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State of Florida



Public Service Commission

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COMMISSION
CLERK

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

DATE: October 6, 2011

TO: Office of Commission Clerk (Cole)

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

PER [Handwritten initials]

RE: Docket No. 110236-EI – Formal complaint of Thomas Saporito against Florida Power & Light Company in connection with charges on billing statement.

AGENDA: 10/18/11 – 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\110236.RCM.DOC

Case Background

On July 26, 2011, Mr. Thomas Saporito (Mr. Saporito) filed a formal complaint (complaint) against Florida Power & Light (FPL) requesting a detailed explanation from FPL on its assessment of a \$5.90 per month customer charge¹ on his electricity bill. Mr. Saporito requested the explanation because his electric meter has never been subject to any requested service, and the meter was already installed at his residence in the year 2004. He also alleges that FPL failed to delineate the nature of any administrative cost related to servicing his account.

¹ Commission Order No. 10306, issued September 23, 1981, in Docket No. 810002-EU, In re: Petition of Florida Power & Light Company for Authority to increase its rates and charges, at pg. 43, established the customer charge for FP&L.

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On August 8, 2011, FPL filed a copy of its letter to Mr. Saporito dated August 5, 2011, explaining the \$5.90 per month customer charge. In its letter, FPL states that: (a) the residential customer charge recovers the cost of all customer-related equipment and expenses to serve residential customers; (b) its website explains the customer charge as a set amount per month, irrespective of electricity usage, that covers installation and administrative costs for servicing accounts including meter reading, billing, meter maintenance, customer records and collections, and other essential customer service costs; (c) the customer charge is part of customers' base rate and for FPL, the standard customer charge has not changed for many decades, varying between \$5.15 and \$5.90 for the past thirty years; (d) the current customer charge, calculated during FPL's last rate case, is the total residential customer-related costs divided by the number of residential customer bills in the year; (e) the customer charge is an average for the entire rate class and is not calculated on an individual customer basis; and (f) the customer charge was approved by the Commission, and the cost allocation method is consistent with the Commission's guidelines.

On August 10, 2011, Mr. Saporito filed a response to FPL's letter. Mr. Saporito alleged that (a) FPL's response did not address his complaint's central issue and merely reiterated the customer charge definition on FPL's website; (b) FPL's response was not valid because his meter was already installed at his residence and did not need FPL servicing; and (c) his bills are paid online. Therefore, he concludes, FPL should make a retroactive refund of the \$5.90 per month to all of FPL's customers.

On August 15, 2011, FPL filed a Motion to Dismiss Mr. Saporito's complaint. Mr. Saporito did not file a response to FPL's dismissal motion. Neither party requested oral argument. This matter is now before the Commission for the purpose of resolving FPL's Motion to Dismiss Mr. Saporito's complaint.

The Commission has jurisdiction over this matter pursuant to Chapter 366, Florida Statutes.

Discussion of Issues

Issue 1: Should FPL's Motion to Dismiss Mr. Saporito's complaint be granted?

Recommendation: Yes. The Commission should grant FPL's Motion to Dismiss, and Mr. Saporito's complaint should be dismissed with prejudice. (Robinson, Roberts)

Staff Analysis:

Standard of Review

A motion to dismiss questions the legal sufficiency of a complaint.² 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.³ 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.⁴ A court may not look beyond the four corners of the complaint in considering its legal sufficiency.⁵ However, the attachment of a document to the complaint that conclusively negates the complaint is sufficient grounds for dismissal.⁶ If it is apparent that an amendment will not cure a deficient complaint, the complaint can be dismissed with prejudice.⁷

FPL's Motion to Dismiss

FPL filed a dismissal motion asserting that Mr. Saporito's complaint fails to state any legally sufficient cause of action and must be dismissed. FPL asserts that:

- Mr. Saporito's complaint must be dismissed for failure to satisfy the Commission's pleading requirements of Rule 25-22.036(2), F.A.C., and is barred by the Doctrine of Mootness.
- Mr. Saporito's complaint did not allege a breach of any rule, order, or statute, and thus, it fails to state a cause of action.

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

³ *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

⁴ 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).

⁵ 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)).

⁶ 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").

⁷ 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).

- Mr. Saporito's complaint is moot because FPL provided the full relief requested; therefore, Mr. Saporito has no actual controversy, as all the issues ceased to exist and a judicial determination can have no actual effect.
- Mr. Saporito's response acknowledges receipt of FPL's letter and the requested explanation for the customer charge, which Mr. Saporito rejects, requesting retroactive refund of the charge for all customers.
- The Commission approved and authorized the flat \$5.90 customer charge as evident in Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, in Docket No. 080677-EI.⁸ Therefore, Mr. Saporito's complaint is barred by the doctrine of administrative finality the counterpart to *res judicata*, which bars the relitigation of claims or issues already addressed by an agency, absent exceptional changed circumstances.
- Mr. Saporito did not allege any violation of a rule, order, or statute in his response to FPL's letter. Additionally, Mr. Saporito's claim is barred by the prohibition against retroactive ratemaking, which prohibits new rates for past service. Therefore, Mr. Saporito's request for retroactive refund must be denied, as it seeks legally impermissible relief.

Mr. Saporito did not respond to FPL's motion to dismiss.

Analysis

The Commission may grant a motion to dismiss upon a finding that the pleading fails to state a cause of action upon which relief can be granted.⁹ Rule 25-22.036(2-3), F.A.C., outlines the procedure for filing a formal complaint. 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, FPL asserts that Mr. Saporito's complaint fail to comply with the

⁸ Docket No. 080677-EI was consolidated with Docket No. 090130-EI.

⁹ See Order Nos. PSC-11-0290-FOF-EI, issued on July 5, 2011, in Docket No. 100459-EI, In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company; PSC-11-0117-FOF-PU, issued on February 17, 2011, in Docket No. 100312-EI, In Re: 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; PSC-10-0624-FOF-WS, issued on October 19, 2010, in Docket No. 100318-WS, In re: Petition for order to show cause against Service Management Systems, Inc., in Brevard County for failure to properly operate and manage water and wastewater system; PSC-08-0380-PCO-EI, issued on June 9, 2008, in Docket No. 080039-EI, In re: Complaint of Sallijo A. Freeman against Florida Power & Light Company for violation of Rule 25-6.105, F.A.C.; and PSC-04-1252-PAA-EI, issued on December 17, 2004, in Docket No. 041169-EI, In re: Complaint Nos. 445185E, 446514E, 446515E, and 446516E filed by Mr. Jude Alcegueire against Florida Power & Light Company for high bills and other alleged violations of Commission rules and statutes.

pleading requirements and is barred by the doctrine of mootness, administrative finality, and retroactive ratemaking, as the Commission approved FPL's customer charge in March 2010.¹⁰

Mr. Saporito's Complaint

Mr. Saporito's complaint quoted a summary of FPL's explanation of the customer charge as "a set amount per month, regardless of how much electricity is used, to cover the costs of your service and meter, including installation and the administrative costs related to servicing your account." Mr. Saporito attached a copy of FPL's explanation as Attachment Two to his complaint.¹¹ He stated that "to the extent FPL is permitted to assess a "Customer Charge" to his account, FPL should be required to explain in detail the reason for the charge," as his meter was already installed in 2004, and it has not been serviced by FPL.

Staff gives Mr. Saporito the benefit of the doubt with regards to conforming to the pleading requirements; however, staff believes that Mr. Saporito's complaint fails to state any violation of a statute, rule, or order by FPL. Mr. Saporito stated that FPL failed to delineate the exact and precise nature of any administrative costs for servicing his account, but Mr. Saporito did not allege that this was a violation of a statute, rule, or order nor did he allege any other violation by FPL.

A complaint may be dismissed where the attachment to the complaint negates the complaint. Attachment Two to Mr. Saporito's complaint is an explanation of the customer charge, which staff believes negates Mr. Saporito's request for an explanation of the customer charge. Moreover, Mr. Saporito stated that FPL is permitted to assess the customer charge in his complaint, which negates any implied violation for assessing the customer charge.

Staff recommends that Mr. Saporito's complaint be dismissed for failure to state a cause of action.

Mr. Saporito's response to FPL's letter

Staff gives Mr. Saporito the benefit of the doubt regarding his response to FPL's letter conforming to the pleading requirements. Staff believes that Mr. Saporito's response supersedes his complaint. Even if staff treats his response as an amended complaint, Mr. Saporito still has not stated a cause of action. In his response, Mr. Saporito requests that FPL retroactively refund the customer charge to all its customers, but stated no violations by FPL that would invoke the Commission's jurisdiction to grant the relief sought. Mr. Saporito attached FPL's letter and FPL's attachment to its letter to his response.

¹⁰ See Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, in Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company, at pg. 194, which states that:

Customer charges are flat fees assessed each month, regardless of the amount of energy (kilowatt hours) used. Utilities typically design and levy customer charges to recover specific accounts associated with meter reading, metering equipment, customer service, and bill processing. Customer charges differ by rate class, depending on the class of customer and the types of equipment used to provide service.

¹¹ Mr. Saporito's Attachment Two is an explanation of the customer charge that FPL has on its website.

In determining the legal sufficiency of Mr. Saporito's complaint, staff may consider Mr. Saporito's complaint and attachments.¹² Mr. Saporito attached to his complaint FPL's letter explaining the customer charge and advising that the customer charge was approved by the Commission. Although Mr. Saporito rejected FPL's explanation of the customer charge, he did not provide any information or documentation to suggest that FPL violated any statute, rule, or order in assessing the customer charge. Mr. Saporito also did not allege that FPL's allocation of the customer charge violated any statute, rule, or order. Therefore, staff believes Mr. Saporito's complaint fails to state a cause of action and should be dismissed.

A complaint may also be dismissed where the attachment to the complaint negates the complaint. Mr. Saporito attached a copy of FPL's letter to his response, which stated that the Commission approved the customer charge, and that the customer charge was allocated within the Commission's guidelines. Mr. Saporito did not dispute or provide any documentation to refute FPL's assertions. The Commission approved FPL's customer charge in FPL's last rate case by Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, and the deadline for appealing the Order has expired.¹³ Therefore, Mr. Saporito's complaint should be dismissed.

Staff is sensitive to Mr. Saporito's concern regarding the customer charge, and despite the lack of legally sufficient pleadings, has attempted to determine whether amendment of the complaint could lead to a situation where the Commission would have jurisdiction to grant Mr. Saporito the requested relief of retroactive refund of the Commission approved customer charge.¹⁴ Staff cannot ascertain any way that Mr. Saporito's complaints could be framed to give the Commission the opportunity to consider and grant the requested relief of a retroactive refund for the customer charge.¹⁵ Therefore, staff recommends that the Commission dismiss Mr. Seaman's complaint with prejudice.

Conclusion

Staff recommends that Florida Power & Light Company's Motion to Dismiss be granted, and that Mr. Thomas Saporito's complaint be dismissed with prejudice.

¹² See Veal v. Voyager Property & Casualty Ins. Co., 51 So. 3d 1246, 1249-50 (Fla. 2nd DCA 2011)(noting that in a complaint where the agreement was attached to the complainant's pleading, the agreement was implicitly incorporated by reference into the pleading, and the court can review the agreement terms in determining the nature of the alleged claim).

¹³ Order No. PSC-10-0153-FOF-EI, issued on March 17, 2010, in Docket No. 080677-EI, In re: Petition for increase in rates by Florida Power & Light Company.

¹⁴ See B&C Investors, Inc. v. Vojak, 2011 Fla. App. LEXIS 12445 (Fla. 2d DCA 2011)(affirming in part the lower court's grant of a dismissal with prejudice because "the stated cause of action was not itself a cause of action but rather, something which 'must be imposed based upon an established cause of action'"); Collinson v. Miller, 903 So. 2d 221, 228 (Fla. 2d DCA 2005)(affirming the grant of a dismissal motion as the "cause of action sought was not a traditional cause of action ..."); and Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999)(suggesting that a dismissal with prejudice is acceptable where a case is not actionable on any grounds).

¹⁵ See Order Nos. PSC-11-0285-FOF-EI, issued on June 29, 2011, in Docket No. 110069-EI, In re: Complaint of Rosario Rojo against Florida Power & Light Company, Case No. 858880E; Order No. PSC-11-0117-FOF-PU, issued on February 17, 2011, in Docket No. 100312-EI, In Re: 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; and PSC-10-0685-FOF-EQ, issued on November 15, 2010, in Docket No. 090372-EQ, In re: Petition for approval of negotiated purchase power contract with FB Energy, LLC by Progress Energy Florida.

Docket No. 110236-EI

Date: October 6, 2011

Issue 2: Should the docket be closed?

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

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