

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

BILL: SB 840

INTRODUCER: Senator Simpson

SUBJECT: Municipal Power Regulation

DATE: February 23, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	Pre-meeting
2.			AGG	
3.			AP	

I. Summary:

SB 840 requires the Florida Municipal Power Agency (FMPA) to file an annual financial report; requires that all members of the FMPA Board of Directors be elected city officials; requires the Public Counsel to participate in FMPA proceedings; and subjects the FMPA to Public Service Commission jurisdiction, but not its ratemaking authority.

II. Present Situation:

Florida Municipal Power Agency

The Florida Municipal Power Agency (FMPA) was created in 1978 by 13 municipalities through an interlocal agreement under s. 163.01, F.S.¹ for the purpose of providing wholesale power supply to municipal electric utilities.² FMPA currently has 31 municipality members.³ Through various joint power supply projects,⁴ FMPA supplies all of the electrical power needs of 13 member utilities (referred to as “All-Requirements Project” or “ARP” members) and some of the

¹ FLORIDA MUNICIPAL POWER AGENCY, *Sum of Our Efforts: 1978-2008*, page 3, http://fmpa.com/wp-content/uploads/2014/10/FMPA_History_Booklet_1978-2008.pdf (last visited February 12, 2016).

² FLORIDA MUNICIPAL POWER AGENCY, *About Overview*, <http://fmpa.com/about/overview/> (last visited February 12, 2016).

³ FMPA members are: Alachua, Bartow, Blountstown, Bushnell, Chattahoochee, Clewiston, Fort Meade, Fort Pierce, Gainesville, Green Cove Springs, Havana, Homestead, Jacksonville Beach, Key West, Kissimmee, Lake Worth, Lakeland, Leesburg, Moore Haven, Mount Dora, New Smyrna Beach, Newberry, Ocala, Orlando, Quincy, St. Cloud, Starke, Vero Beach, Wauchula, Williston, and Winter Park. FLORIDA MUNICIPAL POWER AGENCY, *Members*, <http://fmpa.com/about/members/> (last visited February 12, 2016).

⁴ Section 361.12, F.S., authorizes any electric utility, or any organization, association, or separate legal entity whose membership consists only of electric utilities, to join with any other such entity to finance, acquire, construct, manage, operate, or own an electric power supply project for the joint generation or transmission of electrical energy, or both. Further, section 361.13, F.S., authorizes any such entity to purchase capacity or energy, or both, in an agreed upon quantity from any project in which the purchaser has an ownership interest.

power needs for seven other member utilities.⁵ Through these projects, FMPA members maintain ownership interests in various electrical power plants throughout Florida.⁶ According to its website, FMPA provides economies of scale in electrical power generation, allowing its members, through coordination of their individual power needs, to utilize larger, more efficient power plants and to diversify their power sources.⁷

FMPA is governed by a Board of Directors, with one Board member appointed by each member municipality. The Board decides all issues concerning each of FMPA's power supply projects except the All-Requirements Project. The ARP is governed by an Executive Committee. Each member municipality of the ARP appoints one Executive Committee member. The Board is responsible for approving the rate structures for all non-ARP projects, and the Executive Committee is responsible for approving the rate structure for the ARP project.⁸ As required by law, the Board and Executive Committee must conduct their public business, including rate-setting, in open, public meetings after providing reasonable notice.⁹ A financial audit of FMPA is conducted annually by an independent auditor and is filed with the state.¹⁰

Pursuant to proviso language accompanying a specific appropriation in the 2014-2015 budget,¹¹ the State of Florida Auditor General was directed to retain subject matter experts to conduct a full audit of any entity created under s. 361.10, F.S.¹² The audit was required to analyze all revenues, expenditures, administrative costs, bond agreements, contracts, and employment records and to provide a complete review of the rates of such entities. Under this direction, the Auditor General retained consultants and conducted an operational audit of FMPA and submitted its final audit report to the Speaker of the House of Representatives and the President of the Senate in March 2015.¹³ The audit report produced 15 findings and recommendations related to FMPA's hedging activities, investments, personnel and payroll administration, procurement practices, ARP contract provisions, and information technology practices. The audit report was

⁵ FLORIDA MUNICIPAL POWER AGENCY, *Energy Overview*, <http://fmpa.com/energy/overview-2/> (last visited February 12, 2016). A few members do not purchase any power from FMPA. Overall, FMPA supplies more than 40 percent of its members' total power needs. For a list of the projects and the cities participating in each project, see FLORIDA MUNICIPAL POWER AGENCY, *Projects*, <http://fmpa.com/energy/projects/> (last visited February 12, 2016).

⁶ FLORIDA MUNICIPAL POWER AGENCY, *Plants*, <http://fmpa.com/energy/plants/> (last visited February 12, 2016).

⁷ FLORIDA MUNICIPAL POWER AGENCY, *About Overview*, <http://fmpa.com/about/overview/> (last visited February 12, 2016).

⁸ State of Florida Auditor General, *Operational Audit of Florida Municipal Power Agency, Report No. 2015-165*, March 2015, at p.3.

⁹ Article I, section 24 of the Florida Constitution requires, among other things, that all meetings of any collegial body of a county or municipality at which public business is to be transacted must be open and noticed to the public. Section 286.011(1), F.S., implements this provision and applies it to any board or commissions of any political subdivision of the state, which includes boards formed by interlocal agreement. See 84-16, Fla. Op. Att'y Gen. (1984).

¹⁰ State of Florida Auditor General, *Operational Audit of Florida Municipal Power Agency, Report No. 2015-165*, March 2015 at 36 (Exhibit C, FMPA Management Response).

¹¹ Specific Appropriation 2685, 2014-2015 General Appropriations Act, Ch. 2014-51, Laws of Fla.

¹² The reference in the appropriation to s. 361.10, F.S., was likely misplaced. That section does not authorize the creation of any type of entity. Rather, it authorizes various types of existing utility entities to participate in joint electrical power supply projects.

¹³ State of Florida Auditor General, *Operational Audit of Florida Municipal Power Agency, Report No. 2015-165*, March 2015. The Auditor General did not audit any other entities that participate in joint electrical power supply projects authorized by s. 361.10, F.S.

presented to the Joint Legislative Auditing Committee on March 30, 2015, with a follow-up discussion on October 5, 2015.¹⁴

Public Service Commission Regulation of Retail Electric Service

The PSC's primary purpose,¹⁵ and its primary role relating to regulated electricity utilities,¹⁶ is ratemaking. Regulation of retail electric service in Florida varies based on the organization of the utility providing the service. There are three distinct types of electric utility organizations providing retail service in Florida: investor-owned electric utilities (defined as "public utilities" for purposes of PSC regulation), municipal electric utilities, and rural electric cooperatives. The PSC has ratemaking authority over only the investor-owned utilities.^{17, 18}

The Federal Energy Regulatory Commission (FERC) has authority to regulate rates for certain wholesale power sales,¹⁹ but it is not authorized to regulate rates for wholesale sales by any political subdivision of a state or any rural electric cooperative.²⁰ Accordingly, FMPA's rates and rate structure are not regulated by FERC.

Office of Public Counsel

The Office of the Public Counsel was created by the Legislature in 1974 to provide legal representation for the people of the state in utility-related matters in proceedings before the Public Service Commission (PSC) and in proceedings before counties pursuant to s. 367.171(8), F.S.²¹ The Public Counsel typically participates in cases that impact the retail rates of investor-owned electric, gas, water, and wastewater utilities.²² Because the PSC is not authorized to set rates for governmental utilities,²³ the Public Counsel cannot intervene in cases regarding the rates of such utilities.

¹⁴ At the October 5, 2015, meeting of the Joint Legislative Auditing Committee, FMPA indicated that it had addressed 10 of the 15 audit report findings and anticipated addressing the remaining findings by the end of 2015. FMPA committed to provide the committee with progress reports every 60 days until each of the audit report's findings have been addressed. The committee indicated that it may conduct additional meetings to discuss FMPA's progress.

¹⁵ *Chiles v. Public Service Nominating Council*, 572 So.2d 829, 833 (Fla. 1991).

¹⁶ See s. 366.01, et seq., F.S.

¹⁷ *Id.*

¹⁸ In *Lee County Electric Cooperative, Inc. v. Jacobs*, 820 So. 2d 297 (Fla. 2001), the Florida Supreme Court upheld an order of the Public Service Commission determining that it lacked jurisdiction over the *wholesale* rate structure of a rural electric cooperative.

¹⁹ 16 U.S.C. §824.

²⁰ 16 U.S.C. §824(f).

²¹ See ss. 350.061–350.0614, F.S.

²² Currently, the PSC has rate-setting authority over five investor-owned electric utilities, eight investor-owned natural gas utilities, and 149 investor-owned water and/or wastewater utilities. FLORIDA PUBLIC SERVICE COMMISSION, *Facts and Figures of the Florida Utility Industry*, March 2015, available at <http://www.psc.state.fl.us/publications/reports.aspx>.

²³ Section 367.022(2), F.S., exempts systems owned, operated, managed, or controlled by governmental authorities from PSC regulation and from the provisions of that chapter.

III. Effect of Proposed Changes:

Annual Financial Reporting by FMPA

The bill amends s. 163.01, F.S., the Florida Interlocal Cooperation Act of 1969, under which the FMPA was created. The bill requires any “entity created pursuant to this section that supplies electricity through an interlocal agreement to its member municipalities,” which would include only the FMPA, to file an annual report with the Public Service Commission, the Public Counsel, and each member municipality that participates in the electric power project. The report must contain an independently prepared financial statement for each individual generation asset, with each financial statement required to include:

- A balance sheet that reflects assets and liabilities associated with each generation asset.
- An income statement that reflects each generation asset’s operational and financial activities for the reporting period, with any gains or losses from hedging activities associated with the generation asset separately itemized.
- A statement of cash flows that identifies changes in the generation asset’s cash flows during the reporting period.
- The current fair market value for each generation asset, determined by assuming the price that a willing buyer would pay a willing seller for the generation asset, with neither party being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts, and assuming all risk of ownership, loss, and decommissioning, as applicable. The current fair market value statement must include the overall fair market value of the generation asset as a whole and each member municipality’s equity position net of the entity’s debt, based on the current fair market generation asset value. The current fair market value statement must include, after considering the market value of the generation assets, the net return of equity or the cost to exit the entity for each member municipality.

There are two issues with the reporting requirements. The first is that the reporting requirements appear to be an attempt to establish an alternative mechanism for determining the amount of an All-Requirements project participants’ withdrawal payment. This is based on the following:

- One of the issues in the Auditor General’s report was some municipalities’ inability to obtain, or dissatisfaction with, estimated withdrawal payments.²⁴
- The bill states:
WHEREAS, certain All-Requirements project contract provisions relating to the withdrawal of members are ambiguous, use a fixed discount rate rather than one based on current capital costs, and do not provide for independent verification by a withdrawing member.²⁵
- The reporting requirements build, step by step, towards establishing “the current fair market value for each generation asset.”

It is unknown what the All-Requirements project contracts provide relating to member withdrawal or calculation of withdrawal payments; the Auditor General report does not contain

²⁴ State of Florida Auditor General, *Operational Audit of Florida Municipal Power Agency, Report No. 2015-165*, March 2015, p. 27.

²⁵ Lines 59-63.

this information and a contract is not available. It can be determined, however, that the purpose of participation in the FMPA projects is:

- **Economies of Scale:** By coordinating their power needs, local utilities can build larger, more efficient power plants and diversify their power sources.
- **Access to Resources:** FMPA members have access to the resources of a statewide organization, including FMPA's professional staff and more than two dozen services.
- **Strength in Numbers:** Working together enables municipal utilities to pool their resources in beneficial ways, such as planning, operating, negotiating, advocating and more.²⁶

The purpose of participating in an FMPA project appears to be to pool resources to minimize costs and risks, not to invest in an asset that will appreciate and provide a profit upon its sale. Thus it is highly likely that the point of the contract would be to ensure that FMPA recovers all costs from participant members in the correct proportions, without cost-shifting among members. What would be relevant then is outstanding cost of the asset, and the proportion of that cost attributable to each member, not the asset's value.

The second issue is that "fair market value" is not the same concept when applied to assets in a regulated industry. In a regulated electricity market, the pool of potential buyers is limited; only another utility can buy the plant. And the pool is further limited in that a utility will buy a power plant only if it has a current or projected need for that particular type of plant. Therefore, to meaningfully project who might be a willing buyer, let alone the conditions and price for the transaction may be difficult.

Members of Governing Body of FMPA

The bill also requires that each member of the FMPA's Board of Directors be an elected official from a member municipality. Current board members who are not elected officials may continue to serve until expiration of their terms but no later than July 1, 2018.

Public Counsel Participation in FMPA Proceedings

The bill requires the Public Counsel:

- to provide representation (presumably legal representation for the people of the state as this is what the Public Counsel does) in proceedings before the FMPA;
- to recommend, by petition, the commencement of any proceeding or action of the FMPA, or to appear before the FMPA in any proceeding or action to any position which he or she deems to be in the public interest (again, presumable legal proceedings or actions);
- during any such proceeding, to engage in all forms of legal discovery; and,
- in any proceeding in which he or she has participated as a legal party, to seek judicial review of any determination, finding, or order of the FMPA in the name of the state or its citizens.

It is unclear what role the Public Counsel is intended to play in FMPA meetings as the FMPA does not conduct legal proceedings. Moreover, the bill does not specify precisely who the Public Counsel would represent before FMPA or how it would participate in FMPA's decision-making process.

²⁶ FLORIDA MUNICIPAL POWER AGENCY, *About Overview*, <http://fmpa.com/about/overview/> (last visited February 12, 2016).

PSC Jurisdiction over FMPA

The bill amends the definition of “public utility” in ch. 366, F.S., to include the FMPA, thereby subjecting the FMPA to the full scope of PSC regulation, but then the bill amends s. 366.04(1), F.S., to exclude the FMPA from the PSC’s ratemaking authority, its primary role in economic regulation. As such, it is unclear what additional authority, if any, the PSC would have over the FMPA.

The bill takes effect July 1, 2016.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

Not applicable.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 10 Article I of the Florida Constitution prohibits any law impairing the obligation of contracts. As is noted above, the financial reporting requirements appear to establish a method of calculating an All-Requirements Project member’s withdrawal payments. If these calculations and the resulting withdrawal payment amount conflict with the contractual provisions for establishing the member’s amount of withdrawal payments, the bill may be subject to challenge.

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

FMPA may incur costs to comply with the financial reporting requirements imposed by the bill.

C. Government Sector Impact:

None. While the bill appears to create duties for the Public Counsel and the PSC, these provisions are unclear and it does not appear that either entity will incur additional expenses.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 163.01, 350.0611, 366.02, and 366.04.

IX. Additional Information:**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.