

State of Florida



# Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

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COMMISSION  
CLERK

**DATE:** September 6, 2012

**TO:** Office of Commission Clerk (Cole)

**FROM:** Office of the General Counsel (Robinson) *PERCE AF RH*  
Office of Consumer Assistance and Outreach (Forsman, Hicks)  
Division of Economics (Draper) *ED JWD*

**RE:** Docket No. 110305-EI – Initiation of formal proceedings of Complaint No. 1006767E of Edward McDonald against Tampa Electric Company, for alleged improper billing.

**AGENDA:** 09/18/12 – Motion to Dismiss – Oral Argument Not Requested; Participation at Commission’s Discretion.

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Balbis

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\110305.RCM.DOC

### 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. On February 7, 2012, the Commission issued Proposed Agency Action (PAA) Order No. PSC-12-0053-PAA-EI denying the request for relief against TECO and finding that TECO complied with its tariff with regards to the \$915.94 outstanding balance.

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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.

On May 23, 2012, the Commission issued Order No. PSC-12-0252-FOF-EI, 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 Commission's order dismissing his pleading. 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 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 the Petitioner allegedly overpaid on TECO's own volition based on a lack of due diligence.

On June 14, 2012, TECO filed its Motion to Dismiss with Prejudice requesting dismissal of the amended petition. The Petitioner did not file a response to TECO's motion to dismiss.

Neither party requested oral argument; however, pursuant to Rule 25-22.0022, F.A.C., the Commission has the discretion to hear from the parties, if it so desires.

The Commission has jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes (F.S.), and Chapter 28-106.201, F.A.C.

### Discussion of Issues

**Issue 1:** Should the Commission grant TECO's Motion to Dismiss with Prejudice?

**Recommendation:** Yes. The amended petition should be dismissed with prejudice because it fails to state a cause of action, does not substantially comply with Rule 28-106.201, F.A.C., and fails to cure the deficiencies identified in the initial petition. (Robinson, Draper, Forsman)

#### **Staff Analysis:**

##### 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>

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.

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

In its Motion, 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

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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).

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:

- 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

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., and fails to state a cause of action. 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. 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 should be dismissed.

Additionally, allegations of TECO's lack of due diligence in returning the \$3,500 to the bank were made in the amended petition; however, there were no cited statutes or rules that required reversal of the PAA order or an explanation of the relationship between the alleged facts and any applicable statutes or rules as required by Rule 28-106.201, F.A.C. Moreover, the amended petition acknowledges that the alleged overpayment of \$3,500 was returned to the bank. Therefore, the petitioner's statement that TECO is liable for the \$3,500 because TECO

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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.).

failed to use due diligence in returning the money to the bank and his requested relief of reimbursement of the \$3,500 plus interest satisfies elements in a claim for damages. The Commission's regulatory oversight of TECO does not include the awarding of damages,<sup>8</sup> and the Petitioner's assertion of TECO's liability does not constitute a cause of action, as it does not allege the violation of any applicable statute, rule, or order. Therefore, the amended petition should be dismissed as it fails to state a cause of action.

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, and the deficiencies are incurable as the Commission lacks jurisdiction to award the requested damages, the Petitioner has not alleged the violation of any applicable statutes or rules, and the amended petition fails to substantially conform to the pleading requirements of Rule 28-106.201, F.A.C.

Since the amended petition fails to cure the deficiencies identified in the original petition, it should be dismissed, and Petitioner's request to assign the case to the Division of Administrative Hearing should be denied. 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. The recommended dismissal of the amended petition for failure to cure the deficiencies of the original petition necessitates the denial of the petitioner's request to refer the matter to the Division of Administrative Hearings.

### **Conclusion**

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. Here, the original petition was dismissed without prejudice for failure to state a cause of action and for noncompliance with Rule 28-106.201, F.A.C. The amended petition fails to cure the deficiencies of the original petition, and the deficiencies are incurable as the Commission lacks jurisdiction to award the requested damages, the Petitioner has not alleged the violation of any applicable statutes or rules, and the amended petition fails to substantially conform to the pleading requirements of Rule 28-106.201, F.A.C. Therefore, the amended petition should be dismissed with prejudice in accordance with Section 120.569(2)(c), F.S.

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<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 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).

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**Issue 2:** Should the docket be closed?

**Recommendation:** Yes. If the Commission approves staff regarding Issue 1, then the amended petition requesting the initiation of formal proceedings for Proposed Agency Action Order No. PSC-12-0053-PAA-EI should be dismissed with prejudice, the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective. (Robinson)

**Staff Analysis:** If the Commission approves staff regarding Issue 1, then the amended petition requesting the initiation of formal proceedings for Proposed Agency Action Order No. PSC-12-0053-PAA-EI should be dismissed with prejudice, the docket should be closed, and a Consummating Order should be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective.