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Subject: Electronic Filing Docket No. 100358-EI - AFFIRM'S Response To Florida Power & Light Company's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action, Or In The Alternative, Motion For More Definite Statement

Attachments: AFFIRM Response to FPL MTD.pdf

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Electronic Filing

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b. Docket No. 100358-EI.

c. Document is being filed on behalf of Association for Fairness in Ratemaking (AFFIRM)

d. There are a total of 12 pages in the attached document.

e. The attached document is AFFIRM'S Response To Florida Power & Light Company's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action, Or In The Alternative, Motion For More Definite Statement

Thank you,

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the design of Commercial Time-of-Use rates by Florida Power & Light, pursuant to Order No. PSC-10-0153-FOF-EI.	DOCKET NO. 100358-EI FILED: July 7, 2011

AFFIRM'S Response To Florida Power & Light Company's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action, Or In The Alternative, Motion For More Definite Statement

Petitioner, the Association for Fairness in Ratemaking (AFFIRM), by and through its undersigned counsel, hereby files its response to Florida Power & Light Company's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action ("Motion to Dismiss"), Or In The Alternative Motion For More Definitive Statement ("Motion MDS"). In support thereof AFFIRM offers the following response.

I. Introduction

AFFIRM has availed itself of the point of entry provided by the Commission to challenge the proposed agency determinations in an adjudicatory proceeding. The PAA Order provided by the Commission was issued as a result of an investigation in this docket. Both the investigation and PAA Order proceed on the Commission's recognition that the existing tariffs of a utility do have an effect on substantial interests of customers who take service under the published rates and that customers enjoy a statutory right under Chapter 366, Florida Statutes, to rates that are fair, just and reasonable.

AFFIRM has protested the Commission's proposed determination that the existing tariff offerings of FP&L for medium size businesses, which offerings include

time of use (TOU) rates for medium size businesses, do not result in a misallocation of costs to AFFIRM's members and are therefore fair, just and reasonable. AFFIRM disputes these proposed determinations. In a nutshell, AFFIRM alleges that FPL's commercial rates are unjust, unfair and unreasonable because they allocate disproportionate costs among the different customers within the medium business class. This occurs in part because both the GSD tariff and the GSDT tariff assume that all customers within the medium business class have approximately the same load shape.

This assumption is simply not true because some customers, such as the AFFIRM members, use disproportionate amounts of energy during the off-peak periods (if the off-peak periods were properly determined). The focus of the AFFIRM's petition is FPL's GSDT rate and other TOU rates because those rates fail to recognize different costs associated with off-peak and on-peak individual customer loads and correspondingly fail to incent customers to shift their individual peak loads to off peak periods.

More specifically, AFFIRM has asserted and continues to assert that the time periods defined as On-Peak and Off-Peak hours for base rate purposes are improperly structured in both the defined Summer Months and the defined Winter Months. This improper structure occurs because the defined On-Peak hours during both Summer Months and Winter Months encompass numerous hours when FPL does not ever incur a monthly system peak. Accordingly, commercial customers who regularly experience their individual monthly peaks during defined On-Peak hours in which FPL is not expected to incur a monthly system peak are unfairly burdened with demand related costs.

Further, the improperly structured On-Peak and Off-Peak Periods used for base rate purposes are then extended for use in fuel cost recovery on a time of use basis, even though there has been no showing by FPL of any correlation between the time periods in which FPL's fuel costs are incurred and the time periods for which FPL's fuel costs are collected. This results in a situation whereby not only is the recovery of fuel costs misallocated among TOU customers, but also this structure has entirely negated the usefulness of time signals that would allow TOU customers to react in a manner that would reduce both individual customer costs as well as FPL's ongoing operating costs.

To recap, AFFIRM has protested the PAA Order because it believes that both the GSD rate and GSDT rate misallocate the costs so that disproportionate amounts are placed on AFFIRM's members. In other words, AFFIRM's members are subjected to unfairly high rates. AFFIRM is entitled to hearing under section 120.57, Florida Statutes on the disputed issues in this case, to conduct discovery with respect to these costs and other germane facts, to put on its direct case, to cross-examine witnesses, and to have the issues in dispute determined by the Commission based on the evidentiary record.

II. Standard of Review

FPL's Motion To Dismiss treats AFFIRM's petition as if it were a complaint against FPL filed in circuit court and thus the bar for overcoming a motion to dismiss is low. "[T] he trial court must confine its review to the four corners of the complaint, draw all inferences in favor of the pleader, and accept as true all well-pleaded allegations." *Fox v. Prof'l Wrecker Operators of Fla., Inc.*, 801 So. 2d 175, 178 (Fla. 5th DCA 2001) (citing *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996)). This is because the purpose of a Motion to Dismiss is to test the legal sufficiency

of whether a plaintiff has stated a cause of action. *See, Solorzano v. First Union Mortg. Corp.*, 896 So. 2d 847 (Fla. 4th DCA 2005).

III. Legal Analysis

A. AFFIRM's Petition Sufficiently Alleges Its Standing To Establish That It Is Entitled To A Hearing

AFFIRM's Substantial Interests Are Plead. FPL argues that AFFIRM has failed to adequately plead its "substantial interests" that will be affected by the Commission's determination contained in the PAA Order. Consequently, according to FPL, AFFIRM has failed to meet the technical requirements of Rule 28-106.201(2)(b), Florida Administrative Code, and failed to satisfy the well accepted "two prong" test for standing established in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478 (Fla. 2d DCA 1981), rev. denied, 415 So. 2d 1359 (Fla. 1982). More specifically, FPL argues that AFFIRM did not satisfy the first prong of the test for standing because it has failed to identify an "injury in fact of affecting the substantial interests of AFFIRM or its members which is of sufficient immediacy to give its standing to protest the PAA Order." FPL next argues that the Petition does not satisfy the second prong because AFFIRM has not sufficiently alleged that the injury is of the type the proceeding is designed to protect.

A cursory review of the allegations of the Petition reveals that FPL is incorrect, and is simply attempting to impose heightened pleading requirement on the Petitioner. Indeed, throughout both of its motions, FPL approaches AFFIRM's Petition as if that initial pleading were a motion for summary judgment in which the Petitioner must marshal the evidence to prove the merits of its case. Again, for the purposes of surviving

a motion to dismiss, the pleading is required to allege the elements of a genuine dispute, not prove them. AFFIRM has alleged standing as required in that it has sufficiently identified the substantial interests of its members would be adversely affected by the Commission's proposed determination, i.e., that the proposed determination would result in AFFIRM's members be continuing to be subjected to utility rates that are unjust, unfair and unreasonable.

AFFIRM believed it to be axiomatic that an allegation of unjust, unfair and unreasonable rates signified two distinct harms, both of which are immediate and substantial. The first harm is the violation of the customer's statutory right to a rate that is not unjustly discriminatory; the second is the financial harm of being forced to pay rates that place on the customer a disproportionately high amount of the utility's cost of providing service.

FPL may believe that AFFIRM's allegation of standing is inadequate because AFFIRM did not attach a dollar value to the amount that its members are being overcharged. This was not an oversight on AFFIRM's part, nor was it required. FPL has not yet provided to AFFIRM the data necessary to compute the dollar value for its various members. Nevertheless, on information and belief, AFFIRM estimates that its members are typically being overcharged annually an amount of between $3,500 and $4,000. To a QSR dealing in one of this country's most competitive markets where every penny counts, these are not insubstantial amounts. In fact, this amount could easily be the difference between a QSR reducing an employee's hours or even letting the employee go.

With respect to the requirement of immediacy, the members of AFFIRM are in the unfortunate position of experiencing the loss every month and that unjustifiable harm would continue without being challenged in an adjudicatory proceeding if the PAA order had not been protested. The injury to AFFIRM's members is not only immediate, it is ongoing.

***Agrico's* "Second Prong" Is Satisfied.** Finally, with respect to satisfying the requirement that the injury is of the type the proceeding is designed to protect, AFFIRM refers the Commission and FPL to paragraph 11 of its Petition, which reads as follows:

> 11. Statement of Specific Statutes Involved. At this time the statutes involved are identified as §§366.01, 366.04, 366.041, 366.05, 366.06, and 366.07, Florida Statutes. These sections are involved because they prohibit rates that are unfair, unreasonable, and unjustly discriminatory.

FPL Enjoys No Option To Unjustly Discriminate In Any Tariff. FPL also contends that there can be no harm to AFFIRM because the GSDT rate is an "optional rate", and therefore the GSD default rate is available to it. AFFIRM believes that when FPL publishes a tariff it is obligated to ensure that the rates offered are not unjustly discriminatory and that this obligation cannot be avoided by designating the the tariff as "optional." Likewise, AFFIRM believes that the utility customer has the right to take service under a published tariff that is not unjustly discriminatory (that is fair, just and reasonable), and that this right cannot be extinguished by the utility denominating the offering as "optional."

It's evident that FPL believes both its GSD rate and TOU are valid and do not unjustly discriminate. Thus, it may be difficult for FPL to perceive any harm to

AFFIRM's members. From FPL's perspective, AFFIRM has *two* valid options, not just one. But FPL is being myopic and this can be easily demonstrated.

The Commission must accept for the purpose of the Motion to Dismiss that FPL's commercial rates do in fact unjustly discriminate against AFFIRM's members. What this means is that AFFIRM's members are impermissibly excluded from taking service under a fair TOU rate. The legal question therefore must focus not on the availability of an alternative rate alleged by FPL to be satisfactory, but rather on the unjustifiable discriminatory exclusion of customers from a legitimate fair and reasonable TOU rate. Such exclusion is not permitted. This is even clearer if one hypothetically assumes that the basis for discrimination was not *over-averaging*, but rather discrimination against a protected class such as race, ethnicity, religion, gender, etc. No one would argue that the discriminatory tariff was valid because an alternative tariff existed for the excluded customer, nor that the customer was not harmed by the exclusion because there existed a "separate but adequate" option.

Another problem with the "optional rate" argument is that it would also prevent AFFIRM from challenging the GSD rate, leaving AFFIRM no recourse. Suppose, for example, that AFFIRM had petitioned for direct relief from the GSD rate in the form of a validly designed TOU rate for medium sized customers. Is there any doubt that AFFIRM would be facing the objection that it has no standing to challenge the GSD rate on that basis because FPL already has valid TOU options?

In sum, the fact that FPL dubs the GSDT rate as "optional" does not mean that rate is shielded from scrutiny because of the existence of the GSD default rate.

B. **As an Initial Pleading, AFFIRM's Petition On Proposed Agency Action Provides Ample Detail For The Purpose of Moving Forward**

FPL's alternative Motion MDS contends that AFFIRM's Petition is vague and ambiguous, and that AFFIRM should be required "to provide a more definite statement regarding material and ultimate facts alleged and relief sought." FPL makes two separate arguments in support of this motion. In the first argument FPL raises the concern that AFFIRM is impermissibly broadening the scope of the proceeding by addressing the infirmities of the GSD rate. Its second argument FPL argues that AFFIRM should be required to provide a more definite statement of the relief sought.

In basic response, FPL seems to demand from AFFIRM the level of specificity one would expect after discovery is completed. To be clear, in the past two years FPL has not provided or offered to provide any data that AFFIRM needs for the purposes of prosecuting this case. For example, one set of data AFFIRM needs is FPL's forecast of hourly fuel costs for 2011 and 2012. Until AFFIRM obtains the information it needs, it cannot provide FPL the specify it is seeking.

Moreover, for the purposes of moving forward the Petition is more than adequate. The Petition provides five statements of ultimate facts alleged, and identifies 24 separate issues involving material facts in dispute. This is a lot of issues and a lot of detail. A neutral comparison of the PAA Order to the Petition will further reflect that the PAA Order is rather general when compared to the specificity of the Petition. Given the nature of the PAA Order protested and the limited data available to AFFIRM, it is difficult to see how AFFIRM could be expected, much less required, to provide a more specific or complete framework for the case.

FPL also states that it does not know the specific relief AFFIRM has requested. Actually, the specific relief requested was and continues to be that the dispute over the unlawful TOU rates be set for hearing under section 120.57, Florida Statutes. What FPL appears to be saying is that it does not know what AFFIRM wants the ultimate outcome to look like. However there is no requirement that the Petition on Proposed Agency Action describe a complete blueprint for the correction that will serve as the remedy; it is enough for AFFIRM to identify the specific wrong that must be corrected.

In sum, with respect to the Motion MDS, AFFIRM respectfully submits that it's Petition on Proposed Agency Action amply states the matters in dispute. The Petition is simply the initial pleading to request a hearing under section 120.57, Florida Statutes . It is not intended to be as complete as a prehearing statement, for example. Requiring a more definite statement from AFFIRM at this time is not required under the law, not necessary to meet FPL's concerns, and not useful to shaping this dispute.

IV. Further Response to FPL's Concerns

Although a Motion to Dismiss and a Motion MDS are not typically viewed as friendly motions, AFFIRM appreciates that FPL's basic purpose is to clarify its uncertainties around the dispute. AFFIRM accepts at face value FPL's statements that it remains uncertain as to what AFFIRM wants, whether that relief can be granted, and how FPL is supposed to respond in this proceeding. In this context, AFFIRM views FPL's Motions as constructive and not hostile.

AFFIRM believes that the concerns FPL has made explicit are the result of a communication gap between FPL and AFFIRM in discussing the underlying problem.

AFFIRM has experienced that gap from the other side and has its own uncertainties as to FPL's positions. AFFIRM believes this gap is a major reason that AFFIRM and FPL have not been able to achieve the mutuality required to litigate. Although litigation is used to adjudicate differences, it is easy to overlook that the adversaries go forward with the case based on mutual expectations, including some workable idea of the other side's case. Those mutual expectations are lacking here even though the instant rate issues were raised by AFFIRM in FPL's rate case over two years ago. In some way that neither AFFIRM nor FPL have been able to recognize, we are two parties talking past each other.

AFFIRM would thus request that an early informal issue identification meeting be set in which the parties can attempt to come to a better understanding of each other's positions and to avoid unproductive litigation. Although the TOU rates have been in discussion over the past two years AFFIRM, FPL, and Staff have never sat down in the same room together to address their differences. There have been, however, two telephone conferences and the discussions were robust, but they did not appear to produce positive results. [1]

AFFIRM believes that an early issue identification meeting would be productive. In fact, we remain cautiously optimistic that AFFIRM and FPL can find a way to resolve this dispute without a hearing. But irrespective of the specific outcome of the proposed meeting, the effective and efficient handling of this case requires that the parties sit down together and address areas of agreement and disagreement.

[1] AFFIRM would note that it suggested a meeting with FPL and staff last December before staff finalized its recommendation. FPL was not in a position at that time to accommodate our request to meet in person and FPL instead met with AFFIRM by phone.

V. Conclusion

FPL's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action, Or In The Alternative Motion For More Definitive Statement should be denied. The Petition on Proposed Agency Action adequately pleads standing and amply states the ultimate facts and material issues of fact in dispute. FPL's motions would impose on AFFIRM's petition the level of specificity that might be required of a prehearing statement or a motion for summary judgment. This is not appropriate. The Petition on Proposed Agency Action is an initial pleading triggering a hearing under Section 120.57 Florida Statutes, and it is entirely adequate for that purpose.

Although AFFIRM does not agree with the relief sought by FPL in its motions, AFFIRM does agree that the parties appear to be miscommunicating. AFFIRM therefore requests that an early issue identification meeting be set in which the parties can discuss this dispute face to face for the first time.

WHEREFORE, AFFIRM respectfully request that the Commission deny the FPL's Motion to Dismiss and FPL's Motion for More Definite Statemen

Respectfully submitted this 7th day of June 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the preceding Response To Florida Power & Light Company's Motion To Dismiss AFFIRM's Petition On Proposed Agency Action, Or In The Alternative, Motion For More Definite Statement was furnished to the following electronically on this 7st day of July, 2011:

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