

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: February 23, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Keating) *Wak*
Division of Economic Regulation (Maurey, Willis) *Maurey* *ALM JDT*

RE: Docket No. 060038-EI – Petition for issuance of a storm recovery financing order, by Florida Power & Light Company.

AGENDA: 03/07/06 – Regular Agenda – Motion to Dismiss – Oral Argument Not Requested; Participation at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Deason

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\GCO\WP\2006\060038\060038.RCM.DOC

Case Background

On January 13, 2006, Florida Power & Light Company (“FPL”) filed a Petition for Issuance of a Storm Recovery Financing Order, along with supporting testimony and exhibits, pursuant to Sections 366.04, 366.05, and 366.8260, Florida Statutes. Section 366.8260, Florida Statutes, which became effective June 1, 2005, provides a new means of financing the recovery of utilities’ storm restoration costs and the establishment or replenishment of utilities’ storm damage reserves. FPL’s petition is the first filed under this new law. A formal evidentiary hearing has been scheduled for April 19-21, 2006.

On February 2, 2006, three intervenors in this docket – the Florida Retail Federation, AARP, and the Florida Industrial Power Users Group, collectively referred to in this

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recommendation as “Intervenors”¹ – filed a joint motion to dismiss FPL’s petition, without prejudice, for failure to comply with the pleading requirements of the Uniform Rules of Procedure, Chapter 28-106, Florida Administrative Code, and the Florida Administrative Procedures Act, Chapter 120, Florida Statutes. On February 6, 2006, FPL filed a response in opposition to the joint motion.

This recommendation addresses the joint motion to dismiss FPL’s petition. The Commission has jurisdiction pursuant to Chapters 120 and 366, Florida Statutes.

¹ Florida Retail Federation was granted leave to intervene by Order No. PSC-06-0119-PCO-EI, issued February 15, 2006. AARP was granted leave to intervene by Order No. PSC-06-0117-PCO-EI, issued February 15, 2006. Florida Industrial Power Users Group was granted leave to intervene by Order No. PSC-06-0118-PCO-EI, issued February 15, 2006.

Discussion of Issues

Issue 1: Should the Commission grant Intervenors' joint motion to dismiss FPL's petition for issuance of a storm recovery financing order?

Recommendation: No. Intervenors' joint motion to dismiss FPL's petition should be denied. FPL's petition states a cause of action upon which relief may be granted and, at a minimum, substantially complies with all applicable pleading requirements. (Keating)

Staff Analysis:

Intervenors' Joint Motion to Dismiss

In their joint motion, Intervenors note that FPL's petition for issuance of a storm recovery financing order was filed pursuant to Section 366.8260, Florida Statutes, which establishes a new means for recovery of storm restoration costs through issuance of bonds. Intervenors concede that FPL's petition appears to comply with the pleading requirements of Section 366.8260 but argue that FPL's petition does not comply with the requirements of Section 120.54(5)(b)4., Florida Statutes, and Rule 28-106.201, Florida Administrative Code. Intervenors contend that these alleged deficiencies are prejudicial and that allowing FPL's petition to go forward on the time schedule established for this case would deprive Intervenors of due process and would constitute a departure from the essential requirements of law.

Specifically, Intervenors allege three deficiencies in FPL's petition: (1) that the petition contains no statement of disputed issues of material fact as required by Rule 28-106.201(2)(d), Florida Administrative Code; (2) that the petition contains no statement of ultimate facts alleged, as required by Rule 28-106.201(2)(e), Florida Administrative Code; and (3) that the petition contains no statement of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief, as required by Section 120.54(5)(b)4.f, Florida Statutes.

With respect to the first alleged deficiency, Intervenors note that FPL, in its petition, indicates that it is not aware of any disputed issues. Intervenors claim that this explanation is unreasonable in light of FPL's involvement in a similar docket last year that involved numerous disputed issues and the fact that FPL's petition seeks relief under a new statute that necessarily raises new issues. Intervenors assert that FPL made no attempt to identify disputed issues of material fact and request that FPL's petition be dismissed without prejudice to allow FPL the opportunity to refile its petition with the alleged deficiency corrected.

With respect to the second alleged deficiency, Intervenors allege that FPL has failed to provide a "concise statement of the ultimate facts alleged," as required by Rule 28-106.201(2)(e). Intervenors claim that this deficiency, combined with the failure to identify disputed issues, is prejudicial because it leaves them with the job of guessing what the issues are. Intervenors request that FPL's petition be dismissed without prejudice on these grounds.

Intervenors offer no additional argument in support of the third alleged deficiency.

Finally, Intervenor's argue that if FPL refiles its petition to cure these alleged deficiencies, such a filing should restart the statutory time frames set forth in Section 366.8260, Florida Statutes, for consideration of the new petition. Intervenor's assert that allowing the case to continue on the current schedule would prejudice them by requiring them to prepare for a case without the benefit of the information that they believe FPL was required, but failed, to provide.

FPL's Response

In its response, FPL contends that Intervenor's' argument is "specious and hyper-technical, elevates form over substance, and fails to recognize that the Petition fully complies with all pleading requirements set forth in Section 366.8260, Florida Statutes, and applicable rules." FPL asserts that the provisions of Rule 28-106.201(2), Florida Administrative Code, relied on by Intervenor's do not apply to FPL's petition, and, even if those provisions did apply, FPL's petition complies with the standard set forth in that rule. FPL challenges Intervenor's' assertion that they are prejudiced by not having information necessary to make their case, stating that FPL's filing (its petition, attachments, testimony, and exhibits) comprises 786 pages and is replete with information on its restoration efforts during the 2005 hurricane season, the impact the storms had on FPL's electrical infrastructure, and FPL's proposal to recover storm-related restoration costs. FPL contends that Intervenor's have not met the standard for a motion to dismiss and, thus, that the joint motion should be denied.

With respect to the first and second deficiencies alleged by Intervenor's, FPL states that the Commission has previously determined that the criteria of Rule 28-106.201(2), Florida Administrative Code, relate specifically to a protest of proposed agency action. FPL notes that there is no proposed agency action for which FPL seeks review by the Commission. Thus, FPL argues, its petition is not subject to the requirements of Rule 28-106.201(2). With respect to the third deficiency alleged by Intervenor's, FPL contends that Section 120.54(5)(b)4.f, Florida Statutes, applies only to the Administration Commission and not to FPL.

FPL further contends that even if the provisions of Rule 28-106.201(2), Florida Administrative Code, did apply to FPL's petition, the petition would satisfy the rule because it is, at a minimum, in "substantial compliance," as required by the rule. With respect to the allegation that FPL's petition is deficient for failure to contain a statement of disputed issues of material fact, FPL asserts that the rule does not require FPL to do any more than it did when it stated in its petition that it was "not aware of any disputed issue of material fact." FPL argues that it would be absurd to interpret the rule to require FPL to try to determine who will intervene in the case and what facts, if any, they will dispute. Further, FPL suggests that by not doing so, it could not have prejudiced Intervenor's' ability to make a case.

With respect to the allegations that FPL's petition is deficient for failure to include a statement of ultimate facts alleged or a description of how the facts relate to the statute under which FPL seeks relief, FPL asserts that Intervenor's' argument elevates form over substance. FPL states that, in its petition, it describes in detail the storm-recovery activities and associated costs from the 2005 storm season and sets forth the factual allegations supporting its request for relief. FPL notes that its petition states each of the requirements of Section 366.8260(2)(a), Florida Statutes, regarding the contents of a petition for relief under the statute, and presents supporting information for each requirement, demonstrating how the facts relate to the statute.

Further, FPL notes that it provided, as an attachment to its petition, a draft financing order with findings of fact and conclusions of law proposed by FPL. FPL contends that its petition should not be dismissed simply because it has not separately labeled its statement of ultimate facts alleged and statement of how the facts relate to the law.

FPL contends that Intervenors' joint motion is an attempt to gain additional time by delaying this proceeding in contravention of the legislatively established time frames for disposition of petitions filed under Section 366.8260, Florida Statutes. FPL further challenges Intervenors' allegations of prejudice, noting that not one of these parties has served a single discovery request on FPL in this proceeding.

Staff Analysis

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action upon which relief may be granted. See Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is 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 granted. See id. at 350. In determining the sufficiency of the petition, the Commission must confine its consideration to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. See Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958); Rule 1.130, Florida Rules of Civil Procedure.

Analysis

Intervenors' joint motion and FPL's response raise two questions: (1) what are the pleading requirements applicable to FPL's petition; and (2) does FPL's petition comply with those requirements. To answer the first question, the pleading requirements set forth in Section 366.8260, Florida Statutes, and, to an extent, those set forth in Rule 28-106.201(2), Florida Administrative Code, are applicable to FPL's petition. To answer the second question, FPL's petition, at a minimum, substantially complies with the applicable pleading requirements.

1. Applicable Pleading Requirements

Among several 1996 amendments to Chapter 120, Florida Statutes (the "Administrative Procedure Act" or "APA"), the Legislature required that the Administration Commission adopt uniform rules of procedure to serve as the rules of procedure for each agency subject to the APA. This requirement is set forth in Section 120.54(5), Florida Statutes.² In compliance with this requirement, the Administration Commission adopted uniform rules of procedure in 1997 which address, among other things, the general pleading requirements for the filing of petitions for administrative hearings. Those pleading requirements are set forth in Rule 28-106.201(2), Florida Administrative Code, which states:

² This statute, by itself, does not establish pleading requirements. Instead, it directed the Administration Commission to adopt specific pleading requirements.

- (2) All petitions filed under these rule 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, and telephone number of the petitioner; 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, as well as the rules and statutes which entitle the petitioner to relief; and
 - (f) A demand for relief.

Subsection (4) of the rule states that a petition may be dismissed if it is not in "substantial compliance" with these requirements or if it has been untimely filed. Subsection (1) of the rule defines a petition as "any document that requests an evidentiary hearing and asserts the existence of a disputed issue of material fact."

As the Commission has previously recognized,³ these general provisions apply primarily to petitions requesting a hearing on proposed agency action. First, subsection (2)(c) of the rule requires a statement of how and when the petitioner received notice of the agency decision. Obviously, this subsection can only be applicable when the agency has taken proposed action and issued a decision that is subject to a request for hearing. Second, subsection (2)(d) of the rule requires a statement of all disputed issues of material fact. A petitioner that requests a hearing on proposed agency action will clearly be able to identify those parts of the agency's proposed action that the petitioner disputes, whereas a petitioner filing an original request for relief cannot reasonably be expected to identify "all disputed issues of material fact" that might arise. Prior to some potential party opposing the relief sought through an original petition, logic dictates that there is no "disputed issue" to identify. Finally, even the definition of a "petition" under subsection (1) of the rule suggests that it encompasses only petitions requesting a hearing on proposed agency action. As is true in this case, many original petitions do not request an evidentiary hearing. Further, as noted above, a petitioner filing an original request for relief

³ Order No. PSC-03-0578-FOF-TP, issued May 6, 2003, in Docket No. 030200-TP, In re: Emergency petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaks Service d/b/a AT&T for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc., at p.7.

cannot reasonably be expected to assert the existence of a disputed issue of material fact prior to any known opposition to the petition.

Nonetheless, staff believes that the pleading requirements of Rule 28-106.201(2), Florida Administrative Code, to the extent that they can reasonably be applied, are applicable to FPL's petition. In 1998, following adoption of the Uniform Rules of Procedure, this Commission petitioned the Administration Commission for exceptions to the Uniform Rules so that we could retain certain provisions of our then-existing procedural rules. One of the rules that the Commission sought an exception to retain was Rule 25-22.036, Florida Administrative Code, which concerned the initiation of formal proceedings, including pleading requirements. That rule contained provisions specific to several different types of initial pleadings – original petitions, petitions requesting a hearing on proposed agency action, applications, and complaints – and very clearly distinguished the pleading requirements for original petitions from the pleading requirements for petitions requesting a hearing on proposed agency action. The Administration Commission allowed this Commission an exception to retain only those provisions of the rule that related to applications and complaints. It determined that the provisions related to original petitions and petitions requesting a hearing on proposed agency action were adequately covered by statute and other provisions of the Uniform Rules, including Rule 28-106.201.⁴ Thus, the pleading requirements of Rule 28-106.201(2), to the extent that they can reasonably be applied, are applicable to original petitions, such as FPL's petition in this docket.

FPL and Intervenors agree that the substantive pleading requirements in Section 366.8260(2)(a), Florida Statutes, also apply to FPL's petition.⁵

⁴ Administration Commission Final Order No. APA 98-007, filed June 25, 1998, at p.3.

⁵ Section 366.8260(2)(a) establishes seven substantive pleading requirements for a petition for issuance of a financing order. In such a pleading, the utility shall

1. Describe the storm-recovery activities that the electric utility has undertaken or proposes to undertake and describe the reasons for undertaking the activities.
2. Set forth the known storm-recovery costs and estimate the costs of any storm-recovery activities that are not completed, or for which the costs are not yet known, as identified and requested by the electric utility.
3. Set forth the level of the storm-recovery reserve that the utility proposes to establish or replenish and has determined would be appropriate to recover through storm-recovery bonds and is seeking to so recover and such level that the utility is funding or will seek to fund through other means, together with a description of the factors and calculations used in determining the amounts and methods of recovery.
4. Indicate whether the electric utility proposes to finance all or a portion of the storm-recovery costs and storm-recovery reserve using storm-recovery bonds. If the electric utility proposes to finance a portion of such costs, the electric utility shall identify that portion in the petition.
5. Estimate the financing costs related to the storm-recovery bonds.
6. Estimate the storm-recovery charges necessary to recover the storm-recovery costs, storm-recovery reserve, and financing costs and the period for recovery of such costs.
7. Estimate any cost savings or demonstrate how it would avoid or significantly mitigate rate impacts to customers resulting from financing storm-recovery costs with storm-recovery bonds as opposed to the traditional method of recovering such costs from customers and through alternative financing methods available to the electric utility.

2. *Compliance with Applicable Pleading Requirements*

As noted above, Rule 28-106.201(4), Florida Administrative Code, states that a petition may be dismissed if it is not in “substantial compliance” with the pleading requirements of subsection (2) of the rule. In light of the discussion above, FPL’s petition, at a minimum, substantially complies with the applicable pleading requirements. Each of Intervenor’s alleged deficiencies is discussed below.

First, Intervenor’s allege that FPL’s petition is deficient because it does not contain a statement of all disputed issues of material fact, as required by Rule 28-106.201(2)(d), Florida Administrative Code. FPL addresses this pleading requirement in its petition by stating:

FPL is not aware of any disputed issue of material fact. This Petition is not filed in response to any agency action.

FPL’s petition is not deficient on this ground. As discussed in detail above, a petitioner filing an original request for relief cannot reasonably be expected to identify “all disputed issues of material fact” that might arise. Prior to some potential party opposing the relief sought through an original petition, logic dictates that there is no “disputed issue” to identify. The law recognizes that statutes and rules should not be interpreted in a manner that produces an absurd result. Intervenor’s argument on this point is inconsistent with this principle of interpretation.

Second, Intervenor’s allege that FPL’s petition is deficient because it does not contain a concise statement of the ultimate facts alleged, as required by Rule 28-106.201(2)(e), Florida Administrative Code. The “ultimate facts” are those which, if proven, would support the relief requested by FPL.⁶ While FPL’s petition does not contain a separately labeled section devoted to identifying the ultimate facts alleged, it describes in detail the facts upon which its request for relief is based. Point-by-point, through more half of its 44 page petition, FPL addresses the seven substantive pleading requirements of Section 366.8260, Florida Statutes, which are identified in footnote 5, above, thereby alleging the ultimate facts that would support its request for relief. Further, as an exhibit to its petition, FPL filed a draft financing order which includes its proposed findings of fact and conclusions of law.⁷ Accordingly, staff believes that, at a minimum, FPL’s petition substantially complies with the requirement of Rule 28-106.201(2)(e).

Third, Intervenor’s allege that FPL’s petition is deficient because it does not contain a statement of how the facts alleged relate to the statutes and rules pursuant to which FPL claims to be entitled to relief, as required by Section 120.54(5)(b)4.f, Florida Statutes. As noted in footnote 2, above, Section 120.54(5)(b)4. does not establish pleading requirements. Instead, it directed the Administration Commission to adopt specific pleading requirements. The requirement adopted by the Administration Commission pursuant to the subsection of the statute cited by Intervenor’s appears to be embedded in Rule 28-106.201(2)(e), Florida Administrative

⁶ Fla. Jur. 2d, Vol. 40, Pleadings, §22.

⁷ In determining the sufficiency of the petition, the Commission’s consideration is limited to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. Thus, the draft financing order, which was incorporated into the petition as an exhibit, is to be considered.

Code, which requires that a petition include a statement of the rules and statutes that entitle the petitioner to relief.

While FPL's petition does not contain a separately labeled section devoted to identifying the rules and statutes that entitle it to relief, it more than adequately identifies such rules and statutes. In the first paragraph on the first page of its petition, FPL identifies the statutes and rules upon which it requests relief. Throughout its petition, FPL references these statutes and rules, as well as prior Commission orders, where it believes that application of such law to the facts entitles FPL to the relief it requests. Further, as noted above, FPL's petition included a draft financing order which sets forth FPL's proposed findings of fact and conclusions of law. Accordingly, staff believes that, at a minimum, FPL's petition substantially complies with this pleading requirement.

Finally, Intervenors assert that allowing the case to continue on the current schedule would prejudice them by requiring them to prepare for a case without the benefit of the information that they believe FPL was required, but failed, to provide. Based on the above analysis, this assertion is entirely without merit. FPL's petition, at a minimum, substantially complies with the applicable pleading requirements and provides the necessary information to inform persons of the basis for its requested relief. In addition, as required by Section 366.8260(2)(a)8., Florida Statutes, FPL filed direct testimony in support of its petition at the same time it filed its petition. This prefiled testimony provides additional detail as to the facts and law that FPL presumably has offered in support of its petition.

3. *Conclusion*

Based on the foregoing analysis, staff recommends that the Commission deny Intervenors' joint motion to dismiss FPL's petition for issuance of a financing order. FPL's petition states a cause of action upon which relief may be granted and, at a minimum, substantially complies with all applicable pleading requirements.

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Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open to address FPL's pending petition for issuance of a storm recovery financing order. (Keating)

Staff Analysis: This docket should remain open to address FPL's pending petition for issuance of a storm recovery financing order.