

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of formal proceedings of
Complaint No. 1115382E of Brian J. Ricca
against Florida Power & Light, for failing to
provide reasonable service.

DOCKET NO. 130290-EI
ORDER NO. PSC-14-0191-FOF-EI
ISSUED: April 23, 2014

The following Commissioners participated in the disposition of this matter:

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

ORDER GRANTING FPL'S MOTION TO DISMISS

BY THE COMMISSION:

CASE BACKGROUND

On May 6, 2013, Brian J. Ricca purchased an unfinished, residential home in North Port, Florida. At the time Mr. Ricca purchased the home, Mr. Ricca was aware the structure was neither substantially complete nor possessed electric utility service.¹ After purchasing the home, Mr. Ricca contacted Florida Power & Light Company (FPL) and began discussions for the installation of new electric service to the home. FPL initially advised Mr. Ricca that the installation costs for providing electric service to the home would be approximately \$60,000.

On July 8, 2013, Mr. Ricca contacted our Consumer Assistance Bureau and lodged a complaint against FPL concerning the estimate of contribution-in-aid-of-construction (CIAC) required by FPL to provide new overhead electric service to the unfinished home. Mr. Ricca stated that FPL's quote of \$60,000 was excessive and that, because FPL was the only electric utility and his home was the first and only structure built in the neighborhood, he should not have to pay the cost of providing electric service to the home.²

¹ See, Document No. 07469-13, in Docket No. 130290-EI, Informal Complaint No. 1115382E CATS notes, p. 4 and 17.

² Id., p. 2.

On or about July 11, 2013, FPL provided our staff and Mr. Ricca with a written estimate in the amount of \$55,325.59, for the CIAC cost for installing new overhead electric service to the home.³ Mr. Ricca was not satisfied with FPL's estimate, believing the estimate to be excessive.⁴ Mr. Ricca requested our staff review the estimate and assist him in getting FPL to reduce the CIAC costs, and continued to dispute the estimates with FPL.⁵

On or about August 5, 2013, FPL provided Mr. Ricca with two additional written estimates for the CIAC costs of installing new electric service to the home. One estimate was a revised estimate for the CIAC cost for installing new overhead electric service to the home using a different route than the route previously estimated by FPL in July 2013. The CIAC estimate for the alternate overhead route was \$40,706.16.⁶ The second estimate was for the CIAC cost for installing new underground electric service to the home in the amount of \$31,850.85.⁷

After receiving three different estimates for the cost of installing new service, Mr. Ricca continued to be dissatisfied with FPL's estimates, asserting that the estimates were obviously erroneous, and requested our staff review the estimates. In addition, Mr. Ricca consulted with Mr. William D'Onofrio, a Certified Public Accountant in Ohio with utility experience, concerning the FPL estimates.⁸ Based on his utility experience in Union County, Ohio, Mr. D'Onofrio concurred with Mr. Ricca that FPL's estimates were "excessive."⁹ Our staff reviewed the three estimates provided by FPL and believed the estimates were calculated in accordance with Commission rules and applicable tariffs.¹⁰ Despite our staff's review, Mr. Ricca continued to believe the estimates were erroneous, FPL had committed a violation by providing an erroneous estimate, and requested our staff order FPL to waive or drastically reduce the CIAC costs.¹¹

At Mr. Ricca's request, a formal review of Mr. Ricca's complaint was also performed by our staff, pursuant to Rule 25-22.032, Florida Administrative Code (F.A.C.). During the formal review, our staff discovered no evidence FPL violated any rule or statute and believed the CIAC estimates provided to Mr. Ricca were calculated in accordance with Rule 25-6.064, F.A.C., and FPL's Commission-approved tariff.¹²

³ Id., p. 4.

⁴ Id., p. 5.

⁵ Id., p. 5-6.

⁶ Id., p. 10-12.

⁷ Id.; Staff notes that the CIAC cost for installing underground service to Mr. Ricca's was less than the cost of both overhead routes. The reason is because FPL provides the customer with the option of performing the trenching and PVC installation. Thus, the CIAC estimate for underground service FPL provided to Mr. Ricca included a \$12,324.48 credit for performing the trenching and PVC installation himself.

⁸ Id., p. 18-19.

⁹ Id., p. 23-24.

¹⁰ Id., p. 26-33.

¹¹ Id., p. 5-6, 18-20, 26-33, 35-36.

¹² Id.

On December 2, 2013, our staff closed Mr. Ricca's informal complaint. Our staff advised Mr. Ricca that if he remained unsatisfied with the findings on his informal complaint, he could file a formal complaint with the Commission, pursuant to Rule 25-22.036, F.A.C. On December 5, 2013, Mr. Ricca filed a formal complaint against FPL and requested a formal hearing.¹³

We have jurisdiction over this matter pursuant to Chapter 366, Florida Statutes.

Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action.¹⁴ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition still fails to state a cause of action for which relief may be granted.¹⁵ The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations.¹⁶ A sufficiency determination should be confined to the petition and documents incorporated therein, and the grounds asserted in the motion to dismiss.¹⁷ Thus, "the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side."¹⁸ All allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted.¹⁹ Finally, pursuant to 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.²⁰

¹³ See, Document No. 07305-13, in Docket No. 130290-EI, Mr. Ricca request formal hearing, dated December 5, 2013, lodging violation and complaint against FPL.

¹⁴ Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000); Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

¹⁵ Varnes v. Dawkins, 624 So. 2d at 350.

¹⁶ Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

¹⁷ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173 (Fla. 4th DCA 2000); Varnes v. Dawkins, 624 So. 2d at 350; and Rule 1.130, Florida Rules of Civil Procedure.

¹⁸ Varnes v. Dawkins, 624 So. 2d at 350.

¹⁹ See, e.g. Ralph v. City of Daytona Beach, 471 So. 2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So. 2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So. 2d 233, 235 (Fla. 4th DCA, 1986); Ocala Loan Co. v. Smith, 155 So. 2d 711, 715 (Fla. 1st DCA, 1963).

²⁰ See also, 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); and Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company.

Mr. Ricca's Complaint

On December 5, 2013, Mr. Ricca filed a one-page letter requesting a formal hearing, alleging FPL violated Section 366.03, F.S., by providing "inefficient service due to internal errors within the original quote for CIAC charges."²¹ Mr. Ricca stated that he discovered a shorter and cheaper route for providing service to his home. Mr. Ricca claimed that, had he not discovered the shorter and cheaper route and paid the original quote provided by FPL, he would have "overpaid by a large sum," which is an unacceptable error.²² Mr. Ricca argued the "law requires the utility to provide reasonable efficient service which would not only mean the shortest route but also timely service . . . [and] such a large delay and the risk of overpayment" is not reasonable.²³ Mr. Ricca desired "compensation such that the utility company's requested CIAC charges be waived or drastically reduced."²⁴

FPL's Motion to Dismiss with Prejudice

On January 7, 2014, FPL filed a motion to dismiss Mr. Ricca's complaint, seeking dismissal of Mr. Ricca's request for formal hearing with prejudice.²⁵ In its motion, FPL asserted several grounds for dismissing Mr. Ricca's complaint.

First, FPL argued that Mr. Ricca's complaint failed to meet the pleading requirements of a complaint, pursuant to Rule 25-22.036, F.A.C.²⁶ Specifically, FPL asserted that Mr. Ricca's complaint: (1) failed "to identify, with any specificity, the rule, order, or statute that allegedly has been violated or the actions that constitute the violation;" (2) failed to "provide any statement, or include any documentation that shows an act or omission [by FPL] that violates any" statute, rule or order; (3) failed "to show any injury suffered as a result of the alleged actions or omissions by FPL;" and (4) was "vague as to both the operative facts and the law" for which relief is sought that it is impossible for FPL to formulate a response and "would be impossible for the Commission to properly render a decision on the complaint."²⁷

²¹ See, Document No. 07305-13, in Docket No. 130290-EI, Mr. Ricca request formal hearing, dated December 5, 2013, lodging violation and complaint against FPL.

²² Id.

²³ Id.

²⁴ Id.

²⁵ See, Document No. 00098-14, in Docket No. 130290-EI, Florida Power & Light Company's Motion to Dismiss Request for Formal Hearing of Brian J. Ricca With Prejudice, filed January 7, 2014.

²⁶ FPL cites Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company.; and Rule 25-22.036, F.A.C., which states in part that each complaint must contain:

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.

²⁷ See, Florida Power & Light Company's Motion to Dismiss Request for Formal Hearing of Brian J. Ricca With Prejudice, pgs. 3-6.

Second, FPL argued that Mr. Ricca's complaint failed to state a cause of action upon which relief could be granted.²⁸ Specifically, FPL asserted that the relief sought by Mr. Ricca was not such that could be granted by this Commission. Mr. Ricca's complaint requested that we order FPL to drastically reduce or waive the CIAC cost that FPL calculated, in accordance with Rule 25.6.064, F.A.C., and its CIAC Tariff, in order to extend service to Mr. Ricca's home. FPL claimed Mr. Ricca's complaint does not cite any "statute, rule, or tariff that requires FPL to reduce or waive the CIAC" because there is "no such statute, rule or tariff."²⁹

Finally, FPL argued that Mr. Ricca's complaint should be dismissed with prejudice because re-pleading could not state a cause of action for which relief could be granted.³⁰ FPL asserted that, because the relief sought by Mr. Ricca is not available, Mr. Ricca's complaint "cannot be re-plead in a way that states a cause of action for which such relief can be granted."³¹

Mr. Ricca's Response to FPL's Motion to Dismiss

On January 8, 2014, Mr. Ricca filed a response to FPL's motion to dismiss.³² Mr. Ricca argued his complaint was sufficient based on "the docket being established" by the "PSC filing clerk . . . according to the law and their jurisdiction."³³ Mr. Ricca claimed that FPL told him that "if the PSC finds that a violation has occurred, and the PSC makes the recommendation for the ciac [sic] charges to be waived, they would likely comply."³⁴ Mr. Ricca argued FPL violated the law by providing estimates for new service that were "so outrageous and obviously incorrect" because FPL is required to provide service.³⁵ As a result of FPL's actions, Mr. Ricca suffered "unnecessary hassle, loss of time and financial consequences within daily business activities . . . [and] took way from my family time and daily business routine."³⁶ Finally, Mr. Ricca argued the "FPSC is fully within their right and jurisdiction to hear cases in which excessive fees are being charged, and also to grant relief for such cases" because the "FPSC is in place for providing relief to the public amongst utility matters . . ."³⁷

²⁸ FPL cites Order No. PSC-08-0380-PCO-EI, issued June 9, 2008, in Docket No. 080039-EI, In re: Complaint of Sallijo A. Freeman Against Florida Power & Light Co. for Violation of Rule 25-6.105, F.A.C.

²⁹ See, Florida Power & Light Company's Motion to Dismiss Request for Formal Hearing of Brian J. Ricca With Prejudice, pgs. 6-8.

³⁰ FPL cites Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company, p. 4.

³¹ See, Florida Power & Light Company's Motion to Dismiss Request for Formal Hearing of Brian J. Ricca With Prejudice, p. 8.

³² See, Document No. 00112-14, in Docket No. 130290-EI, Mr. Ricca's Response to Florida Power & Light's Motion to Dismiss Request, filed January 8, 2014.

³³ Id.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

DECISION

A motion to dismiss is granted upon a finding that the pleading failed to state a cause of action upon which relief can be granted.³⁸ Rule 25-22.036(2), F.A.C., outlines the procedure for filing a formal complaint.³⁹ A pleading that conforms to this rule outlines the act or omission that constitutes the violation, the statute violated, injury suffered, and remedy or penalty sought.⁴⁰ In this instance, we find that Mr. Ricca's complaint fails to comply with the requirements of Rule 25-22.036(2), F.A.C., as there is no assertion of an act or omission by FPL that resulted in a violation affecting Mr. Ricca's substantive interest.

Mr. Ricca asserts that FPL violated Section 366.03, F.S., by failing to provide him with efficient service "due to internal errors within the original quote for CIAC charges."⁴¹ Section 366.03, F.S., provides for the "General Duties of Public Utility," requiring public utilities to furnish "reasonably sufficient, adequate, and efficient service upon terms as required by the commission" to each person applying for service.⁴² The statute does not require utilities to install new service free of charge. The statute only requires the service be sufficient, adequate and efficient and comply with Commission requirements.

Rule 25-6.064, F.A.C., outlines the procedures and terms utilities must follow in determining CIAC costs for providing new service. Subsection 6 provides that CIAC cost calculations are "based on estimated work order jobs" and "each utility shall use its best judgment" Per Mr. Ricca's request and pursuant to Rule 25-6.064(9), F.A.C., our staff reviewed all the CIAC estimates provided by FPL and believed the estimates were calculated in accordance with our rules and FPL's Commission-approved, tariff provision. In addition, both

³⁸ See Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company; and Order No. PSC-11-0117-FOF-PU, issued on February 17, 2011, in Docket No. 100312-EI, 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 (granting motion to dismiss with prejudice).

³⁹ See Rule 25-22.036, F.A.C., Initiation of Formal Proceedings; Complaints, states:

(2) Complaints. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

(3) Form and Content.

(a) Application. An application shall be governed by the statute or rules applicable to applications for authority. In the absence of a specific form and content, the application shall conform to this rule.

(b) Complaint. Each complaint, in addition to the requirements of paragraph (a) above shall also contain:

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.

⁴⁰ See Order No. PSC-11-0285-FOF-EI, issued June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company.

⁴¹ See, Mr. Ricca's request for formal hearing, dated December 5, 2013.

⁴² See, Section 366.03, F.S.

Rule 25-6.064(6), F.A.C., and FPL's Tariff provide for a true-up procedure for determining the actual CIAC costs. Rule 25-6.064(6), F.A.C., and FPL's Tariff permit a customer to request a review of CIAC costs paid for new or upgraded service within "12 months following the in-service date of the new or upgraded facilities."⁴³ FPL's Tariff Sheet 6.199, Section 11.1.2, provides that "if the true-up calculation result is different from the paid CIAC amount, the Company will either issue a refund or an invoice for the difference."⁴⁴

In Order No. PSC-99-1054-FOF-EI, we determined that a petitioner must show the elements of the substantive law violated and properly allege the cause of action.⁴⁵ In the instant matter, Mr. Ricca argues that FPL violated Section 366.03, F.S., by providing "inefficient service due to internal errors within the original quote for CIAC charges;" however, his complaint fails to describe or provide documentation of what errors occurred or describe how the errors violated any requirement. As a result, we believe Mr. Ricca's complaint fails to state the required elements of a cause of action.

We are sensitive to Mr. Ricca's circumstances, and despite the lack of a legally sufficient pleading, we attempted to determine whether amendment of the complaint could lead to a situation where we would have jurisdiction to grant Mr. Ricca some relief. Rule 25-6.064, F.A.C., outlines the procedures and terms utilities must follow in determining CIAC costs for providing new service. In particular, subsection 7 provides that a utility "may elect to waive all or any portion of the CIAC for customers . . ." (emphasis added).⁴⁶ The Rule provides the utility with discretion to waive CIAC costs for a customer.

While we have authority under 366.03 and 366.05, F.S., to ensure that all rates and charges are fair and reasonable, there is no provision in Rule 25-6.064, F.A.C., or any other statute or rule that provides us with authority to order a utility to waive CIAC costs for a customer. In this instance, we believe that Mr. Ricca's requested relief, of a waiver or "drastic" reduction of the CIAC costs as damages for the alleged violation and delay of service, is not within our jurisdiction.⁴⁷ Finally, Rule 25-6.064, F.A.C., reflects our "long-standing policy that,

⁴³ See, Rule 25-6.064, F.A.C., and FPL Tariff Sheet 6.199, Section 11, attached hereto as Attachments 1 and 2.

⁴⁴ See, Attachment 2, FPL Tariff Sheet 6.199, Section 11.1.2.

⁴⁵ See Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekin against Florida Power & Light Co., (noting that a determination of a petition's cause of action requires examining the substantive law elements and stating that the improper allegation of the "elements of the cause of action that seeks affirmative relief" is sufficient grounds for dismissal, citing Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957)).

⁴⁶ See, Rule 25-6.064(7), F.A.C.

⁴⁷ See, Southern Bell Telephone and Telegraph Company v. Mobile America Corporation, Inc., 291 So. 2d 199, 202 (Fla. 1974) ["Nowhere in Ch. 364 is the PSC granted authority to enter an award of money damages (if indicated) for past failures to provide telephone service meeting the statutory standards; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, section 5(b), Fla. Const."]; Florida Power & Light Company v. Glazer, 671 So. 2d 211 (3rd DCA 1996) (affirming the application of Southern Bell to a tort claim against FPL); Order No. PSC-99-1054-FOF-EI, issued May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company (finding that the Commission lacked subject matter jurisdiction to award monetary damages for alleged property damage to a customer's gate, and

where practical, the person who ‘causes’ costs to be incurred should bear the burden of those costs.”⁴⁸ As a result, we find Mr. Ricca’s complaint seeks relief that is not within our authority to grant.

We therefore, grant FPL’s Motion to Dismiss, without prejudice. When viewed within the “four corners of the complaint” exclusive of all affirmative defenses/responses, assuming all alleged facts are true, and in a light most favorable to Mr. Ricca, the complaint fails to state a cause of action that would invoke our jurisdiction or permit us to grant the relief requested. Mr. Ricca has not plead specific facts or produced documentation to support FPL violated any statute, rule or order. In addition, Mr. Ricca requested relief that cannot be granted by this Commission.

We find, however, that Mr. Ricca’s complaint be dismissed without prejudice in accordance Section 120.569(2)(c), F.S., and that Mr. Ricca be permitted to file an amended complaint. Should Mr. Ricca choose to file an amended complaint, the complaint should conform to the pleading requirements of Rule 28-106.201, F.A.C., and seek relief within the Commission’s jurisdiction.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power & Light Company’s Motion to Dismiss is hereby granted, without prejudice. It is further

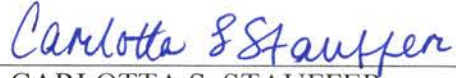
ORDERED that, Mr. Ricca be permitted to file an amended complaint that conforms to the filing requirements of Rule 28-106.201, Florida Administrative Code, and requests the appropriate relief. It is further

ORDERED that, should Mr. Ricca fail to file an amended complaint timely, the docket shall be administratively closed.

therefore dismissal of the complaint was appropriate because the requested relief could not be granted by the Commission).

⁴⁸ See Order No. PSC-05-1033-PAA-EI, issued October 21, 2005, in Docket No. 040789-EI, In re: Complaint of Wood Partners against Florida Power & Light Company concerning contributions-in-aid-of-construction charges for underground distribution facilities (finding FPL properly charged Wood Partners the CIAC cost of facilities consistent with FPL’s approved tariff and Commission policy that cost causer pays cost of such facilities).

By ORDER of the Florida Public Service Commission this 23rd day of April, 2014.



CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

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

KFC

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.