

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
ORDER NO. PSC-16-0025-PAA-EI
ISSUED: January 13, 2016

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN, Chairman
LISA POLAK EDGAR
ART GRAHAM
RONALD A. BRISÉ
JIMMY PATRONIS

ORDER DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS
AND
NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING FORMAL COMPLAINT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the denial of Mr. Musser's Formal Complaint is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code (F.A.C.).

Background

On January 27, 2015, Timothy Musser filed an informal complaint with this Commission against Florida Power & Light Company (FPL). In his complaint, Mr. Musser alleged that FPL had wrongfully accused him of meter tampering, had improperly backbilled 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. 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 stated that he was filing a formal complaint because FPL falsely accused him of theft and meter tampering. Mr. Musser further states that his bill had 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 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.

Mr. Musser did not file a response to the motion to dismiss or provide any other information in support of his complaint. We have jurisdiction over this matter pursuant to Section 366.04, Florida Statutes (F.S.).

Motion to Dismiss Complaint

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).

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.

In its motion to dismiss, FPL cites Rule 25-22.036, F.A.C., which 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.

Section 120.569(2)(c), F.S., states that an 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, we have 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. *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*.

We find that 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 this 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 provide relevant information about Mr. Musser's arguments, factual assertions, and requested relief. We find that this information is sufficient to allow us to make a decision on the substance of Mr. Musser's complaint, and find that it would not be an effective use of the parties' and our resources to require Mr. Musser to amend his complaint to comply with technical pleading rules.

We find that the petition states a cause of action within our jurisdiction as provided in Section 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. We find that these allegations relate to FPL's rates and service for Mr. Musser's electric account.

Mr. Musser also alleges that his civil rights have been violated. This allegation is dismissed with prejudice because we are without jurisdiction under Chapter 366, F.S., to adjudicate civil rights complaints. Therefore, FPL's Motion to Dismiss Complaint is denied in part and granted in part.

Mr. Musser's Formal Complaint

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.

We find 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.

We find 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. We find 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 us. We find that Mr. Musser's account was fairly and reasonably backbilled. We also find 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. We find that because Mr. Musser's account has been closed, and the deposit has been credited to his account, the issue of whether the deposit is reasonable is now moot.

Decision

We find that a thorough and complete investigation of this matter has been conducted. Based on the information obtained by our staff, it appears that Mr. Musser's account was properly billed in accordance with FPL's tariffs and our rules and statutes. The meter inspections, analyses of Mr. Musser's electric consumption history, and review of Mr. Musser's billing history indicate that the charges and account balance are accurate. Mr. Musser has presented no documentation or evidence that supports his contention that he was improperly

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billed for a customer deposit or wrongfully billed for electric usage that occurred but for which he had not paid. Furthermore, we find that FPL has not violated any applicable statute, rule, Commission order, or FPL tariff in the processing of Mr. Musser's account. Therefore, Mr. Musser's Complaint is denied.

Based on the foregoing, it is

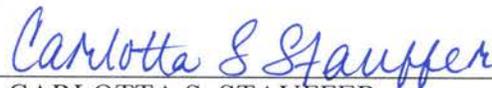
ORDERED that Florida Power & Light Company's Motion to Dismiss Complaint is granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that Mr. Musser's Formal Complaint is hereby denied. It is further

ORDERED that the denial of Mr. Musser's Formal Complaint, issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 13th day of January, 2016.



CARLOTTA S. STAUFFER

Commission Clerk

Florida Public Service Commission

2540 Shumard Oak Boulevard

Tallahassee, Florida 32399

(850) 413-6770

www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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.

As identified in the body of this order, our action denying Mr. Musser's Formal Complaint is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on February 3, 2016. If such a petition is filed, mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

Any party adversely affected by the Commission's ruling on the Motion to Dismiss may request: (1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 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 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.