

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy and Jose Gutman, Teresa Badillo and Jeff Lessera))	DOCKET NO. 010908-EI
)	Petitioners' Motion For
)	Reconsideration Of Order
)	No. PSC-02-1516-FOF-EI
)	Issued November 5, 2002

COMMISSIONER
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Petitioners' Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI

Petitioners pursuant to Rule 25-22.060, F.A.C., hereby submit their Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI, issued November 5, 2002 in this docket ("the Order"), both to the extent the Order may be deemed to constitute final agency action granting the motion to dismiss by Florida Power and Light Company (FPL) and further for allowing Petitioners a hearing to address the issues indicated in the first paragraph of Part II of the Order.

Summary Statement

Petitioners maintain that they were timely by their filing on July 1, 2002, and additionally that well established principles of equitable estoppel and excusable neglect apply for these pro-se Petitioners, and the Florida Public Service Commission (PSC) should grant these Petitioners the opportunity to be heard and to seek further proceedings in accordance with Petitioners' response to the agency action of Order No. PSC-02-0788-PAA-EI, issued June 10, 2002, in this docket; and furthermore that the PSC has jurisdiction to hear Petitioners' complaints and respond accordingly; and lastly that due to FPL having dealt unfairly with the Petitioners as customers and citizens of Florida, FPL should be afforded the least amount of discretion and leniency under the rules and statutes empowering the PSC while the pro-se Petitioners should be granted the maximum ability to pursue their rights under Florida law.

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OTH _____

In support hereof, the Petitioners state as follows:

Background

The following timeline summarizes the events and documents submitted to the Public Service Commission (PSC) for docket 010908:

06/26/2001 A formal complaint was opened against FPL regarding FPL's placement of power poles and transmission lines adjacent to residences and residential communities of Amy & Jose Gutman, Teresa Badillo, and Jeff Lessera, and for the residential communities immediately adjacent to the FPL transmission

lines along the Hillsboro canal. FPL's placement of the lines was without any notice to the homeowners and Petitioners, notwithstanding that FPL knew these homeowners' residential properties were located in very close proximity to the planned transmission lines and would likely complain. Mr. Lessera's bedroom window is approximately 69 feet from the nearest transmission line pole that is approximately 91 feet tall.

- 08/2001 A informal meeting was held with the PSC, FPL, Mr. Butler and the Petitioners. The PSC requested that FPL consider other alternatives for moving the lines and report their findings back to the PSC. There was a very reasonable alternative along a corridor about 1000 feet south where an extension to the Hillsboro Blvd. would soon be located. When Petitioners asked FPL why they didn't seriously consider aligning the transmission line along the Hillsboro Blvd. extension, Mr. Newbold, for FPL, stated: "We didn't want to impact future development."
- 05/09/2002 A recommendation from the PSC was issued stating that the power poles and other facilities associated with FPL's Parkland transmission line are constructed in compliance with National Electric Safety Code and that the complaints should be dismissed due to Commission not having the authority to grant requested relief.
- 06/10/2002 A complex multi-part proposed agency action (PAA) order, PSC-02-0788-PAA-EI, including a number of different instructions and time frames for responding, was issued by the PSC. This multi-part order stated that the transmission facilities were in compliance with National Electrical Safety Code. A final order was also embedded in this multi-part order, dismissing complaints on all other grounds for lack of jurisdiction.
- 07/01/2002 The pro-se Petitioners responded with a formal petition for administrative hearing responding to parts II and III of the Order PSC-02-0788-PAA..
- 07/17/2002 Mr. Butler responded for FPL with a Motion to Dismiss Complainants' Petition for a hearing on Order No. PSC-02-0788-PAA-EI.
- 07/31/2002 Petitioners responded to FPL's Motion to Dismiss Complainants Petition for hearing on Order No. PSC-02-0788-PAA-EI.
- 08/22/2002 A recommendation was issued by the PSC to grant FPL's motion to dismiss Petitioners' request for hearing on Order PSC-02-0788-PAA-EI, stating that the Commission cannot refer to DOAH Petitioners' request for hearing on Part III because it is final agency action.
- 11/05/2002 An order was issued by the PSC, PSC-02-1516-FOF-EI, granting FPL's motion to dismiss with the opportunity to file an amended petition.

11/16/2002 Petitioners hereby submit their Motion for Reconsideration of the Order
PSC-02-1516-FOF-EI.

Argument

I. Petitioners Were Timely In Their Response of July 1, 2002.

1. On July 1, 2002, Petitioners filed their petition requesting a hearing regarding both parts II and III of the Order PSC-02-0788-PAA, dated June 10, 2002.

2. Petitioners were requesting a formal hearing and believed that they were timely in their response to the Order PSC-02-0788-PAA by filing such petition.

3. Petitioners' petition filed on July 1, 2002, should be considered timely also as a request for reconsideration with respect to part III of the Order PSC-02-0788-PAA, in view of the following:

a) Petitioners were pro-se without legal representation.

b) The Order was complex with multiple parts and a number of time frames for response that were specified at the end of the Order letter and without a clear and specific linkage between the notice in part III of the Order and a time frame at the end of the Order letter that specified filing 15 days of the issuance of the Order and without the availability for an additional 5 days as permitted under Rule 28-106.103, FAC.

c) Although the PSC now points to Rule 28-106.111, FAC, to restrict application of the extra time because, as the rule states “[n]o additional time shall be added if service is made by hand, facsimile telephone transmission, or other electronic transmission or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C.”, (emphasis added), Petitioners believe that their timely filed petition has complied with all requirements under the law and with respect to the specific notice requirements in the Order letter issued June 10, 2002.

Petitioners provide the full text of the Rule 28-106.111, FAC, below, with special emphasis to the description of notices and the time frames provided for response.

28-106.111 Point of Entry into Proceedings and Mediation.

(1) The notice of agency decision shall contain the information required by Section 120.569(1), F.S. The notice shall also advise whether mediation under Section 120.573, F.S., is available as an alternative remedy, and if available, that pursuit of mediation will not adversely affect the right to administrative proceedings in the event mediation does not result in a settlement.

(2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the

decision.

(3) An agency may, for good cause shown, grant a request for an extension of time for filing an initial pleading. Requests for extension of time must be filed with the agency prior to the applicable deadline. Such requests for extensions of time shall contain a certificate that the moving party has consulted with all other parties, if any, concerning the extension and that the agency and any other parties agree to said extension. A timely request for extension of time shall toll the running of the time period for filing a petition until the request is acted upon.

(4) Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters.

(5) The agency may publish, and any person who has timely requested mediation may, at the person's own expense, cause the agency to publish, a notice of the existence of the mediation proceeding in the Florida Administrative Weekly or in a newspaper of general circulation in the affected area. The mediation notice can be included in the notice of intended agency action.

(a) The notice of the mediation proceeding shall include:

1. A statement that the mediation could result in a settlement adopted by final agency action;
2. A statement that the final action arising from mediation may be different from the intended action set forth in the notice which resulted in a timely request for mediation;
3. A statement that any person whose substantial interests may be affected by the outcome of the mediation shall within 21 days of the notice of mediation proceeding file a request with the agency to participate in the mediation; and
4. An explanation of the procedures for filing such a request.

(b) The notice shall also advise that in the absence of a timely request to participate in the mediation, any person whose substantial interests are or may be affected by the result of the mediation waives any right to participate in the mediation, and that waiver of participation in the mediation is also a waiver of that person's ability to challenge the mediated final agency action pursuant to Chapter 120, F.S.

(Emphasis added).

Petitioners believe that the notices described in Rule 28-106.111, FAC, deal with filing a petition within twenty one (21) days of agency action. It does not deal with filing a request for reconsideration. Therefore, either the additional 5 days for filing a request for reconsideration response to the mailed PSC Order letter dated June 10, 2002, should apply, or, alternatively, Petitioners' petition response including the request for reconsideration should be considered timely filed within the 21 days allowed under Rule 28-106.111, FAC.

d) Petitioners respectfully submit that principles of excusable neglect and equitable tolling apply, and the PSC should grant these Petitioners the opportunity to be heard and to seek further proceedings in accordance with Petitioners' petition filed on July 1, 2002,

in response to the agency action of Order No. PSC-02-0788-PAA-EI, issued June 10, 2002, in this docket.

Note that the time for filing such a Petitioners' petition response is "not jurisdictional in the sense that failure to comply is an absolute bar to appeal but is more analogous to statute[s] of limitations which are subject to equitable considerations such as tolling." *Machules v. Dept. of Admin.*, 523 So. 2d 1132, 1133, n. 2 (Fla. 1988). See also *Abusalameh v. Dept. of Bus. Reg.*, 627 So. 2d 560 (Fla. 4th DCA 1993); *Castillo v. Dept. of Admin., Div. of Retirement*, 593 So. 2d 1116 (Fla. 2nd DCA 1992); *Stewart v. Dept. of Corrections*, 561 So. 2d 15 (Fla. 4th DCA 1990); *General Motors Corp., etc., v. Gus Machado Buick-GMC, Inc., et al.*, 581 So. 2d 637 (Fla. 1st DCA 1991); *Robinson v. Fla. Unemployment Appeals Comm'n*, 526 So. 2d 198 (Fla. 4th DCA 1988); *Rothblatt v. Dept. of Health, etc.*, 520 So. 2d 644 (Fla. 4th DCA 1988).

II. The Public Service Commission has jurisdiction over the complaints discussed by the Petitioners as exhibited by the PSC's own argument for docket 930676 in Order PSC 940717-FOF-EI.

1. The PSC clearly states its jurisdiction as follows:
By the authority of Section 366.04(5), Florida Statutes, commonly known as "The Grid Bill", we have jurisdiction . . . over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida .
2. Chapter 366 is an exercise of the police power of the State for the protection of the public welfare. Section 366.01, Florida Statutes. The PSC is clearly empowered to protect the public welfare. This includes more than simply meeting the safety requirements under the NESC standard. The powers of the Commission over FPL as a privately-owned utility are omnipotent within the confines of the statute and the limits of organic law. This includes not only fair application of rates to consumers and meeting the safety requirements under the NESC standard, but all aspects of fairness to consumers and maintaining the public welfare to citizens of Florida.
3. The PSC is empowered to require FPL to move its lines as necessary to deal fairly with the public customers and rate payers and to maintain the public welfare. Section 366.05(8), Florida Statutes, provides that
"If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities. . ."

The plain language of the Grid Bill and its related statutes indicates that the PSC has jurisdiction to assure the efficient and reliable operation of the state energy grid while

protecting fairness to the public customers and rate payers and to maintain the public welfare. See also, in re: Petition of Gulf Power Company involving Complaint and Territorial Dispute with Alabama Electric Cooperative, Inc., Docket No. 830428, Order Nos. 13191 and 13926, issued April 12, 1984 and December 21, 1984.

4. As the PSC stated in its Order PSC 940717-FOF-EI, as follows.
“We see no jurisdictional exclusion in the statutes for transmission facilities constructed in order to obtain wholesale power contracts, and we are not aware of any Federal statute or regulation of wholesale power agreements that preempts our authority to protect the efficiency and integrity of the Florida energy grid. Chapter 366 is an exercise of the police power of the State for the protection of the public welfare. Section 366.01, Florida Statutes. TECO's and the cities' contracts are subject to that power. See also *H. Miller & Sons, Inc. v. Hawkins*, 373 So.2d 913, 914 (Fla. 1979) where the Florida Supreme Court said that it is a . . . well-settled principle that contracts with public utilities are made subject to the reserved authority of the state, under the police power of express statutory or constitutional authority, to modify the contract in the interest of the public welfare without unconstitutional impairment of contracts.
The powers of the Commission over these privately-owned utilities are omnipotent within the confines of the statute and the limits of organic law.”

5. The PSC has jurisdiction over this Petitioners' complaint. First, FPL is a "public utility" under Chapter 366, Florida Statutes. Rerouting the power lines affects FPL's rates and service and is included in the PSC's regulatory authority. Finally, the PSC has authority under Section 366.05(1) to promote the public welfare.

6. The placement of 100-foot concrete poles with 230 kV transmission lines running adjacent to a residential area has a negative effect on public welfare. The placement of large concrete support poles in a residential area has an effect on the public welfare and convenience. This situation comes under the Commission's duty to "promote the convenience and welfare of the public..." Additionally, while FPL knew of these homeowners' location and their likelihood to complain, FPL decided to avoid providing any notice to these homeowners and customers prior to the installation of the transmission lines next to their homes. This was totally unfair and unjust.

7. It additionally creates a direct rate impact on the cost of power applied these homeowners, where this should be distributed fairly across all benefiting communities in the area and not only by surprise on these innocent homeowners and customers.

8. The PSC has authority under Section 366.05(1) to promote the public welfare. The concept of public welfare is broad and inclusive, and the values it protects are spiritual, as well as physical, aesthetic as well as monetary. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 72 S. Ct. 405, 96 L. Ed. 469 (1952); Berman et al., Ec . v. Parker et al., 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954) . According to the courts, aesthetic

considerations have a definite relation to the public welfare. See Murphy, Inc v. Town of WestPort, 131 Conn. 292, 40 A.2d 177, 156 A.L.R. 568 (1944) ; Baddour v. City of Long Reach, 279 N.Y. 167, 18 N.E.2d 18, 124 A.L.R. 1003 (1938), reargument denied, 279 N.Y. 794, 19 N.E.2d 90, 124 A.L.R. 1003 (1939), appeal dismissed, 308 U.S. 503, 60 S. Ct. 77, 84 L. Ed. 431 (1939) and reargument denied, 18 N.E.2d 698 (N.Y. 1939); see also. State ex rel. Civello v. City of New Orleans, 154 La. 271, 97 So. 440, 33 A.L.R. 260 (1923) (maintaining the beauty of a fashionable residential neighborhood in a city is a matter of general welfare within the police power of the state).

Therefore, the Public Service Commission has jurisdiction over the complaints discussed by the Petitioners in their petition filed July 1, 2002, and in the record of this docket.

III. With respect to part II of the Order No. PSC-02-0788-PAA-EI, Petitioners request that the PSC reconsider that the petition sufficiently alleges that there is safety concerns and that the PSC engineers should verify whether FPL's transmission lines do not comply with the requirements of the NESC standard.

1. The PSC engineers have done only a minimal visual overview of the transmission line site and without any review of FPL engineering documents, and without any independent professional engineering analysis. We are all only relying on FPL's general statements that the transmission lines comply with the NESC, without any supporting FPL documentation or externally verifiable engineering reports.

2. This is the first time that FPL has used this type of power poles on a parallel run so close to a canal. There is a safety concern here that FPL has no safety track record with such type of an installation of the power poles next to the canal. FPL has applied for a modification to their SFWMD permit to allow FPL to change their design of the transmission line project to make it "safer" and to comply with FPL "internal standards" (which should have already been met before) by replacing four poles and adding braces to three other poles. This modification of FPL poles affects approximately close to 20% of the total number of poles in the project along the permitted Right Of Way on the bank of the Hillsboro canal.

3. The modification to the South Florida Water Management District permit #11367 requested by FPL, which deals with safety, installation and compliance begs the question as to whether this FPL project has been in compliance with the NESC standard as stated by FPL's expert witness. Is it in compliance now? The PSC has a duty to investigate this and it has only done a cursory overview inspection without auditing of FPL internal engineering records or conducting any substantive engineering analysis of the transmission lines and poles along the bank of the canal.

4. FPL has stated that they need to make these design changes to be compliant with their own internal standards and to make the project "safer". Note that FPL and the PSC should have performed the professionally prudent engineering analysis and

required due diligence to certify the transmission line project as safe to all citizens. This has not happened yet.

5. The lack of publicly available engineering reports and data to support FPL's statement suggesting compliance with the NESC standard is especially a concern in view of FPL's recent modification of about 20% of their transmission line poles along the Hillsboro canal to comply with certain unspecified requirements. Also, public statements by representatives of the SFWMD indicated that FPL found that the ground was not as solid as they had expected next to the Hillsboro canal. If this was a main reason for the FPL modifications, could there be other problems along the canal with respect to poor soil conditions? Is this an ongoing problem now because of the proximity to the canal? Recall that this is the first time that FPL has used this type of power poles on a parallel run so close to a canal.

Therefore, Petitioners request reconsideration with respect to requiring their petition to specifically state the lack of compliance by FPL with respect to the NESC standard. It should be the duty of FPL to prove to the PSC and the public that FPL's transmission lines comply with the NESC standard. A reasonable and supportable finding by the PSC must be based on submissions of engineering reports and data by FPL and not on mere statement of assurance that there is compliance. It is unreasonable, and contrary to public policy under the rules and statutes empowering the PSC for protecting the public welfare, to require independent citizens in the public to bear the cost of engineering review and analysis to show why FPL does not comply with the NESC, while at the same time simply accepting FPL's mere statement of compliance without any publicly available engineering reports and data to prove and support such compliance statements.

WHEREFORE, the Petitioners respectfully request (a) that the Commission reconsider its authority on Petitioners complaints, and (b) the Commission find that the Petitioners are timely with their responses under the authority of equitable tolling and (c) the Commission reconsider that since no true electrical engineering study was done on the Parkland Transmission Line it is the responsibility that the PSC verify compliance with the NESC standard with an in depth engineering study and not simply a drive by visual review; and that the Commission should grant this motion for reconsideration to the extent the Order is deemed to effect such a result.

Respectfully submitted this 16th day of November 2002.

By: _____



Jose Gutman for all Petitioners
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
Petitioner's Motion for Reconsideration of Order No. PSC-02-1516-FOF-EI
has been furnished by mail to Mr. John W. Butler, P.A., this 16th day of
November 2002 and sent by courier to Ms. Blanca S. Bayo, Division of the
Commission Clerk and Administrative Services.

By: _____



Jose Gutman
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