

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-2018-0566-FOF-EU
ISSUED: November 30, 2018

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN
DONALD J. POLMANN
GARY F. CLARK
ANDREW GILES FAY

FINAL ORDER GRANTING
THE CITY OF VERO BEACH AND FLORIDA POWER & LIGHT COMPANY'S
JOINT PETITION TO TERMINATE TERRITORIAL AGREEMENT
AND
FLORIDA POWER & LIGHT COMPANY'S PETITION 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

APPEARANCES:

BRYAN S. ANDERSON, WADE LITCHFIED, and KENNETH RUBIN,
ESQUIRES, 700 Universe Boulevard, Juno Beach, Florida 33408-0420
On behalf of Florida Power & Light Company.

J. MICHAEL WALLS, ESQUIRE, Carlton Fields Law Firm, 4221 W. Boy
Scout Boulevard, Tampa, Florida 33607-5780
On behalf of the City of Vero Beach.

BRUCE D. MAY, ESQUIRE, Holland & Knight Law Firm, 315 S. Calhoun
Street, Suite 600, Tallahassee, Florida, 32301
On behalf of the Town of Indian River Shores.

DYLAN REINGOLD, COUNTY ATTORNEY, 1801 27th Street, Building A,
Vero Beach, Florida 32960

On behalf of the Indian River County Board of County Commissioners.

J.R. KELLY, PUBLIC COUNSEL, STEPHANIE A. MORSE, CHARLES
REHWINKEL, and TAD DAVID, ESQUIRES, Office of Public Counsel, c/o
the Florida Legislature, 111 W. Madison Street, Room 812, Tallahassee,
Florida 32399-1400

On behalf of the Citizens of the State of Florida.

LYNNE A. LARKIN, ESQUIRE, 5690 Highway, A1A #101, Vero Beach,
Florida 32963

On behalf of the Civic Association of Indian River County, Inc.

CHARLES MURPHY, SUZANNE BROWNLESS, and KATHRYN G.W.
COWDERY, ESQUIRES, Florida Public Service Commission General
Counsel's Office, 2540 Shumard Oak Boulevard, Tallahassee, Florida
32399-0850

On behalf of the Florida Public Service Commission Staff.

KEITH HETRICK, GENERAL COUNSEL and MARY ANNE HELTON,
DEPUTY GENERAL COUNSEL, Florida Public Service Commission, 2540
Shumard Oak Boulevard, Tallahassee, Florida 32399-0850

Advisors to the Florida Public Service Commission.

BY THE COMMISSION:

I. 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.

The City of Vero Beach's (COVB or City) electric utility is a municipally-owned electric utility providing service to approximately 35,000 customer accounts using COVB's transmission and distribution facilities. The boundaries of the COVB service area were set pursuant to four territorial orders that approved territorial agreements between COVB and FPL.¹ Approximately

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*,

60 percent of COVB's utility customers reside outside the City's municipal borders, including customers residing in portions of unincorporated Indian River County (the County) and portions of the Town of Indian River Shores (Indian River Shores or the Town).

On November 3, 2017, FPL and COVB filed a joint petition for approval to terminate their territorial agreement.² The joint petitioners state that termination of the territorial agreement was sought in connection with FPL's acquisition of the COVB electric utility. The joint petitioners state that 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 for a cash payment of approximately \$185.0 million as well as other consideration. The joint petitioners state that termination of the COVB/FPL territorial agreement can only occur, subject to our approval, if all conditions precedent to the PSA closing are satisfied. The joint petitioners further state that, if the PSA does not close, COVB will continue to serve its customers and the existing territorial boundaries will remain in effect.

Directly related to the joint petition to terminate the COVB/FPL territorial agreement, FPL filed a petition for authority to charge FPL's rates and charges to COVB customers, and for approval of FPL's requested accounting treatment.³ FPL 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 \$114 million⁴ with respect to the City's electric utility system acquired by FPL; and (3) approve recovery of costs associated with the short-term power purchase agreement (PPA) with the Orlando Utilities Commission (OUC).

The Office of Public Counsel (OPC) was granted intervention in both dockets. We granted FPL's Petition and the COVB/FPL Joint Petition in one proposed agency action order (PAA Order) issued on July 2, 2018.⁵ On July 20, 2018, the Civic Association of Indian River County, Inc. (CAIRC) timely filed an amended petition for administrative hearing on the PAA Order.⁶ OPC, Indian River County, and Indian River Shores requested and were granted intervention. A Prehearing Conference was held on October 3, 2018. A *de novo* administrative hearing was held before us on October 18, 2018, as required by Sections 120.569 and 120.57, F.S. In addition, we heard public testimony on October 18, 2018, as part of the proceeding.

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 Docket No. 20170236-EU.

³ Docket No. 20170235-EI.

⁴ FPL's initial petition calculated the estimated amount of the positive acquisition adjustment as \$116.2 million. This amount was revised in FPL's supplemental testimony to reflect the current request of \$114 million.

⁵ Order No. PSC-2018-0336-PAA-EU.

⁶ We also received petitions requesting hearings on the PAA Order from Florida Industrial Power Users Group (FIPUG), Mr. Michael Moran, and Mr. Bill Heady. However, FIPUG withdrew its petition and Messrs. Moran and Heady were dismissed as parties for failure to attend the October 3, 2018 prehearing conference.

II. Acquisition Adjustment

A. Jurisdiction

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 (purchase price premium). 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 in rates. A positive acquisition adjustment is considered goodwill or going-concern value for accounting purposes.

Because an acquisition adjustment affects customer rates, we have jurisdiction under several sections of Chapter 366, F.S. Section 366.04(1), F.S., grants us exclusive jurisdiction to regulate and supervise each public utility with respect to its rates and service. In addition, Section 366.041, F.S., authorizes us to consider, among other things in fixing rates, the cost of providing service and the value of such service to the public. Section 366.06(1), F.S., provides that, in setting rates, we shall investigate and determine the actual legitimate costs of the property of each utility company actually used and useful in the public service. Section 366.05, F.S., gives us the power to prescribe fair and reasonable rates and charges. The Legislature declared in Section 366.01, F.S., that Chapter 366, F.S., is an exercise of the police power of the state for the protection of the public welfare, and all the provisions of Chapter 366, F.S., shall be liberally construed for the accomplishment of that purpose.

Section 366.06, F.S., states that the net investment of each public utility used for ratemaking “shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor.” CAIRC argues that we do not have jurisdiction to approve positive acquisition adjustments because Section 366.06, F.S., prohibits us from approving an acquisition adjustment. FPL witness Deason testified that Section 366.06, F.S., only prohibits the inclusion of goodwill or going concern value to the extent it exceeds payments made by the acquiring utility. He further testified that Section 366.06, F.S., does not prohibit us from exercising jurisdiction to approve the acquisition adjustment based on the purchase price. In this case, the acquisition adjustment is part of the total purchase price. We agree with witness Deason that Section 366.06, F.S., does not prohibit us from approving the acquisition adjustment requested by FPL in this case. FPL is not requesting, and we do not have jurisdiction over, approval of the transfer of the City’s electric utility assets to FPL. We find that we have jurisdiction under our broad ratemaking authority pursuant to Sections 366.04(1), 366.041, 366.05, and 366.06, F.S., to decide whether to approve the acquisition adjustment requested by FPL.

B. Extraordinary Circumstances

The only previous order in which we approved a positive acquisition adjustment in the electric industry was in the FPC/Sebring case.⁷ In that case, when deciding whether to allow a positive acquisition adjustment for an electric utility purchase, we first evaluated the specific facts and circumstances to determine whether there were extraordinary circumstances that warranted consideration of a positive acquisition adjustment.⁸ As explained in the FPC/Sebring Order, and as recognized by FPL witness Deason in the instant case, when one utility purchases another utility, a purchase price premium should be disallowed unless it is shown that extraordinary circumstances exist such that consideration of an acquisition adjustment would be appropriate.⁹ We agree with OPC witness Kollen that this policy protects customers from utilities acquiring assets at inflated prices and provides incentive for utilities to minimize any acquisition costs in excess of the net book value of the acquired assets.

The basic analytical framework used in the FPC/Sebring Order should be applied in this case. That is, we should first determine whether extraordinary circumstances exist that would support consideration of an acquisition adjustment. If we find that such extraordinary circumstances do exist, we then would determine the appropriateness of such a positive acquisition adjustment.

FPL witness Deason testified that there were nine customer benefits of FPL's purchase of the COVB electric utility that could be considered extraordinary circumstances supporting an acquisition adjustment. Although we find that extraordinary circumstances exist that support consideration of a positive acquisition adjustment, we disagree, in part, with FPL's position on what circumstances in this case are extraordinary, as explained below.

FPL provided a 30-year cumulative present value of revenue requirements (CPVRR) analysis to demonstrate extraordinary circumstances in the form of reduced revenue requirements for FPL customers. FPL witness Deason testified that a CPVRR analysis is a tool to measure and weigh the revenue requirement impacts of competing alternatives. Witness Deason indicated CPVRR analyses have previously been used in need determination proceedings and proceedings related to the buyouts of power purchase agreements.

We acknowledge that CPVRR analyses are often used by utilities as a forward-looking decision making tool to evaluate options to assess cost-effectiveness in power plant and transmission line need determination and other proceedings. In this case, the CPVRR analysis estimated the revenue requirement impact of FPL acquiring the COVB assets as well as the proposed acquisition adjustment and power purchase agreement with OUC. However, the record does not show that we have ever approved a positive acquisition adjustment based on a CPVRR

⁷ See 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)

⁸ FPC/Sebring Order at pp. 1-2.

⁹ FPC/Sebring Order at p. 11.

analysis. Further, witness Deason acknowledged that it is within our discretion to find in a particular case that customer savings alone may not be sufficient to demonstrate extraordinary circumstances.

Likewise, the rate disparity between COVB and FPL does not constitute an extraordinary circumstance that can support consideration of a positive acquisition adjustment. Unlike the FPC/Sebring case where the acquired utility was in serious financial distress resulting in the highest electric rates in the state that were in jeopardy of becoming even higher,¹⁰ the evidence shows that the COVB utility is financially sound.

Electric utility customers cannot choose between electricity providers based on which provider has the lower rates. *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 477 (Fla 1997) (Even 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). It is established law that “[a]n individual has no organic, economic or political right to service by a particular utility merely 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 customers are permitted to allege extraordinary circumstances because they pay higher rates than the rates charged by another electricity provider, then every other 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.

Witness Deason testified that approximately 60 percent of COVB’s customers reside outside the City’s municipal borders. This is the largest such percentage in the state of Florida. He testified that these customers feel that they do not have adequate recourse to address or challenge decisions concerning the operations and rates of the COVB utility as currently constituted and have sought recourse through both their local and state-level elected officials, the courts, and with us. He further testified that these initiatives have taken place over a long period of time.

There were multiple attempts to address COVB customer dissatisfaction through legislation. Legislation was passed amending Section 366.04(7), F.S., 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. COVB did not conduct a referendum because it alleged that it did not meet the criteria that would require it to conduct 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 addition, two voter referenda were held that showed that COVB customers supported the sale of the COVB electric utility to FPL.

¹⁰FPC/Sebring Order at pp. 1-2.

In addition to proposed legislation, multiple petitions were filed with us as far back as 2009, some of which resulted in court appeals.¹¹ More recently, on January 5, 2016, the Town of Indian River Shores filed a petition for declaratory statement that asked us for a declaration that we lack jurisdiction to interpret Article VIII, Section 2(c), Florida Constitution, for purposes of determining whether the Town has a constitutional right to be protected from COVB providing electric service within the Town without the Town's consent. In response, we issued an order declaring that we have the jurisdiction under Section 366.04, F.S., to determine whether COVB has 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.¹²

On March 4, 2016, 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, requesting that we move the entire Town of Indian River Shores out of COVB's service area and put it in FPL's service area. We denied Indian River Shores' petition by a proposed agency action (PAA) order.¹³ The Town of Indian River Shores filed a petition for administrative hearing on the PAA order and COVB filed a cross-petition. However, because FPL and COVB had entered into negotiations for the purchase and sale of the COVB electric utility, Indian River Shores and COVB jointly requested that we hold the proceeding in abeyance pending negotiations and sale of the utility. The docket is currently being held in abeyance for this reason.

Settlement of disputes by mutual agreement between contending parties is in the public interest. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997). If the PSA closes, including the required approval of the requested acquisition adjustment, the dispute about the territorial agreement between COVB and Indian River Shores that is pending before us would be resolved. Resolution of this dispute is in the public interest.

The combination of factors that support our consideration of a positive acquisition adjustment in this case are that (1) approximately 60 percent of COVB's electric customers live

¹¹ 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*. This 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; 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*; 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; Board of County Commissioners of Indian River County v. Graham*, 191 So. 3d 890 (Fla. 2016)(affirming Order Nos. PSC-15-0101-DS-EM and PSC-15-0102-DS-EM).

¹² 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*.

¹³ 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*.

outside COVB's municipal boundaries; (2) there have been years of complex litigation between these customers and the COVB attempting to transfer these customers from COVB to FPL, including pending Docket No. 160049-EU (presently in abeyance) concerning Indian River Shores' petition for modification of the COVB/FPL territorial agreement; (3) the customers living outside the municipal boundaries have tried for many years to seek legislative redress for their complaints; and (4) the COVB has had two voter referenda that show that the majority of COVB customers support a sale of the COVB electric utility to FPL. Based upon the totality of the unique and unusual facts listed above, we find that extraordinary circumstances exist that warrant our consideration of authorizing a positive acquisition adjustment.

C. Positive Acquisition Adjustment

As discussed above, the record shows that extraordinary circumstances exist that would support consideration of the appropriateness of a positive acquisition adjustment. The Commission has great discretion in determining what action to take with respect to the requested acquisition adjustment, and may take any action supported by law and evidence of record, including alternatives to the requested acquisition adjustment. In the FPC/Sebring Order, after finding that extraordinary circumstances existed, we next considered approval of a positive acquisition adjustment. In doing so, we stated:

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.¹⁴

Our decision on whether to approve the requested acquisition adjustment must be in the public interest and must not harm either COVB or FPL electric customers. *See Gulf Coast Elec. Coop. v. Johnson*, 727 So. 2d 259, 264 (Fla. 1999) (noting that in approving territorial agreements, we must ensure that the agreement works no detriment to the public interest) and *Utilities Com'n of City of New Smyrna Beach v. Fla. Pub. Serv. Com'n*, 469 So. 2d 731, 732-33 (Fla. 1985) (stating that any customer transfer in a proposed territorial agreement must not harm the public, and we should base our decision on the effect the agreement will have on all affected customers).

The record shows that upon the closing of the PSA, including the termination of the territorial agreement and transfer of COVB customers to FPL, there would be no harm or detriment to the acquired COVB customers. For example, witness Deason provided unrefuted testimony that transfer from COVB to FPL would not result in degradation of COVB customers' quality of service or reliability. Furthermore, bill comparisons between FPL and COVB customers show that 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. COVB commercial and industrial customers would also see bill decreases based on usage.

¹⁴ FPC/Sebring Order at p. 8 (quoting 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).

The record also shows that there would be no harm or detriment to the existing FPL customers. The requested \$114 million¹⁵ positive acquisition adjustment would equate to an estimated impact of \$0.11 per 1,000 kWh on a monthly residential bill if it FPL were to include amortization of the positive acquisition adjustment in rates in its next rate proceeding. We find this to be a *de minimis* rate impact that will not result in harm or detriment to the public interest. Because there are extraordinary circumstances that support consideration of a positive acquisition adjustment and the requested \$114 million positive acquisition adjustment will not result in harm or detriment to the public interest, we approve the requested positive acquisition adjustment associated with FPL's purchase of the COVB electric utility system.

We find that a positive acquisition adjustment in the amount of \$114 million shall be recorded by FPL. The Federal Energy Regulatory Commission (FERC) Uniform System of Accounts (USOA) for Account 114 – Electric Plant Acquisition Adjustments (18 C.F.R. 101), requires a positive acquisition adjustment if the cost of the acquired system is greater than original cost less accumulated depreciation (i.e., net book value). Consistent with Accounting Standard Codification 980, FPL shall record amortization expense associated with an acquisition adjustment in Account 406 over a 30-year period pursuant to the requirements of both generally accepted accounting principles (GAAP) and the FERC USOA.

Historically, we have used a future review to evaluate the cost savings relied upon to support approval of positive acquisition adjustments and to ensure that the cost savings remain beyond the closing of the case.¹⁶ However, projected cost savings were not used as the basis to approve a positive acquisition adjustment in this case. Therefore, we find that future review of the positive acquisition adjustment is unnecessary and is not required here.

III. Power Purchase Agreement

FPL witness Forrest testified 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 COVB's utility. He additionally testified 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 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

¹⁵ This amount is the difference between the negotiated purchase price between FPL and COVB of \$185 million and the net book value of the acquired utility assets of approximately \$71 million.

¹⁶ 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 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.*

anticipating an economic benefit of calling on the energy. FPL is requesting that the payments associated with the PPA be recovered through the fuel and purchased power cost recovery clause (Fuel Clause). In this respect, FPL's requested method of recovery is like that of other power purchase agreements. FPL indicated that the PPA is approximately \$14.1 million above avoided cost. Giving consideration to FPL's 2018 approved Fuel Clause recovery amount of \$3.2 billion,¹⁷ the estimated net costs associated with the OUC PPA (approximately \$6 million in 2019 and \$8 million in 2020) would have a *de minimis* impact on FPL's fuel clause cost recovery factors and, therefore, customer rates. Thus, our approval of FPL recovering costs associated with the short-term PPA with OUC will not result in harm or detriment to the public interest.

Typically, we consider a negotiated power purchase agreement prudent for cost recovery purposes if it is demonstrated that the agreement will not result in costs above avoided cost. However, the joint petition to terminate the COVB/FPL territorial agreement states that the termination of the territorial agreement will be effective if all conditions precedent to the PSA are satisfied, which includes approval of cost recovery for the PPA. As discussed below, termination of the territorial agreement as part of the PSA would resolve controversy over the COVB/FPL territorial agreement. Based on the foregoing, we find that FPL shall be allowed cost recovery of the payments associated with the short-term PPA with OUC through the Fuel Clause. The energy payments shall be recovered through the fuel portion of the Fuel Clause and the capacity payments shall be recovered through the capacity portion of the Fuel Clause.

IV. Termination of the Territorial Agreement

Section 366.04(2), F.S., gives us the authority to approve territorial agreements between municipal electric utilities and investor-owned electric utilities. Any modification or termination of a 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). Our responsibility in evaluating modifications of territorial agreements, and the applicable standard used, is 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) (finding that the territorial agreement as a whole contained no detriment to the public and should have been approved by us). 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). 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.

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. 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 as addressed in Docket No. 20170235-EI. The joint petition states that the termination of the territorial

¹⁷ Order No. PSC-2018-0028-FOF-EI, pp. 24 and 41.

agreement will be effective if all conditions precedent to the PSA are satisfied and the transaction closes. The joint petition states that FPL will provide electric service to COVB's customers at FPL's approved rates and charges upon the closing date of the PSA. The joint petition states that if the territorial agreement is terminated, FPL will serve all of Indian River County, but if the PSA does not close, the joint petitioners will continue to operate pursuant to the Territorial Orders.

Witness O'Connor, the City Manager of the COVB, testified that the COVB City Counsel, duly elected by and representing the citizens of the COVB, directed the negotiations for the sale of the COVB electric utility with FPL, and that the customers of COVB living in the City support the sale. COVB customers testified at hearing in support of becoming FPL customers.

As discussed above, the record shows that for many years, COVB customers living outside the municipal boundaries of the City wanted to be served by FPL instead of by the COVB. There were multiple attempts to address COVB customer dissatisfaction through legislation.¹⁸ In addition, two voter referenda were held that showed that COVB customers supported the sale of the COVB electric utility to FPL. Multiple petitions for relief were filed with us as far back as 2009, some of which resulted in court appeals.¹⁹ Litigation filed by the Town of Indian River Shores challenging our order denying the Town's petition to modify the COVB/FPL territorial agreement²⁰ is pending with us. Upon joint motion of Indian River Shores and COVB, the hearing to address the Town's modification request is being held in abeyance pending closing on the PSA and termination of the COVB/FPL territorial agreement.

The record shows that termination of the territorial agreement and transfer of COVB customers to FPL would not result in harm or detriment to the public interest. Witness Deason provided unrefuted testimony that the transfer from COVB to FPL would not result in degradation of the COVB customers' quality of service or reliability. The record further shows that the \$114 million positive acquisition adjustment equates to an estimated impact of \$0.11 per

¹⁸ 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).

¹⁹ 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*. This 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; 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*; 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; Board of County Commissioners of Indian River County v. Graham*, 191 So. 3d 890 (Fla. 2016)(affirming Commission Order Nos. PSC-15-0101-DS-EM and PSC-15-0102-DS-EM); 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*.

²⁰ 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*.

1,000 kWh on a monthly residential bill if FPL includes amortization of the positive acquisition adjustment in rates in its next rate proceeding. As explained above, this is a *de minimis* rate impact that would not result in harm or detriment to the public interest. Further, as explained above, our approval of FPL recovering costs associated with the short-term power purchase agreement with OUC will not result in harm or detriment to the public interest.

Our approval of termination of the COVB/FPL territorial agreement and attendant transfer of customers from COVB to FPL would resolve the issues between COVB and Indian River Shores in the dispute over their territorial agreement that is pending before us. The general rule that the legal system favors settlement of disputes by mutual agreement applies equally in utility service agreements between municipal electric utilities and other electric utilities under our jurisdiction. *AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997)(noting that our charge in proceedings concerning territorial agreements is to approve those agreements that work no detriment to the public interest). The termination of the territorial agreement as part of the PSA would resolve controversy over the COVB/FPL territorial agreement and is in the public interest.

Based on the foregoing, we approve the joint petitioners' request to terminate the existing territorial agreement between FPL and COVB effective upon the closing date of the PSA. 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.

V. Rates

All parties agree that we should grant FPL the authority to charge FPL's rates and charges to COVB customers upon the closing date of the PSA. FPL witness Cohen testified that FPL and COVB customers will immediately benefit from FPL's residential and commercial rates once the COVB customers are transitioned to receive service from FPL. OPC Witness Kollen testified that OPC supports charging FPL rates to former City of Vero Beach customers. FPL witness Deason explained that for COVB to be willing to sell the utility to FPL, COVB required that COVB's customers would receive FPL rates. COVB witness O'Conner testified that our approval of FPL's request to charge COVB electric customers FPL's rates is a condition precedent to closing on the PSA.

As part of its petition in Docket No. 20170235-EI, FPL asked 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.

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 that 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 this case, because all parties agree that FPL

rates and charges should be imposed, we grant FPL the authority to charge its approved rates and charges to the former COVB customers upon termination of the territorial agreement effective upon the closing date of the PSA. FPL shall notify the former COVB customers of the new rates and charges with the first bill containing the new rates.

VI. Public Interest

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). Determination of what is in the public interest rests exclusively with us. *Citizens of State v. Fla. Pub. Serv. Com'n*, 146 So. 3d 1143, 1173 (Fla. 2014).

In support of its contention that the relief requested by FPL is not in the public interest, CAIRC argues: (1) COVB residents were not properly informed about the effect of the sale of the COVB electric utility to FPL; (2) the sale will have an adverse effect on taxes and city revenues; and (3) the sale negotiations were insufficient. These matters are not within our jurisdiction. Again, it is important to reiterate that the PSA is not subject to our approval. See Section 366.04(2), F.S.

OPC supports the proposed acquisition of the COVB electric utility by FPL and the authorization for FPL to charge its approved rates to former COVB customers. OPC concedes that granting FPL's rates and service to the COVB customers may be in the public interest. OPC did not take a position on whether we should approve recovery of costs associated with the short-term PPA or termination of the COVB/FPL territorial agreement. However, OPC argues that the acquisition adjustment will harm the general body of FPL ratepayers.

As discussed above, termination of the existing territorial agreement between FPL and COVB, approval of a positive acquisition adjustment, recovery of costs associated with the short-term PPA agreement with OUC, and allowing FPL to charge its rates to former COVB electric customers would allow the PSA to close. Granting this requested relief would resolve the dispute about the territorial agreement between COVB and Indian River Shores pending before us and would end years of litigation and legislative efforts by COVB electric customers who want to be transferred to FPL's service area. Based on the foregoing, we find that granting the relief requested by the petitioners is in the public interest.

It is, therefore,

ORDERED by the Florida Public Service Commission that the City of Vero Beach and Florida Power & Light Company's Joint Petition to Terminate Territorial Agreement is hereby granted as set forth in the body of this Order. It is further

ORDERED that Florida Power & Light's Petition 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 is hereby granted as set forth in the body of this Order. It is further

ORDERED that these dockets shall be closed after the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 30th day of November, 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

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 or judicial review of Commission orders that is available under Sections 120.57 or 120.68, 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 or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.