

State of Florida



# Public Service Commission

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

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**DATE:** April 21, 2022

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

**FROM:** Office of the General Counsel (Rubottom, DuVal) *SMC*  
Division of Economics (Coston, Draper) *JGH*

**RE:** Docket No. 20220012-EI – Petition for temporary waiver of Rule 25-6.078(3), F.A.C. by Florida Power & Light Company.

**AGENDA:** 05/03/22 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested; Participation is at the Commission’s Discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Graham

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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## Case Background

On January 7, 2022, Florida Power & Light Company (FPL) filed a petition for a temporary waiver of Rule 25-6.078(3), Florida Administrative Code (F.A.C.).<sup>1</sup> FPL’s requested waiver would allow deferred filing of certain information related to installation of underground facilities in new subdivisions due to be filed by April 1, 2022.

On February 17, 2022, the Commission issued a Notice of Proposed Agency Action, Order Granting Petition for Temporary Rule Waiver<sup>2</sup> (PAA Order) that would become final upon issuance of a Consummating Order unless, within 21 days of issuance of the PAA Order, a

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<sup>1</sup> Document No. 00115-2022.

<sup>2</sup> Order No. PSC-2022-0062-PAA-EI, issued Feb. 17, 2022, in Docket No. 20220012-EI, *In re: Petition for temporary waiver of Rule 25-6.078(3), F.A.C. by Florida Power & Light Company.*

person whose interests would be substantially affected filed a petition for a formal proceeding in conformity with the requirements of Rule 28-106.201, F.A.C.

In its PAA Order, the Commission granted FPL's Petition for a Temporary Waiver of Rule 25-6.078(3), F.A.C., to allow FPL to defer filing its written policy, along with supporting data and analyses, for installation of underground facilities in new subdivisions until April 1, 2023, effectively resetting FPL's three-year filing cycle such that its next filing would be due by April 1, 2026, instead of by April 1, 2025.<sup>3</sup> The Commission found that granting the temporary waiver would serve to achieve the purpose of the underlying statutes<sup>4</sup> and determined that "strict application of Rule 25-6.078(3), F.A.C., would create a substantial hardship for FPL based on the expenditure of resources needed to determine the supporting underlying costs for a time period prior to the consolidation of FPL and Gulf for cost and ratemaking purposes." Additionally, because FPL would still be required to file Form PSC 1031 (08/20)<sup>5</sup> to report its cost differential on underground facilities by October 15, 2022, the Commission found that "there should be no adverse impacts to FPL's customers by granting the request[ed]" waiver.

During the 21-day protest period that expired on March 10, 2022, the Commission received 103 Letters of Protest (Protest Petitions) purporting to challenge the PAA Order and requesting a formal hearing pursuant to Rule 28-106.201, F.A.C.

On March 11, 2022, FPL filed a Motion to Dismiss Petitions (FPL Motion to Dismiss), requesting that the Commission dismiss all 103 Protest Petitions.<sup>6</sup> No responses were filed to FPL's motion, and the deadline for filing a response has passed.

This recommendation addresses whether FPL's Motion to Dismiss should be granted. The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 120.542, Florida Statutes (F.S.).

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<sup>3</sup> Rule 25-6.078(1), (4)-(5), F.A.C., prescribes the written policy and supporting data and analyses to be reported, and Rule 25-6.078(3), F.A.C., requires each utility to file such information "at least once every 3 years."

<sup>4</sup> Sections 366.03, 366.04, and 366.06, Florida Statutes, were identified as the underlying statutes for Rule 25-6.078(3), F.A.C.

<sup>5</sup> Rule 25-6.078(3), F.A.C., requires each utility to file Form PSC 1031 (08/20), entitled "Overhead/Underground Residential Differential Cost Data," by October 15 of each year.

<sup>6</sup> Document No. 01806-2022.

## Discussion of Issues

**Issue 1:** Should the Commission grant FPL’s Motion to Dismiss?

**Recommendation:** Yes. The Commission should grant FPL’s Motion and dismiss the Protest Petitions with prejudice. (Rubottom, DuVal)

### **Staff Analysis:**

#### **The Protest Petitions**

Each of the 103 Protest Petitions received by the Commission were entitled “Letter of Protest” and consisted of three paragraphs requesting an evidentiary hearing and a denial of FPL’s petition for rule waiver, and each Protest Petition included one additional paragraph in which the filer could provide a “personal example of undue and substantial hardship.”<sup>7</sup>

The first three paragraphs, identical in each letter, allege that FPL’s requested base rate increase in Docket No. 20210015-EI<sup>8</sup> was approved in part based on proposed tariffs that included an updated written policy regarding the installation of underground facilities in new subdivisions but that “the data and analyses for [the tariffs]” were omitted from the filing. The letters argue that because “the supporting data and analyses were not included” in the FPL Rate Case, “yet rates were changed that enriched the public utility and caused undue and substantial financial hardship on the people,” FPL’s Petition for Temporary Waiver of Rule 25-6.078(3), F.A.C., should be denied.

The fourth paragraph of each letter provides blank lines for individual petitioners to relate a personal example of undue and substantial hardship. Most petitioners provide some information in paragraph four, all of whom complain of the increased rates and other difficulties resulting from the FPL Rate Case and request in various ways that the Commission review its decision in that case or otherwise reduce rates.

#### **FPL’s Motion to Dismiss**

FPL makes three arguments in support of its Motion to Dismiss.

First, FPL argues that petitioners lack standing to challenge the Commission’s PAA Order. Specifically, FPL cites Rule 28-106.201(2)(b), F.A.C., that requires a petition for an evidentiary hearing to include “an explanation of how the petitioner’s substantial interests will be affected by the agency determination.” Additionally, FPL cites the two-prong test for standing, originating in *Agrico Chemical Company v. Department of Environmental Regulation*,<sup>9</sup> and argues that the petitioners’ protests do not raise any substantial interests relating to the Commission’s PAA Order granting FPL a temporary rule waiver. FPL states that, instead, the substantial interests identified in the Protest Petitions relate to the rate increase approved by the Commission in

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<sup>7</sup> See, e.g., Document No. 01542-2022.

<sup>8</sup> See Order No. PSC-2021-0446-S-EI, issued Dec. 2, 2021, in Docket No. 20210015-EI, *In re: Petition for rate increase by Florida Power & Light Company*; and Amendatory Order No. PSC-2021-0446A-S-EI, issued Dec. 9, 2021 (FPL Rate Case). This order is on appeal before the Florida Supreme Court in Case Nos. SC21-1761 and SC22-12.

<sup>9</sup> 406 So. 2d 478, 482 (Fla. 2d DCA 1981).

Docket No. 20210015-EI and the petitioners' interests as customers of FPL affected by the increased rates.<sup>10</sup> FPL argues that the Protest Petitions fail to meet Florida's two-prong test for standing and should therefore be dismissed because the petitioners' interests are "wholly outside the scope of the Commission's" PAA Order.

Second, FPL argues that the Protest Petitions are an improper collateral attack on the Commission's order in Docket No. 20210015-EI, in which the Commission approved a stipulation and settlement agreement granting FPL a base rate increase.<sup>11</sup> FPL points out that paragraphs 1-3 of the Protest Petitions focus on actions that occurred in the 2021 ratemaking docket. However, because appeals to the Commission's order in that docket were filed with the Florida Supreme Court, FPL argues that jurisdiction to settle complaints of the electric rates approved in that ratemaking case properly resides with the Florida Supreme Court, not with the Commission.

Third, FPL argues that the Protest Petitions fail to comply with the pleading requirements of Rule 28-106.201, F.A.C. Specifically, FPL asserts the following deficiencies related to Rule 28-106.201(2), F.A.C.:

- Failure "to properly state how [petitioners'] substantial interests will be affected" by the PAA Order as required by subsection (b);
- Failure "to provide a statement of all disputed issues of material fact or if there are none" as required by subsection (d);
- Failure "to provide a concise statement of the ultimate facts alleged" and to "state which specific facts warrant reversal or modification" of the PAA Order as required by subsection (e); and
- Failure to "state the specific rules or statutes that they contend require the reversal or modification" of the PAA Order and to "provide an explanation of how the alleged facts relate to a specific rule or statute," as required by subsection (f).

### **Standard of Review for Motion to Dismiss**

The Commission evaluates a motion to dismiss under the legal standard of whether the facts alleged in a petition are sufficient to state a cause of action, taking all material factual allegations from the petition as true and not looking beyond the four corners of the petition.<sup>12</sup> A petition should be dismissed with prejudice where, after resolving every reasonable inference in favor of the petitioner, it "conclusively appears that there is no possible way to amend the complaint to state a cause of action."<sup>13</sup>

### **Discussion**

Where a petitioner requests an evidentiary hearing, Section 120.569(2)(c), F.S., provides, in part, that the Commission shall dismiss a petition that fails to substantially comply with the procedural requirements in the uniform rules of Chapter 28, F.A.C. Under Section 120.569(2)(c), F.S., the dismissal of a petition should, at least once, be without prejudice to the petitioner to allow the

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<sup>10</sup> See, FPL Rate Case.

<sup>11</sup> *Id.*

<sup>12</sup> See, *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

<sup>13</sup> *Meyers v. City of Jacksonville*, 754 So. 2d 198, 202 (Fla. 1st DCA 2000).

filing of a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.<sup>14</sup>

**Sufficiency of the Protest Petitions: Failure to State a Cause of Action, and the Technical Pleading Standard of Rule 28-106.201, F.A.C.**

Each petition for a formal hearing must conform to the pleading requirements of Rule 28-106.201, F.A.C. Rule 28-106.201(2), F.A.C., requires that all petitions requesting an evidentiary hearing and asserting the existence of a disputed issue of material fact shall contain:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; 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;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.<sup>15</sup>

Specifically, staff recommends that the Protest Petitions lack information required in subsections (b), (c), (d), (e), and (f) of that rule, warranting dismissal. Furthermore, in staff's opinion, it appears conclusively on the face of the Protest Petitions that the following defects cannot be cured and thus warrant dismissal of the petitions with prejudice:

- Subsection (b) - Because petitioners fail to explain how their substantial interests will be affected by the PAA Order and FPL's deferred filing of the information required by Rule 25-6.078(3), F.A.C., staff is unable to identify any information in the Protest Petitions sufficient to reasonably infer a causal connection between petitioners' interests and the Commission's proposed action in this docket; and
- Subsection (f) - Because petitioners fail to state the specific rules or statutes the petitioners contend require reversal or modification of the PAA Order, staff is unable to identify any relationship between the facts alleged and any rules or statutes that could warrant such reversal or modification in this case.

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<sup>14</sup> Section 120.569(2)(c), F.S.

<sup>15</sup> Rule 28-106.201(2), F.A.C.

Petitioners have failed to state a cause of action for which relief can be granted in the present docket. As discussed above, the nature of the present docket is whether to grant FPL's requested waiver of Rule 25-6.078(3), F.A.C. To promote the interest of fairness, the Commission has previously held pro se litigants such as the petitioners to a relaxed pleading standard.<sup>16</sup> However, the Protest Petitions allege no material facts related to the Commission's PAA Order granting the waiver and thus fail to state a cause of action for which relief can be granted. Because "it conclusively appears from the face of the petition that the defect[s] cannot be cured," staff recommends that the Commission dismiss the Protest Petitions with prejudice pursuant to Section 120.569(2)(c), F.S.

### **Factual Allegations Related to FPL Rate Case are Outside the Scope of this Docket**

Additionally, based on staff's review of the filings, it appears that petitioners are attempting to reargue facts of the 2021 FPL Rate Case that are not material to the present docket. Therefore, staff recommends that the Protest Petitions should also be dismissed because the petitioners' arguments related to the FPL Rate Case are outside the scope of this docket.

### **Conclusion**

For the reasons discussed above, staff recommends that the Commission grant FPL's Motion and dismiss the Protest Petitions with prejudice.

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<sup>16</sup> See, e.g., Order No. PSC-12-0252-FOF-EI, issued May 23, 2012, in Docket No. 110305-EI, *In re: Initiation of formal proceedings of Complaint No. 1006767E of Edward McDonald against Tampa Electric Company, for alleged improper billing*; Order No. PSC-11-0117-FOF-PU, issued Feb. 17, 2011, in Docket Nos. 100175-TL and 100312-EI, *In re: Complaint against AT&T d/b/a BellSouth for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and AT&T regulations pertaining to billing of charges and collection of charges, fees, and taxes*; *In re: Complaint against Florida Power & Light Company for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and FPL tariffs pertaining to billing of charges and collection of charges, fees, and taxes*; Order No. PSC-02-1344-FOF-TL, issued Oct. 3, 2002, in Docket No. 020595-TL, *In re: Complaint of J. Christopher Robbins against BellSouth Telecommunications, Inc. for violation of Rule 25-4.073(1)(c), F.A.C., Answering Time*.

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

**Recommendation:** Yes. If the Commission accepts staff's recommendation on Issue 1 and dismisses the Protest Petitions with prejudice, then the Commission should issue a Consummating Order finalizing the PAA Order, and the docket should be closed.

**Staff Analysis:** No other outstanding protests of the Commission's PAA Order remain to be resolved in this docket. Therefore, if the Commission grants FPL's Motion to Dismiss and dismisses the Protest Petitions with prejudice pursuant to Section 120.569(2)(c), F.S., the Commission should issue a Consummating Order and close the docket.