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100312-EI

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Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 100312-EI

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.

c. The document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 10 pages.

e. The document attached for electronic filing is Florida Power & Light Company's Motion to Dismiss

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint against Florida Power & Light)
Company for alleged violations of various) Docket No. 100312-EI
sections of Florida Administrative Code, Florida)
Statutes, and FPL tariffs pertaining to billing of) Filed: June 28, 2010
charges and collection of charges, fees, and taxes)

FLORIDA POWER AND LIGHT'S MOTION TO DISMISS COMPLAINT

Florida Power & Light Company, Inc., ("FPL") hereby files, pursuant to Rule 28-106.204, Florida Administrative Code, this Motion to Dismiss the Complaint filed by "Petitioner"¹ in this docket. For the reasons set forth below, the Florida Public Service Commission ("Commission") should dismiss the Petitioner's Complaint.

I. INTRODUCTION

Petitioner's Complaint should be summarily dismissed because it falls far short of the well established pleadings requirements that a Complaint must meet to be deemed sufficient. The various deficiencies in the Complaint do not just render it inadequate to meet the requirements of Florida law. 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. The vagueness of the Complaint also makes it impossible for FPL to adequately respond without engaging in a substantial amount of conjecture as to the true facts in the instant situation. For these reasons, the Complaint should be dismissed as a matter of law.

¹ Customer's name has been redacted by Commission in the Complaint, thus FPL is unable to identify the customer, and simply refers to the customer as the "Petitioner" in this Motion.

II. MOTION TO DISMISS

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. See, *Varnes v. Dawkins*, 624 So.2d 349, 350 (Fla. 1st DCA 1993). To sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. *In re: Petition to investigate, claim, for damages, complaint and other statements against respondents Evercom Systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ*, Order No. PSC-07-0332-PAA-TP, Docket No. 060640-TP (Issued April 16, 2007), citing *In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc.*, 95 FPSC 5:339 (1995); *Varnes*, at 350. "In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not the pleading should be dismissed." See, *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co.*, Order No. PSC-99-1054-FOF-EI at 3, Docket No. 981923-EI, (Issued May 24, 1999).

B. Petitioner's Complaint Fails to State A Cause of Action for Which Relief Can Be Granted

1. Alleged Statutory and Rule Violations

In paragraph (a) of the Complaint, Petitioner alleges that FPL:

[V]iolates sections of Florida Administrative Code Chapter 25-6.103, 25-6.105 and 25-6.106, various sections of Florida Statutes, and FPL tariffs that pertain to billing of charges and collection of charges, fees and taxes, and that are not service charges; FPL violated law it when it demanded and received prior

payment of charges that customers are not required to pay according to F.S. 203, 350, 366 and 367 and the company regulations. Federal law does not demand payment of taxes or money from people e.g. children, elderly and jobless with inadequate access to it.

While Petitioner alleges that FPL violated Rules 25-6.103, 25-6.105 and 25-6.106, F.A.C., Petitioner fails to explain how and why FPL violated these rule provisions when it allegedly billed and collected certain unnamed “charges, fees and taxes.” Moreover, other than the citation to Rules 25-6.103, 25-6.105 and 25-6.106, F.A.C., Petitioner does not allege which specific sections of Florida Administrative Code FPL allegedly violated or how FPL violated any such sections. Similarly, while Petitioner alleges, “FPL violates ... Florida Statutes,” Petitioner does not allege which specific sections of Florida Statutes FPL violated or how FPL violated any such sections. While Petitioner makes a vague and general reference to “F.S. 203, 350, 366 and 367”, Petitioner fails to cite which of the 104 sections² of these chapters of Florida law FPL allegedly violated or specifically allege how FPL violated any such provisions.³ In responding to Petitioner’s Complaint, FPL should not be required to guess which of these 104 statutory sections Petitioner claims FPL violated when it “demanded payment and received payment of charges that customer are not required to pay” or the “charges, taxes and fees” FPL allegedly improperly charged. Accordingly, the Petition fails to state a cause of action by failing to state the elements necessary to show that FPL violated Florida Statutes or Commission rules and the Complaint should be dismissed. *See, In re: Complaint and petition of John Charles Heekin against Florida Power and Light Company*, Order No. PSC-99-1054-FOF-EI at 5, Docket No. 981923-EI, (Issued May 24, 1999). *See also*, Rules 25-22.036 and 28-106.201, F.A.C.

² Chapter 203 has 8 sections, Chapter 350 has 30 sections, Chapter 366 has 37 sections and Chapter 367 has 29 sections.

³ Moreover, FPL does not believe that the Commission would have jurisdiction to enforce against FPL some of the chapters of Florida law cited by Petitioner. As an example, Petitioner references Chapter 367 Water and

2. Alleged Violation of FPL Regulations

Petitioner makes a vague reference that “FPL violates ... various sections of ... company regulations.” To the extent Petitioner is attempting to claim that FPL violated its own “regulations”, her claim fails to state a cause of action in that the Petitioner fails to allege which of its “regulations” were violated and this claim should be dismissed.⁴

3. Alleged Violation of Federal Law

Petitioner makes a vague reference to “federal law” in her Complaint indicating that “Federal law does not demand payment of taxes or money from people e.g. children, elderly and jobless with inadequate access to it.” To the extent Petitioner is attempting to claim that FPL violated federal law, her claim fails to state a cause of action in that the Petitioner fails to allege which federal statutory provision FPL allegedly violated and how FPL violated same and this claim should be dismissed.

Moreover, the Commission must determine whether the Legislature has granted it any authority to find that FPL is in violation of federal law.⁵ In making these determinations, the

Wastewater Systems in her Complaint; however, this referenced chapter of Florida Statutes is not applicable to FPL. Since Petitioner’s Complaint lacks sufficient factual allegations, FPL is unable to further respond at this time.

⁴ FPL does not concede that Petitioner could state a cause of action for an alleged violation of its own regulations but since Petitioner’s Complaint lacks sufficient factual allegations, FPL is unable to further respond at this time.

⁵ In order to hear and determine a complaint or petition, a court or agency must be vested not only with jurisdiction over the parties, but also with subject matter jurisdiction to grant the relief requested by the parties. *See Keena v Kenna*, 245 So.2d 665, 666 (FLA. 1st DCA 1971). Subject matter jurisdiction arises only by virtue of law - it must be conferred by constitution or statute and cannot be created by waiver or acquiescence. *Jesse v. State*, 711 So.2d 1179, 1180 (Fla. 2d DCA 1998). This Commission, therefore, must dismiss a complaint or a petition to the extent that it asks the Commission to address matters over which it has no jurisdiction or to the extent that it seeks relief that the Commission is not authorized to grant. *See, e.g. In re: Petition by FPL Communications of the Southern States, Inc. TCG South Florida, and MediaOne Florida Telecommunications, Inc. for structural separation of BellSouth Telecommunications, Inc. into two distinct wholesale and retail corporate subsidiaries.* Order No. PSC-01-2178-FOF-TP, Docket No. 010345-TP (Issued Nov. 6, 2001) (granting BellSouth’s Motion to Dismiss FPL’s and FCCA’s Petition for Structural Separation because “the Petitions fail to state a cause of action upon which relief can be granted. Namely, we have neither Federal nor State authority to grant the relief requested, full structural separation.”); *In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company*, Order No. PSC-99-1054-FOF-EI, Docket No. 981923-EI (Issued May 24, 1999) (Commission dismissed a complaint seeking monetary damages against a public utility for alleged eavesdropping, voyeurism, and damage to property because the complaint involved “a claim for monetary damages, an assertion of tortious liability or of criminal activity, any and all of which are outside this Commission’s jurisdiction.”)

Commission must keep in mind that the Legislature has never conferred upon the Commission any general authority to regulate public utilities. *See City of Cape Coral v. GAC Util., Inc.*, 281 So. 2d 493, 496 (Fla. 1973). Instead, “[t]he Commission has only those powers granted by statute expressly or by necessary implication.” *See, Deltona Corp. v. Mayo*, 342 So. 2d 510, 512 n.4 (Fla. 1977); also *East Central Regional Wastewater Facilities Oper. Bd. v. City of West Palm Beach*, 659 So.2d 402, 404 (Fla. 4th DCA 1995) (noting that an agency has “only such power as expressly by necessary implication is granted by legislative enactment” and that “as a creature of statute,” an agency “has no common law jurisdiction or inherent power ...”). Any authority granted by necessary implication must be derived from fair implication and intendment incident to any express authority. *See Atlantic Coast Line R.R. Co. v. State*, 74 So. 595, 601 (Fla. 1917); *State v. Louisville & N.R. Co.*, 49 So, 39 (Fla. 1909). Finally, “any reasonable doubt as to the existence of a particular power of the Commission must be resolved against it.” *State v. Mayo*, 354 So. 2d 359, 361 (Fla. 1977).

Petitioner cannot demonstrate that the Commission has the authority to find that FPL violated “federal law.” Specifically, as can be seen by a cursory review of Chapters 350 and 366, Florida Statutes, the Legislature has not granted the Commission any authority to determine whether a utility has violated federal law.⁶

⁶ The Commission addressed a similar situation in *In re: Complaint by Supra Telecommunications and Information Systems, Inc. Against BellSouth Telecommunications, Inc. Regarding BellSouth’s Alleged Use of Carrier-to-Carrier Information*. Order No. PSC-03-1392-FOF-TP, Docket No. 030349-TP (Issued December 11, 2003), (“*Sunrise Order*”). In the *Sunrise Order*, the Commission held that “[f]ederal courts have ruled that a state agency is not authorized to take administrative action based solely on federal statutes” and that “[s]tate agencies, as well as federal agencies, are only empowered by the statutes pursuant to which they are created.” *See Sunrise Order* at 3 (citations omitted). The Commission further noted, however, it can construe and apply federal law “in order to make sure [its] decision under state law does not conflict” with federal law. *Id.* At 3-4. Accordingly, in the *Sunrise Order*, the Commission determined that it “cannot provide a remedy (federal or state) for a violation of” federal law but that the Commission can interpret and apply federal law to ensure that its decision under state law does not conflict with federal law. *Id.* at 5. *See also In re: Complaint against BellSouth Telecommunications, Inc. for alleged overbilling and discontinuance of service, and petition for emergency order restoring service, by IDS Telecom LLC*. Order No. PSC-04-0423-FOF-TP, Docket No. 031125 (Issued April 26, 2004) (The Commission “acknowledged that federal courts have found that a state agency is not authorized to take administrative action based solely on

Here, to the extent that the Petitioner is requesting that the Commission find that FPL violated federal law, pursuant to Commission precedent and Florida law, the Commission lacks jurisdiction to make such a finding. Accordingly, FPL requests that the Commission dismiss Petitioner's Complaint to the extent it seeks a finding that FPL has violated "federal law".

4. Alleged Improper Billing and Collection of Charges, Fees and Taxes

Petitioner alleges in her Complaint that FPL violated "Chapter 25-6.103, 25-6.105 and 25-6.106, various sections of Florida Statutes, and FPL tariffs that pertain to billing of charges and collection of charges, fees and taxes, and that are not service charges" and find that it "violated law when it demanded and received payment of charges that customers are not required to pay." However, Petitioner fails to allege with specificity which "charges, fees and taxes" FPL has improperly charged or collected from Petitioner and how it improperly billed or collected these unnamed "charges, fees and taxes", and, thus, fails to state a cause of action for which relief can be granted.

5. Request for Declaratory Statement

Florida Statutes Section 120.565 governs the issuance of a declaratory statement by an agency. In pertinent part, it provides:

(1) Any substantially affected person may seek a declaratory statement as to regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

federal statutes. *Id.* At 3 (citing *Curtis v Taylor*, 648 F.2d 946 (5th Cir. 1980). Since Count Five relies solely on a federal statute as the basis for relief, we find it appropriate to dismiss Count Five.")

In addition, Florida law provides that “[a]n administrative agency may not use a declaratory statement as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons.” *Tampa Electric Company v. Florida Dept. of Community Affairs*, 654 So.2d 998, 994 (Fla. 1st DCA 1995), citing *Regal Kitchens, Inc. v. Florida Dept. of Revenue*, 641 So. 2d 158, 162 (Fla. 1st DCA 1994).

Petitioner’s Complaint states that the “[p]etition seeks action according to FPL regulations and that benefits customers according to law e.g. Commission declares customer free from paying tax obligations of the company” (emphasis added) and that the “[l]anguage of Florida Administrative Code Chapter 25-6.105 is read by some people in a manner that is harmful to the ordinary customer.”

Section 120.565(2), F.S., requires that “[t]he petition seeking declaratory statement shall state with particularity the petitioner’s set of circumstance and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set circumstances.” Similarly, Rule 28-105.002, F.A.C., requires that a Petition seeking a declaratory statement to contain “[t]he statutory provision(s), agency rule(s), or orders may substantially affect the petitioner in the petitioner’s particular set of circumstances” and “[a] description of how the statutes, rules, or orders may substantially affect the petitioner in the petitioner’s set of circumstances.” Rule 28-105.002 (4)-(5), F.A.C.

Petitioner’s request as stated above woefully fails to meet this standard in that it fails to describe with particularity the circumstances that are the basis for her request for relief. Petitioner has provided deficient and speculative allegations of FPL billing and collecting unnamed “charges, fees and taxes” and that customers should be free from “paying tax obligations of the company.” Florida courts and the Commission have rejected these types of

general and speculative allegations to support a petition for declaratory statement by an administrative agency. *See e.g., In re: Petition for declaratory statement regarding local exchange telecommunications network Emergency 911 service, by Intrado Communications, Inc.* Order No. PSC-08-0374-DS-TP at 13, Docket No. 080089-TP, (Issued June 4, 2008) (Where Commission denied Petition for Declaratory Statement because, among other things, it failed to comply with the legal requirements for a declaratory statement); *National Ass'n of Optometrists and Opticians v. Florida Dep't. of Health*, 922 So. 2d 1060 (Fla. 1st DCA 2006) (Declaratory statement issued by state agency overturned because the facts presented support the petition were not actual and current but merely speculative).

Moreover, Rule 28-105.001, F.A.C, specifically states that a “declaratory statement is not the appropriate means for determining the conduct of another person.” Petitioner’s request, as set forth above, does not conform to Rule 28-105.001, F.A.C, to the extent it is asking the Commission to declare that FPL is not entitled to take certain actions, i.e. billing and collection of certain charges, fees and taxes. The Commission has rejected similar requests in the past.⁷

For all of these reasons, Petitioner's request, to the extent it is seeking a Declaratory Statement from the Commission, is insufficient and improper and should be dismissed.

⁷ *See In re: Petition by Board of County Commissioners of Broward County for declaratory statement regarding applicability of BellSouth Telecommunications, Inc. tariff provisions to rent and relocation obligations associated with BellSouth switching equipment building (“Maxihut”) located at Fort Lauderdale-Hollywood International Airport on property leased by BellSouth from Broward County’s Aviation Department*, Order No. PSC-06-0306-DS-TL, Docket No. 060049-TL (Issued April 19, 2006)(Where Commission held that “Rule 28-405.001, F.A.C., specifically states that a “declaratory statement is not the appropriate means for determining the conduct of another person. Broward County’s request, as set forth in Points A through D above, does not conform to Rule 28-105.001, Florida Administrative Code, in that it is asking us to state that BellSouth is not entitled to take certain actions.”); and *In re: Petition for declaratory statement regarding local exchange telecommunications network emergency 911 service, by Intrado Communications, Inc.*, Order No. PSC-08-0374-DS-TP at 15, Docket No. 080089-TP (Issued June 4, 2008)(“In the Petition at issue here, [petitioner] asks us to determine the conduct of [other persons] in addition to its own interests, which is prohibited by Rule 28-105.001, F.A.C.”). *See also, Tampa Electric Co. v. Florida Dept. of Community Affairs*, 654 So. 2d 998 (Fla. 1st DCA 1995)(Declaratory statement not confirmed to particular set of circumstances but applying to an entire class of persons rejected by appellate court as being “impermissibly broad.”)

III. CONCLUSION

In conclusion, Petitioner's Complaint fails to state a cause of action for which relief can be granted and should be dismissed as a matter of law.

WHEREFORE, based upon the foregoing, FPL requests that the Commission enter an order dismissing Petitioner's Complaint.


Respectfully submitted this 28th day of June, 2010.

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CERTIFICATE OF SERVICE
Docket No. 100312-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery or UPS overnight delivery this 28th day of June, 2010, to the following:

<p>Lisa Bennett, Esq. Division of Legal Services Florida Public Service Commission 2540 Shumard Oak Blvd Tallahassee, Florida 32399-0850 LBENNETT@PSC.STATE.FL.US</p>	<p>Adam Teitzman, Esq. Lawrence Harris, Esq. Office of Public Counsel c/o The Florida Legislature 111 West Madison Street, Room 812 Tallahassee, Florida 32399 ateitzma@psc.state.fl.us lharris@psc.state.fl.us</p>
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*Petitioners name and address redacted per direction of the Commission in this docket