

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re : Complaint and petition )	DOCKET NO. 900811-EI
of Town of Golden Beach for )	ORDER NO. 24955
relief from alleged insufficient, )	ISSUED: 8/21/91
inadequate, and unsafe overhead )	
electric service provided by )	
Florida Power and Light Company. )	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
 J. TERRY DEASON  
 BETTY EASLEY  
 MICHAEL McK. WILSON

ORDER DENYING FPL'S MOTION TO DISMISS

BY THE COMMISSION:

On October 5, 1990, The Town of Golden Beach (Town or Golden Beach) filed a Complaint and Petition of Town of Golden Beach (Document No. 8995-90) which alleges that Florida Power and Light Company (FPL or Company) did not provide the Town with reasonably sufficient, adequate, efficient, and safe service, and which also alleges that FPL's dealings with the Town were not in good faith. To allow for the possibility of a settlement between Golden Beach and FPL, the Commission stayed the proceedings until May 15, 1991. Unfortunately, the parties were not able to come to an agreement. A hearing is scheduled for October 23 and 24, 1991. On May 15, 1991, FPL filed a Motion to Dismiss (Document No. 4814-91). Golden Beach filed a Memorandum in Opposition to Motion to Dismiss (Document No. 5347-91) on May 28, 1991.

Pursuant to Rule 1.140(b)(6), Florida Rules of Civil Procedure, a claim may be dismissed for "failure to state a cause of action." Thus, the purpose of a motion to dismiss is to test whether the complaint states a valid cause of action. As long as Golden Beach's Complaint and Petition sets forth a legitimate dispute over which we have jurisdiction, and as long as the Complaint and Petition requests relief which we may lawfully provide, we must find that a valid cause of action has been stated. Furthermore, it is well-settled that in a motion to dismiss, all well-plead allegations are deemed to be true.

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We note that FPL asserts that Golden Beach makes three allegations in the Town's Complaint and Petition:

- (1) the Town's present service is inadequate and unsafe;
- (2) an overhead electric distribution system in a coastal residential setting is inherently inadequate; and
- (3) FPL acted in bad faith in discussing the cost to convert FPL's overhead electric distribution system in the Town of Golden Beach to an underground electric distribution system.

FPL argues that Golden Beach's allegation that its service is inadequate and unsafe is moot, and that this claim should be dismissed because FPL has made substantial refurbishments and upgrades to the Town's overhead system. We have jurisdiction to determine whether electric service is safe or adequate, and we have jurisdiction to grant relief if service is determined to be unsafe or inadequate. We find this allegation to be a factual issue which can be resolved at hearing.

FPL asserts that Golden Beach's allegation concerning overhead electrical distribution systems in residential coastal areas "is a specious argument devoid of any factual foundation" and that this claim "should be dismissed for failing to plead facts sufficient upon which relief may be granted." Golden Beach responds that it did not attempt to "advance a generic argument about coastal towns, as apparently inferred by FPL." We have jurisdiction to consider the sufficiency of service in Golden Beach, and we have authority to grant relief in the case of insufficient service. We find that the sufficiency of an overhead distribution system in Golden Beach, a coastal town, is a factual issue which can be resolved at hearing.

FPL states that Golden Beach's allegation that FPL acted in bad faith should be dismissed because "there is no cause of action for 'bad faith' at common law, or pursuant to Chapter 366," Florida Statutes. However, in a motion to dismiss, "[t]he movant may not merely state that the pleading fails to state a cause of action as a ground for the motion. ... A motion that says the pleading fails to state a cause of action, without more, should be denied summarily." Trawick, Florida Practice and Procedure § 10-4 (1990). We find that FPL does not assert sufficient grounds upon which this claim may be dismissed. Furthermore, we note that good faith dealing is implicit in Chapter 366, Florida Statutes, and in our rules.

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Finally, FPL recommends that we dismiss the portion of Golden Beach's Complaint and Petition which requests that we declare a formula to use when allocating the costs of converting an above ground distribution system to an underground distribution system. FPL argues that such a cost methodology would be more appropriate for a rule-making docket. While a cost methodology may be developed in a rule-making docket, we find that it would not be inappropriate to develop cost methodology in this matter, if we determine that such a methodology is necessary to grant relief to the Town of Golden Beach.

We find that the Complaint and Petition of Golden Beach is sufficient to withstand FPL's Motion to Dismiss, and, accordingly, we deny FPL's Motion to Dismiss.

It is, therefore,

ORDERED by the Florida Public Service Commission that Florida Power and Light Company's Motion to Dismiss the Town of Golden Beach's Complaint and Petition is hereby denied.

By ORDER of the Florida Public Service Commission, this  
21st day of AUGUST, 1991.

  
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STEVE TRIBBIE, Director  
Division of Records and Reporting

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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

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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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.