

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: December 22, 2015

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Page) *PHP SMC. nca*
Office of Consumer Assistance and Outreach (Forsman, Valdez de Gonzalez) *col*
Division of Economics (Draper, Rome) *DRP*
Division of Engineering (Wooten) *Wooten*

RE: Docket No. 150207-EI – Petition for initiation of formal proceedings pursuant to Rule 25-22.036, F.A.C., by Timothy Musser.

AGENDA: 01/05/16 – Regular Agenda – Proposed Agency Action for Issue 2 - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brown

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Section 366.03, Florida Statutes (F.S.), states that each public utility shall furnish to each person applying for service, reasonably sufficient, adequate, and efficient service. The Commission has jurisdiction, as set forth in Section 366.04, F.S., to regulate and supervise each public utility with respect to its rates and service.

Rule 25-22.032, Florida Administrative Code (F.A.C.), implements Chapter 366, F.S., and establishes informal customer complaint procedures that are designed to address disputes, subject to the Commission's jurisdiction, that occur between regulated companies and individual customers. Under this rule, any customer of a Commission regulated company may file a complaint with the Commission's Office of Consumer Assistance and Outreach whenever the

customer has an unresolved dispute with the company regarding electric, gas, telephone, water, or wastewater service.

On January 27, 2015, Timothy Musser filed an informal complaint with the Commission against Florida Power & Light Company (FPL). In his complaint, Mr. Musser alleged that FPL had wrongfully accused him of meter tampering, had improperly back billed him, and that FPL had wrongfully billed him for investigative costs related to FPL's investigation of the alleged meter tampering. Mr. Musser further stated that he could not afford to pay his existing balance owed to FPL in the amount of \$2,813.81 in order to avoid disconnection of his electric service.

On April 2, 2015, and September 9, 2015, staff advised Mr. Musser that his informal complaint had been reviewed and he had an opportunity to file a petition for formal proceedings. Mr. Musser filed a petition for initiation of formal proceedings on September 18, 2015. The petition generally reiterates his claims set forth in his informal complaint. In the formal complaint, Mr. Musser claims that the amount of his deposit was based upon usage by previous individuals who lived at his address and that it was "wrong." He also states that he is filing a formal complaint because FPL has falsely accused him of theft and meter tampering. Mr. Musser further states that his bill has not changed and that FPL wants him to pay for something he did not do. Mr. Musser contends that he "did nothing wrong" and that his "civil rights" were violated.

On October 1, 2015, FPL filed a Motion to Dismiss the Complaint. FPL asserts that Mr. Musser's complaint fails to cite any statute, rule or order which FPL allegedly violated and should therefore be dismissed because it does not meet the requirements of Rule 25-22.036, F.A.C. FPL contends that even when the complaint is read in a light most favorable to Mr. Musser, it fails to specify a cause of action and should therefore be dismissed.

Staff notified Mr. Musser that a motion to dismiss had been filed and that he could provide a response to FPL's Motion to Dismiss Complaint. Mr. Musser has not filed a response to the motion to dismiss or provided any other information in support of his complaint.

This recommendation addresses whether FPL's Motion to Dismiss Complaint should be granted and the appropriate disposition of Mr. Musser's complaint against FPL. The Commission has jurisdiction over this matter pursuant to Section 366.04, F.S.

Discussion of Issues

Issue 1: Should the Commission grant FPL's Motion to Dismiss Complaint for failure to comply with the pleading requirements set forth in Rule 25-22.036, F.A.C.?

Recommendation: The Commission should grant in part, and deny in part, FPL's Motion to Dismiss Complaint. (Page)

Staff Analysis: To sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition fails to state a cause of action for which relief may be granted. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960). A sufficiency determination is confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss. *Varnes* at 350. Thus, the trial court may not "look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." *Id.* All allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted. *See, e.g., Ralph v. City of Daytona Beach*, 471 So. 2d 1173 (Fla. 4th DCA 2000); *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1986); *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 715 (Fla. 1st DCA 1963).

Section 120.569(2)(c), F.S., states that the agency shall dismiss a petition for failure to substantially comply with the uniform rules. Section 120.569(2)(c), F.S., provides that the dismissal of a petition should, at least once, be without prejudice to the petitioner to allow the filing of a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. However, the Commission has previously held *pro se* litigants such as Mr. Musser to a relaxed pleading standard in order to prevent delay and promote resolution of parties' disputes.¹

¹ *See, e.g.,* Order No. PSC-11-0117-FOF-PU, issued February 17, 2011, in Docket Nos. 100175-TL and 100312-EI, *Complaint against AT&T d/b/a BellSouth for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and AT&T regulations pertaining to billing of charges and collection of charges, fees, and taxes; In re: Complaint against Florida Power & Light Company for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and FPL tariffs pertaining to billing of charges and collection of charges, fees, and taxes*; Order No. PSC-02-1344-FOF-TL, issued October 3, 2002, in Docket No. 020595-TL, *In re: Complaint of J. Christopher Robbins against BellSouth Telecommunications, Inc. for violation of Rule 25-4.073(1)(c), F.A.C., Answering Time*; Order No. PSC-12-0252-FOF-EI, issued May 23, 2012, in Docket No. 110305-EI, *In re: Initiation of formal proceedings of Complaint No. 1006767E of Edward McDonald against Tampa Electric Company, for alleged improper billing*; Order No. PSC-15-05222-PAA-EI, issued November 3, 2015, in Docket No. 150169-EI, *In re: Complaint by James DiGirolamo vs. Florida Power & Light Company*.

Rule 25-22.036, F.A.C., prescribes the criteria that must be addressed in a petition for initiation of formal proceedings:

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;
and
4. The specific relief requested, including any penalty sought.

In his petition for initiation of formal proceedings, Mr. Musser alleges that FPL is requiring him to pay a deposit based upon electric usage by other people that have previously lived at his current address. He also states that FPL has accused him of meter tampering and is backbilling him for electric usage that would otherwise have occurred had he not tampered with the meter.

FPL argues in its motion to dismiss that Mr. Musser's complaint fails to meet the pleading requirements for a formal complaint because it does not cite or reference with specificity "any rule, order, or statute" which FPL has allegedly violated. FPL argues that because the complaint does not allege what actions FPL did or failed to do, Mr. Musser has not met his burden to satisfy the criteria stated in Rule 25-22.036, F.A.C. FPL also contends that the complaint "simply disagrees" with FPL's billing of his account for services rendered.

Staff believes that the petition states a cause of action within the Commission's jurisdiction as provided in subsection 366.04(1), F.S., and should not be dismissed. Mr. Musser's allegations concern the amount of and justification for his service deposit and FPL's backbilling him for service not paid for due to his alleged meter tampering. As stated by FPL in its Motion to Dismiss Complaint, the petition is about Mr. Musser's disagreement with FPL's billing of his account for services rendered. Staff believes that these allegations relate to FPL's rates and service for Mr. Musser's electric account.

Staff also believes the facts and law in this docket are sufficiently developed and a complaint in strict compliance with Rule 25-22.036, F.A.C., is not required for the Commission to make a determination on Mr. Musser's petition. The informal complaint files, Mr. Musser's formal complaint, FPL's Motion to Dismiss Complaint, and the record correspondence between staff and Mr. Musser provides relevant information about Mr. Musser's arguments, factual assertions, and requested relief. Staff believes this information is sufficient to allow the Commission to make a decision on the substance of Mr. Musser's complaint, and does not believe it would be an effective use of the parties' and the Commission's resources to require Mr. Musser to amend his complaint to comply with technical pleading rules.

In his formal complaint, Mr. Musser also alleges that his civil rights have been violated. Staff recommends that this allegation should be dismissed with prejudice because the Commission is without jurisdiction under Chapter 366, F.S. to adjudicate civil rights complaints.

Therefore, staff recommends that FPL's Motion to Dismiss Complaint be denied in part and granted in part as discussed above.

Issue 2: What is the appropriate disposition of Mr. Musser's complaint?

Recommendation: The appropriate disposition of Mr. Musser's formal complaint is to deny the complaint. Mr. Musser's account was properly billed in accordance with Commission statutes and rules and FPL's tariffs. FPL did not violate any applicable statute, rule, company tariff or order of the Commission in the processing of Mr. Musser's account.

Staff Analysis: Mr. Musser alleges that he was "forced to pay a deposit based upon electric use in the past by other people that lived" at his current address, FPL is wrongfully accusing him of meter tampering, and FPL is improperly backbilling him for electric usage that would have occurred in the absence of meter tampering.

Meter Tampering

On March 25, 2014, FPL initiated an investigation of meter tampering at Mr. Musser's residence. The following is a summary of the investigative activity that was conducted by FPL in an effort to address Mr. Musser's complaint that he was wrongfully accused of meter tampering.

On April 27, 2014, an FPL field investigator visited Mr. Musser's residence and documented that there was no meter in the meter socket, and that there was tape over the socket. The investigator took photographs of the condition and documented that a central air conditioning unit located on the roof above the meter enclosure was operating while the meter was out of the socket. The investigator reported that the meter enclosure should be inspected and a new meter installed.

On July 25, 2014, an FPL meter electrician visited Mr. Musser's residence and indicated to a man on the front porch that he needed to replace the electric meter. The FPL meter electrician reported that while he was at the front door, he could hear activity at the meter enclosure. When the FPL electrician was provided access to the meter, the electrician documented that the lid of the meter enclosure was lying on the ground, and that the meter had been installed upside down.

On September 22, 2014, FPL's Revenue Protection Department was requested to conduct an investigation of meter tampering at Mr. Musser's residence. The request indicated that the meter was being removed from the meter socket.

On October 13, 2014, an FPL field investigator visited Mr. Musser's residence. The investigator documented that a board was leaning against the meter enclosure, and was flush with the electrical panel and the meter enclosure, allowing no clearance for a meter to be in the meter socket. The investigator took photographs of the conditions found, and documented that the air conditioner unit was in operation and that the residence was occupied.

On October 14, 2014, an FPL meter electrician visited the Musser residence and documented that the meter was in the meter socket; however, the meter enclosure lid was missing. A person from inside the residence provided the meter electrician with the missing meter enclosure lid. The meter electrician documented that a new meter was installed with a green seal on the meter enclosure, and that a wall air conditioner unit was in operation at the time of the visit.

On December 3, 2014, the FPL field investigator visited Mr. Musser's residence and documented that the meter was in the socket; however, the green meter enclosure outer seal was missing.

Staff believes that the unauthorized conditions found at the electric meter for Mr. Musser's residence and information obtained from his meters by software used by FPL, demonstrate that meter tampering and current diversion occurred.

Backbilling

Section 366.03, F.S., states that all rates and charges made or received by any public utility for service rendered by it and each rule and regulation of such public utility shall be fair and reasonable. Rule 25-6.104, F.A.C., authorizes electric utilities to backbill the customer for a reasonable estimate of the electricity consumed but not metered due to meter tampering or fraudulent use. FPL's tariff sets forth its fees, services and policies as approved by the Commission. FPL's Fourth Revised Tariff Sheet No. 6.061 Section 8.3, Tampering with Meters, states:

Unauthorized connections to, or tampering with the Company's meter or meters, or meter seals, or indications or evidence thereof, subjects the Customer to immediate discontinuance of service, prosecution under the laws of Florida, adjustment of prior bills for services rendered, and reimbursement to the Company for all extra expenses incurred on this account.

Staff believes that Mr. Musser's consumption history shows that he benefited from unauthorized conditions at his meter by paying less for electricity than he would have with properly working meters remaining in the socket at all times. It is staff's belief that Mr. Musser is responsible for payment of a reasonable estimate of the electricity used but not originally billed and that FPL may also recover the costs of its investigation of the meter tampering.

FPL calculated Mr. Musser's backbilled amount using its Seasonal Average Percentage of Usage method, a backbilling methodology recognized and accepted by Commission staff. Staff reviewed FPL's backbilling calculations and determined that Mr. Musser's account was fairly and reasonably backbilled. Staff believes that FPL has violated no statute, rule, company tariff, or orders in the investigation of Mr. Musser's meter tampering or in the backbilling of electricity used by Mr. Musser but for which he did not pay.

Customer Deposit

Rule 25-6.097, F.A.C., states that for new and additional deposits the total amount of the required deposit shall not exceed an amount equal to twice the average charges for actual usage of electric service for "the twelve month period immediately prior to the date of notice." The rule contemplates that prior usage may be used by the utility in calculating the amount of a new or additional deposit.

When Mr. Musser's account was established a security deposit was required, which according to FPL, is usually computer generated and calculated based on usage in the previous twelve months.² Staff believes that because Mr. Musser's account has been closed, and the deposit has been credited to his account, the issue whether the deposit is reasonable is now moot.

²The account has been closed and the deposit amount was applied to Mr. Musser's account yielding a final balance of \$2,442.35.

Conclusion

The appropriate disposition of Mr. Musser's formal complaint is to deny the complaint. Mr. Musser's account was properly billed in accordance with Commission statutes, rules, orders, and FPL's tariffs. FPL did not violate any applicable statute, rule, company tariff or order of the Commission in the handling of Mr. Musser's account.

Issue 3: Should this docket be closed?

Recommendation: Issue 2 should be issued as a proposed agency action. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (Page)

Staff Analysis: Issue 2 should be issued as a proposed agency action. If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (Page)