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| **BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION** |
| In re: complaint by Thomas Saporito against Florida Power & Light Company. | Docket No. 110236 -EIFILED: August 15, 2011  |

 **Florida Power & Light company’s Motion To dismiss
thomas sapoRITO’s Original and amended Complaint**

Florida Power & Light Company (“FPL”), pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves to dismiss the original complaint and amended complaint filed by Thomas Saporito (“Mr. Saporito”) in this docket. For the reasons set forth below, the Florida Public Service Commission (“Commission”) should dismiss Mr. Saporito’s complaint and amended complaint.

1. **INTRODUCTION**

Mr. Saporito’s complaint and amended complaint should be dismissed for failure to state a claim upon which relief can be granted. Mr. Saporito’s original “complaint” consists of a July 26, 2011 letter requesting an explanation of the $5.90 customer charge that appears on his electric utility bill (the “Original Complaint,” attached hereto as Exhibit A). This is not a valid basis for a complaint, particularly because Mr. Saporito does not allege that FPL violated any applicable rule or statute. That notwithstanding, FPL provided Mr. Saporito the explanation he requested. The Original Complaint is thus both legally insufficient and moot, and it should be dismissed.

Mr. Saporito’s amended “complaint” also fails to state a legally viable claim. Apparently dissatisfied with FPL’s detailed explanation of the components of the customer charge, Mr. Saporito filed a second letter on August 10, 2011 requesting that the Commission order FPL to refund retroactively the $5.90 customer charge that has heretofore been assessed against him and all other FPL customers (the “Amended Complaint,” attached hereto as Exhibit B). The charge that is the subject of Mr. Saporito’s request was recently approved by the Commission in Docket No. 080677-EI, and Mr. Saporito presents no new information and points to no changed circumstances since that approval. Thus, the doctrine of administrative finality bars Mr. Saporito from relitigating that issue. Moreover, his request for retroactive refunds violates the well-established prohibition against retroactive ratemaking. For these reasons, the Amended Complaint should be also dismissed as a matter oflaw.

**II. STANDARD FOR MOTION TO DISMISS**

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action asa matter of law. *Varnes v. Dawkins,* 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be 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. *Flye v. Jeffords*, 106 So. 2d 229 (Fla. 1st DCA 1958).

1. **Mr. Saporito’s Original Complaint Must Be Dismissed For Failure to Satisfy the Commission’s Pleading Requirements and is Barred by the Doctrine of Mootness**

In order to determine whether a complaint states a cause of action upon which relief can be granted, the Commission must examine the elements of the complaint that must be alleged under the substantive law. *In re: Emergency Petition by D.R. Horton Custom Homes, Inc. To Eliminate Authority of Southlake Utilities, Inc.*, Docket No. 98-1609, Order No. PSC-99-0648 at page 2 (F.P.S.C. April 6, 1999) (hereinafter “*Horton*”). All of the elements of the cause of action must be properly alleged in the complaint. *Id*. (citing *Kislak v. Kreedian*, 95 So. 2d 510 (Fla. 1957)). If all elements are not properly alleged, the pleading should be dismissed. *Id*.

1. The Original Complaint Fails to Meet the Commission’s Pleading Requirements

A complaint filed with the Commission is appropriate when the petitioner complains of an act or omission by a person subject to Commission jurisdiction which affects the petitioner’s substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order. Rule 25-22.036(2), Florida Administrative Code (2011) (“Rule 25-22.036”). In particular, Rule 25-22.036(3)(b) requires that each complaint state:

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.

Mr. Saporito’s Original Complaint and Amended Complaint fail to satisfy Rule 25-22.036(3)(b).

The Original Complaint consists of a letter in which Mr. Saporito points out that his electric utility bill contains a $5.90 customer charge. This letter was deemed a formal complaint by the Commission. As the Original Complaint acknowledges, FPL’s electric bill explains that the customer charge is a fixed amount per month, regardless of how much electricity is used, to cover the costs of service, as well as meter and administrative costs. Mr. Saporito nevertheless alleges that his meter “has never been subject to any requested [meter] service,” and therefore requests that FPL “explain the details of exactly what [he is] paying for each month.” In short, the Original Complaint alleges that FPL assessed a $5.90 customer charge and that Mr. Saporito does not understand that line item on the billing statement.

Nowhere does the Original Complaint allege a breach of any rule, order or statute. Thus, Mr. Saporito sets forth no cause of action. While Mr. Saporito asserts that the FPL bill contains a $5.90 customer charge and that he desires an explanation of that cost, he fails to allege that FPL’s assessment of the customer charge constitutes a violation of any rule, order, or statute. Simply alleging that he does not understand a cost component is not a viable cause of action. For this reason, Mr. Saporito’s Original Complaint 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-El, (Issued May 24, 1999) (“All of the elements of a cause of action must be properly alleged in a pleadingthat seeks affirmative relief. If they are not the pleading should be dismissed.”).

1. Mr. Saporito’s Original Complaint Must Be Dismissed as Moot Because FPL has provided the full relief requested

A case is moot when it presents no actual controversy, when the issues have ceased to exist, or, stated differently, when a judicial determination can have no actual effect. *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992); *Horton*,Order No. PSC-99-0648, at page 2. A moot case must be dismissed unless there are questions raised which are of great public importance, the issues are likely to recur, or if there are collateral legal consequences that affect the rights of a party that flow from the issue to be determined. *Id.*

Even if Mr. Saporito’s request in the Original Complaint for an explanation of the customer charge constituted a legally sufficient controversy (which it does not), that controversy has ceased to exist. On August 5, 2011, FPL sent a letter to Mr. Saporito detailing the components of the $5.90 customer charge. A true and correct copy of the August 5, 2011 letter is attached as Exhibit C. FPL explained that the customer charge recovers the cost of all customer-related equipment and expenses required to serve a utility’s residential class of customers. The customer charge “is a set amount per month, regardless of how much electricity is used.” FPL specified that the customer charge includes meter installation, meter reading, billing, meter maintenance, customer records and collections and other services provided to customers, including Mr. Saporito. FPL further informed Mr. Saporito that the $5.90 customer charge was calculated during FPL’s last rate case by taking the total residential customer-related costs divided by the number of residential customer bills in the year to determine the charge per customer per month.

In sum, FPL has provided “the details of exactly what [Mr. Saporito] is paying for each month at a cost of $5.90.” Mr. Saporito requested no additional relief. Therefore, Mr. Saporito’s Original Complaint is moot because a determination by this Commission will have no effect and the one issue he raised has “ceased to exist.” On this basis, too, Mr. Saporito’s Original Complaint must be dismissed.

1. **Mr. Saporito’s Amended Complaint is Barred by Sound Legal and Administrative Principles**

In the Amended Complaint, Mr. Saporito acknowledged receipt of FPL’s August 5 letter and acknowledged that the letter contained an explanation of the components that make up the customer charge, but he nevertheless is dissatisfied with having received exactly what he requested. Mr. Saporito’s Amended Complaint alleges, in short, that he does not accept FPL’s explanation of the customer charge because his meter was already installed when he moved into his residence and because he pays his electric bills online. Mr. Saporito consequently asks the Commission to order FPL to refund the entirety of the customer charge assessed to his account – and the accounts of all FPL customers – retroactively from the dates when the accounts were activated.

As set forth more fully below, Mr. Saporito’s Amended Complaint is barred by the doctrine of administrative finality and the prohibition against retroactive ratemaking.

1. Mr. Saporito’s Amended Complaint is barred by the doctrine of administrative finality

In the field of administrative law, the counterpart to *res judicata* is administrative finality. *See* *Florida Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001). Administrative finality bars relitigation of claims or issues that have already been addressed by an agency, absent exceptional changed circumstances that would warrant re-opening the agency’s prior determination. *Id; see also Austin Tupler Trucking v. Hawkins*, 377 So. 2d 679, 681 (Fla. 1979) (administrative orders must eventually pass out of the agency’s control and, absent exceptional changed circumstances, must become final and no longer subject to change or modification). Parties and the public must be able to rely on a decision as being “final and dispositive of the rights and issues involved therein.” *Garcia*, 780 So. 2d at 44-45 (quoting *Austin Tupler*, 377 So. 2d at 681); *Reedy Creek Utils. v. Florida Public Serv. Commission*, 418 So. 2d 24 (1982) (“[a]n underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling.”).

That principle governs here. Even if Mr. Saporito alleged that the $5.90 customer charge violated a statute, rule or order (which he does not), his Amended Complaint would nevertheless fail as a matter of law because the propriety of that charge was recently considered and expressly approved by the Commission in FPL’s 2009 rate case, a proceeding in which Mr. Saporito intervened and later withdrew.[[1]](#footnote-1)

The Commission considered FPL’s position on customer charges, as well as the position of all other parties and interested persons. The final order recited the Commission’s long history holding that electric utility customer charges properly consist of costs related to distribution “from the pole to the customer’s structure,” including the cost of the meter, service drop, meter reading and basic customer services costs. Of particular relevance to Mr. Saporito’s claim, the Commission noted that:

Customer charges are **flat fees** assessed each month, regardless of the amount of energy (kilowatt hours) used.

(Emphasis added). The Commission specifically approved and authorized the flat $5.90 customer charge about which Mr. Saporito now complains. Order No. PSC-10-0153-FOF-EI, Docket No. 080677-EI, issued March 17, 2010, at pages 194-195, 214.

Under the doctrine of administrative finality, Mr. Saporito cannot now relitigate an issue that the Commission has already decided absent some extraordinary change of circumstances that he has not alleged and that do not exist. Mr. Saporito had an opportunity to challenge the customer charge proposed by FPL during the rate proceeding. The Commission’s order is now final and the $5.90 customer charge is legally authorized. For this reason, Mr. Saporito’s Amended Complaint must be dismissed.

1. Mr. Saporito’s claim is barred by the prohibition against retroactive ratemaking

Rates for public utilities are fixed for future services rather than for past service. *Gulf Power v. Bevis*, 289 So. 2d 401, 404 (Fla. 1974). It is well-established that the Commission lacks authority to engage in retroactive ratemaking with respect to electric utilities. *City of Miami v. Florida Public Service Commission*, 208 So. 2d 249, 259-260 (Fla. 1968); *In re Petition of Florida Cities Water Co.*, Docket No. 971663-WS, Order No. PSC-98-1583 (F.P.S.C. Nov. 25, 1998) (the general principle of retroactive ratemaking is that new rates are not to be applied to past consumptions). In *City of Miami*, for example, the petitioner argued that rates should have been reduced for prior period over earnings and that the excess earnings should be refunded. *Id*. Both of these attempts were deemed to be retroactive ratemaking and thus were prohibited. *Id*.

Here, Mr. Saporito’s demand for retroactive ratemaking is express and unequivocal. He requests that the Commission order FPL to:

refund the entirety of the $5.90 per month “Customer Charge” assessed to [Mr. Saporito’s] account (retro-active) from the date that the undersigned’s account was activated[[2]](#footnote-2) and maintained by FPL.

And he requests the same relief for all of the FPL’s customers. As the Supreme Court of Florida held in *City of Miami*, such a refund request must be denied because it violates the prohibition against retroactive ratemaking. Accordingly, Mr. Saporito’s Amended Complaint must be dismissed on the additional ground that it seeks legally impermissible relief.

 **IV. Conclusion**

 Mr. Saporito’s Original Complaint and Amended Complaint fail to state any legally sufficient cause of action and must be dismissed.

WHEREFORE, based upon the foregoing, FPL requests that the Commission enter an order dismissing Mr. Saporito’s Complaint with prejudice.

Respectfully submitted this 15th day of August, 2011.

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By: */s/Maria Jose Moncada*

Maria Jose Moncada

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**CERTIFICATE OF SERVICE**

**Docket No. 110236-EI**

 I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail on August 15, 2011 to the following:

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By:  */s/ Maria Jose Moncada*

Maria Jose Moncada

Fla. Bar No. 0773301

1. In his intervenor capacity, Mr. Saporito appeared at several customer service hearings opposing FPL’s petition, stating at one hearing that: “As God as my witness today, if this Public Service Commission seated behind me approves FPL’s $1.3 billion rate increase, I will campaign to be Florida’s next governor, and if elected I will fire this Public Service Commission.” *See* Docket No. 080677, Transcript of 6/26/09 Miami Gardens service hearing at 42:23-43:2 (filed July 20, 2009).

FPL has been the target of more than 20 years of vexatious litigation by Mr. Saporito, a former employee. Mr. Saporito’s employment with FPL was terminated for cause in 1988 for multiple acts of insubordination, and he has been attempting to litigate and re-litigate that termination ever since. A U.S. Department of Labor (DOL) Administrative Law Judge (ALJ) ruled that the termination was justified because there was “overwhelming” evidence that Mr. Saporito was repeatedly insubordinate, “insolent,” “*blatantly lied*”, and engaged in a “mockery of management’s role.” *Saporito v. Florida Power & Light Co*., 1989-ERA-007, 1989-ERA-017 (ALJ Oct. 15, 1997). Mr. Saporito also filed four nuclear whistleblower discrimination complaints against FPL – all of which were dismissed. Most recently, the Administrative Review Board (ARB) issued an order holding that four pending complaints by Mr. Saporito against FPL were “without merit and frivolous.” The ARB imposed sanctions on Mr. Saporito for having filed a “string of vexatious, harassing, and duplicative complaints against FPL, without a good faith expectation of prevailing, and subsequent appeals to the [ARB] that are wholly without merit.” *Saporito v. Florida Power & Light Co.*, 2009-ERA-001, etc. (ARB Apr. 29, 2011). In another recent case, a DOL ALJ imposed additional sanctions on Mr. Saporito for filing actions against FPL that are “frivolous, an abuse of legal and judicial process, and fraudulent . . . . [Mr. Saporito] has demonstrated a pattern of malicious and frivolous filings involving” FPL. Mr. Saporito has also filed numerous petitions with the U.S. Nuclear Regulatory Commission seeking enforcement action against FPL. All of these petitions have been denied. [↑](#footnote-ref-1)
2. Mr. Saporito assumes that the $5.90 charge has appeared on his bill since his account was activated. This would be true only if Mr. Saporito activated his account after the Commission’s March 2010 final order in FPL’s last rate case. [↑](#footnote-ref-2)