

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for determination of need for
Dania Beach Clean Energy Center Unit
7, by Florida Power & Light Company

Docket No. 20170225-EI

Dated: Jan. 10, 2018

SIERRA CLUB'S MOTION TO STRIKE
THE REBUTTAL TESTIMONY OF WITNESS HECTOR J. SANCHEZ

As authorized by Florida Rule 28-106.204, Florida Administrative Code and the Order Establishing Procedure, Order No. PSC-2017-0426-PCO-EI (OEP), Sierra Club moves to strike the rebuttal testimony of Florida Power & Light Company (FPL) witness Hector J. Sanchez. As discussed further below, Mr. Sanchez's rebuttal testimony should be stricken because, through it, for the first time on rebuttal, FPL seeks to insert novel reliability criteria into this proceeding. Never before has the Florida Public Service Commission recognized these criteria. Nor is this the proper stage of the proceeding or even the proper forum to raise new reliability criteria. Order No. PSC-03-0175-FOF-EI, *In re Petition To Determine Need for Hines Unit 3 in Polk County by Florida Power Corp.* 4-5 (Feb. 4, 2003) ("The proper forum to address what minimum reserves are necessary should be a generic docket, as was previously done, and not in a particular utility's power plant need determination docket.").

If FPL did rely on new reliability criteria to develop its pending need determination petition, then FPL should have disclosed that in its direct case. FPL cannot cure such a material omission in rebuttal. See Order No. PSC-17-0147-PCO-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida* 4-5 (May 2, 2017); see also *Driscoll v. Morris*, 114 So. 2d 314, 315 (3d DCA 1959).

Similarly, Mr. Sanchez's testimony should be stricken because it is not proper rebuttal evidence: the testimony does not respond to the expert testimony proffered by Sierra Club, the only party besides FPL to proffer pre-filed testimony in this proceeding. *See* Order No. PSC-17-0096-PCO-EI, *In re: Petition for rate increase by Gulf Power Company* 3 (Mar. 14, 2017) (quoting *United States v. Delk*, 586 F.2d 513, 516 (5th Cir. 1978)) ("The purpose of rebuttal testimony is 'to explain, repel, counteract, or disprove the evidence of the adverse party'").

Yet another reason to strike Mr. Sanchez's testimony is that, in response to extensive discovery on the reliability criteria that FPL relied upon in its direct case, FPL failed to disclose the new criteria postulated in Mr. Sanchez's testimony. This omission exacerbated the omission from FPL's direct case, effectively precluding Sierra Club and the other parties from presenting contrary evidence or otherwise checking the reliability of the information that FPL now claims, on rebuttal, it has relied on all along. Admitting Mr. Sanchez's testimony therefore would violate the established procedures for this proceeding, *see* OEP at 3 ("Discovery shall be conducted in accordance with the provisions of Chapter 120, Florida Statutes (F.S.), and the relevant provisions of Chapter 366, F.S., Rules 25-22, 25-40, and 28-106, F.A.C., and the Florida Rules of Civil Procedure (as applicable)"), and subvert the evidentiary safeguards to develop a robust record to inform agency decision-making, *see Harriman v. Hancock Cnty.*, 627 F.3d 22, 30 (1st Cir. 2010) (upholding decision to preclude evidence because a delay in producing the evidence was exacerbated by the party's lack of justification, prejudice to other parties, and the party's history of behavior in the litigation).

I. Legal Standard

Rebuttal testimony is permitted to refute a theory from an adverse party. *See Cozzie v. State*, 225 So. 3d 717, 728 (Fla. 2017) (citation omitted). However, adverse testimony does not

open the door to “[rebuttal] testimony which should have properly been submitted by the [party] in his case-in-chief.” *Driscoll v. Morris*, 114 So. 2d 314, 315 (Fla. 3d DCA 1959). The Commission recognizes that while some new information may come in through rebuttal, such as updated cost data, it is inappropriate in rebuttal for a utility “to fundamentally change [its] . . . case” to “correct[] what appear to be material errors in the utility’s initial filing.” Order No. PSC-17-0147-PCO-WS, *In re: Application for increase in water and wastewater rates in Charlotte, Highlands, Lake, Lee, Marion, Orange, Pasco, Pinellas, Polk, and Seminole Counties by Utilities, Inc. of Florida* 4-5 (May 2, 2017); *see also* Order No. PSC-00-0087-PCO-WS, *In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County* 4-5 (Jan. 10, 2000) (granting a motion to strike rebuttal testimony because it was not raised in any party’s direct testimony, but was an impermissible late expansion of the principal party’s case-in-chief).

II. Mr. Sanchez’s Testimony Is an Untimely Attempt to Fundamentally Change FPL’s Case and Assert Novel Reliability Criteria in Rebuttal.

In its direct case, FPL referred to just two reliability criteria in support of its request for an affirmative need determination for the Dania Beach Clean Energy Center Unit 7 (DBEC) in June 2022. These two reliability criteria are (i) system-wide reserve margins and (ii) load-generation balance in Southeast Florida. *See, e.g.*, FPL Petition, *In re: Florida Power & Light Company’s Petition for Determination of Need for Dania Beach Clean Energy Center Unit No. 7*, in Docket No. 20170225-EI, Document No. 09001-2017 at 2, 4, 10-11 (Oct. 20, 2017) (hereinafter “Petition”); Direct Testimony of Dr. Steven R. Sim (hereinafter “Sim Direct”), pages 8-9, 11. Dr. Sim’s direct testimony further specified two types of system-wide reserve margins, a 20% margin and a 10% margin for generation-only resources. *See* “2017 Projection of FPL’s Resource Needs Utilizing FPL’s Two Reserve Margin Criteria,” Sim Direct, Exhibit SRS-2.

Contrary to the legal limits on rebuttal, Mr. Sanchez's testimony introduces entirely new reliability criteria that appear nowhere in FPL's direct case. For instance, Mr. Sanchez touts an ill-defined "robust area reliability margin," allegedly based on whatever "operational realities and risks" that Mr. Sanchez deems relevant.¹ *See* Rebuttal Testimony of Hector J. Sanchez (hereinafter "Sanchez Rebuttal"), page 8 at lines 10-14; page 5 at lines 18-19. This new criteria then becomes the basis for Mr. Sanchez's argument that 3,254 MW of reserve capacity is necessary in Southeast Florida, which translates to 30.2% more capacity than FPL's projected service obligation in the area. Sanchez Rebuttal, page 5 at lines 19-21; page 7 at line 1; page 8 at lines 10-14; page 13 at lines 14-16. But this contradicts Dr. Sim's direct testimony that a 20% margin is in fact what FPL used to develop its petition.

Moreover, to the best of Sierra Club's knowledge, the Commission has not recognized the 30.2% reliability margin for Southeast Florida introduced by Mr. Sanchez. Nor has the Commission condoned attempts to raise new reliability criteria in a particular utility's power plant need determination docket. FPL nonetheless asserts such criteria in Mr. Sanchez's testimony for the first time on rebuttal, impermissibly expanding FPL's case-in-chief. *See Driscoll v. Morris*, 114 So. 2d at 315. Therefore, Mr. Sanchez's testimony should be stricken.

III. Mr. Sanchez's Testimony Does Not Rebut Any Testimony of Sierra Club's Expert Witness.

Dr. Hausman has not testified in any way to the new reliability criteria advanced by Mr. Sanchez on rebuttal. Nor could Dr. Hausman have done so, when the criteria was unknown to any party in this proceeding except, apparently, FPL. Sierra Club's expert never even had an opportunity respond to Mr. Sanchez's criteria, because, prior to Mr. Sanchez introducing them

¹ Mr. Sanchez's testimony also considers a range of other factors, including the possibility of "[e]xtreme and unexpected situations such as wild fires and hurricanes," Sanchez Rebuttal, page 11 at line 14, and Mr. Sanchez's own experience, Sanchez Rebuttal, page 7 at line 20.

via his rebuttal testimony, they were mere mental impressions of his that were not previously reduced to writing according to FPL's discovery responses.

As such, Dr. Hausman necessarily limited his testimony to the reliability criteria FPL did disclose in its direct case. *See, e.g.*, Direct Testimony of Ezra Hausman, page 6 at line 24 to page 7 at line 3 (arranging reliability analysis around "two future reliability needs" that "FPL identified"). In fact, Dr. Hausman testified to his bewilderment at FPL's insistence on a four-year period, even though that period is not required by the reliability criteria that FPL presented in its direct case. *See, e.g.* Direct Testimony of Ezra Hausman, page 22 at line 19-20 ("there is no apparent reason why four years is any kind of 'magic number'"). In addition, as discussed below, FPL was not forthcoming in response to discovery requests, further constraining Sierra Club's analysis to Dr. Sim's direct testimony. Mr. Sanchez's testimony should therefore be stricken: it is not rebuttal but ambush, an untimely attempt to change FPL's direct case and introduce novel reliability criteria that intervenors and Commission Staff neither raised nor had an opportunity to consider.

There is no merit to Mr. Sanchez's assertions that his testimony rebuts the testimony of Sierra Club's expert witness, Dr. Hausman. Sanchez Rebuttal, page 4 at line 20 to page 5 at line 3. In particular, Mr. Sanchez's testimony attempts to cure the flaw, highlighted by Dr. Hausman's testimony, that FPL had no apparent justification for designing Plans 4 and 5 to only allow a four-year window between retiring the existing Lauderdale units and bringing DBEC into service. *See Sim Direct*, page 37 at lines 1-3. However, that cure goes far beyond any criticism offered by Sierra Club's expert witness, and far beyond Dr. Sim's direct case, to assert new reliability criteria. To be sure, these criteria work a fundamental change to FPL's case, because the many pages of testimony where FPL's rebuttal witnesses, Mr. Sanchez and Dr. Sim,

repeatedly assert how critical these criteria are to FPL's case, are also bereft of any citations to FPL's direct case. *See, e.g.*, Sim Rebuttal, page 13 at lines 19-22 (asserting without any citations to FPL's direct case that "system operator experience and guidance should never be ignored when planning a utility system."). Therefore, Mr. Sanchez's testimony should be stricken.

IV. Mr. Sanchez's Testimony Constitutes Trial by Ambush Because FPL Failed to Identify the Guidance and Associated Criteria in Discovery.

When determining whether a late disclosure warrants preclusion, courts have considered the following aggravating factors: a lack of justification for the late disclosure, the impact on the court's docket, and the difficulty for other parties of overcoming the adverse effects. *See Harriman v. Hancock Cnty.*, 627 F.3d 22, 30 (1st Cir. 2010). As applied here, the *Harriman* factors reinforce that Mr. Sanchez's testimony should be stricken. First, FPL has provided no justification for the late production of this testimony which, as discussed above, introduce reliability criteria that are neither recognized by the Commission² nor even mentioned by FPL in its direct case.

Second, FPL's behavior in discovery concealed from Sierra Club for a crucial period in this fast-moving docket the purported guidance from Mr. Sanchez. Apart from completely omitting discussion of new reliability criteria from its direct case, FPL failed to inform Sierra Club, Commission Staff, and other parties of the guidance in response to discovery requests directly addressed to the issue. For example, Sierra Club's interrogatory No. 19 stated "[i]f you contend the Project is needed by the time set forth in the Petition (June 2022), identify all facts, assumptions, and documents that support this contention." FPL's November 22, 2017, response makes no mention of the operator guidance or any criteria utilized by Mr. Sanchez. Instead, FPL

² *See* Order Establishing Issues for Hearing, Order No. PSC-2017-0447-PCO-EI, *In re: Petition for determination of need for Dania Beach Clean Energy Center Unit 7, by Florida Power & Light Company* 1 (Nov. 17, 2017).

summarized its petition. In another example, Sierra Club asked FPL for “any and all documents which you relied on, or considered, in developing the assumption, stated in Sim Testimony at 37, that “the retirement of Lauderdale Units 4 & 5 was also assumed to be delayed by either one year or two years, respectively, to maintain the same roughly 4-year period in which a major Southeastern Florida generation component would be missing as is assumed in Plan 2.” FPL’s response on November 22, 2017, to that request referenced a set of documents that are silent on any guidance from FPL’s system operators or the criteria touted by Mr. Sanchez.

The guidance from FPL’s system operators first came to the attention of the parties in this proceeding more than a month after FPL’s filing of its petition and direct case. In depositions of Dr. Sim, one of FPL’s expert witnesses in this case, on November 29, 2017, and December 4, 2017, the parties first became aware that operators’ “preference” formed an important part of FPL’s assumptions. Nowhere in that discussion, however, did Dr. Sim inform the parties of the “robust area reliability margin” or other criteria advanced by Mr. Sanchez. After those depositions, FPL neither corrected its direct case, nor did FPL supplement its discovery responses to Sierra Club.³ It was not until December 22, 2017, that FPL attempted to insert the criteria touted by Mr. Sanchez.

As such, because of FPL’s behavior during discovery, the testimony from Mr. Sanchez constitutes impermissible trial by ambush. *See, e.g., Spencer v. Beverly*, 307 So. 2d 461, 462 (Fla. 4th DCA 1975) (citation omitted) (“The discovery rules were enacted to eliminate surprise . . . and to assist in arriving at the truth.”). Therefore, Mr. Sanchez’s testimony should be stricken.

I.

II.

³ FPL was aware of its ability to supplement discovery responses. After 5 p.m. on December 7, 2017, less than one day before Sierra Club’s expert testimony was due to be filed, FPL provided a late supplemental response to Sierra Club’s document production requests.

V. There Is Good Cause to Consider Sierra Club's Motion

The Order Establishing Procedure provides that for good cause the Commission may accept a motion to strike that is filed after the prehearing conference, which occurred this morning. OEP at 7. The Commission has found good cause when delays were caused by other parties. *See, e.g.*, Order No. PSC-94-0535-PCO-EG, *In Re: Adoption of Numeric Conservation Goals and Consideration of National Energy Policy Act Standards (Section 111) by Florida Power and Light Company* 1 (May 9, 1994) (allowing intervenor to file late testimony because FPL did not make witness available). In addition, the Commission has found good cause for motions submitted later than the instant filing. *See, e.g.*, Order No. PSC-03-0786-PCO-TP, *In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier to carrier information* 2 (July 2, 2003) (allowing direct testimony to be submitted one day late); Order No. PSC-95-1386-FOF-WS, *In Re: Application for Transfer of Certificates Nos. 374-W and 323-S in Volusia County from Terra Mar Village (River Park) to Terra Mar Village Utilities, Inc.* 4-5 (Nov. 8, 1995) (finding good cause to consider motion filed three days late).

Sierra Club has good cause for filing this motion on the same day as the prehearing conference because FPL has abused the compressed schedule in this proceeding by hiding information. As discussed *supra*, it was not until December 22, 2017, that Sierra Club learned of the criteria advanced in Mr. Sanchez's testimony. Two federal holidays followed that filing, during which time Sierra Club had to wait for responses from FPL to discovery requests seeking to understand Mr. Sanchez's testimony. Sierra Club agreed to depose Mr. Sanchez on January 8, 2018, less than 48 hours before the prehearing conference, because that is when FPL wished to make Mr. Sanchez available.

Moreover, Sierra Club is still waiting for FPL to produce documents relevant to Mr. Sanchez's testimony, even though the deadline for discovery was January 8, 2018. In Sierra Club's subpoenas duces tecum of Mr. Sanchez and Dr. Sim, Sierra Club asked for workpapers supporting their conclusions and discovery responses in this docket. In particular, interrogatories from Commission Staff concerned a scenario in which DBEC is delayed until 2024 and the existing Lauderdale units are retired in 2018. These interrogatories, which include questions on transmission import capability and reserve margins, directly relate to the subject of Mr. Sanchez's testimony. Dr. Sim responded to those interrogatories, but did not bring workpapers. As confirmed by FPL's attorney in an email at 8:44 AM on January 10, 2018, the workpapers should have been produced to Sierra Club. As a result, Sierra Club continues to lack important documents—properly requested in discovery—that directly relate to, and are important to understanding, Mr. Sanchez's testimony.

Sierra Club's delay of seven hours is significantly shorter than other instances where the Commission has exercised its discretion to accommodate late-filed material. For example, in Order No. PSC-04-0743-PCO-EI, *In re: Consumer complaint against Florida Power & Light Company by Leticia Callard* 2, 5 (Aug. 3, 2004), the Commission accepted a late request filed five days late where the petitioner improperly filed by fax. *See also* Order No. PSC-03-0786-PCO-TP, *In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc. regarding BellSouth's alleged use of carrier to carrier information* 2 (July 2, 2003) (allowing direct testimony to be submitted one day late after a party discovered that its mailed copy would not arrive in time).

VI. Statement required by Rule 28-106.204(3), F.A.C.

Sierra Club has conferred with all parties of record. Its undersigned representative is authorized to represent that FPL opposes this motion and the Office of Public Counsel has no objection.

VII. Conclusion

WHEREFORE, Sierra Club respectfully requests the Commission to strike the rebuttal testimony of Hector Sanchez in its entirety.

Respectfully submitted this 10th day of January, 2018.

/s/ Michael Lenoff
Michael Lenoff
Legal Fellow
50 F Street, NW, Eighth Floor
Washington, DC 20001
202-650-6065
michael.lenoff@sierraclub.org

*Qualified Representative for Sierra
Club*

CERTIFICATE OF SERVICE

Docket No. 20170225-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on this 10th day of January, 2018, to the following:

Florida Power & Light Company
Kenneth A. Hoffman
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301
ken.hoffman@fpl.com

William P. Cox
Florida Power & Light Company
700 Universe Boulevard
Juno Beach FL 33408
will.p.cox@fpl.com

Michael Marcil
Gunster Law Firm
450 E. Las Olas Blvd.
Fort Lauderdale FL 33301
MMarcil@gunster.com

Charles Murphy, Esq.
Stephanie Cuello, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
cmurphy@psc.state.fl.us
scuello@psc.state.fl.us

Patricia Christensen, Esq.
Office of Public Counsel
The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
christensen.patty@leg.state.fl.us

/s/ Michael Lenoff
Michael Lenoff
Legal Fellow
50 F Street, NW, Eighth Floor
Washington, DC 20001
202-650-6065
michael.lenoff@sierraclub.org

*Qualified Representative for Sierra
Club*