**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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| 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<br>Filed: August 10, 2018 |

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS PETITION OF MR. MICHAEL MORAN**

Florida Power & Light Company ("FPL"), pursuant to Rules 28-106.201 and 28-106.204, Florida Administrative Code ("F.A.C."), moves to dismiss the Petition filed by Michael Moran ("Mr. Moran") on July 23, 2018 "Asserting the Existence of Disputed Issues of Material Facts in the Order No. PSC-2018-0336-PAA-EU, Issued July 2, 2018; And Requesting a Public Hearing with Certified American Sign Language Interpreter to Be Held in Vero Beach, FL" ("Moran Petition").[1] However, in light of the request for hearing filed by the Florida Industrial Power Users Group, in furtherance of an expedited and efficient process, and in accordance with Order No. PSC-2018-0370-PCO-EU ("Order 2018-0370"), FPL requests that this motion be considered in connection with the Commission's decision on the merits in this proceeding.

The Moran Petition is legally deficient[2] and fails in all material respects to allege the requirements necessary to obtain standing to challenge the Florida Public Service Commission's ("FPSC" or "Commission") proposed agency action. The Moran Petition is nothing more than an expression of Mr. Moran's dissatisfaction with the political process that led to the execution

[1] A "Corrected Petition" was also filed by Mr. Moran on July 24, 2018, which made several "corrections" to allegations in Mr. Moran's July 23, 2018 petition. For the purposes of FPL's motion, the term "Moran Petition" encapsulates both the original and "corrected" petitions.

[2] The Moran Petition does not address or satisfy Commission rules regarding petitions, *i.e.*, there is no particular identification of the issues that are in dispute. *See* Rule 25-22.029(3), F.A.C. The petition also does not conform to the requirements of Rule 28-106.201, F.A.C.

of the Asset Purchase and Sale Agreement ("PSA") for the sale of the City of Vero Beach ("COVB") electric utility to FPL, together with his personal complaints about his interactions with those on the other side of the political process. To the extent the Moran Petition presumes to allege any injury within the Commission's jurisdiction - none of which is apparent on the face of the document - that injury is speculative at best and is based on matters of local politics that are outside the scope of the Commission's proposed agency action and/or beyond the Commission's jurisdiction.

In support of this motion, FPL states:

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

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

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

3. On July 23, 2018, the Moran Petition was filed. Nowhere in the Moran Petition does Mr. Moran identify how he has been or would be impacted by Order 2018-0336. The Moran Petition also fails to specifically identify the substantial interests that have been affected by Order 2018-0336 or the issues that are being disputed. The Moran Petition is replete with the author's personal misgivings about circumstances and events that played out at the local level related to the utility sale, including those related to: (i) voting representation; (ii) local referendum administration; (iii) supposed local media blackouts; (iv) Sunshine laws as applied to

local officials; (v) alleged neglect of certain FPL customers; and (vi) impolite attitudes and behavior of local officials, attorneys, and an unnamed FPL employee. Moran Petition at 1-3.

4. On July 24, 2018, Mr. Moran filed a "Corrected Petition" to expand on his complaints regarding alleged Sunshine Law violations by two local officials and to clarify that a town manager retired instead of resigned. None of this, even as "corrected," is even remotely germane to the issues before the Commission.

5. Even if Mr. Moran's general allegations are accepted as true, he has failed to allege a sufficient factual basis to satisfy the applicable legal standards to establish his standing; therefore, the Moran Petition does not represent a valid protest of Order 2018-0336. Further, the Moran Petition does not dispute facts or issues that are relevant to the holdings of Order 2018-0336. Indeed, the facts and issues he does raise are completely beyond the Commission's jurisdiction. Accordingly, the Moran Petition should be dismissed.

**A. Mr. Moran Lacks Standing**

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

(1) That he will suffer an injury in fact which is of sufficient immediacy to entitle him to a hearing pursuant to Section 120.57, Florida Statutes; and,

(2) That the substantial injury is of a type or nature which the proceeding in question is designed to protect.

*See Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).[3]

7. Thus, in order to establish standing, a condition that must be met by Mr. Moran before he can challenge Order 2018-0336, he must satisfy both elements of the *Agrico* test.

8. ***Agrico* Element 1: Injury in Fact.** Mr. Moran has not sufficiently alleged that he will suffer an injury in fact. To attain standing the alleged "injury in fact" must be both real and immediate and not speculative or conjectural. *See International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3rd DCA 1990); s*ee also Village Park Mobile Home Association. Inc. v. State, Dept. of Business Regulation*, 506 So. 2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So. 2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process); *Florida Soc. of Ophthalmology v. State Board of Optometry*, 532 So. 2d 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient "immediacy" to establish standing). Here, it is difficult to decipher from the Moran Petition any injury at all to Mr. Moran. Clearly he is dissatisfied with the local political processes and the outcome of those processes relating to COVB's decision to sell its electric utility; at the same time, he has failed to allege any injury related to the Commission's rulings in Order 2018-0336. The pivotal fact for purposes of the first element of *Agrico* is that Mr. Moran, as a Vero Beach resident,[4] stands to *benefit* from the Commission's proposed agency action; with the closing of the transaction, Mr. Moran will see a significant reduction of his electric rates.[5] And, of course,

[3] *Agrico* describes the first prong of the test as dealing with the degree of injury, while the second prong deals with the nature of the injury.
[4] Mr. Moran's petition provides an address in Vero Beach, and FPL therefore presumes that he is a Vero Beach resident, another factor that supports FPL's argument on the standing issue.
[5] The typical COVB residential customer using 1000 kilowatt hours per month stands to save approximately $26 a month by transitioning to FPL's rates.

Mr. Moran saving money on his electric bill does not equate to an injury in fact. To the contrary, it is a tangible benefit to Mr. Moran and, upon final approval by the Commission and closing, an immediate one at that. Mere dissatisfaction with the process conducted by COVB or anything relating to how COVB approached or reached its decision with respect to the sale of its utility is not an injury in fact and does not meet the test in *Agrico*.

9. ***Agrico* Element 2: Injury of a Type the Proceeding is Designed to Protect.** Neither do Mr. Moran's concerns meet the second prong of the *Agrico* test requiring a showing that the "substantial injury is of a type or nature which the proceeding is designed to protect." *Agrico*, 406 So. 2d at 482. Any alleged dissatisfaction with the local political process that led to COVB's decision to sell its electric utility to FPL would not be an "injury" that this Commission can change or rectify. Speculative "injuries" related to the local political process within COVB are neither relevant to the issues that the Commission resolved in issuing Order 2018-0336, nor jurisdictional to the Commission; therefore, they have no place in these proceedings. Even accepting Mr. Moran's harms as alleged, they are purely political and are completely beyond any considerations relevant to the Commission's resolution of the issues in this case. Further, injury outside the scope of the Commission's Order equates to a non-injury for the purposes of *Agrico*. *See In re: Petition for prudence determination regarding new pipeline system by Florida Power & Light Company*, Docket No. 20130198-EI, Order No. PSC-13-0669-FOF-EI at 3 (Dec. 18, 2013) (finding that substantial interests were unaffected since none of the injuries asserted were within the scope of the Commission's decision). In sum, opposition to and dissatisfaction with local political decisions does not equate to an injury in fact, and certainly not one that the Commission can redress.

10. With regard to the Commission's territorial approval, Mr. Moran has not demonstrated any injury in fact or any substantial injury of a type or nature which the proceeding

is designed to protect. In essence, the approval of the territorial change is in the nature of a fallout issue. Once the Commission has approved FPL's request to charge FPL rates to former COVB customers, by definition those customers must be brought within the geographic boundaries of FPL's service territory. The joint request by COVB and FPL to terminate their existing territorial agreement is not submitted to resolve any territorial dispute between COVB and FPL, but rather simply as a matter of housekeeping to reflect the result of a final Commission decision, if issued, approving the terms of relief requested by FPL in this proceeding and thus enabling the transaction to close.

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

> In determining the appropriateness of a territorial agreement, the [Florida] Supreme Court has stated a customer "has no organic, economic or political right to service by a particular utility merely because he deems it advantageous to himself." Storey v. Mayo, 217 So.2d 304, 307-308, (Fla. 1968). In Storey, a number of objecting customers were being transferred to a (sic) unregulated utility. The court held that these customers did not have a sufficient interest to object to a territorial agreement simply because they preferred one utility over

> another because of rates or service. If such customers later experienced a rate or service problem, the court held their remedy lay in the courts or a municipal council. This principle was recently reaffirmed by the same court in Lee County Electric Cooperative v. Marks, 501 So.2d 585 (Fla. 1987), where it held that "larger policies are at stake than one customer's self-interest, and those policies must be enforced and safeguarded by the Florida Public Service Commission." In short, the court has firmly established the general rule that a territorial agreement is not one in which the personal preference of a customer is an issue. Therefore, the alleged injury, even if real and direct, is not within the zone of interest of the law.

Mr. Moran's interest, as alleged in his own Petition, is conceptually no different than those in the *Storey* or *Lee County* cases. If a Commission's territorial order was subject to rehearing or reversal each time an intervenor, individual customer or otherwise, claimed that its interest was overlooked, the Commission's authority to decide territorial matters would be illusory at best. Moreover, the Florida Supreme Court has affirmed that a Commission proceeding to approve a territorial agreement is not the proper forum for intervention by a resident electricity consumer to compel service from a different utility based on speculative interests. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997). Thus, the interests that Mr. Moran seems to allege are not within the Commission's jurisdiction, nor subject to protection within this proceeding. He therefore lacks standing to pursue his protest.

**B. The Moran Petition Fails To Address Issues or Facts That Were Determined in Order 2018-0336 or Are Within the Commission's Jurisdiction**

12. Section 120.80(13)(b), Florida Statutes, prescribes the scope applicable to protests of proposed agency action: "a hearing on an objection to proposed action of the Florida Public Service Commission may *only address the issues in dispute*. Issues in the proposed action which are not in dispute are deemed stipulated." (Emphasis added).

13. Order 2018-0336 addressed four substantive issues:

(1) Should the Commission grant FPL the authority to charge FPL's rates and charges to COVB's customers upon the closing date of the PSA?

(2) Should the Commission approve the joint petitioners' request to terminate the existing territorial agreement between FPL and the City of Vero Beach upon the closing date of the PSA?

(3) Should the Commission authorize FPL to recognize a positive acquisition adjustment on its books associated with the purchase of the COVB electric utility system?

(4) Should the Commission approve recovery of costs associated with the short-term power purchase agreement with OUC?

14. The Moran Petition does not challenge facts relevant to any of these issues. His concerns about the political process that led to the sale of the COVB electric utility, and his unsupported and inaccurate description of that process have no place in this proceeding and are clearly beyond the scope of the Commission's decision. Mr. Moran, rather than challenging issues in the case, broadly recommends that each of the approvals be reversed so that an alternative version of the background facts – *his* version - can be presented, none of which is relevant to the Commission's determinations. Since none of the issues that the Commission decided are disputed by the Moran Petition, they may appropriately be deemed stipulated, which in essence makes the Moran Petition moot.

15. In light of the foregoing, it is clear that Mr. Moran fails to satisfy the requirements of Section 120.80(13)(b), Florida Statutes, as the Moran Petition's assertions are outside the scope of the Commission's proposed agency action and/or beyond the Commission's jurisdiction, and fail to "address the issues in dispute." For this reason, the petition must be dismissed. *See In re Matrix Telecom, Inc.*, Docket No. 050200-TX, Order No. PSC-05-1126-

FOF-TX (F.P.S.C. Nov. 8, 2005) (dismissing protest that failed to raise issues that were disputed in the proceeding); *In re APC*, Order No. PSC-99-0146-FOF-TX, *supra* (dismissing protest that raised only issues outside Commission's jurisdiction and failed to comply with Section 128.80(13)).

WHEREFORE, for the foregoing reasons, Florida Power & Light Company respectfully requests that the Commission dismiss the Moran Petition for lack of standing and/or fails to address issues and determinations within the scope of the Commission's proposed agency action and its jurisdiction. However, in light of the request for hearing filed by the Florida Industrial Power Users Group, in furtherance of an expedited and efficient process, and in accordance with Order 2018-0370, FPL requests that this motion be considered in connection with the Commission's decision on the merits in this proceeding.

Respectfully submitted this 10th day of August, 2018.

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

I HEREBY CERTIFY that a true and correct copy of this Motion to Dismiss Protest was served electronically this 10th day of August 2018, to the following:

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