

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

Date: October 29, 2018

POST-HEARING STATEMENT OF ISSUES AND POSITIONS AND INCORPORATED BRIEF OF THE TOWN OF INDIAN RIVER SHORES

The Town of Indian River Shores (the “Town”), pursuant to requirements of the Orders Establishing Procedure (Orders Nos. PSC-2018-0370-PCO-EU, PSC-2018-0397-PCO-EU, PSC-2018-0445-PCO-EU, and PSC-2018-0496-PCO-EU) and the Prehearing Order (Order No. PSC-2108-0494-PHO-EU), respectfully submits this Post-Hearing Statement of Issues and Positions and Incorporated Brief.

SUMMARY OF ARGUMENT

The Commission should approve the petitions filed by Florida Power & Light Company (“FPL”) and the City of Vero Beach (“COVB”), and allow the Asset Purchase and Sale Agreement (the “PSA”) between COVB and FPL to close. Record evidence shows there are extraordinary public interest considerations surrounding the PSA that warrant regulatory approval. The PSA is the product of extensive arms-length negotiations between COVB and FPL, and has been uniquely crafted to benefit all stakeholders. The PSA would benefit the Town along with 35,000 other customers who receive electric service from COVB by substantially reducing their rates. The PSA would benefit FPL’s general body of ratepayers who would receive approximately \$135 million dollars in present value savings from FPL being able to spread its fixed costs over 35,000 additional customers. The PSA would benefit COVB as proceeds from the sale will provide it with

over \$34 million in funds which it can use at its discretion for its own municipal purposes. And, all of COVB's customers will receive regulatory protections from the Commission and legal representation from the Office of Public Counsel ("OPC"). Furthermore, Commission approval of this carefully balanced transaction would end the disenfranchisement suffered by non-resident customers of COVB, and resolve a complex and divisive electric service dispute that has beleaguered the Town and the people of Indian River County for decades.

Conversely, without the Commission's approval, the PSA will not close, the Town and 35,000 other residents currently served by COVB will be deprived of lower electric rates and more robust regulatory protections, FPL's other customers will be deprived of approximately \$135 million in present value savings, and COVB will be deprived of over \$34 million in discretionary proceeds from the sale. Moreover, the pending lawsuit now abated in Docket No. 20160049-EU would be reignited thus thrusting the Town, COVB, and the Commission back into protracted litigation.

Granting the requested regulatory approvals and allowing the PSA to close is most certainly in the public interest.

ISSUES AND POSITIONS¹

Issue 1: **What statutory provisions or other legal authority, if any, grant the Commission the authority and jurisdiction to approve the acquisition adjustment requested by FPL in this case?**

Town: *The Town joins FPL's position on Issue 1.*

Issue 5: **Should the Commission grant FPL the authority to charge FPL's rates and charges to City of Vero Beach's ("COVB") customers upon the closing date of the Asset Purchase and Sale Agreement ("PSA")?**

Town: *Yes. The Town joins FPL's position on Issue 5.*

¹ Issues 2, 3, 4, 10, 14, 18 and 19 were not accepted by the Commission as issues in this proceeding. The remaining issues have not been renumbered. Prehearing Order at 10.

Issue 6: **Should the Commission approve the joint petitioners' request to terminate the existing territorial agreement between FPL and COVB upon the closing date of the PSA?**

Town: *Yes. The existing territorial agreement splits the Town causing residents to be served by two different utilities with vastly disparate rates and consumer protection safeguards. These disparities have spawned various lawsuits. Terminating the territorial agreement would unify electric service within the Town, eliminate the disparities, and settle protracted litigation.*

The existing territorial agreement between COVB and FPL was last reviewed and approved by the Commission over 30 years ago. See Order No. 18834 (Feb. 9, 1988). Under that agreement, the boundary line dividing the electric service territories of FPL and the COVB literally splits the Town in two, which causes neighbors in the Town to be served by two different electric utilities with vastly different rates and levels of service. See Order No. PSC-16-0093-FOF-EU at p.3 ("FPL serves approximately 739 customers and Vero Beach serves approximately 3,500 customers located within Indian River Shores.") This also results in inequitable regulatory safeguards as Town residents served by FPL are afforded regulatory protection by the Commission and legal representation by the OPC, while their neighbors in the Town served by COVB (along with other non-resident COVB customers) are left disenfranchised -- unguarded by the Commission or the OPC, with no vote on how COVB sets its rates or offers its electric service, and no redress to any governmental authority. [Tr. 274, 292, 302, 320, 322, 323, 335 (Deason); Tr. 364-65 (O'Connor); Pub. Hrg. Tr. 8 (Mayfield); Pub. Hrg. Tr. 26 (Grall); Pub. Hrg. Tr. 36 (Zudans); Exh. 66; Pub. Hrg. Tr. 42 (Brackett); Pub. Hrg. Tr. 44-47 (Heran).] The suggestion by Civic Association Witness Kramer that non-resident COVB customers are not disenfranchised because they have recourse to the Vero Beach Utilities Commission is illogical and was soundly rebutted by COVB witness O'Connor. Witness O'Connor testified that the Utilities Commission is only an advisory body and has no authority set the electric rates of COVB. Instead, COVB electric rates are set by members

of the COVB City Council who are elected by COVB residents. COVB customers who live outside the City have no vote on who serves on the COVB City Council, and thus have no vote on who sets their rates. [Tr. 364-65, 383 (O'Connor); Ex. 29.]

The record shows that the disenfranchisement of non-resident electric customers of COVB is real and widespread. Witness Deason, a regulatory policy expert and former commissioner of the Florida Public Service Commission, testified that “more than 60 percent of COVB’s customers resided outside of the City’s borders and have felt disenfranchised as a result.” [Tr. 292 (Deason).] A chart prepared by the Florida Municipal Electric Association, introduced into evidence at the hearing as Exhibit 58, shows that at least 61% of COVB’s customers reside outside of the COVB city limits. That same chart shows that COVB’s percentage of non-resident customers is higher than any other municipal electric utility in Florida. [Ex. 58.]

The disenfranchisement of such a large number of non-resident COVB customers has spawned a host of litigation before the Commission, the circuit court, and the Florida Supreme Court dating back to 2009. *In re: Complaint of Stephen J. Faherty and Glenn Frazier Heran against the City of Vero Beach for unfair electric utility rates and charges*, Docket No. 20090524-EM; *Town of Indian River Shores, et.al v. City of Vero Beach*, Indian River County Circuit Court, Case No. 31-2014-CAA-000748; *In re: Petition for Declaratory Statement by the Board of County Commissioners, Indian River County, Florida*, Docket No. 20140142-EM, *In re: Petition of Vero Beach for a Declaratory Statement Regarding Effect of Commission’s Orders Approving Territorial Agreements in Indian River County* Docket No. 20140244-EM, *Board of County Commissioners of Indian River County v. Graham*, 191 So. 3d 890 (Fla. 2016); and *In re: Petition for Declaratory Statement Regarding the Florida Public Service Commission’s Jurisdiction To Adjudicate the Town of Indian River Shores’ Constitutional Rights*, Docket No. 20160013-EU.

The most recent lawsuit was filed with the Commission by the Town in Docket No. 20160049-EU, and has been abated pending the outcome of this proceeding. See *In re: Petition for modification of territorial order based on changed legal circumstances emanating from Article VIII, Section 2(c) of the Florida Constitution, by the Town of Indian River Shores*, Docket No. 20160049-EU. In that pending docket, the Town has challenged COVB's exercise of unregulated monopoly powers outside of its corporate limits and within the Town as violating (i) the extra-territorial powers clause in Article VIII, Section 2(c) of the Florida Constitution, and (ii) section 180.02(2), Florida Statutes, which establishes that a municipality's exercise of extra-territorial powers outside its boundaries "shall not extend or apply within the corporate limits of another municipality." These constitutional issues regarding COVB's "extra-territorial" powers are unique in that COVB currently exercises extra-territorial powers within the Town without the Town's consent. By comparison, where Florida municipalities operate electric utilities inside the corporate limits of another equally sovereign municipality, they typically do so with the express written consent of the other municipality. For example, evidence adduced at the hearing shows: the Orlando Utilities Commission ("OUC") operates an electric utility within the City of Winter Park pursuant to an interlocal agreement with Winter Park [Ex. 59, pp. 35-79]; the City of Jacksonville Beach operates an electric utility within the corporate limits of the City of Neptune Beach pursuant to an electric service agreement with Neptune Park [Ex. 59, pp. 27-33]; the City of Leesburg operates an electric utility within corporate limits of the City of Fruitland Park pursuant to an electrical franchise agreement with Fruitland Park [Ex. 59, pp. 1-14]; and, the City of Lakeland operates an electric utility within the City of Polk City pursuant to a franchise agreement with Polk City. [Ex. 59, pp. 15-26.] The Town has not consented to COVB exercising extra-territorial powers within the Town's corporate limits as the franchise agreement between the two municipalities expired on November 6, 2016, and has not been extended. Order No. PSC-16-

0093-FOF-EU, p. 3 (Mar. 4, 2016). Unless resolved, this unique constitutional issue of first impression likely will be decided by the Florida Supreme Court.

By granting the requested regulatory approvals, terminating the existing territorial agreement, and allowing the PSA to close, the Commission would unify electric service within the Town and amicably resolve this unique litigation once and for all. It would also advance longstanding Commission policy to encourage settlement of disputes over electric service agreements. *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997) (quoting *Utilities Comm'n of New Smyrna Beach v. Fla. Pub. Serv. Comm'n*, 469 So.2d 731, 732 (Fla. 1985)) (“the legal system favors settlement of disputes by mutual agreement of contending parties ... [t]his general rule applies in utility service agreements.”) See also Order No. PSC-12-0171-AS-GU (Apr. 2, 2012) (“the Commission has a longstanding commitment to the support and encouragement of negotiated settlements”). On the other hand, without the Commission’s approval, there will be no sale, and the Town’s pending lawsuit in Docket No. 20160049-EU would resume.

Issue 7: **What extraordinary circumstances, if any, exist to support the Commission’s consideration of authorizing a positive acquisition adjustment in this case?**

Town: *COVB customers will receive lower rates. FPL’s other customers will receive net present value savings of \$135 million from economies of scale. COVB’s non-resident customers will receive regulatory protection from the Commission and OPC. COVB will receive millions of dollars in sale proceeds. Protracted territorial disputes will be resolved.*

Record evidence shows there are many public interest considerations surrounding this carefully balanced transaction that are truly extraordinary and warrant regulatory approval. The PSA is the product of extensive arms-length negotiations between COVB and FPL that began back in 2009, and has been carefully crafted to benefit all stakeholders. [Tr. 151-163, 171 (Forrest).] The PSA would benefit the Town along with 35,000 other customers who receive more costly

electric service from COVB. [Tr. 159 (Forrest).] Uncontested testimony in this proceeding shows that transitioning COVB customers to FPL rates will save the typical COVB residential customer 22% on its electric bill, or \$330 per year. [Tr. 60 (Cohen).]

Expert testimony shows FPL's general body of ratepayers would receive approximately \$135 million dollars in present value savings from FPL being able to spread its fixed costs over 35,000 additional customers. [Tr. 34, 37, 38, 50 (Bores); Tr. 40, 167, 170 (Forrest); 202, 331, 341, 344 349 (Deason).] In response to questions by Commissioner Polmann, witness Deason explained that the present value savings of \$135 million were "net" savings to FPL's customers after fully taking into account all of the costs of the positive acquisition adjustment:

Witness Deason: The other side of the equation is the fact that there is going to be an acquisition, and you are adding 35,000 customers. You are adding all the revenues that they are going to generate, which helps support all of those costs. And, in fact, the result of the CPVRR analysis, what it shows is that all of those revenues that are going to be coming from the new customers, not only does that fully pay for the acquisition adjustment and the amortization of the acquisition adjustment, there is enough of that revenue that contributes to the fixed cost of FPL that puts downward pressure to the tune of \$135 million on a present value basis.

Comm. Polmann: Okay. So is that a net revenue when you take off the operating expense?

Witness Deason: Well, the CPVRR analysis takes all of that incremental revenue which was coming from the new customers, it also includes the additional expenses of serving those customers. That's all part of that side of the equation. But that additional revenue is sufficient to not only cover the incremental expenses, but to make contributions to the fixed cost of FPL and to pay a return on the acquisition adjustment and the yearly amortization of the acquisition adjustment. It is truly an extraordinary circumstance.

[Tr. 348-49.]

Expert testimony by witness Deason further shows as a result of the PSA COVB's customers would receive regulatory protections from the Commission and legal representation from the OPC, which is a strong public policy benefit:

I believe there to be a strong public policy benefit to putting the management of the Vero Beach utility system in the hands of managers with extensive and proven utility managerial experience and to hold the resulting managerial decisions accountable by an independent regulatory authority that has the duty to protect the interests of all customers, regardless of which political subdivision they may reside in. The obvious way to achieve this outcome is to approve FPL's proposal, have all customers protected by the jurisdiction of the Commission, and have all customers represented by OPC.

[Tr. 297-98 (Deason).]

Uncontroverted testimony also shows that the PSA would benefit COVB as proceeds from the sale will provide that municipality with over \$34 million in funds which it can use at its discretion for its own municipal purposes. [Tr. 157 (Forrest).] Moreover, the Commission has already acknowledged that approval of this carefully balanced transaction would resolve a unique, complex and divisive electric service dispute that has beleaguered the Town and the people of Indian River County for decades. See Order No. PSC-2018-0036-PCO-EU (Jan. 11, 2018) (abating the litigation pending in Docket No. 20160049-EU so the Town and COVB can focus "their efforts on due diligence and consummating the sale, which would resolve the issues in dispute in this docket.")

However, without the Commission's approval, the PSA will not close. If that were to occur, the Town and 35,000 other residents currently served by COVB will be deprived of lower electric rates and more robust regulatory protections, FPL's other customers will be deprived of approximately \$135 million in present value savings from economies of scale, and COVB will be deprived of over \$34 million in funds that it could use at its discretion for its own municipal purpose. Moreover, the lawsuit pending in Docket No. 20160049-EU would resume and the Town, COVB and the Commission would be back in protracted litigation.

To advance the public interest, the Commission should grant the regulatory approvals requested by FPL and COVB, and allow the PSA to close.

Issue 8: **Should the Commission consider alternatives other than what has been proposed by FPL with respect to the acquisition adjustment?**

Town: * No. The Town joins FPL's position on Issue 8.*

Issue 9: **Should the Commission approve a positive acquisition adjustment associated with the purchase of the COVB electric utility system?**

Town: *Yes. The Town joins FPL's position on Issue 9.*

Issue 11: **What is the appropriate amount, if any, of a positive acquisition adjustment to be recorded on FPL's books for the purchase of the COVB electric utility system?**

Town: *The Town joins FPL's position on Issue 11.*

Issue 12: **If a positive acquisition adjustment is permitted, what is the appropriate accounting treatment for FPL to utilize for recovery and amortization of the acquisition adjustment?**

Town: *The Town joins FPL's position on Issue 12.*

Issue 13: **Should the projected cost savings supporting FPL's request for a positive acquisition adjustment be subject to review in future FPL rate cases?**

Town: *The Town joins FPL's position on Issue 13.*

Issue 15: **Should the Commission approve recovery of costs associated with the short-term power purchase agreement with Orlando Utilities Commission?**

Town: *Yes. The Town joins FPL's position on Issue 15.*

Issue 16: **Is granting the relief requested by the applicants in the public interest?**

Town: *Yes. The Town joins FPL's position on Issue 16.*

Issue 20: **Should this docket be closed?**

Town: *Yes. Upon issuance of an Order approving FPL's and COVB's petition to terminate their territorial agreement and approving FPL's requested accounting treatment with regard to the COVB transaction, these dockets should be closed.*

CONCLUSION

A transaction like this one -- that benefits all stakeholders and resolves long-standing and complex disputes -- is not easily achieved. It would be unfortunate if this extraordinary transaction were to die for a lack of regulatory approval. For all of these reasons, the Town respectfully requests that the Commission grant the regulatory approvals requested by FPL and COVB, and allow this carefully balanced transaction to close.

Respectfully submitted on October 29, 2018.

HOLLAND & KNIGHT LLP

/s/D. Bruce May, Jr._____

D. Bruce May, Jr.

Florida Bar No. 354473

bruce.may@hklaw.com

Holland & Knight LLP

315 S. Calhoun St., Ste. 600

Tallahassee, Florida 32301

(850) 224-7000 (Telephone)

Counsel for the Town of Indian River Shores

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 29th day of October, 2018, to the following:

Florida Public Service Commission
Charles Murphy
Kathryn Cowdery
Suzanne Brownless
Office of General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0810
cmurphy@psc.state.fl.us
kcowdery@psc.state.fl.us
rgervassi@psc.state.fl.us

Carlton Fields Law Firm
J. Michael Walls
4221 Boy Scout Blvd., Ste. 1000
Tampa FL 33607
+1-813-2294133
mwalls@carltonfields.com

City of Vero Beach
James O'Connor/Wayne R. Coment/Lange
Sykes
P. O. Box 1389
Vero Beach FL 32961
(772) 978-4710
citymgr@covb.org
wcoment@covb.org

Civic Association of Indian River County,
Inc.
Lynne A. Larkin
5690 HWY A1A, #101
Vero Beach FL 32963
(772) 234-5565
lynnelarkin@bellsouth.net

Florida Power & Light Company
Mr. Ken Hoffman
215 South Monroe Street, Suite 810
Tallahassee FL 32301
(850) 521-3919
ken.hoffman@fpl.com

Florida Power & Light Company
Bryan S. Anderson/Kenneth M. Rubin
700 Universe Boulevard (LAW/JB)
Juno Beach FL 33408
(561) 304-5639
ken.rubin@fpl.com
bryan.anderson@fpl.com

Office of Public Counsel
J.R. Kelly/S. Morse/C. Rehwinkel
c/o The Florida Legislature
111 W. Madison Street, Rm 812
Tallahassee FL 32399
(850) 488-9330
kelly.jr@leg.state.fl.us
morse.stephanie@leg.state.fl.us
Rehwinkel.charles@leg.state.fl.us

Indian River County Board of County
Commissioners
Dylan Reingold, County Attorney
1801 27th Street - Building A
Vero Beach FL 32960
dreingold@ircgov.com

/s/D. Bruce May, Jr.
Attorney