UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Florida Power & Light Co.	**)**	**Docket No. EC13-91-000**

MOTION FOR LEAVE TO SUBMIT ANSWER AND ANSWER OF FLORIDA POWER & LIGHT COMPANY

Pursuant to Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213, Florida Power & Light Company ("FPL") submits this Answer to the protest of the Civic Association of Indian River County, Inc. ("Civic Association") and comments submitted by certain individuals regarding its proposed acquisition (the "Transaction") of the municipal utility assets of the City of Vero Beach, Florida ("Vero Beach"). FPL recognizes that, under Rule 213(a)(2), answers to protests are not permitted without the Commission's authorization. FPL therefore also moves for leave to submit this answer. The Commission frequently permits answers to protests when, as is the case here, the answer provides information that assists the Commission in its decision-making process. *See, e.g.*, *NRG Energy, Inc.*, 141 FERC ¶ 61,207 at P 17 (2012) (accepting answer to protests "because it has provided information that assisted us in our decision-making process"); *Duke Energy Corp.*, 139 FERC ¶ 61,194 at P 23 (2012) (same).

I. INTRODUCTION

Almost without exception, the issues raised by the Civic Association and other opponents of the Transaction are local political issues. They advance arguments attacking the process employed by Vero Beach to reach the decision to enter into the Transaction, the role taken in that process by certain individuals, and the reasonableness of the price negotiated by the Vero Beach City Council. Their positions represent a rehashing of the public comments and arguments

previously made in opposition to the Transaction prior to, during, and following, the referendum that the Vero Beach City Council held to determine public support for Vero Beach's exiting the utility business and selling its system to FPL. That referendum overwhelmingly passed with 64% of the vote, and a number of Vero Beach citizens and customers have submitted comments to the Commission in this proceeding in favor of the Transaction. This public support is not surprising given that the Transaction is expected to result in a significant reduction in the retail rates currently paid by Vero Beach's customers and provide other benefits to Vero Beach, as outlined in FPL's Application.

While FPL disagrees with the characterizations of the local issues made by the Civic Association and others, the Commission need not resolve these disputes here. The arguments presented simply have nothing to do with the issues that the Commission has stated it will consider in evaluating transactions under section 203 of the Federal Power Act ("FPA"), 16 U.S.C. § 824b. Clearly, the Civic Association and others wish to continue in this proceeding a political debate that is not relevant to the issues before the Commission and, moreover, which already has been decided.

The Commission should reject the Civic Association's invitation to get involved in such local political issues here. The Commission's role is to oversee wholesale electric markets and transactions. It would represent an unwarranted, and unprecedented, expansion of the Commission's jurisdiction if it were now to interject itself into the local political process and to second-guess the decision by Vero Beach's elected City Council to enter into the Transaction, which has been approved by voter referendum.

The Civic Association attempts to dress its arguments in the clothes of a competition argument, which is an issue that the Commission does consider as part of its section 203

analysis. However, the Civic Association does not refute, or even present any reason to question, the results of the competition analysis submitted by FPL in conformance with the Commission's Merger Regulations. As FPL explained in its Application, those results show that the Transaction satisfies the standards established by the Commission for evaluating the effect of a transaction on wholesale competition.

At best, the Civic Association's claim is that FPL has a plan to exercise market power by engaging in *future* transactions to purchase the utility assets of *other* municipal utilities. Again, FPL disputes the Civic Association's allegations, but the Commission has no need to even consider the question. At issue here is whether *this* transaction to purchase *Vero Beach's* assets somehow could have an adverse effect on competition. The Commission will be able to evaluate future transactions if and when FPL reaches agreement to purchase such assets and requests the Commission's approval.

The Civic Association also has raised arguments regarding the effect of the Transaction on rates. While these arguments also have no merit, they again are not relevant here. Instead, the Civic Association's arguments go to retail rate issues that the Commission does not consider in its section 203 public interest analysis absent a request to do so, not made here, by the local state utility commission. In any event, the Civic Association does not rebut the fundamental fact that the retail rates of Vero Beach's customers will be reduced as a result of the Transaction.

No party has provided any reason for the Commission to conclude that the Transaction is inconsistent with the public interest under the standards applied by the Commission under FPA section 203. The Commission therefore should approve the Transaction without imposing any conditions or conducting an evidentiary hearing.

II. UNDER ITS MERGER POLICY STATEMENT, THE COMMISSION DOES NOT SECOND-GUESS A DECISION TO ENTER INTO A TRANSACTION OR THE REASONABLENESS OF THE PRICE PAID FOR UTILITY ASSETS

Prior to 1996, the Commission subjected proposed mergers and other transactions subject to its FPA section 203 jurisdiction to a wide-ranging review under six non-exclusive factors developed in the Federal Power Commission's 1966 *Commonwealth Edison* decision. *See Commonwealth Edison Co.*, 36 FPC 927 (1966), *aff'd sub nom. Util. Users League v. FPC*, 394 F.2d 16 (7th Cir. 1968), *cert. denied*, 393 U.S. 953 (1969). In 1996, however, the Commission issued its Merger Policy Statement,[1] in which it significantly revised and streamlined its section 203 review process. Instead of addressing the numerous *Commonwealth Edison* issues (and any other issue raised by any party in its comments), the Commission decided to more narrowly limit the scope of its review, establishing the following three factors that it would consider: (1) effect on competition, (2) effect on rates, and (3) effect on regulation. FERC Stats & Regs. ¶ 31,044 at 30,126-27. Further, the Commission provided specific guidelines as to how it would consider each of these factors. *Id.* at 10,116-25. Four years later, in 2000, the Commission issued Order No. 642,[2] which reaffirmed the Merger Policy Statement and codified the policy in the Commission's regulations.

In 2005, Congress amended FPA section 203 to require the Commission to also consider cross-subsidization issues when reviewing jurisdictional transactions. *See* FPA section 203(a)(4), 16 U.S.C. § 824b(a)(4). The Commission therefore added cross-subsidization to the

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1 *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111 (1996), *order on reconsideration*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (collectively, "Merger Policy Statement").

2 *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,872 (2000) ("Order No. 642"), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001).

issues that it considers in determining whether a proposed transaction is consistent with the public interest. Otherwise, the Commission has not made any changes since 1996 to the issues that it considers in its section 203 review. And the Commission consistently has rejected efforts by intervenors in section 203 proceedings to inject other issues into the process. *See, e.g.*, *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 148 (2011) (declining to address claims regarding the effect of a transaction on qualifying facilities under the Public Utility Regulatory Policy Act of 1978); *Cincinnati Gas & Elec. Co.*, 64 FERC ¶ 61,237 at 62,726 (1993) (declining to address claims regarding potential effect of a transaction on existing contracts), *order on reh'g*, 69 FERC ¶ 61,005 at 61,042 (1994).

Most of the comments submitted in opposition to the Transaction raise local political issues that do not implicate any of the factors currently considered by the Commission in its FPA section 203 review. For example, the Civic Association argues that Vero Beach should have conducted an "open RFP process," and that as a result the Transaction was completed at a "below-market price." Civic Association at 8. The Civic Association also criticizes the political process followed by Vero Beach to reach the decision to make the sale and accuses FPL of manipulating that process. *Id.* at 12-19. Further, the Civic Association criticizes Vero Beach for failing to consider tax increases and the loss of services that the Civic Association claims will result from the Transaction. *Id.* at 20-21.

At best, these charges are based on innuendo and unsupported speculation, and cannot be credited. But the Commission does not need to even consider the claims, because they simply are not relevant. None of them goes to any of the issues that the Commission considers when determining whether a proposed transaction is consistent with the public interest, as required by FPA section 203. Indeed, when it issued its Merger Policy Statement, the Commission

specifically considered whether to continue addressing issues regarding the price paid or whether coercion was involved and declined to do so. *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,125-26. Nor does the Commission have jurisdiction to rule on the political process followed by Vero Beach in deciding to enter into the Transaction. Consequently, none of the arguments based on local political issues provides a basis for the Commission to find that the Transaction is inconsistent with the public interest.

III. THE CIVIC ASSOCIATION HAS NOT SHOWN THAT THE TRANSACTION IS INCONSISTENT WITH THE PUBLIC INTEREST UNDER THE STANDARDS THAT THE COMMISSION APPLIES UNDER FPA SECTION 203

Although most of the comments opposing the Transaction are irrelevant to the issues considered by the Commission under FPA section 203, the Civic Association does make some arguments that, on their face, go to the competition and rate effect issues identified in the Merger Policy Statement as issues that the Commission will consider in evaluating a transaction. For the most part, however, these arguments do not address the issues that the Commission has identified as raising public interest concerns. Furthermore, none of the arguments have any merit.

A. The Civic Association Has Not Demonstrated Any Adverse Competitive Effects Resulting From the Transaction

In its Application, FPL submitted the testimony of Julie Solomon, who performed the Competitive Analysis Screen required by section 33.3 of the Commission's regulations, 18 C.F.R. § 33.3. *See* Exhibit J. In her testimony, Ms. Solomon demonstrated that there are no screen failures resulting from the Transaction. Exhibit J-1 at 4, 32-35, Tables 6–8.

In the Merger Policy Statement, the Commission made it clear that a proposed transaction that passes the Commission's competitive screens ordinarily will not be set for hearing on the competition issue. The Commission reasoned:

> *It is important to give applicants some certainty about how filings will be analyzed and what will be an adequate showing that the merger would not*

> *significantly increase market power*. This will allow applicants to avoid or minimize a hearing on this issue. Consequently, we will use an analytic screen (described in Appendix A) that is consistent with the [DOJ/FTC Merger] Guidelines. *If applicants satisfy this analytic screen in their filings, they typically would be able to avoid a hearing on competition.*

Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118 (emphasis added). In Order 642, the Commission reiterated that a proposed transaction that passes the "generally conservative check" imposed by the Appendix A screen typically will not be required to present additional analyses:

> If the screen is violated, the Commission will take a closer look at whether the merger would harm competition. If not, and no intervenors make a convincing case that the merger has anticompetitive effects despite passing the screen, *the horizontal analysis stops there*.

Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897 (emphasis added). Ms. Solomon's analysis showed no screen violations and therefore satisfied the requirement that FPL demonstrate that there are no adverse competitive effects resulting from the Transaction.

Nothing in the Civic Association's protest undermines Ms. Solomon's analysis. Indeed, only one of its arguments even addresses her analysis. In that argument, the Civic Association asserts that FPL failed to account for its power purchase from the Orlando Utilities Commission ("OUC") in its analysis and therefore "FPL misstates what it will control after the purchase." Civic Association at 7. That argument, however, is simply incorrect. Ms. Solomon *did* include the capacity purchased from OUC as being under FPL's control in her analysis, as she explained at pages 25-26 of her testimony, Exhibit J-1. *See also* Exhibit J-4 (showing the capacity being purchased from OUC as part of the generation being acquired by FPL as part of the Transaction). Ms. Solomon concluded that the Transaction does not result in any screen violations even when the OUC purchase is deemed to be an FPL capacity resource.

The Civic Association's other competition arguments do not address Ms. Solomon's competition analysis and provide no basis for the Commission to conclude that the Transaction will have an adverse effect on the competitiveness of wholesale electric markets. The first argument is that FPL has a plan to acquire additional municipal electric systems in the future that will give it market power. Civic Association at 3-6. In support of this argument, the Civic Association cites to a presentation made by FPL at an investor conference. This presentation does not identify any specific purchase of assets planned by FPL, however, but only includes general statements to the effect that FPL's opportunities to increase its earnings in the future include potential service territory expansion. The Civic Association erroneously asserts that the presentation demonstrates that "FPL plans to use its market power to take any action necessary to squeeze out its competition." *Id.* at 6.

The general statements cited by the Civic Association hardly support its contention. FPL entered into the Transaction at the invitation of Vero Beach, which was looking for ways to lower the retail rates paid by its customers. To the extent that other municipal utility systems likewise want to explore ways to obtain rate reductions for their customers, FPL is willing to discuss potential transactions. But any such transactions would have to be voluntarily entered into by the selling municipality after its determination that the transaction is in the best interest of it and its utility customers—FPL has no ability to force any municipality to enter into a transaction against its will.

More importantly for the Commission's review here, any plans that FPL may have to acquire additional utility assets in theoretical future transactions simply have no relevance to this proceeding. At issue here is whether FPL's acquisition of the Vero Beach municipal utility

system will adversely affect wholesale electric markets in Florida. Ms. Solomon's unrebutted analysis shows that it will not.

The Civic Association's assertions do not go to the Transaction being reviewed by the Commission in this proceeding, and therefore do not present any reason for the Commission to find that the Transaction will have an adverse effect on competition. *See Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 147 (rejecting claim of competitive harm because the claim "failed to demonstrate that the alleged harms to competition *stem from the Proposed Transaction*") (emphasis added). To the extent that FPL ever does enter into agreements in the future to purchase utility assets of other Florida municipal electric utilities, the Commission will be able to assess the competitive effects of such acquisitions at the time they are submitted to the Commission for its approval.

The Civic Association also appears to be attempting to invoke the Commission's vertical market power analysis by invoking a claim that the Transaction will affect a "downstream market." Civic Association at 20. However, as section 33.4(a) of the Commission's Merger Regulations, 18 C.F.R. § 33.4(a), make clear, the Commission's vertical market power analysis considers the competitive effects of transactions that combine inputs to electricity production, such as fuel used to generate electricity (upstream markets), with generation facilities used to generate electricity and other electric products (downstream markets). *See also* Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,903 (vertical market power issues raised by "mergers between public utilities and firms that provide inputs for electric generation") (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,113).

The Civic Association does not allege that the Transaction involves such a combination, nor could it, as Vero Beach neither owns nor controls any inputs to the generation of electricity.

Instead, the "downstream market" that the Civic Association references is "other purchasers and sellers of utilities." Civic Association at 20. The Commission's vertical market power analysis was not intended to address such a claim, which does not raise a valid vertical market power concern.[3]

B. The Civic Association Has Not Demonstrated Any Adverse Wholesale Rate Effects Resulting From the Transaction

The Civic Association also raises several arguments regarding the rate effects of the Transaction. Civic Association at 5-6, 17-18. These arguments all go to *retail* rate effects, however, and not to the wholesale rates that are the subject of the Commission's jurisdiction, and thus its inquiry under FPA section 203. *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (contrasting state role in addressing retail rate issues with the Commission's role under FPA section 203 to "protect the merging utilities' wholesale ratepayers and transmission customers"); Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,914 (noting that focus of the effect on rates inquiry is "to protect wholesale customers of merger applicants"). The retail rate arguments advanced by the Civic Association therefore are not relevant to the Commission's wholesale rate inquiry here.[4]

In any event, the Civic Association's rate arguments have no merit. Although the Civic Association accuses FPL of having made misleading claims regarding rates, it does not, and cannot, refute the fundamental point that the Transaction will cause a reduction in the retail rates

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[3] In any event, this claim is completely unsupported by the Civic Association and cannot constitute a ground for the Commission to find an adverse competitive effect. *See* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,119 ("Unsupported, general claims of harm are insufficient grounds to warrant further investigation of an otherwise comprehensive analysis developed by the applicants.").

[4] It is true that the Commission will consider retail rate effects of a transaction in situations where a local state utility commission has no jurisdiction over the transaction and requests the Commission to address the issue. *See Mirant Corp.*, 111 FERC ¶ 61,425 at P 37 (2005). Here, however, the Florida Public Service Commission ("FPSC") has not even intervened, much less claimed that it has no jurisdiction over the Transaction or requested the Commission to conduct a rate review.

paid by Vero Beach's current customers. The uncontested fact is that, due to its relatively low cost generation and economies of scale, FPL's retail rates are lower than those charged by Vero Beach, and the Transaction will allow Vero Beach customers to become FPL customers and thereby enjoy lower rates.

Additionally, the Civic Association's claims that FPL has misrepresented the rate effects of the Transaction do not bear up to scrutiny. For example, FPL's claim that it has the lowest typical 1,000 kWh residential bill in Florida is based on a current bill comparison appearing on the FPSC's web site of all Florida electric utility rates using the standard 1,000 kWh monthly usage benchmark.[5] Residential service comprises the vast bulk of electric load in Florida (approximately 80% in the case of FPL). Although FPL may not have the lowest retail rates for every combination of rate classes, demand levels and usage levels, it is indisputable that FPL has the lowest typical 1,000 kWh residential bill in Florida, and FPL's other rates are the lowest or among the lowest in Florida. Contrary to the Civic Association's assertion, it was not misleading for FPL to make this claim.

The Civic Association's second claim, that it was misleading for FPL not to include the Vero Beach franchise fee in its comparison of FPL's and Vero Beach's retail rates, similarly has no merit. The alternative rate comparison cited by the Civic Association (at 17-18) as being more honest, and which includes the franchise fee in the rate calculation, shows an even *greater* difference between the FPL and Vero Beach retail rates ($37.98/month) than the comparison that the Civic Association claims is misleading ($29.90/month). Thus, there is no support for the

[5] http://www.psc.state.fl.us/utilities/electricgas/index.aspx (click on "Florida Investor-Owned Electric Utilities Total Cost for 1,000 Kilowatt Hours - Residential Service").

contention that FPL overstated the difference between its retail rates and the rates charged by Vero Beach.

Moreover, FPL has not requested to make changes to any of its stated rates or rate formulas in connection with the Transaction that would result in higher charges for its wholesale requirements or transmission customers, which distinguishes this case from the Commission's recent decision in *ITC Holdings Corp.*, 143 FERC ¶ 61,256 (2013). There, in connection with its section 203 application for approval of the acquisition of Entergy's transmission system, ITC Holdings Corporation ("ITC") requested specific changes to the existing formula rates applicable to the transmission system being acquired that indisputably would cause transmission rates to increase, even though ITC also made a hold harmless commitment barring it from collecting transaction-related costs in its rates. Consequently, in addition to its hold harmless commitment, ITC also made a showing that the benefits provided by the transaction offset the increase in rates resulting from the requested changes to the formula rate. *Id.* at P 124. Here, because FPL is not requesting to make any changes to its stated rates or formula rates, its hold harmless commitment will protect its customers from all transaction-related costs, and there is no need to show offsetting benefits.

IV. FPL'S APPLICATION IS NOT PREMATURE

Finally, the Commission should reject the Civic Association's assertion that FPL's Application is premature and therefore should be dismissed. Civic Association at 10-12. According to the Civic Association, there are certain conditions precedent in the Purchase and Sale Agreement ("PSA") that have not yet been satisfied. Further, the Civic Association points to certain agreements that it asserts must be reached with the Florida Municipal Power Agency in order for the Transaction to be consummated. It concludes that "[s]ince so much of the

foregoing will change the terms and finances of the proposed purchase, too many variables of a material nature remain unfixed." *Id.* at 12.

The Civic Association cites to no precedent to support its contention and, in fact, the Commission's precedent is to the opposite. As the Commission explained when presented with a similar argument that Exelon Corporation's application for approval of its unsolicited offer to purchase NRG Energy, Inc. ("NRG") was premature because NRG had not accepted the offer, "[w]hile we appreciate NRG's concerns regarding efficient use of Commission resources, *the Commission considers applications under section 203 as they are filed*." *Exelon Corp*., 127 FERC ¶ 61,161 at P 25 (2009) (emphasis added).[6] The Commission observed that it retained the authority to issue supplemental orders in the event that any material changes occurred, and directed Exelon "to inform the Commission within 30 days of any change in circumstances that would reflect a departure from the facts the Commission relied upon in granting the application." *Id.* at P 26. This is a standard condition that the Commission imposes in its section 203 approvals; again, precisely because not every aspect of the transactions it reviews has been tied down at the time of the approval. *See, e.g.*, *NSTAR*, 136 FERC ¶ 61,016 at Ordering Paragraph (B) (2011); *Duke Energy Corp*., 136 FERC ¶ 61,245 at Ordering Paragraph (B).

The Commission's holding in the *Exelon* decision is consistent with the Commission's standard practice. Almost without fail, the transactions presented to the Commission for its

[6] To support this proposition, the Commission cited the following cases: *Southaven Power, LLC*, 123 FERC ¶ 62,071 (2008) (approving application, but stating that order was voided if other transaction closed); *Southaven Power, LLC*, 123 FERC ¶ 62,063 (2008) (approving application of Tennessee Valley Authority, which won the auction); *Citizens Power LLC*, 83 FERC ¶ 61,082 at 61,411, 61,411 n.3 (1998) (noting that another application to acquire the same asset was approved in *Citizens Power LLC*, 82 FERC ¶ 61,102 (1998)); *NorthWestern Corp.*, 117 FERC ¶ 61,100 (2006) (approving an application that was later withdrawn because it was not approved by the Montana Commission); *Kan. City Power & Light Co.*, 53 FERC ¶ 61,097 at 61,283-84 (1990) (rejecting argument that the application was part of a negotiating strategy and therefore should not be considered). *Exelon Corp.*, 127 FERC ¶ 61,161 at P 25 n.21.

approval under FPA section 203 include numerous as-yet unsatisfied conditions precedent. Yet, to FPL's knowledge, the Commission never has rejected a section 203 application on the grounds that any conditions precedent had not been satisfied.

Similarly, here, the Commission should consider FPL's application as it is filed. To the extent that any material changes to the Transaction are made in the future, the Commission's standard condition will require FPL to so notify the Commission, which will retain the power to issue supplemental orders if necessary to address any such change.

CONCLUSION

As explained above and in FPL's Application, the proposed Transaction is consistent with the public interest. FPL respectfully requests that the Commission authorize the Transaction without imposing any conditions and without conducting an evidentiary hearing, and thereby allow Vero Beach's customers to enjoy the rate reductions that will result from the Transaction.

Respectfully submitted,

/s/ *Mike Naeve*

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June 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have on this day caused to be served a copy of the foregoing Answer upon all parties designated on the official service list in this proceeding.

Dated at Washington, D.C., this 26th day of June 2013.

/s/ Matthew W.S. Estes

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