

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of formal proceedings of  
Complaint No. 1006767E of Edward  
McDonald against Tampa Electric Company,  
for alleged improper billing.

DOCKET NO. 110305-EI  
ORDER NO. PSC-12-0485-FOF-EI  
ISSUED: September 21, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman  
LISA POLAK EDGAR  
ART GRAHAM  
EDUARDO E. BALBIS  
JULIE I. BROWN

ORDER GRANTING TAMPA ELECTRIC COMPANY'S  
MOTION TO DISMISS COMPLAINT WITH PREJUDICE

BY THE COMMISSION:

**Case Background**

On November 4, 2011, Mr. Edward McDonald (Mr. McDonald or Petitioner) filed a formal complaint against Tampa Electric Company (TECO) asserting that TECO owes him \$3,500 in alleged overpayments and \$5,000 in alleged attorneys' fees he incurred in circuit court. He also stated that the \$915.94 currently outstanding on his electric bill was already paid. Proposed Agency Action (PAA) Order No. PSC-12-0053-PAA-EI was issued on February 7, 2012, denying the request for relief against TECO and finding that TECO complied with its tariff with regards to the \$915.94 outstanding balance.

On February 29, 2012, Petitioner filed a pleading entitled Initiation of Formal Proceedings protesting the PAA Order (petition or initial petition). On March 6, 2012, TECO filed its Motion to Dismiss the petition. On March 26, 2012, Petitioner filed his response to TECO's Motion to Dismiss.

Order No. PSC-12-0252-FOF-EI was issued on May 23, 2012, dismissing, without prejudice, the petition for failure to state a cause of action and for its nonconformance with Rule 28-106.201, Florida Administrative Code (F.A.C.).

On June 12, 2012, the Petitioner filed an amended petition for a formal hearing in response to the order dismissing his initial petition. The amended petition outlined the material facts in dispute as: (1) whether the alleged outstanding bill of \$915.94 was paid; and (2) whether TECO owed him \$3,500 in alleged overpayment. His requested relief included: (1) TECO awarding the Petitioner \$915.94 as a credit on his account; (2) TECO refunding the \$3,500 in alleged overpayment at an interest of 1.5 percent per month beginning in 2004; and (3) that the

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case be assigned to the Division of Administrative Hearings for further proceedings. The Petitioner further asserted that: (1) “the petition pertains to a billing dispute and not an action for damages;” and (2) it is irrelevant that TECO returned the \$3,500 he allegedly overpaid to the bank, as TECO returned the \$3,500 on TECO’s own volition based on a lack of due diligence.

On June 14, 2012, TECO filed its Motion to Dismiss with Prejudice. Mr. McDonald did not file a response to TECO’s motion to dismiss.

We are vested with jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes (F.S.), and Chapter 28-106.201, F.A.C.

### Discussion

#### Standard of Review for a Motion to Dismiss

A motion to dismiss questions the legal sufficiency of a complaint.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> A court may not look beyond the four corners of the complaint in considering its legal sufficiency.<sup>4</sup> However, the attachment of a document to the complaint that conclusively negates the complaint is sufficient grounds for dismissal.<sup>5</sup> Pursuant to Section 120.569(2)(c), F.S., the Commission shall dismiss the petition for failure to substantially comply with the uniform rules or if filed untimely, and in accordance with Section 120.569(2)(c), F.S., a petition shall be dismissed at least once without prejudice, unless it conclusively appears from the face of the petition that the defect cannot be cured.<sup>6</sup>

#### TECO’s Motion to Dismiss with Prejudice

TECO requested a dismissal with prejudice as the Petitioner failed to cure the defects of his original petition for a formal hearing. TECO stated that it adopted and incorporated by reference its arguments and authority for the Motion to Dismiss filed on March 6, 2012, since the amended petition restated the arguments of the original petition. In its March 6, 2012, Motion to Dismiss, TECO asserted, in part, that:

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

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

<sup>3</sup> 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).

<sup>4</sup> 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)).

<sup>5</sup> 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”).

<sup>6</sup> See Kiralla v. John D. and Catherine T. MacArthur Found, 534 So. 2d 774, 775 (Fla. 4th DCA 1988)(stating that a dismissal with prejudice should not be ordered without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action).

- Chapter 95, F.S., is not applicable to administrative proceedings as seen in Sarasota County v. National City Bank of Cleveland, Ohio, 902 So. 2d 233 (Fla. 2nd DCA 2005), and TECO has not commenced a civil action or proceeding against Mr. McDonald.

- The \$915.94 and \$3,500 Mr. McDonald claimed are in dispute were fully investigated, and Mr. McDonald's petition failed to offer any new or different evidence or argument from that previously presented.

- Mr. McDonald completely omitted reference to Account No. 1501-000031-5 with the outstanding balance of \$1,095.20, a separate account than the account with the \$915.94 outstanding balance.

- Mr. McDonald acknowledged that TECO returned the \$3,500 to the Bank of America at the Bank's request and is now seeking damages against TECO with interest, which the Commission has no jurisdiction to award.

### Analysis

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. Here, the amended petition asserts as material facts in dispute whether the outstanding \$915.94 was paid and whether TECO owed petitioner \$3,500 and interest for an alleged overpayment. However, there were no allegations of statutory violations regarding the \$915.94 or the \$3,500, no reference to any applicable statutes, or any explanation of the relationship between the alleged facts in the amended petition and the relevant statutes or rules that would require reversal of the PAA order. The amended petition fails to cure the deficiencies of the original petition as the amended petition does not substantially comply with Rule 28-106.201, F.A.C.

Section 120.569(2)(c), F.S., states, in part, that the Commission shall dismiss the petition for failure to substantially comply with the uniform rules.<sup>7</sup> Since the amended petition did not demonstrate the requisite relationship between facts and law that would require reversal or modification of the PAA Order, then it fails to substantially comply with Rule 28-106.201, F.A.C., and shall be dismissed.

The petitioner's statement that TECO is liable for the \$3,500 because TECO failed to use due diligence in returning the money to the bank and his requested relief of reimbursement of the \$3,500 plus interest denotes a claim for damages. Our regulatory oversight of TECO does not include the awarding of damages.<sup>8</sup> Therefore, the amended petition fails to substantially comply

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<sup>7</sup> 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.).

<sup>8</sup> See Order No. PSC-10-0296-FOF-TP, issued on May 7, 2010, in Docket No. 090538-TP, In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access

with Rule 28-106.201(2)(f), F.A.C., fails to state a cause of action, and shall be dismissed.

Section 120.569(2)(c), F.S., dictates that the dismissal of a petition should, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The original petition was dismissed without prejudice for failure to state a cause of action and for its nonconformance with Rule 28-106.201, F.A.C. The amended petition fails to cure the deficiencies of the original petition.

We find that the deficiencies are incurable for the following reasons: (1) the petition requested damages and our regulatory oversight of TECO does not include the award of damages; (2) the Petitioner has not alleged the violation of any applicable statutes or rules applicable to the regulation of TECO; and (3) the amended petition fails to substantially conform to the pleading requirements of Rule 28-106.201, F.A.C. Therefore, we find it appropriate to dismiss the amended petition with prejudice.

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 with a request that an administrative law judge be assigned to conduct the hearing. Since the amended petition is dismissed with prejudice, we deny Petitioner's request to assign the case to the Division of Administrative Hearing.

The amended petition requesting the initiation of formal proceedings for Proposed Agency Action Order No. PSC-12-0053-PAA-EI is dismissed with prejudice. The docket shall be closed, and a Consummating Order shall be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Motion to Dismiss the complaint is granted, with prejudice. It is further

ORDERED that the docket shall be closed, and a Consummating Order shall be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective.

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Transmission Services) et. al., for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S. (wherein the Commission dismissed the petition stating that it lacked jurisdiction to award attorneys fees and damages).

By ORDER of the Florida Public Service Commission this 21st day of September, 2012.



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HONG WANG  
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Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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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 Office of Commission Clerk, 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 Office of Commission Clerk, 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.