

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power)
Recovery Clause and Generating)
Performance Incentive Factor)

DOCKET NO. 040001-EI

Filed: October 28, 2004

**FLORIDA POWER & LIGHT COMPANY'S OBJECTIONS
TO THOMAS K. CHURBUCK'S AND FIPUG'S
CROSS-NOTICES OF DEPOSITION OF TOM HARTMAN**

Pursuant to Rule 28-106.206, Florida Administrative Code, and Rules 1.310 and 1.350, Florida Rules of Civil Procedure, Florida Power & Light Company ("FPL") submits the following objections to Thomas K. Churbuck's ("Mr. Churbuck") Cross-Notice of Taking Deposition Duces Tecum of Tom Hartman and to FIPUG's Cross-Notice of Deposition of Thomas Hartman.

Background

Staff served a notice on October 20, 2004 of taking the deposition of Tom Hartman on October 28, 2004, starting at 2:00 PM. FPL had agreed to this date and time, with the understanding that the deposition would conclude no later than 5:30 PM on October 28. Mr. Churbuck served a Cross-Notice of Taking Deposition Duces Tecum of Tom Hartman on October 21, 2004 (the "Churbuck Cross-Notice"), which states that his deposition is to commence after Staff's questioning and continue day-to day until complete. FIPUG also served a Cross-Notice of Deposition of Thomas Hartman on October 27, 2004 (the "FIPUG Cross-Notice"), which likewise states that its deposition is to commence after Staff's questioning and continue day-to day until complete. The Churbuck Cross-Notice purports to direct Mr. Hartman to bring with him "all documents relied upon in preparing his pre-filed direct and rebuttal testimony." Similarly, the FIPUG Cross-Notice purports to direct him to bring "all workpapers or other materials

used by the witness in the preparation of his direct and rebuttal testimony filed in this docket or used by the witness in the preparation of responses to discovery requests in this docket.”¹

1. The Requests for Documents in the Churbuck and FIPUG Cross-Notices are Untimely

Pursuant to Florida Rule of Civil Procedure 1.310(b)(5), a party may include within a notice of deposition a request that documents be produced at the taking of the deposition. However, such a request must be made in compliance with the procedures for document production requests set forth in Florida Rule of Civil Procedure 1.350. That rule ordinarily permits thirty days to respond to document production requests; this has been shortened to twenty days by the Commission’s Order Establishing Procedure in this docket with respect to discovery directed to matters raised in a utility’s projection filing. Order No. PSC-04-0161-PCO-EI, dated February 17, 2004. The Churbuck Cross-Notice was served on FPL only seven days before the date on which the deposition of Mr. Hartman is presently scheduled, while the FIPUG Cross-Notice was served only one day before the deposition date. Both are well short of the twenty days that FPL has to respond to a document production request under the Order Establishing Procedure. The Churbuck and FIPUG Cross-Notices are therefore untimely and fail to comply with the requirements of Rules 1.310 and 1.350 for the production of documents at a deposition.

2. The Requests for Documents in the Churbuck and FIPUG Cross-Notices Seek Documents That Are Confidential and Proprietary.

Many of the documents Mr. Hartman relied upon in preparing his pre-filed testimony and in responding to discovery requests are or contain FPL’s confidential and

¹ Staff’s deposition notice requested that Mr. Hartman bring to the deposition all workpapers or other materials used in preparing his pre-filed testimony and discovery

proprietary information, and FPL objects to their production at Mr. Hartman's deposition on that ground. On October 26, 2004, FPL filed a motion for protective order concerning confidential and proprietary information that Mr. Churbuck has previously requested in written discovery. FPL incorporates herein by reference the arguments made in support of its motion for protective order.

3. The Request for Documents in the Churbuck Cross-Notice is Motivated by Competitive Interests That Are Not the Subject of This Docket.

FPL submits that Mr. Churbuck's real motivation for seeking the documents referenced in his Cross-Notice is to gather competitive intelligence for Calpine Corporation ("Calpine"), the true party in interest in this proceeding and a merchant power provider. Asserting customer interests as grounds for standing, Mr. Churbuck petitioned to intervene on behalf of Calpine, a merchant power producer whose standing in this docket would be questionable because its interest is merely competitive in nature. FPL incorporates by reference the arguments in its September 27, 2004, Response to the Petitions to Intervene filed September 17, 2004, by Power Systems, Mfg., LLC ("Power Systems") and September 21, 2004, by Mr. Churbuck, on the point that Mr. Churbuck is not the true party in interest in this docket. Likewise, it is increasingly apparent as a result of recent depositions that FIPUG's purported interest in the issues presented by Mr. Hartman's testimony are, at best, not distinguishable from those of two merchant power producers who have sponsored testimony in this docket.

4. FPL Objects to an Excessively Lengthy Deposition of Mr. Hartman.

Unlike Staff's original notice of Mr. Hartman's deposition, both the Churbuck and FIPUG Cross-Notices state that the "deposition will continue from day-to-day until responses. FPL has reached an accommodation with Staff concerning that request.

complete." FPL recognizes that this wording often appears as a matter of course in deposition notices, but cautions counsel for Mr. Churbuck that FPL will not permit the deposition of Mr. Hartman to become excessively lengthy.

FPL and Staff agreed to schedule Mr. Hartman's deposition to commence at 2:00 PM on October 28. Mr. Churbuck and FIPUG have cross-noticed their depositions to commence at the conclusion of Staff's questioning of Mr. Hartman and to continue day-today thereafter. Neither contacted FPL about Mr. Hartman's availability after the conclusion of Staff's questioning. FPL objects to extending the deposition beyond a reasonable time on October 28, or to continuing their deposition to another day.

Respectfully submitted this 28th day of October, 2004.

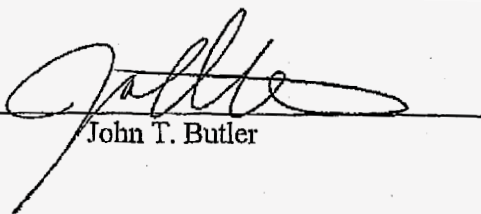
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CERTIFICATE OF SERVICE
Docket No. 040001-EI

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Objections and Responses to Thomas K. Churbuck's and FIPUG's Cross-Notices of Deposition of Tom Hartman has been served by electronic delivery this 28th day of October, 2004, to the following:

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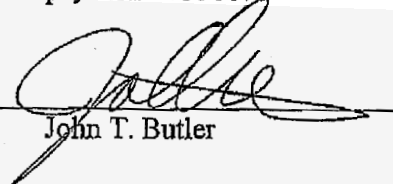
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