

State of Florida



## Public Service Commission

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

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**DATE:** September 21, 2006

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

**FROM:** Division of Economic Regulation (Kummer)  
Office of the General Counsel (Gervasi)

**RE:** Docket No. 060151-EI – Petition for approval of revisions to access to premises section of Tariff Sheet No. 6.020, by Florida Power & Light Company.

**AGENDA:** 10/03/06 – Regular Agenda – Tariff Filing – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** 10/19/06 (8-Month Effective Date)

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\ECR\WP\060151.RCM.DOC

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### Case Background

On February 20, 2006, Florida Power & Light Company (FPL or utility) filed a petition to revise Section 2.8 of its current Ninth Revised Tariff Sheet No. 6.020, Access to Premises, to expand its authority to not only remove trees and vegetation within the utility's designated rights-of-way (ROW), but also to trim or remove vegetation adjacent to its easements and ROW and/or the location of its facilities. Under its current tariff, FPL is authorized to, among other things, trim trees within its easements and ROW. FPL asserts that this change is necessary to clear lines to meet its Storm Secure Plan. FPL believes it would not only prevent outages but allow faster restoration of downed lines.

By Order No. PSC-06-0340-PCO-EI, issued April 24, 2006, in this docket, the Commission suspended its decision on this proposed tariff to allow time for full and careful

review of its provisions. In so doing, the Commission noted that approval of the proposed tariff would appear to expand FPL's authority to trim or remove vegetation on private property if FPL believed it would potentially affect its facilities.

Expansion of tree trimming was discussed during the Infrastructure Workshop held on January 23, 2006, as a potential area for legislative action because of the private property issue. The utilities supported legislation which would address the extent to which a private utility could trim or remove trees or vegetation that interfere with utility facilities. By Order No. PSC-06-0340-PCO-EI, the Commission found it prudent to wait for any legislative guidance before moving forward in this area, as Commission action on the proposed tariff could have potentially conflicted with such legislation. FPL requested that its petition be acted upon on an expedited basis due to an expressed concern for mitigating storm damage from vegetation. The Commission found that concern to be valid. However, the Commission also found that in the absence of legislation which clearly gives the utility the right to trim or remove vegetation outside of its ROW, it should look further into the property rights issues.

The Commission has jurisdiction to consider this proposed tariff filing pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes.

### **Discussion of Issues**

**Issue 1:** Should FPL's proposed tariff filing to revise Section 2.8 of its current Ninth Revised Tariff Sheet No. 6.020, Access to Premises, be approved?

**Recommendation:** No, FPL's proposed tariff filing should be denied because the Commission lacks the statutory authority to approve it. FPL should be encouraged to coordinate its efforts to trim and remove vegetation outside of its easements and ROW with the local governments involved. (Gervasi, Kummer)

### **Staff Analysis:**

#### **Current Vegetation Management Program**

Under its current tariff, FPL is authorized to, among other things, trim trees within its easements and designated rights-of-way (ROW). FPL seeks to expand its authority to not only remove trees and vegetation within the utility's ROW, but also to trim or remove vegetation adjacent to its easements and ROW and/or the location of its facilities. FPL asserts that this change is necessary to clear lines to meet its Storm Secure Plan. FPL believes it would not only prevent outages but allow faster restoration of downed lines.

In response to a staff data request, FPL states that its current vegetation management program directs that trees be trimmed to protect its facilities, including trees where the tree trunk is located outside of a ROW but the limbs are encroaching into its facilities.<sup>1</sup> Under its current policy, FPL must request the property owner's permission before removing vegetation outside of the ROW. FPL does not trim or remove vegetation outside of the ROW if permission is denied. However, FPL will trim trees outside of the ROW at a customer's request after an inspection is completed and it is determined the work is necessary to protect the facilities. FPL is not specifically compensated for this work. Moreover, during its bi-annual inspection of its transmission lines, conflict timber is inspected and danger timber identified and evaluated for risk to the system. Danger timber and conflict timber is trimmed or removed to reduce or eliminate the risk. FPL defines "danger trees" as a dead, diseased, dying or leaning tree that if it were to fall would interrupt the line. "Conflict timber" is defined as a healthy tree that through its geometry and location could interrupt the line if it were to fall. The proposed tariff language, however, does not include any specific criteria that FPL will use to determine if a tree creates a potential for causing customer service interruptions.

#### **New Legislation**

As stated in the case background, during the Infrastructure Workshop held earlier this year, the utilities supported legislation which would address the extent to which a private utility could trim or remove trees or vegetation which interfere with utility facilities. By Order No. PSC-06-0340-EI, the Commission found it prudent to wait for any legislative guidance before

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<sup>1</sup> FPL trims the limbs and branches in accordance with the National Electrical Safety Code (NESC) and follows the American National Standards Institute (ANSI) A-300 pruning practices.

ruling on this proposed tariff revision, as Commission action could potentially conflict with such legislation. The Commission also found that in the absence of legislation which clearly gives the utility the right to trim or remove vegetation outside of its ROW, it should look further into the property rights issues as well as any potential conflict with local tree trimming ordinances.

Legislation was not enacted during this past legislative session to clearly give utilities the right to trim or remove vegetation outside of their ROW. Senate Bill 980, which became law on June 22, 2006, created section 163.3209, Florida Statutes – Electric transmission and distribution line right-of-way maintenance. Among other things, this section prohibits local governments from requiring any permits or approvals for certain vegetation maintenance in an established electric transmission or distribution line ROW. Section 163.3209 expressly states that “[t]he provisions of this section do not include the removal of trees outside the right-of-way, which may be allowed in compliance with applicable local ordinances.” Further, section 163.3209 requires that “[u]pon the request of the local government, the electric utility shall meet with the local government to discuss and submit the utility’s vegetation maintenance plan, including the utility’s trimming specifications and maintenance practices.” A copy of this legislation is attached to this recommendation as Attachment A.

#### Commission Authority to Approve Tariff

In response to a staff data request, FPL argues that the Commission’s authority to approve a tariff allowing a utility to trim or remove vegetation outside of the ROW is pursuant to section 366.04(1), (2)(c), and (5), Florida Statutes. FPL states that these statutory provisions grant broad powers to the Commission to regulate and supervise utilities with respect to service, to require reliability within a coordinated grid, and provide for the Commission’s jurisdiction over the maintenance of a coordinated grid to assure an adequate and reliable source of energy for operation and emergency purposes in Florida. FPL argues that expanded vegetation management rights would further the statutory goal of an adequate and reliable source of energy. FPL also believes that the Commission recognized and acknowledged its authority to approve the requested tariff when it approved FPL’s standard form easements (Tariff Sheets 9.770 and 9.775). These tariff sheets provide that FPL has the right “...to trim and cut and keep trimmed and cut all dead, weak, leaning or dangerous trees or limbs outside of the easement area which might interfere with or fall upon the lines.” Moreover, FPL states that the ANSI A-300 pruning standards require that a branch be removed at its point of origin, notwithstanding that portions of the branch may be outside the ROW, where the branch is growing, or will grow, into utility facilities. Staff believes the current tariff language and the ANSI language are consistent with current practices of trimming vegetation which intrudes into the ROW, even though the source tree may be outside of the ROW. However, neither the current tariff language nor the ANSI language confer the broader authority which FPL is seeking in the instant docket, to trim or remove vegetation adjacent to its easements and ROW and/or the location of its facilities.

Staff is not persuaded by FPL’s argument that the Commission has the statutory authority to approve its proposed tariff revision. Section 366.04(1), Florida Statutes, provides that the Commission has the “jurisdiction to regulate and supervise each public utility with respect to its rates and service...” Section 366.04(2)(c) provides that the Commission has the power to “require electric power conservation and reliability within a coordinated grid, for operational as

well as emergency purposes.” Section 366.04(5) provides that “[t]he commission shall further have jurisdiction over the planning, development, and maintenance of a coordinated electric power grid throughout Florida to assure an adequate and reliable source of energy for operational and emergency purposes in Florida and the avoidance of further uneconomic duplication of generation, transmission, and distribution facilities.”

The Commission is an administrative agency created by the Legislature, and as such, "the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State." City of Cape Coral v. GAC Utilities, Inc. of Florida.<sup>2</sup> FPL apparently believes that section 366.04, Florida Statutes, impliedly confers authority upon the Commission to authorize it to trim or remove vegetation outside of its easements and ROW. Staff disagrees. Nowhere in section 366.04, Florida Statutes, is it expressly or impliedly conferred that the Commission may authorize a public utility to trim or remove vegetation outside of its ROW for the purposes of ensuring reliability or for any other purpose. And “[a]ny reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof. . . .” Id.

Importantly, easements and ROW are property rights. A fundamental tenet of the law of property ownership is that property is a bundle of rights analogous to a bundle of sticks.<sup>3</sup> “Thus, the scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor.”<sup>4</sup> Because the proposed tariff revision seeks to implicate private property rights, staff believes that the Commission’s authority to approve such a tariff revision would have to be expressly conferred by statute.

#### Impact of Proposed Tariff on Property Rights

In staff’s data request, staff asked FPL about the impact of the proposed tariff revision on property rights and the likelihood of lawsuits brought by property owners objecting to vegetation management on private property outside of the ROW. With respect to the lawsuit issue, FPL responded that it has not conducted any legal analysis. With respect to the impact on property rights, FPL asserts that compliance by a customer with a tariff, made in good faith and enforced without discrimination, which provides a utility with reasonable vegetation management rights on private property outside the ROW, would be a condition of service. FPL argues that essentially, the customer would make a limited waiver of rights to receive service.

FPL argues that Rule 25-6.033, Florida Administrative Code, authorizes a public utility to adopt non-discriminatory rules and regulations governing its relations with customers. Moreover, FPL cites to Florida Power & Light Co. v. State of Florida,<sup>5</sup> which states that:

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<sup>2</sup> 281 So. 2d 493, 496 (Fla. 1973).

<sup>3</sup> City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127, 1130, rehearing denied, 2005 Fla. App. LEXIS 5190 (Fla.5<sup>th</sup> DCA 2005).

<sup>4</sup> Id.

<sup>5</sup> 107 Fla. 317, 319-320 (Fla. 1932).

. . . the rule usually followed by the Courts is to hold justifiable a regulation which is made by a public utility company in good faith, and enforced by it without discrimination, unless it is plainly unreasonable or outrageous in its general operation. Whether the court might itself have done differently, or even if it sees hardships in particular cases, is not enough to induce the courts to set a regulation aside or hold it no justification.

Staff disagrees with FPL's analysis. In Florida Power & Light Co. v. State of Florida, FPL was authorized by City ordinances to prescribe reasonable rules and regulations for the management, operation and control of the service at issue. "Acting under the power thus given, the company duly adopted and promulgated [the] regulation. . . ." <sup>6</sup> In the instant docket, there is no authorized regulation for the utility to adopt and promulgate unless the Commission finds that it has the statutory authority to approve the proposed tariff revision, and so approves it. Staff recommends that it does not and should not.

Finally, citing to Landrum v. Florida Power & Light Co. <sup>7</sup> and Potts v. Florida Power & Light Co., <sup>8</sup> FPL argues that a customer is bound by the tariff regardless of his knowledge or assent thereto, and states that compliance with the tariff is therefore a condition of service. These cases apply to limitation of liability clauses contained within a tariff, and are inapplicable to the proposed tariff at issue. <sup>9</sup>

Further, the Commission has found that the determination of property rights and the extent of allowable property uses are not within its jurisdiction. Florida's civil courts are the courts of competent jurisdiction to resolve real property rights issues. <sup>10</sup>

### Conclusion

Staff recommends that for the foregoing reasons, FPL's proposed tariff filing should be denied because the Commission lacks the statutory authority to approve it. In addition, the tariff lacks any criteria for determining when trees would be removed, leaving all discretion to the utility. Even the application of the criteria used for clearing transmission lines, when applied to a residential lot, could effectively eliminate almost any trees between a house and the line. Staff believes the enforcement of the requested tariff could generate numerous customer complaints

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<sup>6</sup> Id. at 320.

<sup>7</sup> 505 So. 2d 552, 554 (Fla. 3<sup>rd</sup> DCA 1987), review denied, 513 So. 2d 1061 (Fla. 1987).

<sup>8</sup> 841 So. 2d 671, 672 (Fla. 4<sup>th</sup> DCA 2003) (quoting Landrum).

<sup>9</sup> "It is well established that a limitation of liability contained in a tariff is an essential part of the rate, and that the consumer is bound by the tariff regardless of his knowledge or assent thereto." Landrum v. Florida Power & Light Co., 505 So. 2d at 554. And ". . . a tariff validly approved by the Public Service Commission, including a limitation of liability for ordinary negligence, resulting in the interruption of the regular supply of electric service, is valid." Id. (emphasis added).

<sup>10</sup> See, e.g., Order No. PSC-02-0788-PAA-EI, issued June 10, 2002, in Docket No. 010908-EI, In Re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy & Jose Gutman, Teresa Badillo, and Jeff Lessera.

and potential legal action against the utility. Furthermore, FPL stated in its response to staff's data request that it would not disconnect service if a customer contested any proposed tree removal, making enforcement of the tariff provision essentially non-existent. The utility remains in the position of relying on the permission of the homeowner.

Nevertheless, staff notes that newly enacted section 163.3209, Florida Statutes, provides that although its provisions do not include the removal of trees outside the ROW, the removal of trees outside the ROW may be allowed in compliance with applicable local ordinances. Further, section 163.3209 requires that "[u]pon the request of the local government, the electric utility shall meet with the local government to discuss and submit the utility's vegetation maintenance plan, including the utility's trimming specifications and maintenance practices." FPL should be encouraged to coordinate its efforts to trim and remove vegetation outside the ROW with the local governments involved. Staff believes it would more fruitful for FPL to intensify its efforts to work with local governments as discussed in Docket No. 060198-EI<sup>11</sup> to adopt tree planting and removal ordinances, which will accomplish the same task with fewer drawbacks from a regulatory perspective.

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<sup>11</sup> See Order Nos. PSC-06-0351-PAA-EI and PSC-06-0781-PAA-EI, issued April 25, 2006 and September 19, 2006, respectively, in Docket No. 060198-EI, In Re: Requirement for investor-owned electric utilities to file ongoing storm preparedness plans and implementation cost estimates.

Docket No. 060151-EI  
Date: September 21, 2006

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

**Recommendation:** Yes, if no timely protest is filed within 21 days of the issuance date of the Order, no further action will be necessary and this docket should be closed upon the issuance of a Consummating Order. However, if a protest is filed by a person whose interests are substantially affected within 21 days of the issuance date of the Order, the docket should remain open pending resolution of the protest. (Gervasi)

**Staff Analysis:** If no timely protest is filed within 21 days of the issuance date of the Order, no further action will be necessary and this docket should be closed upon the issuance of a Consummating Order. However, if a protest is filed by a person whose interests are substantially affected within 21 days of the issuance date of the Order, the docket should remain open pending resolution of the protest.