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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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In re: Fuel and Purchased Power Cost) DOCKET NO. 040001-EI
Recovery Clause and Generating) Filed October 7, 2004
Performance Incentive Factor)

COMMISSION CLERK

THOMAS K. CHURBUCK'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S NOTICE OF SUPPLEMENTAL AUTHORITY

Thomas K. Churbuck ("Churbuck") responds to the Notice of Supplemental Authority for its Response in Opposition to Petitions to Intervene of Power Systems Mfg., LLC and Thomas K. Churbuck ("Notice") filed by Florida Power & Light Company ("FPL") on October 1, 2004, and objects to the same on the following grounds:

Rule 9.225, Florida Rules of Appellate Procedure, permits filing of notices of supplemental authority to "call attention to decisions, rules, statutes, or other authorities that are significant to the issues raised and that have been discovered after the last brief in the cause..." and states that such notices "may identify briefly the points argued on appeal to which the supplemental authorities are pertinent, but shall not contain argument." (Emphasis added.)

FPL fails to state in its Notice any decisions, rules, statutes, or other authorities that have come to light since it filed its Response to Churbuck's Petition to Intervene. Rather, FPL references and attaches copies of discovery propounded by Thomas K. Churbuck as "supplemental authority for the Response". Discovery is not an "authority" for anything, but is rather a process designed to lead to additional information that may support the claims of the party propounding it. As such, FPL's use of Churbuck's discovery as "supplemental authority for the response" is improper.

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FPL's contention that Churbuck's Petition to Intervene is designed to "misuse discovery proceedings" and to "gather information in furtherance of [Calpine's] own competitive interests..." is misplaced, is argumentative and is not relevant to the issues at hand. The test for ruling on a Petition to Intervene is simple and straightforward: the intervener must demonstrate that it will suffer a sufficiently immediate injury in fact that is of the type the proceeding is designed to protect. Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997); Agrico Chemical

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Co. v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So.2d1359 (Fla. 1982). FPL's argument that Churbuck is seeking competitive information is not only without support, it is irrelevant to considering his Petition to Intervene.

Even if FPL's argument was relevant, which it is not, a brief review of Churbuck's discovery (which was attached to FPL's notice) will illustrate that it is designed not to obtain competitive information as FPL contends, but rather to seek evidence to support Churbuck's allegations that FPL did not adequately consider other market opportunities before entering into three purchase power agreements ("PPAs") with a subsidiary of the Southern Company, that approval of the PPAs is premature, and that a competitive process should be used to determine the best deal for ratepayers such as Churbuck for the energy and capacity represented by the PPAs. If FPL is concerned about a particular discovery request served by Churbuck, it is free to object and explain why it believes the request to be improper pursuant to Rule 28-106.206, F.A.C. and the Order Establishing Procedure.¹

Respectfully Submitted,

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¹ As to the reference made by FPL regarding Churbuck's discovery being served before a decision is rendered on his Petition to Intervene, that timing takes into account the requirement set forth in the Order Establishing Procedure, PSC Order No: PSC-04-0161-PCO-EI, that all discovery be completed by November 1, 2004.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 7th day of October, 2004.

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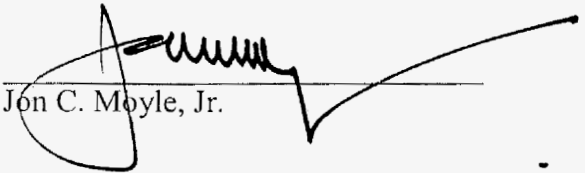
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