

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: March 24, 2005

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

FROM: Office of the General Counsel (Brown)
Division of Economic Regulation (Colson, Gardner)

RE: Docket No. 040660-EG – Petition for approval of modifications to BuildSmart Program by Florida Power & Light Company.

AGENDA: 04/05/05 – Regular Agenda – Decision on Motion to Dismiss – No oral argument requested - Parties may participate at the Commission’s discretion.

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040660.RCM.DOC

Case Background

On October 26, 2004, the Commission issued Order No. PSC-04-1046-PAA-EG, approving amendments to Florida Power & Light Company’s (FPL) BuildSmart program, which is part of FPL’s conservation plan. The BuildSmart program educates builders and customers about energy-efficient building practices. Through BuildSmart, FPL inspects new single family homes to verify installations of conservation measures and then evaluates the new homes for energy efficiency through awards based on measures that exceed Florida Energy Efficiency Code requirements by 10, 20, or 30 points. The program has been a part of FPL’s conservation programs since it was first approved as a pilot project in 1993. The Commission approved BuildSmart as a permanent, cost-effective part of FPL’s conservation programs in 1997.¹

Order No. PSC-04-1046-PAA-EG approved modifications designed to improve the program’s effectiveness and penetration in the production housing market, which includes single

¹ See, Order No. PSC-97-1017-S-EG, issued August 27, 1997, in Docket No. 951536-EG, In re: Petition for approval of BuildSmart Program by Florida Power & Light Company.

family detached homes and single family attached homes. The amendments replaced the existing gold, silver, and bronze levels of participation with a flexible measure approach and a prescriptive measure approach, eliminated premium service and permit only service, and eliminated fees for participation in the program.² The Commission found that the amendments to BuildSmart were cost-effective, would encourage the design and construction of energy efficient homes, and would cost-effectively reduce FPL's coincident peak load and customer energy consumption consistent with the goals of FEECA, the Florida Energy Efficiency and Conservation Act, sections 366.80-366.85 and 403.519, Florida Statutes.

On November 15, 2004, Compliance Data Services, Inc, d/b/a Calcs-Plus, ("Calcs-Plus") which provides energy efficiency consultation and ratings in Florida, filed a protest to the Commission's decision to approve modifications to the BuildSmart program.³ FPL filed a Motion to Dismiss the protest on December 3, 2004. Thereafter, on December 30, 2004, the recently hired attorney for Calcs-Plus filed a Motion to Amend and Clarify Petitioners' Protest Complaint filed November 15, 2004. The motion to amend modified the company's protest and status as a commercial ratepayer, and proposed to add the president and director of the company as parties to the complaint in their capacity as individual ratepayers of FPL. On January 11, 2005, FPL filed a Response in Opposition to Compliance Data Services, Inc.'s Motion to Amend and Clarify Petitioners' Protest Complaint, or in the Alternative, Motion to Dismiss, to which the petitioners responded on January 18, 2005.

This is staff's recommendation on the petitioners' motion to amend and clarify the original protest and FPL's motion to dismiss the amended protest.⁴ The Commission has jurisdiction to address this matter pursuant to sections 366.05, 366.06, 366.82 and 120.569, Florida Statutes.

² See Order No. PSC-04-1046-PAA-EG at page 3.

³ The protest was directed to the staff recommendation on the proposed Buildsmart modifications, but was treated administratively and by FPL as a protest of the Commission's Order No. PSC-04-1046-PAA-EG. The amended protest correctly addressed the Order as the subject of the request for hearing.

⁴ We note for the Commission's information that on March 2, 2005, the parties to this protest also filed a protest to the Commission's Order No. PSC-05-0162-PAA-EG, in Docket No. 040029-EG, approving FPL's demand-side management plan. No action has been taken on the new protest at present.

Discussion of Issues

Issue 1: Should the Commission grant Petitioners' Motion for Leave to Amend Protest?

Recommendation: Yes. The Commission should grant the motion for leave to amend.

Staff Analysis: The petitioners in this case filed the motion to amend their protest after FPL filed its original motion to dismiss, but before the Commission addressed the motion. As the petitioners point out, Section 120.569 (2)(c), Florida Statutes, and Uniform Rule 28-106.201(4), Florida Administrative Code, provide that a party shall have at least one opportunity to amend a petition to cure defects, unless it can be shown conclusively that the defects in the petition cannot be cured. The petitioners claim that they have promptly requested leave to amend their petition to correct the defects identified by FPL, even before the Commission acted on the motion to dismiss. They contend that FPL will not be harmed if leave to amend their petition is granted, as they acted promptly, and FPL will have the opportunity to contest the amended petition. FPL objects to the motion on the grounds that the defects in the original petition cannot be cured, and the amended petition attempts to add parties who did not timely protest the Commission's PAA order.

Florida law and this Commission's policies allow pleadings to be freely amended so that disputes may be decided on their merits, as long as the privilege to amend has not been abused.⁵ Whether or not the amended petition is substantively sufficient to survive a motion to dismiss, the petitioners have filed their motion for leave to amend consistent with the requirements of Uniform Rule 28-106, Florida Administrative Code. Therefore, since it is the Commission's policy to permit amendment where the privilege to amend has not been abused, staff recommends that the motion for leave to amend should be granted, and the Commission should address the issues raised in FPL's motion to dismiss the amended petition. The petitioners have acted promptly to amend their petition, and this protest is in its early stages. In terms of scheduling a hearing or establishing other procedural dates, the parties will not be harmed.

⁵ See, Adams v. Knabb Turpentine Co., 435 So. 2d 944, 946 (Fla. 1st DCA 1983); Order No. PSC-03-0721-PCO-TP, issued June 17, 2003, in Docket No. 030349-TP, In re: Complaint by Supra Telecommunications and Information Systems, Inc. against BellSouth Telecommunications, Inc.; Order No. PSC-03-1305-PCO-TP, issued November 14, 2003, in Docket No. 034746-TP, In re: Complaint of Cargill Crop Nutrition, Inc. f/k/a Cargill Fertilizer, against Verizon Florida, Inc.

Issue 2: Should the Commission grant FPL's motion to dismiss?

Recommendation: No, the Commission should deny the motion to dismiss. The protest of the Commission's PAA Order states a cause of action upon which the Commission can grant relief, and Calcs-Plus has standing as a retail ratepayer of FPL.

Staff Analysis:

The Amended Petition

Section 120.569(2)(c), Florida Statutes, provides, in pertinent part, as follows:

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. . . .

Uniform Rule 28-106.201, Florida Administrative Code, implements that statute and provides the basic technical requirements for filing a petition. Calcs-Plus's December 29, 2004, Motion to Amend and Clarify Petitioners' Protest Complaint, acknowledges that while the original protest was timely filed within 21 days of the issuance of Commission Order No. PSC-04-1046-PAA-EG, it did not comply with some of the technical requirements of the rule. The amended petition explains that the original petitioner, Calcs-Plus, did not seek legal assistance before filing the original.

The amended petition corrects the technical deficiencies of the original protest, and it identifies two additional parties to the protest: Dennis J. Stroer, the president of Calcs-Plus and an individual ratepayer of FPL, and Jon. F. Klongerbo, a director of Calcs-Plus and also an individual ratepayer of FPL. In the original petition Mr. Stroer and Mr. Klongerbo were identified only as representatives of Calcs-Plus. The amended petition also clarifies Calcs-Plus' status as a commercial retail ratepayer of FPL.

The petitioners claim that their substantial interests will be affected by Commission approval of FPL's BuildSmart program because it ". . . will potentially increase their rates and costs of residing and doing business in the state." (Amended Petition, p.2) They also claim that their substantial interests will be affected because the BuildSmart program will grant undue or unreasonable preferences to certain persons, contrary to section 366.03, Florida Statutes, and it will subject the Petitioners to undue or unreasonable prejudice or disadvantage.

The petitioners dispute the Commission's method of calculating the cost benefits of the BuildSmart program, and they claim that they will assert facts that show that persons within the utility's service area will be either unduly advantaged or unduly disadvantaged by the program. They also assert that the BuildSmart program ". . . damages non-monopolistic public and private

sector efforts to provide competitive services in the areas of energy efficient residences and also discourages energy efficient fuel choices between competing suppliers of services in violation of the purpose and intent of chapter 366, F.S.” (Amended Petition p. 3) They state that they are entitled to relief pursuant to sections 366.03 and 366.80-366.85, Florida Statutes, and sections 553.990-553.998, Florida Statutes, the “Florida Building Energy–Efficiency Rating Act.” They ask the Commission to reject FPL’s proposed modifications to the BuildSmart program and require FPL to “submit a new program design that would enhance energy efficiency and the use of building energy rating systems without unduly and unreasonably prejudicing its ratepayers and competing businesses within its territory.” (Amended Petition p.4)

FPL’s Motion to Dismiss the Amended Petition

FPL moves to dismiss the amended petition on the grounds that the primary petitioner, Calcs-plus, a company in the business of providing energy ratings, does not have standing to protest the Commission’s decision approving modifications to the BuildSmart program. FPL argues that Calcs-Plus does not meet the two-pronged “substantial interest” standard for standing in an administrative proceeding that was established by Agrico Chemical Company v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). That standard requires that the petitioners show: (1) that they will suffer an injury in fact that is of sufficient immediacy to entitle them to a formal hearing; and (2) that the injury is of a type or nature that the proceeding is designed to protect. FPL states that Calcs-Plus’s economic interest in the energy rating business is not within the zone of interests of the FEECA statute and the Commission’s rules, and, further, Calcs-Plus has not alleged any facts to show that it will suffer a definite and immediate injury in fact from the decision to approve the BuildSmart modifications. FPL argues that Calcs-Plus’s assertion that it or its management will be subject to undue or unreasonable prejudice in their chosen business and profession is too speculative to be cognizable as a substantial interest under the Administrative Procedures Act. According to FPL, section 366.03, Florida Statutes, is intended to prevent unreasonable preference or discrimination in customer rates among similarly situated customers. It is not intended to protect against disadvantage to business interests. FPL asserts that this lack of standing is a fundamental defect in the petition that cannot be cured and thus the Commission should dismiss the petition with prejudice.

FPL also takes issue with the petitioners’ attempt to add Mr. Stroer and Mr. Klongerbo as new individual parties in the amended petition. FPL states that their protest is untimely and cannot proceed. FPL also contends that the amended petition naming Mr. Stroer and Mr. Klongerbo is a subterfuge to correct Calcs-Plus’s standing problems and is motivated by competitive business reasons that have nothing to do with the individuals’ interests in FPL’s retail rates. FPL points out that representatives of Calcs-Plus had been denied standing in a similar proceeding, where the Commission found that the competitive interests of energy efficiency rating companies were not the type of interests Commission proceedings were designed to protect.⁶ FPL claims that its effort to add its managers as individual ratepayer parties

⁶ Order No. PSC-02-0995-FOF-EI, issued July 23, 2002, in Docket No. 020084-EI, In re: Complaint by National Energy Raters Association against Florida Power & Light Company, Florida Power Corporation, and any other utility engaged in the practice, for alleged violation of Rule 25-17.003(4)(a), F.A.C., which requires every public utility to charge for a Building Energy Efficiency Rating System (BERS) Audit (“ . . . the economic injury to energy

to the protest is actually an effort to gain access to the proceeding by proxy, and Calcs-Plus should not be permitted to do indirectly what it cannot do directly. FPL states that if the Commission determines that the parties have standing to proceed with the case, it should place explicit limits on the intervention against abuse of the proceeding by Calcs-Plus. (Motion to Dismiss Amended Petition, p.7)

Finally, FPL argues that the Commission does not have jurisdiction to enforce or administer sections 553.990-553.998, Florida Statutes, or the Department of Community Affairs' rules implementing them.

Petitioners' Response

The petitioners respond that they did not clearly state their status as parties in the original petition because they did not have aid of counsel when the original protest was filed. They claim that as soon as possible they revised that status and should be permitted to relate their claim of party status as individual and commercial ratepayers back to the initial protest. They point out that their original protest was timely filed. They state that they have shown substantial interests in both the immediate degree of injury and the nature of their injuries. Those interests, they contend, are not solely related to economic interests but to their status as commercial and residential ratepayers who will be forced to finance FPL's "monopolistic attempt to destroy the competitive marketplace for energy efficient services." (Petitioners' Response, p.5) They question the cost-effectiveness of the BuildSmart program and its compliance with the Commission's rules. The petitioners distinguish the Commission's previous decision denying them standing, claiming that this case is "substantially different in that it is FPL's blatant attempt to amend its program to provide "free" (but not to the ratepayer) ratings and inspections for selected residential properties." Finally, they agree that the Commission does not have jurisdiction to enforce sections 553.990-553.998, Florida Statutes, but they propose that the Commission should make its decisions implementing FEECA in a way that is consistent with those statutes.

Analysis

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. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the amended petition taken as true and construed in the light most favorable to the amended petitioner, the amended petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining the sufficiency of the amended petition the Commission should confine its consideration to the amended petition and documents incorporated therein, and the grounds asserted in the motions to dismiss. See, Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure.

raters does not fall within the 'zones of interest' protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code.")

Upon review of the amended petition, FPL's motion to dismiss, and the petitioners' response, staff recommends that the facts alleged in the amended petition, taken as true and viewed in the light most favorable to the petitioners, support a cause of action upon which the Commission can grant relief. The amended petition substantially complies with the requirements of section 120.569, Florida Statutes, and Rule 28-106.201, Florida Administrative Code, and it sufficiently alleges a substantial interest in the proceeding under Agrico's two-pronged standing test. Calcs-Plus has standing to protest Commission approval of amendments to one of FPL's demand-side management programs under the purview of section 366.82, Florida Statutes, and the Commission's implementing rules. Calcs-Plus has shown that it is a commercial retail ratepayer of FPL, and its costs for electricity may be adversely affected by approval of the program modifications. Its interest as a retail ratepayer in cost-effective demand side management programs funded through the Commission's conservation cost recovery clause is the type of interest that this proceeding is designed to protect. While staff agrees with FPL that Calcs-Plus's economic interests as an energy efficiency rating company are not the type of interest protected by this proceeding, its interests as a retail ratepayer are, and therefore FPL's motion to dismiss should be denied.

This analysis is consistent with previous Commission actions granting intervention to a utility's retail ratepayers in proceedings addressing the utility's rates and service. See, Order No. PSC-04-0025-PCO-EI granting intervention, issued January 12, 2004, in Docket No. 031033-EI, In re: Review of Tampa Electric Company's 2004-2008 waterborne transportation contract with TECO Transport and associated Benchmark ("It appears that CSX's substantial interests as a retail customer of Tampa Electric may be affected by this proceeding. Therefore, CSX's petition to intervene is granted so that CSX may represent such interests.") See also, Order No. PSC-02-0357-PCO-EI, issued March 15, 2002, granting intervention in Docket No. 011605-EI, In re: Review of investor-owned electric utilities' risk management policies and procedures (Reliant's substantial interests as a retail customer of FPC may be affected, but not its interests as a wholesale energy provider), and Order No. PSC-04-1018-PCO-EI, issued October 19, 2004, in Docket No. 040001-EI, In re: Fuel and Purchased power cost recovery clause with generating performance incentive factor ("As a retail customer of FPL, Churbuck has a direct interest in the rates and charges of FPL. . . .") As to FPL's suggestion that the Commission should place limits on Calcs-plus's intervention to protect against abuse, that can be accomplished by the Prehearing Officer through the development of the issues to be addressed and the material evidence to be received.

With respect to the participation of Mr. Stroer and Mr. Klongerbo, it is true that they did not timely file a protest to the Commission's PAA order in their capacity as individual residential ratepayers of FPL, and if the Commission grants FPL's motion to dismiss the Calcs-Plus protest it should dismiss the protest as to the individuals as well. Section 120.569(2)(c), Florida Statutes, provides that a petition for an administrative hearing shall be dismissed if not timely filed. No provision is made for excusable neglect or lack of legal representation. If the Commission does deny FPL's motion to dismiss Calcs-Plus's petition, however, Mr. Stroer and Mr. Klongerbo would have the opportunity to intervene as parties in the proceeding, alleging their interests as FPL's residential ratepayers. In the interest of administrative efficiency, staff recommends that it is reasonable for the Commission to permit their participation now.

Docket No. 040660-EG

Date: March 24, 2005

For these reasons, staff recommends that FPL's Motion to Dismiss should be denied. Calcs-Plus, Mr. Stroer, and Mr. Klongerbo have standing as FPL's retail ratepayers to protest Order No. PSC-04-1046-PAA-EG.

Docket No. 040660-EG

Date: March 24, 2005

Issue 3: Should this docket be closed?

Recommendation: If the Commission denies the motion to dismiss, the docket should remain open for further proceedings. If the Commission grants the motion to dismiss, this docket should be closed, and PAA Order No. PSC-04-1046-PAA-EG should be made final and effective.

Staff Analysis: If the Commission denies the motion to dismiss, the docket should remain open for further proceedings. If the Commission grants the motion to dismiss, this docket should be closed, and PAA Order No. PSC-04-1046-PAA-EG should be made final and effective.