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Attachments: 6.21.11 FPL Motion To Dismiss AFFIRM petition on PAA.pdf; 6.21.11 FPL Motion To Dismiss AFFIRM petition on PAA.docx

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 100356-EI
In re: Investigation into the design of Commercial Time-of-Use rates by Florida Power & Light, pursuant to Order No. PSC-10-0153-FOF-EI

c. Documents are being filed on behalf of Florida Power & Light Company.

d. There are a total of 9 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss AFFIRM's Petition on Proposed Agency Action, or in the Alternative Motion for More Definite Statement

Thank you for your attention and cooperation to this request.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the design of Commercial Time-of-Use rates by Florida Power & Light, pursuant to Order No. PSC-10-0153-FOF-EI.	DOCKET NO. 100358-EI FILED: June 21, 2010

FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS AFFIRM'S PETITION ON PROPOSED AGENCY ACTION, OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves the Commission to issue an order dismissing the Petition on Proposed Agency Action (the "Petition") filed by the Association for Fairness in Rate Making ("AFFIRM") on June 1, 2011, which challenged the Commission's Proposed Agency Action Order No. PSC-11-0216-PAA-EI, issued on May 11, 2011, in this docket (the "PAA Order"). In the alternative, FPL moves the Commission to require AFFIRM to provide a more definite statement regarding its ultimate facts alleged, material facts in dispute, and its relief sought. In support thereof, FPL states as follows:

I. MOTION TO DISMISS

The Petition should be dismissed because AFFIRM has failed to identify an injury in fact affecting the substantial interests of AFFIRM or its members which is of sufficient immediacy to give it standing to protest the PAA Order.

In setting out the pleading requirements for a petition, Rule 28-106.201(2)(b), Florida Administrative Code, provides among other things that:

> (2) All petitions filed under these rules shall contain:
> (b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and **an explanation of how the petitioner's substantial interests will be affected by the agency determination**; (emphasis added)

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The accepted test for "substantial interests," and thus standing, is set forth in *Agrico Chemical Co. v. Dep't of Environmental Regulation,* 406 So. 2d 478, 482 (Fla. 2d DCA 1981), wherein the Second District Court of Appeal addressed the issue of "substantial interest" standing, explaining that the petitioner must demonstrate that: 1) he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. As the Court further elucidated, "[t]he first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." To prove standing, the petitioner must satisfy both prongs of the *Agrico* test. *Ybor IIL Ltd. v. Florida Housing Finance Corp.*, 843 So. 2d 344, 346 (Fla. 1st DCA 2003). The "injury in fact" must be both real and immediate and not speculative or conjectural. *International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission*, 561 So. 2d 1224, 1225-26 (Fla. 3d DCA 1990).

The Petition fails to allege any harm to AFFIRM or its members that is either sufficient or immediate. Rather, the Petition simply makes sweeping generalizations suggesting that FPL's existing rates, including Time of Use ("TOU") rates, could be improved in unspecified ways. For example, in the "Statement of Substantial Interests" in the Petition, AFFIRM broadly claims that "AFFIRM's members require adequate, reasonably priced electricity in order to conduct their businesses consistently with the needs of their customers and ownership." AFFIRM further generalizes, in reference to the PAA, that "[t]hese proposed decisions deny AFFIRM's members and other commercial customers the fair, just, and reasonable rates to which they are entitled under statute." And in its discussion of the "sufficient immediacy," AFFIRM only claims that "[t]he purpose of this proceeding is to determine the merits of FPL's time of use base rates and time of use fuel cost recovery rates; the substantial interests of AFFIRM is to ensure that the base

rates and fuel rates paid by its members are fair, just and reasonable." Likewise, in its "Statement of Ultimate Facts Alleged" and its "Material Facts in Dispute, AFFIRM offers nothing beyond generalized claims about FPL rates.

AFFIRM fails to allege any specific facts showing injury to its members as a result of FPL's existing TOU rates. AFFIRM alleges no specific costs actually incurred by its members, or that would be incurred by its members, as a consequence of FPL's existing TOU rates. AFFIRM likewise alleges no specific benefits that its members forego because FPL's TOU rates are not designed differently.

It is difficult to see how AFFIRM ever could allege harm arising from optional TOU rates available to its members. AFFIRM's members are not required to take service under the General Service Demand Time of Use ("GSDT") rate, or any of the various other optional rates available to its members. The Commission recently concluded that the terms of an optional rate do not constitute sufficient, immediate injury to confer standing for a PAA protest such as this upon customers who have no obligation to take the rate. *In Re: Petition For Authority To Implement A Demonstration Project Consisting Of Proposed Time-Of-Use And Interruptible Rate Schedules And Corresponding Fuel Rates In The Northwest Division On An Experimental Basis And Request For Expedited Treatment, By Florida Public Utilities Company*, Docket No. 100459-EI, Agenda Conference held June 14, 2001. As specifically discussed by the Commission in that docket, "the fact that this [rate] is optional" creates a struggle "to find the injury here."[1]

[1] *See* June 14, 2011 Agenda Conference Transcript at p. 21. While that determination was in regard to an experimental rate provided under S. 366.075, F.S., the situation is analogous in that the Commission clearly recognized the lack of sufficient immediate injury to a party that is not required to take service under an optional rate.

Furthermore, AFFIRM continually refers to "business customers". AFFIRM has no standing to represent all business customers. Nor does any reference to business customers indicate to FPL or to the Commission a specific injury that must be alleged by AFFIRM.

Nor does the fact that AFFIRM intervened in Docket No. 080677-EI demonstrate that it has standing to protest proposed agency action in this separate docket. AFFIRM is not a party to this docket. Rule 28-106.201(2)(b), F.A.C., includes a specific requirement that a petitioner include in its protest of proposed agency action "an explanation of how the petitioner's substantial interests will be affected by the agency determination." The "agency determination" in question here is the PAA Order. The Petition provides no meaningful explanation of how AFFIRM's or its members' substantial interests would be affected by the PAA Order. AFFIRM has failed to comply with Rule 28-106.201(2)(b), F.A.C., and its Petition accordingly should be dismissed.

II. MOTION FOR MORE DEFINITE STATEMENT

If the Commission does not dismiss the Petition, it should require AFFIRM to provide a more definite statement regarding material and ultimate facts alleged and relief sought.

A motion for more definite statement is directed to the vagueness and ambiguity of a pleading. *See In Re: Objection to Notice of Intent by Aloha Utilities, Inc.*, 89 FPSC 4:56 (F.P.S.C. 1989) (granting motion for more definite statement where party failed to specify the nature of its objection); *In Re: Complaint of N.P.B. Holdings, Inc. v. Seacoast Utilities for Failure to Refund Water and Sewer Line Installation Costs in Palm Beach County*, 88 FPSC 5:31 (F.P.S.C. 1988) (directing petitioner to "file a more definite statement of its case, which shall specify the nature and basis of its claims and the amount of a refund for which recovery is

sought.").[2] Thus, the function of a motion for a more definite statement is to require that a vague, indefinite, or ambiguous pleading be amended in order to enable the responding party to intelligently discern the issues to be litigated and to properly frame its answer or reply." *Conklin v. Boyd*, 189 So. 2d 401, 404 (Fla. 1st DCA 1966); *Miller v. Bill Rivers Trailers, Inc.*, 450 So. 2d 334, 334-35 (Fla. 1st DCA 1984). *Miller*, for example, involved an employee who sued his employer for breach of contract arising from the employer's failure to pay commissions promised in exchange for securing certain sales orders. *Id.* at 334. The complaint, however, failed to allege any specific amount as, or computational method for determining, the appropriate commission. *Id.* at 334-35. The court recognized that a motion for more definite statement was the proper vehicle for obtaining more details regarding the damages sought. *Id.* at 335.

A. AFFIRM's vague references to "available rates" for business customers could be read as impermissibly broadening the scope of the proceeding beyond its intended focus on a new TOU rate option

On March 17, 2010, the Commission issued Order No. PSC-10-0153-FOF-EI (Final Order) in Docket No. 080677-EI.[3] The Final Order was a culmination of the rate case proceeding that commenced on March 18, 2009, with the filing of a petition for a permanent rate increase by FPL. One of the issues raised in the rate case was the design of FPL's TOU rates for commercial customers. While the Commission approved FPL's proposed TOU design, the Commission's Final Order directed FPL to work with AFFIRM, and any other parties who wish to participate, to explore a new TOU option for commercial customers and to provide a report to the Commission by August 1, 2010. The current docket was opened to investigate that issue.

[2] *See also* Fla. R. Civ. P. 1.140(e) ("If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading.")

[3] Order No. PSC-10-0153-FOF-EI, issued March 17, 2010, in Docket No. 080677-EI, *In re: Petition for increase in rates by Florida Power & Light Company.*

Thus, the issue the Commission preliminarily decided in this case is whether a new TOU rate option should be made available to commercial customers.

AFFIRM's vague allegations in the Petition fail to maintain this focus on a new TOU rate, however. For example, AFFIRM states that "FPL's medium sized business customers are heterogeneous in nature and the menu and application of available rates to such customers results in an unfair, unjust and unreasonable burden of costs...." This statement appears to call into question *all* rates available to medium sized customers. Similarly, AFFIRM claims that "business customers served under FPL's rates pay demand charges that are set unjustifiably at a rate that does not recover all demand related costs, and the deficiency in recovery of demand related costs results in an excess recovery of demand related costs through base energy charges." Here again, AFFIRM's statements are not limited to TOU rates. Additionally, throughout its "Material Facts in Dispute," AFFIRM makes numerous references to rate design in general, without specific focus on a new TOU rate. In contrast, the PAA Order is specifically tailored to the issues in the case surrounding the need for a new TOU rate. AFFIRM should be required to clarify and refine its Petition by properly focusing on the need for a new TOU rate that is the subject of the PAA Order.[4]

B. AFFIRM should provide a more definite statement regarding relief sought

In its Petition, AFFIRM's relief requested indicates:

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[4] Alternatively, if AFFIRM's repeated failure to distinguish between TOU and non-TOU rates is intentional and AFFIRM truly intends its Petition to challenge all of FPL's rates for commercial customers, than all allegations of the Petition that do not refer specifically to TOU rates should be struck. A pleading or part of a pleading is subject to a motion to strike on the basis that the material is "redundant, immaterial, impertinent, or scandalous." *Hodges v. Buckeye Cellulose Corp.*, 174 So. 2d 565, 1340 (Fla. 1st DCA 1965). A motion to strike a matter as immaterial or impertinent should be granted if the material is wholly irrelevant and can have no bearing or influence on the claims presented. *Abruzzo v. Haller*, 603 So. 2d 1338, 1340 (Fla. 1st DCA 1992).

> Petitioner seeks a final order from the Commission directing FPL to: (a) redesign its menu of time of use rates available to medium sized business customers in a revenue neutral manner so that demand related charges in all months of the year are placed on each customer based on the monthly contributions that such customer's load makes to FPL's monthly system peak, using a methodology that measure the customers' monthly contributions to the monthly system peak during the hours in each month in which FPL's monthly system peak load have been observed to occur; and (b) provide a structure for time of use fuel rates under which the rate charged by FPL varies during different time periods (daily, monthly and seasonally) and reflects the variance in FPL's costs of fuel and purchased power per kWh of energy generated or acquired by FPL.

Rule 28-106.201(2), F.A.C., requires that the petitioner state "precisely the action petitioner wishes the agency to take with respect to the agency's proposed action." The statement of relief sought in the Petition is vague, broad and provides minimal insight into the rate design AFFIRM seeks. While AFFIRM discusses its desire for FPL to "redesign its menu of time of use rates" in order to place demand charges on each customer based on contributions to monthly system peaks in hours in each month in which the peak has been observed, this simply is insufficient for FPL to meaningfully respond. This vague reference to a "menu" of options setting demand charges fails to provide FPL the information it needs to respond to AFFIRM's assertions. To continue the metaphor, FPL must know what entrees AFFIRM wishes to be served before it can possibly respond as to the feasibility and appropriateness of serving them.

In regard to the TOU fuel factors, FPL has already indicated it is willing to study the issue and report to the Commission through testimony in the fuel docket. One would expect AFFIRM to concur that the issue should be followed up and welcome FPL's willingness to do so. Thus, when AFFIRM challenges the PAA Order with respect to the treatment of TOU fuel factors, it is unclear what further relief AFFIRM might possibly be seeking. Once again, AFFIRM's vague pleading necessitates a more definite statement.

Pursuant to Rule 28-10.204(3), FPL conferred with AFFIRM's counsel regarding the foregoing motions. AFFIRM's counsel stated that AFFIRM has no objection to the motion for a more definite statement but does not acquiesce in the merits of the petition for either motion.

WHEREFORE, FPL respectfully requests that the Commission dismiss AFFIRM's Petition challenging the PAA Order in this docket or, in the alternative, that the Commission require AFFIRM to provide a more definite statement regarding its relief sought.

Respectfully submitted this 21st day of June, 2011.

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By: *_/s/ John T. Butler_*

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CERTIFICATE OF SERVICE

Docket No. 100358-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on June 21, 2011 to the following:

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