

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Initiation of formal proceedings of Complaint No. 1115382E of Brian J. Ricca against Florida Power & Light, for failing to provide reasonable service

Docket No. 130290-EI

Filed: January 7, 2014

FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS REQUEST FOR FORMAL HEARING OF BRIAN J. RICCA WITH PREJUDICE

Florida Power & Light Company, Inc. ("FPL") hereby files, pursuant to Rule 28-106.204, Florida Administrative Code, this Motion to Dismiss the Request for Formal Hearing ("Complaint") filed by Brian J. Ricca ("Complainant") in this docket. As discussed in more detail below, the Complaint falls far short of the well-established pleadings requirements that a Complaint must meet in order to be deemed sufficient. The Complaint fails to identify, with any specificity, the rule, order, or statute that allegedly has been violated or the actions that constitute the alleged violation; nor does it provide any statement, or include any documentation that shows an act or omission on FPL's part that violates any requirement, whether it be statutory, rule, or order based. Additionally, the Complaint fails to allege any injury suffered as a result of any actions or omissions by FPL. Furthermore, the Complaint is so vague as to both the operative facts and the law for which Petitioner seeks relief that it would be impossible for the Commission to properly issue a decision on the Complaint, and makes it impossible for FPL to adequately respond without engaging in a substantial amount of conjecture as to any alleged violation. Finally, the Complaint fails to state any cause of action for which relief could be granted. Accordingly, the Complaint should be dismissed. Because the Complaint cannot be replead in a way that states a cause of action for which such relief can be granted, the Florida Public Service Commission ("Commission") should dismiss the Complaint as a matter of law, with prejudice.

I. INTRODUCTION

1. In May, 2013, Complainant contacted FPL in order to request that FPL extend service to an isolated rural property Complainant had purchased. In mid-May, 2013, FPL provided an informal, non-binding “ball park” estimate of \$60,000 for the Complainant’s Contribution in Aid of Construction (“CIAC”) to pay for the extension. On July 11, 2013, FPL provided Complainant with a binding estimate of \$55,325.59 for the Complainant’s CIAC, as required by, and in accordance with, Rule 25-6.064, F.A.C., and FPL’s Commission-approved CIAC Tariff, Tariff Sheet Nos. 6.199 to 6.200 (the “CIAC Tariff”).

2. Over a period of several weeks, FPL and Complainant had numerous communications regarding the proposed extension of service. After working with Complainant to explore a number of options, on August 5, 2013, FPL provided the Complainant with additional estimates of the CIAC for alternative options, in addition to the original route option. FPL provided an estimate for a second overhead route of \$40,705.59. FPL also provided an estimate for a route involving underground trenching by the customer, with a credit to the customer for customer trenching and PVC installation upon completion of work, for a final total of \$31,850.85.

3. The CIAC amounts for each of these alternative options were calculated in accordance with Rule 25-6.064, F.A.C., and the CIAC Tariff. Apparently unsatisfied with the options provided by FPL, Complainant requested that FPL further reduce or waive the CIAC, which neither the Rule nor the CIAC Tariff requires. FPL therefore has declined to do.¹

4. On December 6, 2013, Complainant filed the Complaint, asserting that the CIAC should be “waived or drastically reduced.” As demonstrated below, the Complaint should be

¹ Complainant purchased the property in May 2013 for \$18,000. The property did not have, prior to purchase, and still does not have, electric service extended to it. Complainant is now attempting to obtain the extension of electric service for free or at a significantly reduced cost at the expense of FPL shareholders or customers.

dismissed because it falls far short of the well-established pleadings requirements that a Complaint must meet to be deemed sufficient.

II. MOTION TO DISMISS STANDARD

5. 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 disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. *Id.* 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. *Flye v. Jeffords*, 106 So.2d 229 (Fla. 1st DCA 1958). 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.” *In re Complaint of Sallijo A. Freeman Against Florida Power & Light Co. for Violation of Rule 25-6.105, F.A.C.*, Docket No. 080039-EI, Order No. PSC-08-0380-PCO-EI (June 9, 2008). If the Commission cannot grant the relief, the Complaint must be dismissed. *Id.* In considering a motion to dismiss, the Commission is confined to an examination of the complaint and any attached documents. *In re Verizon Florida Inc.*, Docket No. 030869-TL, Order No. PSC-03-1172-FOF-TL (Fla. P.S.C. October 20, 2003) (citing *Posigan v. American Reliance Ins. Co. of New Jersey*, 549 So. 2d 751, 754 (Fla. 3d DCA 1989)).

III. THE COMPLAINT FAILS TO MEET THE WELL ESTABLISHED PLEADING REQUIREMENTS FOR A COMPLAINT

6. Rule 25-22.036, F.A.C., provides that each complaint must contain:

I. The rule, order, or statute that has been violated;

2. The actions that constitute the violation;
3. The name and address of the person against whom the complaint is lodged;
4. The specific relief requested, including any penalty sought.

A pleading does not meet the requirements of this rule unless it outlines the act or omission that constitutes the violation, the statute that is violated, injury suffered, and remedy or penalty sought. *In re: Complaint of Rosario Rojo against Florida Power & Light Company*, Docket No. 110069-EI, Order No. PSC-11-0285-FOF-EI (Fla. P.S.C. June 29, 2011). In *Rojo*, the Petitioner submitted a single page complaint, vaguely alleging bad faith and malice on the part of FPL, and only broadly referenced Chapter 120, F.S., Chapter 28-106, F.A.C., and Rule 25-22.036, F.A.C. No specific actions by FPL were described, nor was there any reference to any substantive requirement that had been violated by FPL. The Commission granted FPL's Motion to Dismiss the complaint with prejudice, holding that there was no assertion of FPL's act or omission that resulted in a violation affecting Ms. Rojo's substantive interest. In addition, the Commission held that also Ms. Rojo did not allege any injury suffered or seek a remedy for which the Commission could grant relief.

7. Here, as was the case in *Rojo*, the Complaint lacks the requisite specificity. It broadly states:

"I would like to hereby make the request for a formal hearing with the Florida Public Service Commission regarding the below Florida law and original complaint which appears to be in direct violation of Florida Statute. The original complaint was listed as Complaint 1115382E - Ricca. I will be seeking compensation such that the utility company's requested CIAC charges be waived or drastically reduced. Any fast track options available would be greatly appreciated considering the delay which has already occurred.

Florida law 366.03 General duties of public utility.-Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission.

The action that constitutes the violation is inefficient service due to internal errors within the original quote for CIAC charges. The company originally quoted the CIAC charges at a price of \$60,000 and *assured me both verbally and literally*

that the shortest route had been taken to the home and no other viable options existed. 84 calendar days later the company acknowledged that the shortest route had not in fact been taken and the new price was to be approx. \$45,000. If I had paid the original quote, I would of overpaid by a large sum and this error is unacceptable. The company is claiming there was no error, but rather a change in route as a courtesy. The law requires the utility to provide reasonably efficient service which would not only mean the shortest route but also timely service. There is no way that such a large delay and the risk of overpayment can be considered reasonable.”

These assertions fail to satisfy Rule 25-22.036 in several respects.

8. First, the Complaint fails to identify, with any specificity, the rule, order, or statute that has been violated, and the actions that constitute the violation. “A petitioner must show the elements of the substantive law violated and properly allege the cause of action.” *Rojo* at p.4. See also Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, *In re: Complaint and petition of John Charles Heekn against Florida Power & Light Co.*, (noting that a determination of a petition's cause of action requires examining the substantive law elements and stating that the improper allegation of the "elements of the cause of action that seeks affirmative relief is sufficient grounds for dismissal, citing *Kislak v. Kredian*, 95 So. 2d 510 (Fla. 1957)). While the Complaint generally refers to “Florida law 366.03” (sic), this general reference is not sufficient to meet the pleading requirements of Rule 25-22.036, F.A.C. The Complaint does not identify any specific requirement within Section 366.03, F.S., which has been violated. Nor is a broad allegation that FPL violated Section 366.03, F.S., sufficient to state a cause of action requiring reduction or waiver of a CIAC. As stated in the header to Section 366.03, F.S., the Statute provides for the “General duties of public utility.” This Section does not provide the requirements for implementation of the CIAC, nor does it provide for any waiver of the CIAC.

9. Second, the Complaint does not provide any statement, or include any documentation whatsoever that shows in any way an act or omission on FPL’s part that violates

any requirement, whether it be statutory, rule, or order based. The Complaint references “internal errors within the original quote for the CIAC”, but does not describe what errors occurred, or provide any documentation of such errors and how those errors violated any requirement. Such a broad and vague claim fails to meet the requirements of Rule 25-22.036 because it provides no specific description or documentation whatsoever of the alleged violation.

10. Third, the Complaint fails to show any injury suffered as a result of the alleged actions or omissions by FPL. See *Rojo* at p.4. In fact, Complainant has not only failed to allege any harm, in Complainant’s own words he shows how he actually *benefited* from FPL’s work to provide alternative options.

11. Finally, the Complaint is so vague as to both the operative facts and the law for which Complainant seeks relief that it would be impossible for the Commission to properly render a decision on the Complaint. This vagueness also makes it impossible for FPL to adequately respond without engaging in a substantial amount of conjecture.

12. Because the Complaint falls well short of satisfying the pleading requirements of Rule 25-22.036, it should be dismissed.

IV. THE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

13. As noted above, 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.” *In re Complaint of Sallijo A. Freeman Against Florida Power & Light Co. for Violation of Rule 25-6.105, F.A.C.*, Docket No. 080039-EI, Order No. PSC-08-0380-PCO-EI

(June 9, 2008).² If the Commission cannot grant the relief requested, a complaint must be dismissed. *Id.*

14. The Complaint seeks relief that the Commission cannot grant. It seeks a reduction or waiver of the CIAC that FPL has calculated for the Complainant's requested service extension. However, the Complaint cites no statute, rule, or tariff that requires FPL to reduce or waive the CIAC and, in fact, there is no such statute rule or tariff. FPL's CIAC is calculated in accordance with Rule 25-6.064, F.A.C., and the CIAC Tariff. Nothing in Rule 25-6.064, F.A.C., or the CIAC Tariff mandates waiver of a CIAC under any scenario. To the contrary, Rule 25-6.064, F.A.C. and the CIAC Tariff dictate the calculation that is to be performed in order to determine the applicable CIAC. FPL followed those requirements, and the Complaint does not even allege otherwise.

15. In discussing the potential for waiver of the CIAC, Rule 25-6.064, F.A.C. provides:

(7) The utility may elect to waive all or any portion of the CIAC for customers, even when a CIAC is found to be applicable. If however, the utility waives a CIAC, the utility shall reduce net plant in service as though the CIAC had been collected, unless the Commission determines that there is a quantifiable benefit to the general body of ratepayers commensurate with the waived CIAC. Each utility shall maintain records of amounts waived and any subsequent changes that served to offset the CIAC.

Thus, any waiver of the CIAC is at the utility's election (and, absent extraordinary circumstances, at the shareholders' expense). As stated above, FPL has elected to charge the CIAC to the Complainant in the same manner as it would any other similarly situated customer, and not to waive the CIAC for the Complainant. The Complainant has not – and cannot – point to any mandate requiring a reduction or waiver of the CIAC under any circumstances. Because

² The *Freeman* proceeding similarly involved a complaint against FPL. There, the complaint in part sought monetary damages which the Commission could not grant because the Commission lacked the subject matter jurisdiction to award the requested relief.

the relief sought by the Complainant is not available, the Complaint fails to state a cause of action upon which relief can be granted and must be dismissed.

16. The Complaint's deficiencies cannot be cured by further amendment, because its fundamental focus and rationale is on seeking relief that it demonstrably unavailable. Therefore, the Complaint's dismissal should be with prejudice. See *Rojo* at p.4. (finding that the underlying factual and legal deficiencies of the complaint could not be cured, and therefore the complaint was dismissed with prejudice).

V. CONCLUSION

The Complaint 1) falls far short of the well-established pleadings requirements that a Complaint must meet to be deemed sufficient; 2) fails to identify, with any specificity, the rule, order, or statute that has been violated, and the actions that constitute the violation; 3) does not provide any statement, or include any documentation whatsoever that shows in any way an act or omission on FPL's part that violates any requirement, whether it be statutory, rule, or order based; 4) fails to show any injury suffered as a result of any actions or omissions by FPL; 5) is so vague as to both the operative facts and the law for which Petitioner seeks relief that it would be impossible for the Commission to properly render a decision on the Complaint or for FPL to adequately respond without engaging in a substantial amount of conjecture; and 6) fails to state any cause of action for which relief could be granted. Accordingly, the Complaint should be dismissed. Furthermore, because the relief sought in the Complaint is clearly unavailable, it cannot be re-plead in a way that states a cause of action for which such relief can be granted.

WHEREFORE, based upon the foregoing, FPL requests that the Commission enter an order dismissing the Complaint with prejudice.

Respectfully submitted this 7th day of January, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion To Dismiss the Amended Complaint with Prejudice has been furnished to following persons via electronic delivery this 7th day of January, 2014.

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