

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

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

DATE: May 10, 2012

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Robinson) *PETZ AT*
Division of Economic Regulation (Draper) *W*
Division of Safety, Reliability & Consumer Assistance (Forsman, Hicks) *Pet* *SM*

RE: Docket No. 110305-EI – Initiation of formal proceedings of Complaint No. 1006767E of Edward McDonald against Tampa Electric Company, for alleged improper billing.

AGENDA: 05/22/12 – Motion to Dismiss – Oral Argument Not Requested; Participation at Commission’s Discretion.

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110305.RCM.DOC

Case Background

On February 7, 2012, the Commission issued Proposed Agency Action (PAA) Order No. PSC-12-0053-PAA-EI denying Mr. Edward McDonald’s request for relief against Tampa Electric Company (TECO). In the Order, the Commission determined that: (1) Mr. McDonald owed TECO \$915.14 for an electric account that was closed, and TECO’s attempt to collect the \$915.14 did not violate any statute, rule, or order; (2) Mr. McDonald mother’s bank recalled \$3,500 that Mr. McDonald made in overpayment to TECO from his mother’s account, and TECO did not owe Mr. McDonald the \$3,500 he allegedly overpaid; and (3) the Commission

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lacked jurisdiction to award Mr. McDonald's alleged attorneys fees of \$5,000 incurred in the circuit court.

On February 28, 2012, Mr. McDonald attempted to e-file his petition entitled Initiation of Formal Proceedings, but he was advised immediately that the petition did not conform to the e-filing requirements, was rejected, and should be refiled. On February 29, 2012, the Commission received Mr. McDonald's petition by regular U.S. mail, postmarked February 27, 2012.

In his petition, Mr. McDonald asserted as material facts in dispute that: (1) the statute of limitations prohibited TECO from billing the \$915.14 and that he paid the \$915.14 with a payment of \$1,095.20 to TECO; and (2) TECO owed him \$3,500 plus interest in allegedly overpayment he made in 2004, as TECO returned the overpayment to his mother's bank and the bank did not recall the funds. He also stated that he does not owe the \$915.14 because collection of a seven year old debt is taking legal action that is barred by Section 95.11, Florida Statutes (F.S.). Mr. McDonald made these same allegations in his initial complaint.

On March 6, 2012, TECO filed a Motion to Dismiss Mr. McDonald's petition. On March 26, 2012, Mr. McDonald filed his Response to TECO's Motion to Dismiss. Neither party requested oral argument; however, pursuant to Rule 25-22.0022, Florida Administrative Code (F.A.C.), the Commission has the discretion to hear from the parties, if it so desires.

The Commission has jurisdiction over this matter pursuant to Chapters 120 and 366, F.S., and Chapter 28-106, F.A.C.

Discussion of Issues

Issue 1: Should the Commission grant TECO's Motion to Dismiss?

Recommendation: Yes. The Commission should grant TECO's Motion to Dismiss, and the petition should be dismissed without prejudice for failure to state a cause of action. (Robinson, Draper, Forsman)

Staff Analysis:

Standard of Review for a Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a complaint.¹ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the complainant, the petition still fails to state a cause of action for which relief may be granted.² When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.³ A court may not look beyond the four corners of the complaint in considering its legal sufficiency.⁴ However, the attachment of a document to the complaint that conclusively negates the complaint is sufficient grounds for dismissal.⁵ Pursuant to Section 120.569(2)(c), F.S., a petition shall be dismissed at least once without prejudice unless it conclusively appears from the face of the petition that the defect cannot be cured.⁶

TECO's Motion to Dismiss

TECO, in its Motion to Dismiss, asserted that Mr. McDonald's complaint should be dismissed as it is legally deficient and failed to state a cause of action upon which relief can be granted. TECO stated the following:

- Chapter 95, F.S., is not applicable to administrative proceedings as seen in Sarasota County v. National City Bank of Cleveland, Ohio, 902 So. 2d 233 (Fla. 2nd DCA 2005), and TECO has not commenced a civil action or proceeding against Mr. McDonald.

¹ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

² *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

³ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁴ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

⁵ See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005) (citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

⁶ See also Kiralla v. John D. and Catherine T. MacArthur Found, 534 So. 2d 774, 775 (Fla. 4th DCA 1988)(stating that a dismissal with prejudice should not be ordered without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action).

- The \$915.14 and \$3,500 Mr. McDonald claimed are in dispute were fully investigated, and Mr. McDonald's petition failed to offer any new or different evidence or argument from that previously presented.

- Mr. McDonald completely omitted reference to Account No. 1501-000031-5 with the outstanding balance of \$1,095.20, a separate account than the account with the \$915.14 outstanding balance.

- Mr. McDonald acknowledged that TECO returned the \$3,500 to the Bank of America at the Bank's request and is now seeking damages against TECO with interest, which the Commission has no jurisdiction to award.

- Mr. McDonald did not file his petition within the time frame provided in the Commission's February 7, 2012 PAA Order, which was the close of business on February 28, 2012.

Mr. McDonald's Response to TECO's Motion to Dismiss

In his response to TECO's Motion to Dismiss, Mr. McDonald stated the following:

- TECO's inaccurate and unlawful billing violates Federal debt collection laws and he is entitled to the benefits of the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act prohibits TECO from charging Mr. McDonald the outstanding \$915.14. Florida debt statutes provide that no state laws shall supersede or conflict with Federal laws.

- The \$915.14 was paid by the \$1,095.20 payment Mr. McDonald made as both accounts are the same, and the last digit in the account numbers reflects the order of account activity. The account, customer, service address, and meter (reading & usage) are identical.

- The record shows that TECO refused to return the \$3,500 in overpayment, which was cleared by the bank and posted to his account due to negligence and lack of due diligence.

- His petition was received by the office of commission clerk by close of business on February 28, 2012, and he had attached proof of compliance with the notice, and that the petition was timely received and fully complied with Rule 28-106.201, F.A.C.⁷

Analysis

As the petitioner, Mr. McDonald has standing to request a Section 120.57, F.S., hearing. As a pro se petitioner, Staff recommends that the Commission excuse the lateness of Mr. McDonald's filing because of his attempted e-filing on February 28, 2012 and the receipt of his petition on February 29, 2012, which was postmarked on February 27, 2012.

⁷Mr. McDonald attached a copy of a certified mail label and receipt as proof that his petition was mailed on February 25, 2012, by certified mail. However, Mr. McDonald's petition was received by regular mail on February 29, 2012, and was postmarked by the post office with a February 27, 2012 mailing date.

However, staff recommends the Commission dismiss the petition as it fails to state a cause of action. The petition seeks restitution of \$3,500 that TECO returned to Mr. McDonald mother's bank and a determination from the Commission that Mr. McDonald does not owe TECO \$915.14 for an outstanding balance. The petition highlights that TECO returned the \$3,500 to the bank; therefore, there is no material dispute requiring further action by the Commission, as TECO no longer has possession of the \$3,500, and the Commission lacks jurisdiction to award damages.⁸ Likewise, the petition fails to state a cause of action as there is no allegation that TECO violated any statute, rule, or order regarding the \$3,500. There is also no request for relief that the Commission has authority to award, as the Commission lacks jurisdiction to award damages.

Regarding the \$915.14 outstanding balance, the same statements in this petition were made in the initial complaint that were thoroughly reviewed by staff. Additionally, TECO has not initiated a civil action and is not attempting to enforce a court ordered judgement with regards to the outstanding balance of \$915.14. The petition also fails to demonstrate an allegation that TECO violates any statutes, rules, or orders regarding the \$915.14 sufficient to constitute a cause of action.⁹ Further, there is no requested relief in the petition that the Commission has the authority to award. Since the petition fails to demonstrate a cause of action, staff recommends dismissal of the petition.

The petition does not comport with the pleading requirements of Rule 28-106.201, F.A.C., in that it fails to demonstrate disputed issues of material facts, concisely state the specific facts the petitioner contends warrant reversal or modification of the PAA Order, or the specific rules or statutes that will require reversal or modification of the PAA Order, including an explanation of how the alleged facts relate to the specific rules or statutes. The assertions regarding damages from TECO for \$3,500 were made in the petition as well as allegations regarding the outstanding balance of \$915.14. However, these assertions and allegations do not constitute disputed issues of material facts or demonstrate the requisite facts and statutes that would require reversal or modification of the PAA Order, and pursuant to Section 120.569(2)(c), F.S., the Commission shall dismiss the petition for failure to substantially comply with the uniform rules or if filed untimely. Therefore, staff recommends the dismissal of the petition.

Section 120.569(2)(c), F.S., further states that dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. Staff recommends that the petition be dismissed without prejudice in accordance with Section 120.569(2)(c), F.S., and Mr. McDonald may file an amended petition. Should Mr. McDonald

⁸ See Order No. PSC-10-0296-FOF-TP, issued on May 7, 2010, in Docket No. 090538-TP, In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services) et. al. for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S., (wherein the Commission dismissed the petition stating that it lacked jurisdiction to award attorneys fees and damages).

⁹ See Order No. PSC-12-0066-FOF-EI, issued on February 13, 2012, in Docket No. 100459-EI, In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company.

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choose to file an amended petition, staff recommends that the petition conforms to the pleading requirements of Rule 28-106.201, F.A.C.

Conclusion

Staff recommends that the Commission grant TECO's Motion to Dismiss and dismiss the petition without prejudice because it fails to demonstrate a cause of action or a disputed issue of material fact.

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Issue 2: Should the docket be closed?

Recommendation: No. If the Commission agrees with staff regarding Issue 1, then Mr. McDonald's petition requesting the initiation of formal proceedings for Proposed Agency Action Order No. PSC-12-0053-PAA-EI should be dismissed, and Mr. McDonald should file an amended petition by 5:00 PM on June 12, 2012. If Mr. McDonald fails to timely file an amended petition, then the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective. (Robinson, Draper, Forsman)

Staff Analysis: If the Commission agrees with staff regarding Issue 1, then Mr. McDonald's petition requesting the initiation of formal proceedings for Proposed Agency Action Order No. PSC-12-0053-PAA-EI should be dismissed and Mr. McDonald should file an amended petition Mr. McDonald should file an amended petition by 5:00 PM on June 12, 2012. If Mr. McDonald fails to timely file an amended petition, then the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective.