

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 20180049-EI

Filed: May 24, 2019

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

Florida Power & Light Company (“FPL”), by and through its undersigned counsel, pursuant to Rule 1.140(f), Florida Rules of Civil Procedure, Rule 28-106.204(1), Florida Administrative Code (“F.A.C.”), and the Florida Public Service Commission (“Commission”) Order Establishing Procedure, Order No. PSC-2018-0290-PCO-EI (“OEP”), hereby files this Response in Opposition to the Office of Public Counsel’s (“OPC”) Motion to Strike Portions of Rebuttal Testimony of FPL Witness Ronald R. Reagan. OPC’s Motion to Strike alleges that certain portions of Mr. Reagan’s rebuttal testimony (a) fail to meet the admissibility standard for expert testimony, and (b) do not meet the legal requirements for competent, substantial evidence. Insofar as OPC’s Motion to Strike purports to challenge Mr. Reagan’s competence to offer expert testimony, it is untimely, fails to comply with the OEP, and is contrary to well-established law allowing the finder of fact – here, the Commission – the opportunity to determine the weight and credibility to be given to Mr. Reagan’s testimony. To the extent that the Motion to Strike attempts to go further and actually seeks to strike fact testimony, any such effort is completely unsupported and is nothing more than a misguided attempt to deprive the Commission of the right to understand FPL’s competitive bidding process for line contractors and the manner in which FPL negotiated the rates charged by FPL’s storm vendors based on the facts and circumstances that existed at the time. For these reasons, as further explained below, OPC’s motion should be denied. In support, FPL states as follows:

I. BACKGROUND

1. OPC and FPL have engaged in extensive discovery throughout this proceeding, with FPL responding to hundreds of interrogatories and producing nearly 100,000 pages of documents in response to requests for production of documents. Additionally, OPC deposed five FPL witnesses, including FPL witness Reagan on April 26, 2019. A large portion of the discovery in this case involves vendor contracts, vendor rates, and billing by vendors pursuant to the negotiated contracts.

2. On January 11, 2019, OPC submitted the direct testimony and exhibits of Mr. Schultz.

3. On March 15, 2019, FPL submitted its rebuttal testimony and supporting exhibits, including the rebuttal testimony of Mr. Reagan and Exhibits RR-1 through RR-4, later corrected by errata, but on matters unrelated to the subject of OPC's Motion to Strike.

4. The Parties submitted their Prehearing Statements on May 6, 2019.

5. On May 20, 2019, approximately one hour before the Prehearing Conference, OPC filed its Motion to Strike. OPC's motion alleges that portions of Mr. Reagan's rebuttal testimony "fail to meet the admissibility standard for expert testimony" and "do not meet the legal requirements for competent, substantial evidence."

6. The Prehearing Conference was held on May 20, 2019. During the Prehearing Conference, the Prehearing Office granted FPL leave to file a written response to OPC's Motion to Strike by May 24, 2019. Consistent therewith, FPL hereby submits this Response and requests that OPC's Motion to Strike be denied.

II. RESPONSE

7. Pursuant to Rule 28-106.211, F.A.C., "[t]he presiding officer before whom a case

is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case” and presiding officers have significant discretion in ruling on motions to strike testimony. *See In re: Petition for approval of Special Gas Transportation Service agreement with Florida City Gas by Miami-Dade County through Miami-Dade Water and Sewer Department*, Docket No. 090539-GU, Order No. PSC-11-0228-PCO-GU 2011, WL 2090841 (FPSC May 20, 2011); *In re: Joint petition by TDS Telecom d/b/a TDS TelecodQuincy Telephone; ALLTEL Florida, Inc.; Northeast Florida Telephone Company d/b/a NEFCOM; GTC, Inc. d/b/a GT Com; Smart City Telecommunications, LLC d/b/a Smart City Telecom; ITS Telecommunications Systems, Inc.; and Frontier Communications of the South, LLC*, Docket No. 050119-TP, Order No. PSC-06-0261-PCO-TP (FPSC Mar. 28, 2006),

8. In administrative proceedings, all parties must be given an opportunity to respond, present evidence and argument on all issues involved, and to conduct cross-examination and submit rebuttal evidence. *See* Section 120.57(1)(b), F.S. Furthermore, Section 120.569(2)(g), F.S., is much broader than the Florida Evidence Code and allows the consideration of all relevant, non-cumulative evidence that is “the type commonly relied upon by a reasonably prudent [person] in the conduct of their affairs.”

9. In its Motion to Strike, OPC alleges certain portions of FPL witness Reagan’s rebuttal testimony should be stricken because, according to OPC, they “fail to meet the admissibility standard for expert testimony” and “do not meet the legal requirements for competent, substantial evidence.” As explained below, OPC’s Motion to Strike is untimely and fails to comply with the OEP insofar as it purports to question the expertise of Mr. Reagan, and is contrary to well-established law, mischaracterizes Mr. Reagan’s rebuttal testimony, and seeks to deprive the Commission of the opportunity to determine the weight and credibility that should be applied to Mr. Reagan’s rebuttal testimony in deciding the issue of whether the rates charged by

FPL's storm vendors were reasonable and prudent based on the actual facts and circumstances that existed at the time.

A. OPC's Motion to Strike is Untimely

10. OPC's attempt to object to Mr. Reagan's qualifications as an expert is untimely.

11. Pursuant to Section V.A(8) of the OEP, any party that intended to object to a witness' qualifications as an expert was required to comply with the following in their Prehearing Statement:

Any objections to a witness' qualifications as an expert. The objection shall identify each witness the party wishes to voir dire as well as state with specificity the portions of that witness' pre-filed testimony, by page and line number, and/or exhibits, by page and line number, to which the party objects. Failure to specifically identify the portions of the pre-filed testimony or exhibits to which the party objects will result in restriction of a party's ability to conduct voir dire absent a showing of good cause at the time the witness is offered for cross-examination at hearing;

See OEP, p. 6. Failure to comply with this requirement, absent a showing of good cause, results in a waiver of the party's ability to (i) conduct voir dire of a witness or (ii) object to a witness being proffered as an expert.

12. In its Prehearing Statement submitted on May 6, 2019, OPC stated that "[t]o the extent that any expert witness has not identified his or her area(s) of expertise, OPC objects." *See* OPC Prehearing Statement, Section 8. Although OPC attempted to reserve the right to object to witnesses being offered as experts, OPC failed to comply with the requirements of Section V.A(8) of the OEP.¹ As a result, the Prehearing Officer stated at the May 20, 2019 Prehearing Conference that OPC waived the right to object to witnesses being offered as expert witnesses, but advised

¹ OPC affirmatively stated that there were no requirements with which they cannot comply. *See* OPC Prehearing Statement, Section 9. Thus, despite its purported reservations, OPC has acknowledged that they had the opportunity to, but were not prevented from, properly reserving their request to voir dire Mr. Reagan pursuant to Section V.A.(8) of the OEP.

that FPL should file its response to the OPC's Motion to Strike, if it chose to do so, by May 24, 2019.

13. In its pending Motion to Strike, OPC objects to certain portions of Mr. Reagan's rebuttal testimony on the basis that they "fail to meet the admissibility standard for expert testimony." It is abundantly clear that OPC's Motion to Strike is nothing more than an objection to Mr. Reagan's qualifications as an expert.² To the extent that OPC sought to challenge the qualifications of Mr. Reagan, it was incumbent upon OPC to timely comply with the clear requirements of Section V.A(8) of the OEP, which it failed to do.

14. Accordingly, OPC's Motion to Strike Mr. Reagan's rebuttal testimony on the basis that it does not meet the standard for expert testimony is untimely and, moreover, has already been rejected by the Prehearing Officer. For this reason alone, OPC's Motion to Strike must be denied.

B. OPC's Motion Applies an Incorrect Standard for Expert Testimony

15. OPC's attempt to object to Mr. Reagan's qualifications as an expert witness misapplies the standard for expert witness testimony.

16. OPC appears to claim that Mr. Reagan is not qualified to testify about storm vendor contracts and rates because the "only educational qualification listed by Mr. Reagan in his rebuttal testimony was a Bachelor of Science degree in electrical engineering." *See* OPC Motion to Strike, p. 4.³ The Motion also seems to rely upon the fact that Mr. Reagan does not have knowledge of the confidential rates charged by vendors to other utilities as somehow significant and related to his ability to offer expert testimony about the rates charged to FPL. *See* OPC Motion to Strike p.2.

² OPC's Motion to Strike is nothing more than an untimely attempt to do a proverbial "end-run" around the clear requirements of Section V.A(8) of the OEP.

³ Interestingly, under OPC's own theory of qualifications to provide expert testimony, OPC's witness would not be qualified to provide expert testimony or opinion on utility storm restoration activities, management, contracting, or costs because Mr. Schultz's only educational experience is a Bachelor of Science in Accounting. *See* OPC Exhibit HWS-1, p. 1.

However, it is well-established that a witness may be qualified as an expert through specialized knowledge, training, or education, which is not limited to academic, scientific, or technical knowledge. *Chavez v. State*, 12 So. 3d 199, 205 (Fla. 2009).⁴ An expert witness may acquire this specialized knowledge through an occupation or business or frequent interaction with the subject matter. *See Weese v. Pinellas County*, 668 So.2d 221, 223 (Fla. 2d DCA 1996) (citing *Harvey v. State*, 129 Fla. 289, 176 So. 439, 440 (Fla. 1937) (witnesses were qualified as expert cattlemen and butchers based upon many years of experience in such business and occupation and knowledge acquired thereby)). A witness may be qualified as an expert if the witness has specialized knowledge that will assist the trier of fact in understanding the evidence or in determining a fact in issue. *See, e.g., In re: Fuel and purchased power cost recovery clause with generating performance incentive factor*, Docket No. 140001-EI, Order No. PSC-14-0666-PCO-EI, 2014 WL 6601848 (FPSC Nov. 19, 2014) (citing Section 90.702, F.S.) (denying the Florida Industrial Power Users Group’s motion to strike or exclude expert testimony where the testimony presented would assist the Commission in the determination of facts to be weighted by the Commission in deciding the issues).

17. OPC’s Motion to Strike attempts to ignore Mr. Reagan’s experience in negotiating and contracting for vendor rates. However, a review of Mr. Reagan’s rebuttal testimony and deposition testimony clearly shows that Mr. Reagan has substantial, real experience in utility storm restoration contracting and vendor rates. Mr. Reagan was the Vice President of Integrated Supply Chain from April 2011 through November 2018, during which time he was responsible for procurement, procurement engineering, materials management, logistics, and recycling functions for FPL as well as the entire NextEra Energy enterprise. During the time leading up to and during

⁴ *See also See Allen v. State*, 365 So.2d 456, 458 (Fla. 1st DCA 1978) (holding that the trial court abused its discretion in determining that a witness was not qualified to testify as an expert because he did not hold a doctoral degree).

the Hurricane Irma restoration, Mr. Reagan also served as Logistics Section Chief where he had responsibility for storm staging site logistics including staging site mobilization/demobilization, meals, transportation, lodging, procurement and inventory management of materials. *See* Reagan Rebuttal Testimony, p. 1, lines 6-18. Mr. Reagan also has experience in the processes actually used by FPL to negotiate and retain vendors for storm restoration activities. *See* Reagan Rebuttal Testimony pp. 8-10.

18. Mr. Reagan clearly possesses specialized knowledge regarding FPL's utility storm restoration contracting and vendor rates. Mr. Reagan's testimony will not only assist the Commission in its evaluation of FPL's storm contracting processes and vendor rates; this testimony is necessary for the Commission to determine "what a reasonable utility manager would do in light of the conditions and circumstances which he knew or reasonably should have known at the time the decision was made." *In Re Fuel & Purchased Power Cost Recovery Clause*, Docket No. 080001-EI, Order No. PSC-2009-0024-FOF-EI, 2009 WL 692572 (FPSC Jan. 7, 2009) (emphasis added). Based on his substantial and real experience in negotiating and contracting for storm restoration vendors, Mr. Reagan is clearly qualified to give an expert opinion on FPL's utility storm restoration contracting and vendor rates based on the actual circumstances and conditions that existed at the time.

19. Moreover, even assuming, *arguendo*, that Mr. Reagan's substantial experience is somehow not sufficient to qualify him as an expert on FPL's utility storm restoration contracting and vendor rates, a position FPL rejects, the portions of Mr. Reagan's testimony that OPC seeks to strike are also factual in nature. These portions of Mr. Reagan's testimony explain that FPL used a competitive bidding process that was open to all vendors to submit bids/rates at which they would be willing to perform storm restoration work for FPL (*i.e.*, rates determined and submitted by willing market participants), and that this open competitive bid process enabled FPL to contract

for the lowest rates that could be obtained at the time from the vendors willing to perform storm restoration work for FPL. Thus, regardless of whether Mr. Reagan is qualified or being offered as an expert or a fact witness, his testimony explaining what occurred includes factual testimony that should be admitted to the record.⁵

20. Based on the foregoing, OPC's Motion to Strike Mr. Reagan's testimony for failure to meet the admissibility standard for expert testimony must be denied.

C. OPC's Motion Applies an Incorrect Standard for Admissibility of Evidence

21. OPC's Motion to Strike portions of Mr. Reagan's rebuttal testimony for failure to satisfy the legal requirements of competent, substantial evidence is not based on the correct standard for admissibility of evidence, mischaracterizes Mr. Reagan's testimony, and is an improper attempt to deny the Commission the opportunity to consider and evaluate the credibility and weight to be given to this clearly relevant evidence.

22. As a preliminary matter, the "competent, substantial evidence" standard is the standard of review applied to determine whether the Commission's conclusions and findings are supported by the evidentiary record.⁶ Substantial evidence is defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Becker v. Merrell*, 20

⁵ Although OPC may choose to challenge the fact that the rates charged by FPL's storm restoration vendors during Hurricane Irma were the result of an open competitive bidding process or that FPL selected the lowest vendor rates that could be obtained at that time, this does not change what actually occurred.

⁶ The "competent, substantial evidence" standard is the standard of review applied to determine whether the Commission's conclusions and findings are supported by the evidentiary record, *i.e.*, an appellate standard of review. *See, e.g., GTC, Inc. v. Edgar*, 967 So. 2d 781 (Fla. 2007); *Crist v. Jaber*, 908 So. 2d 426 (Fla. 2005); *Verizon Florida, Inc. v. Jaber*, 889 So. 2d 712 (Fla. 2004); *West Florida Elec. Co-op. Ass'n, Inc. v. Jacobs*, 887 So. 2d 1200 (Fla. 2004); *Sprint-Florida, Inc. v. Jaber*, 885 So. 2d 286 (Fla. 2004); *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447 (Fla. 2003); *Florida Industrial Power Users Group v. Jaber*, 833 So. 2d 750 (Fla. 2002); *Florida Power Corp. v. Garcia*, 780 So. 2d 34 (Fla. 2001); *GTC, Inc. v. Garcia*, 791 So. 2d 452 (Fla. 2000); *Gulf Coast Elec. Co-op., Inc. v. Johnson*, 727 So. 2d 259 (Fla. 1999).

So.2d 912, 155 Fla. 379 (Fla. 1944). Competent, as a modifier of substantial, means “that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). Whether relevant evidence is adequate to support the conclusion reached by a reasonable mind is a question of whether there is evidence to support the conclusion; it is not the standard to determine whether the evidence is admissible in the first instance.

23. Commission proceedings fall under the Administrative Procedures Act, Chapter 120, F.S. Section 120.569(2)(g), F.S., controls the admissibility of evidence in administrative hearings:

Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied on 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.

Section 120.569(2)(g), F.S., is much broader than the Florida Evidence Code and allows the consideration of all relevant, non-cumulative evidence that is “the type commonly relied upon by a reasonably prudent [person] in the conduct of their affairs.” This standard allows for the consideration of any type of competent evidence that may support a finding of fact. *Miller v. State*, 796 So. 2d 644, 646 (Fla 1st DCA 2001).

24. Notably, OPC’s Motion to Strike does not claim that any portion of Mr. Reagan’s rebuttal testimony is irrelevant, immaterial, or unduly repetitious. Further, as explained above, Mr. Reagan’s testimony about FPL’s utility storm restoration contracting and vendor rates, based on the actual circumstances and conditions that existed at the time, is relevant to and rebuts the storm contractor rate issue raised by OPC witness Mr. Schultz, and is clearly the type of evidence that a reasonably prudent person would rely upon in deciding the issue.

25. Not only does OPC apply an incorrect standard to determine admissibility, OPC's claim that portions of Mr. Reagan's testimony are not competent, substantial evidence is nothing more than a thinly veiled attempt to usurp this Commission's role in evaluating the credibility and weight of the testimony. Whether Mr. Reagan has sufficient knowledge about the market rates of storm vendors and whether FPL obtained lowest vendor rates available at the time are questions of the credibility and weight to be applied to the evidence. However, determining the credibility and weight of evidence is a job solely for the Commission, not OPC. If Mr. Reagan's rebuttal testimony is stricken, as requested by OPC, this would deny the Commission the opportunity to consider and evaluate the credibility and weight to be given to this clearly relevant evidence.⁷

26. It also must be remembered that Mr. Reagan will be made available at the hearing for cross-examination and to answer questions, if any, from the Commission. To the extent that OPC, or the Commission, believes that Mr. Reagan lacks sufficient foundation or knowledge of storm vendor market rates, they will clearly have the opportunity to question Mr. Reagan on these points. The Commission can consider any testimony elicited during cross-examination in its evaluation of the credibility and weight to be applied to Mr. Reagan's rebuttal testimony.

27. Finally, OPC's claim that Mr. Reagan lacks sufficient foundation or knowledge about storm vendor market rates and FPL's rates being the lowest available to FPL is based on a mischaracterization of Mr. Reagan's rebuttal testimony. According to OPC, in order for Mr. Reagan to have sufficient knowledge to testify about these facts, Mr. Reagan must have "information concerning the hourly rates storm contractors charged to other utilities" and must "compare the rates FPL paid to the rates paid by other utilities." *See* OPC Motion, p. 3. To be clear, Mr. Reagan is not testifying about the rates charged to other utilities or whether those rates

⁷ Relevant testimony must first be admitted before the Commission can determine the credibility and weight to be applied to the testimony.

are higher or lower than the rates charged to FPL.⁸ Rather, Mr. Reagan is only testifying about the market rates actually offered to FPL in response to a competitive bidding process open to all storm vendors, and that FPL selected the lowest rates offered to FPL at the time. Stated otherwise, Mr. Reagan is only testifying about the actual market rates and conditions for FPL at the time the contracts were negotiated. It cannot be disputed with any degree of reasonableness that Mr. Reagan is qualified and has sufficient foundation and knowledge to provide testimony about the process used by FPL to obtain the lowest storm vendor rates that were available to FPL at the time.

28. Based on the foregoing, Mr. Reagan's rebuttal testimony should be admitted into the record in its entirety to ensure that the record is complete and accurately reflects what actually occurred with respect to FPL's storm vendor contracts and rates, and to ensure that the Commission can properly consider and evaluate the credibility and weight to be given to this clearly relevant evidence.

⁸ The rates that utilities are able to negotiate with storm vendors are treated as confidential, and Mr. Reagan has no knowledge of the rates charged to other utilities, with the exception of (1) what is in the public record of another docket regarding the rate charged by a single contractor and (2) based on a document regarding a second contractor shown to Mr. Reagan by OPC during OPC's deposition of Mr. Reagan.

III. CONCLUSION

WHEREFORE, for all the reasons stated above, Florida Power & Light Company respectfully requests that the Office of Public Counsel's Motion to Strike Portions of Rebuttal Testimony of FPL Witness Ronald R. Reagan be denied.

Respectfully submitted this 24th day of May, 2019

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CERTIFICATE OF SERVICE

Docket No. 20180049-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished

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