

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint and petition of
John Charles Heekin against
Florida Power & Light Company.

DOCKET NO. 981923-EI
ORDER NO. PSC-99-1054-FOF-EI
ISSUED: May 24, 1999

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER DENYING COMPLAINT AND DISMISSING PETITION

BY THE COMMISSION:

On December 22, 1998, Mr. John Charles Heekin (Mr. Heekin, Petitioner) filed a formal complaint pursuant to Rule 25-22.036(4) (b) and (5), Florida Administrative Code, against Florida Power & Light Company (Company, FPL) alleging that FPL violated the following:

Section 810.02, F.S. (burglary); Section 810.115, F.S. (breaking a fence); Fla.R.Civ.P. 1.280 (scope of discovery); Fla.R.Civ.P. 1.410 (subpoenas to non-parties); FAC 25-6.094 (full and prompt investigation of customer complaints); FAC 25-6.021 (records of complaints); Sections 934.01(4), F.S. (interception of oral communications prohibited); Section 810.14 F.S. (voyeurism prohibited). (Petition at 4).

The Petitioner further alleged that:

The actions which constitute the violation are set forth in the preceding paragraphs. To summarize, they are eavesdropping, voyeurism, breaking the fence and thereby forcibly entering the curtilage of the dwelling of the Petitioner and bad faith games-playing in the defense of the civil litigation, all of which are charged to the rate-paying public rather than to the tortfeasor.

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FPSC-RECORDS/REPORTING

FPL responded to Petitioner on February 8, 1999, by filing a Motion to Dismiss and a Motion for More Definite Statement. Petitioner filed a response to these motions on February 19, 1999. This Order grants the Motion to Dismiss the Complaint and Petition.

For ease in referring to the various complaints put forth by Petitioner, they will be referred to as follows: Count One, alleged violation of Section 810.02, Florida Statutes, burglary; Count Two, alleged violation of Section 810.115, Florida Statutes, maliciously breaking a fence; Count Three, alleged violation of Section 810.12, Florida Statutes, trespass; Count Four, alleged violation of Section 810.14, Florida Statutes, voyeurism prohibited; Count Five, Section 934.01(4), Florida Statutes, interception of oral communications prohibited; Count Six, Section 934.03, Florida Statutes, interception of oral communications prohibited; Count Seven, Fla.R.Civ.P. 1.280, scope of discovery; Count Eight, Fla.R.Civ.P. 1.410, Subpoena of non parties; Count Nine, Rule 25-6.021, Florida Administrative Code, requirement to keep records of written complaints; and, Count Ten, Rule 25-6.094, Florida Administrative Code, requirement to promptly respond to substantial objections of customers as to charges, facilities or service.

I. FPL'S MOTION TO DISMISS THE COMPLAINT AND PETITION OF JOHN CHARLES HEekin

In its Motion to Dismiss, FPL alleged that we should dismiss with prejudice counts one through eight of the petition, regarding criminal activity allegedly engaged in by FPL's employees ranging from eavesdropping, interception of oral communications, and voyeurism to burglary, maliciously breaking fences and unauthorized entry on land, for failure to state a cause of action and lack of subject matter jurisdiction. FPL asserted that the Petitioner's request for attorney's fees be dismissed with prejudice for failure to state a cause of action and lack of subject matter jurisdiction. FPL's motion also stated that the request for rate relief in the petition should be dismissed with prejudice for failure to state a cause of action. FPL finally stated that the petition's claims that FPL has violated Rules 25-6.021 and 25-6.094, Florida Administrative Code, relating to the handling of customer complaints, should be dismissed without prejudice in order to allow the Petitioner to handle the complaint under Rule 25-22.032, Florida Administrative Code.

FPL also filed a Motion for More Definite Statement in this docket. Our decision to grant the Motion to Dismiss renders the Motion for More Definite Statement moot.

II. RESPONSE TO MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT

Mr. Heekin responded to both FPL's Motion to Dismiss and Motion for a More Definite Statement in one response. The attachment to this response was filed by FPL in the civil action between FPL and Mr. Heekin. Mr. Heekin, in his response, states that FPL represented to the civil court that the civil court did not have jurisdiction over the facts involved in this case because this Commission granted FPL the right to trespass by approving FPL's fifth revised tariff sheet number 6.020.2.8. Mr. Heekin states that the same jurisdictional argument is being made by FPL to the Commission, that the Commission does not have jurisdiction over the instant facts because it lacks the legislative authority.

III. LEGAL STANDARD FOR MOTIONS TO DISMISS

A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Varnes v. Dawkins describes the standard for disposing of motions to dismiss as whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

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. Kislak v. Kredian, 95 So.2d 510, (Fla. 1957).

IV. SUBJECT MATTER JURISDICTION AS TO COUNTS ONE THROUGH EIGHT AND TEN

The substantive law governing the causes of action set forth in counts one through eight and ten is found outside of Chapter 366, Florida Statutes, which is that portion of the Florida Statutes from which we derive our authority over FPL.

Because we do not believe that counts one through eight and ten of the petition come under the subject matter jurisdiction vested in this Commission, we dismiss these counts for lack of subject matter jurisdiction. "Jurisdiction over the subject matter refers to a court's power to hear and determine a controversy.... Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So.2d 882, 883 (Fla. 1978). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." Lusker v. Guardianship of Lusker, 434 So.2d 951, 953 (Fla. 2d DCA 1983). In any cause of action, a court must not only have jurisdiction over the parties but must also be vested with subject matter jurisdiction in order to grant relief. See Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So.2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla. 1986). The Commission may not award monetary damages in resolving utility related disputes. Southern Bell Tel. Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974). The Supreme Court of Florida has decreed that "Nowhere . . . is the PSC granted authority to enter an award of money damages . . . ; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const." Southern Bell at 202.

We believe that if counts one through eight and ten of the petition are taken in the light most favorable to the Petitioner, they do not state a cause of action for which we may grant relief. Varnes v. Dawkins, at 350. It appears that counts one through eight and ten involve 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.

For the foregoing reasons, we grant FPL's Motion to Dismiss as to counts one through eight and ten for lack of subject matter jurisdiction.

V. ALLEGED VIOLATION OF RULE 25-6.021, FLORIDA ADMINISTRATIVE CODE

Count Nine alleges that FPL violated Rule 25-6.021, Florida Administrative Code, by failing to keep a record of the complaint. Petitioner's Complaint and Petition fails to assert that he filed a written complaint with the company which the company upon request was unable or unwilling to produce. We believe, therefore, that the Petition has failed to state a cause of action by failing to state the elements necessary to show the company violated Rule 25-6.021, Florida Administrative Code, by failing to keep a written copy of the complaint.

Though it may be good business practice to make a notation of each verbal complaint received, the company is not required by rule to do so and has not violated this rule. We, therefore, dismiss Count Nine of the Petition for failure to state a cause of action.

VI. ALLEGED VIOLATION OF RULE 25-6.094, FLORIDA ADMINISTRATIVE CODE

The Petitioner alleged that FPL did not make a "full and prompt" investigation of his complaint as required under this rule. However, this rule only applies when there has been a "substantial objection made to a utility by a customer as to its charges, facilities, or service." We believe that the Petitioner's complaint appears to be an objection to the allegedly tortious, criminal behavior of FPL's agent(s) resulting in a claim for damages to a gate, rather than a "substantial objection made to a utility by a customer as to its charges, facilities, or service."

Under Lusker, jurisdiction over the subject matter means jurisdiction over the particular class of cases to which the particular controversy belongs." Lusker, at 953. Ultimately, as a claim for damages, Count Ten resides outside of the subject matter jurisdiction of this Commission because the Commission may not award monetary damages in resolving utility related disputes. Southern Bell, at 202. Because Petitioner's complaint does not constitute a "substantial objection made to a utility by a customer as to its charges, facilities, or service," Rule 25-6.094, Florida Administrative Code, is not applicable, and FPL is under no requirement to investigate the complaint.

In Trawick v. Florida Power & Light Company, 700 So.2d 772 (Fla. 2d DCA 1997), petitioners sought declaratory relief and an

injunction against FPL for trimming their live oak trees. As in the instant case, the Trawicks asserted that FPL should desist from having its agents come on the Trawick's land and destroy their property, in the Trawick's case, the live oak trees, in Petitioner's case, the gate. The trial court dismissed the Trawick's petition, insisting that the PSC had exclusive jurisdiction. On appeal the 2d DCA reversed and remanded, stating:

We conclude that courts are not precluded from determining whether a utility company, in serving a customer, has acted arbitrarily to the detriment of that customer or in a manner that results in unnecessary damage to the customer's property. Neither are courts precluded, in such situations, from fashioning a remedy to prevent future damage. Trawick 700 So.2d 772 (Fla. 2d DCA 1997)

The 2d DCA, therefore, recognized that in instances where judicial relief or damages are plead, the judicial system is the proper location for the complaint. The instant complaint as a claim for damages and not for charges, facilities, or service, therefore, fails to state a cause of action. As a result, we grant FPL's Motion to Dismiss as to Count Ten both for lack of subject matter jurisdiction and for failure to state a cause of action.

VII. CONCLUSION

Therefore, FPL's Motion to Dismiss Complaint and Petition of John Charles Heekin is granted as to Counts One through Eight and Ten because the petition requests relief that is beyond the jurisdiction of the Commission to grant. Count Nine is dismissed because there was no violation of Rule 25-6.021, Florida Administrative Code, and the count therefore fails to state a cause of action. Count Ten is dismissed because the complaint is for damages and, therefore, is outside the jurisdiction of the Commission and, for the same reason, the complaint fails to state a cause of action under Rule 25-6.094, Florida Administrative Code.

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Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company's Motion to Dismiss Complaint and Petition of John Charles Heekin is granted for the reasons stated herein. Our decision renders Florida Power & Light Company's Motion for More Definite Statement moot. It is further

ORDERED that this order shall be closed and become final when the time for filing an appeal has run.

By ORDER of the Florida Public Service Commission this 24th day of May, 1999.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

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GAJ

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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of

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Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting 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.