

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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.

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

Filed: August 6, 2018

FLORIDA POWER & LIGHT COMPANY’S MOTION TO DISMISS PROTEST

Florida Power & Light Company (“FPL”), pursuant to Rules 28-106.201 and 28-106.204, Florida Administrative Code (“F.A.C.”), moves to dismiss the July 18, 2018 Petition by The Civic Association of Indian River County, Inc., Asserting the Existence of Disputed Issues of Material Facts in the Order No. PSC-2018-0336-PAA-EU, Issued July 2, 2018; and Requesting a Hearing Thereon (“Protest Petition”). However, in light of the request for hearing filed by the Florida Industrial Power Users Group, in furtherance of an expedited and efficient process, and in accordance with Order No. PSC-2018-0370-PCO-EU, FPL requests that this motion be considered in connection with the Commission’s decision on the merits in this proceeding.

The Protest Petition filed by the Civic Association of Indian River County, Inc. (“Civic Association”) is both legally deficient and factually inaccurate, and fails in all material respects to allege the requirements necessary to obtain standing to challenge the Commission’s proposed agency action. The Protest Petition alleges only speculative harm based on matters that are outside the scope of the Commission’s proposed agency action or beyond the Commission’s jurisdiction. The Civic Association, dissatisfied with the political process that led to the City of Vero Beach (“COVB”) City Council’s approval of the agreement to sell the COVB electric utility to FPL, has filed its Protest Petition in a thinly veiled – and legally deficient – attempt to

use the administrative process to challenge the sale, motivated by political objectives that are not jurisdictional to this Commission and despite the fact that the typical COVB residential customer using 1000 kWh per month stands to save approximately \$26 a month by transitioning to FPL's rates.

In support of this motion, FPL states:

1. On October 24, 2017, after a nearly 10 year effort, FPL and COVB entered into an Asset Purchase and Sale Agreement (the "PSA") for the sale of the COVB electric utility to FPL. On November 3, 2017, FPL filed a petition along with the supporting testimony and exhibits of six FPL witnesses in Docket No. 20170235-EI, seeking authority to charge FPL rates to former COVB customers and for approval of the accounting treatment needed to consummate the PSA. Concurrently, FPL and COVB filed a joint petition in Docket No. 20170236-EU for approval to terminate their territorial agreement. Approval of the requests in both petitions is required for the transaction to close. Specific ratemaking and accounting approvals are specified as a condition precedent in the PSA; they are predicates to realizing the benefits of the transaction for all FPL customers, including lower rates for the new customers that would be transferred to FPL upon closing the transaction and pursuant to the termination of the territorial agreement. As noted by the Commission, "We have jurisdiction over the matters raised in the petitions filed in Docket Nos. 20170235-EI and 20170236-EU pursuant to Sections 366.06 and 366.076, F.S. To be clear, FPL is not requesting, and we do not have jurisdiction over, approval of the transfer of the City's electric utility assets to FPL." See page 7 of Order No. PSC-2018-0336-PAA-EU dated July 2, 2018. ("Order 2018-0336")

2. By Order No. 2018-0336, the Commission took proposed agency action on the petitions, in which it:

- Authorized FPL to charge its approved rates and charges to COVB customers upon the closing date of the transaction (p.15)
- Found extraordinary circumstances exist that warrant the approval of a positive acquisition adjustment (p.13)
- Authorized FPL to record a positive acquisition adjustment in the amount of \$116.2 million (p.15)
- Approved FPL's request to recover the energy portion of the Orlando Utilities Commission power purchase agreement charges through the Fuel and Purchased Power Cost Recovery Clause, and recovery of the capacity charges component through the Capacity Cost Recovery Clause (p.15)
- Approved the request to terminate the existing territorial agreement between FPL and COVB effective upon the closing date (p.9)
- Found that it does not have jurisdiction over the transfer of COVB's electric utility assets to FPL (p. 9)

3. On July 18, 2018, the Civic Association filed its Protest Petition. In attempting to identify "substantial interests" and describe how those substantial interests are impacted by the proposed agency action, the Civic Association alleges that all of its approximately 900 members are subject to changes in service and rates, with members in COVB affected by "loss of revenues" and "additional taxes of unknown amounts". The Civic Association also alleges that the "lifestyles of its members" will be affected by the proposed agency action. Protest Petition at p. 1.

4. What their Petition inexplicably fails to note, however, is that immediately upon closing of the transaction, customers currently served by COVB will receive FPL rates which,

for the typical 1000 kWh residential customer, will produce savings of more than \$26 per month. Nor is there any assertion that the change in service will be anything but positive, save an unsupported and irrelevant comment related to restoration of service following a hurricane.

5. It is also interesting to note that although certain members of the Civic Association have been extremely active and vocal opponents in general to any proposal for the sale of the COVB electric system and, specifically to the PSA, those individuals appeared before the Vero Beach City Council in their own right and not on behalf of the Civic Association. Yet now, they purport to represent the Civic Association in this protest.¹

6. Even if the Civic Association's amorphous general allegations are accepted as true, it has failed to allege a sufficient factual basis to satisfy the applicable legal standards to establish standing, and therefore the Protest Petition does not represent a valid protest of Order 2018-0336. Also, none of the Civic Association's "Issues of Disputed Fact" are relevant to the holdings of Order 2018-0336, while others are completely beyond the Commission's jurisdiction. Accordingly, the Protest Petition should be dismissed.

¹ While the Civic Association had the opportunity during the past decade to address alleged loss of revenues and "additional taxes of unknown amounts" through the political process with the Vero Beach City Council, the very place where such a debate is appropriate, those matters do not fall within the Commission's jurisdiction and simply have no place in these proceedings. Those arguments in fact were made by certain individuals that now have filed this Petition on behalf of the Civic Association and those arguments were rejected by the Vero Beach City Council.

A. The Civic Association Lacks Standing

7. When a petitioner's standing in an action is contested, the burden is upon the petitioner to demonstrate that it has standing to participate in the case. *Department of Health and Rehabilitative Servs. v. Alice P.*, 367 So. 2d 1045, 1052 (Fla. 1st DCA 1979). To prove standing, a petitioner must make two demonstrations:

- (1) First, that it will suffer an injury in fact which is of sufficient immediacy to entitle them to a hearing pursuant to Section 120.57, Florida Statutes; and
- (2) Second, that the substantial injury is of a type or nature which the proceeding in question is designed to protect.

See Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981).²

8. Additionally, the Civic Association, as an association representing its members, must demonstrate the following factors set forth in *Florida Home Builders v. Dept. of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982) to prove associational standing:

- (1) That a substantial number of an association's members may be substantially affected by the Commission's decision in a docket;
- (2) That the subject matter of the proceeding is within the association's general scope of interest and activity; and
- (3) The relief requested is of a type appropriate for the association to receive on behalf of its members.

See also Farmworker Rights Organization, Inc. v. Dept. of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982).

² *Agrico* describes the first prong of the test as dealing with the degree of injury, while the second prong deals with the nature of the injury.

9. Therefore, in order to establish standing, a condition that must be met by Civic Association before it can challenge Order 2018-0336, it must satisfy all requirements of both the *Agrico* test and the *Florida Home Builders* test.

10. ***Agrico* Element 1: Injury in Fact.** The Civic Association has not sufficiently alleged that it or its members will suffer an injury in fact. To attain standing the alleged “injury in fact” must be both real and immediate and not speculative or conjectural. See *International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990); see also *Village Park Mobile Home Association, Inc. v. State, Dept. of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process); *Florida Soc. of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient “immediacy” to establish standing). Here, Civic Association’s claimed injury is purely conjectural. First, it claims that its members are subject to changes in service and rates. Protest Petition at 1. This is change of utility service, but not an injury in fact. It is axiomatic that an immediate *decrease* in electric rates for COVB customers cannot by definition be an “injury in fact.”

11. Second, the Civic Association claims that its members in COVB will be affected by “loss of revenues” and “additional taxes of unknown amounts”.³ Protest Petition at 1. This contention on its face is non-jurisdictional to the Commission. Moreover, it is sheer speculation. There is nothing in the Protest Petition that even attempts to demonstrate the extent to which an

³ As noted above, the Commission has acknowledged that it has no jurisdiction over the COVB’s decision to enter into the PSA or to consider the unsupported and purely speculative assertions that the transaction might have some impact on City revenues or taxes.

alleged “loss in revenue” may occur or what specific impact it would supposedly have on Association members. The Civic Association does not directly contest that COVB customers will enjoy lower rates. Instead, they speculate that there is no guarantee. Such speculation has no impact on the fact that the clear and unambiguous result of the Commission granting the relief requested by FPL and COVB is that COVB customers will become FPL customers and immediately receive FPL rates. The evidence in the case supports the conclusion that the typical 1000 kWh COVB residential customer will save about \$26 per month beginning on Day 1 (a savings of about 21%). Even more speculative is the Civic Association’s assertion that “additional taxes of unknown amounts” will be incurred by members, which, again, on its face, is a conjectural injury, and one that is subject to the political process in which the Civic Association and its members will have full opportunity to participate. Regardless, these speculative “injuries” in no way tie to the issues that the Commission resolved in issuing Proposed Agency Action, or that it will or can resolve in these proceedings. Injury outside the scope of the Commission’s Order equates to a non-injury for the purposes of *Agrico*. See *In re: Petition for prudence determination regarding new pipeline system by Florida Power & Light Company*, Docket No. 20130198-EI, Order No. PSC-13-0669-FOF-EI at 3 (Dec. 18, 2013) (finding that substantial interests were unaffected since none of the injuries asserted were within the scope of the Commission’s decision). In sum, the prospect of a change in utility service, especially one in which electric rates for COVB customers will be lowered, does not equate to an injury in fact.

12. ***Agrico* Element 2: Injury of a Type the Proceeding is Designed to Protect.**

Given that the Civic Association and its members have sustained no injury in fact, it naturally follows that the Civic Association cannot satisfy the second prong of the *Agrico* test which

requires a showing that the “substantial injury is of a type or nature which the proceeding is designed to protect.” *Agrico*, 406 So. 2d at 482. Even if for argument’s sake it is accepted that as a result of the transaction Civic Association members *might* someday see a change in their municipal taxes, this is clearly not the type of alleged injury the proceeding is designed to address or protect. A proceeding that decides whether customers may appropriately be transitioned to a high performing, low-cost utility does not create a risk of injury for customers, especially in a situation where those customers’ elected officials have already voted in favor of such a transition. Nor is the alleged injury within the scope of interests the proceeding is designed to protect. Further, the Commission’s review of the related accounting and cost recovery mechanisms are a necessary part of transitioning COVB’s customers to FPL’s lower rates. The Civic Association alleges no facts even suggesting that approval of the accounting treatment is an “injury” from which they seek relief.

13. With regard to the territorial approval, the Civic Association has clearly not demonstrated any injury in fact or any substantial injury of a type or nature which the proceeding in question is designed to protect. In essence, the approval of the territorial agreement is in the nature of a fallout issue. Once the Commission has approved FPL’s request to charge FPL rates to former COVB customers, by definition those customers must be brought within the geographic boundaries of FPL’s service territory. The joint request by COVB and FPL to terminate their existing territorial agreement is not submitted to resolve any territorial dispute between COVB and FPL, but rather simply as a ministerial matter to reflect the result of a Commission decision, if issued, approving the terms of relief requested by FPL in this proceeding and thus enabling the transaction to close.

14. Even if the question of whether to approve the termination of a territorial agreement were addressed independently, the Commission's resolution of territorial issues does not hinge on whether individual customers experience greater or lesser economic impacts. Based on this reasoning, the Commission has previously dismissed similar protests of a Commission order approving territorial agreements on the basis that a petitioner did not have standing. *See, e.g., Joint Approval of Territorial Agreement Between Florida Power & Light Company and Peace River Electric Cooperative, Inc.*, Docket No. 870816-EU, Order No. 19140 (April 13, 1988) and *Petition to Resolve a Territorial Dispute with Florida Power & Light Company in St. John's County, By Jacksonville Electric Authority*, Docket No. 950307-EU, Order No. PSC-96-0755-FOF-EU (June 10, 1996). These earlier protest dismissals are supported by Florida Supreme Court precedent. Order No. 19140, cited above, provided a fulsome delineation of what considerations are not germane in a proceeding determining territory, stating:

In determining the appropriateness of a territorial agreement, the [Florida] Supreme Court has stated a customer "has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." *Storey v. Mayo*, 217 So.2d 304, 307-308, (Fla. 1968). In *Storey*, a number of objecting customers were being transferred to a unregulated utility. The court held that these customers did not have a sufficient interest to object to a territorial agreement simply because they preferred one utility over another because of rates or service. If such customers later experienced a rate or service problem, the court held their remedy lay in the courts or a municipal council. This principle was recently reaffirmed by the same court in *Lee County Electric Cooperative v. Marks*, 501 So.2d 585 (Fla. 1987), where it held that "larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the Florida Public Service Commission." In short, the court has firmly established the general rule that a territorial agreement is not one in which the personal preference of a customer is an issue. Therefore, the alleged injury, even if real and direct, is not within the zone of interest of the law.

The Civic Association's interest, as alleged in its own Protest Petition, is no different than those in the *Storey* or *Lee County* cases. If a Commission's territorial order was subject to rehearing or reversal each time an intervenor, individual customer or otherwise, claimed that its financial interest was overlooked, the Commission's authority to determine territorial issues would be illusory at best. Moreover, the Florida Supreme Court has affirmed that a Commission proceeding to approve a territorial agreement is not the proper forum for intervention by a resident electricity consumer to compel service from a utility based on speculative economic interests like those at play here. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997). Similarly, the substantial injury that is claimed by the Civic Association (*i.e.*, that there will be a loss in revenues and uncertainty surrounding taxes) is squarely beyond the Commission's jurisdiction.

15. ***Florida Home Builders Element 1: Substantial Number of Members Substantially Affected.*** The Civic Association has not alleged sufficient information in its Protest Petition to support a position that a substantial number of its members are substantially affected. The Protest Petition alleges that it has members within and surrounding COVB, but it does not demonstrate what the interests of those members are. Certainly the Civic Association's COVB members who are slated to receive lower rates are not affected by the proposed agency action in an adverse manner. Further, the proposed PSA that would provide for current COVB customers to receive the lower FPL rates, subject to the conditions precedent being met that would enable the transaction to close, was voted on and approved by elected COVB representatives presumably representing the same members that Civic Association now insists *it* is representing. Thus, it is the decision of the COVB City Council rather than the Commission's proposed agency action that affected the Civic Association's members in the manner alleged.

The Civic Association has not properly alleged that there is a substantial number of members substantially affected by the Commission's action, such that it cannot satisfy the first prong of the *Florida Home Builders* test.

16. ***Florida Home Builders Element 2: Whether Subject Matter within the Association's Scope of Interest and Activity.*** The Civic Association made no attempt to delineate whether the subject matter of the proceeding is within its general scope of the association's interest and activity. Instead, the Protest Petition simply alleges that the Civic Association has 900 members "in the cities and county at issue" who "all share a substantial interest in the outcome." Protest Petition at 1. From this, and the rest of the Protest Petition, it is impossible to discern whether utility territorial agreements, electric rates, and electric service form part of the Civic Association's mission or "scope of interest and activity." Nowhere in the Civic Association's Protest Petition does it state the goals of the association, its mission statement, the purposes it serves, the scope of its interests, or how it represents that interest for its members. This alone makes dismissal for lack of standing proper. Moreover, this Commission has found previously that an association that fails to allege member interests germane to the proceeding may not sustain a petition due to lack of standing. *See In re Petition for approval of arrangement to mitigate impact of unfavorable Cedar Bay power purchase obligation, by Florida Power & Light Company*, Docket No. 20150075-EI, Order No. PSC-15-0295-PCO-EI (July 20, 2015); *see also In re Commission review of numeric conservation goals (Florida Power & Light Company)*, Docket No. 20130199-EI, Order No. PSC-14-0329-PCO-EU (June 25, 2014). In addition, the petition offers nothing regarding whether participation in this type of regulatory proceeding is within the scope of the Association's authorized activities, much less whether the Civic Association's members had any expectation that the Association would

attempt to protest Order 2018-0336, the reversal of which would deny its members FPL's lower rates. Regardless, there is no showing from the Civic Association that any subject matter relevant to the proposed agency action is within the association's scope of interest and activity. As such, the Civic Association has failed to establish the requirements of the second prong of the *Florida Home Builders* test.

17. ***Florida Home Builders* Element 3: Whether the Relief Requested is Appropriate for a Trade Association to Receive on Behalf of its Members.** The Civic Association has failed to meet its burden to show that the relief requested is appropriate for a trade association to seek or receive on behalf of its members. Notwithstanding the failure to satisfy this requirement, it is hard to imagine that the interests of a Civic Association would be properly or well served by opposing the implementation of significantly lower rates for its customers. Again, if the interest of the Association is in preserving COVB's electric revenues at rates that historically have been much higher than FPL's and that sale to FPL might somehow affect property tax levels within Vero Beach, that is an interest that should have, and presumably was, properly heard by the City Council before they approved the PSA. Opposition to an affirmative decision by this Commission that lowers rates for Civic Association members therefore cannot be viewed as appropriate relief to be requested of this Commission by the Civic Association on behalf of its members. Said differently, how does the Civic Association legitimately represent member interests by arguing that the Commission should "reverse the approvals given in the subject Order" (Protest Petition at 7) and return electric rates to the higher levels? The Civic Association has failed to satisfy the third prong of the *Florida Home Builders* test based upon its failure to even approach the level of pleading required to establish that the

relief requested, much of which falls outside the Commission's jurisdiction, is appropriate for the Civic Association to seek or receive on behalf of its members.

18. In sum, the Civic Association, which must satisfy all five requirements of the *Agrico* and *Florida Home Builders* tests to establish standing to challenge Order 2018-0336, satisfies none of them. The alleged injuries are hypothetical in nature and not of a type that can be redressed by the Commission. The Civic Association has also not sufficiently alleged that a substantial number of its members are substantially affected by the proposed agency action, nor that the association is operating within the scope of its interests for the benefit of its members. Accordingly, the Commission should dismiss the Civic Association's protest for lack of standing.

WHEREFORE, for the foregoing reasons, Florida Power & Light Company respectfully requests that the Commission dismiss the Civic Association's Protest Petition because the Civic Association lacks standing and fails to address issues and determinations within the scope of the Commission's proposed agency action and its jurisdiction. However, in light of the request for hearing filed by the Florida Industrial Power Users Group, in furtherance of an expedited and efficient process, and in accordance with Order No. PSC-2018-0370-PCO-EU, FPL requests that this motion be considered in connection with the Commission's decision on the merits in this proceeding.

Respectfully submitted this 6th day of August, 2018.

R. Wade Litchfield
Vice President and General Counsel
wade.litchfield@fpl.com
Bryan S. Anderson
Assistant General Counsel – Regulatory
bryan.anderson@fpl.com
Kenneth M. Rubin
Senior Counsel
ken.rubin@fpl.com
700 Universe Boulevard
Juno Beach, FL, 33408
(561) 691-2512

By: s/ Kenneth M. Rubin
Kenneth M. Rubin
Fla. Bar No. 349038

CERTIFICATE OF SERVICE
DOCKET NOS. 20170235-EI AND 20170236-EU

I HEREBY CERTIFY that a true and correct copy of this Motion to Dismiss Protest was served electronically this 6th day of August 2018, to the following:

Kathryn G. W. Cowdery, Esq.
Jennifer Crawford, Esq.
Charles Murphy, Esq.
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
kcowdery@psc.state.fl.us
j.crawford@psc.state.fl.us
c.murphy@psc.state.fl.us
Florida Public Service Commission

J. R. Kelly, Esq.
Stephanie Morse, Esq.
Charles Rehwinkel, Esq.
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, Florida 32399
kelly.jr@leg.state.fl.us
morse.stephanie@leg.state.fl.us
Rehwinkel.charles@leg.state.fl.us
Office of Public Counsel

J. Michael Walls, Esq.
Carlton Fields
4221 Boy Scout Blvd., Suite 1000
Tampa, FL 33607
mwalls@carltonfields.com

James O'Connor
1053 20th Place
Vero Beach, FL 32961
citymgr@covb.org
City of Vero Beach

Lynne A. Larkin, Esq.
5690 HWY A1A, #101
Vero Beach, FL 32963
lynnelarkin@bellsouth.net
**Civic Association of Indian River County,
Inc.**

Jon C. Moyle, Jr., Esq.
Karen A. Putnal, Esq.
Moyle Law Firm, P.A.
118 North Gadsen Street
Tallahassee, FL 32301
jmoyle@moylelaw.com
kputnal@moylelaw.com
Florida Industrial Power Users Group

Brian T. Heady, Esq.
406 19th Street
Vero Beach, FL 32960
brianheady@msn.com

Michael Moran
P.O. Box 650222
Vero Beach, FL 32965
Mmoran@vernet.net

By: s/ Kenneth M. Rubin
Kenneth M. Rubin