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 October 29, 2018

CIVIC ASSOCIATION POST-HEARING STATEMENT OF POSITIONS AND POST-HEARING BRIEF

CAIRC, pursuant to Order No. PSC-2018-0494-PHO-EU dated October 5, 2018, hereby submits its Post-hearing Statement and Post-hearing Brief.

SUMMARY OF ARGUMENT

Petitioners have failed to meet their burden of proof necessary to obtain the relief requested. The PSC should not create new policy based on self-serving opinions rather than on fact-based evidence and *stare decisis*. Competent expert testimony puts into question the bulk of the data submitted by FPL.

The law does not support, and in fact contraindicates, the petitioners' legal arguments.

Testimony and exhibits proferred, **Exhibit 67 particularly**, show the facts alleged by petitioners are incorrect and prove that the request for an acquisition adjustment does not meet the standards of proof necessary to find extraordinary circumstances. CAIRC's focus on the public interest is best explained through a short reading of the minutes of City meetings, clearly showing how the claim of extraordinary circumstances is illusory.

The requested action is not in the public interest. Informed notice to the public, particularly the City residents, was absent regarding facts and ramifications of a sale. Referenda were lacking in even the most basic detail. The only information received

by voters was “lower rates” when so much more was necessary. There is a large space between “Do you want to sell” and “Taxes will rise, services will be eliminated, do you want to sell?” If members of the public did not investigate on their own, they were left in the dark. No better statement could reflect this than one by the City Manager himself: “”If [the public] asked no questions, they would not have the information.” Tr.Vol.2, p.408, L.6-9.

No plan exists to replace income for the City. The City Manager, Jim O’Connor, gave information in testimony on budget plans for the future of the City that is contradicted in the record. Tr.Vol.3, p.421, L.3-8. O’Connor had previously been warned that utility expenses were being ignored to the detriment of maintaining reliable delivery to customers and passed this information along to the Utility and Finance Commissions. Id. p.420, L.1-25. Those Commissions were then prevented from meeting and participating in the review of the sale. See p.14, infra, Issue 7, footnote 7. The argument on “improved reliability” should be ignored, as reliability problems were actually created by the City Council itself.

The issue of finding “extraordinary circumstances” is foundational to this matter. “Extraordinary” is defined as “going beyond what is usual or customary; exceptional to a very marked extent; [in financial transactions] non-recurring. Synonym: rare.” Merriam-Webster Dictionary, 2018. Evidence put forward by petitioners shows clearly that none of these adjectives would apply to the COVB circumstances. Customers who desire lower rates are universal. Tr.Vol.2, p.375, L.15-16. Outside customers of a municipal utility exist in 27 out of 31 cities in Florida. Exhibit 58. Litigation between parties is as unremarkable as rain in Florida, sadly, but if the PSC decides this is an important [or extraordinary] factor in these cases, litigation will not decrease in popularity.

The evidence is compelling that negotiations were limited to the point of absence.[1] This would belie any claim of an "arms-length deal." See CAIRC Brief, Issue 7 infra, p.13, 14 footnotes 6 & 7.

In setting out this brief, CAIRC finds it necessary again to note that they have been hampered by an inability to fully benefit from discovery and have been pressed at every turn by the schedule which was "streamlined" to the point of placing CAIRC at an extreme disadvantage since filing its protest petition on July 20, 2018.[2] To further hamper CAIRC, one party, the City of Vero Beach [COVB], failed to submit direct testimony and avoided having any officials responsible for the actions and decisions made in this case give evidence. The absence of input from those persons instrumental in forming [or not] the essential elements in determining both the presence or lack of extraordinary circumstances and what may or may not be in the public interest, causes the PSC to rely on hearsay evidence of FPL personnel who were only repeating convenient statements rather than stating first-hand knowledge of the issues. CAIRC would argue, and truly hopes, that the PSC finds this is not an adequate basis for such a tremendous change in policy.

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[1] See Exhibit 67, City Council Minutes June 6, 2017, p. 38-39, discussion of state of "negotiations" by Council members Winger, Moss and Howle. Winger points out that if there are negotiations going on, the City should be asking the Commissions to comment, Mayor Moss replying that since the LOI has been approved, that's all they need. Discussion is then continued on p.40 where FPL-supported councilmembers have no desire to negotiate, Mr. Sykes pointing out that the City was in no position to negotiate anything. At p.40 bottom, affirming that their hired attorney, Doliner, made it clear he is not doing any negotiating.

[2] See Motions filed by CAIRC: July 27, 2018, Motion for Re-Setting Hearing Dates; August 13, 2018, Motion for Setting Hearing Date on FPL Motion to Dismiss CAIRC; August 31, 2018, Withdrawal of Motion to Set Hearing Date [Insufficient time to be heard]; October 8, 2018, Motion for Stay of Proceedings [Hurricane Michael hits Oct.9]; October 15, 2018, Motion for Relief from Rescheduling of Proceedings. The shortened timeframe on this docket left no time to pursue contested matters. See Notice of Taking Deposition dated September 20, 2018, and Motion to Reconsider Order Protecting witness from deposition dated September 25, 2018.

CAIRC, with no staff and only one attorney, was unable to send out discovery adequate to its needs while compiling the witness testimony for its case and responding to discovery requests from a late intervenor, Indian River County, and preparing for a standing challenge from FPL. CAIRC would note that the County's only participation in this docket was directed to placing CAIRC under burdensome discovery requests, which they did not intend to pursue, for responses that they had no intention of using. FPL dropped its challenge to CAIRC standing at the last moment possible at the hearing on October 18, 2016, proving their only intention in bringing this matter in this docket, and for having the County propound voluminous and improper discovery requests, was for purposes of harassment. [Tr.Vol.3, p.436, L.2]

The public interest has been ignored by the Petitioners, the circumstances are not extraordinary in any respect other than the obvious steam-rolling of customers into believing a false narrative, and the data being used which claims to support the FPL request is strongly and convincingly shredded by an experienced and independent utility accounting expert. The Petitioners requests should be denied.

ISSUES AND POSITIONS

ISSUE 1: What statutory provisions or other **legal authority**, if any, grant the Commission the authority and jurisdiction to approve the acquisition adjustment requested by FPL in this case?

CAIRC: *None. The law doesn't allow goodwill expenses to be added to rates. Speculative, opinion testimony doesn't replace legal standards found in statute and case law, nor any change in policy. Setting a precedent of such practice would have momentous impact on ratepayers in the future.*

ARGUMENT: Fla.Stat. Sec. 366 reads in part:

> The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. (Emphasis added.) Sec. 366.06, Fla. Stat. (2018).

This law specifically bars including any goodwill/going concern value invested in by the utility from being included in the rate structures. A tortured reading by FPL of only a portion of the statute in question regarding the goodwill matter does not hold legal water. [Deason testimony, Tr., Vol. 2, 248, L5-20; Tr., Vol. 2, 253, L14]. FPL's witness' reading of this law apparently claims that anything you actually pay for is fair game to add to rates, Id., and what the statute is excluding from ratemaking is any value that was in excess of payments actually made. This non-lawyer's novel interpretation of statute is unsupported, and in fact is disputed, by a plain reading of

the statute itself. The last phrase “in excess of payment made therefor” has to refer to the “used and useful” costs, not to the goodwill, as proposed by witness Deason. There is no goodwill that isn’t paid for in a transaction, by definition. The only things considered in the ratemaking process are the monies “invested by the public utility company in such property used and useful in serving the public.” Sec. 366.06. If a business doesn’t pay for something, it didn’t “invest” money in it and there is no “actual legitimate cost” of that property. Witness Deason’s reading of this statute would render any consideration of “goodwill” meaningless.

In statutory construction, a plain reading of the statute is preferred. Where, as here, a statute is free from ambiguity, its plain meaning must be followed: "Where the legislature has used particular words to define a term, the courts do not have the authority to redefine it." Bdo Seidman v. Banco Espirito Santo Intern., 26 So.3d 1, 4 (Fla. App., 2009); Baker v. State, 636 So.2d 1342, 1343-44 (Fla.1994). Likewise, where the language of a statute is unambiguous and clear, there is no room for interpretation. See State v. Dugan, 685 So.2d 1210, 1212 (Fla.1996) ("When interpreting a statute, courts must determine legislative intent from the plain meaning of the statute."); St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071, 1073 (Fla.1982) ("The plain meaning of the statutory language is the first consideration."); State v. Egan, 287 So.2d 1, 4 (Fla.1973) ("Where the legislative intent as evidenced by a statute is plain and unambiguous, then there is no necessity for any construction or interpretation of the statute, and the courts need only give effect to the plain meaning of its terms.")

The law purposely distinguishes the different types of investment categories, setting goodwill aside from other investments. “When Congress uses ‘different language in similar sections,’ we should give those words different meanings.”

McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc., 851 F.3d 1076 (11th Cir., 2017).

"As lawyers, we're taught that an interpretation rendering a statutory clause meaningless violates the 'cardinal principle of statutory construction': that we must 'give effect, if possible, to every clause and word of a statute.' Williams v. Taylor , 529 U.S. 362, 404, 120 S.Ct. 1495 1519, 146 L.Ed.2d 389 (2000). McCarthan, supra.

Prior decisions of the Commission and the Florida Courts of Appeal also support the plain reading of the statute and set the policy of the Commission in this matter. Sebring Order, at 10. Action Group v. Clark, 615 So2d 683, 685 (Fla. 1993). The Sebring Order is specific about the case not changing Commission procedure. Sebring Order, at 11. See also Southern States v. FPSC, 714 So.2d 1046, 1055 (Fla. 1st DCA 1998) which discusses PSC changing policy without proper evidence to do so, pointing out that the legislature has set out some items that the PSC cannot ignore. Id at 1057.

> The goal of not including certain expenses in rate base is: Utilities should be prudent and efficient in their business operations.... The most efficient way to ensure accountability is to force a utility to look at these decisions as they relate to the cost and benefits of the particular service area rather than on a total company basis where the individual investment decisions often appear immaterial. Id. At 1053.
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> Exceptional circumstances not present. Id. at 1054.
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> When the Legislature has specified a particular accounting treatment by statute, the PSC is not at liberty to ignore it in making used and useful or other ratemaking calculations. Id. at 1057.

In this case, the Commission should refrain from creating a new reading of a very specific statute.

ISSUE 5: Should the Commission grant FPL the authority to **charge FPL's rates** and charges to City of Vero Beach's ("COVB") customers upon the closing date of the Asset Purchase and Sale Agreement ("PSA")?

CAIRC: *Yes, as long as they do not improperly add fees and costs to those rates and bills to hide the recoupment of the transaction, thereby eliminating any savings promised to the customers.*

ISSUE 6: Should the Commission approve the joint petitioners' request to terminate the existing **territorial agreement** between FPL and COVB upon the closing date of the PSA?

CAIRC: *No. Petitioners have failed to prove that this transaction will be of benefit to the consumers, and therefore the existing territorial agreements should remain.*

ISSUE 7: What **extraordinary circumstances**, if any, exist to support the Commission's consideration of authorizing a positive acquisition adjustment in this case?

CAIRC: *None. No evidence has been presented, other than non-evidence hearsay and non-expert self-serving opinion, that would support such a finding. Customers living outside the municipal boundaries is commonplace, and a switch to FPL would have no effect on an ability to vote for your decision-makers regarding rates.*

ARGUMENT: The Sebring Utilities Commission case, Docket No. 1992-0949-EU, is the only electric utility case in which extraordinary circumstances have been found to allow a positive acquisition adjustment. It is a unique case and clearly distinguishable from the case at hand. The Commission affirmed its intention that the case not be used as precedent. Sebring Order, infra, at p. 11. Sebring UC had considered and pursued many alternatives to their financial problems, engaged an independent valuation expert [Sebring Order p. 9], sent out professional and detailed RFPs for suitors to purchase their system, chose among several bidders, and negotiated for over a year on the transaction. See Order No. PSC-92-1468-FOF-EU, dated 12-17-92. COVB, by contrast, is not in financial trouble, did not seriously consider other options to its imagined problems, did not professionally request serious suitors for bids [instead sending out one-page letters of no substance or detail [Exhibit 30], did not entertain communications from other companies who did express an interest [Tr.Vol. 2, p.388, L.9], and hurriedly signed an agreement not to entertain other bidders [both LOI

included same], and a final contract with FPL without doing any due diligence or obtaining independent advice on any portion of the transaction or on the terms, or even allowing study and review by staff, commissions, or other knowledgeable parties [Exhibit 67]. There is no evidence to suggest the terms of the LOI for the full sale were negotiated by the COVB. This decision was made at the insistence of the City Council [the rationale for these actions are unavailable, as mentioned, since no decision-makers from the City testified or were deposed], and those terms resulted in the actual terms of the final contract [October 24, 2017] See Exhibit 67, Joint Commissions Minutes August 30, 2017, p.11, where the City Manager confirms same.

Prior to the 2017 COVB Council taking office, the rate differential had been decreasing through the combined efforts of the Council and Commissions. (Kramer Testimony, Tr.Vol.1, p.68, L.9-16.) The COVB had enlisted professional and experienced counsel to deal with [successfully] the challenges being placed on them, and had used caution in considering offers on any sale (Kramer Testimony, Tr.Vol.1, p.65, L.1-8; White Testimony, p.72, L.22-25, p. 73, L.1-2; Whittall Testimony, Tr.Vol.1, p.75, L6-24; p.77, L.4-9). The 2017 Council began reversing those gains. Id. CAIRC will note that the COVB response to interrogatories attempts to hide this evidence by its incomplete answer to Staff's request for a history of rates for the past 20 years. See Exhibit 48, where groupings of years are shown, not individual years, and the power adjustments are in a separate table altogether.

The legal elements for finding extraordinary circumstances must be proven by the petitioner, and FPL has failed in this task. No studies, no evaluations based on factual matters, nor any reports [independent or otherwise], form a basis to meet the standards set out in Rule 27.30-0371(2) FAC, which states: "the Commission shall

consider evidence provided to the Commission such as anticipated improvements in quality of service, anticipated improvements in compliance with regulatory mandates, anticipated rate reductions or rate stability over a long-term period, anticipated cost efficiencies, and whether the purchase was made as part of an arms-length transaction." (Emphasis added.)

Testimony shows only self-serving opinions about COVB by FPL are offered in the place of hard evidence or factual comparisons. Witness Forrest, for example made many claims about what the COVB did or how it benefits, but then is unable to show personal knowledge of those actions or any studies that were done, nor can he answer questions about those claims. (Forrest Testimony, Tr.Vol.1, p.151, L.14-25; p.154, L.5-23 & p.155, L.1-2; p.159, L.14-22; p.161-162; p.171-172; p.178-180; p.184-185, L.20-6; p.185-186, L.25-6; p.186-192; p.202, L.17-23). This is the identical case with Witness Deason. (Deason Testimony, Tr.Vol.2, p.303-4, L.20-17; p.307-309; p.310, L.1-4 [Deason testifying that he is relying on his own opinion, which he values.]; p.312-313 [Deason stating there is a precedent for including goodwill in rates, but it is a gas case where that request was rejected]; p.313, L.14-25 [Deason explains that his inclusion of the entire [moot] order from July 2, 2018, on which he bases most of his supplemental testimony, is based on unsworn statements and non-evidentiary submissions]; p.314, L.21-25 & p.315, L.1-23 [Deason is relying on FPL statements of certainty about rates but cannot explain expert witness' rebuttal of same]; p.316, L.1-14 [Deason has no direct knowledge to support his claims of benefits to the COVB]; p.317, L.6-15 [Deason surmises that the litigation he cites as benefitting COVB if it ends has been won by the COVB, which by most definitions of the word "successful" would negate that litigation as a factor]; p.319, L.22 to p.321, L.[Deason is not sure of data on "disenfranchised" customers, admits it would actually affect any

city with outside customers, not only COVB]; p.325, L,4-8 [testimony is not based on personal analysis of figures]; p.327, L.13 to p.328, L.2 [statements aren't based on research he or anyone else has conducted].)

COVB meeting minutes confirm that the City Manager was told of the reliability issues owing to not funding maintenance matters, was aware of the impact on delivery, and the Council ignored budgeting and planning for continuing upgrades, maintenance, and other upkeep. [Exhibit 67, Uilities Commission Minutes July 6, 2017, p.7, O'Connor at middle of page]. COVB could have maintained and improved what had been excellent reliability by means well short of a sale but chose instead to cut the budget for the utility. Id. Quality of service has always been high for COVB, and no evidence exists that a change to FPL would improve same. See Kramer Testimony, Tr.Vol.1, p.68, L.3-8; White Testimony, Id., p.72-73; Tripson Testimony, p.80, L.13-25, p.81, L.6-16. See also O'Connor testimony, Tr.Vol.3 p.419, L.19-22. Petitioners have produced no evidence of any problems with compliance that need improvement. The projected reductions in rates are premised on accounting manipulations which will cause other FPL customers to pay the hundreds of millions of dollars for the transactions bundled into this sale, thereby causing upward pressure on rates for customers not receiving any benefit therefrom. COVB minutes also show that negotiations were forbidden, and that access to the transaction documents was limited, and input from the Commissions was prevented by vote of the City Council. See below, p.14, footnotes 6 & 7.

Not being able to vote for the body that sets your utility rates is claimed to be disenfranchising outside customers. This alleged "problem" exists in almost every municipally-owned utility. See Exhibit 58, FMEA Response to FPSC Data Request, where of 31 listed cities, 27 have outside customers [data as of August 29, 2018 for

most cities - 3 of the 4 listing "0" outside customers did not respond to FMEA request for data]. As brought out by Chairman Graham, such a situation, if it is truly an issue, needs to be addressed statewide by the legislative body and not the PSC. However, a purchase by FPL will in no way cure that situation. As highlighted in Storey v. Mayo, infra, outside customers have access to the regulating body and to the courts, which is equivalent to [and more convenient than] regulation by the PSC. Therefore, changing COVB customers to FPL merely removes the access to one regulatory body, here the City Council or local courts, and puts it under the PSC in Tallahassee, another body for whom they cannot vote. As noted in Storey, where the claim was a violation of customers' Constitutional right of equal protection, this Commission emphasized [to some of the present intervenors] in 2016 Docket No. 160049, that regarding a claim that the City is using the income as "surrogate vehicle for taxation," that:

> "The Petition's complaint that the Territorial Orders result in Indian River Shores residents being disenfranchised from voting for members of the Vero Beach City Council is not a circumstance that has changed since the Territorial Orders were issued, and therefore does not form a basis for modifying the Territorial Orders. For the same reason, there is no merit to the Petition's argument that the Territorial Orders should be modified because FPL is regulated as to rates by the Commission and Vero Beach is not." See Storey v. Mayo, 217 So. 2d 304, 307 (Fla. 1968), cert. denied, 395 U.S. 909 (1969) at 307-308 (where, in affirming the Commission's territorial order, the Court did not accept the customers' argument that the order should be reversed because the impact of the approved territorial agreement was to force them to take service from an unregulated city utility with inferior rates and service, instead of receiving service from a regulated utility.)
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> See, Docket No. 160049-EU – 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, Memo from PSC General Counsel date June 23, 2016.

In Storey, the Supreme Court emphasized that certain controlled monopolies of municipal utilities were "in the public interest", Id. at 307. This is because the Florida Legislature has through Section 366.04(2), F.S., created a "clearly articulated and affirmatively expressed state policy for establishing electric utility territorial

boundaries" resulting in state action immunity for utilities from antitrust liability. See Union Carbide Corp. v. Florida Power & Light Co., 1993 U.S. Dist. LEXIS 21203 (M.D. Fla. 1993). This was re-emphasized in BOCC of IRC, Fla. v. Graham, 191 So.3d 890 (Fla. 2016) (rejecting the argument that counties may use franchise agreements to choose their electric service provider because that would let counties do indirectly what the Commission's exclusive and superior jurisdiction over territorial agreements precludes them from doing directly).

Testimony from all parties shows outside customers have full access to the COVB City Council[3], that council members listen to and get advice from County and Town residents on rates and other utility issues, especially as outside customers chair and form the majority on the Utilities Commission, and that County and Town residents can and have impacted who sits on that City Council (Sen. Mayfield at June 2 hearing in this docket: "We finally got [sic] the Council" we need. See CAIRC petition dated July 20, 2018, Sec.2(a). In regard to the "we," CAIRC assumes Ms. Mayfield is referring to the citizens outside the City whom she represents, which again indicates that those "disenfranchised" voters have more than adequate opportunity to affect who sits on the City Council. Unless of course "we" was meant to indicate her work with FPL. Either meaning is telling regarding legislative concern for her constituents.)

[3] **Exhibit 67:** August 9, 2016 Utilities Commission Minutes, p. 4, Chair [Town resident] points out they are representing County and Town residents as well as City; p. 5-8, Chair Auwaerter and County/Shores residents Tonkel, Stabe, Heran, others have full input on discussion; p. 6, City Councilman Howle expresses complete confidence in study and advice given by Shores residents; August 16, 2016, City Council Minutes, p. 2, Town resident Auwaerter presents his personal analysis "separate from FPL" with the same two "relatively modest changes" suggested in those same words by FPL speaker Forrest, to the COVB model;p. 7 Councilman Howle suggests following Auwaerter model over that of experts used by COVB attorney Schef Wright; p. 14 Mayor emphasizes the Council represents ALL ratepayers, not just City residents; December 16, 2016, City Council Minutes, p. 21, Dylan Reingold, County attorney, gives advice to Council and that advice is accepted; May 16, 2017, City Council Minutes, p.5, Town resident and Mayor Barefoot gives presentation at invitation of Council; p. 6, Town resident and Chair of Utilities Commission Auwaerter speaks as authority on Letter of Intent that has not been presented to the Utilities Commission.

As stated by this Commission many times, lower rates alone cannot be the basis for finding extraordinary circumstances. The arguments placed in letters to the PSC favoring the petitioners, however, all concern lowering rates.[4] (See Docket, citizen letters.) No issues of alleged "disenfranchised customers" existed prior to the PR campaign begun by private citizens pushing the sale. (Robinson letter to PSC dated 10-8-18; Whittall Testimony, Tr. Vol.1 at 74, L12). The key expressed interests for the request for finding extraordinary circumstances cited in testimony were lower rates.[5]

The contract at issue was not an arms length transaction: City meeting minutes consistently show no negotiations occurred.[6] Testimony shows each time a proposal was given to the City, a short deadline was placed on getting it executed, and the City complied in every case. See details below, Issue 16.

Shutting down Utilities and Finance Commissions, thereby preventing expert review, also clearly shows no attempt to alter or change the terms of any agreement, much less to even question what was being offered and accepted, all of this occurring

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[4] The Brief from Indian River County is solely and completely about rates. Their argument highlights that this is about customers selecting a utility, and there is nothing extraordinary about that.

[5] COVB acquisition primarily driven by desire for lower rates - Forrest Testimony, Tr. Vol.1, 151, L15; Id. at 154, L21; Id. 151, L8; Id. at 173, L17; Id. at 178, L6, 9-13; If couldn't produce lower rates, no deal - Id. at 183, L9-11; Ferguson Testimony Tr. Vol.1, 210, L19) However, in spite of the PSC clear statement that lower rates cannot be the basis for finding extraordinary circumstances, FPL puts forth unsupported opinion that it should. Witness Deason Testimony, Tr.Vol.2, 272, L1-25. Also see discussion above regarding rate differentials under Storey, supra, at 307-308; and AmeriSteel v. Clark, 691 So.2d 473, 476 (Fla. 1997) (steel company intervenes owing to high rates being charged by FPL, seeking lower rates with JEA.

[6] **Exhibit 67**: August 9, 2016, Utilities Commission Minutes, page 4, paragraph 2, and page 5, end of paragraph 3, City Council directs that no negotiations take place. August 16, 2016, City Council Minutes, page 16 bottom, FPL states offer is final, no negotiations; pp 15-16 Town refuses to negotiate; December 6, 2016, City Council Minutes, p. 6, paragraph 1, $30 million is the number, no negotiations, FPL attorney advising Council; p 7, para. 4, refusal to negotiate due diligence clause, para. 6 former attorney Wright no longer retained by City, no replacement yet, p. 7 Mayor suggests relying on FPL counsel for legal advice on negotiations. May 2, 2017, City Council Minutes, considering just presented Letter of Intent from FPL, p. 23, para. 1 Mayor is "only putting numbers together, no negotiating, p. 20, no discussion until after May 16;" p. 25 no negotiations at this point. May 16, 2017, Special Call Minutes, p. 6, the Mayor instructs the Council that City can't negotiate a transaction until the LOI is signed; p. 7 "negotiation period is 90 days," p. 8 [top] Councilman Winger indicates no negotiations happening or possible; June 6, 2017, City Council Minutes, p. 38, no negotiations needed since the LOI is complete; p. 40 Councilman Sykes declares trying to negotiate is "ludicrous." August 30, 2017, Joint Utilities and Finance Minutes, p. 11, City Manager states that the LOI is the contract, no changes; p. 12 City Manager states that negotiating terms and conditions of a partial sale, now part of the full sale contract, will be "discussed later," after the contract is signed, and the Town affirms that it considers the LOI the contract, won't negotiate any changes, p. 13 Town can't address the entire contract as that would be too difficult; p. 14, "they've converted the LOI to the contract," p. 15 Council will not negotiate the partial sale, it was already voted on [in 2016]; p. 16 FPL explains that the LOI is the contract.

while the City was unrepresented by expert utility counsel.[7] This means, in turn, that no City resident had any opportunity to understand or comment on same, much less put questions to the City before they were signed, about what the agreements will mean to them.

The very unusual testimony that two citizens approached a large utility to suggest that the utility purchase the COVB operation also contradicts the many assertions that the City presented the idea to FPL. The mystery behind the genesis of this effort, and behind who it was who funded the alleged "private citizens" to press this campaign for nine years, has not been given any further enlightenment by what evidence CAIRC was able to obtain in this time-shortened docket and from the actual persons involved who refused to testify.[8] The odd contradictions of these facts again call into question what the public knows and understands about the promises of "lower rates." CAIRC contends that the answers to why the City would push for a sale when lower rates are not guaranteed or even likely unless FPL can change PSC policy; why allowing FPL to dictate the deal without conducting proper and full review of the contracts; and why agreeing to a "poison pill" partial sale that in no way beneficial to the City are important factors only answerable by the City Council members. [See Tr.Vol.2, pp.385, 396-406, O'Connor unable to answer questions about City decisions.]

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[7] **Exhibit 67:** December 6, 2016, City Council Minutes, p. 11, Commissions have not discussed the terms; May 2, 2017, City Council Minutes, p.17-20, Mayor places gag order on Commissions; Id. p.28, Mayor indicates no staff has reviewed the details; May 16, 2017, Special Call Minutes, p.7, Councilman Young demands that review process include staff and commissions; June 6, 2017, City Council Minutes, p.37 Councilman Winger demands that commissions need to address the contract; July 6, 2017, Utilities Commission meeting, p.2, Member Whittall requests information on when the Commission will discuss the FPL contract; August 30, 2017, Joint Utilities and Finance Minutes, p.17, Mr. Brovont states the City Council has already agreed to both the full sale and partial sale contracts without any input from either Commission; p.21, Mr. Brovont clarifies that they have been and still are under a gag order about the sale.

[8] CAIRC will note that the rare and preferential treatment given to FPL of an extremely compacted timeline for this case caused the normal citizens who wish to participate in matters of great import to them to be incapable of completing even minimal discovery, especially when, as is common in any legal engagement, one party stonewalls the other by refusing to grant access to key witnesses, floods the citizens with useless discovery requests intended only to harass, and is given no consideration for their demands in scheduling of hearings.

City residents should be [and are] disturbed that their own elected representatives, at all levels, are ignoring the basic tenets of good business and representative government. See Tr.Vol. Of Public Hearing, p.13, L.21 to p.14, L.22, Testimony of Sen. Mayfield that she believes what FPL has stated, doesn't understand the accounting questions being challenged; and p.16, L.18 to p.17, L.19, where Sen. Mayfield refuses to explain why she is opposed to the participation of both the OPC and CAIRC. Sen. Mayfield claims, when asked on whose information she is relying for her support of the action in this docket, she is relying on the citizens to tell her whether or not the deal is a good one. Id. at L.13. A curious position to take.

There are, of course, citizens who want the full information. See letters from those opposed to the PSC action on the docket. Therefore, the questions that remain and contradictions in testimony noted here, added to the mountain of discredited "facts" alleged by Petitioners, shows Sen. Mayfield should be leading, not following.

ISSUE 8: Should the Commission **consider alternatives** other than what has been proposed by FPL with respect to the acquisition adjustment?

CAIRC: *The law would not seem to support any "alternatives" to a yes-or-no situation, even if many alternatives are available to the COVB which have not yet been pursued or were ignored.*

ISSUE 9: **Should the Commission approve a positive acquisition adjustment** associated with the purchase of the COVB electric utility system?

CAIRC: *No. There is no legal precedent for such action, as Sebring is specifically exempted as being such and is factually distinct in most respects. Water and gas cases, purposely and reasonably, are in a separate category. The statute says no, specifically, and must be given the most logical reading.*

ARGUMENT: As to whether or not this would be in the public interest, see Issue 16.

Concerning the existence or not of extraordinary circumstances, see Issue 7.

Southern States , supra, at 1055 discusses PSC changing policy without proper evidence to do so.

For a discussion of the laws which would bar such an approval, see Issue 1.

The rule in question only applies to water cases. See Rule **25-30.011 Application and Scope. F.A. C. (2018)**

> (1) These rules and regulations shall, as appropriate, apply to all water systems and/or wastewater systems which are now, or may hereafter be, subject to the jurisdiction of the Florida Public Service Commission.
> (2) And gas cases are easily distinguishable. INDIANTOWN - tiny operation All gas cases are businesses, not municipal utilities. Reasons for electric not included are the same reasons these utilities all have different dockets. In the AGLR gas case, for example, FGC was purchased by AGLR, but FGC is asking for the acquisition adjustment.

ISSUE 11: What is the **appropriate amount, if any, of a positive acquisition adjustment** to be recorded on FPL's books for the purchase of the COVB electric utility system?

CAIRC: *FPL is required to record the actual acquisition premium as "goodwill" under generally accepted accounting principles ("GAAP") and, more specifically, is required to record the acquisition premium in account 114 under the Federal Energy Regulatory Commission ("FERC") Uniform System of Accounts ("USOA").*

ISSUE 12: If a positive acquisition adjustment is permitted, what is the **appropriate accounting treatment** for FPL to utilize for recovery and amortization of the acquisition adjustment?

CAIRC: *If recovery is permitted, then FPL is required pursuant to the FERC USOA to record the amortization in account 406 Amortization of Electric Plant Acquisition Adjustments. If recovery is not permitted, then there is no amortization recorded in account 406.*

ISSUE 13: Should the projected cost savings supporting FPL's request for a positive acquisition adjustment be **subject to review in future** FPL rate cases?

CAIRC: *Yes. Future impacts need to be seen and addressed if such a deviation from prior law is accepted.*

ARGUMENT: Yes, but only if the Commission approves recovery of the acquisition premium. If so, then the Commission should specifically reserve the right to determine how the savings are measured in the subsequent proceeding and decline to affirm FPL's methodology, including its errors, in this proceeding. Alternatively, the Commission could determine in this proceeding that OPC's criticisms are correct and reflect the correction of those errors in its subsequent review of any savings.

ISSUE 15: Should the Commission approve recovery of costs associated with the short-term power purchase agreement with **Orlando Utilities Commission**?

CAIRC: *No, this agreement will increase the cost of service for the general body of FPL ratepayers and set a precedent contrary to PSC policy.*

ARGUMENT: Southern States, supra, at 1055, discusses PSC changing policy without proper evidence to do so.

ISSUE 16: Is granting the relief requested by the applicants in the **public interest**?

CAIRC: *No. Current evidence shows the public has been kept in the dark, purposely misled, about how "lower rates" would be accomplished. Granting FPL's rates to COVB customers will include undisclosed fees and costs negating any alleged savings. Sets a poor precedent for future rates.*

ARGUMENT: The public is unaware, and has been kept intentionally ignorant, of the costs and resulting diminution in City services that will result from this transaction. See above, Issue 7. If public interest is actually going to be a factor, as it should be in any decision of the PSC, the basic facts of the decisions being made in this docket have to be made clear to that public. How this has, or hasn't, been done should weigh heavily in each Commissioner's evaluation of this case.[9] When state elected officials spend an inordinate amount of time attacking the OPC and CAIRC for raising valid questions [see Testimony of Mayfield, supra, and Grall, Tr. Of Public Hearing, pp. 22-29], citizens must wonder [as do we] why they are so angry about any challenges to what FPL is claiming. We would expect guardians of the public trust to be alert to, and alarmed by, such obvious conflicts in data on which they claim to rely.

Notice to the public on how this grant of an acquisition adjustment will affect them is absent. As argued in the CAIRC petition for review of the June 2, 2016 PSC Order, now quashed, FPL has flooded the media with their "lower rates" campaign

[9] CAIRC sincerely hopes that the Commission will recall the oppression of opposing voices, as emphasized in CAIRC opening statement, and not put tremendous weight on the coordinated write-in campaign by an organized and well-funded group of citizens, as well as by Councilmembers Howle and Zudans. The fact that several citizens were willing to put their voices on the record supporting CAIRC and its efforts for truth should be viewed in light of that oppression.

while independent voices have been muted and ignored. As seen from the non-sworn letters of public input to the PSC, there is little [if any] comprehension of how this transaction will affect the public. Warnings to the public about "lower rates" being distinguishable from "lower bills" have been non-existent from the City itself via the City Council members. For example, much of the public has no understanding that COVB per kWh rates are already lower than FPL (see Exhibits 9-12, "Rate comparison charts", that fail to show the breakdown of COVB rates, and Exhibit 40 & 48, "COVB Responses to FPSC Staff's First Set of Interrogatories," in response to a request for the data on the last 20 years of rate breakdowns for City customers [Interrogatory #1], City Manager O'Connor submits a partial response that chooses certain base rate data, not every year for 20 years as requested, but the added fees are found on a separate sheet which would still not give a full picture of the rates). It is the addition of fuel charges that puts COVB over the final charges of FPL.

The City manager's statement [see O'Connor Testimony, Tr. Vol.3, p.422, L.6-25 and p.423, L.1-6] that a five-year plan for the budget has been discussed by City commissions or the Council is not supported by the City meeting minutes. CAIRC has reviewed all the minutes to date, and none contain a plan or discussion for a five-year budget. In fact, as was pointed out by several people at the August 30, 2017 joint meeting of the Utilities and Finance Commissions, held to discuss a full sale but two months prior to the receipt of any full sale contract, there was no plan for the City budget following the sale. See Exhibit 67, August 30, 2017 Minutes of Joint Commission Meeting, p.2, in which former Councilman Brian Heady points out the flaws in not getting enough money to cover the lost income; p.7, Mr. George Baczynski of the Utilities Commission points out there is no financial plan; p.8, Mr. Peter Gorry of the Finance Commission points out the City needs a five-year plan

prior to finalizing this transaction; p.9, City Councilman Randy Old states they have not had time to make a five-year plan. This remains true today.

The Town and County residents push hard in that same August 30 meeting to make a decision based upon an incomplete picture given in the FPL Letter of Intent. The PSC will note that this entire meeting occurred without the assistance of either the City Attorney or outside legal counsel. Id. p.1. Indeed Mr. Auwaerter, resident of the Town of Indian River Shores and Chair of the Utilities Commission, points out that reviewing any actual contract would mean looking over hundreds of pages, but the Letter of Intent gave them the few details on which they really needed to focus. Id. p.13. FPL representative Amy Brunjes helpfully points out that the company hopes to have a full sale contract to the City in October of 2017, it will be "voluminous," and that the "outline" of the contract is what they are addressing that day. Id. p.16. City Manager O'Connor points out that the two Commissions can vote on going forward with a full sale that day, and then any analysis of that move can be done afterwards, an interesting concept. Id. [Note: This was the last meeting held of the Utilities Commission from 2017 until present day. See Whittall Testimony, Tr.Vol.1, p.76, L.24]

The comparison of times when documents were received from FPL as offers to the times the votes taken on those offers is very telling. How the Council or Commissions considering said documents were able to understand them, much less review their content, is a mystery not cleared up by testimony or evidence. It is clear, therefore, that any member of the public had no opportunity to comprehend or intelligently comment on these transactions. See Tr. Vol.2, p.393 - 397, where witness O'Connor is questioned about the Utility Commission meeting of August 9, 2016 [minutes of which are attached in Exhibit 67]. The Commission is being asked to

recommend passage of a Letter of Intent received *that morning* from Sam Forrest of FPL for the partial sale of Indian River Shores, which became a key part of the final full-system sale contract one year later. The PSC will note that the Utility Commission was called to order at 9:00 a.m. that same day, meaning they were meeting just as the LOI was delivered.

At the above-noted meeting of 8-9-16, and in the above-cited hearing testimony, Mr. O'Connor confirms that no due diligence has been done on the LOI. (Tr. Id., at 393, L20-22.) Then at p. 394, Id., he confirms that the City Finance Director hasn't done an analysis. At L.20 he confirms that the City is relying on the FPL analysis. When asked why that is the case, on p. 395, Id., Mr. O'Connor says he can't speak for the Finance Director [L.1-11.] On p. 396, Id., he testifies that City personnel and their attorney have not reviewed the LOI, although they have the LOI in hand [L.6-15] On p. 397, Id., L.1, he claims to have no idea why the City commissions had not reviewed the LOI. From the Exhibit it is quite clear why that is the case, of course. The Utility Commission is being asked to vote on something that they received minutes ago, and which everyone in the City just received minutes ago. Nevertheless, the Commission voted at that meeting five to zero to "approve the offer" from FPL.[10]

A mere seven days later, the two FPL-supported council members voted to accept this partial sale, but the majority on the council thought that seven days to review such an important move was inadequate. Their outside legal counsel, Mr. Schef Wright, suggested they not accept the offer which he and other experts he consulted, just on their brief review, found to be harmful to the City. After elections placed two more FPL-funded council members in office, Mr. Wright was fired by a new City Council

[10] Note that three votes were from Town and County residents, meaning outside customers carried the decision.

just a few weeks later. [See City Council Minutes, December 6, 2016, Exhibit 67, p.20, Item on agenda to find a new transactional attorney to replace Schef Wright.]

When there was a joint meeting of the City Finance and Utilities Commissions on August 30, 2017, to approve the full sale contract, that contract was not yet in existence. See minutes of that meeting, Exhibit 67, Joint Meeting Minutes, p.14. The City Council received the full contract on October 23, 2017 [See Exhibit 1, Asset Purchase and Sale Agreement]. That contract was voted on immediately thereafter by the City Council on October 24, 2017 [See Testimony of Witness Forrest, Tr. Vol.1, p.152, L.19].

Throughout their testimony, FPL [and what little there is from the City, County and Town] all rely heavily on the statements that two referenda votes clearly show the residents of the COVB support the full sale. See Referenda, Exhibits 31-32. Both were held well before any full contract was presented, the first in the November 2011 election, considering a [non-existent] lease of the power plant land, not regarding any utility sale details other than the City Council deciding if a sale is "beneficial to the citizens." Exhibit 31. The November 2013 election ballot carried the second referendum, Exhibit 32. That language asked about a sale, and it referred to an "asset purchase and sale agreement" that was not yet in existence. See Witness Kramer testimony, Tr.Vol.1, p.66 L.22-25 p.67, L.1-18; and see COVB Witness O'Connor Tr.Vol.2, p.405, unable to contradict Kramer.[11] In confirming that any detail at all about what "the sale" would mean would necessitate that voters contact the City somehow to get those details [Id. p.402, L.3-15 & p.403, L.1-10, and p.405, L.13-16.], Mr. O'Connor testified that approximately 10-15 people made inquiry at City Hall

[11] CAIRC would note that Witness O'Connor was unable to discuss how the wording of the referendum of 2013 was selected, as it was the City Council who made those decisions. Tr.Vol.2, p.401, L.19-24. Again, failing to allow full discovery opportunities for CAIRC has hindered our ability to present a full accounting of the facts.

about the details of that referendum. Id. p.403, L.11-22. There are more than 20,000 voters in the City.

See also facts on City Council shutting down Commissions in Issue 7, above.

The foregoing shows clearly that the Vero Beach public has been denied the facts, details, and resulting changes likely to impact finances and their City services if this request is approved. The failure to provide residents with information sufficient to make a reasoned and informed decision on the impact of this docket issue is a fraud on the public perpetrated by the Petitioners. The fact that Rep. Grall levies a full-out assault on the OPC, claiming that when they are helping citizens, they are actually "carrying the water of special interest groups," [Tr.Public Comment, p.23] and asks the Commission to "please discount any OPC testimony" [Id., p. 25 L.7-13], all of Florida should be shocked. Grall does finally admit that her statements are "personal belief, Id., p.29.

CAIRC concern remains with the outside customers, as well, who will be harmed by a new PSC policy that allows large corporate utilities to purchase other utilities and transfer any costs of any kind to the ratepayers.

As much leeway as is given the PSC in these cases, CAIRC would urge you to rely on the facts rather than on opinions from biased petitioners and their witnesses. **Reading Exhibit 67** will clarify much in the way of the truth.

This transaction will be wholly funded by the ratepayers, which will include the City ratepayers on the next occasion this type of transaction is approved. Setting a precedent of putting all costs of a sale into rates is not in the public interest, especially since lower rates cannot be considered a primary focus in acquisition premium recovery.

ISSUE 20: Should this **docket be closed**?

CAIRC: *Not until CAIRC is given the opportunity to complete depositions and discovery.*

ARGUMENT: Due process, see Motion for Reconsideration of Order Granting Protective Order to the City.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed and forwarded via email this 29th day of October, 2018, to: PARTIES listed below.

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