

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of arrangement
to mitigate impact of unfavorable Cedar
Bay power purchase obligation, by Florida
Power & Light Company

Docket No. 150075-EI

Filed: August 13, 2015

**JOINT POST-HEARING BRIEF BY FLORIDA POWER
& LIGHT COMPANY AND THE OFFICE OF PUBLIC COUNSEL**

Pursuant to the schedule set by the presiding officer at the end of the July 28, 2015 hearing in this docket, petitioner Florida Power & Light Company (“FPL”) and the Citizens of the State of Florida, through the Office of Public Counsel (“OPC”) hereby file their Joint Post-Hearing Brief in support of the Stipulation and Settlement filed by FPL and OPC on July 24, 2015 (the “Settlement Agreement”). The Settlement Agreement is in the public interest, addresses and resolves all of the issues contained in the Prehearing Order, Order No. PSC-15-0294-PHO-EI, is a reasonable compromise of the parties’ litigation positions, and is supported by the evidence presented in this proceeding for resolution concerning FPL’s Petition for approval of an arrangement to mitigate the impact of FPL’s unfavorable Cedar Bay power purchase obligation. In support, FPL and OPC state:

BACKGROUND

FPL’s Petition. On March 6, 2015, FPL filed a Petition for approval of arrangement to mitigate impact of unfavorable Cedar Bay power purchase obligation. In the petition, FPL sought approval for a proposed purchase and sale agreement (“PSA”) in which it would purchase the ownership equity interest in CBAS Power, Inc., the upstream owner of the Cedar Bay generating facility (the “Cedar Bay Facility” or “Facility”) and Cedar Bay Generating Company, the counter-party to a power purchase agreement (“PPA”) with FPL. Upon closing, FPL would be able to terminate the PPA, thereby avoiding approximately nine years of above-market payments that would be recovered through the Capacity Cost Recovery Clause (“Capacity

Clause”). FPL projected that avoiding these payments would result in \$70 million in customer savings on a cumulative present value revenue requirements (“CPVRR”) basis. As an upstream owner of the Cedar Bay Facility, FPL and its customers also would gain the fuel source reliability benefit derived from the ability to dispatch a coal-fired facility if natural gas delivery or transportation were constrained.

FPL’s petition requested that the Commission enter an order approving the Cedar Bay Transaction as prudent and authorizing FPL to (a) establish regulatory assets for the purchase of CBAS Power, Inc. in the amount of \$520.5 million and the associated income tax gross up of \$326.9 million, and (b) recover through the CCR Clause (i) amortization over a ten-year period of the regulatory assets and (ii) a return on the unamortized balance of the CBAS Power, Inc. purchase price regulatory asset calculated at FPL’s weighted average cost of capital (“WACC”) that is used for adjustment clause recovery.

On June 8, 2015, OPC filed testimony challenging the proposed Cedar Bay Transaction. OPC opposed the purchase price, method of acquisition, and accounting treatment sought by FPL, the proposed calculation of FPL’s return on investment, and the proposed recovery of costs associated with contracts that would be acquired under the Transaction. In addition, OPC questioned whether FPL’s customers were sufficiently protected against any potential unknown environmental liabilities associated with the Cedar Bay Facility. The Florida Industrial Power Users Group (“FIPUG”) also filed direct testimony challenging the proposed Cedar Bay Transaction. On June 17, 2015, FPL filed rebuttal testimony to both OPC and FIPUG.

FPL and OPC reach a settlement. In accordance with this Commission’s Order Establishing Procedure, No. PSC-15-0143A-PCO-EI, all parties engaged in four months of extensive discovery, including the depositions of four Cogentrix witnesses (Cogentrix is the

operator of the Cedar Bay Facility) and six FPL witnesses. Near the completion of discovery, FPL and OPC engaged in negotiations, and reached an agreement to resolve the issues associated with the Cedar Bay Transaction.

FPL and OPC disclosed and fully explained the terms of the Settlement Agreement to FIPUG's counsel and principal witness; however, FIPUG declined the invitation to be a signatory. Thereafter, on July 24, 2015, FPL and OPC filed a Joint Motion for Approval of Stipulation and Settlement. DN 04663-15. A full copy of the Settlement Agreement is included as Exhibit 1 to the Joint Motion for Approval.

The Hearing. On July 28, 2015, the Commission held a technical hearing. FPL was prepared to present a witness to answer questions regarding the Settlement Agreement. Tr. 8-9. However, FIPUG objected to the presentation of such evidence which the Commission sustained. Tr. 9-11, 169-70. Accordingly, the Commission held a hearing addressing only the evidence supporting or opposing FPL's Petition. FPL witnesses Robert E. Barrett (Tr. 37-102), Thomas L. Hartman (Tr. 106-68), David Herr (Tr. 170-238), Kim Ousdahl (Tr. 239-79) and Ray Butts (Tr. 279-322) appeared live to present their direct testimony and respond to cross-examination. OPC witnesses Gary Brunault (Tr. 340-87) and Dan Wittliff (Tr. 387-405) likewise presented their direct testimony and responded to cross-examination. The testimony and exhibits of all other witnesses were stipulated by the parties and those witnesses were excused from cross examination. While the evidence presented on FPL's Petition is relevant to the same issues included in the Settlement Agreement, consistent with FIPUG's objection, no independent evidence regarding the Settlement Agreement was introduced by any party.

Briefing. At the close of the July 28 hearing, the presiding officer advised the parties that the Commission will vote on whether to approve the Settlement Agreement on August 27, 2015.

The parties were provided an opportunity to file briefs concerning the Settlement Agreement by August 13, 2015. In the event that the Commission does not approve the Settlement Agreement, the parties will have an opportunity to file a second brief on September 8, 2015, to address their respective litigation positions. FPL and OPC hereby submit this Joint Brief in support of the Settlement Agreement, without prejudice to their rights to submit separate briefs in support of their litigation positions if the Settlement Agreement is not approved.

As described below, the Settlement Agreement reflects a negotiated compromise by FPL and OPC resolving both the ultimate question of whether FPL's proposed Cedar Bay Transaction is in the public interest and the specific issues set forth in the Prehearing Order. The Settlement Agreement should, therefore, be approved.

THE SETTLEMENT AGREEMENT IS IN THE PUBLIC INTEREST

For the following reasons, approval of the Cedar Bay Transaction subject to the modifications set forth in the Settlement Agreement is in the public interest:

1. The Settlement Agreement provides a fair and reasonable basis for FPL to recover the costs of the Cedar Bay Transaction. FPL has estimated that the Cedar Bay Transaction will save customers \$70 million on a net present value basis compared to continued recovery of payments under the existing PPA, will provide FPL fuel diversity and reliability benefits from having the Cedar Bay Facility available for operation as needed, and will reduce air emissions from the Facility's reduced operation and early retirement.
2. Because of the partial recovery of the Purchase Price Regulatory Asset in base rates while those rates are frozen under the 2012 Settlement Agreement, the amount recovered from customers under the Capacity Clause for 2015 and 2016

will be reduced by approximately \$30 million as a result of this Settlement Agreement.

3. The additional environmental liability insurance coverage limits and term will provide further protection for customers against the possibility of exposure to environmental liability arising out of FPL's ownership and operation of the Cedar Bay Facility.
4. The limits on FPL's recovery of rail car lease and ground lease payments will provide additional protection for customers against unanticipated costs under those leases after the Cedar Bay Facility is retired.
5. To the extent that the Settlement Agreement is approved sooner than the schedule in this docket currently calls for a Commission decision, FPL may be able to close on the Cedar Bay Transaction sooner than provided for under the Cedar Bay Petition and thereby provide additional customer savings in the form of avoided unfavorable power-purchase capacity payments.

ISSUES AND POSITIONS

In the context of a Settlement Agreement it is not always necessary for the settlement terms to address each issue identified for decision. However, FPL and OPC address each issue identified in the Prehearing Order to this docket providing the Commission additional assurance that approving the Settlement Agreement is in the public interest, because it represents a reasonable compromise of the parties' positions. As demonstrated below, the terms of the Settlement Agreement are in all material respects bounded by the parties' positions and are supported by the evidence in the record.

ISSUE 1: What is the fair value of the existing purchase power agreement with Cedar Bay Genco that FPL is acquiring?

FPL and OPC Position:

The Settlement Agreement does not specifically address the fair value of the existing PPA; however, its terms are consistent with the testimony and exhibits of FPL witness Herr that the fair value is \$520 million. The restrictions on FPL's recovery of that fair value imposed by Paragraphs 3(a) and 3(b) of the Settlement Agreement address the positions of OPC witnesses Brunault and Dawson that the fair value is lower.

The Settlement Agreement does not specifically address the fair value of the existing PPA; however, its terms are consistent with the testimony and exhibits of FPL witness Herr that the fair value is \$520 million. Tr. 175 (Herr); Exhibit 7, page 5. The restrictions on FPL's recovery of that fair value imposed by Paragraphs 3(a) and 3(b) of the Settlement Agreement address the positions of OPC witnesses Brunault and Dawson that the fair value is lower. *See* Tr. 374-75 (Brunault); Tr. 456-58 (Dawson).

ISSUE 2: Is FPL's purchase price for the equity ownership interest of CBAS Power, Inc. fair and reasonable?

FPL and OPC Position:

Yes. Paragraph 1 of the Settlement Agreement provides that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL witnesses Hartman and Herr that FPL negotiated the \$520.5 million purchase price under the PSA in an arm's length transaction and that the purchase price corresponds closely to the fair value determined for the assets FPL will acquire.

Paragraph 1 of the Settlement Agreement provides that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL witnesses Hartman and Herr that FPL negotiated the \$520.5 million purchase price under the PSA in an arm's length transaction with the owners of CBAS Power, Inc. and that the purchase price corresponds closely to the fair value determined

for the assets FPL will acquire by virtue of the purchase. Tr. 88, 187 (Hartman); Tr. 175 (Herr); Exhibit 7, page 5.

ISSUE 3: Is FPL's purchase and sale agreement between FPL and CBAS Power Holdings, LLC., and termination of the existing purchase power agreement with Cedar Bay Genco cost-effective?

FPL and OPC Position:

Yes. Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is cost-effective and prudent. This is consistent with the testimony of FPL witness Hartman that the acquisition of CBAS Power, Inc. and termination of the existing Cedar Bay PPA is estimated to result in customer savings of \$70 million compared to continuing to make the PPA payments.

Yes. Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. (FPL's proposal to enter into the PSA may be referred to herein as the "Cedar Bay Transaction") is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL witness Hartman that the acquisition of CBAS Power, Inc. and subsequent termination of the existing PPA with Cedar Bay Genco is estimated to result in customer savings of \$70 million (CPVRR) compared to continuing to make the contractually required PPA payments. Tr. 113-14, 116-17 (Hartman); Exhibit 5.

ISSUE 3A: In its economic evaluation of and selection of the proposed transaction, did FPL take into account all reasonable measures to mitigate future PPA impacts to ratepayers?

FPL and OPC Position:

Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL witness Hartman that FPL's economic evaluation of the transaction reasonably projected the payments that FPL would be required to make over the remaining term of the PPA.

Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL witness Hartman that FPL's economic evaluation of the transaction reasonably projected the payments that FPL would be required to make over the remaining term of the PPA.*** Tr. 113-14, 116-17 (Hartman); Exhibit 5.

ISSUE 4: If the Commission approves FPL's proposed Cedar Bay transaction, how will existing contracts between third party providers and CBAS Power, Inc. or subsidiaries be handled, what are the projected costs of fulfilling or terminating such contracts, and how should these costs be recovered?

FPL and OPC Position:

The Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. Paragraph 2 of the Settlement Agreement provides that, except as set forth in Paragraph 3, FPL's proposed accounting and recovery of costs associated with the Cedar Bay Transaction should be approved. Paragraphs 1 and 2 are consistent with the testimony of FPL witnesses Hartman and Ousdahl.

Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. Paragraph 2 of the Settlement Agreement provides that, except as set forth in Paragraph 3, FPL's proposed accounting for the Cedar Bay Transaction and recovery of costs associated with the Cedar Bay Transaction should be approved. Paragraphs 1 and 2 are consistent with the testimony of FPL witnesses Hartman and Ousdahl. Tr. 115, 118 (Hartman); 248, 251 (Ousdahl).

ISSUE 5: What are the operational and regulatory risks associated with the proposed Cedar Bay transaction and has FPL appropriately accounted for these risks under the transaction?

FPL and OPC Position:

Paragraph 3 of the Settlement Agreement sets forth negotiated adjustments to FPL's proposed accounting and cost recovery. Subparagraphs 3(c)-(e) limit the amount that FPL may recover for the Cedar Bay rail car lease and ground lease, and require FPL to double the limits of its environmental liability insurance policy for the Cedar Bay Facility to \$40 million. These adjustments reflect a reasonable compromise between the testimony of FPL's and OPC's witnesses.

Paragraph 3 of the Settlement Agreement sets forth a series of adjustments to FPL's proposed accounting and cost recovery that FPL and OPC have negotiated. Among the negotiated adjustments are Subparagraphs 3(d) and 3(e), which limit the amount that FPL may recover for the Cedar Bay rail car lease and ground lease to the lesser of the actual net lease payments after crediting sublease revenues, and 50% of the face value of the lease payments under the existing or renegotiated lease terms. In addition, Subparagraph 3(c) requires FPL to double the limits of its environmental liability insurance policy for the Cedar Bay Facility (from \$20 million to \$40 million) and continue the policy in effect until January 2020 (with an opportunity for OPC to seek a Commission decision that the term be further extended if justified by a substantial and significant change of circumstances). Subparagraphs 3(c), 3(d) and 3(e) are a reasonable compromise between the testimony of FPL witnesses Hartman and Butts addressing the limitations on risks that FPL will be assuming under the Cedar Bay Transaction, and the testimony of OPC witnesses Dawson and Wittliff concerning unquantified risks associated with the Transaction. The doubling of the limits on the environmental liability insurance policy is consistent with the testimony of OPC witness Wittliff. Tr. 401 (Wittliff).

ISSUE 6: Should the Commission approve as prudent FPL's request to approve the purchase and sale agreement between FPL and CBAS Power Holdings, LLC and terminate the existing purchase power agreement with Cedar Bay Genco?

FPL and OPC Position:

Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL's witnesses.

Paragraph 1 of the Settlement Agreement reflects FPL's and OPC's negotiated position that FPL's entering into the PSA for the equity ownership interest of CBAS Power, Inc. is reasonable, cost-effective and prudent. This is consistent with the testimony of FPL's witnesses.

E.g., Tr. 40 (Barrett); 115-116 (Hartman).

ISSUE 7: If the Commission approves FPL's proposed Cedar Bay transaction, what is the proper accounting treatment for the transaction?

FPL and OPC Position:

The Settlement Agreement provides that FPL's proposed accounting for the Cedar Bay Transaction and recovery of costs associated with the Cedar Bay Transaction should be approved, subject to certain enumerated exceptions set forth in Paragraph 3. The exceptions are a reasonable compromise between the testimony of FPL witnesses addressing FPL's proposed regulatory accounting and cost recovery for the Cedar Bay Transaction, and the testimony of OPC witnesses recommending alternative accounting and cost recovery approaches.

Paragraph 2 of the Settlement Agreement provides that FPL's proposed accounting for the Cedar Bay Transaction and recovery of costs associated with the Cedar Bay Transaction should be approved, with the following exceptions set forth in Paragraph 3:

1. FPL will recover \$85 million of the \$520.5 million purchase price regulatory asset through base rates instead of the Capacity Clause until the next test year for base rates, at which point recovery of the remaining balance of the \$85 million will revert to the Capacity Clause.

2. FPL's amortization of the \$400 million Reserve Amount under the stipulation and settlement that was approved in Order No. PSC-13-0023-S-EI will be limited to \$370 million unless the full balance must be amortized to comply with the requirements of that settlement that FPL use amortization to remain above the bottom of its approved ROE range.
3. FPL will double the limits of its environmental liability insurance policy for the Cedar Bay Facility (from \$20 million to \$40 million) and continue the policy in effect until January 2020 (with an opportunity for OPC to seek a Commission decision that the term be further extended if justified by a substantial and significant change of circumstances).
4. FPL's recovery through the Fuel Clause for the Cedar Bay rail car lease is limited to the lesser of the actual net lease payments after crediting sublease revenues, and 50% of the face value of the lease payments under the existing or renegotiated lease terms.
5. FPL's recovery through base rates for the Cedar Bay ground lease is limited to the lesser of the actual net lease payments after crediting sublease revenues, and 50% of the face value of the lease payments under the existing or renegotiated lease terms.

These exceptions are a reasonable compromise between the testimony of FPL witnesses Barrett and Ousdahl addressing FPL's proposed regulatory accounting and cost recovery for the Cedar Bay Transaction, and the testimony of OPC witnesses Dawson and Myers recommending alternative accounting and cost recovery approaches. Tr. 42-43 (Barrett); 247-251 (Ousdahl); 398-401 (Myers); 447-48 (Dawson); Exhibit 9.

ISSUE 8: If the Commission approves FPL's proposed Cedar Bay transaction, what is the proper rate of return?

FPL and OPC Position:

FPL proposes that it earn a return on the purchase price regulatory asset at its weighted average cost of capital, calculated consistent with the Commission's approved procedure for capital investments in adjustment clauses. The Settlement Agreement provides that FPL's proposed recovery be approved, subject to certain exceptions. The Settlement Agreement's restrictions on FPL's return on recovery address the position of OPC witnesses that FPL should not earn its full WACC on that regulatory asset.

FPL proposes that it earn a return on the purchase price regulatory asset at its WACC, calculated consistent with the Commission's approved procedure for recovery of a return on capital investments in the adjustment clauses. Paragraph 2 of the Settlement Agreement provides that FPL's proposed accounting for the Cedar Bay Transaction and recovery of costs associated with the Cedar Bay Transaction should be approved, with the exceptions set forth in Paragraph 3. Recovery of FPL's WACC on the purchase price regulatory asset is consistent with the testimony of FPL witness Barrett. Tr. 42-43 (Barrett). The restrictions on FPL's current recovery of a return on the purchase price regulatory asset imposed by Paragraphs 3(a) and 3(b) of the Settlement Agreement address the position of OPC witness Dawson that FPL should not earn its full WACC on that regulatory asset.

ISSUE 9: If FPL's petition is approved, how should the Cedar Bay Generating Facility acquisition costs be recovered?

FPL and OPC Position: ***See response to Issue 7 above.***

Respectfully submitted this 13th day of August, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery on the 13th day of August 2015, to the following:

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