



Public Service Commission
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-M-E-M-O-R-A-N-D-U-M-

DATE: AUGUST 22, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION
ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (C. KEATING, MCLEAN)
DIVISION OF AUDITING & SAFETY (MILLS)
DIVISION OF CONSUMER AFFAIRS (RASPBERRY)

RE: DOCKET NO. 010908-EI - COMPLAINT AGAINST FLORIDA POWER &
LIGHT COMPANY REGARDING PLACEMENT OF POWER POLES AND
TRANSMISSION LINES BY AMY & JOSE GUTMAN, TERESA BADILLO,
AND JEFF LESSERA.

AGENDA: 09/03/02 - REGULAR AGENDA - DECISION ON MOTION TO DISMISS
- PARTIES MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

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CASE BACKGROUND

Three separate informal complaints were filed with this Commission's Division of Consumer Affairs against Florida Power & Light Company ("FPL") regarding the placement of a particular FPL transmission line. The named complainants were Jose and Amy Gutman (Request No. 366172E), Teresa Badillo (Request No. 344754E), and Jeff Leserra (Request No. 367987E). The line in question is a 230kV transmission line that runs 4.75 miles in length along the south bank of the South Florida Water Management District's ("SFWMD") Hillsboro Canal and the north shoulder of Lox Road in northwest Broward County and southwest Palm Beach County, Florida. The line, known as the "Parkland Line," connects FPL's newly-constructed Parkland substation to FPL's existing transmission system. The land permit authorizing the line was granted by the

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Governing Board of the SFWMD at its July 2000 meeting, and construction of the line began in late October 2000.

In June 2001, staff conducted two mediation sessions with FPL and complainants to explore the possibility of settlement, but no resolution of the complaints was reached. Staff made additional attempts to informally resolve this matter through agreement among the parties, but those attempts were not successful. By letter dated April 5, 2002, staff provided the parties with its proposed resolution of these complaints, pursuant to Rule 25-22.032, Florida Administrative Code. The proposed resolution concluded that the transmission line in question is in compliance with the National Electrical Safety Code ("NESC"), which this Commission enforces, but that the remaining concerns involve subjects not within our jurisdiction and thus should be dismissed. By letter dated April 24, 2002, FPL concurred with the proposed resolution and requested that a recommendation concerning these complaints be submitted for consideration by this Commission. On May 2, 2002, the complainants filed their response to the proposed resolution, requesting that they be heard before the Commission on this matter.

Because two informal mediation sessions with the parties had already been conducted, an informal conference was found unnecessary. Accordingly, the Commission heard from the complainants and FPL on this matter at its May 21, 2002, Agenda Conference. By Order No. PSC-02-0788-PAA-EI, issued June 10, 2002, in this docket, the Commission made the following findings: (1) the power poles and other facilities associated with FPL's Parkland transmission line are constructed in compliance with the NESC; and (2) the Commission does not have the authority to grant the relief requested by the complainants, i.e., to require FPL to relocate its Parkland Line, based on the concerns raised by the complainants other than concerns that the Parkland Line does not comply with the NESC. The first finding was made as proposed agency action in Part II of the Order, and the second finding was made as final agency action in Part III of the Order. (Part I of the Order consisted only of the case background.)

On July 1, 2002, Jose Gutman, Suzanne Terwilliger, Jeff Leserra, Donna Tennant, and Teresa Badillo (collectively, "petitioners") filed a petition for a hearing before an Administrative Law Judge ("ALJ") on both the proposed agency action and final agency action taken in Order No. PSC-02-0788-PAA-EI. On July 17, 2002, FPL filed a motion to dismiss the petitioners'

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request for hearing. The petitioners filed a response to FPL's motion to dismiss on July 31, 2002.

This recommendation addresses FPL's motion to dismiss. The Commission has jurisdiction over this matter pursuant to the provisions of Chapter 366, Florida Statutes, including Sections 366.04 and 366.05, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant FPL's motion to dismiss the petitioners' request for hearing on Order No. PSC-02-0788-PAA-EI?

RECOMMENDATION: Yes. The Commission should grant FPL's motion to dismiss, with prejudice, the petitioners' request for hearing on the portion of Order No. PSC-02-0788-PAA-EI issued as final agency action. The Commission should grant FPL's motion to dismiss, without prejudice, the petitioners' request for hearing on the portion of Order No. PSC-02-0788-PAA-EI issued as proposed agency action.

STAFF ANALYSIS: In their petition for hearing on Order No. PSC-02-0788-PAA-EI, the petitioners ask for an administrative hearing on all portions of Order No. PSC-02-0788-PAA-EI to determine: (1) if the Parkland Line complies with the NESC; and (2) if the Commission had a right to dismiss their complaints based on concerns other than safety concerns.

In its motion to dismiss, FPL notes that the petitioners objected to the Parkland Line on several grounds, alleging that: (1) the Parkland Line will diminish their property values; (2) they will lose the quiet enjoyment of their property; (3) they did not receive proper notice of the SFWMD's permitting and rule waiver proceedings; (4) restrictions in the deed to the SFWMD's predecessor in interest for the right-of-way preclude the placement of the Parkland Line in the right-of-way; and (5) the Parkland Line is not the least-cost alternative. FPL notes that the petitioners, based on these concerns, seek to have the Commission require FPL to move the Parkland Line away from their property. FPL further notes that the Commission determined, by final agency action in Part III of Order No. PSC-02-0788-PAA-EI, that the Commission does not have the authority to grant the relief requested by the complainants, i.e., to require FPL to relocate its Parkland Line, based on those concerns. FPL notes that Order No. PSC-02-0788-PAA-EI advised the petitioners of their right to seek reconsideration of Part III of the Order within 15 days of the issuance of the Order and of their appellate rights. FPL asserts that the petitioners' request for hearing on Part III of Order No. PSC-02-0788-PAA-EI must be dismissed with prejudice because, by the terms of the Order, petitioners have no opportunity for hearing on Part III.

As to Part II of the Order, FPL notes that the Commission found that the Parkland Line is in compliance with the NESC but concluded that NESC compliance is an issue of fact that precludes final agency action until the petitioners are afforded an opportunity for hearing on the issue. FPL notes that by the terms of Order No. PSC-02-0788-PAA-EI, the petitioners are entitled to request a hearing on Part II of the Order within 21 days of the issuance of the Order. Although FPL recognizes the petitioners right to request a hearing on Part II of the Order, FPL asserts that the petitioners have not made a valid request for hearing because they make no allegations that the Parkland Line does not comply with the NESC. In its motion, FPL asserts that it is incumbent upon the petitioners to at least state the basis for their disagreement with the Commission's findings in Order No. PSC-02-0788-PAA-EI that the Parkland Line is in compliance with the NESC. Further, FPL asserts that the relief sought by the petitioners, relocation of the Parkland Line, is not contemplated by either the statute or Commission rule concerning NESC compliance. FPL concludes that the Commission should dismiss the petitioners' request for hearing on Part II of the Order without prejudice to the petitioners' right to amend their request for hearing on Part II to specifically identify how the Parkland Line does not comply with the NESC and to identify the specific relief they seek that is within the Commission's authority.

In their response to FPL's motion to dismiss, the petitioners assert they have a legal right to respond to both Parts II and III of Order No. PSC-02-0788-PAA-EI. Petitioners assert that, by the terms of the Order, they are permitted to reply to Part III of the Order within 15 days of the date of issuance of the Order. The petitioners also assert that Rule 28-106.103, Florida Administrative Code, allows five additional days for that reply because the Order was sent to them by mail. Accordingly, the petitioners assert that their request for hearing on Part III of the Order was timely.

As to Part II of the Order, the petitioners assert that they have made a valid request for hearing. In their response, the petitioners assert that they are concerned about the safety of the Parkland Line because FPL has refused to provide them a "statement of safety" and because the Commission has not conducted a formal investigation concerning compliance of the Parkland Line with the NESC. The petitioners further state that their petition brings in new evidence regarding modifications to the Parkland Line,

specifically the replacement of certain poles along the line to bring it into compliance with FPL's internal standards.

Staff recommends that the Commission grant FPL's motion to dismiss, with prejudice, the petitioners' request for hearing on Part III of Order No. PSC-02-0788-PAA-EI. Part III of the Order was issued as final agency action. The "Notice of Further Proceedings and Judicial Review" set forth at the end of the Order, as required by Section 120.569(1), Florida Statutes, clearly sets forth the rights of the parties to appeal or seek reconsideration of Part III of the Order and the deadlines for doing both. The Order does not provide an opportunity to request a hearing on Part III because the law provides no right to request a hearing on final agency action.

The petitioners appear to suggest that their filing is appropriate because it was made within the time allowed for seeking reconsideration of Part III of the Order. The petitioners are incorrect. Even if the petitioners' filing is considered as a request for reconsideration of Part III, it must be denied as untimely. The "Notice of Further Proceedings and Judicial Review" set forth at the end of the Order clearly states that any request for reconsideration of Part III must be filed within 15 days of the issuance of the Order. Contrary to the petitioners suggestion, an additional five days is not permitted under Rule 28-106.103, Florida Administrative Code. That rule clearly states that no additional time shall be added when the period of time begins pursuant to the type of notice described in Rule 28-106.111, Florida Administrative Code, e.g., the "Notice of Further Proceedings and Judicial Review" set forth at the end of Order No. PSC-02-0788-PAA-EI. Further, the courts have not permitted extensions of time to request reconsideration of final agency action. City of Hollywood v. Public Employees Relations Commission, 432 So. 2d 79 (Fla. 4th DCA 1983).

Staff recommends that the Commission grant FPL's motion to dismiss, without prejudice, the petitioners' request for hearing on Part II of Order No. PSC-02-0788-PAA-EI. Staff tends to agree with FPL's suggestion that the appropriate remedy for any deficiency found in the line is correction of that deficiency, rather than relocation of the line. The petitioners have not specifically pled how the Parkland Line is not in compliance with the NESC, nor have they pled how such non-compliance with the NESC entitles the petitioners to the relief they seek, i.e., having the line

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relocated. Accordingly, staff recommends that the Commission dismiss the petitioners' request for hearing as to Part II of the Order, without prejudice to the petitioners' right to amend their request for hearing to specifically allege how the Parkland Line is not in compliance with the NESC and why such non-compliance requires relocation of the line. Staff recommends that the Commission require the amended petition to be filed within 20 days of the issuance of the Order resulting from this recommendation. If an amended petition is not filed within that time, the docket should be administratively closed.

In conclusion, staff recommends that the Commission grant FPL's motion to dismiss.

ISSUE 2: Should the Commission grant the petitioners' request to have their petition for hearing referred to the Division of Administrative Hearings ("DOAH") for an administrative hearing?

RECOMMENDATION: No. The Commission cannot refer to DOAH the petitioners' request for hearing on Part III of Order No. PSC-02-0788-PAA-EI because that portion of the Order was issued as final agency action upon which a hearing cannot be granted. It is within the Commission's discretion to refer to DOAH the petitioners' request for hearing on Part II of the Order, but such a decision would be premature at this time.

STAFF ANALYSIS: As discussed in Issue 1, above, the petitioners' request for hearing on Part III of Order No. PSC-02-0788-PAA-EI, issued as final agency action, must be dismissed because the law does not provide persons the right to request an administrative hearing on final agency action. Thus, the Commission cannot refer to DOAH the petitioners' request for hearing on Part III of Order No. PSC-02-0788-PAA-EI.

The Commission has the discretion to refer to DOAH the petitioners' request for hearing on Part II of the Order, because that portion of the Order was issued as proposed agency action. Alternatively, the Commission may choose to hear the matter itself. Regardless, it would be premature to make that decision. If the Commission agrees with staff's recommendation in Issue 1 to dismiss the petitioners' request for hearing on Part II of the Order without prejudice to amend their petition, the Commission should wait for the petitioners' to file a valid petition for hearing before determining whether to hear this matter itself or refer it to DOAH.

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ISSUE 3: Should this docket be closed

RECOMMENDATION: No. This docket should remain open to allow the petitioners to amend their request for hearing consistent with staff's recommendation in Issue 1. If the petitioners do not file an amended petition within 20 days of the issuance of the order resulting from this recommendation, this docket should be administratively closed.

STAFF ANALYSIS: This docket should remain open to allow the petitioners to amend their request for hearing consistent with staff's recommendation in Issue 1. If the petitioners do not file an amended petition within 20 days of the issuance of the order resulting from this recommendation, this docket should be administratively closed.