rebuttal testimony as described by the courts, and adopted by this Commission, provides that:

[T]he 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.'

United States v. Delk, 586 F.2d 513, 516 (5th Cir. 1978), quoting, Luttrell v. United States, 320 F.2d 462, 464 (5th Cir. 1963); 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; Order No. PSC-10-0426-PCO-WS, issued July 2, 2010, in Docket No. 090478-WS, In Re: Application for original certificates for proposed water and wastewater systems, in Hernando and Pasco Counties, and request for initial rates and charges, by Skyland Utilities, L.L.C.; and Order No. PSC-04-0928-PCO-EI, issued September 22, 2004, in Docket No. 030623-EI, In Re: Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error. In addition, while "a trial court has broad discretion to admit rebuttal testimony," the court "abuses that discretion when it limits non-cumulative rebuttal that goes to the heart of the principal defense." Mendez v. Caddell Construction Co., 700 So. 2d 439, 440-41 (3rd DCA 1997) (internal citations omitted).

Upon review of the pleadings filed by OPC and Gulf, and the rebuttal testimony and related exhibits of Gulf Witness Burleson, I find that the contested portion of the rebuttal testimony and related exhibit fit within the definition of rebuttal testimony applied by the Commission. The contested portion of Witness Burleson's rebuttal testimony and related exhibit present a comparative economic analysis of the incremental cost of continuing to own and operate Scherer Unit 3 as an asset serving retail customers versus the incremental costs of

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<sup>6</sup> Gulf Response to Staff Interrogatory No. 376. (Staff's Eleventh Set of Interrogatories to Gulf Power Company (Nos. 361-381), served on December 23, 2016; Gulf Responses to Staff's Eleventh Set of Interrogatories (Nos. 361-381), served on January 23, 2017.)


constructing and operating replacement capacity. The rebuttal testimony and related exhibit were offered to directly rebut assertions made by OPC Witness Dauphinais and Sierra Club Witness Mosenthal in their respective testimonies. Therefore, I find that the contested portion of Gulf Witness Burleson's rebuttal testimony and related exhibit do not constitute improper rebuttal.

As to OPC's argument of prejudice, I note that the public policy of this state favors traditional due process rights in rate hearings. Citizens of Florida v. May, 333 So. 2d 1, 6 (Fla. 1976). When a regulatory commission considers factual matters affecting the fairness of utility rates, the principles of fair play and due process require that parties to a rate proceeding be afforded a fair hearing, which includes an opportunity to explain or rebut those matters. Florida Gas Company v. Hawkins, 372 So. 2d 1118 (Fla. 1979); Order No. PSC-11-0563-PCO-EI. The OPC propounded discovery on both Witness Burleson's direct and rebuttal testimonies and deposed the witness. In addition, OPC will have the opportunity to conduct cross-examination of the witness at the hearing in this proceeding. Therefore, I find no prejudice to OPC or the parties by allowing the contested portion of Witness Burleson's rebuttal testimony and related exhibit.

Based on the foregoing, it is

ORDERED by Prehearing Officer Commissioner Jimmy Patronis that the Office of Public Counsel's Motion to Strike a Portion of the Rebuttal Testimony of Jeffrey A. Burleson, filed on behalf Gulf Power Company is denied for the reasons described herein.

By ORDER of Commissioner Jimmy Patronis, as Prehearing Officer, this 14th day of March, 2017.

  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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.