BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against Florida Power & Light Company, by Wellington A Condominium Association, Inc., for alleged failure to properly supervise and inspect work to be, and performed, by Robert C. Ambrosius d/b/a One Call Property Service, Inc.	DOCKET NO. 120040-EI ORDER NO. PSC-12-0547-FOF-EI ISSUED: October 16, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING
MOTION TO DISMISS WITH PREJUDICE

BY THE COMMISSION:

CASE BACKGROUND

Pursuant to Sections 120.569(2) and 120.573, Florida Statutes ("F.S."), and Rules 25-6.004 and 25-22.036, Florida Administrative Code ("F.A.C."), on February 13, 2012, Wellington, A Homeowners Association., Inc.[1] ("Wellington") filed a complaint against Florida Power & Light Company ("FPL" or "Company") ("Complaint"). On March 5, 2012, pursuant to Rule 28-106.204, F.A.C., FPL filed its Motion to Dismiss Complaint by Wellington or, Alternatively, for More Definite Statement; Wellington did not file a response. By Order No PSC-12-0232-PCO-EL, issued on May 14, 2012, the Florida Public Service Commission ("Commission") denied FPL's Motion to Dismiss and Granted FPL's Motion for a More Definite Statement. On June 14, 2012, Wellington filed its First Amended Complaint ("Amended Complaint"). On July 11, 2012, FPL filed its Motion to Dismiss Wellington's Amended Complaint with Prejudice ("Motion to Dismiss"). On August 10, 2012, Wellington filed its Affidavit in Opposition to the FPL Motion to Dismiss ("Opposition"), and its Request for Naming of Qualified Representative; the latter was granted on August 14, 2012, by Order No PSC-12-0412-FOF-OT.

[1] At Wellington's request, the name of this party and the docket have been amended to reflect the party's name as Wellington A Condominium Association, Inc. *See* Order No.12-0415-PCO-EI, issued on August 14, 2012, approving amendment.

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By this Order, we address FPL's Motion to Dismiss Wellington's Amended Complaint and Wellington's Opposition thereto. The Wellington Amended Complaint concerns the failure of a reflective roof coating that was applied to Wellington's roof by a participating independent contractor, engaged by Wellington, and paid, in part, by FPL pursuant to a Commission-approved Residential Building Envelope/Roof Savings Program. FPL acknowledges problems with the work done on Wellington's roof and that it did not inspect or oversee the work performed. FPL does not dispute Wellington's standing or that this Commission has the authority to provide the types of relief requested. Rather, FPL asserts that Wellington has failed to identify any statute, rule, or order that FPL has violated, and that the Amended Complaint is partially moot. Thus, FPL argues that the Amended Complaint must be dismissed. FPL further asserts that, because the deficiencies cannot be cured by further amendment, the dismissal should be with prejudice. In its Opposition, Wellington asserts that, notwithstanding FPL's arguments, the serious problems with the roof coating warrant that the matter not be dismissed and that we should investigate similar incidents to determine whether the spirit and intent of our orders have been followed.

Neither party requested oral argument pursuant to Rule 25-22.0022(1), F.A.C. We have jurisdiction pursuant to Chapter 366, F.S.

STANDARD OF REVIEW

FPL asserts that the following legal standards apply to its Motion to Dismiss. Wellington does not dispute FPL's representation and we find that FPL has accurately reflected the applicable standards as follows:

> 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.[2] 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."[3] If we cannot grant the relief, the Complaint must be dismissed.[4] In considering a motion to dismiss, we are confined to an examination of the Complaint and any attached documents.[5] We may also take notice of a record filed in another case, when the judgment in such case is pled.[6] If an attached document negates a pleader's cause of action, the plain language of the document will control and may serve as the basis for a motion to dismiss.[7] Pursuant to Rule 25-22.036(3)(b), F.A.C., a filing to initiate a formal complaint proceeding must contain the rule, order, or statute that has been violated, and the actions that constitute the violation.

[2] *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).
[3] Order No. PSC-08-0380-PCO-EI, issued on June 9, 2008, in Docket No. 080039-EI.
[4] *Id.*
[5] Order No. PSC-03-1172-FOF-TL issued on October 20, 2003, in Docket No. 030869-TL, (citing *Posigan v. American Reliance Ins. Co. of New Jersey*, 549 So. 2d 751, 754 (Fla. 3d DCA 1989)).
[6] *Id.*
[7] *Id.* (citing *Striton Properties, Inc. v. The City of Jacksonville Beach, Florida*, 533 So. 2d 1174, 1179 (Fla. 1st DCA 1988)).

WELLINGTON'S AMENDED COMPLAINT

Wellington asserts that it engaged an FPL-approved contractor, Robert C. Ambrosius d/b/a ONE CALL PROPERTY SERVICE, INC. ("One Call" or "Contractor"), to coat its roof with Kool Seal Premium White Elastomeric Roof Coating 63-600[8] ("Kool Seal 63-600" or "Coating"), an FPL-approved reflective roof coating. The Coating was applied and FPL provided an incentive of $8,750, which is recovered from FPL's ratepayers, as part of a Commission-approved Residential Building Envelope/Roof Savings Program ("Program"). FPL did not inspect the roof, either before or after the work was performed, and was not involved in the selection of the Coating. There were substantial problems related to the Contractor's work including installation, choice of materials, building code compliance, and failure to obtain a building permit. The Coating was not appropriate for application on Wellington's flat roof and has failed, causing harm to the roof in the amount of between approximately $98,000 and $135,000 and negating all of the conservation benefits expected to be derived under the Program. The Contractor has ceased honoring its warranty. Wellington concludes that, based on FPL's failure to supervise and inspect work on Wellington's roof, there has been a loss of all conservation benefits anticipated to be derived, and Wellington's roof must now be replaced.

Wellington asks this Commission to rescind energy conservation cost recovery ("ECCR") by FPL for unreasonable and imprudent expenditures, to penalize FPL for its implementation of the Program related to One Call and Kool Seal 63-600, to require modification of the Program, and to "award such other supplemental relief as may be just and necessary."

Rescission of ECCR Recovery

Wellington makes the following argument in favor of rescission of FPL's ECCR recovery.

In order to increase customer participation with resulting system demand and energy savings, FPL petitioned this Commission to increase the level of incentives paid by FPL for customers to install energy-efficient measures. In approving the FPL petition, this Commission relied on specific projections by FPL.[9] As implemented by the Contractor and/or the Coating used and as applied to buildings with flat roofs, FPL has failed to meet the anticipated projections based on measurements established by the Commission.[10] FPL recovered $8,750 from ratepayers for unreasonable and imprudent expenditures made under its Program in connection with One Call's application of the Coating on Wellington's roof as a purported conservation measure. Such expenses did not qualify for recovery through the ECCR pursuant to Rule 25-17.015(5), F.A.C., due to the loss of all demand conservation benefits. FPL has recovered additional sums related to flat roofs that are similarly not eligible for recovery. The

[8] Manufactured by KST Coatings, a unit of Sherwin-Williams, Inc.
[9] Wellington reproduces information from a spreadsheet included as attachment A of Order No. PSC-06-0740-TRF-EI, issued September 1, 2006, in Docket No. 060408-EI, that includes projections.
[10] *Citing* Order No. PSC-94-1313-FOF-EG, issued on October 25, 1994, in Dockets Nos. 930548-EG , 930549-EG, 930550-EG, and 930551-EG.

"unreasonable and imprudent cost recoveries by FPL" violate Order No. PSC-06-0740-TRF-EI, and must be rescinded. Pursuant to Rules 25-6.109 and 25-17.015, F.A.C., this Commission, in our next ECCR proceeding, "should seek a refund from FPL for its over-recovery of total conservation costs, so that the complained of Contractor and Coating transactions and activities are not subsidized by utility ratepayers."

Penalty and Modification of FPL's Residential Building Envelope/Roof Savings Program

Wellington makes the following arguments for a penalty to be imposed on FPL and for the Program to be modified.

The following criteria apply to conservation programs: 1) whether each component program advances the policy objectives set forth in Rule 25-17.001, F.A.C., and the Florida Energy Efficiency and Conservation Act[11] ("FEECA"); 2) whether each component program can be directly monitored and yield measurable results; and, 3) whether each component program is cost-effective.[12] However, the Program as implemented by One Call and the application of Kool Seal 63-600 on flat roofs does not comply with the criteria governing conservation programs because: 1) it does not advance the FEECA policy objectives; 2) it does not yield measurable results; and, 3) it is not cost effective to the general body of ratepayers. As such, it violates Section 366.82, F.S. In approving plans and programs for cost recovery, we have authority to "modify or deny plans or programs that would have an undue impact on the costs passed on to customers."[13] Additionally, Section 366.82 provides the following:

> (8) The commission may authorize financial rewards for those utilities over which it has ratesetting authority that exceed their [conservation] goals *and may authorize financial penalties* for those utilities that fail to meet their goals . . . associated with conservation, energy efficiency, and demand-side renewable energy systems additions.
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> . . .
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> (10) . . . The commission shall also consider the performance of each utility pursuant to ss. 366.80-366.85 and 403.519 when establishing rates for those utilities over which the commission has ratesetting authority.

(Emphasis added).

Wellington asserts that this Commission, in our next ECCR proceeding, should penalize FPL for its over-recovery of total conservation costs in connection with the Contractor and Coating transactions and activities, and eliminate the application of the Coating on flat roofs

[11] Sections 366.80-366.85 and 403.519, F.S.
[12] *Citing* in Order No. 22176, issued November 14, 1989, in Docket No.890737-PU.
[13] Section 366.82, F.S.

from the Program. Similarly, we should consider FPL's poor performance under the Program when establishing the rates FPL may charge pursuant to FEECA and determinations of need pursuant to the Florida Electrical Power Plant Siting Act.

In summary, Wellington asks we impose fines, forfeitures, penalties, or other remedies pursuant to Chapter 366, F.S., and Chapters 25-6 and 25-17, F.A.C.,[14] for FPL's over-recovery of "unreasonable and imprudent" conservation costs related to FPL-authorized contractors that have applied Kool Seal 63-600 on flat roofs with resulting loss of demand conservation benefits in violation of Commission orders. Wellington further asks that we require FPL to eliminate the application of Kool Seal 63-600 on flat roofs from its Program and consider FPL's performance under the Program when establishing[15] the rates FPL may charge. Finally, Wellington asks that we award other and supplemental relief as may be just and necessary under the circumstances.

FPL'S MOTION TO DISMISS

Pursuant to Rule 28-106.204, F.A.C., FPL asks that we dismiss Wellington's Amended Complaint with prejudice for failure to state a claim upon which relief can be granted. In its introduction, FPL reiterates the history of the work on Wellington's roof and concludes that Wellington has failed "to identify any rule, statute, or order violated by FPL, or a viable factual basis for any purported violation." FPL continues,

> [t]he Commission's Order approving the reflective roof coating conservation measure does not require FPL to inspect every applicant's rooftop. No rule, statute, or order requires such inspections, and there is no authority that requires that FPL supervise or guarantee an independent contractor's performance. Furthermore, FPL's recovery of the costs it incurred in implementing a Commission-approved program pursuant to approved program standards violates no rule, statute or order. In short, Wellington's . . . unique experience with One Call does not constitute grounds for rescission or the imposition of penalties.

FPL distills Wellington's case before us into three basic claims: 1) FPL failed to perform pre-application and post-application inspections of the roof to determine the appropriateness of the Coating; 2) the recovery of FPL's costs associated with Wellington's transaction must be rescinded because energy savings were not realized; and 3) we should impose a penalty on FPL for recovering costs associated with the One Call/Kool Seal 63-600 transaction. FPL asserts that each of these claims fails as a matter of law as follows.

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[14] Including without limitation Section 366.82(8) and (10), F.S., (and rules promulgated pursuant thereto) and Rules 25-6.109 and 25-17.015, F.A.C.

[15] Pursuant to FEECA.

Roof Inspections: Failure to State a Claim

FPL asserts that no rule, statute or order requires the Company to inspect or supervise all roof coating applications and that Wellington cites no authority imposing such a duty on FPL. More specifically, Wellington has not, and cannot, point to a mandate that the Company physically inspect the roof of each customer who applies for a rebate to ensure the compatibility of the product selected by the contractor. FPL concludes that, on this ground alone, Wellington's theory fails. FPL also makes the following arguments.

Roof inspections are optional, not required. The FPL petition, approved by this Commission by Order No. PSC-06-0740-TRF-EI, provides that "FPL will perform post installation inspections on a *random* basis for a *sample* of participants prior to the payment of incentives."[16] The Program Standards relied on by Wellington provide that FPL "*reserves the right* to verify each installation" and that the independent contractor "must allow FPL to perform a pre-installation inspection *(if deemed necessary)*."[17]

Nothing in Order No. PSC-06-0740-TRF-EI, the DSM Plan, or the Program Standards requires FPL to determine product compatibility for each application. Compatibility is left to the licensed roofer and product manufacturer.[18] Wellington relies on One Call's advertising materials for the proposition that FPL should have determined compatibility; however, an independent contractor's advertisements do not constitute a rule, statute or order and do not create contractual (or regulatory) obligations for FPL. Moreover, Wellington makes no assertion that FPL was aware of the misrepresentations contained in One Call's advertisements. Although Wellington would have us make FPL a guarantor of the work performed by all independent contractors, it can cite to no rule, statute or order that requires FPL to guarantee an independent contractor's workmanship.

Rescission: Fails as a Matter of Law

Wellington alleges that, because the Coating on its roof failed, FPL should not have recovered costs related to the work performed. In support of its argument Wellington relies on Order Nos. PSC-94-1313-FOF-EG and PSC-06-0740-TRF-EI, and Rule 25-17.015, F.A.C. However, FPL asserts that Wellington does not, and cannot, identify any actions by FPL that violate these (or any other) authorities. Specifically, FPL makes the following arguments.

Order No. PSC-94-1313-FOF-EG

By Order No. PSC-94-1313-FOF-EG, this Commission set DSM goals for FPL for the years 1994-2003 based on the Rate Impact Measure ("RIM") test. Wellington alleges that the manner in which One Call applies Kool Seal 63-600 to buildings with flat roofs caused FPL to

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[16] Docket No. 060408, Document No. 04421-06, Appendix A at p. 2 (emphases added), referenced by Wellington in its Amended Complaint at ¶ 58

[17] Wellington's Am. Compl., Exh. 3, at pp. 3 and 4 (emphases added).

[18] *See* Program Standards (requiring that the reflective coating "be installed by a [contractor] in accordance with the manufacturer's recommendations"). Wellington's Am. Compl., Exh. 3, at p.1

fail to meet the Participant and RIM tests as required under Order No. PSC-94-1313-FOF-EG. However, Wellington failed to cite any such requirement in Order No. PSC-94-1313-FOF-EG and no such requirement exists. Order No. PSC-94-1313-FOF-EG does not require that future-proposed DSM measures, to be evaluated in subsequent DSM goal and DSM plan proceedings, pass the Participant and RIM tests. Moreover, Order No. PSC-94-1313-FOF-EG does not require that each individual participant achieve a specified level of benefits from future programs in order for FPL to seek cost recovery of its costs.

Order PSC-No. 06-0740-TRF-EI

Wellington alleges that FPL violated Order No. PSC-06-0740-TRF-EI by seeking cost recovery because Wellington did not realize its anticipated conservation benefits. However, this Commission approved the reflective roof measure in Order No. PSC-06-0740-TRF-EI based on its energy savings and cost-effectiveness.[19] Energy savings and cost-effectiveness measurements assume appropriate installations, and the projected measures are representative of estimated savings realized by an average customer. While Wellington might not have received conservation benefits due to an alleged faulty application, it fails to explain how a result unique to its own experience and outside FPL's control constitutes a violation of Order No. PSC-06-0740-TRF-EI. FPL concedes that One Call's workmanship was the cause of Wellington's alleged failure to achieve its anticipated savings;[20] however, FPL reiterates that nothing in Order No. PSC-06-0740-TRF-EI (or this Commission's approval of DSM programs in general) requires FPL to guarantee the work of independent contractors.

Rule 25-17.015, F.A.C.

Rule 25-17.015 provides that "[e]ach utility over which the Commission has ratemaking authority may seek to recover its costs for energy conservation programs." Recovery is not based on individual results and is not dependent on the workmanship of independent contractors selected by participants. Rather, the standard for recovery under the ECCR is whether the overall costs of the program were prudent and attributable to a Commision-approved program.[21]

In its Amended Complaint, Wellington concedes that, at the time FPL sought recovery, the reflective roof coating measure was attributable to a Commission-approved program.[22] Wellington makes no viable allegation that FPL's implementation was imprudent. Wellington does not allege that FPL disregarded evidence that the Contractor was performing poorly, that FPL knew the Contractor had misapplied incompatible reflective products on customers' premises, or that, at the time the Contractor applied the Coating on Wellington's roof, FPL was aware that the application would cause damage to the roof. Wellington alleges only that FPL

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[19] The Commission found that reflective rooftop measure meets FEECA policy objectives, is monitorable and will continue to yield measurable results and is cost-effective. Order No. 06-0740 at pp. 3-4.

[20] *See* Am. Compl. ¶ 45 ("It is clear that the Kool Seal applied to the Premises' roof has failed, causing the loss of all demand conservation benefits anticipated to be derived in connection therewith . . .").

[21] *See* Am. Compl. ¶ 25 (*citing* PSC-03-1339-PAA-EG (FPL "is required to file a Demand Side Management (DSM) Plan for our approval and is entitled to seek recovery of associated expenditures.")).

[22] Am. Compl. ¶¶ 8, 11, 13, 58-59; *see also* Order No. 06-0740.

failed to inspect or supervise One Call's application. However, because Order No. PSC-06-0740-TRF-EI imposes no obligation for FPL to supervise the work of the independent contractors or to inspect each and every rooftop, Wellington's allegations are insufficient, as a matter of law, to serve as a basis for any finding of imprudence.

In sum, FPL concludes that Rule 25-17.015 provides no support for Wellington's rescission claim. FPL appropriately sought ECCR recovery for costs incurred in implementing the Commission-approved Program, and Wellington makes no cognizable claim that FPL was imprudent or that the costs were not attributable to a Commision-approved program.

Penalty or Modification of Program: No Viable Basis

Wellington asks us to penalize FPL for its recovery of costs in connection with the One Call and Kool Seal 63-600 transactions and activities, and to eliminate from FPL's Residential Building Envelope Program the application of Kool Seal 63-600 on flat roofs.

No grounds for a penalty

FPL asserts that it appropriately sought ECCR recovery. The reflective roof coating conservation measure was approved by this Commission, and no order, rule or statute requires FPL to supervise or guarantee the workmanship of an independent contractor. Wellington fails to identify any order, rule or statute providing that its unique experience with One Call's misapplication of Kool Seal 63-600 constitutes grounds for a penalty.

Wellington's Request for Modification is Moot

Wellington's request to eliminate from the Program the use of Kool Seal 63-600 on flat roofs is moot. The Program Standards require that "all qualifying Residential Building Envelope Program products must be installed according to the manufacturer's recommendations and specifications."[23] The Kool Seal 63-600 specification sheet dated September 2009, and attached to Wellington's Amended Complaint, states that the product should not be used on flat roofs with a slope of ½ inch or less per foot.[24] Thus, post September 2009, contractors are prohibited, based on this specification, from applying the Coating on flat roofs. Because no further action by this Commission is required to effectuate Wellington's modification request, this claim for relief is moot and must be dismissed.[25]

FPL summarizes its Motion as follows:

This Commission found that Wellington's original Complaint failed to identify a specific rule, statute or order that FPL violated and the facts that support each such alleged violation. The Amended Complaint suffers the same fatal flaw. Wellington cites no rule, statute or order

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[23] Am. Compl., Ex. 3 at pp. 1 and 3.
[24] Am. Compl. ¶ 46 and Ex. 2 at p.2.
[25] *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) (A case is moot when it presents no actual controversy, when the issues have ceased to exist, or, stated differently, when a judicial determination can have no actual effect.).

that requires FPL to a) supervise the independent contractors hired by customers, b) inspect the premises of every customer who applies reflective roof coating to ensure workmanship or compatibility, or c) guarantee the workmanship of the independent contractor. Similarly, Wellington does not cite any authority that conditions FPL's ECCR recovery on the level of conservation benefits achieved in individual transactions. On these same grounds, there is no basis for imposing a penalty on FPL. Wellington's request for a modification to the Residential Building Envelope Program is moot because the terms of the program already provide the relief requested. Accordingly, Wellington's Amended Complaint should be dismissed. Because these deficiencies cannot be cured by further amendment, dismissal of Wellington's Complaint should be with prejudice.[26]

WELLINGTON'S OPPOSITION TO FPL's MOTION TO DISMISS

In it's Opposition, Wellington makes the following arguments.

Wellington and its constituent homeowners are FPL customers and seek a determination of substantial interests under Commission orders,[27] pursuant to Section 120.569(2), F.S.; mediation pursuant to Section 120.573, F.S.; and an adjudication, pursuant to Rule 25-6.004, F.A.C., related to the matters raised in its Amended Complaint.

Wellington quotes FPL for the proposition that no rule, statute, or order requires FPL to inspect every roof top and that similarly, recovery of FPL's costs violates no rule, statute, or order. Wellington argues that FPL attempts to disavow any responsibility under the Program, but accepts payments under the Program. Wellington argues that FPL considers itself apart and removed from the Program when things go wrong, notwithstanding: 1) the intent of this Commission's orders to promote energy conservation; 2) the conduct of the Program under FPL auspices thereby legitimizing it; 3) the selection by FPL of installers that customers must use under the Program; and 4) the receipt of financial rewards by FPL as a result of the Program. Wellington asserts that FPL's "'heads I win, tails you lose' attitude must not be countenanced by the Commission."

Wellington argues that without FPL's participation in the Program and its imprimatur of authenticity, there would not have been a contract between Wellington and One Call. Wellington argues that, to the extent that FPL asserts that the concept of privity of contract is applicable to this matter, such a requirement is not needed under the law of contracts governing third-party beneficiaries.[28] Wellington argues that this Commission *does have jurisdiction* over the

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[26] *See In re: Complaint of Rosario Rojo against Florida Power & Light Company*, Order No. PSC-11-0285-FOF-EI issued on June 29, 2011, in Docket No. 110069-EI (dismissing complaint with prejudice because underlying deficiencies not curable).

[27] Order No. 22176, Order No. PSC-99-1942-FOF-EG, issued October 1, 1999, in Docket No. 971004-EG, as revised and further set forth in PSC Order No. PSC-03-1339-PAA-EG issued September 24, 2003, in Docket No. 030949-EG, and Order No.PSC-06-0740-TRF-EI.

[28] *Citing Ocean Ritz Condo v. GGV Assocs.*, 710 So.2d 702, 703 (Fla. Dist. Ct. App. 5th Dist. 1988), for the proposition that the third-party beneficiary rule eliminates the need for privity and permits the beneficiary to maintain an action for breach of the contract.

contractual relationship between FPL and One Call by which FPL, in part, effected its obligations under our orders. Wellington, asserts that it, and all other similarly situated ratepayers, are the third-party beneficiaries of such a contract and thus have standing. Wellington argues that FPL inaccurately states that Wellington received payment from FPL to apply to One Call's bill when actually One Call received payment directly from FPL and Wellington paid $4,750 of a total contract price of $13,500.

Acknowledging that 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, Wellington introduces new information and invites us review a structural engineering report, to determine if the facts of the case are sufficient to state a cause of action. More specifically, Wellington asserts that, notwithstanding FPL's argument that "recovery of the costs it incurred in implementing a Commission-approved program pursuant to approved program standards violates no rule, statute or order," the deficiencies highlighted in the engineering report regarding the failure of the Coating warrant 1) that Wellington's Amended Complaint not be dismissed, and 2) that we further investigate similar incidents to determine whether the spirit and intent of our orders have been followed.

Wellington reiterates its prayer for relief from its Amended Complaint adding a request that we find that allowing cost recovery for the application of the Coating on flat roofs 1) does not advance FEECA policy objectives, 2) does not yield measureable results and 3) is not cost effective to the general body of rate payers in violation of Section 366.82, Florida Statutes.

DECISION

In its Motion to Dismiss, FPL acknowledges the catastrophic problems with Wellington's roof resulting from the Contractor's work. However, the Company argues that, in its Amended Complaint, Wellington has identified no rule, statute, or order that the Company has violated and that Wellington's argument in favor of a modification of the Program is moot. FPL asserts that further amendment of the Amended Complaint will not remedy these deficiencies and asserts that the Amended Complaint should be dismissed with prejudice.

In its Opposition, Wellington acknowledges the applicable standard of review for a motion to dismiss and does not meaningfully dispute FPL's assertion that Wellington has failed to identify a rule, statute, or order that FPL has violated. Instead Wellington attaches a new document that clearly evinces the seriousness of the problems with Wellington's roof. Wellington asserts that, along with other similarly situated customers, it is a third party beneficiary of the contract between FPL and One Call. Wellington disputes that it received payment from FPL under the Program and instead asserts that FPL paid the Contractor directly. Wellington argues that we should not dismiss the Amended Complaint and instead should investigate whether FPL has followed the spirit and intent of our orders.

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.[29] 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

[29] *See Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

light most favorable to the petitioner, the petition states a cause of action upon which relief may be granted."[30] If we cannot grant the relief, the Complaint must be dismissed.[31]

Upon review, we find that, despite having the opportunity to amend its Complaint, Wellington has failed to identify a requirement in any rule, statute, or order that FPL has violated. Based on the legal authorities referenced by Wellington, there is simply no requirement that FPL inspect each roof, approve the application of each coating, or warrant the work of independent contractors under the Program. Similarly, there is no requirement linking recovery in an ECCR proceeding to the individual outcome of each FPL customer participating in the Program. The request that we modify the Program is moot. As such, we shall grant the FPL Motion to Dismiss Wellington's Amended Complaint. Because Wellington has had an opportunity to amend its Complaint, and nothing in its Amended Complaint or Opposition (including the additional information attached thereto) suggests that further amendment will cure the deficiencies of its pleading, the dismissal shall be with prejudice in accordance with our decision in *e.g., Complaint of Rosario Rojo against Florida Power & Light Company.*[32]

Nonetheless, to the extent that Wellington would like to participate in the ECCR, Power Plant Siting, or Conservation Goals proceedings, we find that dismissal of its instant Amended Complaint does not preclude Wellington from attempting to establish its standing and, if determined to be relevant to those dockets, expressing its broader concerns regarding the Program.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Motion to Dismiss Wellington's Amended Complaint with Prejudice is hereby granted. It is further,

ORDERED that this docket is hereby closed.

[30] Order No. PSC-08-0380-PCO-EI, issued on June 9, 2008, in Docket No. 080039-EI.
[31] *Id.*
[32] Order No. PSC-11-0285-FOF-EI issued on June 29, 2011, in Docket No. 110069-EI.

By ORDER of the Florida Public Service Commission this 16th day of October, 2012.

ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

CWM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.