

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: January 10, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Robinson) *PER M*
Division of Economics (Draper, Garl) *PD J.W.D*

RE: Docket No. 120192-EI – Robert D. Evans' formal complaint against Tampa Electric Company requesting reimbursement of money paid for installation of infrastructure on Mr. Evans' property for which Tampa Electric Company failed to complete.

AGENDA: 01/24/13 – Regular Agenda – MOTION TO DISMISS – Oral Argument Not Requested; Participation at Commission's Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120192.RCM.DOC

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Case Background

On July 17, 2012, a docket was established for Mr. Robert D. Evans' (Mr. Evans) formal complaint against Tampa Electric Company (TECO). In his complaint, Mr. Evans requested a refund of monies paid and the payment of his attorneys' fees and costs. Mr. Evans alleged that in 1989, TECO was paid by the prior owner of the property to install underground cable in an existing underground conduit. Therefore, Mr. Evans alleged that his payment to TECO in 2010 for the installation of the underground cable and the transformer means that TECO was paid twice for the same service. TECO denied receiving any payment from the prior property owner as alleged by Mr. Evans. Neither Mr. Evans nor TECO has any record of TECO receiving any

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property owner in 1989, and the prior owner of the property is deceased. TECO stated that it maintains records of transactions dating back over 50 years, but it has no record of payments from the prior property owner for the underground conduit, cable, or transformer.

On October 19, 2012, the Commission issued Proposed Agency Action (PAA) Order No. PSC-12-0556-PAA-EI, denying Mr. Evans' request for a refund and attorneys' fees and costs, as Mr. Evans provided no evidence of the prior owner's payment to TECO in 1989, and the Commission lacks jurisdiction to award attorneys' fees and costs.

On November 9, 2012, Mr. Evans filed a petition for formal proceedings. Mr. Evans stated that the Commission failed to address issues of material facts in making its decision. He stated the following as factual disputes: (1) whether TECO was previously paid for the underground cable and conduit; (2) whether TECO's refusal to provide the records of the payment violated Rule 25-6.093, Florida Administrative Code (F.A.C.); and (3) whether Mr. Evans had to pay TECO for installing the underground cable in the existing underground conduit. Mr. Evans' requested relief includes: (1) the Commission reversing the Order denying Mr. Evans' request for refund and attorneys' fees and costs; (2) the Commission referring his complaint to the Division of Administrative Hearing; and (3) the Commission issuing an order directing TECO to specifically perform under the prior executed contract on the property.

On November 15, 2012, TECO filed its Motion to Dismiss Mr. Evans' Petition with Prejudice and to Deny his Hearing Request. Mr. Evans did not file a response to TECO's Motion to Dismiss. Neither party requested Oral Argument; however, pursuant to Rule 25-22.0022, F.A.C., the Commission has the discretion to hear from the parties, if it so desires.

The purpose of this recommendation is to address TECO's Motion to Dismiss Mr. Evans' Petition with Prejudice and to Deny his Hearing Request. The Commission has jurisdiction over this matter pursuant to Sections 366.04, and 366.05, Florida Statutes (F.S.), Chapter 28-106.201, F.A.C., and Rules 25-6.064 and 25-6.078, F.A.C.

Discussion of Issues

Issue 1: Should the Commission grant TECO's Motion to Dismiss Mr. Evans' petition and to Deny his Hearing Request?

Recommendation: Yes. The Commission should grant TECO's Motion to Dismiss Mr. Evans' petition. However, Mr. Evans' petition for a formal hearing should be dismissed without prejudice. (Robinson, Draper, Garl)

Staff Analysis:

Standard of Review for a Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a petition.¹ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the complainant, the petition still fails to state a cause of action for which relief may be granted.² When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.³ A court may not look beyond the four corners of the petition in considering its legal sufficiency.⁴ However, the attachment of a document to the petition that conclusively negates the petition is sufficient grounds for dismissal.⁵

TECO's Motion to Dismiss

In its Motion to Dismiss, TECO asserted that Mr. Evan's petition was not in substantial compliance with the requirements of Rule 28-106.201, F.A.C., as it failed to demonstrate specific facts that he contends warrant reversal or modification of the PAA Order. Mr. Evans' petition also failed to allege specific rules or statutes that he contends required reversal or modification of the PAA order including an explanation of how the facts relate to the specific rules or statutes. TECO further stated that Mr. Evans' petition should be dismissed as Mr. Evans requested the relief of specific performance, which the Commission lacks jurisdiction to grant. TECO also asserted that Mr. Evans' original complaint was dismissed for its failure to provide any proof that TECO was paid by the prior property owner in 1989 for the installation of the underground cable. TECO concluded that it is clear from Mr. Evans' petition for formal hearing that Mr. Evans cannot provide the necessary proof of a 1989 payment to TECO, and the petition should be dismissed with prejudice and the request for hearing denied. Additionally, TECO asserted that Mr. Evans did not provide a Notice of Service or serve a copy of his petition for formal proceeding to TECO as required by Rule 28.106-104, F.A.C.

¹ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

² *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

³ 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).

⁴ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000) (citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

⁵ See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005) (citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

Analysis

Staff believes that Mr. Evans' petition for a formal hearing does not substantially comply with Rule 28-106.201, F.A.C., as required by the Commission's rules. In addition to requiring a statement of the disputed issues of material fact, Rule 28-106.201(2)(f), F.A.C., requires that a petition state the specific rules or statutes that require reversal of the PAA order and provide an explanation of the relationship between the alleged facts and the statutes or rules. Mr. Evans' petition asserts as material facts in dispute whether TECO was previously paid for the underground cable and conduit and whether TECO's refusal to provide the records of the payment violated Rule 25-6.093, F.A.C. Mr. Evans did not mention TECO's refusal to provide records of the alleged payment in his original complaint. Additionally, Mr. Evans did not provide a statement of the specific rules or statutes that required reversal or modification of the Commission's proposed agency action order or an explanation of how his alleged facts relate to the specific rules or statutes. Therefore, Mr. Evans' petition for a formal hearing does not substantially conform to the uniform rules.

Section 120.569(2)(c), F.S., states, in part, that the Commission shall dismiss a petition for failure to substantially comply with the uniform rules.⁶ Since Mr. Evans' petition did not demonstrate the requisite relationship between facts and law that would require reversal or modification of the proposed agency action order, staff believes that it fails to substantially comply with Rule 28-106.201, F.A.C., and should be dismissed. Staff notes that Mr. Evans also seeks attorneys' fees and costs. As noted in the PAA order, the Commission lacks authority to award attorneys' fees and costs.

Rule 28-106.201(3), F.A.C., states in part, that upon receipt of a petition involving disputed issues of material fact, the agency shall grant or deny the petition, and if granted shall, unless otherwise provided by law, refer the matter to the Division of Administrative Hearings. Mr. Evans requests that his complaint be forwarded to an administrative judge for review. Staff recommends that the Commission deny Mr. Evans' request to refer the matter to the Division of Administrative Hearings as his petition does not substantially comply with the uniform rules and should be dismissed.

Pursuant to Section 120.569(2)(c), F.S., the dismissal of a petition should, at least once, be without prejudice to the petitioner filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. Staff recommends that the Commission dismiss Mr. Evans' petition without prejudice, and Mr. Evans may file an amended petition.

Conclusion

The Commission should grant TECO's Motion to Dismiss Mr. Evans' petition. However, Mr. Evans' petition for a formal hearing should be dismissed without prejudice.

⁶ See Order No. PSC-07-0724-PCO-EQ, issued on September 5, 2007, in Docket No. 070234-EQ, In re: Petition for approval of renewable energy tariff standard offer contract by Florida Power & Light Company (dismissing the petition for failure to meet the pleading requirements contained in Rule 28-106.201, F.A.C.).

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Issue 2: Should the docket be closed?

Recommendation: No. If the Commission agrees with staff regarding Issue 1, then Mr. Evans' petition for a formal hearing should be dismissed, and Mr. Evans should file an amended petition by 5:00 PM on February 14, 2013. If Mr. Evans fails to timely file an amended petition, then the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0556-PAA-EI, making it final and effective. (Robinson)

Staff Analysis: If the Commission agrees with staff regarding Issue 1, then Mr. Evans' petition for a formal hearing should be dismissed, and Mr. Evans should file an amended petition by 5:00 PM on February 14, 2013. If Mr. Evans fails to timely file an amended petition, then the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0556-PAA-EI, making it final and effective.