

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-**

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**DATE:** October 22, 2020

**TO:** Office of Commission Clerk (Teitzman)

**FROM:** Office of the General Counsel (Lherisson) *JSC*  
Office of Consumer Assistance and Outreach (Hicks, Plescow) *RH*  
Division of Economics (Coston) *JGH*

**RE:** Docket No. 20200030-EI – Complaint by Juana L. Del Rosario against Florida Power & Light Company regarding backbilling for alleged meter tampering.

**AGENDA:** 11/03/20 – Regular Agenda – Motion to Dismiss – Oral argument not requested; participation is at the Commission’s discretion

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Brown

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

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### Case Background

On June 13, 2019, Ms. Juana Del Rosario filed an informal complaint with the Florida Public Service Commission (Commission) against Florida Power & Light Company (FPL or Utility).<sup>1</sup> In her informal complaint, Ms. Del Rosario alleged that she was improperly backbilled for up to 48 months of usage, for a total of \$2,351.23. Although FPL had found that her meter had been tampered with, Ms. Del Rosario alleged that she did not tamper with the meter.

By letter dated December 17, 2019, staff advised Ms. Del Rosario that her informal complaint had been reviewed by the Commission’s Process Review Team, in accordance with Rule 25-22.032, Florida Administrative Code (F.A.C.), and it appeared that FPL had not violated any applicable statutes, rules, company tariffs, or Commission orders. Staff advised Ms. Del Rosario

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<sup>1</sup> Complaint Number 1310438E.

that if she disagreed with staff's complaint conclusion, she could file a petition for initiation of formal proceedings for relief against FPL.

Ms. Del Rosario filed a formal complaint against FPL on January 17, 2020, pursuant to Rule 25-22.036, F.A.C. In her complaint Ms. Del Rosario stated that she did not tamper with her meter. During the investigation of Ms. Del Rosario's complaint, staff learned that Ms. Del Rosario established an account for electric service with FPL at her residence on April 18, 2003. On September 14, 2010, FPL installed smart meter ACD0735 at Ms. Del Rosario's residence. On February 25, 2019, FPL reviewed the communication from smart meter ACD0735 and found a drop in consumption occurred on May 22, 2014. On May 16, 2019, FPL found that Ms. Del Rosario's smart meter was missing the outer and inner seals, which were an indication that someone other than utility staff accessed the meter enclosure and internal meter workings. On June 12, 2019, FPL provided notice to Ms. Del Rosario that her service would be disconnected due to meter tampering. FPL restored Ms. Del Rosario's service pending the resolution of her complaint.

On March 20, 2020, staff sent a letter to Ms. Del Rosario requesting any additional information or documentation that might assist the Commission in addressing her complaint. Staff did not receive a response from Ms. Del Rosario.

In Ms. Del Rosario's formal complaint she requested the Commission find that FPL incorrectly backbilled her account and to require FPL to give Ms. Del Rosario a credit adjustment of \$2,351.23. At the June 9, 2020 Commission Agenda Conference, Ms. Del Rosario asserted that she denies all of FPL's allegations and she did not engage in meter tampering.

By Proposed Agency Action Order No. PSC-2020-0219-PAA-EI, issued June 29, 2020 (PAA Order 2020-0219), the Commission denied Ms. Del Rosario's formal complaint. In PAA Order 2020-0219 the Commission placed the customer on notice that pursuant to Rule 25-6.104, F.A.C., in the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer based on a reasonable estimate of the energy used. The Commission found that there was sufficient cause to determine that meter tampering occurred at the Del Rosario residence to allow FPL to backbill the Del Rosario account for unmetered kilowatt hours, and that because the account was in Ms. Del Rosario's name during the entire period, she should be held responsible for a reasonable amount of backbilling. Finally, the Commission found that it was reasonable for FPL to backbill the account for 48 months in the amount of \$2,351.23.

On July 20, 2020, Ms. Del Rosario timely filed with the Commission Clerk a letter of protest titled Notice of Request of An Appeal (Protest Petition) reiterating her claims set forth in her formal complaint. On July 31, 2020, FPL filed a Motion to Dismiss Petition asserting that the Protest Petition failed to meet the established pleading requirements and states no cause of action for which relief can be granted. Ms. Del Rosario did not file a response to FPL's Motion.

FPL did not request oral argument regarding its Motion to Dismiss. Pursuant to Rule 25-22.0022, F.A.C., the Commission may hear argument from the parties at its discretion.<sup>2</sup>

This recommendation addresses whether FPL's Motion to Dismiss should be granted and the appropriate disposition of Ms. Del Rosario's Protest Petition. The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 120.569, Florida Statutes (F.S.), and Rule 25-22.032, F.A.C.

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<sup>2</sup> Rule 25-22.0022(1), F.A.C., provides, in pertinent part, "[f]ailure to timely file a request for oral argument shall constitute waiver thereof." Staff notes that waiver does not limit the Commission's discretion to grant or deny oral argument. Rule 25-22.0022(3), F.A.C. If the Commission decides that oral argument would aid in its understanding and disposition of the underlying matter, staff recommends that the Commission allow three minutes per side.

## Discussion of Issues

**Issue 1:** Should the Commission grant FPL's Motion to Dismiss Ms. Del Rosario's Protest Petition?

**Recommendation:** Yes. The Commission should grant FPL's Motion to Dismiss Ms. Del Rosario's Protest Petition. (Lherisson)

**Staff Analysis:** Rule 25-22.036(2), F.A.C., states that a complaint is appropriate when an act or omission of a person subject to the Commission's jurisdiction affects the complainant's substantial interest and violates a statute, rule or Commission order. A complaint is dismissed with prejudice if no cause of action is stated and an amended pleading will not cure the deficiency.

### Ms. Del Rosario's Protest Petition

By PAA Order 2020-0219 the Commission denied Ms. Del Rosario's formal complaint. On July 20, 2020, Ms. Del Rosario filed with the Commission Clerk a letter of protest. In Ms. Del Rosario's Protest Petition, she reiterates the information that the parties provided which led to the Commission taking a proposed agency action on Ms. Del Rosario's formal complaint. The only new information that Ms. Del Rosario provided in her Protest Petition is that she considers herself "a victim of this situation" and that she is "a Christian woman with moral principles and values, [she] work[s] for [her] local church, and [she] would not jeopardize those principles in violation of [her] integrity and commitment to God." Ms. Del Rosario requests that her case be "thoroughly reviewed, revised, and corrected."

### FPL's Motion to Dismiss

FPL alleges that Ms. Del Rosario's Protest Petition fails to meet pleading requirements for a formal proceeding under Rule 28-106.201, F.A.C., because it does not provide a statement of all disputed issues of material fact or a statement of ultimate facts alleged requiring reversal or modification of PAA Order 2020-0219. FPL contends that Ms. Del Rosario fails to state any rule or statutes that FPL has allegedly violated. As such, FPL contends that Ms. Del Rosario's Protest Petition must be dismissed because it does not give FPL or the Commission adequate notice of what facts would give rise to an alleged violation of rule or statute requiring reversal or modification.

### Analysis

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. 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). When making this determination, only the petition and documents incorporated therein can be

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reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. 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); and Rule 1.130, Florida Rules of Civil Procedure. When “determining the sufficiency of the complaint, 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.” Varnes v. Dawkins at 350.

For formal administrative proceedings authorized by Chapter 120, F.S., the Uniform Rules of Procedure contained in Chapter 28-106, F.A.C., apply. Section 120.569(2)(c), F.S., states that the Commission shall dismiss a petition for failure to substantially comply with the Uniform Rules. Pursuant to this statute, the dismissal of a petition shall, 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 Ms. Del Rosario to a relaxed pleading standard, in order to prevent delay and promote resolution of parties’ claims.<sup>3</sup>

Staff is sensitive to Ms. Del Rosario’s circumstances, and despite the lack of a legally sufficient pleading, staff has attempted to determine whether amendment of the complaint could lead to a situation where the Commission would have jurisdiction to grant Ms. Del Rosario some relief. The facts and arguments alleged in Ms. Del Rosario’s Protest Petition are the same facts and arguments that the Commission considered when taking proposed agency action on Ms. Del Rosario’s formal complaint. She fails to allege a statement of ultimate facts that would require reversal or modification of PAA Order 2020-0219. Ms. Del Rosario’s Protest Petition fails to make any new allegations or assertions that could be framed differently that would give the Commission the opportunity to consider and grant her relief.

Upon review of information provided to staff, there is no evidence that FPL backbilled Ms. Del Rosario incorrectly. Meter tests performed by FPL on smart meter ACD0735 revealed a registration below the allowable tolerances due to the tampered CT wires. Ms. Del Rosario has presented no documentation or evidence that supports her contention that she was improperly backbilled or that the meter tampering occurred before she became owner of the property. In the Protest Petition, Ms. Del Rosario fails to state how any of her claims relate to a specific rule or statute that she contends would require reversal or modification of Commission PAA Order 2020-0219. Staff believes that FPL properly handled Ms. Del Rosario’s account in compliance

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<sup>3</sup> 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 254.073(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.

with FPL's tariffs, statutes, rules or Commission Order. Staff recommends that the Commission grant FPL's motion to dismiss without prejudice.

**Issue 2:** Should this docket be closed?

**Recommendation:** Yes. If the Commission agrees with staff regarding Issue 1, then Ms. Del Rosario's Protest Petition should be dismissed without prejudice, and the docket should be closed. (Lherisson)

**Staff Analysis:** If the Commission agrees with staff regarding Issue 1, then Ms. Del Rosario's Protest Petition should be dismissed without prejudice, and the docket should be closed.