

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Re: Evaluation of storm restoration costs for
Florida Power & Light Company related to
Hurricane Irma.

DOCKET NO. 20180049-EI

FILED: May 20, 2019

OPC's Motion to Strike Portions of Rebuttal Testimony of FPL Witness Ronald R. Reagan

The Citizens of the State of Florida ("Citizens"), by and through the Office of Public Counsel ("OPC"), pursuant to the Order Establishing Procedure in this docket (Order No. PSC-2018-0290-PCO-EI, as amended by Order No. PSC-2018-0539-PCO-EI) and Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby move to strike portions of Florida Power and Light Co.'s ("FPL" or the "Utility") rebuttal testimony, because the portions of testimony, whether presented as fact witness or expert witness testimony, do not meet the legal requirements for competent, substantial evidence. Additionally, portions of the subject rebuttal testimony fail to meet the admissibility standard for expert testimony.

In support of this motion, OPC states as follows:

1. On February 22, 2018, the Commission established this docket for the evaluation of storm restoration costs.
2. In its August 31, 2018 Petition, FPL requested the Commission find its Hurricane Irma Costs were reasonable and that FPL's actions following Hurricane Irma were prudent.
3. FPL bears the burden of proving that its expenses are reasonable, utility-related and prudently-incurred.
4. In rebuttal testimony, FPL's witness, Ronald R. Reagan, made numerous representations about the hourly labor rates charged by storm restoration contractors in connection with market conditions, despite his deposition testimony admission that he does not have

knowledge about the full market, most importantly market prices, which are influenced by the hourly rates negotiated by other utilities with the same or similar vendors.

5. As such, Mr. Reagan claimed to testify in relation to market conditions when in fact, the only portion of the market about which he had direct knowledge at the time of his rebuttal testimony concerned rates FPL negotiated in a vacuum, without any knowledge about the rates paid by other utilities.
6. Mr. Reagan compounded his erroneous representation regarding so-called "market conditions" by stating repeatedly that FPL obtained the best and lowest rates possible based on market conditions. Where the witness lacked essential information required to compare storm contractor rates, he did not have the requisite basis on which to state that the rates he negotiated in a vacuum were the "best" or "lowest" available.

Applicable Law

Mr. Reagan readily admitted in deposition he did not know the storm contract vendor hourly rates obtained by other utilities. (Reagan Dep. 25:15-21, 33:11-18, Apr. 26, 2019, excerpts attached hereto as Composite Exhibit A.) Mr. Reagan further seemed to concede that knowledge of the rates obtained by other utilities would be useful, as he testified he would "love to have" information on the rates negotiated by the other utilities. (Reagan Dep. 64:12-17.)

Mr. Reagan criticized OPC's expert, Helmuth W. Schultz' testimony on storm vendor rates despite the fact that Mr. Schultz, by virtue of his work on storm dockets involving most other investor-owned utilities in Florida, has reviewed, thus has knowledge of, the rates negotiated and paid by utilities other than FPL. Mr. Reagan also disingenuously criticized Mr. Schultz' purported lack of support on other utilities' vendor rates, knowing that the vast majority of storm contractor

rates in each docket were classified as confidential, which would explain why the data on non-FPL utilities was not filed as part of Mr. Schultz' direct prefiled testimony.

Mr. Reagan admitted he did not personally conduct any sort of analysis of storm contractor rates. (Reagan Dep. 16:5-8.) Mr. Reagan also:

- Did not perform a comparison of different contractors' rates (Reagan Dep. 19:17-20.)
- Had no analysis to support his testimony that FPL's pre-negotiated rates were the lowest that could be obtained. The only so-called "analysis" touched upon was the competitive bidding process, which only involves FPL. (Reagan Dep. 25:7-14.)
- Did not compare FPL's purportedly "lowest rates" to the rates paid by other utilities in Florida (Reagan Dep. 25:15-21, 33:11-18.)
- Conceded that he based his testimony on FPL's skewed "closed bid process" (Reagan Dep. 32:23-25.) which simply compares each contractor's bids to the previous rates FPL had in place for a given contractor, thus were blind to the rest of the market (Reagan Dep. 39:8-16.)

Mr. Reagan's sworn testimony was that he did not have information concerning the hourly rates storm contractors charged to other utilities and did not compare the rates FPL paid to the rates paid by other utilities. He further testified that he had no analysis to support his testimony that FPL's rates were the best or lowest available. Instead, Mr. Reagan's testimony is simply conclusory, repetitive and gratuitous in its constant assertion that FPL's rates are the lowest and best considering his artificially limited market, where he failed to present sufficient factual support for the claims. Such unsubstantiated testimony has the potential to mislead the trier of fact to the prejudice of OPC. *See*, Section 90.701, Fla. Stat. To qualify as "competent and substantial,"

evidence must have more than a mere scintilla of real, material probative value. *Scholastic Book Fairs, Great Am. Div. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289-290 (Fla. 5th DCA 1996), citing, *Dunn v. State*, 454 So. 2d 641, 649 n. 11 (5th DCA 1984)(Cowart, J. concurring). The fundamental lack of factual basis for the portions of Mr. Reagan's testimony which purport to discuss the storm contractor market, market conditions, and FPL's rates as being the lowest available, reduces his testimony to a speculative or theoretical exercise, and thus renders the testimony unreliable and inadmissible. The portions of Mr. Reagan's testimony on the referenced subjects cannot be considered substantial, competent evidence, so they must be stricken.

Mr. Reagan testified in deposition that he did not know whether he was testifying as an expert. (Reagan Dep. 11:21-23.) However, he later stated that mobilization billing times were not his "area of expertise." (Reagan Dep. 100:11-21.) Mr. Reagan's testimony suggests he considered the other subjects on which he testified to be within his "expertise." Mr. Reagan testified the stated purpose of his rebuttal testimony was to respond to certain portions of OPC witness Helmuth Schultz' testimony, including testimony regarding excessive contractor hourly rates. (Rebuttal Testimony of Ronald Reagan at 4-5, lines 20-21, 1.)

The only educational qualification listed by Mr. Reagan in his rebuttal testimony was a Bachelor of Science degree in electrical engineering. (Reagan Rebuttal at 3, lines 19-21.) Nonetheless, Mr. Reagan purports to testify about complex economic issues, including labor rates in the context of alleged market conditions. Mr. Reagan's testimony purportedly encompasses technical knowledge which is beyond that of a layperson; therefore, portions of his testimony may arguably be proffered as expert testimony. *See, In re: Petition on behalf of Citizens of the State to Require Progress Energy Florida, Inc. to Refund Customers \$143 million*, Order No. PSC-2007-0270-PCO-EI, p. 2-3.

Section 90.702, Fla. Stat. provides that an expert may testify on specialized knowledge only if the testimony is based on sufficient facts or data. As explained fully above, Mr. Reagan's testimony regarding the alleged market and purportedly "best" rates was, by his own admission, based on incomplete facts.

Regardless of whether Mr. Reagan's testimony is proffered as fact or expert testimony, OPC requests that the following portions of witness Reagan's rebuttal testimony be stricken from the record:

Rebuttal at 5, lines 13-14 starting after the word storm. (strike "and include the lowest rates that could be obtained at the time.")

Rebuttal at 7, lines 21-23 (strike "Those pre-storm negotiations allowed FPL to negotiate the best market rates it was able to obtain from the contractors at the time.")

Rebuttal at 8, lines 17-19 (strike "This allows FPL to ensure that the rates received for storm restoration work are competitive, consistent with the market rate, and as low as possible.")

Rebuttal at 10, lines 4-5 (strike "and the market conditions at that time.")

Rebuttal at 11, line 20 (strike "based on the market conditions at the time.")

Rebuttal at 12, line 7-8 (strike "based on the market conditions at the time the contracts were negotiated.")

Rebuttal at 12, lines 10-11 (strike sentence starting "Notwithstanding")

Rebuttal at 13, lines 16-17 (strike "and that FPL negotiated for and obtained the lowest contractor rates based on the prevailing market conditions.")

Pursuant to Rule 28-106.204(3), F.A.C., the undersigned counsel contacted the parties to this docket concerning this Motion. FPL objects to the instant motion to strike portions of

testimony. The Florida Retail Federation supports OPC's motion. The Florida Industrial Power Users Group had not expressed a position by the time OPC filed the motion.

Respectfully submitted this 20th day of May, 2019.

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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 20th day of May, 2019, to the following:

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“Composite Exhibit A”

1 exhibit.

2 (Whereupon a document/item was marked for
3 identification as Regan Exhibit 1.)

4 MR. RUBIN: Stephanie, we had -- in the
5 panel deposition that was taken of FPL witnesses,
6 we went through number 33. So if you want to
7 mark these consecutively, this would be 34,
8 unless you want to start from the beginning
9 again.

10 MS. MORSE: I think it would be okay to
11 start at one. Just start this one with one.

12 MR. RUBIN: Okay, we're all set here.

13 BY MS. MORSE:

14 Q Okay. Mr. Regan, do you have a copy of your
15 rebuttal testimony with you?

16 A Yes, I do.

17 Q And I think you've already answered this
18 partially, but you have the copies of the documents I
19 forwarded to your attorney yesterday?

20 A Yes.

21 Q Okay. Are you testifying today as an
22 expert?

23 A I don't know.

24 Q Well, I just have a couple of background
25 questions. Regarding your education, do you have

1 systematic analysis of storm restoration contractor
2 rates?

3 A I oversaw the team that was responsible for
4 entering into the contracts for storms.

5 Q In your role in overseeing those teams,
6 though, did you personally do any sort of analysis of
7 the contractor rates?

8 A No. I would only be involved if my team had
9 an issue that they thought was relevant that needed to
10 be raised to my level.

11 Q And again, while you were the vice president
12 of the Integrated Supply Chain, did you conduct a
13 systematic analysis of storm vendor contract
14 exceptions?

15 A No. I'd only be involved if my team felt an
16 issue came up that needed to be raised to my level.

17 Q Do you recall approximately how many times
18 something, an issue as you've described, needed to be
19 raised to your level?

20 A I would characterize it as less than ten
21 times during my time as VP of the Integrated Supply
22 Chain.

23 Q And during Hurricane Irma, about how many
24 times did that happen?

25 A During Hurricane Irma, none.

1 A No.

2 Q Let's turn to your testimony at page four,
3 lines 22 to 23, and continue on to line one of page
4 five.

5 So regarding Mr. Schultz's opinion on
6 excessive rates, do you dispute that Mr. Schultz made
7 a comparison of FPL's external contractor rates as
8 part of his analysis?

9 A I agree that it's an opinion of his and I
10 agree that he, you know, formed an opinion and
11 documented that in his testimony.

12 Q I understand. But I guess more
13 specifically, the question is not just the opinion,
14 but the fact that he made a comparison of FPL's
15 external contractor rates, do you dispute that?

16 A No, I do not dispute that.

17 Q To the extent that you determined whether
18 rates are reasonable or excessive, did your analysis
19 include a comparison of different contractors' rates?

20 A I did not do a comparison.

21 Q Well, let's look at your testimony on page
22 five, lines 8 through 12.

23 Regarding your testimony that Mr. Schultz's
24 criticism failed to recognize the actual circumstances
25 FPL faced in responding to Hurricane Irma, is that

1 contractors?

2 MR. RUBIN: I'm going to object to the form.
3 That's been asked and answered, I believe,
4 Stephanie.

5 You can answer it, though, Ron.

6 A No.

7 Q What analysis do you have that supports your
8 testimony that the pre-negotiated rates, FPL's
9 pre-negotiated rates are the lowest rates that could
10 be obtained at the time they were negotiated?

11 A I have no analysis, except I would add that
12 we use a competitive bidding process, where we let the
13 market determine what the market rates are for storm
14 contracts.

15 Q All right. Well, in terms of the
16 pre-negotiated rates being the lowest that could be
17 obtained, did you compare those rates that FPL
18 negotiated to rates that other Florida utilities were
19 paying?

20 A No. I don't know if that information would
21 be available to me.

22 Q All right. Well, did you compare the rates
23 that FPL negotiated to the rates that other utilities
24 outside of Florida were paying?

25 A No.

1 contracts were the locations that resources actually
2 came out of to support Irma.

3 Q I'm going to go back to your testimony at
4 page eight, lines 14 through 22, regarding your
5 testimony that "FPL uses a competitive bidding process
6 and negotiates labor rates with the majority of these
7 contractors well in advance of their services being
8 needed."

9 Did I read that correctly?

10 A Yes.

11 MR. RUBIN: I think, Stephanie, you left out
12 a couple of words, but it's not substantive.

13 MS. MORSE: Oh, goodness, okay.

14 MR. RUBIN: I think you left out "of the
15 time their services may be needed," but it's
16 fine. We're fine with the question.

17 MS. MORSE: Okay. He know where we are in
18 the testimony there.

19 BY MS. MORSE:

20 Q When negotiating rates, what does FPL use as
21 a benchmark to determine whether those rates are
22 reasonable?

23 A We use the market test, and by that I mean
24 we do a closed bid process, where we tell each
25 contractor to submit their market bid on what we would

1 need to pay them to perform the services during a
2 storm.

3 When we sign a contract with them, there is
4 no guarantee that they will be allowed to do work for
5 us. We rank the bids that come in from lowest to
6 highest and the contractor that has the lowest price
7 and is closest to our service territory typically are
8 the first ones that we call, and those contractors
9 that have higher bids and may be located further from
10 our service territory may or may not get called.

11 Q So other than the market test that you
12 described, does FPL have any studies that you use to
13 determine if rates are reasonable?

14 A No.

15 Q Does FPL have information from other Florida
16 utilities that would indicate what they're paying
17 contractors for storm restoration work?

18 A Not to my knowledge.

19 Q So how would FPL make a comparison of its
20 resulting negotiated vendor rates in order to
21 determine whether those rates are appropriate, if FPL
22 doesn't have vendor rates that are being charged to
23 other utilities?

24 MR. RUBIN: Object to the form.

25 Go ahead, Ron.

1 Q Turning to your testimony at page nine,
2 lines 1 through 9, regarding the rate comparison
3 referenced in your testimony there, was that
4 comparison strictly based on bids sent to FPL?

5 A I'm sorry, can you point out which line you
6 are referring to?

7 Q Oh, that was lines one through nine.

8 A So when we go out for bids to the 30 to
9 50 percent of the total contracts each year, when we
10 receive those bids, we compare those bids to the
11 previous rates that we had in place for that
12 contractor, and we compare those rates to other
13 contracts that we have in place at the time and use
14 that information to determine how we are going to
15 negotiate the final rate with each of those
16 contractors that have supplied the bid.

17 Q Well, would you agree that Mr. Schultz has
18 suggested that based on his experience, FPL is paying
19 on average more than what other utilities are paying
20 for the same type of vendors?

21 MR. RUBIN: Let me object to the form.

22 Go ahead, Ron.

23 A I don't agree with his opinion, but I agree
24 that that is what his testimony states.

25 Q Do you have any reason to believe that

1 4 through 13, do you take issue with Mr. Schultz only
2 identifying a single contractor used by another
3 Florida utility?

4 A Yes.

5 Q How many Florida utilities have made their
6 contractor rates public?

7 A I'm not aware of any.

8 Q Are you aware of the large number of names
9 of the vendors that Duke and TECO used in the
10 restoration?

11 A No.

12 Q Would you like to know what other Florida
13 utilities pay contractors they employ, especially
14 since they're probably the same ones used by FPL?

15 A Yes. If that did not breach confidentiality
16 that they had between them and their vendors, I would
17 love to have that information.

18 Q Okay. Turning to your testimony at page 14,
19 lines 15 through 21, and on to page 16 through line
20 20, is it your testimony that Mr. Schultz's comparison
21 is not an apples-to-apples comparison?

22 A Yes.

23 Q Now, is that because he makes a comparison
24 based on differing rates for the different job
25 classifications and different types of equipment,

1 Q So how is it that you justify the higher
2 rates without knowing what rates are being charged to
3 other utilities for mobilization work?

4 A My testimony is not intended to compare
5 against other utilities. My testimony is just to say
6 that mobilization and demobilization rates typically
7 are higher because in our case we include the cost of
8 the fuel in that rate and the wear and tear on the
9 equipment while the contractors are driving from their
10 home service territory to our service territory.

11 Q Okay. Turning to page 23 of your testimony,
12 lines 18 through 23, continuing on to page 24, lines 1
13 through 15, is it your testimony that during
14 mobilization and demobilization FPL is not concerned
15 with how much time the contractor spends, say having a
16 sit-down meal while in transit for which the
17 contractor is still on the clock billing time?

18 A That's not my area of expertise. The
19 tracking of contractors and how many miles they're
20 driving each day and how much time they're stopping is
21 performed by our Power Delivery business unit.

22 Q Okay. Let's turn to page 27 of your
23 testimony, lines 6 through 22. Did you personally
24 review the detail provided in FPL's response to
25 Citizens' Request for Production of Documents number