

137 FERC ¶ 61,183
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of South Daytona, Florida	Docket Nos.	EL12-1-000
Florida Power & Light Co.		ER12-46-000
		(Not Consolidated)

ORDER GRANTING PETITION FOR DECLARATORY ORDER
AND DISMISSING RATE FILING WITHOUT PREJUDICE

(Issued December 6, 2011)

1. On October 5, 2011, in Docket No. EL12-1-000, as supplemented on October 6, 2011, the City of South Daytona, Florida (South Daytona) filed a petition for declaratory order requesting a finding that the Commission's stranded cost regulations do not apply to a retail-turned-wholesale municipal utility that intends to continue receiving its power supply from its former retail supplier, in this case Florida Power & Light Company (FPL), as opposed to a new power supplier.
2. On October 7, 2011, in Docket No. ER12-46-000, FPL filed with the Commission a rate change application, pursuant to 18 C.F.R. § 35.26, proposing a charge to recover stranded costs from South Daytona. Specifically, FPL submitted Attachment P to its Open Access Transmission Tariff (Tariff) setting forth a stranded cost charge of \$8,160,000 for South Daytona.
3. In this order, we grant South Daytona's petition for declaratory order in Docket No. EL12-1-000 and dismiss FPL's October 7, 2011 rate change application in Docket No. ER12-46-000 without prejudice.

I. Background

4. FPL is an investor-owned utility that provides electric generation, transmission and distribution service to both wholesale and retail customers within the State of Florida. It currently serves 4.5 million customers in 190 municipalities and 35 counties.

5. South Daytona is a municipal corporation located within Volusia County. FPL states that there are approximately 7,500 retail customers in South Daytona.

6. FPL states that it has served South Daytona's residents and businesses at the retail level since 1917. In May 1978, FPL and South Daytona entered into a franchise agreement for a period of thirty years with a renewal provision. The renewal provision includes an option for South Daytona to purchase FPL's distribution system at the end of the franchise agreement term. South Daytona states that it began to consider whether to exercise this option as a result of what it considered to be FPL's inadequate responses to hurricanes it experienced during 2004 and 2005.

7. According to South Daytona, in June 2008, FPL and South Daytona entered into an abeyance arrangement under which FPL would continue to provide electrical service to South Daytona upon the expiration of the 1978 franchise agreement. Meanwhile, the parties entered into non-binding arbitration to determine the purchase price for the distribution facilities. In May 2011, the Circuit Court in Florida ruled that the purchase price for the FPL distribution system should be \$15,647,022.¹ Following this ruling, South Daytona sought wholesale power purchase proposals. South Dayton states that it found FPL's bid to be more favorable than offers received from other bidders. Accordingly, on July 19, 2011, the South Daytona City Council voted both (1) to exercise the purchase option, and (2) to negotiate a wholesale power purchase agreement with FPL. During the course of negotiating these agreements, a dispute arose with respect to Order No. 888² stranded costs associated with South Daytona's move from retail to wholesale service.

¹ *City of South Daytona v. Florida Power & Light Co.*, No. 2008-30441-CICI, slip op. (Fla. Cir. Ct. 7th Cir. 2011) (attached as Attachment 1 to the South Daytona Petition). South Daytona states that the court subsequently amended its calculation of the purchase price to \$15,543,603.

² *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,787 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (*TAPS*), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

II. South Daytona Petition for Declaratory Order (Docket No. EL12-1-000)

8. South Daytona requests that the Commission issue a declaratory order finding that it will have no Order No. 888 stranded cost obligation to FPL if it purchases wholesale power from FPL, rather than from a new wholesale power supplier, under a cost-based rate. In support of its petition, South Daytona contends that the Commission's stranded cost regulations are only intended to apply where a former retail customer utilizes open access transmission service to obtain power supplies from a different power supplier. South Daytona contends that the Commission developed its stranded cost recovery mechanism as a procedure that would apply where a utility could demonstrate that (1) generation used to serve existing wholesale or retail customers had been stranded because its former wholesale or retail customers use an Order No. 888 open access transmission tariff to purchase power from another supplier, and (2) the public utility had a reasonable expectation that, even after expiration of its contract with the former wholesale or retail customer, the customer would continue to purchase power from the utility.

9. In support, South Daytona argues that Order No. 888's stranded cost provisions were intended solely as a transition mechanism that would permit an adjustment period following the implementation of the open access transmission requirement in which public utilities could seek recovery of costs stranded as a direct result of their new obligation to provide open access to competing suppliers.

10. Second, South Daytona maintains that the stranded cost recovery provisions of the Commission's regulations are limited to addressing the sunk cost problem created by departing customers and the associated lost power sales. South Daytona notes that the evidentiary showing that a public utility must make to recover stranded costs has been interpreted to apply only where there is a "departing" customer that uses the utility's open access tariff "to obtain access to a new generation supplier at the end of its contract term."³

11. South Daytona maintains that before a public utility can seek to recover stranded costs, it must actually lose customer load. It argues that the Commission's stranded cost rules do not apply where the new municipal utility does not switch suppliers. It states that Order No. 888-A holds that stranded cost recovery in the case of a municipalization "is limited to those cases in which the new wholesale entity uses Commission-mandated transmission access to obtain new power supply on behalf of retail customers that were formerly supplied power by the utility providing the transmission service."⁴ South

³ South Daytona Petition at 10 (quoting *TAPS*, 225 F.3d at 701-02).

⁴ *Id.* at 12 (quoting Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,404).

Daytona also notes that the United States Court of Appeals for the District of Columbia Circuit has ruled that in the case of retail-turned-wholesale customers, the Commission had jurisdiction because the costs that were stranded in these circumstances “are properly viewed as ‘costs’ of the *former supplying utility’s* provision of open access transmission service.”⁵

12. South Daytona states that, in connection with its contemplated municipalization, FPL proposed to serve South Daytona with full requirements power supply service under a formula rate substantially similar to that already on file with the Commission for FPL’s requirements service to Lee County Electric Cooperative.⁶ South Daytona further states that it is willing to execute a similar wholesale power supply contract with FPL to purchase full requirements service at cost-based formula rates.

III. FPL Rate Change Application (Docket No. ER12-46-000)

13. In the transmittal letter to its rate change application in Docket No. ER12-46-000, FPL maintains that if South Daytona forms a municipal electric utility, FPL would be entitled to recover Order No. 888 stranded costs from South Daytona. FPL states that Order No. 888 designated the Commission as the primary forum for stranded cost claims stemming from new municipalizations. It asserts that this case presents a potential new municipalization. FPL states that it owns the only transmission facilities by which South Daytona can access wholesale electric power in the event South Daytona becomes a municipal utility and that South Daytona will need to use FPL’s current tariff if it wants to obtain access to a wholesale power supplier. Therefore, FPL proposes a stranded cost charge of \$8,160,000 for South Daytona. Under its proposed Attachment P to its Tariff, FPL proposes to recover the stranded costs by means of a surcharge on its rates for wholesale transmission service to the newly formed municipal utility. FPL states that it based the charge on the formula set forth in section 35.26(c)(2) of the Commission’s regulations:

$$\text{Stranded Cost Obligation} = (\text{Revenue Stream Estimate} - \text{Competitive Market Value Estimate}) \times \text{Length of Obligation} \\ (\text{Reasonable Expectation Period})$$

14. FPL requests an effective date 60 days from the date of filing. It states that “South Daytona’s payment obligation would be triggered upon municipalization in fact.”

⁵ *Id.* at 12 (quoting *TAPS*, 225 F.3d 667 at 723) (emphasis supplied by South Daytona).

⁶ *Id.* at 13 (citing FPL Rate Schedule FERC No. 317).

IV. Notice of Filings and Responsive Pleadings

15. Notice of South Daytona's petition in Docket No. EL12-1-000 was published in the Federal Register, 76 Fed. Reg. 63,919 (2011), with interventions or protests due on or before November 4, 2011. On October 20, 2011, FPL filed a motion to intervene and an answer to South Daytona's petition for expedited action (October 20 Answer). On October 21, 2011, South Daytona filed an answer to FPL's October 20 Answer (October 21 Answer). On November 4, 2011, FPL filed an answer to South Daytona's Petition (November 4 Answer). On November 7, 2011, FPL filed an answer to South Daytona's October 21 Answer (November 7 Answer). On November 10, 2011, South Daytona filed an answer to FPL's November 4 Answer (November 10 Answer).

16. Notice of FPL's rate filing in Docket No. ER12-46-000 was published in the Federal Register, 76 Fed. Reg. 64,938 (2011), with interventions or protests due on or before October 28, 2011. On October 13, 2011, South Daytona filed a motion to intervene and for summary disposition (October 13 Motion).

17. In its October 13 Motion, South Daytona argues that summary dismissal of FPL's stranded cost claim is warranted because: (1) the stranded cost provisions of Order No. 888 do not apply where the retail-turned-whole sale customer intends to continue purchasing power at embedded cost-based rates from its existing power supplier, and (2) there is no material factual dispute that South Daytona intends to purchase full requirements wholesale service from FPL for ten years upon commencement of its operation as a municipal utility. On October 28, 2011, South Daytona filed a motion to amend its October 13 Motion, requesting summary and partial summary disposition and, alternatively, expedited evidentiary hearing (October 28 Motion). In its October 28 Motion, South Daytona argues that FPL failed to: (1) prove that South Daytona has a stranded cost obligation under Order No. 888; and (2) demonstrate that FPL had a reasonable expectation of continued service under Order No. 888. On October 28, 2011, FPL filed an answer to the October 13 Motion (October 28 Answer). On November 14, 2011, FPL filed an answer to South Daytona's October 28 Motion. On November 16, 2011, South Daytona filed a motion to lodge a copy of an initial brief that FPL filed in the Florida Fifth District Court of Appeal on November 8, 2011 (Initial Brief). On November 16, 2011, South Daytona filed an answer to FPL's October 28 Answer (November 16 Answer). On November 17, 2011, FPL filed an answer to South Daytona's motion to lodge.

FPL's Answer to South Daytona's Petition

18. FPL argues that South Daytona's petition should be denied. It states that South Daytona's petition is premised upon a wholesale purchase agreement that does not exist.⁷ FPL states that South Daytona has not entered into any agreement with FPL for such a purchase, nor has it provided FPL with a binding commitment to enter into such an agreement.⁸

19. In response to South Daytona's argument that the stranded cost recovery provisions of the Commission's regulations are limited to addressing sunk costs created by departing customers, FPL emphasizes that the existing South Daytona customers of FPL would no longer be purchasing generation supply from FPL, but rather from South Daytona, thus creating "departing" customers. FPL also states that South Daytona notified FPL that it was electing the "brokering/marketing option" under the stranded cost regulations. FPL asserts that the Commission used the term "departing" in Order No. 888 to describe a situation where a new wholesale customer exercises a marketing option to buy released capacity from the utility, thus showing that the term "departing" includes a wholesale purchase scenario.⁹ FPL maintains that, in any event, the Commission does not need to address this "definitional" issue because South Daytona has not entered into any binding agreement to purchase generation supply from FPL.

20. FPL believes that South Daytona may not be able to become a municipal utility given: (1) its apparent lack of financing to purchase FPL's distribution facilities; (2) the absence of a vendor to operate and maintain the assets; and (3) the lack of a wholesale agreement. FPL states that it did not want to invest time and resources in extensive, complex negotiations for the asset purchase and to commit a portion of its available wholesale power if either of these outcomes may not materialize.

21. FPL also maintains that South Daytona's contention that it will keep FPL "as its continuous supplier" is inaccurate as FPL does not currently supply the city (except as a retail customer for municipal buildings).¹⁰

⁷ November 4 Answer at 5.

⁸ *Id.* at 2.

⁹ *Id.* at 12 (citing Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,842).

¹⁰ *Id.* at 13 (citing South Daytona Petition at 13).

V. Motion to Consolidate

22. South Daytona argues that consolidation of Docket Nos. EL12-1-000 and ER12-46-000 is warranted because the threshold issue that it argues FPL's filing presents – whether Order No. 888 applies where the retail-turned-wholesale customer intends to continue purchasing power at embedded cost-based rates from its existing power supplier – is the subject of the South Daytona's petition for declaratory order. FPL states that it does not oppose South Daytona's motion to consolidate.

VI. Motion to Lodge

23. South Daytona argues in its motion to lodge that FPL's position in the Initial Brief in the Florida state proceeding to determine the purchase price for the distribution assets contradicts its position in the pleadings it filed in these dockets by acknowledging that for stranded cost jurisdiction to apply, South Daytona must switch power suppliers. South Daytona also contends that FPL's Initial Brief concedes that retail-turned-wholesale customers do not “depart” if they continue to purchase power from the former retail supplier.

24. In its answer to South Daytona's motion to lodge, FPL denies that its Initial Brief contradicts its position in these proceedings or concedes that FPL can recover stranded costs only if South Daytona purchases power from a third party. FPL argues that South Daytona is incorrect that stranded cost recovery turns on the identity of the wholesale power supplier, not the price of the power supplied. FPL maintains that the Commission's stranded cost calculation measures the difference between the competitive market price and the rate previously paid by the customer and that it is not important which supplier is deemed to set the market price. FPL further states that if the competitive price is lower than the revenue stream estimate, there will be stranded costs, but if it is equal to or higher than the revenue stream estimate, there will be no stranded costs. FPL maintains that because Daytona has argued that it might execute a contract with FPL and because it has disputed almost every element of FPL's proposed revenue stream estimate, the rate case should be set for hearing.

VII. Discussion**A. Procedural Matters**

25. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to these proceedings.

26. With regard to South Daytona's motion to consolidate, the Commission typically consolidates proceedings only for purposes of hearing and decision.¹¹ As we are not setting either of these proceedings for hearing, there is no need to consolidate the dockets formally. Accordingly, we will deny South Daytona's motion to consolidate.

27. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits answers to protests and answers unless otherwise ordered by the decisional authority. We are not persuaded to accept South Daytona's October 21 Answer and November 10 Answer in Docket No. EL12-1-000, FPL's November 7 Answer in Docket No. EL12-1-000, and South Daytona's November 16 Answer in Docket No. ER12-16-000, and will, therefore, reject them.

B. Analysis

1. Docket No. EL12-1-000

28. As discussed below, we grant South Daytona's petition for declaratory order and find that the Commission's stranded cost regulations do not apply to a retail-turned-wholesale municipal utility that intends to continue receiving its power supply from its former retail supplier, in this case FPL, rather than from a new power supplier.

29. In Order No. 888, the Commission adopted regulations permitting public utilities to seek recovery of stranded costs associated with providing open access transmission. The Commission limited the opportunity to seek stranded cost recovery primarily to two discrete situations: (1) costs associated with customers under wholesale requirements contracts executed on or before July 11, 1994 that do not contain an exit fee or other explicit stranded cost provision, a situation that is not present in the instant proceedings; and (2) costs associated with retail-turned-wholesale customers, a situation that arises through new municipalizations and municipal annexations.¹² The Commission explained that stranded cost recovery in the case of new municipalizations is limited "to those cases in which the new wholesale entity uses Commission-mandated transmission access to obtain new power supply on behalf of retail customers that were formerly supplied power by the utility providing the transmission service."¹³

¹¹ *See, e.g., Arizona Public Service Company*, 90 FERC ¶ 61,197, at P 14 (2000).

¹² Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,348.

¹³ *Id.* at 30,404.

30. We agree with South Daytona that if South Daytona proceeds with its municipalization but continues to purchase power from FPL, as opposed to a new wholesale power supplier, South Daytona will have no Order No. 888 stranded cost obligation to FPL. Order No. 888-A states this clearly in the following:

[I]n a “retail-turned-wholesale customer” situation, such as the creation of a municipal utility system, a newly-created entity becomes a wholesale power purchaser on behalf of retail customers who were formerly bundled customers of the historical local utility power supplier. The new municipal utility is the conduit by which retail customers, if they cannot obtain direct retail access, can reach power suppliers *other than their historical local utility power supplier*. Although the retail customers remain bundled retail customers, in that they become the bundled customers of the new entity, we call this a “retail-turned-wholesale customer” situation because the new entity in effect “stands in the shoes” of the retail customers *for purposes of obtaining wholesale transmission access and new power supply*.¹⁴

31. The Commission further stated:

[W]e believe that this Commission must address the recovery of the costs of moving from a monopoly-regulated regime to one in which all sellers can compete on a fair basis and in which electricity is more competitively priced. On this basis, we believe that if a new wholesale entity such as a municipal utility uses Commission-required open access *to reach a new supplier* on behalf of its retail customers (previously retail customers of the former supplier), the *former supplying utility* should be given an opportunity to recover legitimate, prudent and verifiable costs that it incurred under the prior regulatory regime to serve that customer.¹⁵

32. The foregoing language shows that the Commission contemplated stranded cost recovery in the retail-turned-wholesale situation where retail customers acquire power from “power suppliers other than their historical local utility power supplier.” In cases where this does not occur, i.e., where retail customers would continue to receive power

¹⁴ *Id.* at n.479 (emphasis supplied).

¹⁵ *Id.* at 30,405-406 (emphasis supplied).

generated by the same power supplier, there would be no Order No. 888 stranded costs for the power supplier to recover.

33. South Daytona states that it is not leaving FPL's generation system and will become a wholesale full requirements customer of FPL. Based on South Daytona's representations in this regard, if South Daytona does not obtain a new power supplier, it cannot be considered a departing customer that could be responsible for wholesale stranded costs. For this reason we grant its petition for a declaratory order in Docket No. EL12-1-000.

34. FPL maintains that it is appropriate to treat South Daytona as a departing customer in this case because FPL's retail customers in South Daytona will now purchase power from South Daytona. It also states that, in Order No. 888, the Commission used the term "departing" to describe a situation where a new wholesale customer exercises a marketing option to buy released capacity from the utility, which according to FPL shows that the term "departing" includes a wholesale purchase scenario. We disagree. FPL is seeking recovery of wholesale stranded costs, and therefore the fact that customers in South Daytona could be viewed as departing retail customers is not relevant to these proceedings. Secondly, the specific language in Order No. 888 that FPL cites to in this connection refers not simply to "departing" customers but rather to a "departing generation customer."¹⁶ South Daytona would not be a departing generation customer if, as it proposes, it will purchase power at wholesale from FPL. Moreover, the marketing option discussed in the text cited by FPL is characterized by the Commission as a mechanism "to create an incentive to produce a good faith estimate of stranded costs and to safeguard customers if a utility fails to do so."¹⁷ As the Commission explained, "the Commission allows the departing customer to market or broker the capacity that it would strand as a result of its decision to purchase power from an alternative supplier. This option is intended to protect a departing customer from a low utility estimate of CMVE, which would result in a higher stranded cost charge to the customer."¹⁸ Such a mechanism has no stranded cost implications in a case where there is no departing generation customer, an essential precondition of all requests for stranded cost recovery.

35. FPL argues that South Daytona's petition is premised on a wholesale agreement between FPL and South Daytona that does not exist. While it is true that the parties have not signed either a wholesale agreement or a service agreement for transmission service, that is not relevant for the purposes of our granting South Dayton's petition. South

¹⁶ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,842.

¹⁷ *Id.*

¹⁸ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,432.

Daytona's petition seeks a declaratory order on the legal issue of whether "the Commission's stranded cost regulations . . . apply to a retail-turned-wholesale municipal utility that intends to continue receiving its power supply, albeit at wholesale, from its former retail supplier."¹⁹ Our decision here is premised on the assumption that this intention is realized, i.e., that South Daytona will receive its power supply at wholesale from FPL, not from an alternative power supplier.

36. It is true that the Commission previously has ruled on potential stranded cost obligations where it had not yet been determined whether a retail-turned-wholesale customer would in fact be a departing customer or would continue to take power from its previous supplier. These were cases in which the municipality itself sought a declaratory order regarding its potential stranded cost liability.²⁰ Here, however, FPL has filed a rate change application under section 205 of the FPA to place in its Tariff a specific stranded cost recovery charge before it has been determined that there will in fact be a departing customer that would be liable for those costs.

37. We also disagree with FPL's argument that stranded costs turn on the price of the power supplied rather than the identity of the wholesale supplier, and that to view stranded cost recovery otherwise would conflict with the robust wholesale competition that the Commission sought to promote in Order No. 888. In support of this argument, FPL presents a scenario where a municipality is paying a generation rate of eight cents per kilowatt-hour to its host utility and in an effort to municipalize its electric system, solicits bids for lower cost alternatives. FPL argues that were the host supplier and a potential third-party supplier each to make identical, seven cents per kilowatt-hour bids, under South Daytona's analysis the municipality will pay a stranded cost obligation of one cent per kilowatt-hour if it selects the third party as the winning bidder, but there will be no stranded costs if it chooses the host supplier. FPL disagrees with this result and argues instead that the Commission's stranded cost calculation measures the difference between the competitive market price and the rate previously paid by the customer. It submits that, if the rule were otherwise, the host utility would never compete to serve the customer because, if it won, it would waive its stranded cost claim. According to FPL, this conflicts with the Commission's policy of promoting competition.

38. We disagree with FPL's analysis. Given the emphasis placed in Order Nos. 888 and 888-A on a departing customer and an associated loss of load as a prerequisite to

¹⁹ South Daytona Petition at 1.

²⁰ *City of Las Cruces, New Mexico v. El Paso Electric Co.*, Opinion No. 438, 87 FERC ¶ 61,201 (1999) (*City of Las Cruces*); *City of Alma, Michigan*, Opinion No. 452, 96 FERC ¶ 61,163, *reh'g denied*, Opinion No. 452-A, 97 FERC ¶ 61,147 (2001) (*City of Alma*).

stranded cost recovery, it is not reasonable for FPL to argue that the inputs of the Commission's stranded cost formula show otherwise. As the Commission stated in Order No. 888-A, "the departing customer's stranded cost obligation is determined by taking the average annual revenues that the customer *would have paid had it remained a customer of the utility* (RSE), and subtracting from it the competitive market value of the power . . . *no longer taken by the departing customer* (CMVE)." ²¹

39. FPL's argument also misconstrues the relationship between stranded cost recovery and the Commission's desire to promote competition as expressed in Order No. 888. In a competitive market for any product, a competitor generally has no claim to its sunk costs, i.e., past costs that have already been incurred and cannot be recovered, when a customer chooses to purchase from a different supplier. Competitors always face the possibility that they can lose market share and thus could not recover sunk costs.

40. Stranded costs are a form of sunk costs. ²² The Commission chose to allow stranded cost recovery in Order No. 888 in specific situations on the grounds that it would be unfair to expect power suppliers to have anticipated the significant changes made through Order No. 888 that had important implications for their past conduct. Specifically, the Commission stated:

[W]e do not believe that utilities that made large capital expenditures or long-term contractual commitments to buy power years ago should now be held responsible for failing to foresee the actions this Commission would take to alter the use of their transmission systems in response to the fundamental changes that are taking place in the industry. ²³

41. The Commission acknowledged that "there has always been some risk that a utility would lose a particular customer," but it found that "[w]ith the new open access, the risk of losing a customer is radically increased." ²⁴ The Commission thus concluded:

If a former wholesale requirements customer or a former retail customer uses the new open access *to reach a new supplier*, we believe that the utility is entitled to recover

²¹ Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at n.737 (emphasis supplied).

²² *TAPS*, 225 F.3d at 683.

²³ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,789.

²⁴ *Id.*

legitimate, prudent and verifiable costs that it incurred under the prior regulatory regime to serve that customer.²⁵

42. We thus disagree with FPL that stranded cost recovery itself should be understood as an integral feature of the competitive markets that the Commission was seeking to promote. Stranded cost recovery is rather intended to serve as a means of ensuring that the *transition* to such markets is fair and equitable. At the core of this policy is the idea that it would be unfair to expect public utilities when making large capital investments in generation assets to foresee later actions by the Commission that had important implications for those investments. However, here South Daytona has asked us to rule on whether it would have a stranded cost obligation if it converts from bundled retail service to unbundled wholesale and transmission service with FPL's total power sales to South Daytona remaining constant. To the extent that FPL will continue to use its generation assets to serve South Daytona, none of its investment in its generation assets will be stranded for purposes of Order Nos. 888 and 888-A and the Commission's stranded cost regulations. Additionally, it will be compensated for the purchase of its distribution assets, an option expressly set forth in the May 1978 franchise agreement.

2. Docket No. ER12-46-000

43. With respect to FPL's proposed stranded cost charge in Docket No. ER12-46-000, we find that FPL's filing is premature given that neither South Daytona's formation of a municipal electric utility nor its wholesale supply and transmission arrangements have been finalized. In these circumstances, it would be premature to accept for filing the stranded cost surcharge set forth in Attachment P to FPL's Tariff and to make it effective 60 days from the date of filing. We therefore dismiss FPL's filing without prejudice to FPL's ability either (1) to make another rate change application to recover a stranded cost charge should the circumstances change (e.g., South Daytona becomes a municipal electric utility service provider and finds an alternative power supplier) or (2) to file a petition for declaratory order seeking an estimate of what South Daytona's stranded cost obligation would be if South Daytona were to purchase from another generation supplier.²⁶ Our dismissal is based on the conclusion set forth above that there is no basis for a stranded cost filing under section 205 of the FPA before it has been determined that there will in fact be a departing customer that would be liable for those costs. We therefore do not need to address the merits of South Daytona's motion for summary disposition or FPL's answer to that motion.

²⁵ *Id.* (emphasis supplied).

²⁶ See *City of Las Cruces*, 87 FERC ¶ 61,201 and *City of Alma*, 96 FERC ¶ 61,163, *reh'g denied*, 97 FERC ¶ 61,147.

The Commission orders:

(A) South Dayton's petition for declaratory order in Docket No. EL12-1-000 is hereby granted, as discussed in the body of this order.

(B) FPL's rate change application in Docket No. ER12-46-000 is dismissed without prejudice, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

Nathaniel J. Davis, Sr.,
Deputy Secretary.