

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaint by Erika Alvarez,)
Jerry Buechler, and Richard C. Silvestri)
against Florida Power & Light Company)

Docket No. 150185-EI
Filed: November 30, 2015

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE**

Pursuant to Rule 28-106.204(2), Florida Administrative Code, Florida Power & Light Company (“FPL”) hereby files its Motion to Dismiss with Prejudice the amended complaint filed by Richard Silvestri on behalf of himself, Erika Alvarez, and Jerry Buechler (the “Petitioners”) on November 6, 2015.¹ The Amended Complaint fails to state a cause of action for which relief could be granted by the Florida Public Service Commission (“Commission”) and seeks improper relief in the form of damages, and therefore should be dismissed with prejudice.

I. INTRODUCTION AND BACKGROUND

On August 17, 2015, Petitioners filed a complaint and request for hearing regarding FPL’s administration of its Residential PV pilot program² (the “Complaint”). Petitioners contended that FPL violated Section 366.81 and Section 366.82(3)(a), (b), and (c), Florida Statutes, (portions of the Florida Energy Efficiency and Conservation Act, or “FEECA”) and Order No. PSC-14-0696-FOF-EU (the 2014 Demand Side Management Goals Order). Petitioners generally alleged bad faith and unfair treatment by FPL. On August 25, 2015, Mr. Silvestri e-mailed FPL a copy of a letter described as a “motion for oral argument” regarding expedited consideration of the complaint.

¹ Pursuant to Rule 28-106.204(2), Fla. Admin. Code, motions to dismiss are required to be filed within 20 days. The 20th day after Petitioners’ Amended Complaint was filed was November 26, 2015, Thanksgiving Day. Pursuant to Rule 28-106.103, Fla. Admin. Code, the filing period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. Accordingly, this motion is timely.

² For additional background on FPL’s two 2015 Residential PV pilot rebate launches, please see FPL’s Motion to Dismiss Complaint and Response to Request for Oral Argument, Attachment A, filed on September 1, 2015.

On September 1, 2015, FPL filed a motion to dismiss the complaint and a response to the request for oral argument. FPL asserted that the Complaint should be dismissed because it failed to state any cause of action for which relief could be granted by the Commission and that Petitioners' request for oral argument should be denied.

On September 14, 2015, the Prehearing Officer issued an order denying Petitioners' request for oral argument and Petitioners' request for an expedited decision. *In re: Complaint by Erika Alvarez, Jerry Buechler, and Richard C. Silvestri Against Florida Power & Light Company*, Docket No. 150185-EI, Order No. PSC-15-0387-PCO-EI. On October 23, 2015, the Commission issued its order dismissing the Complaint without prejudice. *In re: Complaint by Erika Alvarez, Jerry Buechler, and Richard C. Silvestri Against Florida Power & Light Company*, Docket No. 150185-EI, Order No. PSC-15-0496-FOF-EI.

In its order dismissing the Complaint without prejudice, the Commission found that Petitioners' Complaint failed to comply with the requirements of Rule 25-22.036(2), Florida Administrative Code, "because the complaint contains no specific facts asserting an act or omission by FPL that resulted in a violation of a particular provision of a statute, rule or Commission Order affecting Petitioners' substantive interests." Order No. PSC-15-0496-FOF-EI, p. 7. Specifically, the Commission noted that the Complaint "fail[ed] to allege any facts that FPL failed to: (1) meet the conservation goals we set, (2) fund its solar pilot programs within the expenditure cap we set, or (3) implement the solar pilot programs as approved by us." *Id.* Further, the Commission found the following:

. . . Petitioners' complaint fails to describe or provide any documentation of any specific FPL actions during the administration of the two online residential solar rebate reservation offerings to indicate that either of FPL's online rebate offerings was unfair, partial or discriminatory, or violated any statute, rule or Commission Order governing FPL's solar pilot programs.

Id. at 8. In closing, the Commission held that any amended complaint filed by Petitioners should conform to the pleading requirements of Rule 25-22.036, Florida Administrative Code, and request appropriate relief. *Id.* at 9.

On November 6, 2015, Petitioners filed an Amended Complaint. However, no new allegations whatsoever have been added to the Amended Complaint, let alone allegations sufficient to state a cause of action and conform to Rule 25-22.036, Florida Administrative Code. The Amended Complaint contains no specific facts asserting an act or omission by FPL that resulted in a violation of a particular provision of a statute, rule, or Commission Order. Petitioners simply restate their prior, general allegations of bad faith and unfair treatment.

Petitioners did modify their requested relief, but did so by asking that the Commission utilize its penalty power authorized by Section 366.095, Florida Statutes, to award Petitioners damages. Section 366.095 only authorizes penalties in the event that the Commission finds a utility “refused to comply with . . . or willfully violated” a lawful rule or order of the Commission, or a provision of Chapter 366, Florida Statutes. Petitioners have not alleged any such actions by FPL to invoke the Commission’s penalty power. Additionally, monetary damages are outside the Commission’s jurisdiction. *See, e.g., Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So. 2d 199 (Fla. 1974).

After Petitioners’ second attempt, it is clear that the Amended Complaint’s deficiencies cannot be cured in a manner that states a cause of action for which relief can be granted or seeks appropriate relief; accordingly, the Commission should dismiss the Amended Complaint with prejudice.

II. ARGUMENT

A. Standard for Motion to Dismiss

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In 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. *Kislak v. Kredian*, 95 So. 2d 510 (Fla. 1957); *see also, John Charles Heekin v. Florida Power & Light Company*, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (issued May 24, 1999). In determining the sufficiency of a complaint, the Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. *Barbado v. Green and Murphy, P.A.*, 758 So. 2d 1173 (Fla. 4th DCA 2000). In reviewing a motion to dismiss, the Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. *See, e.g., Ralph v. City of Daytona Beach*, 471 So. 2d 1, 2 (Fla. 1983).

B. Petitioners Fail to State a Cause of Action as a Matter of Law

Petitioners' allegations, copied from the one-page Amended Complaint in their entirety, are as follows:

At this time we wish to amend this complaint, above Docket No., stating that FPL did not act in good faith in following the requirements of ORDER NO. PSC-11 0079-PAA-EG DOCKET NO. 100155-EG and ORDER NO. PSC-14-09-696 FOF-EU DOCKET NOS. 130199-EI, 130200-EI, 130201-EI, 130202-EI, 130203 EM, 130204-EM, 130205-EI

Complainants state that FPL did not act in good faith in accordance with the requirements of the above during the “launch” of Solar Pilot Program Rebate process on January 14, 2015. The unfair “launch” of January 14, 2015 led to another “launch” on January 21, 2015 that further exasperated [sic] the situation. The failure by FPL to administer the process amounts to unjust and unfair treatment of the Complainants by FPL.

Accordingly, Petitioners’ allegations are that (i) FPL did not act in “good faith”; (ii) the January 14, 2015 launch was “unfair”; (iii) the January 21, 2015 launch “exacerbated the situation”; and (iv) FPL’s administration “amounts to unjust and unfair treatment of the Complainants.” These vague and general allegations are no different than those included in the original Complaint, and fall far short of stating a cause of action consistent with the Commission’s pleading requirements and applicable law.

The Commission specified in its order dismissing the original Complaint that an amended complaint must comply with the pleading requirements found in Rule 25-22.036, Florida Administrative Code. Rule 25-22.036(3)(b) requires that a formal complaint contain the following: 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; and 4) the specific relief requested, including any penalty sought.

Petitioners claim that FPL violated Order No. PSC-11-0079-PAA-EG, as well as Order No. PSC-14-09-696-FOF-EU.³ (Petitioners appear to have dropped Sections 366.81 and 366.82, Florida Statutes, as bases for their complaint.) Petitioners specify the relief requested, which is the imposition of a penalty pursuant to Section 366.095, Florida Statutes, and presumably the payment of that penalty to Petitioners. However, Petitioners fail to allege “the actions that constitute the violation” as required by Rule 25-22.036(3)(b)2, Florida Administrative Code.

³ The reference to Order No. PSC-14-09-696-FOF-EU is presumed to be a reference to Order No. PSC-14-0696-FOF-EU, which was cited in the original complaint.

Accordingly, the Amended Complaint still does not conform to Rule 25-22.036, Florida Administrative Code.⁴

A pleading does not meet the requirements of Rule 25-22.036(3)(b)2 unless it outlines the act or omission that constitutes the violation. For example, in *Complaint of Rosario Rojo Against Florida Power & Light Company*, Docket No. 110069-EI, the petitioner submitted a single page complaint, vaguely alleging bad faith and malice on the part of FPL and broadly referencing Chapter 120, Florida Statutes, Chapter 28-106, Fla. Admin. Code, and Rule 25-22.036, Fla. Admin. Code. No specific actions by FPL were described, nor was there any reference to any substantive requirement that had been violated by FPL. The Commission granted FPL's motion to dismiss the complaint with prejudice, holding that there was no assertion of an FPL act or omission that resulted in a violation affecting Ms. Rojo's substantive interests. Order No. PSC-11-0285-FOF-EI (issued June 29, 2011). *See also, In re: Initiation of formal proceedings of Complaint No. 1115382E of Brian J. Ricca against Florida Power & Light*, Docket No. 130290-EI, Order No. PSC-14-0475-FOF-EI (issued Sept. 8, 2014). Similarly, this Amended Complaint lacks the requisite specificity.

A complaint must sufficiently allege the ultimate facts which, if established by competent evidence, would support the relief sought under law. *See Kislak v. Kredian*, 95 So. 2d 510 (Fla. 1957). Broad assertions are insufficient. *See, e.g.*, Order No. PSC-14-0475-FOF-EI (issued Sept. 8, 2014). Petitioners point to no substantive requirement contained in Order No. PSC-11-0079-PAA-EG or Order No. PSC-14-0696-FOF-EU, and allege no particular act or omission by FPL that would constitute a violation of the (unreferenced) substantive requirement. Like the original Complaint, Petitioners' Amended Complaint fails to describe or provide any

⁴ The Amended Complaint also fails to contain FPL's address; however, that is not the basis for FPL's Motion to Dismiss with Prejudice.

documentation of any specific FPL actions during the administration of its Residential PV pilot rebate launches that indicate that FPL's process was unfair, partial, or discriminatory, or that FPL violated any statute, rule, or Commission Order. Petitioners may feel that the results of the Residential PV rebate reservation process were "unfair" or "unjust" but that falls far short of sufficiently alleging a cause of action against FPL.

C. Petitioners' Allegations are Insufficient to Invoke the Commission's Penalty Power

In their Amended Complaint, Petitioners seek a "remedy" of \$5,000 per day, per Petitioner, beginning the date of FPL's first Residential PV rebate launch (January 14, 2015) totaling \$4,440,000. Petitioners then seek to increase this amount by \$15,000 per day following the date the Amended Complaint was filed (November 6, 2015). Petitioners claim this remedy is "provided in Florida Statute 366.095, Penalties."

In order to invoke the Commission's penalty power, the Complaint must first satisfy the requirements of Rule 25-22.036(3)(b)2, Florida Administrative Code, by specifying the act or omission that constitutes the violation, and then go beyond those requirements to support a finding that the violation was the result of a "refusal to comply" or a "willful violation." *See* § 366.095, Fla. Stat. (authorizing the Commission to impose a penalty upon any entity subject to its jurisdiction "that is found to have refused to comply with or to have willfully violated any lawful rule or order of the commission or any provision of this chapter"). Petitioners have not alleged any act or omission that would constitute a violation of Order No. PSC-11-0079-PAA-EG or Order No. PSC-14-0696-FOF-EU. Petitioners also have not provided any information that would support a finding that FPL refused to comply with or willfully violated those orders. Accordingly, there is no basis for a penalty.

Petitioners state that their calculated penalties are “for each party” and “for the Complainants,” implying that the calculated penalty amount would then be paid to petitioners as some form of damages. However, nothing in Section 366.095, Florida Statutes, authorizes such a payment to Petitioners. To the contrary, this statute only authorizes penalties to be “collected by the Commission.” § 366.095, Fla. Stat. Indeed, the Commission does not have the statutory authority to award monetary damages. *See, e.g., Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So. 2d 199 (Fla. 1974). Accordingly, even if there were a basis for a penalty (which there is not), the relief sought by Petitioners is improper.

D. Dismissal Should be with Prejudice

Pursuant to Section 120.569(2)(c), Florida Statutes, a petition shall be dismissed if it is not in substantial compliance with the uniform rules. This is Petitioners’ second attempt to seek a determination by the Commission that FPL violated a statute, rule, or order, and second attempt to seek relief. As noted above, the allegations contained in the Amended Complaint again fail to meet the pleadings requirements set forth in Rule 25-22.036, Florida Administrative Code, and continue to constitute only broad statements of dissatisfaction with the Residential PV pilot rebate process. Furthermore, Petitioners have provided no basis for the new relief sought – the exercise of the Commission’s penalty power. It is now clear that the complaint’s deficiencies cannot be cured. Accordingly, the dismissal of Petitioner’s Amended Complaint should be with prejudice. *See* § 120.569(2)(c), Fla. Stat; *see also*, Order No. PSC-14-0475-FOF-EI (issued Sept. 8, 2014) (dismissing an amended complaint with prejudice because the amended complaint “again, fails to state a cause of action upon which relief can be granted, does not substantially comply with Rules 25-22.036 and 28-106.201, F.A.C., and fails to cure the deficiencies identified in the initial complaint.”)

III. CONCLUSION

FPL understands that many customers who were interested in obtaining rebates for residential PV systems were unable to do so, as has been the case each year during the program's 5-year term. Nonetheless, Petitioners' dissatisfaction with the process fails to state a cause of action as a matter of law. After two attempts, Petitioners are unable to state with any particularity an act or omission by FPL that, if proven, would constitute a violation of Petitioners' referenced orders. Accordingly, Petitioners' Complaint should be dismissed with prejudice.

Respectfully submitted this 30th day of November, 2015.

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CERTIFICATE OF SERVICE
Docket No. 150185-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Amended Complaint with Prejudice has been furnished via electronic mail this 30th day of November, 2015 to the following:

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