

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for Initiation of Formal Proceedings )  
Pursuant to Rule 25-22.036, F.A.C. by )  
Timothy Musser )

Docket No. 150207-EI

Filed: October 1, 2015

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO DISMISS COMPLAINT**

Florida Power & Light Company ("FPL") hereby files, pursuant to Rule 28-106.204, Florida Administrative Code, this Motion to Dismiss the Complaint filed by Petitioner Timothy Musser in this docket. For the reasons set forth below, the Florida Public Service Commission ("Commission") should dismiss the Petitioner's Complaint.

**I. INTRODUCTION**

The Petitioner, Timothy Musser, at all times relevant to this action is the customer of record of an FPL electric account for electric service provided at 3 Palmetto Drive, Ormond Beach, Florida 32176, since February 21, 2014. Mr. Musser's claim is that FPL improperly and unreasonably back-billed him for unpaid consumption of electricity during the period March 31, 2014 through November 29, 2014.

Pursuant to an investigation, FPL removed a meter on three separate occasions located at Mr. Musser's service address, performed a meter test, reviewed the consumption history, reviewed the meter communication history, and confirmed evidence of meter tampering. On September 18<sup>th</sup>, 2015, the Petitioner filed a complaint for formal proceedings on this matter. (Exhibit "A")

FPL asserts that Petitioner's Complaint should be dismissed because it falls below the well-established pleading requirements that a Complaint must meet to be deemed sufficient. As discussed below, the Complaint should be dismissed because it fails to state any cause of action

for which relief could be granted by the Commission. For the reasons discussed below, the Complaint should be dismissed as a matter of law.

## II. ARGUMENT

### A. **Standard for Motion to Dismiss**

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. 1<sup>st</sup> DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint are 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. Connolly v. Sebeco, Inc., 89 So. 2d 482, 483 (Fla. 1956). The Fourth District Court of Appeal has held that “a court’s gaze is limited to the four corners of the complaint.” Provence v. Palm Beach Taverns, Inc., 676 So. 2d 1022 (Fla. 4<sup>th</sup> DCA 1996). The standard in reviewing a motion to dismiss, this Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of actions upon which relief may be granted. Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983). If the Commission cannot grant the relief, the Complaint must be dismissed. 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<sup>th</sup>, 2008).

### B. **Petitioner’s Complaint Fails to Meet the Well-Established Pleading Requirements**

Florida Administrative Code Rule 25-22.036 provides in pertinent part that each complaint must contain:

1. 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.

Petitioner's Complaint fails to satisfy the requirements of Rule 25-22.036, F.A.C. A pleading that does not meet these requirements does not satisfy the Rule. In re Complaint of Rosario Rojo Against Florida Power & Light Co. for Violation of Rule 25-6.105, F.A.C. Docket No. 110069-EI, Order No. PSC-11-0285-FOF-EI (June 29<sup>th</sup>, 2011). In Rojo, the Petitioner submitted a single page complaint, vaguely alleged bad faith and malice by FPL, and broadly reference certain statutes and administrative rules. Id. Additionally, the complaint failed to allege specific actions by FPL or substantive requirements that FPL violated. Id. The Commission granted FPL's Motion to Dismiss the complaint with prejudice finding that there was no assertion of FPL's act or omission that resulted in a violation affecting the petitioner's substantive interest. Id.

In the instant case, Mr. Musser's Complaint fails to identify, cite or reference with specificity any rule, order, or statute which FPL has allegedly violated as required by the rule. FPL is severely prejudiced in the preparation of its defense by not knowing what rules, orders, or statutes FPL is purported to have violated. Moreover, the complaint does not state any elements of a cause of action or duties to which FPL allegedly owes to the Petitioner. This Commission has held in numerous orders that to sustain a motion to dismiss, the moving party must demonstrate, taking all allegations in the petition as correct, that the petition states a cause of action upon which relief can be granted. In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., F.A.C. Docket No. 941121-WS, Order No. PSC-95-0614-FOF-WS (May 22, 1995). First, the complaint filed before this Commission merely alleges that the Petitioner did not "steal or tamper with the

electric.” Second, the complaint makes allegations as to why the Petitioner’s bills purportedly haven’t varied. The instant complaint suffers from greater deficiencies in the pleading requirements regarding the rules, orders, or statutes violated than this Commission found in Rojo where that complaint broadly referenced certain statutes and rules. As such, the complaint should be dismissed with prejudice.

The complaint fails to allege what actions FPL did or did not perform that constitute a violation. Rather, the Petitioner’s complaint simply provides a description of the petitioner as a person and the reasons why the petitioner needs electricity. In addition, the complaint merely disagrees with FPL’s billing of his account for services rendered. Because the complaint fails to allege what actions FPL potentially did or failed to do, the Petitioner has not met his burden of satisfying the requirements of the Rule.

Finally, the complaint fails to state a specific requested relief and/or penalty allegedly caused by FPL. The complaint states that “I’m begging for help in this matter” without stating what this help is supposed to be. Assuming arguendo that the complaint identifies a relief sought, which FPL contends it does not, the complaint fails to specify with enough sufficiency what said relief and/or penalty the Petitioner is seeking from the Commission.

### **III. CONCLUSION**

Petitioner’s complaint fails to properly allege each of the required elements as required by 25-22.036, F.A.C., to state a cause of action. The lack of sufficiency in the pleadings leaves FPL to speculate on 1) what actions took place, 2) whether any actions violated a specific rule, order, or statute, and 3) how FPL would defend this matter. Therefore, the Petitioner’s complaint must be dismissed as being legally and factually deficient.

WHEREFORE, based upon the foregoing, Florida Power & Light Company requests that the Commission enter an order dismissing Petitioner's complaint.

Respectfully submitted this 1, day of October, 2015.

Kevin I.C. Donaldson, Esq.  
Attorneys for Florida Power & Light  
Company  
700 Universe Boulevard  
Juno Beach, Florida 33408  
(561) 304-5170  
(561) 691-7135 (fax)

By: s/ Kevin I.C. Donaldson  
Kevin I.C. Donaldson  
Florida Bar No. 0833401

**CERTIFICATE OF SERVICE  
DOCKET NO. 150207-EI**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail or electronic delivery this 1, day of October, 2015 to the following:

Timothy Musser  
3 Palmetto Drive  
Ormond Beach, Florida 32176

J.R. Kelly, Public Counsel  
John J. Truitt, Associate Public Counsel  
Office of Public Counsel  
The Florida Legislature  
111 West Madison Street, Room 812 Tallahassee,  
Florida 32399  
kelly.jr@leg.state.fl.us  
*Attorney for the Citizens of the State of Fla.*

By: s/ Kevin I.C. Donaldson  
Kevin I.C. Donaldson, Esq.  
Florida Bar No. 0833401

# EXHIBIT “A”

8-10-2015

I Timothy Marner  
Complaint # 1172524E

I was forced to pay a Dep. Based on electric use in the past by other people that lived here, I could not afford that that was wrong.

I am file a formal Complaint a petition, for falsely accusing me of stealing and tampering with Electric

Also I am medically need electric to breath for I have a Oxygen mask. that needs electric to work, I am in medical need, of electric a note from my doctor was sent in to # P 1 and they agreed to not turn electric off as long as I continue to pay my monthly Bill, which I am and have done, they

If you look at my bill from the date I have been accused of stealing electric my bill has not changed but yet they want us to pay for something we did not do. I had told them I am 89 years old and I have ~~the~~ health issues, in the past year I have had or have been in and out of the hospital I am on a fixed income and I am being forced out of this home for I can't afford

**ORIGINAL**

JAMBIRO

RECEIVED  
SEP 18 2015  
FLORIDA PUBLIC SERVICE COMMISSION  
CONSUMER ASSISTANCE

to pay what they are accusing me  
of ussing, which I did not, If you  
look at my bills they have not varied  
by much, the only time they are high  
is when I have to pay interest on a  
bill that they have accused me of  
taking but I did not, I am asking  
I am pleading, begging for help in  
this matter, I, did nothing wrong  
and my civil wrights are being violated  
and so is my wife do a human  
I am being accused, and no matter what  
preff I give, I am sending what I sent  
F P L about my Cuygen and I need  
to live, I have Sky apmics, I am also low  
income I was Born May 28-1933, I am  
81 years old, I am disabled and have in  
home care servs.

My FPL Acct # 17674-22544

Also I am and have been billed incorrectly  
Based on there guess, We are, I am below  
poverty level am, we are just barely make  
enough for food, I am 80 years old  
and I have my Grandchild living with  
me full time As of August 1<sup>st</sup> 2015. He  
is eleven years old he goes to J.C.

**ORIGINAL**

ORIGINAL

RECEIVED  
SEP 18 2015  
FLORIDA PUBLIC SERVICE COMMISSION  
CONSUMER ASSISTANCE



**FPL**  
March 3, 2015

TIMOTHY MUSSER  
3 PALMETTO DR  
ORMOND BEACH FL 32176



Re: BILL ACCOUNT #: 1767422544  
3 PALMETTO DR  
ORMOND BEACH FL 32176

Dear Timothy Musser:

Thank you for your application to participate in our Medically Essential Service Program. We are happy to inform you that you have been accepted into the program and that a special notation has been made to your account indicating your participation in the program.

Customer satisfaction is important to us and ensuring that your electric needs are met is our primary concern. The Medically Essential Service Program will provide advance notification before any scheduled disconnection will take place. A limited payment extension, if needed, is also provided. The Program does not, however, exempt the customer from payment of the electric bill, guarantee uninterrupted service, or assign a priority status to the customer for service restoration during outages.

Each year we will contact you by mail to request proof of certification because we know that situations change from time to time. We will be sure to give you and your physician plenty of time to complete the re-certification process.

In spite of how hard we work at FPL to keep your power up and running, sometimes acts of nature can cause your power to fail. The time it takes to restore your power depends upon the severity of the damage. Here are some suggestions that may help your household prepare for a prolonged power outage:

- Have sufficient battery backup ready for home medical equipment.
- Register with your local office of Emergency Management.
- Clearly post the telephone number for the American Red Cross.
- Make pre-arrangements with family or friends in case you need to relocate temporarily.

FPL also offers various programs that can help those requiring Medically Essential Service. Information explaining Special Consumer Services is also enclosed.

We especially urge your participation in the following programs:

- FPL Friendly Reminder sends a duplicate final notice to the person of your choice if your electric bill is past due.
- FPL Automatic Bill Pay ensures your bill is always paid, and always on time.
- FPL E-Mail Bill allows you to receive your bills online; like getting an e-mail from a friend.
- FPL Budget Billing helps make your monthly electric bill more predictable.

To sign up for any of these programs or obtain additional information about them, please contact us toll free at 1-800-226-3545.

**MEDICALLY ESSENTIAL SERVICE**

In order for Florida Power & Light Company to determine whether a customer is eligible for designation as a Medically Essential Service ("MES") Customer, Part A must be completed and signed by the Customer and the Patient or Guardian (if other than the Customer). Part B is to be completed by the Patient's physician and the entire form consisting of both Part A and Part B returned directly to FPL at the following address:  
FPL, Attn: Medically Essential Service Program CSF/GO, PO Box 029100, Miami, FL 33102-9100

**Part A: CUSTOMER APPLICATION**  
FPL Account No.: 17674-22544  
Customer Name: Tim Mussen Social Security No.: \_\_\_\_\_  
Service Address: 3 Palmetto Dr  
City, State, Zip: Ormond Beach FL 32176  
Daytime Area Code & Telephone Nos.: 386 301 8918 and/or (\_\_\_\_\_) \_\_\_\_\_  
Name of Person Using Equipment: Tom Low Patient's Physician: Chris LARRAZABAL

To the best of my knowledge and belief, the Patient identified above is medically dependent on electric-powered equipment that must be operated continuously or as circumstances require as specified by the Patient's physician to avoid the loss of life or immediate hospitalization. The Patient is a permanent resident at the Service Address identified above. I agree to notify FPL when this equipment is no longer in use. FPL has fully explained how my account will be handled regarding any collection action due to non-payment of the bill. I understand that FPL does not guarantee uninterrupted service or assign a priority status to my account for service restoration during outages. I understand that I must be prepared with backup medical equipment and/or power and a planned course of action in the event of prolonged outages. I agree that FPL, upon request of federal, state, or local governmental authorities whose duties or functions include emergency response or disaster relief or prevention, or private entities authorized by congressional charter to assist in disaster relief efforts, may disclose to such requesting entity the following information: the MES Customer name and service address. However, I also understand that FPL may not receive any such requests for this information and that FPL has no obligation to release this MES information to any such entity. In order to be excluded from the disclosure by FPL of the MES information on this form, I must contact FPL to request a Notice of Exclusion From Disclosure. The Notice of Exclusion From Disclosure must be returned to FPL, as provided with the Notice of Exclusion From Disclosure, and will be effective upon FPL's receipt of such properly completed Notice. If I wish to ensure that the MES and/or any additional information regarding the Patient's condition is furnished to any such entity, I will contact the relevant authorities and provide the MES and/or additional information myself. I agree to hold FPL harmless from any claim based on or related to the disclosure of my information by or to FPL, or any failure of FPL to disclose the MES information whether advertent or inadvertent and whether or not the MES information was requested.

Tim Mussen  
Customer Signature Date: 2-11, 2015  
Francis P. Low  
Patient's or Guardian's Signature (if other than the Customer) Date: 2-11, 2015

**WARNING - PART A - CUSTOMER APPLICATION:** Knowingly making a false or misleading statement in completing the Customer Application could result in the denial or termination of the medically essential service certification.

**Part B: PHYSICIAN'S CERTIFICATE**

Physician's Name: CHRISTOPHER LARRAZABAL Physician's License #: ME0071203  
Physician's Address: 509 Memorial Circle STE A Ormond Beach FL 32174  
Physician's Area Code & Telephone Nos.: (386) 676-2779 and/or (386) 676-9220

I, CHRISTOPHER LARRAZABAL, duly licensed and authorized to practice medicine in the State of Florida,  
(Name of physician)  
hereby certify that FRANCIS LARWA who resides at 3 Palmetto Dr Ormond Beach FL 32176  
(Name of patient) (Patient's place of residence)

is under my care, has been seen by and/or has consulted with me within the past 12 months, and depends upon electric-powered equipment that must be operated continuously or as circumstances require as specified below in order to avoid the loss of his/her life or serious medical complications requiring his/her immediate hospitalization. The medically essential equipment upon which this patient relies is described as follows: Nebulizer machine

Oxygen 2L via nasal cannula  
night time usage COPD need

The patient uses this equipment 24 hours within each twenty-four (24) hour period. The following medical condition is why, in my opinion, this patient needs the continuous or specified use of this equipment in order to avoid the loss of his/her life or serious medical complications requiring his/her immediate hospitalization: (Attach additional pages if necessary)

COPD  
OSA  
Alpha Antitrypsin Deficiency

Physician's Signature: \_\_\_\_\_ Date: 2/11/15, 2015

**WARNING - PART B - PHYSICIAN'S CERTIFICATE:** False certification of medically essential service by a physician is a violation of s. 458.331(1)(h) or s. 459.015(1)(f), Fla. Stat. and constitutes grounds for discipline, penalties and/or enforcement.

This certificate shall be deemed valid for a period of twelve (12) months from the date the certificate is accepted by FPL for purposes of determining that a customer qualifies as a Medically Essential Service Customer within the meaning of Section 1.05 of the Company's General Rules and Regulations for Electric Service, or that

*I also only pay 1200.00 monthly and I have a 12 year old that I am raising, I am low income also*

**ORIGINAL**

ORIGINAL

RECEIVED  
SEP 18 2015  
FLORIDA PUBLIC SERVICE COMMISSION  
CONSUMER ASSISTANCE