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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: June 2, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Robinson Evans)
Division of Economic Regulation (A. Roberts)

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RE: Docket No. 110069-EI – Complaint of Rosario Rojo against Florida Power & Light Company, Case No. 858880E.

AGENDA: 06/14/11 – Regular Agenda – Motion to Dismiss – Oral argument not requested; participation is at the Commission's discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\110069.RCM.DOC

Case Background

On March 15, 2011, Ms. Rosario Rojo (Ms. Rojo) filed a one page formal complaint (Complaint) against Florida Power & Light Company (FPL) alleging that FPL has created a financial burden on her emotionally and financially. Ms. Rojo stated that she will provide additional documentation but staff has received no additional documentation or information to date.

On April 4, 2011, FPL filed its Motion to Dismiss Complaint with Prejudice (FPL's Motion) asserting that the complaint failed to meet the established pleading requirements and states no cause of action for which relief can be granted.

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On April 12, 2011, Ms. Rojo filed a Motion for Extension of Time to respond to FPL's Motion. Order No. PSC-11-0207-PCO-EI was issued on April 26, 2011, granting Ms. Rojo's Motion for Extension of Time. On April 12, 2011, Ms. Rojo also filed a single page Motion in Opposition (Rojo's Response) in response to FPL's dismissal motion. In her response, Ms. Rojo requests that the Commission deny FPL's Motion because of alleged false allegations made with malice and bad faith.

On April 19, 2011, FPL filed its Reply asserting that Ms. Rojo's Motion to Oppose merely reiterates her accusations in her complaint of bad faith and malice and should be rejected.

This matter is now before the Commission for the purpose of resolving FPL's Motion to dismiss Ms. Rojo's complaint with prejudice. While none of the parties requested oral argument pursuant to Rule 25-22.022(1), F.A.C., staff notes that oral argument may be heard at the Commission's discretion pursuant to Rule 25-22.022(7)(b), F.A.C.

The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should FPL's Motion to Dismiss with Prejudice be granted?

Recommendation: Yes. The Commission should grant FPL's Motion to Dismiss with Prejudice. (Robinson Evans, Roberts).

Staff Analysis: Rule 25-22.036(2), F.A.C., states that a complaint is appropriate when a person subject to the Commission's jurisdiction act or omission affects the complainant's substantial interest and violates a statute, rule or Commission order. A complaint is dismissed with prejudice if no cause of action is stated and an amended pleading will not cure the deficiency. The respective arguments are summarized below.

I. Standard of Review

A motion to dismiss challenges the legal sufficiency of the facts alleged in a petition to state a cause of action. Meyers v. City of Jacksonville, 754 So. 2d 198, 202 (Fla. 1st DCA 2000). The standard to be applied in disposing of a motion to dismiss is whether, with all the allegations in the petition assumed to be true, the petition states a cause of action upon which relief can be granted. Id. When making this determination, only the petition and documents incorporated therein can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. 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); and Rule 1.130, Florida Rules of Civil Procedure. When "determining the sufficiency of the complaint, 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." Varnes v. Dawkins at 350.

II. Ms. Rojo's Complaint

Ms. Rojo filed a one page complaint stating that she is "seeking the Commission's protection to seek relief from FPL, because FPL acted in bad faith and with malice while denying wrongdoing." Ms. Rojo also asserts that:

- FPL's actions created a financial burden on her, emotionally and financially;
- FPL has the power and resources to deny the complaint;
- She requests the Commission's protection to seek relief from FPL's abusive practices, bad faith, and malice; and
- FPL denies wrongdoing but holds a monopoly that forces clients to accept its abuse.

III. FPL's Motion to Dismiss with Prejudice

FPL, in its response to Ms. Rojo's complaint, seeks dismissal of the complaint with prejudice because:

- Ms. Rojo failed to state a cause of action upon which relief can be granted;¹
- Ms. Rojo did not comply with the established pleading requirements of Rule 25-22.036, F.A.C., as the complaint lists procedural rules but alleges no violations that would invoke the Commission's jurisdiction;²
- The complaint's vagueness makes it impossible for FPL to formulate a response or the Commission to issue a decision;
- Ms. Rojo has over four separate accounts with FPL and is attempting to avoid paying her outstanding balances by using the Commission and its process;
- Ms. Rojo has filed multiple complaints with the Commission and in each instance, the Commission has determined that FPL acted properly;³ and
- Ms. Rojo's current pleading and her past practice suggest re-pleading could not state a cause of action.⁴

¹ FPL cites Order No. PSC-07-0332-PAA-TP, issued on April 16, 2007, in Docket No. 060640-TP, In re: Petition to investigate, claim, for damages, complaint and other statements against respondents Evercom systems, Inc. d/b/a Correctional Billing Services and BellSouth Corporation by Bessie Russ (citing In re: Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc. 95 FPSC 5:339 (1995)); and Varnes, at 50.

² FPL asserts that Ms. Rojo's complaint fails to meet any part of 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.

³ FPL contends that Ms. Rojo contacted the Commission on numerous occasions falsely alleging FPL damaged her property. FPL also notes that numerous letters from the Commission to Ms. Rojo dated October 8, 2009, November 24, 2009, August 18, 2010, and March 10, 2011 demonstrate the Commission has adequately addressed Ms. Rojo's concerns and found no violations by FPL.

⁴ FPL also stated that "[i]n 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." FPL cites Order No. PSC-99-1054-FOF-EI at 3, issued on May 24, 1999, in Docket No. 981923-EI, In re: Complaint and petition of John Charles Heekn against Florida Power & Light Co.

IV. Ms. Rojo's Motion in Opposition

Staff notes that Ms. Rojo titled her response as a Motion to Oppose. However, staff interprets Ms. Rojo's opposition motion as a response to FPL's dismissal motion. In her response, Ms. Rojo repeats her accusations outlined in her complaint and states as follows:

- FPL's dismissal motion was filed in bad faith and with malice;
- FPL's claims were false and unethical; and
- The Commission should deny FPL's dismissal motion.

V. FPL's Reply to Ms. Rojo's Motion in Opposition

FPL's Reply reiterates Ms. Rojo's inability to show any violations by FPL that would invoke the Commission's jurisdiction. FPL contends that:

- Ms. Rojo's Motion to Oppose should be interpreted as an attempt at a response to FPL's dismissal motion; or
- Ms. Rojo's Motion to Oppose should be interpreted as a request for permission to reply to FPL's dismissal motion.

VI. Analysis

The Commission grants a motion to dismiss upon a finding that the pleading failed to state a cause of action upon which relief can be granted.⁵ Rule 25-22.036(2), F.A.C., outlines the procedure for filing a formal complaint.⁶ A pleading that conforms to this rule outlines the act or omission that constitutes the violation, the statute that is violated, injury suffered, and remedy or penalty sought. Here, Ms. Rojo's complaint fails to comply with the requirements of Rule 25-22.036(2), F.A.C., as there was no assertion of FPL's act or omission that resulted in a violation

⁵ See 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).

⁶ See Rule 25-22.036(2), 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.

affecting Ms. Rojo's substantive interest. Ms. Rojo also failed to allege any injury suffered and failed to seek a remedy for which the Commission could grant relief.⁷

Additionally, this Commission determined in Order No. PSC-99-1054-FOF-EI that a petitioner must show the elements of the substantive law violated and properly allege the cause of action.⁸ Here, Ms. Rojo stated that FPL acted in bad faith and malice; however, her complaint failed to show the required "elements of a cause of action" or supporting documentation of any violations.

Staff is sensitive to Ms. Rojo's circumstances, and despite the lack of legally sufficient pleading, has attempted to determine whether amendment of the complaint could lead to a situation where the Commission would have jurisdiction to grant Ms. Rojo some relief. Staff cannot find any way that any of Ms. Rojo's assertions could be framed that would give the Commission the opportunity to consider and grant her relief.⁹

Staff, therefore, recommends that the Commission grant FPL's motion to dismiss with prejudice because 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 Ms. Rojo, the complaint fails to state a cause of action that would invoke the Commission's jurisdiction or permit the Commission to grant a relief.

Because the complaint fails to plead any facts or cause of action upon which the Commission can grant relief, staff recommends that the complaint be dismissed. Furthermore, because the underlying substance of Ms. Rojo's complaint has factual and legal deficiencies, it is unclear that an amended complaint will cure these deficiencies. Therefore, Ms. Rojo's complaint should be dismissed with prejudice.

VII. Conclusion

Staff recommends that FPL's Motion to Dismiss with Prejudice be granted.

⁷ See Order No. PSC-10-0685-FOF-EQ, issued on November 15, 2010, in Docket No. 090372-EQ, Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida (granting motion to dismiss amended protest with prejudice); and Order No. PSC-08-0380-PCO-EI, issued on June 9, 2008, in Docket No. 080039-EI, Complaint of Sallijo A. Freeman against Florida Power & Light Company for violation of Rule 25-6.105, F.A.C. (granting motion to dismiss).

⁸ 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 Heekn 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)).

⁹ But compare Quilling v. Price, 894 So. 2d 1061, 1063 (Fla. 5th DCA 2005) (reversing the lower court's dismissal of petitioner's claim and stating that "although inartfully drafted, Petitioner's complaint states a valid cause of action for the tort of battery." The petitioner filed a tort claim for aggravated battery, but tort law recognizes only battery. However, the petitioner's complaint outlined the respondent's action that constituted the statutory violation, the petitioner listed the injury suffered, and the petitioner demanded judgment for damages).

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Date: June 2, 2011

Issue 2: Should the docket be closed?

Recommendation: Yes. If the Commission agrees with staff regarding Issue 1, then Ms. Rojo's complaint should be dismissed with prejudice, and the docket should be closed. (Robinson Evans, Roberts)

Staff Analysis: If the Commission agrees with staff regarding Issue 1, then Ms. Rojo's complaint should be dismissed with prejudice, and the docket should be closed.