

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchase Power Cost Recovery
Clause and Generating Performance Incentive
Factor

Docket No. 150001-EI

Filed: October 26, 2015

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION
TO THE OFFICE OF PUBLIC COUNSEL'S MOTION TO STRIKE
REBUTTAL TESTIMONY OF JOHN REED**

Pursuant to Rule 28-106.204(1), Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files this response in opposition to "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," filed by the Office of Public Counsel ("OPC") on October 19, 2015 ("OPC Motion"). In support thereof, FPL states:

1. OPC argues in its Motion that Mr. Reed "lacks the expert qualifications to testify on the subject matter of his Rebuttal testimony" (OPC Motion, p. 2) and that, therefore, Mr. Reed's rebuttal testimony "must be stricken" (OPC Motion, p. 6). These arguments mischaracterize the scope of Mr. Reed's rebuttal testimony and his qualifications, and also are incorrect as a matter of law that the necessary result – even if Mr. Reed were not an expert – is that his rebuttal testimony must be stricken. As discussed below, Mr. Reed is eminently qualified to provide expert testimony on the prudence standard and the application of that standard to FPL's actions related to the 2011 St. Lucie Unit 2 foreign material event that is the subject of OPC Witness Jacobs's testimony.¹ Further, even if one were to doubt his expertise, Mr. Reed's testimony would be admissible pursuant to Section 120.569(2)(g), Florida Statutes,

¹ Mr. Reed is also qualified to provide expert testimony on the potential economic consequences of the application of a different cost recovery standard to FPL's actions, another subject of his rebuttal testimony. However, OPC's Motion does not challenge his qualifications in this subject matter.

which deems evidence “of a type commonly relied upon by reasonably prudent persons” to be admissible in administrative proceedings, regardless of whether such evidence would be admissible in a trial in the courts of Florida. Simply stated, OPC’s reliance on Section 90.701 of the Florida Evidence Code is misplaced. Accordingly, OPC’s Motion to strike Mr. Reed’s rebuttal testimony should be denied.

Mr. Reed’s Expertise In The Subject Matter Of His Testimony Is Evident On The Face Of His Testimony And Exhibits

2. The OPC Motion is premised upon (i) its overly broad characterization of the subject matter of Mr. Reed’s rebuttal testimony; and (ii) its highly selective reading of Mr. Reed’s Exhibits JJR-1 and JJR-2, setting forth Mr. Reed’s experience, background, and qualifications. This approach results in an inaccurate representation of the subject matter of Mr. Reed’s rebuttal testimony and Mr. Reed’s expertise. The plain language of Mr. Reed’s testimony and exhibits demonstrates that he is in fact an expert in the subject matter of his rebuttal testimony.

3. OPC states that Mr. Reed’s testimony addresses “the areas of law and nuclear power plant operations.” OPC Motion, p. 2. The Motion goes on to summarize Mr. Reed’s testimony as addressing the “legal standard for prudence” and the “legal concept of strict liability.” OPC Motion, p. 4. OPC then states that Mr. Reed “purports to give expert testimony regarding the ‘legal standard of prudence’...” It is worth noting that while OPC places the phrase “legal standard of prudence” in quotation marks, that phrase is found nowhere in Mr. Reed’s testimony.

4. The subject of Mr. Reed’s testimony is neither “law” nor “nuclear power plant operations” as OPC asserts. Mr. Reed is testifying on the appropriate standard that this

Commission should apply, as a matter of regulatory policy,² to FPL's decisions and actions related to a particular event at St. Lucie Unit 2. In Mr. Reed's opinion, the Commission should apply the prudence standard in assessing FPL's role in this event. Mr. Reed's testimony directly rebuts OPC Witness Jacobs's testimony, wherein Witness Jacobs opines that the Commission should apply a "reasonably preventable" standard in assessing FPL's role.³ Each witness testifies to the standard he thinks the Commission should apply. Of course, the fact that the prudence standard happens to be supported by Florida law does not make Mr. Reed's testimony legal in nature. The legal support for the use and application of the prudence standard will be addressed by FPL's attorneys in its post-hearing brief, just as OPC can be expected to provide whatever legal support it may have for a disallowance based on its witness's "reasonably preventable" standard in its post-hearing brief.

5. OPC claims that Mr. Reed "lacks the expert qualifications to testify on the subject matter of his Rebuttal testimony" (OPC Motion p. 2) and repeatedly refers to Mr. Reed's experience as "financial and economic," implying that those terms limit the extent of his expertise. On page 3 of its Motion, OPC states that "Mr. Reeds' [sic] 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." As explained above, Mr. Reed is not testifying in a legal capacity. Moreover, Mr. Reed's vast experience in the use and application of the prudence standard,

² As an example of the distinction between law and policy, Mr. Reed does not testify that the Commission's use of the prudence standard has been considered by the Florida Supreme Court in evaluating the constitutionality of the NCRC statute. See *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 749-50 (Fla. 2013) (noting that "statutes and caselaw routinely apply the prudence standard in the PSC context").

³ See Witness Jacobs's testimony, p. 13 lines 21-23, where he recommends the Commission disallow replacement power costs on the basis that the outage extension was "reasonably preventable."

including its application to projects at operating nuclear power plants here in Florida, is clearly stated in Mr. Reed's rebuttal testimony and exhibits.

6. In its Motion, OPC has chosen to ignore the following evidence of Mr. Reed's relevant experience:

- Reed Rebuttal Testimony, p. 2: "I also have provided testimony on behalf of FPL in its Nuclear Cost Recovery Clause ("NCRC") proceedings for the last seven years. My testimony in those proceedings has focused on the prudence of the Company's management of nuclear projects at PSL [St. Lucie] and Turkey Point."
- Exhibit JJR-1 (Reed Resume), p. 2-3: "Testimony has focused on issues ranging from broad regulatory and economic policy . . . Also frequently testified regarding . . . accepted energy industry practices . . . and management prudence."
- Exhibit JJR-2, p. 6: Eight examples of testimony presented to this Commission on "Prudence" in the NCRC dockets
- Exhibit JJR-2, p. 11: Example of testimony presented to Michigan Public Service Commission on "Prudence"
- Exhibit JJR-2, p. 15: Example of testimony presented to New Hampshire Public Utilities Commission on "Prudence"
- Exhibit JJR-2, p. 17: Example of testimony presented to Oklahoma Corporation Commission on "Prudence"
- Exhibit JJR-2, p. 19: Example of testimony presented to the Texas Public Utility Commission on "Prudence" and four examples of testimony on "Regulatory Policy"
- Exhibit JJR-2, p. 27: One example of testimony presented before the U.S. District Court, Northern District of Illinois, Eastern Division on "Prudence"

A complete review of the qualifications presented in his rebuttal testimony and exhibits leaves little doubt that Mr. Reed is an expert qualified by knowledge, skill, and experience on the subject of the prudence standard and its application to utility decisions and actions, including at operating nuclear power plants. Accordingly, Mr. Reed is an expert that may provide opinion testimony as contemplated by Section 90.702, Florida Statutes.

Mr. Reed's Experience Related to Nuclear Power Plants Is Extensive

7. Mr. Reed's experience in assessing the prudence of FPL's activities at nuclear power plants over the last several years is stated clearly, but briefly, in his rebuttal testimony and Exhibit JJR-2 filed in this docket. As a party to each of those dockets, OPC is likely aware of Mr. Reed's participation and the expert testimony he provided.

8. Mr. Reed presented his nuclear qualifications to the Commission in the recently concluded 2015 NCRC proceeding, Docket No. 150009-EI. He testified as follows:

My consulting experience with nuclear power plants spans more than 30 years. My clients have retained me for assignments relating to the construction of nuclear plants, the purchase, sale and valuation of nuclear plants, power uprates and major capital improvement projects at nuclear plants, and the decommissioning of nuclear plants. In addition to my work at FPL's plants, I have had significant experience with those activities at the following plants:

- Big Rock Point
- Bruce Power
- Callaway
- Darlington
- Duane Arnold
- Fermi
- Ginna
- Hope Creek
- Indian Point
- Limerick
- Millstone
- Monticello
- Nine Mile Point
- Oyster Creek
- Palisades
- Peach Bottom
- Pilgrim
- Point Beach
- Prairie Island
- Salem
- Seabrook
- Vermont Yankee
- Wolf Creek
- Vogtle

. . . In addition, I have provided nuclear industry clients with detailed reviews of contracting strategies, cost estimation practices, and construction project management.

9. In each NCR docket during the years 2008-2015, Mr. Reed testified regarding the prudence of FPL's management of its Turkey Point 6 & 7 new nuclear project. *See* Docket No. 080009-EI, Tr. 515-563, 733-763; Docket No. 090009-EI, Tr. 355-470, 774-851; Docket No. 100009-EI, Tr. 1509-1632; Docket No. 110009-EI, Tr. 531-647, 1166-1198; Docket No.

120009-EI, Tr. 20-190; Docket No. 130009-EI, Tr. 286-360; Docket No. 140009-EI, Tr. 137-189; Docket No. 150009-EI, Tr. 374-490, 714-791. During the years 2009-2014, that testimony also addressed the prudence of FPL's management of its Extended Power Uprate ("EPU") project – a construction project that occurred primarily during refueling outages at FPL's existing, operating nuclear power plants.

10. In addition to Mr. Reed's broad review of the management of the EPU project, he also reviewed a particular outage extension at St. Lucie Unit 2 caused by an EPU vendor error. Mr. Reed provided testimony discussing the appropriate standard of review, opining that FPL's decisions and actions related to the event that caused the outage extension were prudent, and concluding that no disallowance of cost recovery was warranted. *See* Docket No. 120009-EI, Tr. 92-98.⁴ OPC intervened and participated in that proceeding, and never challenged Mr. Reed's qualifications or expertise. Mr. Reed's experience on that NCR issue parallels the scope of his review and testimony in the instant docket.

Mr. Reed's Testimony Would Be Admissible Even If He Were Not Eminently Qualified As An Expert

11. As discussed above, Mr. Reed has extensive knowledge, skill, and experience in the subject matter of his rebuttal testimony. Accordingly, he would be qualified to provide expert testimony in a court of law pursuant to Section 90.702 of the Florida Evidence Code.⁵

⁴ In 2011, when this outage extension was first considered, the Commission held that "the recoverability of the work stoppage related costs concern raised by our audit staff witnesses hinges on whether FPL was prudent in training and oversight prior to work stoppages and its response to the facts surrounding the work stoppage. We note that our audit staff's testimony identifies no error or deficiency in FPL's procedures, policies, or other management related controls." Order No. PSC-11-0547-FOF-EI, p. 45. FPL reached a settlement with the vendor prior to the Commission's 2012 decision.

⁵ Because it is clear that Mr. Reed is an expert, OPC's argument that Mr. Reed's rebuttal testimony is based on hearsay and should be excluded is moot. *See* § 90.704, Fla. Stat. ("The 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."); *see also*, § 120.57(1)(c), Fla. Stat. (admitting hearsay evidence for the purpose of supplementing or explaining other evidence).

However, the Florida Evidence Code is not the standard for admissibility in an administrative hearing before the Commission. OPC's argument that Mr. Reed is not qualified consistent with Section 90.702 and that therefore his testimony must be stricken relies upon the wrong standard.

12. The Administrative Procedure Act governs the types of evidence that may be received in administrative proceedings. Section 120.569(2)(g), Florida Statutes, states:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida.

Mr. Reed's testimony is certainly the type "commonly relied upon by reasonably prudent persons," including this Commission and many other state public utility commissions as demonstrated in Exhibit JJR-2. OPC contends that Mr. Reed's testimony is "unnecessary," in part because Mr. Jones is also providing rebuttal testimony, but Mr. Reed's testimony provides a different, policy-based perspective. Accordingly, Mr. Reed's rebuttal testimony is appropriate and "shall be admissible" pursuant to Section 120.569(2)(g), Florida Statutes.

WHEREFORE, FPL requests that the Commission deny OPC's Motion to Strike and allow Mr. Reed's prefiled rebuttal testimony to be entered into the record of this proceeding when it is presented at the scheduled hearing.

Respectfully submitted this 26th day of October 2015.

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