

State of Florida



# Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

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

**DATE:** April 12, 2013

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

**FROM:** Office of the General Counsel (Murphy)  
Division of Economics (Draper, Garl)

*J.W.D.  
M  
ED 10/14*

**RE:** Docket No. 120192-EI – Robert D. Evans' formal complaint against Tampa Electric Company requesting reimbursement of money paid for installation of infrastructure on Mr. Evans' property for which Tampa Electric Company failed to complete.

**AGENDA:** 04/25/13 – Regular Agenda – 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\120192.RCM.DOC

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### Case Background

On July 17, 2012, the Florida Public Service Commission (Commission) established this docket to address a formal complaint (Complaint) by Mr. Robert D. Evans (Mr. Evans) against Tampa Electric Company (TECO). In his Complaint, Mr. Evans requested a refund of funds he paid to TECO and the payment of his attorneys' fees and costs. Mr. Evans alleged that in 1989, TECO was paid by the prior owner of the property to install underground cable in an existing underground conduit. Therefore, Mr. Evans alleged that, by his payment to TECO in 2010 (for the installation of the underground cable and the transformer) TECO was paid twice for the same service. TECO denied receiving any payment from the prior property owner. Neither Mr. Evans nor TECO has any record of TECO receiving any payment from the prior property owner in

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1989, and the prior owner of the property is deceased. TECO stated that it maintains records of transactions dating back over 50 years, but it has no record of payments from the prior property owner for the underground conduit, cable, or transformer.

On October 19, 2012, the Commission issued Proposed Agency Action (PAA) Order No. PSC-12-0556-PAA-EI, denying Mr. Evans' request for a refund and attorneys' fees and costs, because Mr. Evans provided no evidence of the prior owner's payment to TECO in 1989, and because the Commission lacks authority to award attorneys' fees and costs.

On November 9, 2012, Mr. Evans filed a petition for formal proceeding in which he asserted that the Commission failed to address issues of material fact in making its decision. He identified the following as factual disputes: (1) whether TECO was previously paid for the underground cable and conduit; (2) whether TECO's refusal to provide the records of the payment violated Rule 25-6.093, Florida Administrative Code (F.A.C.); and (3) whether Mr. Evans had to pay TECO for installing the underground cable in the existing underground conduit. Mr. Evans' requested relief included asking the Commission: (1) to reverse the Order denying Mr. Evans' request for refund and attorneys' fees and costs; (2) to refer his complaint to the Division of Administrative Hearings (DOAH); and (3) to issue an order directing TECO to specifically perform under the prior executed contract on the property.

On November 15, 2012, TECO filed its Motion to Dismiss Mr. Evans' petition with prejudice and to deny his hearing request. Mr. Evans did not file a response to TECO's Motion to Dismiss.

On February 7, 2013, by Order No. PSC-13-0073-FOF-EI, the Commission granted the TECO Motion to Dismiss and denied Mr. Evans' request for referral of his complaint to DOAH.

On February 11, 2013, Mr. Evans submitted an untitled letter (Letter) in which he argues the merits of his case. Staff observes that, although Mr. Evans did not request oral argument on the matter, he did ask that the Commission "allow [him] to be heard." TECO did not respond to the Letter. Because there is some ambiguity regarding the nature and intent of the Letter, staff will address the Letter as both a motion for reconsideration and as an amended petition.

The Commission has jurisdiction over this matter pursuant to Sections 366.04 and 366.05, Florida Statutes (F.S.), Chapter 28-106.201, F.A.C., and Rules 25-6.064 and 25-6.078, F.A.C.

### Discussion of Issues

**Issue 1:** What is the appropriate disposition of Mr. Evans' Letter?

**Recommendation:** Staff recommends that, if the Letter is intended to be a motion for reconsideration, it should be denied for failure to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering Order No. PSC-13-0073-FOF-EI.<sup>1</sup> Similarly, staff recommends that, if the Letter is intended to be an amended petition, it should be dismissed with prejudice for failure to identify specific rules or statutes that require reversal of Order No. PSC-12-0556-PAA-EI,<sup>2</sup> or to provide an explanation of the relationship between the alleged facts and the applicable statutes or rules.

**Staff Analysis:** Staff will evaluate the Letter first as a motion for reconsideration and then as an amended petition.

### *Reconsideration*

At page 2 of his Letter, Mr. Evans asks "that the Commission's reconsider their Motion to Dismiss of January 24, 2013." To the extent that the Letter is intended to be a motion for reconsideration of Order No. PSC-13-0073-FOF-EI, staff recommends that it fails.

It is well established:

- that the standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order;
- that it is not appropriate to reargue matters that have already been considered by the Commission; and,
- that a motion for reconsideration should not be granted based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record.<sup>3</sup>

Mr. Evans' November 9, 2012 petition for formal proceeding (Petition) was denied for failure to comply with Rule 28-106.201, F.A.C., which requires that a petition state the specific

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<sup>1</sup> Granting TECO's Motion to Dismiss.

<sup>2</sup> Denying Mr. Evans' request for a refund and attorneys' fees and costs.

<sup>3</sup> See e.g., Order No. PSC-11-0222-FOF-TP, issued May 16, 2011, in Docket No. 090538-TP; in *In re: Amended Complaint of Qwest Communications Company, LLC against MCI metro Access Transmission Services (d/b/a Verizon Access Transmission Services); XO Communications Services, Inc.; tw telecom of florida, l.p.; Granite Telecommunications, LLC; Broadwing Communications, LLC; Access Point, Inc.; Birch Communications, Inc.; Budget Prepay, Inc.; Bullseye Telecom, Inc.; DeltaCom, Inc.; Ernest Communications, Inc.; Flatel, Inc.; Lightyear Network Solutions, LLC; Navigator Telecommunications, LLC; PaeTec Communications, Inc.; STS Telecom, LLC; US LEC of Florida, LLC; Windstream Nuvox, Inc.; and John Does 1 through 50, for unlawful discrimination (citing Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981); and Sherwood v. State, 111 So.2d 96 (Fla. 3<sup>rd</sup> DCA 1959)).*

rules or statutes that require reversal or modification of the Commission's PAA Order.<sup>4</sup> Staff recommends that, by his February 11, 2013 Letter, Mr. Evans fails to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. By his Letter, Mr. Evans does recount factual assertions from his Petition; however, he does not identify where, in his Petition, he stated the specific rules or statutes that constitute compliance with Rule 28-106.201, F.A.C. As such, Mr. Evans simply reargues his case and he does not address any matter that was overlooked by the Commission related to the basis of the Commission's decision. Therefore, staff recommends that, to the extent that the Letter is intended by Mr. Evans to be a motion for reconsideration, it should be denied.

*Amended Petition*

By Order No. PSC-13-0073-FOF-EI, the Commission dismissed without prejudice Mr. Evans' November 9, 2012 petition for formal proceeding. The Order identified defects in the petition, provided that Mr. Evans could file an amended petition curing the same, and stated that "Mr. Evans may file an amended petition by 5:00 PM on February 14, 2013." While Mr. Evans' Letter was timely filed, staff recommends that it fails to identify the specific rules or statutes that require reversal of Order No. PSC-12-0556-PAA-EI, or to provide an explanation of the relationship between the alleged facts and the applicable statutes or rules. As such, the Letter fails to cure the defects identified by the Commission in Order No. PSC-13-0073-FOF-EI.<sup>5</sup> Therefore, staff recommends that, to the extent that the Letter is intended by Mr. Evans to be an amended petition, it should be dismissed with prejudice pursuant to Section 120.569(2)(c), Florida Statutes.

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<sup>4</sup> See PSC-13-0073-FOF-EI, at 3 (granting motion to dismiss).

<sup>5</sup> *Id.*

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**Issue 3:** Should this docket be closed?

**Recommendation:** Yes. If the Commission approves staff's recommendations regarding Issue 1, Order No. PSC-12-0556-PAA-EI should be revived and made final and effective, and the docket should be closed. (Murphy)

**Staff Analysis:** If the Commission approves staff's recommendations regarding Issue 1, staff recommends that Order No. PSC-12-0556-PAA-EI should be revived and made final and effective, and that the docket should be closed.