Eric Fryson

From:	Moncada, Maria [Maria.Moncada@fpl.com]
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To:	Filings@psc.state.fl.us
Cc:	Butler, John
Subject:	Electronic Filing / Dkt 120040-EI / FPL's Motion to Dismiss Wellington A. Homeowners Association Inc.'s Amended Complaint with Prejudice
Attachments:	Docket No 120040-EI - FPL's Motion To Dismiss Amended Complaint.pdf; Docket No. 120040-EI - FPL's Motion To Dismiss Amended Complaint.docx

Electronic Filing

a. Person responsible for this electronic filing:

Maria J. Moncada, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
561-304-5795
maria.moncada@fpl.com

b. Docket No. 120040 - EI
Complaint against Florida Power & Light Company, by Wellington A Homeowners Assoc., Inc., for alleged failure to properly supervise and inspect work to be, and performed, by Robert C. Ambrosius d/b/a One Call Property Service, Inc.

c. The Document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 15 pages

e. The document attached for electronic filing is Florida Power & Light Company's Motion To Dismiss Wellington A. Homeowners Association Inc.'s Amended Complaint With Prejudice.

Maria J. Moncada, Esq.
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408
561-304-5795
maria.moncada@fpl.com

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint against Florida Power & Light Company, by Wellington A Homeowners Assoc., Inc., for alleged failure to properly supervise and inspect work to be, and performed, by Robert C. Ambrosius d/b/a One Call Property Service, Inc.	Docket No. 120040-EI Filed: July 11, 2012

FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS WELLINGTON A. HOMEOWNER'S ASSOCIATION INC.'S AMENDED COMPLAINT WITH PREJUDICE

Florida Power & Light Company ("FPL"), pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves to dismiss Wellington A. Homeowners Association, Inc.'s ("Wellington HOA") Amended Complaint with prejudice for failure to state a claim upon which relief can be granted. In support of dismissal, FPL states:

I. INTRODUCTION

On February 13, 2012, Wellington HOA commenced this proceeding arising from a dispute between Wellington HOA and an independent roofing contractor, One Call Property Services, Inc. ("One Call"). Wellington HOA alleges that it contracted with One Call to perform roofing work, which included repairs and the application of a non-leaking reflective coating to its flat roof. Am. Compl. ¶¶ 31-32. As part of the contract terms, One Call agreed to provide Wellington HOA with a seven year manufacturer's material warranty and a seven year warranty on workmanship. Am. Compl. ¶ 38. Pursuant to the contract, One Call commenced and completed the repairs and application of the reflective coating to the roof and was paid by Wellington HOA. Am. Compl. ¶ 34. Application of a reflective roof coating is a Commission-approved conservation measure included in FPL's Residential. Accordingly, Wellington HOA received an incentive certificate from Building Envelope Program requirements and received an incentive payment from FPL that was applied towards payment for the roofing work. Am.

Compl. ¶ 35[1] According to the Amended Complaint, several months after One Call repaired and applied the reflective roof coating, Wellington HOA's roof began to deteriorate. Am. Compl. ¶¶ 39-40. After several unsuccessful attempts to fix the problem, One Call refused to provide additional repair services allegedly in violation of its contractual warranties. Am. Compl. ¶¶ 39-40.

Approximately three years later, Wellington HOA turned to FPL for relief, alleging that FPL failed to supervise One Call. Wellington HOA alleges that the reflective coating product selected by One Call is not compatible with flat roofs, and as a result, it lost conservation benefits and will need to repair or replace the entire roof. Am. Compl. ¶¶ 9, 45, 50, 55. On May 14, 2012, the Commission entered an order finding that the initial Complaint failed to cite any statute, rule or order that FPL violated and the facts that support such violation. Accordingly, the Commission directed Wellington HOA to provide "a more definite statement identifying each rule, statute, or order that is alleged to have been violated by FPL, and the factual basis for each such allegation."

On June 14, 2012, Wellington HOA amended its complaint, but the chief factual allegations remain unchanged. Wellington HOA again alleges that One Call's misapplication of the reflective coating on its flat roof resulted in lost conservation benefits and the need to repair or replace the roof. Wellington HOA now goes on to claim that its contractual dispute with One Call is tantamount to a violation by FPL of this Commission's Demand Side Management ("DSM") orders, and asserts that FPL should rescind and be penalized for the $8,750 rebate that

[1] Throughout the Amended Complaint, Wellington HOA improperly uses interchangeably the "C/I Building Envelope Program" which concerns FPL's commercial customers and the "Residential Building Envelope Program" which concerns FPL's residential customers. *See* Am. Compl. ¶¶ 10, 12, 35, 59, 60, 61, 62, 67, 70 and 71. The incentive in question was actually submitted and paid under the Residential Building Envelope Program. Wellington HOA attaches the applicable Residential Building Envelope Program Standards to the Amended Complaint as Exhibit "3".

FPL paid Wellington HOA for its energy conservation improvement and recovered under the Energy Conservation Cost Recovery Clause (ECCR).

As demonstrated below, Wellington HOA once again fails to identify any rule, statute, or order violated by FPL, or a viable factual basis for any purported violation. The Commission's Order approving the reflective roof coating conservation measure does not require FPL to inspect every applicant's rooftop. No rule, statute, or order requires such inspections, and there is no authority that requires that FPL supervise or guarantee an independent contractor's performance. Furthermore, FPL's recovery of the costs it incurred in implementing a Commission-approved program pursuant to approved program standards violates no rule, statute or order. In short, Wellington HOA's unique experience with One Call does not constitute grounds for rescission or the imposition of penalties.

II. FACTUAL BACKGROUND

Residential Building Envelope Program - Reflective Roofs

In 2006, FPL petitioned the Commission for approval of two new DSM programs and revisions to seven existing DSM programs. Order No. PSC-06-0740-TRF-EI ("Order No. 06-0740") at p. 1. Among its requests, FPL sought to add the reflective roof conservation measure to its Residential Building Envelope Program. *Id.* The Commission approved FPL's new and revised DSM programs, including the reflective roofs measure, finding that the programs:

- meet the policy objectives of FEECA by producing energy savings and reductions to weather-sensitive peak demand;
- are monitorable and will continue to yield measurable results; and
- are cost-effective under the Participants, Rate Impact Measure (RIM), and Total Resource Cost (TRC) test

Order No. 06-0740 at pp.3-4

The reflective roof conservation measure consists of an independent contractor applying or installing a reflective product with specified solar reflectance properties to FPL customers'

facilities. Residential Building Envelope Program Standards, attached as Exhibit 3 to Am. Compl., at p. 3. All program measures must be installed by a Participating Independent Contractor (PIC) in accordance with the manufacturer's recommendations and specifications. *Id.* at p. 1. The PIC must comply with all local, state, and national rules, as well as permits and codes pertaining to the installation of the program measure. *Id.* at p. 2. Customers who install a qualifying measure and comply with the program requirements receive an incentive certificate from FPL that serves as partial payment for the installation. *Id.* at p. 5. FPL recovers through the Energy Conservation Cost Recovery Clause ("ECCR") the costs it prudently incurred in administering and implementing the program. Am. Compl. ¶ 25; Rule 25-17.015, F.A.C.

Wellington HOA engages One Call

In early 2009, Wellington HOA met on several occasions with One Call, a PIC, and ultimately contracted One Call to perform roof repairs and to apply a reflective roof coating. Am. Compl. ¶¶ 28-31. One Call selected KoolSeal 63-600 as the reflective coating product to apply to Wellington HOA's flat roof. ¶ 33. As part of the contractual arrangement, Wellington HOA received a seven-year labor warranty from One Call and a seven-year materials warranty from the reflective coating manufacturer, Sherwin Williams/KST-Kool Seal. Am. Compl. ¶ 38 and Ex. 8. FPL was not a party to the contract between Wellington HOA and One Call.

One Call completed the roof project in May 2009. Wellington HOA paid One Call for the roofing work, using an $8,750 FPL incentive certificate as partial payment. Am. Compl. ¶ 37, Ex. 7. Several months later, the roof began to deteriorate. ¶ 39. One Call made several attempts to repair the roof but ultimately refused to provide additional services, in violation of its contractual warranty. ¶ 40.

Wellington HOA alleges that One Call misapplied the roof coating because the *September 2009* manufacturer's specification for Kool Seal 63-600 states that the product should

not be used on flat roofs with a slope of a half inch or less per foot. ¶ 46. According to Wellington HOA's Amended Complaint, the Kool Seal 63-600 application failed and that failure "caus[ed] the loss of all demand conservation benefits anticipated to be derived . . . ." Am. Compl. ¶ 45. However, Wellington HOA neither attaches the specification sheet in effect at the time One Call completed the work (May 2009), nor alleges that the flat roof prohibition was in effect during that time. Wellington HOA does, however, attach a seven-year materials warranty it received for its roof from the reflective coating manufacturer, Sherwin Williams/KST-Kool Seal, dated May 2, 2009. Am. Compl. ¶ 38 and Ex. 8.

Wellington HOA's allegations against FPL

As a consequence of One Call's alleged misapplication of the reflective roof coating, Wellington HOA instituted this proceeding against FPL. Wellington HOA asserts three basic claims:

- FPL failed to perform pre- and post- application inspections of the roof to determine the appropriateness of the coating. ¶¶ 53, 55;
- FPL must rescind the recovery of costs associated with Wellington HOA's transaction because energy savings were not realized. ¶¶ 60-64; and
- The Commission should impose a penalty on FPL for recovering costs associated with the One Call/Kool Seal transaction. ¶¶ 65-71.

Each of these claims fails as a matter of law.

III. MOTION TO DISMISS STANDARD

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is "whether, with all factual allegations in the petition taken as true and construed in the light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted." *In re Complaint of Sallijo A. Freeman Against Florida Power & Light Co. for Violation of Rule 25-*

6.105, F.A.C., Docket No. 080039-EI, Order No. PSC-08-0380-PCO-EI (June 9, 2008). If the Commission cannot grant the relief, the Complaint must be dismissed. *Id.*

In considering a motion to dismiss, the Commission is confined to an examination of the complaint and any attached documents. *In re Verizon Florida Inc.*, Docket No. 030869-TL, Order No. PSC-03-1172-FOF-TL (Fla. P.S.C. October 20, 2003) (citing *Posigan v. American Reliance Ins. Co. of New Jersey*, 549 So. 2d 751, 754 (Fla. 3d DCA 1989)). The Commission may also take notice of a record filed in another case, where the judgment in such case is pled. *Id.* Under Florida law, if an attached document negates a pleader's cause of action, the plain language of the document will control and may serve as the basis for a motion to dismiss. *Id.* (citing *Striton Properties, Inc. v. The City of Jacksonville Beach, Florida*, 533 So. 2d 1174, 1179 (Fla. 1st DCA 1988)).

Pursuant to Rule 25-22.036(3)(b), F.A.C., a filing to initiate a formal complaint proceeding, must contain the rule, order, or statute that has been violated, and the actions that constitute the violation. Wellington HOA's Amended Complaint cites numerous rules, orders and statutes, but it does not point to a single directive within those authorities that FPL violated and cannot allege action on the part of FPL that constitutes a purported violation.

IV. WELLINGTON HOA'S COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

A. No Rule, Statute or Order Requires FPL To Inspect or Supervise All Roof Coating Applications

Wellington HOA alleges that FPL "failed to provide inspections or supervision in connection with the installation of a reflective roof coating" on Wellington HOA's property under FPL's Residential Building Envelope Program. Am. Compl. ¶¶ 9, 36 and 55. According to Wellington HOA, FPL "has a duty under PSC approved incentive programs to conduct pre- and post- installation inspections to determine the eligibility of conservation measures such as

reflective roof coatings if it is allowed to recover expenditures through the Energy Conservation Cost Recovery Clause of its Demand Side Management Plan." Am. Compl. ¶ 53. Wellington HOA cites no rule, order or statute that imposes such a duty on FPL.

Wellington HOA's Amended Complaint points to numerous Commission orders and regulations, but only one order is at all relevant to this proceeding and it is not helpful to Wellington HOA. Order No. PSC-06-0740-TRF-EI is the order in which the Commission approved the residential reflective roofs conservation measure under the Residential Building Envelope Program. Nothing in Order No. PSC-06-0740 requires FPL to physically inspect the roof of each customer who applies for a rebate to ensure the compatibility of the product selected by the PIC and the homeowner. Wellington HOA has not – and cannot – point to any such mandate in the body of the order. On this ground alone, Wellington HOA's theory fails.

Going further, the Commission acknowledged when it approved the reflective roof coating conservation measure that FPL will not inspect every roof top. The description of the Residential Building Envelope Program containing the reflective roof coating measure, approved by the Commission in Order No. PSC-06-0740 states: "FPL will perform post installation inspections on a *random* basis for a *sample* of participants prior to the payment of incentives." Docket No. 060408, Document No. 04421-06, Appendix A at p. 2 (emphases added).[2] Likewise, the detailed Residential Building Envelope Program Standards ("Program Standards") provide that FPL "*reserves the right* to verify each installation" and that the independent contractor "must allow FPL to perform a pre-installation inspection *(if deemed necessary)*." Am. Compl., Exh. 3, at pp. 3 and 4 (emphases added). These terms make clear that inspections are optional, not required.

[2] Wellington HOA references this document in its Amended Complaint at ¶ 58 ("in Connection with Order 06-0740-TRF-EI, FPL has petitioned the Commission for program modifications . . . .").

Additionally, nothing in the Order, the DSM Plan, or the detailed Program Standards requires FPL to determine product compatibility for each application. FPL leaves that determination to the experts: the licensed professional roofer and the product manufacturer. *See* Program Standards at p. 1 (requiring that the reflective coating "be installed by a [PIC] in accordance with the manufacturer's recommendations"). In fact, the only "source" to which Wellington HOA points for its proposition that FPL should have examined the roof for the compatibility of the roof coating is One Call's advertising materials. An independent contractor's advertisements do not constitute a rule, statute or order. Nor can such third party advertisements create contractual (or regulatory) obligations for FPL. Indeed, Wellington HOA does not – and cannot – allege that FPL was even aware of the misrepresentations contained in One Call's advertisements.[3]

Wellington HOA effectively seeks to make FPL a guarantor of the work performed by all independent contractors, but it can cite to no rule, statute or order that requires FPL to guarantee independent contractors' workmanship.[4] The Commission's approval of the Residential Building Envelope Program acknowledged that FPL would not inspect every reflective roof coating application. Accordingly, Wellington HOA's claim fails.

B. <u>Wellington HOA's Rescission Claim Fails as a Matter of Law</u>

Wellington HOA alleges that, because the coating on its roof failed, FPL should not have recovered costs related to "the complained of One-Call [sic] and Kool Seal transactions and activities." Am. Compl. ¶¶ 63-64. To support its rescission claim, Wellington HOA points to Order Nos. PSC-94-1313-FOF-EG and PSC 06-0740 and Rule 25-17.015(5). As demonstrated

[3] To be sure, FPL was not aware of One Call's misrepresentations.

[4] Wellington HOA received a 7-year warranty for both the labor performed by One Call and the roof coating material manufactured by Sherwin Williams/KST-Kool Seal. Am. Compl. ¶¶ 30, 32 and Ex. 8. If, as alleged, One Call misapplied the product, Wellington HOA can avail itself of the full set of legal rights afforded by these warranties.

below, however, Wellington HOA does not – and cannot – identify any actions by FPL that violate these (or any other) authorities.

Order No. PSC-94-1313-FOF-EG

In Order No. PSC-94-1313-FOF-EG ("Order No. 94-1313"), the Commission set DSM goals for FPL for the years 1994-2003 based on the Rate Impact Measure test. Wellington HOA alleges that the manner in which One Call applies Kool Seal 63-600 to buildings with flat roofs caused FPL to fail to meet the Participant and RIM tests "as required under Order No. 94-1313." Am. Compl. ¶ 60. Wellington HOA fails to cite any such requirement in Order No. 94-1313, and no such requirement exists. Order No. 94-1313 does not require that future-proposed DSM measures, to be evaluated in subsequent DSM goal and DSM plan proceedings, pass the Participant and RIM tests. And nothing in Order No. 94-1313 requires that each individual participant achieve a specified level of benefits from future programs in order for FPL to seek cost recovery of its costs.

Order No. 06-0740

In the same vein, Wellington HOA also alleges that FPL violated Order No. 06-0740 by seeking cost recovery even though Wellington HOA did not realize its anticipated conservation benefits. Wellington HOA's understanding of DSM programs is fundamentally flawed. The Commission approved the reflective roof measure in Order No. 06-0740 due to its energy savings and cost-effectiveness.[5] Energy savings and cost-effectiveness measurements assume appropriate installations, and the projected measures are representative of estimated savings realized by an average customer. While Wellington HOA might not have received conservation

[5] The Commission found that reflective rooftop measure meets FEECA policy objectives, is monitorable and will continue to yield measurable results and is cost-effective. Order No. 06-0740 at pp. 3-4.

benefits due to an alleged faulty application, it fails to explain how a result unique to its own experience and outside FPL's control constitutes a violation of Order No. 06-0740.[6]

Furthermore, it is without question that One Call's workmanship was, in this instance, the cause of Wellington HOA's alleged failure to achieve its anticipated savings. Am. Compl. ¶ 45 ("It is clear that the Kool Seal applied to the Premises' roof has failed, causing the loss of all demand conservation benefits anticipated to be derived in connection therewith . . ."). As explained above, nothing in Order No. 06-0740 (or the Commission's approval of DSM programs in general) requires FPL to guarantee the work of independent contractors.

Section 25-17.015, Florida Administrative Code

Section 25-17.015 provides that "each utility over which the Commission has ratemaking authority may seek to recover its costs for energy conservation programs." Recovery is not based on individual results and is not dependent on the workmanship of independent contractors selected by participants. Rather, the standard for recovery under the ECCR is whether the overall costs of the program were prudent and attributable to a Commision-approved program. *See* Am. Compl. ¶ 25 (citing PSC Order No. 03-1339-PAA-EG (FPL "is required to file a Demand Side Management (DSM) Plan for our approval and is entitled to seek recovery of associated expenditures.")).

Here, Wellington HOA's Amended Complaint expressly concedes that, at the time FPL sought recovery, the reflective roof coating measure was "attributable to a Commission-approved program (*i.e., the* Residential Building Envelope Program). Am. Compl. ¶¶ 8, 11, 13, 58-59; *see also* Order No. 06-0740. Moreover, Wellington HOA's Amended Complaint sets forth no viable allegation that FPL's implementation was imprudent. Wellington HOA does not allege that FPL

[6] Wellington HOA does not allege that the reflective roof measure does not provide cost-effective energy savings under any circumstance. Indeed, Wellington HOA may still achieve energy savings by pursuing its warranty and contractual rights against One Call or the manufacturer and receiving an appropriate roof coating application.

disregarded evidence that One Call was performing poorly, that FPL knew One Call had misapplied incompatible reflective products on customers' premises, or that, at the time One Call applied the reflective coating on Wellington HOA's roof, FPL was aware that the application would cause damage to the roof. [7] The Amended Complaint alleges only that FPL failed to inspect or supervise One Call's application. Order No. 06-0740 imposes no obligation, however, for FPL to supervise the work of the independent contractors or to inspect each and every rooftop. Therefore, such allegations are insufficient, as a matter of law, to serve as a basis for any finding of imprudence.

In sum, Section 25-17.015 provides no support for Wellington HOA's rescission claim. FPL appropriately sought ECCR recovery for costs incurred in implementing the Commission-approved reflective roof coating measure of the Residential Building Envelope Program. Wellington HOA sets forth no cognizable claim that FPL was imprudent or that the costs were not attributable to a Commision-approved program.

C. No Viable Basis Exists for Imposing a Penalty or Modifying the Residential Building Envelope Program

Wellington HOA's final claim asks the Commission to impose a penalty upon FPL for its recovery of costs in connection with the One Call and Kool Seal transactions and activities, and to eliminate from FPL's Residential Building Envelope Program the application of Kool Seal 63-600 upon flat roofs. Am. Compl. ¶ 70.

[7] Nor can Wellington HOA, in good faith, cure this deficiency by make such allegations. Wellington HOA's duly signed incentive certificate application, conspicuously absent from the Amended Complaint, plainly states that the manufacturer performed a walk through quality assurance inspection. In light the manufacturer's quality assurance, there can be no good faith allegation that FPL should have known that the reflective coating would cause the roof to deteriorate.

No grounds for a penalty

As explained in detail above, FPL appropriately sought ECCR recovery. The reflective roof coating conservation measure was approved by the Commission, and no order, rule or statute requires FPL to supervise or guarantee the workmanship of an independent contractor. Wellington HOA fails to identify any order, rule or statute providing that its unique experience resulting from One Call's alleged misapplication of the roof coating product constitutes grounds for a penalty.

Wellington HOA's Request for Modification is Moot

Wellington HOA's request to eliminate from the program the use of Kool Seal 63-600 upon flat roofs is moot. The Program Standards expressly and unambiguously require that "all qualifying Residential Building Envelope Program products must be installed according to the manufacturer's recommendations and specifications." Am. Compl., Ex. 3 at pp. 1 and 3. The Kool Seal 63-600 specification sheet dated September 2009 and attached to Wellington HOA's Amended Complaint states that the product should not be used on flat roofs with a slope of ½ inch or less per foot. Am. Compl. ¶ 46 and Ex. 2 at p.2. Thus, post September 2009, PICs are prohibited, based on this specification, from applying Kool Seal 63-600 on flat roofs.[8] Because no further action by this Commission is required to effectuate Wellington HOA's modification request, this claim for relief is moot and must be dismissed. *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) (A case is moot when it presents no actual controversy, when the issues have ceased to exist, or, stated differently, when a judicial determination can have no actual effect.).

[8] This assumes, for purposes of this Motion, that the specification sheet attached to Wellington HOA's Amended Complaint is current.

V. CONCLUSION

The Commission found that Wellington HOA's original Complaint failed to identify a specific rule, statute or order that FPL violated and the facts that support each such alleged violation. The Amended Complaint suffers the same fatal flaw. Wellington HOA cites no rule, statute or order that requires FPL to (a) supervise the independent contractors hired by customers, (b) inspect the premises of every customer who applies reflective roof coating to ensure workmanship or compatibility, or (c) guarantee the workmanship of the independent contractor. Nor does Wellington HOA cite any authority that conditions FPL's ECCR recovery on the level of conservation benefits achieved in individual transactions. On these same grounds, there is no basis for imposing a penalty on FPL. Finally, Wellington HOA's request for a modification to the Residential Building Envelope Program is moot because the terms of the program already provide the relief requested. Accordingly, Wellington HOA's Amended Complaint should be dismissed. Moreover, because these deficiencies cannot be cured by further amendment, Wellington HOA's Amended Complaint should be dismissed with prejudice. *See In re: Complaint of Rosario Rojo against Florida Power & Light Company*, Docket No. 110069-EI, Order No. PSC-11-0285-FOF-EI (Fla. P.S.C. June 29, 2011) (dismissing complaint with prejudice because underlying deficiencies not curable).

WHEREFORE, based upon the foregoing, FPL requests that the Commission enter an order dismissing Wellington HOA's Amended Complaint with prejudice.

Respectfully submitted this 11th day of July, 2012.

R. Wade Litchfield, Vice President
and General Counsel
John T. Butler, Assistant General Counsel - Regulatory
Maria Jose Moncada, Principal Attorney
Attorneys for Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: (561) 691-7101
Facsimile: (561) 691-7135

By: */s/Maria Jose Moncada*
Maria Jose Moncada
Florida Bar No. 0773301

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion To Dismiss the Amended Complaint with Prejudice has been furnished to following persons via electronic delivery and U.S. Mail this 11th day of July 2012.

Edward R. Grossman
102 Wellington A
Century Village
West Palm Beach, FL 33417
Telephone: (561) 471-3605
Edwardgrossman@comcast.com
Complainant, *Wellington A. Homeowner's Association*

Bruce H. Kaplan, Esq.
515 Madison Avenue, 22nd Floor
New York, NY 10022
Telephone: (212) 639-9000
Fax: (212) 658-9747
brucehkaplan@gmail.com
Qualified Representative for Wellington A. Homeowner's Association

Charles W. Murphy, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850
cmurphy@psc.state.fl.us

By: */s/Maria Jose Moncada*
Maria Jose Moncada
Florida Bar No. 0773301