

State of Florida



Public Service Commission

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DATE: February 21, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Murphy) *AM*
Office of Consumer Assistance and Outreach (Forsman, Hicks) *PH*
Division of Economics (Draper) *EDD PA JWS*

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: 03/05/13 – Regular Agenda – Motion to Stay --Oral Argument Not Requested

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) filed a formal complaint (Complaint) against Tampa Electric Company (TECO) asserting that (1) he did not owe TECO the \$915.94 shown as outstanding balance on his account and (2) TECO owed him \$3,500 in alleged overpayments and \$5,000 in alleged attorneys' fees he incurred in circuit court. TECO offered Mr. McDonald a settlement regarding the outstanding \$915.94 which Mr. McDonald rejected. On February 7, 2012, by Proposed Agency Action Order No. PSC-12-0053-PAA-EI, (PAA Order) the Commission denied Mr. McDonald's request for relief.

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On February 29, 2012, Mr. McDonald filed a pleading entitled, "Initiation of Formal Proceedings," (Initial Petition) protesting the PAA Order and requesting a formal hearing. On May 23, 2012, by Order No. PSC-12-0252-FOF-EI, the Commission dismissed Mr. McDonald's request for a formal hearing for failure to state a cause of action and nonconformance with Rule 28-106.201, Florida Administrative Code (F.A.C.).

On June 12, 2012, Mr. McDonald filed an Amended Petition. On September 21, 2012, by Order No. PSC-12-0485-FOF-EI, the Commission dismissed Mr. McDonald's Amended Petition with prejudice for failure to cure the defects of the Initial Petition. On September 24, 2012, Consummating Order No. PSC-12-0489-CO-EI was issued in the docket, closing the docket file and the original complaint. Mr. McDonald's services were disconnected after the docket file was closed.

On October 8, 2012, Mr. McDonald filed a Request for Oral Argument, Motion for Reconsideration, and a Motion to Stay the Proceedings (Motion for Reconsideration and Stay). On October 11, 2012, TECO filed its response to the Motion for Reconsideration and Stay (TECO's Response). TECO did not request oral argument. On October 17, 2012, Mr. McDonald filed a Motion to Strike TECO's Response. On October 16, 2012, Mr. McDonald filed another complaint (Second Complaint) based on the same facts in this docket regarding disconnection of his services. He alleged that the interruption of service was without the required five days disconnection notice in violation of Rule 25-6.005, F.A.C. He also alleged that his bill was inaccurate and that his reconnection fees were excessive.

On October 22, 2012, TECO filed a letter in response to Mr. McDonald's Second Complaint regarding the interruption of services (TECO's Letter). TECO asserted that it was not served a copy of the Second Complaint but stated that the disconnection was in compliance with the Commission's rules, and that Mr. McDonald's services were reconnected that same day after he paid the outstanding balance on his account.

On October 30, 2012, Mr. McDonald filed a response to TECO's Letter (McDonald's October 30, 2012 Response) in which Mr. McDonald asserted that the Second Complaint (regarding the disconnection of services) should be severed from this docket as it alleges impermissible conduct by TECO and disputed billing amounts. On November 6, 2012, Mr. McDonald submitted a letter (McDonald's Letter) in which he states that TECO's representative acknowledged that the bill was inaccurate and the disconnection notice did not conform to the Commission's rules as he alleged in his Second Complaint.

On November 7, 2012, TECO filed its response to McDonald's Letter (TECO's Second Response) in which TECO stated that its representative did not acknowledge anything to Mr. McDonald. Instead, its representative's contact with Mr. McDonald was to explain his payment obligations. On November 16, 2012, Mr. McDonald filed a notice of filing complaint (Notice).

On December 31, 2012, by Order No PSC-12-0668-FOF-EI, the Commission dismissed Mr. McDonald's Second Complaint with prejudice and denied his motion for reconsideration, motion to stay proceeding and motion to strike.

On December 21, 2012, Mr. McDonald filed an Amended Motion for Stay Pending Judicial Review (Amended Motion for Stay) in which he asks for a stay of the Commission's "decision rendered on December 10, 2012."¹ On January 30, 2013, Mr. McDonald filed his Notice of Appeal. The Florida Supreme Court has assigned the Appeal Case Number SC13-160. Mr. McDonald's Amended Motion for Stay is the subject of Staff's Recommendation. The Commission is vested with jurisdiction over this matter pursuant to Chapters 120 and 366, Florida Statutes (F.S.), and Rule 25-22.061, F.A.C.

¹ *Memorialized in Order No. PSC-12-0668-FOF-EI*, issued December 31, 2012.

Discussion of Issues

Issue 1: Should the Commission grant Mr. McDonald's Amended Motion for Stay Pending Judicial Review?

Recommendation: No. The Commission should deny Mr. McDonald's Amended Motion for Stay. (Murphy)

Staff Analysis: In his Initial Petition, Mr. McDonald asked to have a \$915.94 charge removed from his account and to have \$3,500.00 overpayment from 2004 returned to him plus interest. In his Amended Petition, Mr. McDonald reiterated his relief sought, referenced negligence by TECO and a fraudulent guardian associated with payment made to TECO. In his October 8, 2012 Motion for Reconsideration and Stay, Mr. McDonald asked that the case be stayed until allegations of fraud could be addressed. In his Second Complaint Mr. McDonald complained about how his service was disconnected but sought no relief; the Second Complaint was determined by the Commission to be "directly related to issues resolved in this docket" and barred by the doctrine of administrative finality.²

Mr. McDonald filed a Notice of Appeal in the Florida Supreme Court on January 30, 2013. In his Amended Motion for Stay, Mr. McDonald asks for a stay of the December 10, 2012 vote³ by which the Commission denied his Motion for Reconsideration and Stay. Mr. McDonald asks that bond be waived and alleges that he will suffer irreparable harm if TECO is allowed to interrupt his service because he is 75 years old with declining health and electric service is medically necessary.

TECO did not respond to the Amended Motion for Stay.

Standard or Review

Rule 25.22.061(2), F.A.C., authorizes the filing of a petition for stay pending judicial review. The Commission has authority to grant, modify, or deny such relief and such relief "may be conditioned upon the posting of a good and sufficient bond . . . , other conditions relevant to the order being stayed, or both." In evaluating the request for a stay, the Commission may consider, among other things, the following:

- (a) Whether the petitioner has demonstrated a likelihood of success on the merits on appeal;
- (b) Whether the petitioner has demonstrated a likelihood of sustaining irreparable harm if the stay is not granted; and
- (c) Whether the delay in implementing the order will likely cause substantial harm or be contrary to the public interest if the stay is granted.⁴

² Order No PSC-12-0668-FOF-EI , at 4-5.

³ *Memorialized in* Order No. PSC-12-0668-FOF-EI.

⁴ Rule 25.22.016(2), F.A.C.

Analysis

As set forth below, staff has evaluated the Amended Motion for Stay in accordance with the applicable standards.

Likelihood of Success on Appeal

In his Amended Motion for Stay, Mr. McDonald does not develop any argument regarding the likelihood of his success on appeal. However, staff observes that the history of this matter is informative on that subject. In granting TECO's Motion to Dismiss with Prejudice the Commission determined the following:

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. 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.

We find that the deficiencies are incurable for the following reasons: (1) the petition requested damages and our regulatory oversight of TECO does not include the award of damages; (2) the Petitioner has not alleged the violation of any applicable statutes or rules applicable to the regulation of TECO; and (3) the amended petition fails to substantially conform to the pleading requirements of Rule 28-106.201, F.A.C. Therefore, we find it appropriate to dismiss the amended petition with prejudice.⁵

In denying Mr. McDonald's Motion for Reconsideration of the order quoted above, the Commission found that Mr. McDonald had failed "to identify any errors or omissions . . . that require modification to or reversal of the order"⁶ and found "no legal basis for staying the proceedings"⁷ at that time. Staff recommends that the Amended Motion for Stay is similarly lacking and does not demonstrate a likelihood of success on the merits on appeal.

Likelihood of Sustaining Irreparable Harm

Mr. McDonald *does assert* that, based on his alleged medical conditions, he would suffer irreparable harm if TECO were permitted to interrupt his service. However, Mr. McDonald *does not assert* that he is unable to pay his bill to avoid such disconnection. Moreover, in Mr. McDonald's October 30, 2012 Response, he acknowledges that his service had been

⁵ Order No. PSC-12-0485-FOF-EI, at 4.

⁶ Order No. PSC-12-0668-FOF-EI, at 5.

⁷ *Id.*

disconnected and does not dispute language in TECO's Letter, attached thereto, reflecting that, "After the disconnection Mr. McDonald, on the same day, paid the new past due amount and his electric service was thereupon reconnected." This series of events is reflected in the Commission's Order Denying Reconsideration.⁸ Finally, should Mr. McDonald prevail on appeal, a refund of money could still be made. Thus, staff recommends that Mr. McDonald has not been persuasive in his argument that he will suffer irreparable harm if a stay is not granted.

Public Interest

The Amended Motion for Stay does not address any potential harm or public interest considerations that might result from the Commission granting the requested stay.

Conclusion

Based on the foregoing, staff recommends that the Amended Motion for Stay should be denied and that a stay pending judicial review should not be granted.

⁸ See Order No PSC- 12-0668-FOF-EI, at 2.

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Issue 2: Should this docket be closed?

Recommendation: No. this docket should remain open during the pendency of Mr. McDonald's appeal. (Murphy)

Staff Analysis: Staff recommends that this docket should remain open during the pendency of Mr. McDonald's appeal.