

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Company (FPL) for authority to charge FPL rates to former City of Vero Beach customers and for approval of FPL's accounting treatment for City of Vero Beach transaction.

DOCKET NO. 20170235-EI

In re: Joint petition to terminate territorial agreement, by Florida Power & Light and the City of Vero Beach.

DOCKET NO. 20170236-EU

Submitted for filing: September 21, 2018

CITY OF VERO BEACH, FLORIDA'S MOTION FOR PROTECTIVE ORDER

The City of Vero Beach, Florida (the "COVB"), pursuant to Section 28-106.206, Florida Administrative Code, and Rules 1.280(c) and 1.310(b)(6), Florida Rules of Civil Procedure, moves the Florida Public Service Commission to enter a protective order as to the Civic Association of Indian River County's (the "CAIRC") Notice of Taking Deposition Duces Tecum directed to Mayor Harry Howle ("Notice"), which has been noticed for September 27, 2018. In support of the motion, the City states as follows.

1. On September 18, 2018, CAIRC counsel advised the COVB counsel that the CAIRC intended "to set for deposition Mr. Harry Howle, Mayor of Vero Beach" concerning this matter "[s]ince the City of Vero Beach has not entered any pre-filed testimony" and requested dates for which to do so. *See* the Notice and Correspondence Concerning the Notice, attached hereto as Composite Exhibit A.

2. On September 20, 2018, the COVB counsel advised CAIRC counsel that the COVB intended to file rebuttal testimony on September 24, 2018, therefore, because CAIRC counsel sought to depose Mr. Howle "as Mayor of Vero Beach," and Mr. Howle was not the

COVB witness, the COVB witness would be designated as the deponent to speak on the COVB's behalf. *See id.*

3. That same day, CAIRC counsel sent COVB counsel correspondence insisting that the City present Mayor Howle as the deponent to speak on the COVB's behalf stating that "[t]he City is a party." CAIRC counsel also erroneously claimed "there is no support in the law or rules of discovery which prevent our taking his deposition," despite the CAIRC's apparent position that the CAIRC, not the COVB, was entitled to select the public corporation representative. To make clear CAIRC counsel was demanding that the COVB produce Mr. Howle in the capacity as the COVB public corporate representative, CAIRC counsel alleged that Mayor Howle "signed the contract with FPL" -- when in fact his predecessor Mayor Moss executed the agreement with FPL -- and that Mayor Howle "[has] been the primary spokesperson for the City on this matter." *See id.* There can be no doubt that CAIRC intends to depose Mayor Howle in the capacity as the COVB public corporation representative and not in some individual capacity. Within hours that same day, CAIRC counsel filed the Notice for Mr. Howle as "Mayor" of the COVB.

4. The Notice is improper and should be stricken, and a protective order should be entered because under Florida Rule of Civil Procedure 1.310(b)(6) and established Florida law, the public or other corporate entity, not the party seeking the deposition of the representative for the public or corporate entity, is entitled to select the deponent who will testify on behalf of the public or corporate entity.

MEMORANDUM OF LAW

Rule 1.280(c) Florida Rules of Civil Procedure provides that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which

the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires, including . . . that the discovery not be had” Fla. R. Civ. P. 1.280(c). Here, justice requires that a protective order be entered as CAIRC counsel improperly noticed Mr. Howle as “Mayor” of the COVB for deposition with respect to the City, a public corporation, in a manner that is contrary to the rules and well established Florida law.

Particularly, Section 28-106.206, Florida Administrative Code (F.A.C.) provides that [a]fter commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure.” F.A.C. § 28-106.206. The Florida Rules of Civil Procedure govern how and when depositions may be taken and who may be deposed. Rule 1.310(b)(6) provides that if a public corporation is the intended deponent then the public corporation must designate an individual to testify concerning the matters that are the subject of the deposition. Rule 1.310(b)(6) in pertinent part states:

In the notice a party may name as the deponent a public or private corporation, a partnership or association, or a governmental agency, and designate with reasonable particularity the matters on which examination is requested. The organization so named must designate one or more officers, directors, or managing agents, or other persons who consent to do so, to testify on its behalf and may state the matters on which each person designated will testify. The persons so designated must testify about matters known or reasonably available to the organization.

Fed. R. Civ. P. 1.310(b)(6) (emphasis added).

The City is a public corporation. *Forbes Pioneer Boat Line v. Board of Comm’rs of Everglades Drainage Dist.*, 82 So. 346, 350 (Fla. 1919). Florida law is clear that under Rule 1.310(b)(6) the corporation, whether private or public, designates the deponent to speak on behalf of and bind the corporation. *See, e.g., Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334-336 (Fla. 4th DCA 2013) (explaining that the

corporation must designate the deponent to speak on behalf of the corporation, that person so designated is not required to be the individual with the most personal knowledge of the matter, and that “Rule 1.310(b)(6) streamlines the discovery process and gives the corporation being deposed more control by permitting it to select and prepare a witness to testify on its behalf”); *Chiquita Intern. Ltd. v. Fresh Del Monte Produce, N.V.*, 705 So. 2d 112, 113 (Fla. 3d DCA 1998) (“Under this rule [1.310(b)(6)], it is the defendant corporation which designates the representative employee.”). CAIRC counsel makes clear in the correspondence concerning the Notice and the Notice that CAIRC intends to depose Mr. Howle, not in some individual capacity, but in the capacity as the “Mayor” to speak on the COVB’s behalf because “the City is Party,” Mayor Howle has allegedly “been the primary spokesperson for the City on this matter,” and, albeit incorrect, Mayor Howle “signed the contract with FPL.” CAIRC counsel cannot tenably claim otherwise based on the Notice and CAIRC counsel’s correspondence explaining CAIRC’s reasons for noticing Mayor Howle for deposition.

This is improper. The decision who will speak on the COVB’s behalf is not CAIRC’s decision it is the COVB’s decision. *See, e.g., Carriage Hills Condominium, supra, Chiquita Intern. Ltd., supra.* The COVB will be filing rebuttal testimony of the COVB City Manager in this proceeding and he is the COVB witness. The COVB in fact offered to make this rebuttal witness available for deposition. See Composite Exhibit A. CAIRC counsel apparently rejected this offer and failed to comply with Rule 1.310(b)(6) by specifically naming Mr. Howle as the deponent on the COVB’s behalf. *Chiquita Intern. Ltd.*, 705 So. 2d at 113 (“by naming a particular corporate employee, and also by failing to designate with reasonable particularity the matters on which examination was being requested, the petitioner failed to comply with Rule 1.310(b)(6)”). Accordingly, CAIRC’s Notice is improper and should be stricken, and the Court

should issue a protective order for these reasons.

WHEREFORE, the City of Vero Beach, Florida (“COVB”) requests that the Florida Public Service Commission enter an order granting the COVB’s motion for protective order, striking the CAIRC Notice, and order that the deposition of Mr. Harry Howle as “Mayor” of the COVB as contemplated by CAIRC’s Notice not be had.

/s/ James Michael Walls
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jcostello@carltonfields.com
Attorneys for City of Vero Beach

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the CITY OF VERO BEACH NOTICE OF SERVICE and responses as identified above have been served by electronic mail on this 24th day of September, 2018 to all counsel of record as listed below.

/s/ James Michael Walls
James Michael Walls

COUNSEL OF RECORD

| | |
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| Charles W. Murphy Suzanne Brownless Senior Attorney, Office of the General Counsel FLORIDA PUBLIC SERVICE COMMISSION 2540 Shumard Oak Blvd. Tallahassee, FL 32399-0850 cmurphy@PSC.STATE.FL.US STATE>FL>US">SBrownle@PSC>STATE>FL>US CCraig@PSC.STATE.FL.US CBulecza@PSC.STATE.FL.US CMOURING@PSC.STATE.FL.US dasmith@psc.state.fl.us | Ken Hoffman FLORIDA POWER & LIGHT 215 South Monroe Street, Ste. 810 Tallahassee, FL 32301 Ken.hoffman@fpl.com |
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by Florida Power & Company (FPL) for authority to charge FPL rates to former City of Vero Beach customers and for approval of FPL's accounting treatment for City of Vero Beach transaction.

DOCKET NO. 20170235-EI

In re: Joint petition to terminate territorial agreement, by Florida Power & Light and the City of Vero Beach.

DOCKET NO. 20170236-EU

Submitted for filing: September 21, 2018

**ORDER GRANTING THE CITY OF VERO BEACH FLORIDA'S
MOTION FOR PROTECTIVE ORDER**

THIS CAUSE having come before the Prehearing Officer upon the City of Vero Beach, Florida's ("COVB") Motion for Protective Order concerning the Civic Association of Indian River County's ("CAIRC") Notice of Taking Deposition Duces Tecum directed to Mayor Harry Howle and noticed for September 27, 2018, and the Prehearing Officer having reviewed the motion, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the COVB's Motion for Protective Order is GRANTED.

1. The Civic Association of Indian River County's Notice of Taking Deposition Duces Tecum directed to Mayor Harry Howle is hereby stricken in its entirety; and

2. The City of Vero Beach, Florida is relieved of any obligation to produce Mayor Harry Howle in response to and for the purpose contemplated by the Civic Association of Indian River County's Notice.

Docket No. 20170235-EI
Docket No. 20170236-EU
Order
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By ORDER of the Prehearing Officer this ____ day of September, 2018.

GARY F. CLARK
Commissioner and Prehearing Officer
FLORIDA PUBLIC SERVICE COMMISSION
2540 Shumard Oak Boulevard
Tallahassee, FL 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

Walls, J. Michael

From: Lynne Larkin <lynnelarkin@bellsouth.net>
Sent: Thursday, September 20, 2018 4:07 PM
To: Walls, J. Michael
Cc: Charles Murphy; JR Kelly; Bryan Anderson; Ken Rubin; Charles Rehwinkel; Stephanie Morse; Brian T. Heady; Michael Moran; Kenneth Hoffman; Kathryn Cowdery; James O'Connor; Mary Anne Helton; Wayne R. Coment; Keith Hetrick; Dylan Reingold
Subject: Re: FPSC 20170235 20170236: Request for deposition availability
Attachments: NOTICE DEPO - HOWLE.pdf

Dear Mike,

While I'm uncertain as to why you wouldn't want Mayor Howle to be deposed, since he has spoken at length on this matter, run his campaign on all aspects of completing the deal, signed the contract with FPL, and been the primary spokesperson for the City on this matter at the PSC, in the media, and on the Council. The City is a party and there is no support in the law or rules of discovery which prevent our taking his deposition.

Therefore, we are insisting that he join us for a deposition next Thursday, as you will see on the attached Notice, at 1 p.m. at Atlantic Reporting in Vero Beach. Arrangements will be made in order that any other party may join us by phone.

All best,

Lynne A. Larkin
Counsel for CAIRC
5690 Hwy A1A, Unit 101
Vero Beach, FL 32963
772-234-5565

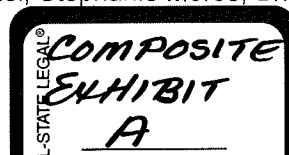
On Thursday, September 20, 2018 1:51 PM, "Walls, J. Michael" <mwalls@carltonfields.com> wrote:

"Ms. Larkin,

I have received your emails and your call. Mayor Howle is not a witness in this proceeding and will not be produced for deposition. The COVB is considering rebuttal testimony on behalf of the City, which will be filed Monday under the OEP, and we can make that witness available for deposition. Next Wednesday is out because I am in a deposition in another case. I assume no more than a couple of hours are needed for this deposition and both our proposed witness and I are available for deposition Thursday afternoon in Vero Beach.

Mike "

From: Lynne Larkin [<mailto:lynnelarkin@bellsouth.net>]
Sent: Thursday, September 20, 2018 7:15 AM
To: Walls, J. Michael
Cc: Charles Murphy; JR Kelly; Bryan Anderson; Ken Rubin; Charles Rehwinkel; Stephanie Morse; Brian T. Heady;



Michael Moran; Kenneth Hoffman; Kathryn Cowdery; James O'Connor; Mary Anne Helton; Wayne R. Coment; Keith Hetrick; Dylan Reingold

Subject: Re: FPSC 20170235 20170236: Request for deposition availability

Hello again, Mike,

Having not yet received a response from your office from my calls or email, I'm following up this morning.

I'm sure we're all very busy, so can I suggest two times that we could convene for the deposition of Mayor Howle? Wednesday or Thursday next week, any time, at City Hall or a court reporters office.

Since we are running out of time, and I'd prefer not to merely set it without your input, I hope you can respond sometime today.

Thank you much for your immediate attention to our request.

Lynne

Attorney for CAIRC

Sent from Yahoo Mail for iPad

On Tuesday, September 18, 2018, 10:37 AM, Lynne Larkin <lynnelarkin@bellsouth.net> wrote:

Good morning Mr. Walls,

Since the City of Vero Beach has not entered any pre-filed testimony, the Civic Association would like to set for deposition Mr. Harry Howle, Mayor of Vero Beach, in re the above-cited case.

Can you provide us with possible dates for same?

I have also copied the parties and intervenors on this email, as we will have to do a lot of coordinating [hopefully by phone] to accomplish this.

Thank you to everyone for your efforts in getting this accomplished as soon as possible under our very tight time constraints.

All best,

Lynne A. Larkin
Counsel for CAIRC
5690 Hwy A1A, Unit 101
Vero Beach, FL 32963
772-234-5565

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In re: Petition by Florida Power & Light Company (FPL) for authority to charge FPL rates to former City of Vero Beach customers and for approval of FPL's accounting treatment for City of Vero Beach transaction.

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In re: Joint petition to terminate territorial agreement, by Florida Power & Light and the City of Vero Beach.

DOCKET NO. 20170236-EU

**THE CIVIC ASSOCIATION OF INDIAN RIVER COUNTY'S
NOTICE OF TAKING DEPOSITION DECUS TECUM**

You are hereby notified that CAIRC will take the deposition of the following party:
MAYOR HARRY HOWLE

DATE: Thursday, September 27, 2018
PLACE: Atlantic Reporting
2143 15th Avenue, VB 32960
TIME: 1:00 p.m.
BY: Atlantic Reporting

This deposition will continue from hour to hour and day to day until completed, pursuant to the Florida Rules of Civil Procedure.

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been filed and forwarded via email this 20th day of September, 2018, to: PARTIES listed below.

LYNNE A. LARKIN, ESQ.
5690 Hwy. A1A, Unit 101
Vero Beach, FL 32963
Phone: 772-234-5565
lynnelarkin@bellsouth.net

By /s/ LYNNE A. LARKIN
Florida Bar # 56693

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