

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: April 26, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy)
Division of Regulatory Analysis (Gilbert, Garl)

RE: 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.

AGENDA: May 8, 2012 – Regular Agenda – Oral Argument not Requested; Participation at Commission’s Discretion.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120040.RCM.DOC

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APR 26 AM 11:21
COMMISSION CLERK

Handwritten signatures and initials: Murphy, Gilbert, Garl, etc.

Case Background

Pursuant to Sections 120.569(2) and 120.573, Florida Statutes (“F.S.”) and Rules 25-6.004 and 25-22.036, Florida Administrative Code (“F.A.C.”), on February 13, 2012, Wellington, A Homeowner’s Association., Inc. (“Wellington”) filed a complaint against Florida Power & Light Company (“FPL”) (“Complaint”). On March 5, 2012, pursuant to Rule 28-106.204, F.A.C., FPL filed its Motion to Dismiss Complaint by Wellington or, Alternatively, for More Definite Statement (“Motion to Dismiss” or “Motion for More Definite Statement,” collectively “Motion”). Wellington did not file a response to the FPL Motion. The Florida Public Service Commission (“Commission”) has jurisdiction pursuant to Chapter 366, F.S.

DOCUMENT NUMBER-DATE
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Discussion of Issues

Issue 1: Should the Commission grant FPL's Motion to Dismiss Wellington's Complaint?

Recommendation: No. The Commission should deny FPL's Motion to Dismiss and instead should grant FPL's Motion for More Definite Statement.

Staff Analysis:

Wellington

In its Complaint, Wellington asserts that the Commission is charged with implementing and administering conservation measures pursuant to Section 366.82(12), F.S., and may authorize penalties for utilities that fail to meet their goals pursuant to Section 366.82(8), F.S., or refuse to comply with or willfully violate its rules pursuant to Section 366.095, F.S. Wellington contends that 1) FPL filed a demand side management plan in accordance with Commission authority, 2) the plan was approved by the Commission, and 3), in turn, FPL implemented its Roof Savings Program ("Program") to offset a portion of the costs of building improvement at a rate of \$.50 per square foot for reflective roof coating.

Wellington argues that FPL failed to provide inspections or supervision related to the FPL-authorized contractor's installation of the FPL-approved roof coating on Wellington's roof under the Program, and that this failure resulted in harm to the roof and failure of all conservation benefits. Wellington asserts that FPL paid the installer \$8,750 under the Program which is presumed to be recovered from FPL's ratepayers. Wellington describes problems with the contractor (including installation, choice of materials, building code compliance, and failure to obtain a building permit) resulting in the need for roof repairs estimated to cost between \$98,000 and \$135,000.

Wellington asserts that 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 FPL is allowed to recover expenditures through the Energy Conservation Cost Recovery Clause of its Demand Side Management Plan. Wellington argues that FPL admits that it had no involvement in the contractor's selection of the roof coating, yet provided an incentive of \$8,750 that is presumed to be recovered from ratepayers. Wellington concludes that, based on FPL's failure to supervise and inspect work on Wellington's roof, there has been a loss of all conservation benefits anticipated to be derived, and Wellington's roof must now be replaced.

As relief requested, Wellington summarizes the alleged factual basis for its Complaint and asks the Commission to do the following: exercise jurisdiction over this action and the parties; impose on FPL "any fine, forfeiture, or other remedy provided by statute; and . . . award such other and supplemental relief as may be just and necessary under the circumstances."

FPL

In its Motion, FPL asserts that Wellington's Complaint must be dismissed for failure to state a claim upon which relief can be granted because the Commission lacks jurisdiction to award compensatory damages and that, to the extent that Wellington seeks something other than damages, the allegations are too vague and ambiguous for FPL to discern the nature of the claim or relief requested. Thus, FPL concludes that if Wellington is permitted to proceed with its Complaint, the Commission should order Wellington to clarify its claim by providing a more definite statement.

Motion to Dismiss

Relying on the authorities set forth in the footnotes below, FPL asserts that the applicable standard of review for its Motion to Dismiss is as follows:

- a motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action¹
- the Commission must determine 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 granted²
- pursuant to Chapter 366, F.S., the Commission has jurisdiction to consider violations of its rules, statutes, and orders
- the Commission lacks jurisdiction to award compensatory damages,³ or to address contract disputes, torts, and property damage claims⁴
- the authority to award money damages is a judicial function within the jurisdiction of a circuit court⁵
- to determine whether it has jurisdiction, the Commission must examine the nature of the relief sought⁶

¹ *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

² *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) (*hereinafter In re Freeman*).

³ *Southern Bell Telephone and Telegraph Co. v. Mobile Am. Corp.*, 291 So. 2d 199, 202 (Fla. 1974).

⁴ *Id.*; *In re Freeman* (Commission lacks jurisdiction to award monetary damages in negligence and contract disputes); *Florida Power & Light Co. v. Glazer*, 671 So. 2d 211 (Fla. 3d DCA 1996) (affirming the application of *Southern Bell* to a tort claim against FPL); *In re Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) (finding that Commission lacked subject matter jurisdiction to award monetary damages for alleged property damage to a customer's gate, and therefore dismissal of the complaint was appropriate because the requested relief could not be granted).

⁵ *Southern Bell*, 291 So. 2d at 202.

⁶ *Ramos v. Florida Power & Light Co.* 21 So. 3d 91, 94 (Fla. 3d DCA 2009).

- it is the nature of the relief sought, not the language of the complaint, that ultimately determines which tribunal has jurisdiction over the claim.⁷

FPL summarizes the relief requested by Wellington as follows: FPL failed to supervise and inspect One Call's roofing work; the failure to inspect "caused loss of all demand conservation benefits anticipated" and "necessitated the roof's total replacement;" Wellington has received estimates for the roof repair; and, the Complaint "references no other specific relief sought." FPL concludes that, construed as a whole, Wellington's prayer for relief seeks compensation for lost conservation benefits and property damages." FPL asserts that the Commission lacks jurisdiction to grant such relief and therefore, must dismiss the Complaint.

Motion for More Definite Statement

In the alternative, FPL argues that, if the Commission does not dismiss the Complaint for lack of subject matter jurisdiction, it should require Wellington to provide a more definite statement identifying with specificity the relief it seeks. Relying on the authorities set forth in the footnotes below, FPL asserts that the applicable standard of review for its Motion for More Definite Statement is as follows:

- a motion for a more definite statement is directed to the vagueness and ambiguity of a pleading⁸
- 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 reply⁹
- Wellington is required to state "precisely the action petitioner wishes the agency to take with respect to the agency's proposed action."¹⁰

FPL asserts that, to the extent that Wellington is not seeking compensation for damages, the relief sought by Wellington is:

- vague and broad
- does not identify "precisely the action" it is asking the Commission to take, and
- the Complaint does not provide sufficient information from which FPL can discern the relief sought.

⁷ *Id.*; see *Winter Springs Dev. Corp. v. Florida Power Corp.*, 402 So. 2d 1225, 1228 (Fla. 5th DCA 1981).

⁸ *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). 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.

⁹ *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).

¹⁰ Rule 28-106.201(2), F.A.C.

FPL concludes that, if permitted to proceed, the Commission should order Wellington to clarify the nature of its claim and request for relief by filing a more definite statement.

Analysis

Staff believes that, in reviewing FPL's Motion to Dismiss, the Commission must take all factual allegations of the Complaint as true, and then must determine whether the facts in the Complaint are sufficient to state a cause of action.¹¹ Staff also believes that FPL correctly argues that the Commission does not have authority to award damages. As the Commission has previously stated: "It is well settled that jurisdiction to award monetary damages in negligence and contract disputes is outside of our jurisdiction."¹² FPL urges the Commission to read the factual allegations made by Wellington, including those in Wellington's Relief Requested, as a request for damages. Based on this interpretation, FPL asks that the Commission dismiss the Complaint in accordance with the applicable case law and prior Commission orders. However, staff believes that, while Wellington makes allegations that it has been harmed by the contractor and that FPL failed to properly oversee the work of the contractor, Wellington does assert that this alleged failure to oversee the contractor is linked to the following: 1) FPL's purported duties under a Commission-approved Program, 2) incentives paid to the contractor through the Program, and 3) recovery of those incentives from ratepayers. Wellington then asks that the Commission "impose upon [FPL] any fine, forfeiture, penalty, or other remedy provided by statute." Staff does not believe that this represents a request for damages as asserted by FPL and might, if clarified with a more definite statement, represent a cause of action. Thus, staff recommends that FPL's Motion to Dismiss should be denied.

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. Rule 1.140(e), Florida Rules of Civil Procedure, provides that "[i]f 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." In its Complaint, Wellington describes the Commission's statutory authority, notes that the Commission has promulgated rules and issued orders related to conservation goals, and asserts that FPL implemented its Program pursuant to Commission Orders. However, staff believes that the Complaint is vague and ambiguous because it fails to identify the specific rule, statute, or order that FPL is alleged to have violated and the facts that support each such alleged violation. This information is required by Rule 25-22.036(3)(b), F.A.C., and is needed so that FPL may properly frame its answer or reply. Thus, staff recommends that the Commission should grant FPL's Motion for More Definite Statement and order Wellington to file, within thirty days of the issuance of an order addressing the instant FPL Motion, 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.

¹¹ See *Varnes*, 624 So.2d at 350.

¹² *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).

In conclusion, staff believes Wellington's Complaint presents a colorable, albeit vague, cause of action. However, Wellington has not presented sufficient detail for FPL to frame a response. As such, staff recommends that the Commission should deny FPL's Motion to Dismiss, grant FPL's Motion for More Definite Statement, and order Wellington to file its more definite statement within thirty days of the issuance of an order addressing FPL's Motion. If Wellington fails to file a more definite statement within thirty days, staff recommends that the Complaint should be dismissed as authorized by Rule 1.140(e), Florida Rules of Civil Procedure.

Docket No. 120040-EI

Date: April 26, 2012

Issue 2: Should this Docket be closed?

Recommendation: No. This Docket should remain open to allow Wellington to file a more definite statement. However, if Wellington fails to file a more definite statement within thirty days, the Complaint should be dismissed and the Docket closed.

Staff Analysis: Staff believes that the Docket should remain open for the Commission to address the timely filing of a more definite statement by Wellington. Absent the timely filing of a more definite statement, staff believes that the Complaint should be dismissed and the Docket should be closed.