

State of Florida



## Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

**DATE:** January 21, 2016

**TO:** Office of Commission Clerk (Stauffer)

**FROM:** Office of the General Counsel (Corbari, Lherisson)  
Division of Economics (Harlow, Margolis)  
Office of Industry Development and Market Analysis (Dowds, Marr)

**RE:** Docket No. 150185-EI – Amended Complaint by Erika Alvarez, Jerry Buechler, and Richard C. Silvestri against Florida Power & Light Company.

**AGENDA:** 02/02/16 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Edgar

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

### Case Background

On August 17, 2015, Florida Power & Light Company (FPL) customers, Erika Alvarez, Jerry Buechler, and Richard C. Silvestri (collectively referred to as Petitioners), filed a formal Complaint against FPL. Petitioners alleged that FPL's administration of its online residential solar rebate reservation program was unfair and violated Florida Statutes and Commission Orders governing energy conservation goals and programs and requested a formal hearing. On September 1, 2015, FPL filed a Motion to Dismiss Petitioners' Complaint with prejudice. On September 8, 2015, Petitioners filed a response in opposition to FPL's Motion to Dismiss.

On October 23, 2015, the Commission issued Order No. PSC-15-0496-FOF-EI, dismissing Petitioners' initial complaint, without prejudice, for failing to state a cause of action upon which relief could be granted and not conforming with the pleading requirements of Rule 25-22.036, Florida Administrative Code (F.A.C.). In its Order, the Commission granted Petitioners the opportunity to file an amended complaint, provided the amended complaint conformed to the filing requirements of Rule 25-22.036, F.A.C., and requested appropriate relief.

On November 6, 2015, Petitioners filed an Amended Complaint in response to the Commission's Order.<sup>1</sup> On November 30, 2015, FPL filed a Motion to Dismiss Petitioners Amended Complaint with prejudice.<sup>2</sup> Petitioners did not file a response to FPL's motion.

Neither party requested oral argument; however, pursuant to Rule 25-22.0022, F.A.C., the Commission has the discretion to hear from the parties if it so desires.

The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes (F.S.).

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<sup>1</sup> Document No. 07087-15, in Docket No. 150185-EI, Amended Complaint by Erika Alvarez, Jerry Buechler and Richard C. Silvestri against Florida Power & Light Company.

<sup>2</sup> Document No. 07629-15, in Docket No. 150185-EI, FPL's Motion to Dismiss Amended Complaint With Prejudice.

## Discussion of Issues

**Issue 1:** Should Florida Power & Light Company's Motion to Dismiss be granted?

**Recommendation:** Yes. Staff recommends that the Commission grant FPL's Motion to Dismiss and dismiss the Amended Complaint with prejudice because the Amended Complaint fails to demonstrate a cause of action upon which the requested relief may be granted, does not substantially comply with Rule 25-22.036, F.A.C., and fails to cure the deficiencies identified in the initial complaint. (Corbari, Lherisson)

### **Staff Analysis:**

#### Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action.<sup>3</sup> The moving party must show that, accepting all allegations as true, the petition fails to state a cause of action for which relief may be granted.<sup>4</sup> The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.<sup>5</sup> A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.<sup>6</sup> Thus, "the trial court may not look beyond the four corners of the Amended Complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side."<sup>7</sup> All allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.<sup>8</sup> Finally, pursuant to Section 120.569(2)(c), F.S., a petition shall be dismissed at least once without prejudice unless it conclusively appears from the face of the petition that the defect cannot be cured.<sup>9</sup>

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<sup>3</sup> Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000); Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

<sup>4</sup> Varnes v. Dawkins, 624 So. 2d at 350.

<sup>5</sup> Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

<sup>6</sup> Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000); Varnes v. Dawkins, 624 So. 2d at 350; and Rule 1.130, Florida Rules of Civil Procedure.

<sup>7</sup> Varnes v. Dawkins, 624 So. 2d at 350.

<sup>8</sup> Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So. 2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So. 2d 233, 235 (Fla. 4th DCA, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1st DCA, 1963).

<sup>9</sup> See also, Kiralla v. John D. and Catherine T. MacArthur Found, 534 So. 2d 774, 775 (Fla. 4th DCA 1988)(stating that a dismissal with prejudice should not be ordered without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action); and Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Amended Complaint of Rosario Rojo against Florida Power & Light Company.

### Petitioners' Amended Complaint

In their Amended Complaint, Petitioners allege FPL did not act in good faith during the administration of its two online residential solar PV rebate reservation program offerings in January 2015, as required by Commission Order Nos. PSC-11-0079-PAA-EG<sup>10</sup> and PSC-14-09-0696-FOF-EU.<sup>11</sup> Petitioners allege that FPL's initial rebate offering on January 14, 2015, was "unfair," which led to another offering on January 21, 2015, that "further exacerbated the situation." Petitioners contend that FPL's failure to administer the rebate offerings with good faith amounts to unjust and unfair treatment by FPL. Petitioners request that the Commission assess FPL penalties, pursuant to Section 366.095, F.S., of \$5,000, per day, per Petitioner. Petitioners request the penalties be assessed beginning January 14, 2015 (date of initial rebate offering), through the present.

### FPL's Motion to Dismiss

FPL asserts Petitioners' Amended Complaint fails to allege sufficient facts to state a cause of action upon which relief could be granted by the Commission and seeks improper relief. Specifically, FPL asserts that Petitioners' Amended Complaint: (1) fails to assert specific facts alleging an act or omission by FPL that resulted in a particular provision of a statute, rule, or Commission Order; and (2) seeks improper relief. Because the deficiencies contained in Petitioners' Amended Complaint cannot be cured, FPL requests that the Amended Complaint be dismissed with prejudice.

### Analysis

The Commission grants a motion to dismiss upon a finding that the pleading failed to state a cause of action upon which relief can be granted.<sup>12</sup> In order to determine whether a petition states a cause of action upon which relief may be granted, the Commission must examine the elements needed to be alleged under the substantive law on the matter.<sup>13</sup> If all the necessary elements of a cause of action are not properly alleged in a pleading that seeks affirmative relief, the pleading should be dismissed.<sup>14</sup>

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<sup>10</sup> Order No. PSC-11-0079-PAA-EG, issued January 31, 2011, in Docket No. 100155-EG, In re: Petition for approval of demand-side management plan of Florida Power & Light Company.

<sup>11</sup> Order No. PSC-14-0696-FOF-EU, issued December 16, 2014, in Docket Nos. 130199-EI, In re: Commission review of numeric conservation goals (Florida Power & Light Company); 130200-EI, In re: Commission review of numeric conservation goals (Duke Energy Florida, Inc.); 130201-EG, In re: Commission review of numeric conservation goals (Tampa Electric Company); 130202-EI, In re: Commission review of numeric conservation goals (Gulf Power Company); 130203-EM, In re: Commission review of numeric conservation goals (JEA); 130204-EM, In re: Commission review of numeric conservation goals (Orlando Utilities Commission); 130205-EI, In re: Commission review of numeric conservation goals (Florida Public Utilities Company).

<sup>12</sup> Id.

<sup>13</sup> Kislak v. Kredian, 95 So. 2d 510, 515 (Fla. 1957); Order No. PSC-14-0475-FOF-EI, issued September 8, 2014, in Docket No. 130290-EI – Initiation of formal proceedings of Amended Complaint No. 1115382E of Brian J. Ricca against Florida Power & Light, for failing to provide reasonable service; and Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In Re: Amended Complaint and petition of John Charles Heekin against Florida Power & Light Company.

<sup>14</sup> Id.

Rule 25-22.036, F.A.C., outlines the procedure for filing a formal complaint. A pleading that conforms to the rules provides the act or omission that constitutes the violation, the statute that is violated, injury suffered, and remedy or penalty sought.<sup>15</sup>

By Order No. PSC-15-0496-FOF-EI, issued October 23, 2015, the Commission dismissed Petitioners' complaint and request for formal hearing in this matter without prejudice, finding that Petitioners' complaint failed to state a cause of action upon which relief could be granted. In addition, the Commission found that Petitioners' complaint failed to comply with the requirements of Rule 25-22.036, F.A.C., because the complaint contained no specific facts asserting an act or omission by FPL that resulted in a violation of a particular provision of a statute, rule or Commission Order affecting Petitioners' substantive interests. The Order permitted Petitioners the opportunity to file an amended complaint, provided the amended complaint conformed to the pleading requirements of Rule 25-22.036, F.A.C., and sought appropriate relief within the Commission's jurisdiction. Because Petitioners' Amended Complaint again fails to state a cause of action upon which relief may be granted and fails to substantially comply with the Commission's Order, Staff recommends Petitioners' Amended Complaint be dismissed with prejudice for the reasons discussed below.

Petitioners argue that FPL did not act in good faith in administering its residential solar PV rebate offering as required by Commission Order Nos. PSC-11-0079-PAA-EG and PSC-14-09-0696-FOF-EU. However, as FPL argues, Petitioners fail to assert any specific facts describing actions or omissions by FPL that would constitute a violation of a particular provision of a statute, rule or Commission Order affecting Petitioners' substantive interests. Rather, Petitioners' broadly assert that FPL acted in bad faith in administering the rebate offerings. A complaint must sufficiently allege facts that, if established by competent evidence, would support the relief sought under the law.<sup>16</sup> Vague, broad general allegations are insufficient to state a cause of action.<sup>17</sup>

As in their original complaint, Petitioners provide no specific facts or evidence in their Amended Complaint describing how FPL violated Order Nos. PSC-11-0079-PAA-EG and PSC-14-09-0696-FOF-EU. By both Orders, the Commission set conservation goals for FPL and approved FPL's solar pilot programs with an annual expenditure cap. As the Commission stated in its Order dismissing Petitioners' original complaint, no statute, Commission rule or Commission Order prescribes a particular format or manner in which FPL, or any other utility, is required to administer its solar rebate reservations.

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<sup>15</sup> Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Amended Complaint of Rosario Rojo against Florida Power & Light Company.

<sup>16</sup> Kislak v. Kredian, 95 So. 2d 510, 514 (Fla. 1957); Order No. PSC-14-0475-FOF-EI, issued September 8, 2014, in Docket No. 130290-EI – Initiation of formal proceedings of Amended Complaint No. 1115382E of Brian J. Ricca against Florida Power & Light, for failing to provide reasonable service; and Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Amended Complaint of Rosario Rojo against Florida Power & Light Company.

<sup>17</sup> Id.

In addition, staff notes that the remedy sought by Petitioners is the Commission's penalty power provided in Section 366.095, F.S., which authorizes the Commission to impose a penalty upon a utility "that is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter." Willfulness is a question of fact.<sup>18</sup> The plain meaning of "willful" typically applied by the Courts is an act or omission that is done "voluntarily and intentionally" with specific intent and "purpose to violate or disregard the requirements of the law."<sup>19</sup> Petitioners have not alleged any act or omission that would constitute a violation of either Order No. PSC-11-0079-PAAEG or Order No. PSC-14-0696-FOF-EU, or provided any information that FPL refused to comply with or willfully violated either Order. Therefore, staff does not believe the requested relief is appropriate.

Staff conducted research into the substance of Petitioners' allegations in order to determine whether amendment of Petitioners' Amended Complaint could lead to a situation where the Commission would have jurisdiction to grant Petitioners relief. When viewed within the "four corners of the Amended Complaint" exclusive of all affirmative defenses/responses, assuming all alleged facts are true, and in a light most favorable to Petitioners, staff does not believe Petitioners' Amended Complaint states a cause of action that would invoke the Commission's jurisdiction or permit the Commission to grant the requested relief.

Under the circumstances, staff recommends that the Commission grant FPL's motion to dismiss with prejudice. Petitioners' Amended Complaint is not in substantial compliance with Rule 25-22.036, F.A.C. The rule requires that a written petition contain a statement of all issues of material fact, a concise statement of the ultimate facts alleged, a statement of the specific rules or statutes that apply, an explanation of how the alleged facts relate to the specific rules and statutes, and a statement of the relief sought by the petitioner stating precisely the action the petitioner wishes the agency to take. When viewed within the "four corners of the Amended Complaint" exclusive of all affirmative defenses/responses, assuming all alleged facts are true, and in a light most favorable to Petitioners, the Amended Complaint fails to state a cause of action that would invoke the Commission's jurisdiction or permit the Commission to grant the relief requested. Thus, pursuant to Section 120.569(2)(c), F.S., staff recommends that Petitioners' Amended Complaint should be dismissed with prejudice.

### Conclusion

Staff recommends that the Commission grant FPL's Motion to Dismiss and dismiss the Amended Complaint with prejudice because the Amended Complaint fails to demonstrate a cause of action upon which the requested relief may be granted, does not substantially comply with Rule 25-22.036, F.A.C., and fails to cure the deficiencies identified in the initial Amended Complaint.

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<sup>18</sup> Fugate v. Fla. Elections Comm'n, 924 So. 2d 74, 75 (Fla. 1st DCA 3006), citing, Metro. Dade County v. State Dep't of Env'tl. Prot., 714 So. 2d 512, 517 (Fla. 3d DCA 1998).

<sup>19</sup> Fugate v. Fla. Elections Comm'n, 924 So. 2d at 76.

**Issue 2:** Should the docket be closed?

**Recommendation:** Yes. If the Commission agrees with staff regarding Issue 1, then Petitioners' Amended Complaint should be dismissed with prejudice. (Corbari, Lherisson)

**Staff Analysis:** If the Commission agrees with staff regarding Issue 1, then Petitioners' Amended Complaint should be dismissed with prejudice.