

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 25, 2018

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CITY OF VERO BEACH, FLORIDA'S RESPONSE IN OPPOSITION TO CIVIC ASSOCIATION OF INDIAN RIVER COUNTY INC.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING REQUEST FOR PROTECTIVE ORDER BY CITY OF VERO BEACH

The City of Vero Beach, Florida (the "COVB") hereby files its response to the Civic Association of Indian River County's (the "CAIRC") Motion for Reconsideration of Order Granting Request for Protective Order by City of Vero Beach ("Motion for Reconsideration"), and in support thereof states as follows.

1. On September 20, 2018, CAIRC counsel unilaterally and improperly filed a Notice of Deposition directed to Mayor Harry Howle as Mayor of Vero Beach. CAIRC counsel expressed in correspondence concerning the notice that the rationale for deposing Mayor Howle was largely in part because "[t]he City is a party" and, according to CAIRC's counsel, Mayor Howle "[has] been the primary spokesperson for the City on this matter." See Exhibit A to the COVB's Motion for Protective Order.

2. The COVB counsel objected to CAIRC counsel noticing Mayor Howle for deposition, asserting that the COVB, as a public corporation, has the right to determine its

representative to speak on its behalf, it chose the City Manager for this purpose, and the COVB offered its City Manager as its representative for deposition. CAIRC counsel unilaterally and improperly noticed Mayor Howle notwithstanding the COVB's position.

3. On September 21, 2018, the COVB filed a Motion for Protective Order requesting that the Florida Public Service Commission ("Commission") strike the unilateral and improper notice concerning Mayor Howle filed by the CAIRC. The COVB again offered its witness, the COVB City Manager, for deposition. On September 24, 2018, the Commission, in a proper exercise of its discretion, granted COVB's Motion for Protective Order and struck the improper notice.

4. On September 25, 2018, rather than notice the COVB City Manager for deposition, the CAIRC counsel filed the Motion for Reconsideration of the Order granting the Motion for Protective Order. CAIRC's Motion for Reconsideration is devoid of merit and should be denied.

ARGUMENT

The Commission or the Prehearing Officer should deny the CAIRC's Motion for Reconsideration because the motion advances neither a legitimate nor persuasive reason for the Commission to deviate from its prior decision to grant the protective order in the first instance. The Commission Prehearing Officer properly granted the COVB's Motion for Protective Order because it rightfully recognized that (i) the COVB is entitled to choose its own representative to speak on its behalf concerning COVB matters, and (ii) the COVB, not Mayor Howle, is a party to this action. Therefore, the Commission Prehearing Officer rightfully and properly exercised its discretion and rejected CAIRC counsel's apparent personal desire to depose Mayor Howle. The CAIRC provides no justifiable reason to revisit that decision.

The COVB and the Commission Prehearing Officer recognized that CAIRC counsel intended to have Mayor Howle speak on behalf of the COVB despite her purported assertions to the contrary. To be clear, Mayor Howle is neither a party to this proceeding in his capacity as mayor nor in any personal capacity. Therefore, Mayor Howle has little, if anything, to offer in his personal capacity to a matter involving the COVB. The deposition request could only logically be based on his capacity as mayor to which the Commission Prehearing Officer rendered the proper ruling.

Even now, in CAIRC's Motion for Reconsideration, CAIRC advances no legitimate reason for the Commission Prehearing Officer to rule contrary to the well established principle that the corporation must designate the deponent to speak on behalf of the corporation, and that person so designated is not required to be the individual with the most personal knowledge of the matter or the person the opposing party desires. *Carriage Hills Condominium, Inc. v. JBH Roofing & Constructors, Inc.*, 109 So. 3d 329, 334-336 (Fla. 4th DCA 2013). This is because "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." *Id.* The argument presently advanced by the CAIRC is that Mayor Howle is in some unexplained way material to its ability to establish its own standing. The COVB is unable to discern from the CAIRC Motion for Reconsideration or comprehend in any way how Mayor Howle in his official or even personal capacity is able to say anything that will confer standing on CAIRC in this proceeding.

The CAIRC's standing to maintain this action is a threshold determination to be determined at the outset of the case. *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015). Thus, the CAIRC's "lack of standing at the inception of the case is not a defect that may

be cured by the acquisition of standing after the case is filed.” *Progressive Exp. Ins. Co. v. McGrath Cmty. Chiropractic*, 913 So. 2d 1281, 1286 (Fla. 2d DCA 2005). The COVB cannot discern how deposing Mayor Howle will assist CAIRC in establishing its standing if such standing does not presently exist. The CAIRC offers no explanation in its Motion for Reconsideration. The CAIRC devotes pages in its motion about how it is vital for it to have standing -- and the COVB agrees that the CAIRC must have standing -- however, the CAIRC not once explains how Mayor Howle’s deposition assists the CAIRC in this regard. Noticeably absent from the Motion for Reconsideration are any delineations of facts expected to be elicited from Mayor Howle to establish the CAIRC’s standing.

The few facts the CAIRC states that it seeks to elicit from Mayor Howle in a deposition do nothing to support its standing assertion, but they do substantiate the points made in the COVB’s Motion for Protective Order, i.e. that CAIRC counsel seeks to depose Mayor Howle to speak on behalf of the COVB because the COVB is a party. In the Motion for Reconsideration, the CAIRC refers to its concerns regarding the COVB’s “elected officials,” including Mayor Howle, discussions and the COVB’s “history of negotiations” with various parties, and the COVB’s “patient partner FPL.” Motion for Reconsideration, paragraph 5. These are all actions taken by or involving the COVB, thus, confirming the correspondence that preceded the CAIRC’s deposition notice for Mayor Howle where the CAIRC made clear it intended to depose Mayor Howle because “[t]he City is a Party.”

The CAIRC claims that it will be irreparably harmed if it is unable to depose Mayor Howle. Nowhere in its Motion for Reconsideration does the CAIRC explain in any way how the CAIRC will be irreparably harmed if it is unable to depose Mayor Howle. This bald assertion without any corroborative facts or authority should be rejected.

Finally, in an attempt to lend some support to its otherwise unsupported contentions that Mayor Howle's deposition will assist in establishing the CAIRC's standing and absent this deposition the CAIRC will be irreparably harmed, the CAIRC cites to the *City of Miami Mayor Tomas Regalado, et al. v Vila et al.*, 225 So. 3d 874 (Fla. 3d DCA 2017), a negligence case in which the mayor was deposed. *Vila* is inapposite and offers no support to the CAIRC. In *Vila*, several customers were injured at a sidewalk diner and brought suit against the diner. *Id.* at 874-875. The City of Miami had issued the sidewalk diner three citations months before the incident for operating an illegal sidewalk diner, but the sidewalk diner was permitted to remain open. *Id.* at 875. The plaintiffs took the depositions of seven (7) City of Miami officials who presumably would know why the sidewalk diner was permitted to remain open, but those officials did not know this information. *Id.* Thus, it was only after seven prior City of Miami officials were deposed and unable to adequately provide answers to the relevant information the plaintiffs sought that the court permitted the mayor to be deposed. *Id.*

Here, the CAIRC seeks to circumvent Rule 1.310(b)(6), which allows the COVB to designate one or more city officials to be deposed concerning information relevant to this proceeding. It is only if the city official designated by the COVB does not have the information that is relevant to this proceeding involving the COVB and sought by the CAIRC that the COVB fails to comply with its Rule 1.310(b)(6) obligations. *See, e.g., Carriage Hills Condominium, Inc.*, 109 So. 3d at 334 (once the public corporation offers a deponent, it is only "[i]f the deponent cannot answer questions regarding the designated subject matter, 'the corporation has failed to comply with its Rule 1.310(b)(6) obligation'"). This failure has not occurred because the CAIRC never even noticed the COVB designated witness for deposition.

The Commission or the Prehearing Officer should again reject the CAIRC's

predetermined intentions to depose Mayor Howle concerning a matter to which he is not personally involved to somehow assist the CAIRC in some unexplained way in establishing its standing. For all these reasons, and the reasons provided in the COVB's Motion for Protective Order, the Commission or the Prehearing Officer should deny the CAIRC's Motion for Reconsideration.

WHEREFORE, the City of Vero Beach, Florida ("COVB") respectfully requests that the Florida Public Service Commission or the Commission Prehearing Officer enter an order denying the Civic Association of Indian River County's Motion for Reconsideration.

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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 25th day of September, 2018 to all counsel of record as listed below.

/s/ James Michael Walls
James Michael Walls

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ORDER DENYING THE CIVIC ASSOCIATION OF INDIAN RIVER COUNTY INC.'S MOTION FOR RECONSIDERATION OF ORDER GRANTING REQUEST FOR PROTECTIVE ORDER BY CITY OF VERO BEACH

THIS CAUSE having come before the Prehearing Officer upon the Civic Association of Indian River County Inc.'s Motion for Reconsideration of Order Granting Request for Protective Order by City of Vero Beach, and the Prehearing Officer having reviewed the motion for reconsideration, and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that the Civic Association of Indian River County Inc.'s COVB's Motion for Reconsideration is DENIED.

By ORDER of the Prehearing Officer this ____ day of September, 2018.

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