

152 FERC ¶ 61,013
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

Florida Power & Light Company

Docket No. EC15-102-000

ORDER AUTHORIZING PROPOSED TRANSACTION

(Issued July 2, 2015)

1. On March 23, 2015, pursuant to section 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² Florida Power & Light Company (FPL) requested Commission authorization for a transaction (Proposed Transaction) in which FPL, the buyer, will acquire from CBAS Power Holdings, LLC (CBAS Power Holdings), the seller, all of the outstanding ownership interests (Cedar Bay Interests) in CBAS Power, Inc. (CBAS), which is the upstream owner of a 250 megawatt (MW) generating facility (Facility) located in Jacksonville, Florida. FPL states that it currently buys all the capacity and electric power from the Facility pursuant to a long-term power purchase agreement (Power Purchase Agreement).
2. As discussed below, we have reviewed the Proposed Transaction under the Commission's Merger Policy Statement³ and authorize the Proposed Transaction under FPA section 203 as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2012). FPL states that, while it is unclear whether authorization for the Proposed Transaction is required under section 203, as a precautionary measure, FPL is seeking authorization without requiring analysis of the applicable jurisdiction. Application at 12-13 & n.15.

² 18 C.F.R. §§ 33.1-33.11 (2014).

³ See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996),
(continued ...)

I. Background

A. Description of the Buyer, Seller, and the Power Purchase Agreement

1. Buyer

3. FPL states that it is a wholly owned subsidiary of NextEra Energy, Inc. (NextEra), which is one of the largest electric power companies in North America, and which owns through all its subsidiaries approximately 44,900 MW of generating capacity in 25 states in the U.S. and four provinces in Canada. According to FPL, NextEra is the largest generator of renewable energy in North America, operating approximately 17 percent of the installed base of U.S. wind power production capacity and approximately 11 percent of the installed base of U.S. utility-scale solar power production capacity as of December 31, 2014. FPL states that NextEra also owns and operates one of the largest fleets of nuclear power stations in the U.S., with eight reactors at five sites located in four states, representing approximately six percent of U.S. nuclear power electric generating capacity as of December 31, 2014. FPL explains that NextEra Energy Resources, LLC (NEER) is the main vehicle through which NextEra holds and manages its competitive power businesses. Through its subsidiaries, NEER owns, develops, constructs, manages, and operates independent power projects that sell energy, capacity, and ancillary services in multiple domestic markets outside of Florida. FPL adds that NEER, through its subsidiaries, owns and operates generation facilities that total approximately 19,800 MW in net generating capacity as of December 31, 2014.⁴

4. FPL states that it is a rate-regulated utility engaged in the generation, transmission, distribution, and sale of electric energy in Florida. FPL is vertically integrated, with approximately 25,100 MW of generating capacity in service as of December 31, 2014. FPL provides service to approximately 4.7 million retail customers via an integrated 70,000-mile transmission and distribution system that links its generation facilities to its customers. FPL maintains interconnection facilities with neighboring utilities and

reconsideration denied, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). *See also FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008) (Supplemental Policy Statement). *See also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). *See also Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

⁴ Application at 4.

wholesale power providers in order to buy and sell wholesale electricity outside its service territory and to enhance the reliability of its own and neighboring networks. FPL states that its load consists primarily of retail customers, although wholesale power sales customers comprise a small percentage of its load. FPL states that it does not have market-based rate authority in peninsular Florida.⁵

2. Seller

5. FPL states that CBAS Power Holdings is a subsidiary of The Carlyle Group, a global alternative investment management firm. FPL adds that CBAS Power Holdings owns 100 percent of CBAS, which in turn owns 100 percent of Gray Hawk Power Corporation (Gray Hawk). FPL explains that Gray Hawk has two subsidiaries, Cedar Bay Cogeneration, LLC (CB Cogen) and Cedar Power, LLC (Cedar Power). CB Cogen owns a 78 percent general partnership interest and a 2 percent limited partnership interest in Cedar Bay Generating Company, Limited Partnership (Cedar Bay). Cedar Power owns 100 percent of Cedar I Power, LLC (Cedar I). Cedar I owns 100 percent of Cedar II Power, LLC (Cedar II). Cedar II owns a 20 percent general partnership interest in Cedar Bay, which owns and operates the 250 MW coal-fired topping cycle cogeneration Facility. FPL states that the Facility is a qualifying facility (QF) located in Duval County, Florida that includes interconnection facilities necessary to interconnect to the grid.⁶ According to FPL, the Facility is interconnected with the transmission system of Jacksonville Electric Authority pursuant to an Interconnection and Transmission Service Agreement executed in January 1990, and since amended.⁷ FPL states that Cedar Bay, the owner of the Facility, does not have Commission-authorization to sell energy at market-based rates.

3. Power Purchase Agreement

6. FPL states that Cedar Bay and FPL are parties to a Power Purchase Agreement under which FPL purchases all of the firm capacity and electric energy from the Facility, while the steam from the Facility is sold to a nearby paper mill. FPL maintains that the Power Purchase Agreement was originally executed in 1988 by FPL and a previous owner of the Facility, but has since been amended. FPL asserts that the Power Purchase Agreement pricing was based on state-wide avoided costs required by the Florida Public Service Commission (Florida Commission) at the time the Power Purchase Agreement

⁵ *Id.* at 4-5.

⁶ FPL states that the original certification of QF status was filed in 1989 in Docket No. QF89-126. Application at 8 & n.8.

⁷ This non-jurisdictional agreement is not on file with the Commission.

was executed. Delivery of energy from Cedar Bay to FPL is achieved through wheeling the energy across the transmission system of Jacksonville Electric Authority to a delivery point at a point of interconnection between FPL and Jacksonville Electric Authority.⁸

7. FPL asserts that the capacity pricing of the Power Purchase Agreement is “far above” market prices and FPL’s avoided costs.⁹ For example, FPL states that in 2014, FPL paid \$10.8 million in capacity payments and operations and maintenance (O&M) fees to Cedar Bay each month. FPL explains that, under the Power Purchase Agreement, these capacity prices increase yearly, such that by the end of the term of the Power Purchase Agreement, which is currently scheduled to terminate in 2024, monthly payments will surpass \$14 million. FPL estimates that, if the Power Purchase Agreement were to run its full term, FPL’s payments for capacity, capacity bonus, and O&M would total approximately \$1.5 billion on a nominal basis. FPL adds that, although the energy pricing under the Power Purchase Agreement is not above market, due to the high capacity price, the “all in” price of the energy from the Cedar Bay Facility in 2014 was over \$178/megawatt hour (MWh), compared to an average FPL avoided cost of \$27/MWh.¹⁰ FPL explains that consummation of the Proposed Transaction will enable FPL to terminate the Power Purchase Agreement and save its retail and wholesale ratepayers approximately \$70 million in capacity and energy payments over the remaining term of the Power Purchase Agreement, calculated on a net present value basis.¹¹

B. Description of the Proposed Transaction

8. FPL states that pursuant to the Purchase and Sale Agreement between FPL and CBAS dated December 10, 2014, FPL will pay CBAS Power Holdings \$520.5 million for the Cedar Bay Interests, which are defined as 100 percent of the equity interest in CBAS.¹² FPL asserts that the estimated fair value of the Facility and other net assets and liabilities exclusive of the Power Purchase Agreement is approximately \$0. FPL asserts that the \$520.5 million purchase price reflects the fair value related to terminating the

⁸ Application at 6.

⁹ *Id.* at 7.

¹⁰ *Id.*

¹¹ *Id.* at 1-2.

¹² *Id.* at 7.

Power Purchase Agreement, thereby avoiding continued monthly capacity payments at above-market prices both immediately and in the long-term.¹³

9. FPL states that it intends to contract with Cedar Bay Operating Services, LLC to continue operating the Facility and to preserve the corporate legal structure for ownership of the Facility, as a protection from any unforeseen contingent losses that could arise from the prior operation of the Facility. FPL states that it anticipates dispatching the Facility until at least 2016, but at an approximately 5 percent capacity factor instead of at the current approximately 50 percent capacity factor.¹⁴ Due to the expected availability of a new interstate natural gas pipeline system to fuel its natural gas-fired units, FPL projects that it will retire the Facility in early 2017.¹⁵ FPL adds that the Facility is neither needed at present, nor in 2017, to meet the reliability criteria FPL uses for its planning purposes.

10. FPL states that it filed a petition with the Florida Commission on March 6, 2015, requesting approval of the Proposed Transaction, including the accounting treatment (Florida Petition). FPL explains that, in the Florida Petition, it sought permission to treat the \$520.5 million purchase price and associated income tax gross up of \$326.9 million as regulatory assets that would be recovered through FPL's retail Capacity Cost Recovery Clause.¹⁶ FPL explains that recovery is premised on the following: (1) amortization of the regulatory assets over roughly 10 years (which corresponds to the remaining term of the Power Purchase Agreement); and (2) a return on the unamortized balance of the purchase price calculated at FPL's weighted average cost of capital that is used for its retail adjustment clause proceedings. FPL asserts that it is appropriate to recover these costs through the Cost Recovery Clause because capacity and O&M payments paid to Cedar Bay are currently recovered through this Clause and termination of the Power Purchase Agreement would eliminate these payments. FPL states that Florida Commission approval of this recovery is a condition precedent to closing the Proposed Transaction.

11. FPL adds that it will request authorization under section 205 of the FPA¹⁷ to recover what it refers to as the "net regulatory asset" through FPL's cost of service

¹³ *Id.* (citing *Gerrish Aff.* at 5-6).

¹⁴ *Id.* at 7-8 (citing *Gerrish Aff.* at 6-7).

¹⁵ *Id.*; *Gerrish Aff.* at 5-6.

¹⁶ Application at 11-12.

¹⁷ 16 U.S.C. § 824d (2012).

production formula rates in the power sales agreements of its two long-term wholesale requirements customers, Florida Keys Electric Cooperative (Florida Keys) and Lee County Electric Cooperative (Lee County).¹⁸

12. FPL further anticipates that it or its subsidiary, Cedar Bay, will file under section 205 of the FPA for Commission approval of a cost-based power sales arrangement, which would take the place of the terminated Power Purchase Agreement upon closing of the Proposed Transaction.¹⁹

13. FPL states that customers will receive at least three benefits from the Proposed Transaction. First, the Proposed Transaction will terminate FPL's obligation to make high capacity payments under the Power Purchase Agreement. Second, while FPL anticipates retiring the Facility in 2017, if economic conditions change, FPL may continue to operate it; thus, FPL asserts that, by keeping the Facility in service, it maintains for its customers the option of continued fuel reliability and diversity. Third, FPL points out that the Facility is a high emitter of carbon dioxide. FPL states that reducing the Facility's rate of dispatch from 50 percent to 5 percent per year will reduce carbon dioxide emissions in Florida by nearly a million tons per year.²⁰

II. Notice of Filing and Responsive Pleadings

14. Notice of the Application was published in the *Federal Register*, 80 Fed. Reg. 16,668 (2015), with interventions and protests due on or before April 13, 2015. Timely motions to intervene and comments were filed by Florida Keys on April 10, 2015 and by Lee County on April 13, 2015. Florida Keys and Lee County ask the Commission to authorize the Proposed Transaction because it is their understanding that the Proposed Transaction will overall lower payments under their formula rate full requirements contracts.

¹⁸ Application at 9, 12. While FPL does not define "net regulatory asset," it seems to refer to the sum of the \$520.5 million purchase price plus the \$326.9 million tax gross up minus the \$4.9 million regulatory liability associated with the plant book/tax difference. See Exh. TWG-2; Application at 12 & n.14; Attachment 2 (FPL Proposed Accounting Entries). We will use the term "regulatory assets."

¹⁹ Application at 8.

²⁰ *Id.*; Gerrish Aff. at 6.

III. Discussion

A. Procedural Matter

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,²¹ the timely, unopposed motions to intervene serve to make Florida Keys and Lee County parties to this proceeding.

B. Substantive Matters

1. Standard of Review under FPA Section 203

16. FPA section 203(a)(4) requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest.²² The Commission's analysis of whether a transaction is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.²³ FPA section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest."²⁴ The Commission's regulations establish verification and informational requirements for entities that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.²⁵

²¹ 18 C.F.R. § 385.214 (2014).

²² 16 U.S.C. § 824b(a)(4) (2012). Approval of the Proposed Transaction is also required by other regulatory agencies pursuant to their respective statutory authority before the Proposed Transaction may be consummated. *See* Application Exhibit L. Our findings under FPA section 203 do not affect those agencies' evaluation pursuant to their respective statutory authority.

²³ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

²⁴ 16 U.S.C. § 824b(a)(4) (2012).

²⁵ 18 C.F.R. § 33.2(j) (2014).

2. Analysis of the Proposed Transaction

a. Effect on Horizontal Competition

i. Applicant's Analysis

17. FPL states that the Proposed Transaction raises no horizontal market power concerns. FPL asserts that its generation market share will not increase in the relevant geographic market as a result of the Proposed Transaction. Specifically, FPL explains that it already has a long-term Power Purchase Agreement for the entire electric power output of the Facility and thus already contractually controls the output of the Facility. Although the Proposed Transaction involves a change of ownership of the Facility, FPL points out that there will be no change in the disposition of its output or its treatment as a resource controlled by FPL. Therefore, FPL asserts that the Proposed Transaction does not have any effect on horizontal competition and there is no need to submit an Appendix A analysis under the Commission's regulations.²⁶

ii. Commission Determination

18. In analyzing whether a transaction will adversely affect competition, the Commission examines the effects on concentration in the generation markets and whether the transaction otherwise creates the incentive and ability to engage in behavior harmful to competition, such as withholding of generation.²⁷

19. We find that the Proposed Transaction will not have an adverse effect on horizontal competition. FPL has a long-term Power Purchase Agreement for the entire output of the Facility and thus already contractually controls the output of the Facility.²⁸ While the Proposed Transaction will result in a change in ownership of the Facility, there will be no change in the disposition of its output.²⁹ Thus, there will be no change in

²⁶ Application at 16 (citing 18 C.F.R. § 33.3(a)(2)(i) (2014)); Solomon Aff. at 3.

²⁷ *Nevada Power Corp.*, 149 FERC ¶ 61,079, at P 28 (2014).

²⁸ FPL states that it has included the Facility among the generation owned and controlled by FPL in prior market power analysis for the FPL balancing authority area, including in the context of applications under sections 203 and 205 of the FPA. Application at 16.

²⁹ *See, e.g., Cleco Power LLC*, 144 FERC ¶ 62,162 (2013) (finding no impact on concentration where purchaser of facility already controlled its output); *Pub. Serv. Co. of Colorado*, 132 FERC ¶ 62,032 (2010); *Black Hills Wyoming, Inc.*, 123 FERC ¶ 62,236 (2008); *Virginia Elec. & Power Co.*, 110 FERC ¶ 62,077 (2005).

FPL's market concentration in any relevant geographic market as a result of the Proposed Transaction.³⁰

b. Effect on Vertical Competition

i. Applicant's Analysis

20. According to FPL, the Proposed Transaction also raises no vertical market power concerns. FPL states that Cedar Bay only owns limited interconnection facilities necessary to connect the Facility to the transmission system in order to effectuate wholesale power sales. Furthermore, the Proposed Transaction does not involve any new combination of transmission or gas assets.

ii. Commission Determination

21. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.³¹

22. We find that the Proposed Transaction will not have an adverse effect on vertical competition. As FPL points out, Cedar Bay only owns limited interconnection facilities and the Proposed Transaction does not involve any new combination of transmission or gas assets. Moreover, access to FPL's transmission is governed by the FPL open access transmission tariff.

c. Effect on Rates

i. Applicant's Analysis

23. FPL asserts that the Proposed Transaction will not have an adverse impact on rates. On the contrary, FPL estimates that the Proposed Transaction will result in an

³⁰ Thus, we agree with FPL that there is also no need for an Appendix A analysis, also referred to as a Delivered Price Test or Competitive Screen Analysis. See *Supplemental Merger Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at n.57 (no need to perform complete Appendix A analysis where overlap in combined relevant geographic market is *de minimis*).

³¹ *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

approximately \$70 million cumulative benefit on a net present value basis due to termination of the Power Purchase Agreement. FPL derives this value from the projected \$1.038 billion reduction in capacity payments that would have been required by the Power Purchase Agreement over the remaining 10 years of the term of the agreement, weighed against the \$881 million cost of acquiring the Facility³² and the \$86 million in incremental fuel, purchased power, variable operating expenses, and environmental compliance costs associated with dispatching other generators on the FPL system.³³

24. As noted above, FPL states that it has two long-term wholesale full requirements customers, Lee County and Florida Keys, each of which are billed under cost of service production formula rate contracts.³⁴ FPL asserts that approximately \$1.4 million of the \$70 million in benefits, calculated on a net present value basis, accrue to Lee County and Florida Keys as a proportionate share of total system benefits.³⁵ FPL further explains that total revenue requirements associated with the net regulatory assets³⁶ are higher in the years immediately after the Proposed Transaction closes, but these costs decline as the balance of the net regulatory assets declines and after the Facility is expected to be retired, resulting in a slight increase in the initial years before a larger decrease produces these benefits. According to FPL, the net effect of the Proposed Transaction on these two long-term wholesale full requirements formula rate customers will be an overall rate decrease over the period corresponding to the remaining term of the Power Purchase Agreement.³⁷ FPL states that, in a later filing, it will seek Commission authority pursuant

³² The acquisition price is comprised of the regulatory assets (\$520.5 million Power Purchase Agreement and respective tax gross up of \$326.9 million), operating expenses, asset retirement obligation, interest expense, return on equity, and income tax. Exh. TWG-2.

³³ FPL pays for energy from the Facility based on the unit cost for coal at the Saint Johns River Power Park times a fixed heat rate. FPL states that, under current economic conditions, the Facility produces energy at a net loss to its immediate owner because the fuel for the Facility costs more than FPL pays for the energy output. Gerrish Aff. at 4.

³⁴ Application at 9 & n.9. These contract rates are on file with the Commission. See *Florida Power & Light Co.*, Docket No. ER13-1998-000 (Sept. 5, 2013) (revising agreement with Florida Keys) (delegated letter order); *Florida Power & Light Co.*, Docket No. ER13-2090-000 (Sept. 17, 2013) (accepting revisions to agreement with Lee County) (delegated letter order).

³⁵ Application at 9; Deaton Aff. at 5.

³⁶ For background on the regulatory assets, see *supra* text at PP 10-11.

³⁷ Application at 9, 18; Deaton Aff. at 3-5.

to section 205 of the FPA to recover under each of Florida Keys' and Lee County's respective formula rates the net regulatory assets created as a result of the Proposed Transaction.³⁸

25. FPL adds that it has four wholesale requirements customers³⁹ whose power purchase agreements are priced through stated base rates and formula fuel rates. FPL states that the costs associated with the regulatory assets will not be recovered from any of these wholesale stated rate customers. FPL notes that three of these customers' power purchase agreements will expire in 2016, and one will expire in 2017. FPL states that it anticipates that its fuel costs will incrementally increase as a result of the Proposed Transaction, which will consequently cause an average 0.17 percent increase in fuel costs for these four wholesale stated rate customers. FPL estimates that the total incremental fuel cost paid by the four customers over their remaining contract terms will be less than \$40,000.⁴⁰ FPL states that this minimal increase reflects prudently incurred costs of utility service associated with least cost dispatch of FPL's generation fleet for the relevant period.

26. FPL argues that the "significant economic benefits" that the two long-term wholesale full requirements formula rate customers will receive through the Proposed Transaction will offset the incidental \$40,000 increase in fuel costs that is expected for FPL's four wholesale stated-rate customers with contracts approaching the end of their terms. FPL states that, as a matter of policy, the Commission has held that ratepayers should bear prudently incurred costs of utility service.⁴¹ Additionally, FPL maintains that the Commission has found that there is no adverse effect on rates where costs may increase in one area of the utility's operations but lower costs that more than offset any increase are expected elsewhere.⁴² FPL argues that such is the case here, where benefits

³⁸ Application at 9-10, 18.

³⁹ FPL states that these customers are City of Wauchula, City of New Smyrna Beach, City of Blountstown, and City of Winter Park.

⁴⁰ Application at 19; Deaton Aff. at 5-6.

⁴¹ Application at 18 & n.37 (citing *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at P 28 (2008) (approving section 203 application despite "some increase in transmission rates").

⁴² *Id.* at 19 & n.38 (citing *Policy Statement on Hold Harmless Commitments: Proposed Policy Statement*, 150 FERC ¶ 61,031, at P 4, n.7 (2015) (stating that where "sufficient potential economic benefits that offset the projected increase in rates . . . [exist], the analysis of the effect on rates ends with a finding that there is no adverse effect because of those offsetting benefits") (citing *Bluegrass Generation Co., L.L.C.*,
(continued ...)

in the form of lower costs to retail customers and to two long-term wholesale full requirements formula rate customers are much more substantial than the increase in fuel costs to shorter-term wholesale requirements customers served under stated (base) rates.

27. With respect to transmission rates subject to the Commission's jurisdiction, FPL states that the Proposed Transaction will have no adverse effect. FPL asserts that it has a stated rate for open access transmission service and the Proposed Transaction involves no transmission plant. FPL therefore concludes that the acquisition of the Facility and termination of the Power Purchase Agreement will have no impact on unbundled transmission rates.

28. Thus, FPL asserts that the Proposed Transaction will not have an adverse effect on the rates charged to either wholesale power service customers or transmission service customers and no additional ratepayer protections, such as a hold harmless commitment, are necessary.⁴³

ii. Commission Determination

29. Based on the representations made in the Application, we find that the Proposed Transaction will not have an adverse effect on rates. We emphasize at the outset that our analysis of rate effects under section 203 of the FPA differs from the analysis of whether rates are just and reasonable under section 205 of the FPA. Our focus here is on the effect that the Proposed Transaction will have on jurisdictional rates, whether that effect is adverse, and whether any adverse effect will be offset or mitigated by benefits that are likely to result from the Proposed Transaction.⁴⁴

139 FERC ¶ 61,094, at P 41 (2012) (finding no adverse effect on rates because increases in capacity charges may be offset by a savings in energy rates)); Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates “can be consistent with the public interest if there are countervailing benefits that derive from the transaction”); *ALLETE, Inc.*, 129 FERC ¶ 61,174, at P 20 (2009) (determining “[e]ven though the Proposed Transaction will result in rate increases for ALLETE’s and Minnkota’s customers . . . [because] there are benefits associated with the Proposed Transaction . . . we find that [it] will not have an adverse impact on rates.”)).

⁴³ *Id.* at 19.

⁴⁴ *See, e.g.*, Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (noting that an increase in rates “can be consistent with the public interest if there are countervailing benefits that derive from the transaction”); *see also ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010); *ALLETE, Inc.*, 129 FERC ¶ 61,174 at P 19; *Startrans IO*,

(continued ...)

30. With respect to transmission rates, we note that the Proposed Transaction does not involve the transfer of transmission facilities that are part of the bulk transmission system and that FPL has a stated rate for open access transmission service. Therefore, we find that the Proposed Transaction will not adversely affect transmission rates.

31. Based on the representations made by FPL, we find that the Proposed Transaction will not have an adverse effect on wholesale electricity rates.⁴⁵ Both Florida Keys and Lee County support the Proposed Transaction and none of FPL's other wholesale customers intervened or filed protests in the proceeding.

32. FPL states that, in the future, it intends to seek recovery of the regulatory assets related to the early termination of the Power Purchase Agreement through its long-term wholesale full requirements customers' formula rates. If FPL seeks to recover the regulatory assets, then, as FPL acknowledges, it must submit a filing in a new FPA section 205 docket.⁴⁶ In authorizing the Proposed Transaction, we make no determination in this section 203 proceeding regarding recovery of the regulatory assets.

d. Effect on Regulation

i. Applicant's Analysis

33. FPL states that the Proposed Transaction will not have an adverse impact on federal or state regulation. Specifically, FPL asserts that the Proposed Transaction will not diminish the Commission's regulatory authority over the Facility.⁴⁷ FPL explains that it expects to file, or, because the Facility will be owned by an FPL subsidiary, its subsidiary, Cedar Bay, will file pursuant to section 205 of the FPA a cost-based sales arrangement to cover sales from the Facility to FPL.⁴⁸ With respect to state regulation, FPL states that the Facility will still be subject to state regulation as a generation asset owned by FPL and that approval from the Florida Commission is required to consummate the Proposed Transaction.

L.L.C., 122 FERC ¶ 61,307 at PP 25-28; *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-128 (2007).

⁴⁵ *Cf. Boston Edison Co.*, 117 FERC ¶ 61,083, at PP 30, 33 (2006).

⁴⁶ 16 U.S.C. § 824d.

⁴⁷ Application at 20.

⁴⁸ *Id.* at 8, 20.

ii. Commission Determination

34. We find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We find that the Proposed Transaction will not create a regulatory gap at the federal level because sales of electric power from the Facility will be subject to Commission jurisdiction under section 205 of the FPA⁴⁹ when FPL (or its subsidiary, Cedar Bay) files the cost-based sales arrangement to cover sales from the Facility to FPL. We further find that the Proposed Transaction will not create a regulatory gap at the state level because the Proposed Transaction requires approval from the Florida Commission and because the Facility will still be subject to state regulation.

e. Cross-Subsidization**i. Applicant's Analysis**

35. FPL asserts that, based on facts and circumstances known to it or that are reasonably foreseeable, the Proposed Transaction will not result in, at the time of the Proposed Transaction or in the future: (1) any transfer of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) any new issuance of securities by a traditional public utility associate company that has captive customers or that owns, or provides transmission service over, jurisdictional transmission facilities, for the benefit of an associate company; (3) any new pledge or encumbrance of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) any new affiliate contracts between a non-utility associate company and a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, other than non-power goods and service agreements subject to review under sections 205 and 206⁵⁰ of the FPA.⁵¹

ii. Commission Determination

36. Based on FPL's representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company,

⁴⁹ 16 U.S.C. § 824d.

⁵⁰ 16 U.S.C. § 824e (2012).

⁵¹ Application at Exh. M.

or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

37. When a controlling interest in a public utility is acquired by another company, whether a domestic company or a foreign company, the Commission's ability to adequately protect public utility customers against inappropriate cross-subsidization may be impaired absent access to the parent company's books and records. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transaction is based on such examination ability.

3. Other Considerations

38. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁵² To the extent that the foregoing authorization results in a change in status, FPL is advised that it must comply with the requirements of Order No. 652. #In addition, FPL shall make any appropriate filings under section 205 of the FPA to implement the Proposed Transaction.

39. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cybersecurity standards approved by the Commission pursuant to FPA section 215.⁵³ Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information database, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, etc., must comply with all applicable reliability and cybersecurity standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cybersecurity standards.

⁵² *Reporting Requirements for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42.

⁵³ 16 U.S.C. § 824o (2012).

4. Accounting

40. FPL provided *pro forma* accounting entries recording the effects of the Proposed Transaction on the books of FPL.⁵⁴ As noted above, FPL proposes to record a regulatory asset related to the CBAS purchase price, which was equivalent to the fair value of the early-terminated Power Purchase Agreement, as a regulatory asset of \$520.5 million. Additionally, it is recording the associated income tax gross up of \$326.9 million as a regulatory asset. FPL proposes to amortize the regulatory assets to Account 557, Other Expenses, over the remaining Power Purchase Agreement period at the transaction date, which is 112 months.

41. Also as noted above, FPL states that the regulatory assets would be recovered through its retail Capacity Cost Recovery Clause and that it has filed a petition with the Florida Commission requesting approval of the recovery and accounting treatment.⁵⁵ FPL indicates that, in the future, it may seek recovery of a portion of the regulatory assets through its long-term wholesale full requirements customers' formula rates. We will approve FPL's proposed accounting for the regulatory assets and amortization. This accounting approval is for accounting purposes only and subject to a determination by a regulatory body (e.g., FERC, Florida Commission) that such amounts are recoverable for ratemaking purposes. If rate recovery of all or part of an amount included in this account is disallowed, the disallowed amount shall be charged to Account 426.5, Other Deductions, or Account 435, Extraordinary Deductions, in the year of the disallowance.

42. Additionally, FPL's *pro forma* journal entries also reflect the purchase of FPL's equity interest in CBAS. FPL proposes to record its ownership interest in CBAS on its books, in Account 123.1, Investment in Subsidiary Company, which is generally consistent with the equity method of accounting and the Commission's requirements.⁵⁶ However, FPL proposes to record additional journal entries to transfer acquired assets and liabilities (e.g., asset retirement cost and obligations, accumulated deferred income taxes, and regulatory liabilities) to an FPL subsidiary. Also, while FPL's journal entries reflect the account names it intends to use, they do not provide estimated amounts and explanations related to these transfers to the FPL subsidiary. Accordingly, our approval

⁵⁴ See FPL's April 1, 2015 Errata, Docket No. EC15-102-000, Attachment: #Journal Entries Revising Attachment 2 of the Application.

⁵⁵ Application at 8.

⁵⁶ *Revisions in the Uniform System of Accounts, and Annual Reports Form No. 1 and No. 2 to Adopt the Equity Methods of Accounting for Long-Term Investments in Subsidiaries*, Order No. 469, 49 F.P.C. ¶ 326, *reh'g denied*, 49 F.P.C. ¶ 1028 (1973).

of FPL's accounting for its acquired equity interest in CBAS is subject to our review of the proposed final accounting entries.

43. Finally, FPL must submit its proposed final accounting for the Proposed Transaction within six months of the consummation of the Proposed Transaction. The accounting submission must provide all accounting entries made to the books and records of FPL related to the Proposed Transaction, including appropriate narrative explanations describing the basis of such entries.

The Commission orders:

(A) The Proposed Transaction is hereby authorized, as discussed in the body of this order.

(B) FPL must inform the Commission of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of any material change in circumstances.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) FPL shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) FPL must submit its proposed final accounting for the Proposed Transaction within six months of the consummation of the Proposed Transaction. The accounting submission must provide all accounting entries made to the books and records of FPL related to the proposed transaction, including appropriate narrative explanations describing the basis of such entries.

(H) FPL shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.