

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
ORDER NO. PSC-2018-0336-PAA-EU
ISSUED: July 2, 2018

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
JULIE I. BROWN
DONALD J. POLMANN
GARY F. CLARK
ANDREW GILES FAY

NOTICE OF PROPOSED AGENCY ACTION ORDER
GRANTING PETITION BY FLORIDA POWER & LIGHT COMPANY
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
AND
GRANTING JOINT PETITION OF FPL AND THE CITY OF VERO BEACH
TO TERMINATE TERRITORIAL AGREEMENT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

I. Background

A. Historic Background

Florida Power & Light Company (FPL) is an investor-owned electric utility operating under our jurisdiction pursuant to the provisions of Chapter 366, Florida Statutes (F.S.). FPL

provides generation, transmission, and distribution service to approximately 4.9 million retail customer accounts or an estimated 10 million people.

The City of Vero Beach's (COVB or City) electric utility is a municipally-owned electric utility providing service to customers through approximately 35,000 customer accounts using the COVB transmission and distribution facilities. The boundaries of the COVB service area are set pursuant to four territorial orders that approved territorial agreements between COVB and FPL (Territorial Orders).¹ Approximately 60 percent of COVB's utility customers reside outside the City's municipal borders including customers residing in portions of unincorporated Indian River County (County), and portions of the Town of Indian River Shores (Town or Indian River Shores). In addition to the Territorial Orders, COVB operated in Indian River County and Indian River Shores under franchise agreements, which have since expired.² For many years, there has been controversy because customers living outside the boundaries of the City wanted to be served by FPL because it charges lower rates than COVB. The customers who live outside the City have argued that they have no ability to vote for the members of the COVB City Council and thus have no voice concerning the operation or management of the City's electric utility and no redress to any governmental authority.

Legislation was passed in 2008 that required a municipal electric utility meeting certain criteria to conduct a referendum of its customers on the question of whether a separate electric utility authority should be created to operate the business of the city's electric utility. Section 366.04(7), F.S. COVB did not conduct such a referendum because it alleged that it did not meet the criteria that would require it to conduct such a referendum. Further attempts to pass Legislation to address the concerns of COVB electric customers living outside the City failed in 2010 (HB 725/SB 2632; HB 1397); 2011 (HB 899); 2013 (HB 733/SB 1620); 2014 (HB 813/SB 1248; HB 861/SB 1294); 2015 (HB 773; HB 337/SB 442); and 2016 (HB 5790/SB 840).

In 2009, a complaint was filed with us by two COVB customers asking for a hearing to address our enforcement of Section 366.04, F.S., and review the territorial agreement between COVB and FPL.³ The complaint alleged concerns about COVB's proposed changes to rates significantly higher than FPL's rates. The complaint also alleged that the City Council had entered into a series of ill-fated electric utility agreements and decisions that led to a small, outmoded and costly utility, that the City siphoned utility revenue for city budget purposes rather

¹ See Order No. 5520, issued August 29, 1972, in Docket No. 72045-EU, *In re: Application of Florida Power and Light Company for approval of a territorial agreement with the City of Vero Beach*; Order No. 6010, issued January 18, 1974, in Docket No. 73605-EU, *In re: Application of Florida Power & Light Company for approval of a modification of territorial agreement and contract for interchange service with the City of Vero Beach, Florida*; Order No. 10382, issued November 3, 1981 and Order No. 11580, issued February 2, 1983, in Docket No. 800596-EU, *In re: Application of FPL and the City of Vero Beach for approval of an agreement relative to service areas*; and Order No. 18834, issued February 9, 1988, in Docket No. 871090-EU, *In re: Petition of Florida Power & Light Company and the City of Vero Beach for approval of amendment of a territorial agreement*.

² Indian River County's franchise agreement with COVB expired in February 2017, and Indian River Shore's franchise agreement with COVB expired in November 2016. We have no information that new franchise agreements are in place.

³ Docket No. 090524-EM, *In re: Complaint of Stephen J. Faherty and Glenn Fraser Heran against the City of Vero Beach for unfair electric utility rates and charges*.

than utility operations or reserves, that over 60 percent of customers living outside the City had no voice with city elected officials, and that the City offered no conservation incentives such as rebates for installing more energy efficient appliances. The complaint was voluntarily dismissed in 2014 because of then on-going negotiations between FPL and COVB concerning the possible purchase and sale of COVB's electric system. However, those negotiations did not result in a sale.

By letter dated July 18, 2014, Indian River Shores advised COVB that it was taking several actions to achieve rate relief for its citizens who received electric service from the City. The Town filed a complaint against COVB in Indian River County Circuit Court Case No. 31-2014-CA-000748, one count of which asked the circuit court to declare that COVB was subject to and must comply with the requirement of Section 366.04(7)(a), F.S., to have a referendum. The lawsuit also challenged COVB's electric rates as unreasonable, oppressive, and inequitable and raised "a Constitutional challenge regarding the denial of rights" to COVB electric customers living in Indian River Shores.

Following unsuccessful mediation between Indian River Shores and COVB pursuant to the Florida Governmental Conflict Resolution Act, Chapter 164, F.S.,⁴ Indian River Shores filed an amended complaint asking the circuit court, in part, to declare that upon expiration of the franchise agreement giving COVB permission to provide electric service in Indian River Shores, COVB had no legal right to provide electric service in the Town. In its amended complaint, Indian River Shores alleged that COVB sought to exert extra-territorial monopoly powers and extract monopoly profits within the corporate limits of the Town without the Town's consent. The Town alleged that even though COVB's electric utility paid no corporate income taxes, no property taxes, had access to low cost financing subsidized by tax-free bonds, and was not subject to the costs of complying with state mandated energy efficiency and conservation requirements, COVB's electric rates had been some of the highest in Florida over the previous ten years and were substantially higher than FPL's rates.

Indian River Shores further alleged that although we regulated FPL's electric rates, we did not regulate COVB's rates, which were managed by the COVB City Council. The amended complaint alleged that approximately 65 percent of COVB's electric customers were located outside of the City and thus had no voice in electing the officials that managed the City's electric utility system and set their electric rates. The Town alleged that COVB's high electric rates were due to factors within the City's control, including (1) abdicating its operational and managerial responsibilities to entities with which it had entered into expensive long-term power supply arrangements without appropriate oversight and due diligence; (2) the City was bound to above-market power prices under the long-term power supply arrangements agreed to by the City; (3) the City administered its electric utility power supply without appropriate hedging, interest-rate swaps, and other risk management protocols needed to mitigate fuel price volatility and keep electric power costs as low as reasonably possible; and (4) electric utility revenues were diverted to COVB's general revenue fund as a means to keep ad valorem taxes on property within the City artificially low and to cover costs that had nothing to do with operation of the City's electric

⁴ Indian River County also participated in this mediation.

utility. Indian River Shores alleged that COVB had not operated its electric utility and furnished electric services in accordance with normally accepted electric utility standards, but rather had acted imprudently in its utility management.

COVB filed a motion to dismiss the circuit court franchise agreement claim, which we supported in court as amicus curiae. On November 11, 2015, the circuit court granted the motion to dismiss, finding that the question of whether COVB had the authority to continue to provide electric service within Indian River Shores upon expiration of the franchise agreement was squarely within our jurisdiction to decide. The circuit court did not dismiss the count that COVB's electric rates were unreasonable. However, Indian River Shores subsequently voluntarily dismissed its lawsuit with prejudice.

In 2014, Indian River County filed a petition for declaratory statement, asking us for a declaration that upon expiration of its franchise agreement with COVB in February 2017, the County would have the right to choose its electricity provider. In its petition, Indian River County alleged that more than half of COVB's electric customers were outside the City limits in the unincorporated parts of the County, and that while the exemption from our jurisdiction for municipal utilities was understandable where the customers are all or mostly all city residents, the majority of COVB's customers had no political or regulatory recourse regarding COVB as their electric service provider. The County further alleged that the situation was especially egregious since COVB refused to hold a referendum under Section 366.04(7), F.S., or to otherwise create an electric utility authority that would include representation of non-city customers. The petition alleged that COVB's electric service to customers who lived outside the City in unincorporated Indian River County had become increasingly more contentious and controversial, that the non-city COVB electric customers who receive no city services were contributing two-thirds as much revenue to general government as is generated by the City's property taxes, and that COVB's rates were approximately one-third higher than FPL's rates. We denied this petition for failing to meet the statutory requirements necessary to obtain a declaratory statement.⁵

Also in 2014, COVB filed a petition asking us for a declaration that upon expiration of its franchise agreement with the County, COVB would have the right and obligation to continue providing electric service in unincorporated Indian River County under the Territorial Orders. We issued an order declaring that COVB has the right and obligation to continue to provide retail electric service in the territory described in the Territorial Orders upon expiration of its franchise agreement with the County.⁶ The County appealed both orders, and both orders were affirmed by the Florida Supreme Court.⁷

⁵ Order No. PSC-15-0101-DS-EM, issued February 12, 2015, in Docket No. 140142-EM, *In re: Petition for Declaratory Statement by the Board of County Commissioners, Indian River County, Florida*.

⁶ Order No. PSC-15-0102-DS-EM, issued February 12, 2015, in Docket No. 140244-EM, *In re: Petition of Vero Beach for a Declaratory Statement Regarding Effect of Commission's Orders Approving Territorial Agreements in Indian River County*.

⁷ *Board of County Commissioners of Indian River County v. Graham*, 191 So. 3d 890 (Fla. 2016).

On January 5, 2016, Indian River Shores filed a petition for declaratory statement with us that asked for a declaration that we lack jurisdiction to interpret Article VIII, Section 2(c), Florida Constitution for purposes of determining whether Indian River Shores has a constitutional right to be protected from COVB providing electric service within the Town without Indian River Shores' consent. In response, we issued an order declaring that we had the jurisdiction under Section 366.04, F.S., to determine whether COVB had the authority to continue to provide electric service within the corporate limits of Indian River Shores upon expiration of the franchise agreement and that in a proper proceeding we have the authority to interpret the phrase "as provided by general or special law" as used in Article VIII, Section 2(c), Florida Constitution.⁸

On March 4, 2016, pursuant to Sections 120.57 and 366.04, F.S., Indian River Shores filed a Petition for Modification of Territorial Order Based on Changed Legal Circumstances Emanating from Article VIII, Section 2(c) of the Florida Constitution. Indian River Shores asked us to modify the Territorial Orders between FPL and COVB by moving the entire Town of Indian River Shores out of COVB's service area and placing it within the electric service area of FPL. In its Petition, based on essentially the same specific allegations made in the Circuit Court Amended Complaint as detailed above, the Town argued that we should modify the Territorial Orders because COVB was operating as an unregulated monopoly within the Town and subjected captive customers in the Town to excessive rates, inferior quality of services, and other monopoly abuses contrary to the public interest. The Town alleged that some of its citizens were served by FPL and some by COVB and that, as a consequence, the Town's residents received vastly different service, rates, regulation, and oversight and that the territory boundary pitted neighbor against neighbor and caused discord and confusion among Town residents.

Indian River Shores also alleged that having FPL as the single electric provider would allow all Town residents access to the energy conservation programs offered by FPL, give access to FPL's deployment of solar generation and smart meters, which were not offered by COVB, would dramatically reduce the utility costs to the Town's residents, and would provide the Town with the benefits of FPL's highly regarded management expertise and high customer satisfaction ratings. The petition alleged that the Town's residents were overwhelmingly in favor of having FPL as the single electric provider within the Town. We issued a proposed agency action (PAA) order denying the petition for modification.⁹ The Town of Indian River Shores filed a petition for administrative hearing on the PAA order and COVB filed a cross-petition. Upon joint motion of Indian River Shores and the City, the hearing is being held in abeyance pending closing on the purchase and sale of the COVB electric utility to FPL.

⁸ Order No. PSC-16-0093-FOF-EU, issued March 4, 2016, in Docket No. 160013-EU, *In re: Petition for declaratory statement regarding the Florida Public Service Commission's jurisdiction to adjudicate the Town of Indian River Shores' constitutional rights.*

⁹ Order No. PSC-16-0427-PAA-EU, issued October 4, 2016, in Docket No. 160049-EU, *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.*

B. The Petitions Filed in Docket Nos. 20170235-EI and 20170236-EU

On November 3, 2017, FPL filed a petition in Docket No. 20170235-EI for authority to charge FPL's rates and charges to COVB customers and for approval of FPL's requested accounting treatment. As part of its petition, FPL filed testimony and exhibits of six technical experts. FPL's petition stated that on May 16, 2017, FPL presented a letter of intent to COVB for the potential purchase of the City's electric utility system, which was subsequently executed by both parties. FPL stated that, thereafter, FPL and the City negotiated an agreement for the sale of the COVB's electric utility assets. FPL also stated that negotiations were held with the Florida Municipal Power Agency (FMPA) and the Orlando Utilities Commission (OUC) to resolve COVB's contractual obligations with those entities, which would be necessary in order to close the transaction. On October 24, 2017, FPL and COVB entered into an Asset Purchase and Sale Agreement (the PSA) that reflects COVB's and FPL's agreement to sell and to purchase the COVB electric utility system. Pursuant to the PSA, FPL will acquire assets of the COVB electric utility system for a cash payment of approximately \$185.0 million as well as other consideration.

The petition states that in connection with the PSA, COVB needs to address power contracts to which it is a party, including (1) a 20-year wholesale services agreement with OUC to provide supplementary power to COVB, due to expire in 2023 (Wholesale Services Agreement); and (2) a series of three contracts for the City's share of the FMPA generation entitlements from certain power plants, namely St. Lucie Unit 2 and Stanton Units 1 and 2 (collectively "FMPA Entitlements"). The petition further states that, pursuant to the provisions of the PSA, COVB's Wholesale Services Agreement with OUC and COVB's obligations to FMPA for the FMPA Entitlements would terminate upon the closing of the PSA. FPL states that, as part of the PSA and to enable the COVB to terminate its obligations with OUC, FPL negotiated a short-term power purchase agreement (PPA) with OUC for capacity and energy, commencing at the close of the PSA and extending through 2020.

FPL states in its petition that in order to implement the PSA, it requests that we: (1) grant FPL approval to charge its approved rates and charges to the COVB customers; (2) approve the establishment and base rate recovery of a positive acquisition adjustment of approximately \$116.2 million with respect to the City's electric utility system acquired by FPL; and (3) approve recovery of costs associated with the short-term PPA with OUC. An acquisition adjustment is the difference between the purchase price paid to acquire a utility asset or group of assets and the depreciated original cost, or net book value, of those assets. A positive acquisition adjustment exists when the purchase price is greater than the net book value. With respect to the OUC PPA, FPL requests that we: (1) approve recovery of the energy portion of charges through FPL's Fuel and Purchased Power Cost Recovery Clause; and (2) approve recovery of the capacity charges component through the Capacity Cost Recovery Clause.

In addition, on November 3, 2017, FPL and COVB filed a joint petition in Docket No. 20170236-EU for approval to terminate their territorial agreement. The joint petition alleges that termination of the territorial agreement is sought in connection with FPL's acquisition of the COVB electric utility and FPL's petition to charge FPL's approved rates and charges and for the approval of its requested accounting treatment.

The joint petitioners state that FPL's purchase of COVB's electric system is projected to result in more economical service to both COVB's customers and FPL's current customers and, therefore, termination of the territorial agreement is in the public interest. COVB's existing service territory is surrounded by FPL's service territory. The joint petitioners state that the geographic configuration will allow FPL to make efficient use of resources in providing electric service to COVB's customers. The joint petitioners further state that termination of the territorial agreement will result in excellent service reliability for COVB's customers. Additionally, the joint petitioners state that COVB's residential and commercial customers will be eligible to participate in FPL's energy conservation programs and commercial customers will have the opportunity to enroll in economic development rates.

Intervention by the Office of Public Counsel in both dockets was acknowledged by Order Nos. PSC-2018-0145-PCO-EI (Docket No. 20170235-EI) and PSC-2018-0163-PCO-EU (Docket No. 20170236-EU).¹⁰

C. Jurisdiction

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. In the 1974 Grid Bill,¹¹ as part of the Legislature's regulatory regime over electric utilities, we were given limited regulatory jurisdiction over municipal electric utilities. *See* 366.04(2), F.S. The Legislature gave us authority over municipalities to prescribe uniform systems and classifications of accounts; to prescribe a rate structure for all electric utilities; to require electric power conservation and reliability within a coordinated grid, for operational as well as emergency purposes; to approve territorial agreements; to resolve territorial disputes; and to prescribe and require the filing of periodic reports and other data. The purchase and sale agreement between COVB and FPL is not subject to our approval.

Further, the Legislature did not give us jurisdiction over municipal rates. *Lewis v. Public Service Commission*, 463 So. 2d 227 (Fla. 1985)(stating that our jurisdiction over rate structure does not include jurisdiction over the actual rates charged by a municipal electric utility). Because we lack this jurisdiction, we do not have authority to determine what COVB's electric rates should be or whether COVB's rates are "too high" compared to FPL's rates. The Florida Supreme Court has stated that as part of Florida's legislatively constructed regulatory regime, if customers of municipal electric utilities have complaints of "excessive rates or inadequate

¹⁰ Order No. PSC-2018-0145-PCO-EI, issued March 15, 2018, in Docket No. 20170235-EI, *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*; Order No. PSC-2018-0163-PCO-EU, issued March 26, 2018, Docket No. 20170236-EU, *In re: Joint petition to terminate territorial agreement, by Florida Power & Light Company and the City of Vero Beach*.

¹¹ The Grid Bill codified the Commission's authority to approve and review territorial agreements involving investor-owned utilities and expressly granted the Commission jurisdiction over rural electric cooperatives and municipal electric utilities for approving territorial agreements and resolving territorial disputes. *See Richard C. Bellak and Martha Carter Brown, Drawing the Lines: Statewide Territorial Boundaries for Public Utilities in Florida*, 19 Fla. St. L. Rev. 407, 413 (1991).

service their appeal under Florida law is to the courts or the municipal council.” *Story v. Mayo*, 217 So. 2d 304, 308 (Fla. 1968), *cert. denied*, 395 U.S. 909 (1969).

II. FPL’s Request to Charge its Rates to Former COVB Customers

As part of its petition filed in Docket No. 20170235-EI, FPL asks us to grant it the authority to charge its rates and charges to COVB’s customers. The PSA provides for the COVB customers to become FPL electric customers and receive service at the applicable FPL rates and charges upon the closing of the PSA. Specifically, the PSA states that FPL has the responsibility for securing our approval for authority under Rule 25-9.044, F.A.C., to charge FPL’s existing rates to the COVB customers.¹² Rule 25-9.044(1), F.A.C., states that in the case of a change of ownership or control of a utility that places the operation under a different or new utility, the company which will thereafter operate the utility must adopt and use the rates, classifications, and regulations of the former operating company unless we authorize a change.

In response to our staff’s first data request, FPL provided bill comparisons between FPL and COVB customers. A COVB residential customer who becomes an FPL customer who uses 1,000 kilowatt hours (kWh) would see a bill decrease from \$126.10 to \$99.37, a decrease of \$26.73 or approximately 21.2 percent, based on rates effective March 2018.¹³ COVB commercial and industrial customers would also see bill decreases based on usage.

Regarding customer notification, FPL explains that its proposal to acquire the COVB electric utility has been the subject of public debate and discussion for nearly a decade up to the time when the City Council voted in favor of the sale in October 2017. FPL further states that the proposed sale of the COVB electric utility to FPL was addressed in two public referendums and during numerous publicly noticed City Council meetings. In addition, FPL states that it plans to hold two open houses before the transaction closes in order to address all customer questions and concerns.

We authorize FPL to charge its approved rates and charges to the COVB customers effective upon the closing date of the PSA because those customers would become FPL customers. FPL should notify the COVB customers of the new rates and charges with the first bill containing the new rates. Given the lengthy public debate regarding the proposed FPL/COVB transaction and the fact that FPL’s current rates and charges are lower than the City’s rates, customer notification with the first bill containing the new rates is sufficient.

III. Termination of FPL and COVB’s Existing Territorial Agreement

In Docket No. 20170236-EU, FPL and COVB jointly ask us to terminate their territorial agreement. The joint petition involves the transfer of customers from COVB to FPL. Section

¹² Document No. 09427-2017, Exhibit SAF-1, page 63.

¹³ In its November 3, 2017 petition, FPL stated that a residential customer using 1,000 kWh per month would save \$16.34 per month. This calculation was based on September 2017 COVB bills and January 2018 FPL bills. In response to our staff’s first data request, FPL provided updated bill calculations based on rates effective March 2018.

366.04(2), F.S., gives us the power to approve territorial agreements between municipal electric utilities and investor-owned electric utilities. Any modification or termination of a Commission-approved territorial order must be made by us pursuant to our exclusive jurisdiction. *See Public Service Commission v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989). We have the responsibility to ensure that the termination of the territorial agreement and concomitant transfer of customers to FPL results in no harm or detriment to the public interest. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997), *Utilities Commission of the City of New Smyrna Beach v. Florida Public Service Commission*, 469 So. 2d 731, 732-33 (Fla. 1985). The public interest is the ultimate measuring stick to guide our decision. *Gulf Coast Electric Cooperative v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999). Utility ratemaking is viewed as a matter of fairness. *GTE Florida Inc. v. Clark*, 668 So. 2d 971, 972 (Fla. 1996). Our decision must be based on the effect termination of the territorial agreement will have on all affected customers, both those transferred and those not transferred. *See New Smyrna Beach*, 469 So. 2d at 732.

FPL and COVB's joint petition states that they are requesting termination of their existing territorial agreement in connection with FPL's acquisition of the COVB electric utility addressed in Docket No. 20170235-EU. The joint petition states that the termination of the territorial agreement will be effective if all conditions precedent to the PSA are satisfied and the transaction closes. Currently, COVB serves 29,258 residential, 5,721 commercial, and 144 street light customers for a total of 35,123 customers. FPL will provide electric service to COVB's customers at FPL's approved rates and charges upon the closing date of the PSA. If the territorial agreement is terminated, FPL will serve all of Indian River County. If the PSA does not close, the joint petitioners will continue to operate pursuant to the Territorial Orders.

Regarding customer notification of the proposed termination of the territorial agreement, the joint petitioners explain that FPL's proposal to acquire the COVB electric utility has been the subject of public debate and discussion for nearly a decade. In addition, the joint petitioners state that FPL plans to hold two open houses before the transaction closes in order to address all customer questions and concerns, including termination of the territorial agreement.

We approve the joint petitioners' request to terminate the existing territorial agreement between FPL and COVB effective upon the closing date of the PSA. Termination of the territorial agreement results in no harm or detriment to the public interest. Upon closing of the PSA, FPL shall file revised tariff sheets Nos. 3.020, 3.010, and 7.020 to reflect the addition of the COVB service area to the description of territory and communities served. We give our staff authority to administratively approve the tariff sheets consistent with our decision.

IV. FPL's Request for a Positive Acquisition Adjustment

As explained above in the Case Background, we do not have jurisdiction over the transfer of the COVB's electric utility assets to FPL. The narrow question before us is whether FPL's proposed accounting treatment should be approved.

A. Legal Standard

An acquisition adjustment is the difference between the purchase price paid to acquire a utility asset or group of assets, and the depreciated original cost, or net book value, of those assets. A positive acquisition adjustment exists when the purchase price is greater than the net book value. The approval of a positive acquisition adjustment for rate-making purposes means that a utility can recover the purchase price premium from all of its customers. Our policy with respect to acquisition adjustments has been to evaluate the specific facts and circumstances on a case by case basis and to determine whether there are extraordinary circumstances that warrant the approval of a positive acquisition adjustment. This policy as applied to electric investor-owned utilities is explained in Order No. PSC-92-1468-FOF-EU, where we analyzed whether to allow a positive acquisition adjustment in the acquisition of the Sebring Utilities Commission (Sebring) electric system by Florida Power Corporation (FPC).¹⁴ In that case, FPC purchased the Sebring electric system for \$54.0 million, paying a premium of approximately \$36.5 million over the net book value of \$17.5 million.

As described in the 1992 FPC/Sebring Order, Sebring was in serious financial distress, with debt service bringing it to the verge of bankruptcy. Sebring was in default of its bond covenants and its rates were not sufficient to cover the debt service and maintain required reserve margins. Sebring's rates were the highest in the state, and to comply with its bond covenants would require an estimated thirty-seven percent rate increase, raising the typical residential electric bill to \$151 per 1,000 kWh. We determined that extraordinary circumstances existed for allowing a positive acquisition adjustment because the acquisition of the Sebring electric system represented the most reasonable resolution of Sebring's financial problems.

Upon answering the threshold question of extraordinary circumstances in the affirmative, we examined the value above net book value which reasonably could be approved as benefitting the general body of FPC's existing customers, thereby establishing a going concern value of \$5.7 million. In our decision, we quoted the Florida Supreme Court in *C.F. Industries, Inc. v. Nichols*, 536 So. 2d 234, 238-39 (Fla. 1988), in which the Court affirmed our approval of standby rates to be charged cogenerators:

In setting rates, the PSC has a two-pronged responsibility: rates must not only be fair and reasonable to the parties before the PSC, they must also be fair and reasonable to other utility customers who are not directly involved in the proceedings at hand. Standby rates which did not properly recover the cost-of-service would unfairly discriminate against other customers by requiring them to subsidize the standby service.

We applied this principle in the FPC/Sebring case. Therefore, the cost of the debt attached to the Sebring electric system was not recovered from the existing general body of FPC

¹⁴ Order No. PSC-92-1468-FOF-EU, issued December 17, 1992, in Docket No. 920949-EU, *In re: Joint Petition of Florida Power Corporation and Sebring Utilities Commission for Approval of Certain Matters in Connection with the Sale of Assets by Sebring Utilities Commission to Florida Power Corporation*, affirmed, *Action Group v. Deason*, 615 So. 2d 683 (Fla. 1993) (FPC/Sebring Order).

customers through an acquisition adjustment. Instead, we stated that the debt that the Sebring electric system had accrued was a “cost of service” attached to that system, and that attaching that cost of service to a different existing general body of customers was against the principles of ratemaking. Apart from the recovery of the net book value and the going concern value, we found all other recovery to be the responsibility of Sebring to be specifically recovered only from the existing and future customers located within the Sebring service area.

The record of this proceeding makes it perfectly clear, despite many Sebring customers’ wish that it be otherwise, that the cost of the Sebring debt is a cost to serve the Sebring customers. . . . We find that the Sebring rider rate appropriately identifies the additional cost to serve Sebring customers, appropriately allocates that cost to those customers, and appropriately insulates Florida Power Corporation’s general body of ratepayers from the costs that were not incurred for their benefit.¹⁵

The public interest is the ultimate measuring stick to guide our decisions. *Gulf Coast Electric Cooperative v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999). Utility ratemaking is viewed as a matter of fairness. *GTE Florida Inc. v. Clark*, 668 So. 2d 971, 972 (Fla. 1996).

B. FPL’s Request for a Positive Acquisition Adjustment

As part of its petition filed on November 3, 2017, FPL requests approval to record and recover through base rates a positive acquisition adjustment of \$116.2 million. FPL states that the acquisition of the COVB system will benefit the existing general body of FPL customers because FPL projects that the incremental costs to serve the COVB customers will be less than the incremental revenues received from those same customers. FPL also states that the addition of the COVB customers will reduce the shared amount of fixed cost spread across FPL’s existing general body of customers. FPL provided a cumulative present value revenue requirements (CPVRR) analysis that showed potential 30-year present value savings of \$105.3 million to the existing general body of FPL customers.¹⁶

FPL identified three cases involving natural gas utilities where we addressed positive acquisition adjustments. These cases involved the acquisition of Florida City Gas by AGL Resources, Inc. (AGLR), the acquisition of Florida Public Utilities Company (FPUC) by the Florida Division of Chesapeake Utilities Corporation (Chesapeake), and the acquisition of Indiantown Gas Company by FPUC.¹⁷ FPL alleges that in these cases, we identified five factors

¹⁵ Order No. PSC-92-1468-FOF-EU, p. 8.

¹⁶ The CPVRR analysis included the short-term PPA with OUC. Following data requests by our staff and discovery by OPC, FPL amended its 30-year CPVRR analysis to account for the tax savings from the Tax Cuts and Jobs Act, which became law on December 22, 2017. The amended CPVRR projects 30-year present value savings of \$127.0 million.

¹⁷ Order No. PSC-07-0913-PAA-GU, issued November 13, 2007, in Docket No. 060657-GU, *In re: Petition for approval of acquisition adjustment and recognition of regulatory asset to reflect purchase of Florida City Gas by AGL Resources, Inc.*; Order No. PSC-12-0010-PAA-GU, issued January 3, 2012, in Docket No. 110133-GU, *In re: Petition for approval of acquisition adjustment and recovery of regulatory assets, and request for consolidation of regulatory filings and records of Florida Public Utilities Company and Florida Division of Chesapeake Utilities*

that have been considered in determining whether an acquisition and any resulting positive acquisition adjustment are in the public interest. FPL states that these five factors are: (1) increased quality of service; (2) lowered operating costs; (3) increased ability to attract capital for improvements; (4) a lower overall cost of capital; and (5) more professional and experienced managerial, financial, technical, and operational resources. FPL states that due to its size and expertise in the electric utility industry, all five of these factors will be met for the benefit of the COVB customers if the transaction is consummated. FPL also cites the case of the acquisition of Sebring by FPC¹⁸ as an example of our approving a positive acquisition adjustment.

FPL also cites to Rule 25-30.0371, F.A.C., in support of its request. Rule 25-30.0371, F.A.C., addresses acquisition adjustments for water and wastewater utilities. The rule states, consistent with our policy for all regulated industries, that a positive acquisition adjustment shall not be included in rate base absent proof of extraordinary circumstances.

C. Extraordinary Circumstances

Like almost every other state utility commission, we practice original cost ratemaking. Under original cost ratemaking, the value of a utility's rate base is determined by the depreciated original cost of the property devoted to public service.

As noted earlier, our policy concerning consideration of acquisition adjustments for electric utilities has been that, for ratemaking purposes, absent a clear demonstration of extraordinary circumstances, the purchase of a utility system at a premium does not affect the determination of rate base. In other words, if the purchase price of a utility is greater than the net book value, the difference between the purchase price and net book value is not passed on to the general body of customers vis-a-vis an increase in rate base absent a demonstration of extraordinary circumstances. Such a policy protects customers from utilities "swapping assets" and inappropriately increasing costs to customers. For example, if a utility paid \$2 million for a \$1 million piece of equipment, we would appropriately deny the unjustified \$1 million additional cost. Similarly, when one utility purchases another utility at above depreciated original cost, any cost above the depreciated original cost should be disallowed unless extraordinary circumstances indicate it would be in the best interests of customers to allow an acquisition adjustment. The premium paid above the depreciated original cost does not represent a contribution of capital to public service.

We do not agree with FPL that its reliance on a CPVRR analysis demonstrates extraordinary circumstances. Moreover, we do not agree with FPL that Rule 25-30.0371, F.A.C., concerning acquisition adjustments for water and wastewater utilities, is applicable to this case. That rule is specific to water and wastewater utilities and does not apply to electric utilities. Further, we do not agree with FPL that the factors that we have considered in determining

Corporation.; Order No. PSC-14-0015-PAA-GU, issued January 6, 2014, in Docket No. 120311-GU, *In re: Petition for approval of positive acquisition adjustment to reflect the acquisition of Indiantown Gas Company by Florida Public Utilities Company.*

¹⁸ Order No. PSC-92-1468-FOF-EU.

whether to allow a positive acquisition adjustment for a gas utility purchase are determinative in this case.

The FPC/Sebring Order is the only case where we approved a positive acquisition adjustment in the electric industry. This case provides guidance in addressing FPL's petition. The difficulty associated with addressing the question of whether a positive acquisition adjustment should be allowed in the electric industry and applied to the general body of customers was expressed in the FPC/Sebring Order:

From our regulatory perspective the case has been a difficult one. As a general rule, we do not preapprove the prudence of rate base acquisitions outside of a rate case, nor do we usually permit acquisition adjustments, particularly outside of a rate case. As a general rule, we do not permit utilities to identify a pool of debt costs and apply those costs to a particular set of customers. Nevertheless, unique problems require unique solutions, and under this particular set of extraordinary circumstances, we believe our decision is in the best interest of all concerned. To those who would view our decision here as precedent, we unconditionally state that this decision has no precedential value. It is limited to the unique set of facts in this case.¹⁹

We find that there are extraordinary circumstances in this case that warrant the approval of a positive acquisition adjustment. As described in the Case Background, approximately 60 to 65 percent of COVB's customers reside outside the City's municipal borders. For many years, these customers have been frustrated by their inability to have a voice in the operation of the City's electric utility or in rate setting decisions. This dissatisfaction has resulted in years of controversy, repeated efforts to address issues through legislation, multiple filings with us, and litigation between the City of Vero Beach and the Town of Indian River Shores and Indian River County. We received no objections in either Docket Nos. 20170235-EI or 20170236-EU from any COVB or FPL customers. The legal system favors settlement of utility territorial disputes by mutual agreement between contending parties. *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997). The sale of the COVB electric utility to FPL and attendant transfer of customers from COVB to FPL will resolve the ongoing contention between the COVB and Indian River County and the Town of Indian River Shores. For these reasons, we find that FPL has demonstrated extraordinary circumstances that justify approval of a positive acquisition adjustment.

It is important to note that a disparity in rates alone does not constitute an extraordinary circumstance that can support a positive acquisition adjustment. Electric utility customers cannot choose between electricity providers based on which provider has the lower rates. A significant price differential in electric rates between two electricity providers does not give a customer a substantial interest in the outcome of a proceeding on a proposed territorial agreement. *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla 1997). It is established law that "[a]n individual has no organic, economic or political right to service by a particular utility merely

¹⁹ Order No. PSC-92-1468-FOF-EU, p.11.

because he deems it advantageous to himself.” *Story v. Mayo*, 217 So. 2d 304, 307 (Fla. 1968), *cert. denied*, 395 U.S. 909 (1969). In the exercise of our jurisdiction over territorial agreements, larger policies are at stake than one customer’s self-interest. *Lee County Electric Co-op v. Marks*, 501 So. 2d 585, 587 (Fla. 1987). If a customer is permitted to allege extraordinary circumstances simply because they pay higher rates than the rates charged by another electricity provider, then every person or entity in Florida would have grounds to argue they too are entitled to be served by a different electricity provider with lower rates.

D. Positive Acquisition Adjustment Amount

Extraordinary circumstances due to the unique nature of the territorial issues in this case merit our approval of a positive acquisition adjustment. Due to the facts of this case, we need not determine a value above net book value that could benefit the general body of ratepayers because we find that allowing a positive acquisition adjustment of \$116.2 million will not harm FPL’s existing customers. Therefore, we authorize FPL to record a positive acquisition adjustment in the amount of \$116.2 million on its books in Federal Energy Regulatory Commission (FERC) Account 114 - Electric Plant Acquisition Adjustments and to amortize this amount over the requested period of 30 years.

V. The Short-Term Power Purchase Agreement with OUC

FPL states that obtaining COVB’s release from an existing wholesale contract with OUC, due to expire in 2023, is a necessary step to proceed with the acquisition of the City’s utility. FPL additionally states that OUC would not grant COVB a release from the wholesale contract without additional compensation beyond the \$20 million that COVB committed to pay from the proceeds of the sale. As such, FPL negotiated a power purchase agreement (PPA) with OUC effective upon the closing of the PSA through December 2020.

Under the terms of the PPA, FPL is obligated to purchase a specified amount of capacity at a specified price from OUC. The purchase of energy is optional and is based on FPL anticipating an economic benefit of calling on the energy. Monthly energy costs are based on heat rate, duration of the purchase, and the daily price of natural gas. Energy costs also contain a defined operation and maintenance component. FPL states that the PPA would effectively be exercised as a peaking option to cover load during periods of high demand. However, FPL has made no assertion or demonstration that the PPA is needed for reliability purposes.

FPL requests that we approve recovery of the energy portion of charges through the Fuel and Purchased Power Cost Recovery Clause and approve recovery of the capacity charges component through the Capacity Cost Recovery Clause. In this respect, FPL’s requested method of recovery is like that of other power purchase agreements. FPL states that, from an avoided cost perspective, FPL customers will receive a total of approximately \$6.9 million in net energy savings, compared to total fixed costs of \$23.5 million. Therefore, based on FPL’s estimates at this time, the PPA is approximately \$16.6 million above avoided cost.

Typically, a power purchase agreement is considered appropriate for cost recovery if it is reasonably demonstrated that the agreement will not result in costs above avoided cost. However, consistent with our decision to approve an acquisition adjustment under the extraordinary circumstances in this case, we approve FPL's request to recover the energy portion of charges through the Fuel and Purchased Power Cost Recovery Clause, and we approve recovery of the capacity charges component through the Capacity Cost Recovery Clause.

VI. Conclusion

Our decision is limited to the unique set of circumstances in this case and does not represent a change in our regulatory policy concerning positive acquisition adjustments. We reiterate that, as a general rule, we do not preapprove the prudence of rate base acquisitions outside of a rate case, nor do we permit positive acquisition adjustments, particularly outside of a rate case. The threshold determination of whether extraordinary circumstances exist will continue to be determined on a case-by-case basis through informed Commission judgment. Nevertheless, unique problems require unique solutions, and under this particular set of extraordinary circumstances as described in this order, we believe our decision is in the public interest.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that we authorize Florida Power & Light Company to charge its approved rates and charges to the City of Vero Beach customers effective upon the closing date of the Asset Purchase and Sale Agreement because those customers would become Florida Power & Light Company customers. Florida Power & Light Company shall notify the City of Vero Beach customers of the new rates and charges with the first bill containing the new rates. It is further

ORDERED that we approve the joint petitioners' request to terminate the existing territorial agreement between Florida Power & Light Company and the City of Vero Beach effective upon the closing date of the Asset Purchase and Sale Agreement. Upon closing of the Asset Purchase and Sale Agreement, Florida Power & Light Company shall file revised tariff sheets Nos. 3.020, 3.010, and 7.020 to reflect the addition of the City of Vero Beach service area to the description of territory and communities served. We give our staff authority to administratively approve the tariff sheets consistent with our decision. It is further

ORDERED that, as set forth in the body of this Order, we find that Florida Power & Light Company has demonstrated extraordinary circumstances that justify approval of a positive acquisition adjustment. It is further

ORDERED that we authorize Florida Power & Light Company to record a positive acquisition adjustment in the amount of \$116.2 million on its books in Federal Energy Regulatory Commission Account 114 - Electric Plant Acquisition Adjustments and to amortize this amount over the requested period of 30 years. It is further

ORDERED that we approve Florida Power & Light Company's request to recover the energy portion of charges through Florida Power & Light Company's Fuel and Purchase Power Cost Recovery Clause and the capacity charges component through the Capacity Cost Recovery Clause. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 2nd day of July, 2018.



CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 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.

KGWC

Chairman Art Graham dissents on the issue of the finding that extraordinary circumstances exist to authorize a positive acquisition adjustment; on the issue of the approval of a positive acquisition adjustment; and on the issue of the approval of Florida Power & Light Company's requested cost recovery of the short-term Power Purchase Agreement with the Orlando Utilities Commission.

Commissioner Donald J. Polmann dissents on the following as presented by Florida Power & Light Company: The amount of the positive acquisition adjustment and the cost recovery of the short-term Power Purchase Agreement with the Orlando Utilities Commission.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on July 23, 2018.

In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.