



**Public Service Commission**  
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**DATE:** MARCH 20, 2003

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

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

**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:** 04/01/2003 - REGULAR AGENDA - DECISION ON MOTION FOR RECONSIDERATION - ORAL ARGUMENT NOT REQUESTED

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** RECOMMENDATION SHOULD BE ADDRESSED BY COMMISSIONERS JABER, DEASON, BAEZ, AND BRADLEY

**FILE NAME AND LOCATION:** S:\PSC\GCL\GCO\WP\010908.RCM

**CASE BACKGROUND**

Three separate informal complaints were filed with the 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

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system. The land permit authorizing the line was granted by the Governing Board of the SFWMD at its July 2000 meeting, and construction of the line began in late October 2000.

In June 2001, Commission staff conducted two mediation sessions with FPL and the 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, and 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 the 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 "June 10 Order"), 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 the June 10 Order. On July 17, 2002, FPL filed a motion to dismiss the petitioners' request for hearing, and the petitioners filed a response to FPL's motion to dismiss on July 31, 2002.

By Order No. PSC-02-1516-FOF-EI, issued November 5, 2002 (the "November 5 Order"), the Commission granted FPL's motion to dismiss the petitioners' request for hearing. First, the Commission granted FPL's motion to dismiss, without prejudice, the petitioners' request for hearing on Part II of the June 10 Order, finding that the petitioners did not specifically plead how the Parkland Line is not in compliance with the NESC, nor how such non-compliance with the NESC entitles the petitioners to the relief they seek, i.e., having the line relocated. Petitioners were afforded the opportunity to amend their request for hearing to make such specific allegations. Second, the Commission granted FPL's motion to dismiss, with prejudice, the petitioners' request for hearing on Part III of the June 10 Order. The Commission noted that Part III of the Order was issued as final agency action, and the Order did 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.

On November 18, 2002, the petitioners filed a motion for reconsideration of the November 5 Order. FPL filed its response to the petitioners' motion for reconsideration on November 27, 2002. This recommendation addresses the petitioners' motion for reconsideration. 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 the petitioners' motion for reconsideration of Order No. PSC-02-1516-FOF-EI?

**RECOMMENDATION:** No. The petitioners' motion for reconsideration fails to identify any point of fact or law that the Commission overlooked or failed to consider in rendering Order No. PSC-02-1516-FOF-EI and should therefore be denied.

**STAFF ANALYSIS:** The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision-maker in rendering its order. Diamond Cab Co. V. King, 146 So. 2d 889 (Fla. 1962). The mere fact that a party disagrees with the order is not a valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 104 So. 2d 817 (Fla. 1st DCA 1958).

The petitioners ask the Commission to reconsider Order No. PSC-1516-FOF-EI (the "November 5 Order") in its entirety. This recommendation addresses the petitioners' motion in two parts: (1) with respect to the Commission's decision to grant FPL's motion to dismiss, with prejudice, the petitioners' request for hearing on Part III of the June 10 Order, which was issued as final agency action; and (2) with respect to the Commission's decision to grant FPL's motion to dismiss, without prejudice, the petitioners' request for hearing on Part II of the June 10 Order, which was issued as proposed agency action. Staff recommends that the petitioners' motion for reconsideration be denied.

A. Reconsideration of Dismissal of Request for Hearing on Part III of Order No. PSC-02-0788-PAA-EI

Petitioners' Arguments

In their motion, the petitioners contend that their request for hearing on Part III of the June 10 Order should have been considered not only as a request for hearing but also as a timely request for reconsideration of Part III of the Order. Although not stated directly in their motion, the petitioners appear to suggest that the Commission erred by doing otherwise. The petitioners assert that the June 10 Order "was complex with a number of time frames for response that were specified at the end of the Order"

and did not clearly indicate that parties seeking reconsideration of the Order would not have an additional five days, beyond the 15 day reconsideration period set forth in the Order, "as permitted under Rule 28-106.103, [Florida Administrative Code]." The petitioners further argue that the Uniform Rules of Procedure allow an additional five days, beyond the 15 day reconsideration period set forth in the Order, for the petitioners to seek reconsideration of the Order. Noting their status as pro se litigants, the petitioners ask the Commission to apply principles of excusable neglect and equitable tolling and allow the petitioners "the opportunity to be heard and to seek further proceedings" in response to Part III of the Order. The petitioners go on to argue that, contrary to the Commission's findings in Part III of the Order, the Commission does have jurisdiction to require FPL to relocate its power lines as necessary to promote the public welfare.

#### FPL's Arguments

In its response, FPL notes that the primary rationale stated in the November 5 Order for dismissing the petitioners' request for hearing on Part III of the June 10 Order is that the Order did 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. FPL states that the petitioners' motion for reconsideration entirely ignores this primary rationale, instead focusing on a tangential finding in the November 5 Order that even if the petitioners' request for hearing is considered as a request for reconsideration, it must be denied as untimely. FPL contends that nothing in the petitioners' request for hearing could conceivably qualify as a motion for reconsideration of Part III of the June 10 Order, and, therefore, the Commission need not perform an analysis of the timeliness of such a motion. In any event, FPL asserts that the Commission correctly construed the Uniform Rules of Procedure as not permitting an additional five days for service of a motion for reconsideration. Further, FPL asserts that the petitioners' motion for reconsideration provides no valid justification for applying the doctrines of excusable neglect or equitable tolling such that petitioners should have been given additional time to file a motion for reconsideration of the June 10 Order.

Staff Analysis

The Commission's November 5 Order states, in pertinent part:

We 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. 4<sup>th</sup> DCA 1983).

Clearly, the Commission dismissed the petitioners' request for hearing on Part III of the June 10 Order because neither the Order nor the law provided the right to request a hearing on final agency action. As FPL notes, the petitioners entirely ignore this

rationale in their motion for reconsideration. Hence, the motion for reconsideration fails to identify any point of fact or law that the Commission overlooked or failed to consider in reaching this dispositive finding.

The petitioners' request for hearing expressly sought a hearing on both the proposed agency action and final agency action portions of the Commission's June 10 Order. Among the disputed issues set forth in the petitioners' request for hearing were the matters addressed as final agency action in Part III of the June 10 Order. Further, as FPL points out in its response to the petitioners' motion for reconsideration, the petitioners' request for hearing followed the format of a petition to initiate proceedings and ended by requesting relief in the form of "the right to appear before an Administrative Law Judge, and have the ALJ determine . . . if the PSC does indeed have a right to simply dismiss [the concerns dismissed in Part III of the June 10 Order]." Thus, staff agrees with FPL that nothing in the petitioners' request for hearing could conceivably qualify as a motion for reconsideration on Part III of the June 10 Order.

In their July 31, 2002, response to FPL's motion to dismiss their request for hearing, the petitioners suggested that their request for hearing was timely filed within the 15 day time period set forth in the June 10 Order. Still, the petitioners did not submit that they had intended their request for hearing on Part III of the June 10 Order as a motion for reconsideration. In the interest of providing a thorough analysis, staff's recommendation on FPL's motion to dismiss addressed a hypothetical situation in which the petitioners had intended their request for hearing as a motion for reconsideration. The November 5 Order adopted this additional analysis. However, because none of the petitioners' pleadings had given any indication that their request for hearing on Part III of the June 10 Order was intended as a motion for reconsideration, the petitioners cannot now assert that the Commission erred by not treating their request for hearing as a motion for reconsideration also. Accordingly, an analysis of the timeliness of a motion for reconsideration would be merely an academic exercise.

In conclusion, staff recommends that the Commission deny the petitioners' motion for reconsideration of the Commission's decision to dismiss the petitioners' request for hearing on Part III of the June 10 Order.

B. Reconsideration of Dismissal of Request for Hearing on Part II of Order No. PSC-02-0788-PAA-EI

Petitioners' Arguments

In their motion, the petitioners ask the Commission to reconsider that portion of the November 5 Order which dismisses the petitioners' request for hearing on Part II of the June 10 Order without prejudice to amend. Further, the petitioners ask that the Commission's engineers verify whether the Parkland Line complies with NESC requirements.

First, the petitioners assert that the Commission's 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." The petitioners contend that they can only rely on FPL's general statements that the Parkland Line complies with the NESC without any supporting documentation from FPL or "externally verifiable engineering reports." Second, the petitioners assert that this is the first time that FPL has used this type of power pole on a parallel run so close to a canal, and that FPL's lack of experience with such an installation raises a safety concern. Third, the petitioners note that FPL applied for a modification to their SFWMD permit to change the design of the transmission line project to make it compliant with FPL's internal standards. The petitioners assert that FPL's application for a permit modification calls into question whether the Parkland Line has been in compliance with the NESC all along. Fourth, the petitioners suggest that the steps FPL has taken to comply with its internal standards may be related to poor soil conditions on the canal bank, then question whether other problems could be present along the canal bank.

FPL's Arguments

In its response, FPL asserts that the points raised by the petitioners do not warrant reconsideration of Part II of the June 10 Order. FPL asserts that the petitioners first point, as set forth above, is "just plain wrong." FPL notes that on September 6, 2002, a Commission engineer completed a safety evaluation of the Parkland Line based upon an inspection of each pole and concluded that there was not a "single trace" of a possible NESC violation. As to the petitioners second point, FPL asserts that the petitioners' motion for reconsideration makes no reference to



anything in the NESC that relates to placement of poles near canals or to a requirement for prior experience installing such poles. As to the petitioners' third point, FPL notes that the modification to its SFWMD permit was obtained to modify the Parkland Line to meet FPL's internal standards, not NESC requirements. FPL asserts that by taking these steps, the Parkland Line is presumably safer now rather than less safe. FPL asserts that the petitioners' fourth point is no more than speculation and cannot be the type of specific allegation of non-compliance with the NESC contemplated by the November 5 Order.

Staff Analysis

The Commission's November 5 Order states, in pertinent part:

We further grant FPL's motion to dismiss, without prejudice, the petitioners' request for hearing on Part II of Order No. PSC-02-0788-PAA-EI. We tend 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 relocated. Accordingly, the petitioners' request for hearing as to Part II of the Order is dismissed 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.

The petitioners' motion for reconsideration fails to identify any point of fact or law that the Commission overlooked or failed to consider in rendering this portion of the November 5 Order. The petitioners' first and third points, as set forth above, were raised by the petitioners in their request for hearing and were considered in rendering the November 5 Order. The petitioners' second and fourth points, as set forth above, introduce speculation of safety concerns because this is the first time FPL has installed a transmission line along a canal and because poor soil conditions may be present. Neither of these points undercuts the rationale for the relevant portion of the November 5 Order cited above because neither point, had it been presented prior to the November

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5 Order, specifically alleges non-compliance with the NESC or how such non-compliance entitles the petitioners to the relief of having the Parkland Line moved. The Commission's jurisdiction over the safety of transmission facilities is limited to enforcement of the NESC's requirements. Thus, it would be pointless to move toward a formal hearing without an allegation of an NESC violation within the Commission's jurisdiction to remedy.

In conclusion, staff recommends that the Commission deny the petitioners' motion for reconsideration of the Commission's decision to dismiss, without prejudice, the petitioners' request for hearing on Part II of the June 10 Order.

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

**RECOMMENDATION:** No. This docket should remain open to allow the petitioners the opportunity to amend their request for hearing on Part II of the June 10 Order to specifically allege how the Parkland Line is not in compliance with the NESC and why such non-compliance requires relocation of the line. If an amended petition is not filed within 20 days of the Commission's vote on this matter, this docket should be administratively closed.

**STAFF ANALYSIS:** The November 5 Order provided the petitioners the opportunity to file, within 20 days of the issuance of that Order, an amended request for hearing on Part II of the June 10 Order. The November 5 Order went on to state that if an amended request for hearing was not filed within that time, this docket would be administratively closed.

Citing Rule 25-22.060(1)(c), Florida Administrative Code, FPL argues that the petitioners no longer have the option of filing an amended request for hearing on Part II of the June 10 Order. Rule 25-22.060(1)(c), Florida Administrative Code, provides that "[a] final order shall not be deemed rendered for the purpose of judicial review until the Commission disposes of any motion and cross motion for reconsideration of that order, but this provision does not serve automatically to stay the effectiveness of any such final order." Thus, FPL argues that the petitioners motion for reconsideration did not automatically stay the effectiveness of the November 5 Order, in particular the 20 day time period provided for filing an amended request for hearing.

Staff believes that the petitioners reasonably believed that their motion for reconsideration would toll the 20 day time period for filing an amended request for hearing. The portion of the November 5 Order which provided the petitioners the opportunity to file an amended petition was issued as procedural rather than final agency action. Thus, the rule cited by FPL, which relates to final orders, does not appear to apply in this instance. Further, if the petitioners' motion for reconsideration were resolved in their favor, filing an amended petition would have been unnecessary.

Therefore, staff recommends that this docket remain open to allow the petitioners the opportunity to amend their request for hearing on Part II of the June 10 Order to specifically allege how the Parkland Line is not in compliance with the NESC and why such

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non-compliance requires relocation of the line. Further, staff recommends that if an amended petition is not filed within 20 days of the Commission's vote on this matter, this docket should be administratively closed.