

145 FERC ¶ 61,018
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

Florida Power & Light Co.

Docket No. EC13-91-000

ORDER AUTHORIZING
ACQUISITION OF FACILITIES

(Issued October 7, 2013)

1. On April 12, 2013, Florida Power & Light Co. (FPL) filed, pursuant to sections 203(a)(1) of the Federal Power Act (FPA)¹ and Part 33 of the Commission's regulations,² an application for authorization of a proposed transaction in which FPL will acquire certain electric generation, transmission and distribution facilities, and associated liabilities of the City of Vero Beach, Florida (Vero Beach), a non-jurisdictional municipal electric utility (Proposed Transaction). The Commission has reviewed the application under the Commission's Merger Policy Statement.³ As discussed below, we will authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b (2006).

² 18 C.F.R. Pt. 33 (2013).

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), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *FPA Section 203 Supplemental Policy Statement*, 72 Fed. Reg. 42,277 (Aug. 2, 2007), FERC Stats. & Regs. ¶ 31,253 (2007) (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).

I. Background

A. Description of the Parties

1. NextEra Energy, Inc.

2. FPL states that it is a wholly-owned subsidiary of NextEra Energy, Inc. (NextEra Energy), which is one of the largest electric power companies in North America, with over 42,000 MW of generating capacity in 26 states in the United States and four provinces in Canada. FPL explains that NextEra Energy provides retail and wholesale electric services to nearly five million customers and owns generation, transmission and distribution facilities to support its services. FPL adds that NextEra Energy is a generator of renewable energy in North America and operates a fleet of nuclear power stations in the United States.

2. FPL

3. FPL states that it conducts its utility operations in Florida. FPL explains that it is a rate-regulated electric utility engaged primarily in the generation, transmission, distribution and sale of electric energy in Florida. FPL states that it is vertically integrated, with approximately 27,000 MW of generating capacity in service or under construction and expected to be in service in the next two years. FPL notes that it does not have market-based rate authority in peninsular Florida. FPL states that it provides service to its customers through an integrated transmission and distribution system, with over 70,000 miles of transmission and distribution lines. According to FPL, it maintains interconnection facilities with neighboring utilities and wholesale power providers. FPL states that its load consists primarily of retail customers. FPL adds that, while it does serve some wholesale customers, its wholesale load represents only a small percentage of its total load. According to FPL, the highest peak load FPL has served to date was 24,346 MW, which occurred on January 11, 2010.⁴

3. Vero Beach

4. FPL states that Vero Beach is a political subdivision of the State of Florida. FPL states that Vero Beach consists of 13.1 square miles and is located about 190 miles south of Jacksonville and 135 miles north of Miami on Florida's east coast. FPL states that

⁴ For a more detailed description of FPL's generation and transmission assets, *see* Application, Exh. J (Solomon Testimony and Exhibits). A map showing FPL's service territory (including the location of Vero Beach) and location of FPL's generation resources is attached as Exhibit K-1 to the Application.

Vero Beach currently owns and operates a municipal electric utility system, which includes generation, transmission and distribution facilities. FPL elaborates that this includes 150 MW of generation capacity and 42 miles of 138 kV and 69 kV transmission lines. FPL adds that Vero Beach's peak demand was 180 MW in the winter and 153 MW in the summer. FPL notes that, although Vero Beach owns electric generating units, Vero Beach primarily purchases the power necessary to serve its load under long-term power purchase agreements. FPL states that Vero Beach is exempt from the Commission's jurisdiction of public utilities pursuant to FPA section 201(f).⁵

B. Description of the Proposed Transaction

5. FPL states that in 2010, Vero Beach asked FPL to explore a potential purchase of its municipal electric utility. According to FPL, Vero Beach's intention was two-fold. First, to exit the business of providing electricity service, and second, to reclaim for public use the waterfront property where Vero Beach's generation assets are currently located.

6. FPL states that, in April 2011, after several months of analysis, FPL presented Vero Beach with a Letter of Intent to purchase its electric facilities. FPL explains that this led to further negotiations, and ultimately to the execution of a Purchase and Sale Agreement (PSA) on February 25, 2013.⁶ FPL states that, on March 12, 2013, Vero Beach held a ballot referendum, and the sale was approved by 64 percent of the voters.

7. FPL explains that there are three main elements of the Proposed Transaction: (1) FPL's purchase of the Vero Beach utility system; (2) unwinding of Vero Beach's existing power supply arrangements; and (3) retirement of Vero Beach's generation facilities.

8. First, with respect to the purchase of the Vero Beach utility system, FPL explains that, under the PSA, FPL will purchase or lease certain specified assets of the municipal utility system, and FPL will assume certain specified liabilities associated with the municipal utility system. FPL states that, in exchange, FPL will pay a cash purchase price of \$111.5 million, subject to certain specified adjustments intended to reflect changes in circumstances after the date the PSA was executed.

⁵ 16 U.S.C. § 824(f) (2006). For a more detailed description of Vero Beach's electric utility assets, *see* Application, Exh. J (Solomon Testimony and Exhibits). A map showing Vero Beach's service territory is attached as Exhibit K-2 to the Application.

⁶ For the detailed terms of the PSA, *see* Application, Exh. I (PSA).

9. Next, FPL explains that, in order to unwind these agreements, Vero Beach has entered into agreements with the Orlando Utility Commission (Orlando) providing that, at the same time that it closes the Proposed Transaction, Vero Beach will also undertake the following: (1) terminate its existing wholesale power supply agreement with Orlando; (2) transfer Vero Beach's Florida Gas Transmission Company gas transportation rights to Orlando; and (3) transfer all of Vero Beach's Florida Municipal Power (FMPA) power entitlements in the St. Lucie, Stanton I and Stanton II projects to Orlando. FPL states that, in addition, it will enter into a three-year power purchase agreement with Orlando to purchase 383 MW of capacity from the Stanton I and II projects. The power purchase agreement will terminate no later than 2017. FPL states that because non-jurisdictional municipal entities will sell all power under these agreements, none of these agreements will be subject to the Commission's jurisdiction.

10. Finally, as to retirement of Vero Beach's generation facilities, FPL states that the land on which Vero Beach's generation units are located is prime waterfront property, centrally located in Vero Beach along the intra-coastal waterway. FPL explains that one of Vero Beach's primary goals in selling its municipal utility is to retire the generation units and return the land to Vero Beach for public use.⁷ Consequently, under the terms of the Proposed Transaction, Vero Beach will give FPL a three-year lease to the site, subject to a one-year extension, during which time the generation units must be retired and dismantled.⁸

11. FPL explains that under the terms of the Proposed Transaction, FPL has four years to retire the units. FPL states that it nevertheless commits to retire the three least economic of these units, totaling 102 MW of capacity, immediately upon closing of the Proposed Transaction. FPL adds that it will retire the remaining two units, representing 48 MW of capacity, within four years of closing.⁹

⁷ See Application, Exh. J-1 at 2.

⁸ *Id.* at 2 & n.4 (“There is an option to extend the site lease for one year if more time is needed to dismantle the plants. Thus, in any event, all of the Vero Beach units will be retired within four years at the outside.”).

⁹ Under section 6.23(a) of the PSA, FPL is obligated to dismantle the units “during the term of the Vero Beach Power Plant Site Lease Agreement[.]” See also Application, Exh. J-14 (Forrest Testimony) at 3-4 (explaining the FPL intends to completely dismantle all five generating units within three years after closing; the optional additional one-year site lease term is a cushion in case there are unforeseen delays in decommissioning the

(continued...)

II. Notice of Filing and Responsive Pleadings

12. Notice of the application was published in the *Federal Register*, 78 Fed. Reg. 23760 (2013), with interventions and comments or protests due on or before June 11, 2013. Timely motions to intervene and comments or protests were filed by Stephen J. Faherty; Lynne A. Larkin on behalf of the Civic Association of Indian River County (Indian River); Vero Beach, and the Taxpayers Association of Indian River County, Inc. (Taxpayers).

13. The following persons filed comments or protests without a motion to intervene:¹⁰ George M. Baczynski; Patricia Braedyn; Jeff Brewster; George M. Bryant; George Childers; Citizens for a Brighter Future; Larry Close; Douglass Coffey; Stephen J. Faherty and Glenn F. Heran; Reynold Gervasio; Caroline D. Ginn; Joseph Johnson; Robert D. and Joan Livingston Johnson; Jay Kramer; The Moorings of Vero Beach Property Owners' Association (Moorings); George Robertson, Jr.; Louis Schlitt; William F. and Doris B. Schroeder; the South Beach Property Owners Association (South Beach); John Steiner; Van Mooney; and an anonymous person.¹¹

14. On May 15, 2013, Commission staff sent a deficiency letter asking FPL to provide additional information on the impact of the Proposed Transaction on rates (Deficiency Letter). On May 28, 2013, FPL submitted a timely response to the Deficiency Letter (Response).

15. On June 26, 2013, FPL filed a motion for leave to answer and answer to the protests (FPL Answer). Vero Beach also filed an answer to the protests on the same day (Vero Beach Answer). On August 5, 2013, Indian River filed a supplemental submission in response to FPL's Answer (Supplemental Response); on September 4, 2013, Indian River filed a second supplemental response to FPL (Second Supplement) (together, Supplemental Responses).

generating units or upgrading the transmission system to obviate the need for voltage support during peak loads).

¹⁰ Commenters and protestors who do not intervene in a proceeding pursuant to Rule 214 are not parties to that proceeding. *Cf.* 18 C.F.R. § 385.211(a)(2) (2013).

¹¹ While the name on the filing appears to be Doms Datoro, it is docketed in this proceeding as an anonymous person.

III. Discussion

A. Procedural Matters

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure,¹² the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure¹³ prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept FPL's and Vero Beach's answers, as well as Indian River's Supplemental Responses, because they have provided information that assisted us in our decision-making process.

B. Standard of Review Under Section 203

17. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it determines that the transaction will be consistent with the public interest. 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.¹⁴ 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."¹⁵ 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.¹⁶

¹² 18 C.F.R. § 385.214 (2013).

¹³ 18 C.F.R. § 385.213(a)(2) (2013).

¹⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹⁵ 16 U.S.C. § 824b(a)(4) (2006).

¹⁶ 18 C.F.R. § 33.2(j) (2013).

C. Analysis Under Section 203

1. Effect on Horizontal Competition

a. FPL's Analysis

18. FPL states that it has analyzed the impact of the Proposed Transaction on horizontal competition in the FPL Balancing Authority Area (BAA) as a separate geographic market, as well as the Florida Municipal Power Pool (FMPP) BAA, where the Vero Beach facilities currently are located, and all BAAs that are directly interconnected to either the FPL or FMPP BAAs.¹⁷

19. FPL asserts that, as a practical matter, the only geographic market where the Proposed Transaction could potentially increase FPL's market power is in its own FPL BAA, where it has a very high market share. FPL maintains that its market share in the other BAAs is not large enough for the addition of the Vero Beach capacity to result in any appreciable increase in market share in those BAAs. Therefore, FPL focuses its discussion primarily on the results of analysis of its home FPL BAA.¹⁸

20. FPL states that, consistent with section 33.3(c)(4)(i) of the Commission's regulations,¹⁹ it performed an analysis of the energy markets in the relevant geographic markets using both the Available Economic Capacity and the Economic Capacity measures of capacity.²⁰ FPL states that there are no centralized markets in peninsular Florida and thus no competitive markets for capacity or ancillary services. Therefore, FPL limited its analysis to the energy markets. FPL then calculated the increase in the

¹⁷ Other BAAs that are directly interconnected to either FPL or FMPP include: Florida Power Corporation, Jacksonville Electric Authority, Seminole Electric Cooperative, Tampa Electric Company, Gainesville Regional Utilities, New Smyrna Beach, City of Homestead, and Southern Company Services, Inc.

¹⁸ *Id.* at 10-11.

¹⁹ 18 C.F.R. § 385.33.3c(c)(4)(1) (2013).

²⁰ Each supplier's "Economic Capacity" is the amount of capacity that could compete in the relevant market given market prices, running costs, and transmission availability. "Available Economic Capacity" is based on the same factors but subtracts the supplier's native load obligation from its capacity and adjusts transmission availability accordingly.

Herfindahl-Hirschman Index (HHI)²¹ to determine the change in market concentration due to the Proposed Transaction.

21. FPL explains that, while it performed both Available Economic Capacity and Economic Capacity analyses, it focused its discussion primarily on the results of its Available Economic Capacity analysis.²² Quoting the Commission's finding in *Duke Energy Corp.*²³ that "the [Available Economic Capacity] measure is more appropriate for markets where there is no retail competition and no indication that retail competition will be implemented in the near future,"²⁴ FPL points out that there is no retail competition in Florida, currently or imminently. Thus, consistent with Commission precedent, FPL asserts that its Available Economic Capacity analysis is more pertinent to evaluation of the Proposed Transaction.

22. FPL states that it performed two different Available Economic Capacity analyses of the FPL BAA. FPL states that its base case analysis takes into account FPL's plan to retire 102 MW of Vero Beach's generation capacity immediately upon consummation of the Proposed Transaction. FPL states that its supplemental analysis does not take these early retirements into consideration and instead analyzes the effect of transferring to FPL the entire 150 MW of Vero Beach's generation capacity, plus the 38 MW of Stanton I

²¹ The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails its screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; see also *Analysis of Horizontal Market Power under the Federal Power Act, order reaffirming commission policy and terminating proceeding*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

²² Application at 11.

²³ 136 FERC ¶ 61,245, at P 124 (2011).

²⁴ Application at 16 (citing *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 124).

and II capacity purchased from Orlando. FPL states that its analysis shows the Proposed Transaction decreases horizontal market concentration in the FPL BAA in both the base case and the supplemental analysis. FPL explains that this result is achieved because the load obligation that FPL assumes from Vero Beach is greater than the additional economic generation capacity FPL acquires in every time period analyzed.²⁵ FPL also performed sensitivity analyses where market prices are 10 percent higher and 10 percent lower than the base case. FPL states that its sensitivity analyses show no screen failures for Available Economic Capacity.²⁶

23. FPL states that its two analyses show that there is a greater reduction in its market share of Available Economic Capacity under the immediate retirement scenario, that is, the immediate retirement of the three units totaling 102 MW of capacity, than if the units are kept in service. FPL therefore commits to retire the three least efficient units (102 MW) upon closing of the Proposed Transaction.²⁷

24. FPL states that because the 188 MW of capacity that FPL is acquiring from Vero Beach²⁸ represents such a small amount of the over 27,000 MW of installed capacity and capacity under construction in the FPL BAA, the increase in FPL's market share of Economic Capacity resulting from the Proposed Transaction is less than 1 percent. FPL states that the resultant HHI increases are two points or less and, thus, are minor.²⁹

25. FPL states that it analyzed the effect of the Proposed Transaction on the FMPP BAA. FPL states that the Simultaneous Import Limit (SIL) into FMPP is zero in summer and winter and only a very small amount in shoulder seasons. FPL states that as a consequence, the Proposed Transaction does not cause any increase in FPL's market share or ability to exercise market power in the FMPP market.

²⁵ *Id.* at 12.

²⁶ *Id.* at 13-14.

²⁷ *Id.* at 13.

²⁸ FPL is acquiring 150 MW of generation from Vero Beach and FPL will enter into a contract with Orlando for the equivalent capacity from Stanton 1 and 3 (38 MW), for a contract term not to exceed three years (terminating no later than December 31, 2017). *See* Application, Exh. J-1 at 2.

²⁹ *Id.* at 14.

26. FPL submits that the principal effect of the Proposed Transaction in the FMPP market is to increase the amount of Orlando's Available Economic Capacity. FPL explains that this effect results from Vero Beach terminating its partial requirements contract with Orlando, which frees up the Available Economic Capacity that Orlando previously used to supply Vero Beach. FPL reasons that increasing the amount of supply in a market is a pro-competitive result, and therefore the Commission should deem this result of the Proposed Transaction to be beneficial.³⁰

27. FPL states that the Proposed Transaction also removes Vero Beach's generation facilities from the FMPP market, as these facilities will be owned by FPL and will be in the FPL market. FPL adds that Orlando will be selling 38 MW of capacity to FPL for three years (or until the end of 2017 at the latest). FPL reasons that because Vero Beach's units are uneconomic and operate so infrequently, however, the amount of economic capacity removed from the FMPP market is generally exceeded by the amount of Orlando's Available Economic Capacity freed-up by the termination of its partial requirements contract with Vero Beach. FPL states that in the base case, the net effect of the Proposed Transaction generally is to increase the amount of Available Economic Capacity in the FMPP market, which FPL reasons to be a beneficial result.

28. FPL's Delivered Price Test results for the FMPP BAA show no screen failures for Available Economic Capacity. FPL's plus 10 percent price sensitivity shows one screen failure, as does its minus 10 percent price sensitivity.³¹ FPL submits that these screen failures again do not reflect any increase in FPL's market share, but instead are artifacts of the model that result either from, in one case, increasing Orlando's Available Economic Capacity (as a consequence of terminating Orlando's partial requirements contract with Vero Beach), and in the other case, from shrinking the size of the FMPP market by 6 MW as a result of moving Vero Beach into the FPL BAA after the Proposed Transaction. FPL maintains that the Proposed Transaction achieves the beneficial and

³⁰ *Id.* at 15.

³¹ *Id.* at 14-16. When FPL assumes no immediate retirements, there is one screen failure in the FMPP BAA that is equal to an HHI increase of 134 points in a highly concentrated market under the plus 10 percent price sensitivity analysis in the summer super peak 1. Application, Exh. J-7 at 2. Likewise, there is one screen failure equal to an HHI increase of 916 points in a highly concentrated market in the winter off-peak period in the minus 10 percent price sensitivity analysis. *Id.*

pro-competitive result of increasing Orlando's Available Economic Capacity, in spite of these single screen failures.³²

29. FPL states that there are no screen failures for either Available Economic Capacity or Economic Capacity for any markets that are directly interconnected with either the FPL or the FMPP BAA under either the base case or any sensitivity analyses.³³

30. Finally, FPL notes that, as part of the Proposed Transaction, it has committed to Vero Beach that it will retire all of the generation capacity that it purchased from Vero Beach within four years of closing. FPL states that this is the same time frame in which FPL's power purchase agreement with Orlando for the purchase of Stanton I and II capacity will have expired. FPL states that at that time, it will no longer have any of the capacity that it purchased from Vero Beach, although it will retain the Vero Beach load. Thus, FPL concludes that any increase in its market power resulting from the Proposed Transaction will not be material, and it will last for no more than four years after the Proposed Transaction.³⁴

b. Protests

31. Indian River asks the Commission to examine the Proposed Transaction in light of FPL's anticompetitive conduct.³⁵ Indian River argues that FPL aims to control the Florida utility market and squeeze out competitors, adding that FPL has publicly stated its intent to take over the municipal power and cooperative utilities in Florida, and that many citizens of Vero Beach do not wish to be the "first pawn to fall" in the "FPL scheme."³⁶

32. In support of the above claim, Indian River cites a March 12, 2013 investor conference where various FPL presentations stated: "Opportunities include geographic expansion through acquiring municipals and coops and wholesale sales," and "FPL has the opportunity to expand its service territory through a potential acquisition of the Vero

³² *Id.* at 16-17.

³³ *Id.* at 17. *See also id.*, Exh. J-9.

³⁴ *Id.* at 14.

³⁵ Indian River Protest at 4. Jay Kramer supports Indian River's Protest. Protest of Jay Kramer at 1.

³⁶ *Id.* at 4.

Beach municipal electric utility.”³⁷ Indian River asserts that the above statements (among others) indicate that “FPL plans to use its market power to take any action necessary to squeeze out the competition.”³⁸

33. Indian River argues that FPL’s market power will increase as a result of the Proposed Transaction because, as part of the Proposed Transaction, FPL is committed to purchase the capacity of Orlando’s generators for three years.³⁹ Patricia Braedyn also protests that “the Proposed Transaction would result in a monopoly in the area and the only real rate benefits will go to commercial interests and land deal makers.”⁴⁰ She also asserts that city taxes will go up to offset the drop in revenue from the power company.

34. Indian River emphasizes the fact that the Proposed Transaction failed to take place through an open solicitation process.⁴¹ Indian River contends that this failure allows FPL to be the only player in a no-bid contract, and is a tactic to eliminate competition, orchestrated through “back-door” political maneuvering. Indian River asserts that this non-competitive process resulted in a below-market purchase price for the Vero Beach assets, and thus that the Proposed Transaction could drive down market prices for utility assets across the nation.⁴²

35. Indian River alleges that FPL is trading on its position in the nuclear market to obtain Orlando’s cooperation. Indian River submits that Orlando had little interest in helping out Vero Beach with its FMPP obligations until FPL “waived the nuclear carrot in its direction.”⁴³ Specifically, Indian River alleges that, for Orlando to agree to take 52.7 MW of allegedly above-market coal-generated power from Vero Beach, Vero Beach had to agree to pay Orlando \$34 million, and FPL had to agree to buy three years of

³⁷ *Id.* at 4-5.

³⁸ *Id.* at 6.

³⁹ Indian River Protest at 7; Patricia Braedyn Protest at 1.

⁴⁰ Patricia Braedyn Protest at 1.

⁴¹ We note that protesters Robert D. Johnson and Joan Livingston Johnson, Jay Kramer, and George Baczynski also raise concerns with the lack of a request for proposals (RFP) or competitive bidding process.

⁴² Indian River Protest at 8; *see also* Jay Kramer Protest at 2.

⁴³ *Id.*; *see also* Second Supplement at 1.

above-market coal power back from Orlando, so Orlando would not have to take on power it cannot use. Indian River contends that without FPL leveraging its nuclear capabilities and its already substantial market power, i.e., by executing an option agreement with Orlando for Orlando's potential participation in nuclear facilities that FPL is developing, FPL would not have been able to draw Orlando into the deal and the Proposed Transaction would be impossible.⁴⁴

36. Indian River also claims that FPL's application is incomplete and therefore premature.⁴⁵ Pointing to Exhibit I of the Application, the PPA, Indian River asserts that certain items, including environmental, licensing labor, and many other sections are contingent and/or to be determined. Indian River adds that there is also an issue of contingent liability that has yet to be assigned.⁴⁶ Indian River states that a third unresolved issue is that Internal Revenue Service (IRS) private use requirements have not been met.⁴⁷

c. Answers

37. FPL answers that, almost without exception, the issues raised by Indian River are local political issues. Specifically, FPL points out that Indian River attacks the process Vero Beach used to decide to enter into the Proposed Transaction, the role certain individuals took in that process, and the reasonableness of the price negotiated by the Vero Beach City Council. FPL asserts that these arguments have nothing to do with the issues that the Commission has stated it will consider in evaluating the transaction under section 203 of the FPA. FPL argues that Indian River 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. FPL states that these results show that the Proposed Transaction satisfies the standards established by the Commission for evaluating the effect of a transaction on wholesale competition. FPL maintains that, at best, Indian River'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.⁴⁸ While

⁴⁴ *Id.* at 9. Indian River further explains that this nuclear "leveraging" refers to FPL granting Orlando an option to purchase 112 MW of power from Turkey Point 6 & 7 nuclear plants.

⁴⁵ Indian River Protest at 10-12.

⁴⁶ *Id.* at 11.

⁴⁷ *Id.*

⁴⁸ FPL Answer at 2-3.

FPL says it disputes this allegation, it asserts that the Commission has no need to consider it here because the issue in this proceeding is whether the proposal to purchase Vero Beach's assets could have an adverse effect on competition. FPL asserts that the Commission will be able to evaluate future transactions if and when FPL reaches agreement to purchase such assets and requests Commission approval.

38. FPL argues that nothing in Indian River's protest undermines the analysis of FPL's expert witness, Ms. Solomon. Contrary to Indian River's claim regarding FPL's analysis, FPL points out that its analysis *does* include the capacity purchased from Orlando as being under FPL's control.⁴⁹ FPL emphasizes that, as its analysis indicates, even when the Orlando purchase is deemed to be an FPL capacity resource, the Proposed Transaction does not result in any screen violations.⁵⁰ FPL states that its analysis, therefore, rebuts Indian River's assertion that FPL's market power will increase because FPL is required to purchase the capacity from Orlando's generators.

39. Vero Beach states that it did not deal exclusively with FPL, but rather attempted to negotiate a sale with other electric utilities in order to obtain the best possible price. Vero Beach states that in late 2009, its City Council determined to investigate the sale of its electric utility system. Vero Beach continues that its City Manager wrote to seven electric utilities, including FPL, soliciting their interest in the possible purchase of Vero Beach's electric utility system. Vero Beach states that FPL was the only one of these seven utilities to submit a proposal to acquire the Vero Beach facilities.⁵¹

40. Vero Beach states that FPL did not improperly manipulate Vero Beach into agreeing to sell its utility system to FPL. Vero Beach states that it initiated the sale based on its own evaluation of how to achieve lower retail rates for its utility customers and obtain other benefits. Vero Beach emphasizes that FPL did not improperly interfere with the process by which Vero Beach made its decision to enter into an agreement with FPL.⁵²

⁴⁹ *Id.* at 7 (citing Exh. J-1 (Solomon Testimony) at 25-26; Exh. J-4 ("showing that capacity being purchased from [Orlando] as part of the generation being acquired by FPL as part of the Transaction")).

⁵⁰ *Id.* at 7.

⁵¹ Vero Beach Answer at 2 (unpaginated).

⁵² *Id.* at 2-3.

d. Supplemental Responses

41. In its Supplemental Response, Indian River expands upon its earlier arguments and submits several attached communications, including correspondence from other Florida power providers regarding access to FPL's planned nuclear plants and e-mails in support of Indian River's claim that FPL engaged in "favoritism toward Orlando as a useful partner in their nuclear expansion to the exclusion of all other interested partners."⁵³ Indian River alleges that FPL is not willing to offer other Florida municipal utilities an option to participate in the nuclear units FPL is developing similar to the one it has offered Orlando. Indian River challenges FPL's rationale for according Orlando this beneficial treatment, citing Orlando's credit rating and FPL's stated concern that any additional partners would slow the lengthy nuclear facility development process. Indian River essentially contends that the analytic screens do not capture the extent of FPL's market power.

42. In its Second Supplement, Indian River reiterates its contention that "having extremely unbalanced market power advantages has enabled FPL to prey on the smaller utilities in Florida and elsewhere."⁵⁴ In support of its allegation, Indian River attaches a letter from FPL's president to the Florida Municipal Power Agency, which Indian River describes as "once again offering its nuclear option 'carrot' in exchange for cooperation with this deal."⁵⁵

e. Commission Determination

43. We find that the combination of generation resulting from this Proposed Transaction will not affect horizontal competition. The two relevant markets are the FMPP BAA, where the facilities subject to the Proposed Transaction are currently located, and the FPL BAA, where the facilities will be located after the Proposed Transaction has been consummated.

44. First, even in the FPL BAA, where FPL acknowledges it "has a very high market share,"⁵⁶ there is no evidence that the Proposed Transaction would increase market concentration. Rather, the record evidence demonstrates that in every period analyzed,

⁵³ Supplemental Response at 4.

⁵⁴ Second Supplement at 1.

⁵⁵ Supplemental Response at 1.

⁵⁶ Application at 10.

the amount of Vero Beach load obligation that FPL takes on exceeds the amount of economic Vero Beach capacity acquired by FPL, thus reducing FPL's total available economic capacity in every period.⁵⁷ This is true even without taking into account the retirement of 102 MW of Vero Beach capacity.⁵⁸ FPL's base case analysis shows that the Proposed Transaction will even slightly reduce FPL's market power within the FPL BAA.

45. Next, we also find that FPL has demonstrated that there are no competitive concerns involving the FMPP BAA. FPL has shown that in six of the 10 time periods analyzed, there is a decrease in market concentration in the applicable market. In the remaining four time periods, there is a change of 25 points or less, and therefore the Proposed Transaction passes our competitive screens. Because there are no screen failures in the base case and only isolated screen failures in FPL's sensitivity analysis, we find there are no competitive concerns raised under FPL's supplemental Available Economic Capacity analysis.⁵⁹

46. Regarding challenges to the process Vero Beach used to decide to enter into the Proposed Transaction and the role certain individuals took in that process, we find these challenges are misplaced. Protesters, including Indian River, have not shown that these issues have any bearing on the factors that the Commission uses to evaluate under section 203 of the FPA, that is, the effect of the Proposed Transaction on competition, rates, regulation, and cross-subsidization.⁶⁰ With regard to Indian River's allegations that FPL

⁵⁷ *Id.* at 13. *See also id.*, Exh. J-1, Solomon Testimony at 27.

⁵⁸ This refers to FPL's commitment to retire the three least efficient units upon closing of the Proposed Transaction, in order to further reduce its Available Economic Capacity. *Id.* at 11.

⁵⁹ We find that the isolated screen failures in FPL's Available Economic Capacity analysis do not raise competitive concerns. The Commission is normally concerned with cases where there are systematic screen failures, that is, where screen failures "present a consistent pattern across time periods and/or markets." *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,054 (2000); *see also Arizona Pub. Serv. Co.*, 141 FERC ¶ 61,154, at PP 30, 35-36 (2012) (finding screen failures that were small in magnitude, short in duration, occurring during off-peak periods and not systematic did not indicated adverse impact on competition); *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at P 49 (2010) (finding screen failures that did not involve systematic failures in a competitive market did not raise competitive concerns).

⁶⁰ *See, supra*, text at P 17 & nn.14-15.

has inappropriately used its position to facilitate the Proposed Transaction, Indian River provides no specific evidence to refute or contradict the testimony and exhibits FPL provides demonstrating that the Proposed Transaction does not raise any competitive concerns.⁶¹

47. As to concerns about the lack of an RFP or other form of competitive bidding process, the Commission's section 203 analysis does not require an RFP or any other particular form of competitive bidding process in order to dispose of or acquire facilities. Moreover, Vero Beach's testimony shows that it solicited interest from a number of potential buyers, and that only FPL expressed interest. Further, as discussed below, we find FPL has sufficiently addressed concerns over the reasonableness of the purchase price.⁶² Indian River's concern that the Proposed Transaction could drive down market prices across the nation is purely speculative and beyond the scope of our analysis under section 203 of the FPA.

48. Finally, we disagree with Indian River's claim that FPL's application is incomplete. Exhibit I of the Application includes an executed and complete PPA. The contingencies in the PPA that Indian River cites are not uncommon in these types of transactions and do not render the application incomplete.⁶³ Further, Indian River's concerns involving contingent liability and IRS private use restrictions do not fall within the scope of our section 203 analysis.

2. Effect on Vertical Competition

a. FPL's Analysis

49. FPL states that the Proposed Transaction will not have an adverse impact on vertical competition for the following reasons: FPL does not have and will not obtain control over any natural gas pipelines as a result of the Transaction; FPL provides open access transmission under its Commission-approved Open Access Transmission Tariff (OATT) and will not be able to use the acquisition of the limited transmission facilities

⁶¹ See, e.g., *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 147 (2011) (rejecting claim of competitive harm because claim failed to show that alleged harm to competition stemmed from the Proposed Transaction).

⁶² See text, *infra*, at PP 58-62.

⁶³ 18 C.F.R. §§ 33.1-33.4 (2013).

owned by Vero Beach to benefit itself competitively; and FPL will not be acquiring any inputs to the generation of electricity as a result of the Proposed Transaction.⁶⁴

b. Commission Determination

50. The Commission finds that the Proposed Transaction does not raise any vertical market power concerns. The Commission has expressed vertical market power concerns primarily in three contexts: (1) convergence mergers between electric utilities and natural gas pipelines that may create or enhance the incentive and/or ability of the merged firm to adversely affect prices or output in the downstream electricity market and to discourage entry by new generators; (2) mergers involving the ownership of other inputs to electricity generation; and (3) mergers involving owners of electric transmission facilities that may use those facilities to benefit their electric generation facilities.⁶⁵ We find that the Proposed Transaction does not raise any of these concerns. First, the FPL does not have and will not obtain control over any natural gas pipeline as a result of the Proposed Transaction. Second, the FPL will not be acquiring through the Proposed Transaction any inputs to electricity generation. Finally, the FPL will not be able to use the limited Vero Beach transmission facilities to its own competitive benefit because the FPL will be providing open access transmission service under its OATT.

3. Effect on Rates

a. FPL's Analysis

51. FPL states that it is willing to make commitments to ensure that the Proposed Transaction will not have an adverse effect on transmission or wholesale requirements customers. Specifically, FPL commits, for a period of five years, to hold such customers harmless from the rate effects of the Proposed Transaction. For that five-year period, FPL will not seek to include merger-related costs in its transmission service or wholesale requirements service revenue requirements, except to the extent it can demonstrate that merger-related savings are equal to or in excess of all of the transaction-related costs so included. FPL states that the Commission has approved this type of commitment in its Merger Policy Statement and in a number of subsequent cases.⁶⁶ FPL clarifies that the

⁶⁴ Application at 18.

⁶⁵ See generally Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,904.

⁶⁶ Application at 19 & n.10 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124; *Ameren Corp*, 108 FERC ¶ 61,094, at PP 62-68 (2004); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069, at P 48 (2007)).

proposed hold harmless provision includes all transaction-related costs, not only costs related to consummating the Proposed Transaction.⁶⁷

52. Commission staff, via Deficiency Letter, sought additional information on the impact of the Proposed Transaction on rates. Specifically, staff asked FPL to “explain the impact of the \$111.5 million purchase price of the Vero Beach facilities (i.e., the Acquired Assets) on wholesale requirements and/or transmission customers.”⁶⁸

53. In its Response, FPL reiterates its offer to hold ratepayers harmless to protect against adverse rate effects, consistent with Commission precedent.⁶⁹ FPL points out that it has agreed to pay more than the net book value of the Vero Beach utility assets that it is acquiring. FPL adds, however, that it “intended for this acquisition adjustment to be treated as a transaction-related cost, and so clarifies its commitment to the extent that there was any ambiguity on this score.”⁷⁰ FPL reasons that, therefore, during the five-year hold harmless period, the purchase price paid can have no direct or indirect effect on FPL’s wholesale requirements and transmission rates, which FPL states will be based on the net book value of the assets purchased from Vero Beach. FPL emphasizes that the Commission has, on numerous occasions, approved a five-year hold harmless period such as FPL proposes in this proceeding, as sufficient to address concerns about a proposed transaction’s rate impact. FPL states that it could not receive approval for recovery of an acquisition adjustment in rates during the five-year hold-harmless period without first meeting the Commission’s standard for recovery of transaction-related costs. FPL notes that:

To the extent the Commission is concerned about the effect of an acquisition adjustment on FPL’s wholesale requirements and transmission rates after the end of the hold harmless commitment, FPL observes that the Commission has established standards for the recovery of acquisition adjustments in rates, separate and apart from the hold-harmless requirement, that are intended to ensure that any such recovery is just and

⁶⁷ *Id.* at 19 (citing *ITC Midwest LLC*, 133 FERC ¶ 61,169, at P 24 (2010)).

⁶⁸ Deficiency Letter at 1.

⁶⁹ Response at 2 (citing Application at 19; *Exelon Corp.*, 138 FERC ¶ 61,167, at P 118 (2012); *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 169; *NSTAR*, 136 FERC ¶ 61,016 at P 62); *FirstEnergy Corp.*, 133 FERC ¶ 61,222, at PP 62-63 (2010); *PPL Corp.*, 133 FERC ¶ 61,083, at PP 26-27 (2010)).

⁷⁰ Response at 2.

reasonable. Consequently, even at the conclusion of the hold harmless commitment, FPL would be able to include the amount of the purchase price associated with the acquisition adjustment in its wholesale requirements and transmission rates only if it were able to satisfy the standards established by the Commission that protect wholesale customers.⁷¹

b. Comments and Protests

54. Several commenters and Vero Beach express support for the Proposed Transaction because they anticipate it will lower their retail rates.⁷² Vero Beach explains that its high cost-of-service is due to the fact that its electric generation facilities are largely uneconomic and rarely operate; it incurs high operation and maintenance costs on these facilities; and it has entered into relatively expensive wholesale purchase contracts in order to supply its own customers.⁷³

55. Indian River argues that FPL used a misleading bill comparison when advertising its lower retail rates, having omitted a 6 percent franchise fee and storm charge common to all other FPL customer bills. Indian River further accuses FPL of regularly misusing the higher/lower percentage calculation when comparing the latter's rates to Vero Beach.

⁷¹ *Id.* at 3-4.

⁷² *See, e.g.*, John Steiner Comments (40 percent reduction in retail rates post transaction); Douglas Coffey Comments (Vero Beach's rates are 35-45 percent higher than FPL's); Reynold Gervasio Comments (FPL supports demand response and cost sharing for solar generation, whereas Vero Beach does not); George Robertson Comments (Vero Beach's rates are 30 percent higher than FPL, higher than competitive market rates and include an extra penalty charged to out-of-city customers; senior community forced to pay rates 30 percent higher than FPL rates); George Childers Comments (lower costs); and Vero Beach Comments. Also, many commenters also support the Proposed Transaction because customers who live outside the Vero Beach city limits that are served by Vero Beach pay higher rates for Vero Beach electricity service than residents living within Vero Beach city limits. Since these Vero Beach outsiders also have no vote in Vero Beach matters, they argue this is "taxation without representation." *See, e.g.*, Citizens for a Brighter Future Comments; South Beach Comments; Stephen J. Faherty Comments; and Taxpayers Comments.

⁷³ Vero Beach Comments at 3-4.

Indian River asserts that FPL has stated that Vero Beach's rates are 25 to 40 percent higher than FPL's, which is a gross misstatement.⁷⁴

c. Answers

56. FPL contends that Indian River's arguments have no merit and are not relevant here. Instead, FPL asserts that Indian River'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, FPL claims that Indian River does not rebut the fundamental fact that the retail rates of Vero Beach's customers will be reduced as a result of the Proposed Transaction.⁷⁵

57. Vero Beach adds that as a result of the Proposed Transaction, FPL will retire and decommission the generation facilities it is purchasing from Vero Beach within three to four years after the Proposed Transaction closes. Vero Beach states that at this time the valuable property on which these facilities lie will be returned to Vero Beach's control for use as a public park or some other yet-to-be-determined public use.⁷⁶

d. Commission Determination

58. The Commission finds that FPL has shown that the Proposed Transaction will not adversely affect wholesale requirements or transmission 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 transaction.⁷⁷

⁷⁴ Indian River Protest at 18-19.

⁷⁵ FPL Answer at 3.

⁷⁶ Vero Beach Comments at 4.

⁷⁷ *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 (2009); *Startrans IO, L.L.C.*, 122 FERC ¶ 61,307, at PP 25-28 (2008); *ITC Holdings Corp.*, 121 FERC ¶ 61,229, at PP 120-28 (2008).

59. We accept FPL's commitment to hold harmless wholesale requirements and transmission customers from transaction-related costs for a period of five years, consistent with Commission precedent.⁷⁸ We interpret this commitment to apply to all transaction related-costs, including costs related to consummating the Proposed Transaction.⁷⁹

60. We note, however, that FPL agreed to pay more than the net book value of the Vero Beach utility assets it is acquiring.⁸⁰ Consequently, there is a positive acquisition adjustment. FPL states that it "intend[s] for this acquisition adjustment to be treated as a transaction-related cost."⁸¹ Contrary to FPL's intention, however, Commission precedent dictates that "[t]ransaction-related costs do not include any acquisition premium (or acquisition adjustment), including goodwill, associated with the Proposed Transaction."⁸² Furthermore, the Commission "historically has not permitted rate recovery of acquisition premiums."⁸³ As FPL acknowledges in its Response, any acquisition premium or acquisition adjustment associated with the Proposed Transaction is not permitted to be included in rates absent Commission approval in a section 205 rate filing.⁸⁴ Therefore, FPL will only be able to recover its acquisition premium if it is able to show in a subsequent proceeding under section 205 of the FPA that its acquisition was "prudent and

⁷⁸ See, e.g., *Appalachian Power Co.*, 143 FERC ¶ 61,074, at P 37 (2013); *Cinergy Corp.*, 140 FERC ¶ 61,180, at P 42 (2012); *Exelon Corp.*, 138 FERC ¶ 61,167 at P 118; *Duke Energy Corp.*, 136 FERC ¶ 61,245 at P 169; *NSTAR*, 136 FERC ¶ 61,016, at P 62 (2011).

⁷⁹ *Exelon Corp.*, 138 FERC ¶ 61,167 at P 118.

⁸⁰ Response at 2.

⁸¹ *Id.* at 3.

⁸² *Exelon Corp.*, 138 FERC ¶ 61,167 at P 118.

⁸³ Merger Policy Statement, FERC Stats. & Regs. P 31,044 at 30,126.

⁸⁴ Response at 3. See also *Exelon Corp.*, 138 FERC ¶ 61,167 at P 118 & n.127 (citing Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,126; *Duke Energy*, 86 FERC ¶ 61,227, at 61,816 (1999) (citing *Mid-Louisiana Gas Co.*, 7 FERC ¶ 61,316, at 61,682, *reh'g denied*, 8 FERC ¶ 61,227 (1979), *aff'd sub nom. Transcontinental Gas Pipe Line Corp. v. FERC*, 652 F.2d 179 (D.C. Cir. 1981) (rate recovery of an existing facility is generally limited to the original cost of the facility))).

provides measurable, demonstrable benefits to ratepayers.”⁸⁵ We nevertheless accept FPL’s commitment not to recover the acquisition premium for a period of five years.

61. The Commission will be able to monitor the FPL’s hold harmless commitment under its authority under section 301(c) of the FPA⁸⁶ and the books and records provision of the Public Utility Holding Company Act of 2005.⁸⁷ Moreover, the commitment is fully enforceable based on the Commission’s authority under section 203 of the FPA.

62. If FPL seeks to recover transaction-related costs through its wholesale power or transmission rates within five years after the Proposed Transaction is consummated, it must submit a compliance filing that details how it is satisfying the hold-harmless requirement. If FPL seeks to recover transaction-related costs in an existing formula rate that allows for such recovery within such five-year period, then that compliance filing must be filed in the section 205 docket in which the formula rate was approved by the Commission, as well as in the instant section 203 docket.⁸⁸ We also note that if FPL seeks to recover transaction-related costs in a filing in such five-year period, whereby FPL is proposing a *new* rate (either a new formula rate or a new standard rate), then that filing must be made in a *new* section 205 docket as well as in the instant section 203 docket.⁸⁹ The Commission will notice such filing for public comment. In such filings, FPL must: (1) specifically identify the transaction-related costs it is seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the transaction, in addition to any requirements associated with filings made under section 205. Such a hold harmless commitment will protect customers’ wholesale rates from being adversely affected by the Proposed Transaction.

⁸⁵ *ITC Holdings Corp.*, 139 FERC ¶ 61,112 at P 50 & n.116 (citing *Minnesota Power & Light Co.*, 43 FERC ¶ 61,104, at 61,342, *reh’g denied*, 43 FERC ¶ 61,502 (1988); *Duke Energy Moss Landing, LLC*, 83 FERC ¶ 61,318, at 62,304 (1988); *PSEG Power Connecticut, LLC*, 110 FERC ¶ 61,020, at P 32 (2005)).

⁸⁶ 16 U.S.C. § 825(c) (2006).

⁸⁷ 42 U.S.C. § 16452 (2006).

⁸⁸ In this case, the filing would be a compliance filing in both the section 203 and 205 dockets.

⁸⁹ In this case, the filing would be a compliance filing in the section 203 docket, but a rate application in the section 205 docket.

63. Finally, regarding retail rate concerns, in its section 203 analysis, the Commission does not examine the effect of a Proposed Transaction on retail rates unless a state specifically asks the Commission to consider such rate impacts.⁹⁰ The role of the relevant state commission is, among other things, to consider such effects.⁹¹ The Florida Commission has not requested an examination of retail rate impacts in the instant proceeding. Thus, we will not address Indian River's or other protestors' or commenters' retail rate concerns or supporting comments.

4. Effect on Regulation

a. FPL's Analysis

64. FPL maintains that the Proposed Transaction will not have any effect on the jurisdiction of either this Commission or the Florida Public Service Commission (Florida Commission), except to bring Vero Beach's transmission facilities under FPL's OATT and subject to the Commission's jurisdiction. FPL argues that the Proposed Transaction will *expand* the Florida Commission's jurisdiction over retail sales in Vero Beach, which currently are subject only to limited Florida Commission regulation (e.g., the Florida Commission has jurisdiction over the rate structure but not the level of the rates that Vero Beach charges). FPL submits that, in any event, the Florida Commission has the authority to approve the essential elements of the Proposed Transaction, including the central question of whether Vero Beach customers can receive electric service at FPL's retail rates. FPL maintains that there is thus no need for the Commission to address the issue here.⁹²

b. Comments

65. A number of commenters support Proposed Transaction because it would place Vero Beach customers under the purview of Florida Commission regulation.⁹³

⁹⁰ *Mirant Corp.*, 111 FERC ¶ 61,425, at P 37 (2005).

⁹¹ *See generally* Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,123 (contrasting state's role to handle retail issues and Commission's role to protect merging utilities' wholesale electricity and transmission customers).

⁹² Application at 20-21.

⁹³ *See, e.g.*, Moorings Comments at 1; Stephen J. Faherty and Glenn Fraser Heran Comments at 1-2; Citizens for a Brighter Future Comments at 3; Taxpayers Comments at 2; South Beach Comments at 1.

c. Commission Determination

66. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap at the federal or state level.⁹⁴ We find that neither state nor federal regulation will be impaired by the proposed transaction. Indeed, as FPL points out, regulation will arguably be enhanced because, once the Proposed Transaction has been completed, the Commission will obtain jurisdiction over the facilities for wholesale ratemaking purposes, and the Florida Commission will obtain additional jurisdiction over the facilities for retail ratemaking purposes. We note that no party has alleged that regulation would be impaired by the proposed merger, nor has the Florida Commission asked the Commission to address the issue of the effect on state regulation.

5. Cross-Subsidization

a. FPL's Analysis

67. FPL states that, based on facts and circumstances known to them or that are reasonably foreseeable, the Proposed 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. FPL further states that the Proposed Transaction does not involve: (1) any new issuances 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; (2) 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 facilities, for the benefit of an associate company; or (3) other than the Memorandum of Understanding between the parties, filed as Exhibit I, and certain other transaction documents, 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.

b. Commission Determination

68. Based on the facts presented in the application, we find that the Transaction will not result in cross-subsidization or the pledge or encumbrance of utility assets for the benefit of an associate company.⁹⁵ According to FPL, FPL will own the assets it is

⁹⁴ Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁹⁵ See Application, Exh. M.

acquiring “and there are no transfers of any assets, or contracts with, or encumbrances in favor of any of FPL’s assets.”⁹⁶ We note that no party has argued otherwise.

6. Other Considerations

69. 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.⁹⁷ 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.

70. Information and/or systems connected to the bulk power system involved in this transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to section 215. 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 cyber security standards. The Commission, North American Electric Reliability Corporation or the relevant regional entity may audit compliance with reliability and cyber security standards.

The Commission orders:

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

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

⁹⁶ Application at 21.

⁹⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, 70 Fed. Reg. 8,253 (Feb. 18, 2005), FERC Stats. & Regs. ¶ 31,175, *order on reh’g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42.

(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 shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. FPL shall submit its final accounting entries within six month of the date that the transaction is consummated, and the accounting submissions shall provide all the accounting entries and amounts related to the transfer along with narrative explanations describing the basis for the entries.

(H) If FPL seeks to recover transaction-related costs through their wholesale power or transmission rates, they must first submit a compliance filing in this docket that details how they are satisfying the hold harmless requirement. In particular, in such a filing, FPLs must: (1) specifically identify the transaction-related costs they are seeking to recover; and (2) demonstrate that those costs are exceeded by the savings produced by the transaction.

(I) 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)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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