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 Filed: August 10, 2018

FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS SUBMISSION OF MR. BRIAN HEADY

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 Motion to Reverse Prior Approvals and Motion to Deny Petitions by FPL and Vero Beach filed by Brian Heady ("Mr. Heady") on July 23, 2018 ("Heady Motion"). Although the Heady Motion is titled as a motion requesting that the Florida Public Service Commission ("Commission" or "FPSC") "reverse prior approvals",[1] it could be argued to be a protest petition filed in response to Order No. PSC-2018-0336-PAA-EU dated July 2, 2018 ("Order 2018-0336"). 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 Heady Motion is legally deficient and fails in all material respects to allege the requirements necessary to obtain standing to challenge the Commission's proposed agency action. Notwithstanding the fact that Mr. Heady "agree(s) with the majority of the council that

[1] By its rules, the Commission does not entertain a motion for reconsideration of a notice of proposed agency action. *See* Rule 25-22.0376(5), F.A.C. and Rule 25-22.029(4), F.A.C. Additionally, the Heady Motion does not address or satisfy Commission rules regarding petitions, *i.e.*, there is no request for a hearing, nor a 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.

the city owned electric utility should be sold" (Heady Motion at 1), he nonetheless has taken the opportunity to express his political views, provide a history of the City of Vero Beach ("COVB") electric utility, and offer his opinion of the local COVB politics that led to agreement to sell the COVB electric utility to FPL. In short, the Heady Motion is nothing more than an expression of Mr. Heady's dissatisfaction with the political process that led to the execution of the Asset Purchase and Sale Agreement ("PSA") for the sale of the COVB electric utility to FPL. To the extent the Heady Motion alleges any injury within the Commission's jurisdiction – none of which is apparent on the face of the motion - that injury is speculative 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 Heady Motion was filed. According to the Heady Motion, Mr. Heady was formerly a member of the "Utility Commission", an entity which he claims has oversight responsibilities over the Vero Beach electric utility. Heady Motion at 2. The Heady Motion does not specifically identify the substantial interests that have been affected by Order 2018-0336 or the issues that are being disputed. In fact, Mr. Heady represents in his motion that he "agree[s] with a majority of the [city] council in the belief that our city residents and

businesses would benefit from lower electric rates." Heady Motion at 2. Mr. Heady also expresses in his petition his misgivings about being removed from City Hall by a former mayor and how referenda regarding the sale were administered. Heady Motion at p. 4-5. He concludes by requesting that the Commission "impose whatever sanctions against any entity feeding you false information (sic)." Heady Motion at 6.

4. Even if Mr. Heady'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 Heady Motion does not represent a valid protest of Order 2018-0336. Further, the Heady Motion 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 Heady request should be dismissed.

A. Mr. Heady Lacks Standing

5. 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).[2]

[2] *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.

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

7. ***Agrico* Element 1: Injury in Fact.** Mr. Heady 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 Heady Motion any injury at all to Mr. Heady. 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. Also, given that Mr. Heady favors a sale of the COVB electric utility (Heady Motion at 2) and believes that city residents and businesses would benefit from lower electric rates (Heady Motion at 2), the Commission's Order arguably advances Mr. Heady's interests rather than harms them. The pivotal fact for purposes of the first element of *Agrico* is that Mr. Heady, as a Vero Beach resident,[3] stands to *benefit* from the Commission's proposed agency action; with the closing of the transaction, Mr. Heady will see a significant reduction of his electric rates.[4] And, of course,

[3] Mr. Heady's motion provides an address in Vero Beach and indicates that he has held elected office in the COVB, and FPL therefore presumes that he is a Vero Beach resident, another factor that supports FPL's argument on the standing issue.

[4] The typical COVB residential customer using 1000 kilowatt hours per month stands to save approximately $26 a month by transitioning to FPL's rates.

the circumstance of Mr. Heady saving money on his electric bill does not equate to an injury in fact. To the contrary, it is a tangible benefit to Mr. Heady 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*.

8. ***Agrico* Element 2: Injury of a Type the Proceeding is Designed to Protect.** Neither do Mr. Heady'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 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 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. Heady'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.

9. With regard to the Commission's territorial approval, Mr. Heady 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.

10. 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. Heady's interest, as alleged in his own motion, 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. Heady seems to allege are not within the Commission's jurisdiction, nor subject to protection within this proceeding. He therefore lacks standing to pursue his requested relief.

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

11. 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).

12. 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?

13. The Heady Motion 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. Heady, 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 Heady Motion, they may appropriately be deemed stipulated, which in essence makes the Heady Motion moot.

14. In light of the foregoing, it is clear that Mr. Heady fails to satisfy the requirements of Section 120.80(13)(b), Florida Statutes, because the Heady Motion'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, his request 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 Heady Motion because Mr. Heady lacks 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
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I HEREBY CERTIFY that a true and correct copy of this Motion to Dismiss Submission was served electronically this 10th day of August 2018, to the following:

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