

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint by Erika Alvarez,)
Jerry Buechler, and Richard C. Silvestri)
against Florida Power & Light Company)

Docket No. 150185-EI
Filed: September 1, 2015

**FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS COMPLAINT
AND RESPONSE TO MOTION FOR ORAL ARGUMENT**

Pursuant to Rule 28-106.204, Florida Administrative Code, Florida Power & Light Company ("FPL") hereby files its Motion to Dismiss the complaint filed by Erika Alvarez, Jerry Buechler, and Richard Silvestri (the "Petitioners") and Response to the Motion for Oral Argument, and states as follows:

I. INTRODUCTION AND BACKGROUND

In January 2015, FPL made rebates available to its customers for residential solar photovoltaic ("PV") systems pursuant to its Commission-approved Residential PV pilot program. On January 14, 2015, while preparing the system for the planned rebate "launch," the rebate application webpage inadvertently became active earlier than scheduled. In response, and in order to ensure an opportunity for all customers interested in obtaining a residential PV rebate to participate, FPL decided to offer a second round of rebates. The second launch started at the designated time; however, due to unusual user activity, the website slowed and the application process was interrupted. FPL explained the events surrounding the Residential PV pilot rebate offerings in two letters to the Florida Public Service Commission's ("Commission's") Executive Director, attached as Exhibit A. As discussed in those letters, a review of the system data demonstrated that all applications were accepted by the system on a "first come, first served" basis and that there were no violations of the approved Residential PV pilot program standards.

On August 17, 2015, a complaint and request for hearing regarding these rebate offerings, signed by Petitioners, was filed with the Commission (the “Complaint”). FPL received notice of the Complaint on August 18, 2015. Pursuant to Rule 28-106.204(2), FPL has 20 days to move to dismiss the Complaint.

On August 25, 2015, Mr. Silvestri e-mailed FPL a copy of a letter purporting to be a “motion for oral argument” regarding expedited consideration of the complaint. Assuming *arguendo* that the letter is a proper motion, pursuant to Rule 28-106.204(1), FPL has seven days to file a response in opposition.

For purposes of administrative efficiency, FPL is hereby moving to dismiss the Complaint and responding to the “motion for oral argument” in a single pleading, within the earliest applicable timeframe established by the above-referenced rules. As discussed below, the Complaint should be dismissed because it fails to state any cause of action for which relief could be granted by the Commission. Similarly, the Petitioners’ request for oral argument should be denied because it fails to meet requirements applicable to such requests and because oral argument is not necessary for the Commission to reach an informed decision on either of the Petitioners’ filings.

II. ARGUMENT

A. Motion to Dismiss Complaint

1. Standard for Motion to Dismiss

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law

on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. *Kislak v. Kredian*, 95 So. 2d 510 (Fla. 1957); *see also, John Charles Heekin v. Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (issued May 24, 1999). In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000). In reviewing a motion to dismiss, the Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. *See, e.g., Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983).

2. Petitioners Fail to State a Cause of Action as a Matter of Law

Petitioners contend that FPL violated Section 366.81 and Section 366.82(3)(a), (b), and (c), Florida Statutes, (portions of the Florida Energy Efficiency and Conservation Act, or “FEECA”) and Order No. PSC-14-0696-FOF-EU (the “2014 DSM Goals Order”) during the two Residential PV pilot rebate launches that occurred in January 2015. Petitioners’ complaint, however, fails to allege facts sufficient to state a cause of action.

First, Petitioners state that on January 14, 2015, the residential PV rebate system began accepting applications for rebates earlier than planned. (Complaint, p. 1) From this, Petitioners make the sweeping conclusions that FPL “did not abide by the Goals” and that FPL committed “error . . . to meet the statutes and rules of the PSC.” However, Petitioners do not state how the early opening constitutes a violation of the 2014 DSM Goals Order. For example, Petitioners do not point to any portion of that order that requires FPL to administer its solar rebate programs in

any particular way. Nor do Petitioners allege that FPL will not meet its DSM goal of spending up to \$15.5 million on solar rebate programs this year (which resulted from a different DSM goals order, not referenced by Petitioners). Petitioners also do not state how the early opening of the reservation system constitutes a violation of FEECA. Petitioners point to no language in Section 366.81 or Section 366.82 that requires FPL to administer its solar rebate programs in any particular manner.

Second, Petitioners state that on January 21, 2015, during the subsequent residential PV rebate launch, the website “locked up.” (Complaint, p. 2). Petitioners then conclude that this constituted a “failure of FPL to have a fair, impartial and nondiscriminatory process as Florida Statute 366 in sections .81 and .82 (a), (b) and (c) and ORDER NO. PSC-14-0696-FOF-EU AND DOCKET NOS. 130199-EI thru 130205-EI requires.” The Complaint is lacking in any specific allegations as to how or whether the website “lock up” was the result of any action by FPL, let alone any unfair, partial, or discriminatory action by FPL.

Third, Petitioners make a legal argument that the Commission’s 2014 DSM Goals Order contains an implicit requirement that FPL’s Residential PV pilot process must be implemented in a “fair, impartial and nondiscriminatory” manner. (Complaint, p. 2). Despite Petitioners’ claims of unfair treatment due to their inability to secure a rebate reservation, and speculation about the potential for “favoritism,” Petitioners again fail to allege how the earlier-than-planned launch on January 14th or the website freeze on January 21st resulted in any targeting or disparate treatment of Petitioners or any other particular customers or customer groups. Additionally, Petitioners’ own Complaint undermines any allegation that FPL treated certain customers in a discriminatory manner by characterizing the website problems as turning the on-line rebate reservation process

into a “game of chance” (Complaint, p. 2). Without accepting this characterization, FPL notes that by its very definition a game of chance is random and impartial.

A complaint must sufficiently allege the ultimate facts which, if established by competent evidence, would support the relief sought under law. *See Kislak v. Kredian*, 95 So. 2d 510 (Fla. 1957). Broad assertions are insufficient. *See, e.g., Order Granting Florida Power & Light’s Company’s Motion to Dismiss with Prejudice*, Docket No. 130290-EI, Order No. PSC-14-0475 (issued Sept. 8, 2014). Petitioners have not alleged any unfair, partial or discriminatory actions by FPL. As Petitioners state, the reservation system opened early to all customers on January 14, 2015, and the website “locked up” affecting customers randomly on January 21, 2015. Petitioners may feel that the results of these system issues were “unfair” but that falls far short of sufficiently alleging a cause of action for specific, unfair actions by FPL. As a result, the Complaint should be dismissed.

B. Response to “Motion” for Oral Argument

Mr. Silvestri’s letter dated August 25, 2015 states that the letter is “a motion for oral argument to be heard at the September 15th meeting . . . to request an expedited process for decision by the commissioners.” While it is somewhat unclear, the letter appears to be requesting oral argument to address expedited consideration of the Complaint, not to address the substance of the Complaint itself.

Pursuant to Rule 25-22.0022(a), F.A.C., “[o]ral argument must be sought by separate written request filed concurrently with the motion on which argument is requested.” In other words, a *request* for oral argument must accompany some *motion* for relief. In this instance Petitioners have not filed a motion, in compliance with Rule 28-106.204, for expedited

consideration of the Complaint or for a waiver of any timeframes that otherwise would apply. Accordingly, Petitioners' request for oral argument should be disregarded.

The analysis of Petitioners' request for oral argument could (and should) stop there. Nonetheless, if the Commission were to look past the lack of an accompanying and compliant motion for relief, the request for oral argument fails to meet other elements of the applicable rule. Rule 25-22.0022(a) requires the movant to identify why oral argument on the requested relief is necessary. Specifically, it states the following:

The request for oral argument shall state with particularity why oral argument would aid the Commissioners . . . in understanding and evaluating the issues to be decided...

Petitioners have not stated (let alone stated with particularity) why oral argument would be helpful for the Commission to understand their request for expedited treatment. The Petitioners' letter sets forth Petitioners' arguments for their request for expedited treatment. There is no indication that oral argument would further illuminate those arguments or help the Commission to understand and evaluate the request for expedited treatment. Finally, Rule 25-22.0022(a) requires a party to state "the amount of time requested for oral argument." No timeframe for oral argument was stated in the Petitioners' letter. Accordingly, Petitioners' request for oral argument should be denied.

III. CONCLUSION

FPL understands that many customers who were interested in obtaining rebates for residential PV systems were unable to do so, as has been the case each year during the program's 5-year term. Nonetheless, Petitioners' dissatisfaction with the process fails to state a cause of action as a matter of law. Accordingly, Petitioners' Complaint should be dismissed. In the event the Commission denies FPL's motion to dismiss or provides Petitioners the opportunity to file an

amended Complaint, FPL will respond substantively to the allegations. Additionally, due to the lack of any motion for relief (i.e., for expedited consideration of the Complaint) and the failure to satisfy the elements required by Rule 25-22.0022(a) in requesting oral argument, Petitioners' "motion for oral argument" in support of expedited treatment of its Complaint also should be denied.

Respectfully submitted this 1st day of September, 2015.

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By: s/ Jessica A. Cano
Jessica A. Cano
Fla. Bar No. 0037372

CERTIFICATE OF SERVICE
Docket No. 150185-EG

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss and Response to Motion for Oral Argument has been furnished via electronic mail* or U.S. mail on this 1st day of September, 2015 to the following:

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Kelley Corbari, Esq.
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Richard C. Silvestri
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By: s/ Jessica A. Cano
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EXHIBIT A



January 16, 2015

Mr. Braulio Baez
Executive Director
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: January 2015 Launch of Residential PV Rebate Pilot Program

Dear Mr. Baez,

I am writing to provide you with an explanation of the events that occurred when FPL launched its Residential Photovoltaic ("PV") rebate pilot program on Wednesday, January 14, 2015.

Prior to Wednesday, all customers were put on notice that the launch would occur at 8:30 a.m. This was stated on FPL's solar pilot programs webpage. Customers had also been advised to create a log-in (username and password) and have all application information ready prior to the launch date. Because the Residential PV pilot program historically has been fully subscribed within minutes of launch, most customers interested in applying for a rebate would have accessed the webpage prior to 8:30 a.m. and been prepared to begin filling out the application as soon as the launch occurred.

Below is a brief chronology of Wednesday morning's events:

On Wednesday morning FPL was readying the solar reservation system and ensuring the system was ready to launch.

At 8:22 a.m. the page was "refreshed" in preparation for the launch. Due to this refresh action, the "Apply Now" button inadvertently appeared enabling customers to begin the application process, and customers positioned to begin applying prior to 8:30 a.m. began doing so.

At 8:26 a.m. FPL closed the reservation system upon identifying the error. This prevented new Residential PV applications from being initiated, but did not prevent applications that were already in process from being completed and submitted.

Between 8:22 a.m. and 8:30 a.m., 402 applications were completed and submitted. Customers who submitted applications that were accepted by the system received an automatically-generated e-mail saying the application had been received. A copy of the confirmation e-mail is attached (see Attachment 1).

At 8:30 a.m., the program was re-opened, consistent with the previously scheduled launch time.

Between 8:30 a.m. and 8:31 a.m., an additional 4 applications were completed and submitted, at which point the system automatically closed. (These customers also received the automatically-generated confirmation e-mail mentioned above.) The system is designed to stop accepting new applications when the funds allocated to the program (up to \$4 million) plus an additional amount to accommodate a waitlist are reserved.

Of the 406 applications accepted, 221 customers received funded reservations totaling \$3,999,106. The remaining 185 applications were automatically accepted on a waitlist basis, consistent with the manner in which the program was administered last year.

FPL Response:

FPL immediately began evaluating appropriate actions to take to ensure that all customers applying for Residential PV (including those customers that ended up on the waitlist but otherwise may have received a "funded" reservation, but especially those customers who properly waited for the designated 8:30 launch time) could participate and apply for a funded reservation.

FPL considered a number of options and determined that the best approach for all affected customers is to honor the 221 funded reservations that were obtained in the initial launch and schedule an additional launch to provide a second opportunity for all of FPL's customers who did not receive a funded reservation to participate. FPL is allocating \$4 million for this second launch, which will take place at 8:30 a.m. on January 21, 2015, from the aggregate \$15.5 million annual limit for all solar pilot programs.

On Wednesday evening (January 14th), via e-mail, FPL notified the 221 customers that received funded reservation that their applications were preapproved (please see Attachment 2). The customers who initially were accepted for purposes of a waitlist were notified via e-mail that they would have the opportunity to participate in the second launch (please see Attachment 3). All other customers are being notified of the second launch via FPL's website, information provided to the media, and information provided to the Florida Solar Energy Industries Association.

FPL is continuing to investigate why the system reacted to the refresh of the webpage in this manner. Regardless of the cause, FPL feels that its course of action and response, including a second launch of additional Residential PV funding, is the right thing to do for its customers.

Sincerely,



Kenneth A. Hoffman
Vice President, Regulatory Affairs

cc: Mark Futrell

**ATTACHMENT 1
(Confirmation E-Mail)**

Thank you for your interest in FPL's Solar Rebate Programs. We have received your application to reserve a rebate, and we will review it and respond to you within three business days.

Do not begin your installation until you receive your rebate reservation. **IF YOUR SYSTEM IS INSTALLED OR THE FINAL PERMIT DATE IS PRIOR TO THE DATE OF FPL'S ISSUANCE OF A REBATE RESERVATION, YOU WILL NOT QUALIFY FOR A REBATE.**

This email is an automated notification, which is unable to receive replies. If you have questions regarding the program, please review the program guidelines and Frequently Asked Questions (FAQs) on our Solar Rebates web page at www.FPL.com/solarrebates.

**ATTACHMENT 2
(Preapproval E-Mail)**

Welcome to FPL's Residential Photovoltaic Rebate Program, which is part of a five-year pilot program authorized by the Florida Public Service Commission. Your application for the premise at [redacted] has been reviewed and approved for a rebate reservation. Your reservation number is [redacted]. Based on the scope of the submitted proposal, we anticipate your rebate will be \$[redacted].

Your rebate reservation is not transferable to another premise. The premise noted above is the only approved installation address for this rebate reservation.

Please note that this reservation is not a guarantee of a rebate payment; rather, it serves as your guaranteed place in line for rebate consideration. FPL reserves the right to conduct a pre-installation verification of the proposed site; and final payment will depend on verification by FPL that all program requirements have been completed.

You have until close of business on 10/16/2014, 90 days from today to complete the installation of your project, have it inspected by your local building authority and provide the necessary documentation to FPL. **We strongly urge you to begin this process immediately in order to meet this deadline.**

To review the status of your rebate reservation and check your remaining time, we invite you to log in to your personalized Solar Rebate System, which you can access from www.FPL.com/solarrebates. It allows you to track your reservation through each stage up until your rebate is processed, and also outlines the required final documentation which can be easily uploaded to this system for your convenient submission. If you prefer, you may also scan and email the documents to SolarPVResRebate@fpl.com, or mail to: FPL - Solar Rebates - CSF/CB / P.O. Box 29311 / Miami, FL 33102. Please be sure to send your documents to FPL within this timeframe or you will risk losing your rebate.

In order to ensure we're able to process your rebate payment, we recommend you review the program's requirements, you may do so at FPL's Solar Rebates web page at www.FPL.com/solarrebates. If you have any questions, please contact us at SolarPVSupport@fpl.com.

Thank you for your participation, and good luck with your project.

Sincerely,

FPL Solar Rebate Processing Team

IMPORTANT NOTICE: Without limiting your obligations to comply with the program standards and requirements, you acknowledge the following through your participation in the program:

- FPL is not liable for any manufacturer warranty or any representation or warranty made by the contractor you hire concerning the suitability of the equipment or materials that have been selected, the quality of materials/equipment, workmanship or any projected energy savings.
- It is your sole responsibility along with your contractor to determine what equipment and/or materials, if any, might be appropriate for your specific situation and location.
- The contractor you choose to install the energy conservation measure is neither endorsed by FPL nor employed by FPL nor is an agent of FPL nor under the control or supervision of FPL.
- The decision to select and hire and the management of the contractor that will install the energy conservation measure is your sole responsibility.
- FPL has not made, does not make and specifically disclaims any representations, warranties, promises, covenants, agreements, or guaranties of any kind of character whatsoever as to, concerning, or with respect to the energy conservation measure.
- Should you have any issue regarding the workmanship and/or the suitability of the energy conservation measure that is eligible for a rebate payment under the program, you must contact the independent contractor you hired to perform the work.

ATTACHMENT 3
(Second Launch E-Mail)

Thank you for your interest in solar PV rebate funding. Unfortunately, due to an error in our process, the application process inadvertently opened a few minutes prior to the scheduled 8:30 a.m. launch. As a result, applications were submitted before the designated time resulting in you not receiving an opportunity to properly apply for the allocated funds. We apologize for this situation, and want to do what's right for all of our customers.

That's why we're ensuring that you have another opportunity to participate by instituting another approximately \$4 million into the residential PV program, and scheduling a supplemental rebate offering at **8:30 a.m. on Wednesday, Jan. 21.**

During this application period, all reservations will be issued on a first-come, first-served basis; and we expect funds to run out quickly. We may maintain a limited standby list for customers who do not receive a reservation after this supplemental offering.

Once again, we regret any inconvenience we have caused you, and encourage you to apply next week by visiting www.FPL.com/solarrebates. If you have any questions, please contact us at SolarPVSupport@fpl.com.

Sincerely,
FPL Solar Rebate Program Manager



Kenneth A. Hoffman
Vice President, Regulatory Affairs
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February 11, 2015

VIA HAND DELIVERY

Mr. Braulio Baez
Executive Director
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: REVISED--January 21, 2015 Second Launch of Residential PV Rebate Program

Dear Mr. Baez,

On January 16, 2015, I provided a letter that explained the events that occurred on January 14, 2015, during FPL's Residential Solar Photovoltaic ("PV") rebate pilot program launch. As indicated in that letter, due to the inadvertent early opening of the application system on that day, FPL decided to provide a second offering of PV rebate funds for residential customers on January 21, 2015. During the second offering, FPL's website experienced technical difficulties causing it to temporarily slow down and interrupt the application process. Following the completion of the offering, FPL conducted a thorough review, and determined that the website issue had been caused by an unusual and unanticipated spike in the number of "hits" (users visiting or refreshing a webpage) to the solar reservation website. Further, our investigation indicates that the extraordinary level of hits was generated primarily by the pattern of visitor behavior repeatedly refreshing the solar rebate reservation website – not by a spike in the number of customer accounts seeking reservations.

Although this activity was unusual and unforeseen, FPL's investigation found no evidence of any violations of program standards or any impact to the fairness of the system's allocation of rebate reservations. Despite the slow-down that the excessive hits caused, the reservation system followed its standard procedure and accepted completed applications on a first-come first-served basis until all funds had been reserved.

FPL's investigation and analysis of the system issues is described in more detail below.

Chronology of events related to FPL's solar PV rebate offering on January 21, 2015:

At 8:30:16 a.m., the "Apply Now" button on FPL's solar PV rebate webpage was activated, opening the system to customer applications.

Between 8:30:16 a.m. and 8:31:56 a.m., 133 customer applications were completed, accounting for more than half of the available rebate funding.

At 8:31:56 a.m., website issues began to occur, causing intermittent functionality.

Between 8:31:56 a.m. and 9:01:48 a.m., 19 applications were completed.

At 9:01:48 a.m., the system was fully restored.

Between 9:01:48 a.m. and 9:05:52 a.m., 67 applications were completed, reserving the remaining rebate funding.

At 9:05:52 a.m., with all available funding reserved, the system stopped accepting further applications.

In total, 219 applications were accepted by the system. The first 187 of these received confirmed rebate reservations, and the remaining 32 were placed on a stand-by list. This is consistent with the process by which FPL has allocated funding in its recent solar rebate offerings.

Cause of System Issues:

After an in-depth investigation and analysis, including a performance test that simulated some of the activity that occurred on January 21, the system issues were determined to be the result of a massive number of “hits” caused by site visitors repeatedly accessing and refreshing the application webpage.¹

FPL’s investigation and analysis found the following:

- Immediately prior to and during the January 21 offering, there were 1,285 computer users accessing the solar rebate webpage on behalf of 751 FPL customers through 920 unique internet provider (“IP”) addresses.
- During the five minutes surrounding the launch (approximately 3 minutes before to 2 minutes after), the website experienced 30,158 hits. This is almost *six times* the number of hits experienced in a similar five-minute timeframe surrounding the January 14 launch.
- The ten most active IPs – about one percent of the IPs accessing the webpage at the time – created more hits in those 5 minutes than were created by *all* IPs accessing the webpage on January 14 in a similar five-minute timeframe.
- The website received more hits during the January 21 offering than all prior Residential Solar PV rebate launches combined.

¹ Visitors refreshed the solar rebate webpage at a peak of 323 times per second, leading up to the issues that began at 8:31:56 a.m. During previous launches, the highest number of refreshes experienced was 162 refreshes per second.

FPL's rebate application system was appropriately designed and tested for an anticipated volume of activity, plus a reasonable margin. This unprecedented, excessive activity could not have been anticipated.

Additional Observations

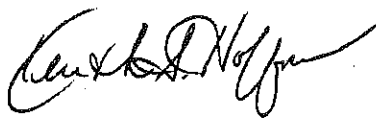
FPL was able to trace some of the IPs that created the most hits to certain solar contractors, who were presumably attempting to gain an advantage by employing multiple computer-users to access the rebate application system simultaneously. Examples of findings include:

- 48 users from a single, public-access IP address attempted to apply for reservations for 25 individual customer accounts.
- 31 users from one contractor's IP address attempted to apply for reservations for 23 individual customer accounts.
- Seven users originated from a single IP address in the Philippines. FPL is investigating the activity through this IP address further, since FPL has no customers in the Philippines.

Finally, while FPL is mindful that customers may choose to share their confidential FPL account information with solar contractors (FPL account information is needed to complete a rebate application), FPL will continue to clearly and regularly advise customers against sharing their individual account information due to the potential for fraud.

Please feel free to contact me if you would like any further information.

Sincerely,



Kenneth A. Hoffman
Vice President, Regulatory Affairs

cc: Mark Futrell