

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: November 30, 2017

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Page) *PHP S.M.C.*
Office of Consumer Assistance and Outreach (Hicks, Plescow) *RAH*
Division of Economics (Ollila) *J.O. PD GS*

RE: Docket No. 20170098-EI – Complaint by Richard Ralph Malcolm against Florida Power & Light Company.

AGENDA: 12/12/17 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Brisé

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Section 366.03, Florida Statutes (F.S.), states that each public utility shall furnish to each person applying for service, reasonably sufficient, adequate, and efficient service. The Commission has jurisdiction as set forth in Section 366.04, F.S., to regulate and supervise each public utility with respect to its rates and service.

Rule 25-22.032, Florida Administrative Code (F.A.C.), implements Chapter 366, F.S., and establishes informal customer complaint procedures that are designed to address disputes, subject to the Commission's jurisdiction, that occur between regulated companies and individual customers. Pursuant to this rule, any customer of a Commission-regulated company may file a complaint with the Commission's Office of Consumer Assistance and Outreach whenever the customer has an unresolved dispute with the company regarding electric, gas, water, or wastewater service.

On May 1, 2017, Mr. Malcolm filed a petition for initiation of formal proceedings. In the formal complaint, Mr. Malcolm claimed that FPL has been “unjustly” awarded for allegedly “stolen” electric services. Mr. Malcolm also stated that he is not responsible for the services because he has never opened an account with FPL or conducted business with FPL on his own behalf.

On October 13, 2017, the Commission issued PAA Order No. PSC-2017-0389-PAA-EI, Notice of Proposed Agency Action Order Denying Complaint by Richard Malcolm Against Florida Power & Light Company (PAA Order), that established November 3, 2017, as the date by which any protest to the PAA Order must be made. On October 13, 2017, Commission staff electronically provided Mr. Malcom a copy of Rule 28-106.201, F.A.C., Initiation of Formal Proceedings, to clarify the requirements for filing a protest of the Commission’s PAA Order.

Mr. Malcolm filed a protest of the PAA Order on October 13, 2017. In his “Protest Against Agency Ruling,” Mr. Malcolm restates the arguments that he made in his petition for initiation of formal proceedings. He seeks “equitable relief” from FPL’s unjust award of alleged stolen revenue. He states that FPL’s bill is unreasonable, the Commission has failed in its duty to regulate FPL’s charges, and FPL abused its monopoly power by refusing to open an account in his name.

This recommendation addresses the appropriate disposition of Mr. Malcolm’s petition for formal hearing. The Commission has jurisdiction over this matter pursuant to Section 366.04, F.S.

Discussion of Issues

Issue 1: Should the Commission dismiss on its own motion Mr. Malcolm's petition for failure to comply with the pleading requirements of Rule 28-106.201, F.A.C.?

Recommendation: Yes, Mr. Malcolm's petition for formal hearing on his complaint against FPL should be dismissed for failure to comply with the pleading requirements of Rule 28-106.201, F.A.C., without prejudice to file a timely amended petition pursuant to Section 120.569(2)(c), F.S. Mr. Malcolm should be given 10 days after the issuance of the Commission order dismissing his petition to file an amended petition. (Page)

Staff Analysis: Rule 28-106.201(2), F.A.C., prescribes the criteria that must be included in a petition for an evidentiary proceeding:¹

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
- (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

The Commission has previously held *pro se* litigants such as Mr. Malcolm to a relaxed pleading standard in order to prevent delay and promote resolution of parties' disputes.² However, FPL

¹ Commission Rule 25-22.029, F.A.C. also states that one whose substantial interests may or will be affected by the Commission's proposed action may file a petition for a Section 120.569 or 120.57, F.S., hearing in the form provided by Rule 28.106.201, F.A.C.

² See, e.g., *Complaint against AT&T d/b/a BellSouth for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and AT&T regulations pertaining to billing of charges and collection of charges, fees, and taxes*, Order No. PSC-11-0117-FOF-PU, issued February 17, 2011, in Docket Nos. 100175-TL and 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*, Order No. PSC-02-1344-FOF-TL, issued October 3, 2002, in Docket No. 020595-TL; *In re: Complaint of J. Christopher Robbins against BellSouth Telecommunications, Inc. for violation of Rule 25-4.073(1)(c), F.A.C., Answering Time*, Order No. PSC-02-1344-FOF-TL, issued October 3, 2002, in Docket No. 020595-TL; *In re: Initiation of formal proceedings of Complaint No. 1006767E of Edward McDonald against Tampa Electric Company, for alleged improper billing*, Order No. PSC-12-0252-FOF-EI, issued May 23, 2012, in

needs to be put on notice by Mr. Malcolm as to what tariff, rule or statute or Commission order it has allegedly violated. As discussed in more detail below, Mr. Malcolm's petition should be dismissed for failure to meet the pleading requirements of subparagraphs (d), (e), (f), and (g) of Rule 28-106.201(2), F.A.C.

Mr. Malcolm states that he is "seeking equitable relief from this unjust Awarding to FPL 3 years of alleged stolen revenue in the amount of \$3,580.99." The Commission does not have jurisdiction to grant Mr. Malcolm's request for equitable relief. *See In re: Amended Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services) et al.*, Order No. PSC-13-0185-FOF-TP, Docket No. 090538-TP, issued May 1, 2013. Because this request for relief is not within the Commission's jurisdiction, the petition for formal hearing does not comport with Rule 28-106.201(g), F.A.C.

He further states that he "has not opened an account with FPL or conducted business with FPL on his behalf." Mr. Malcolm states "the bill is unreasonable and that FPL had a legal duty to mitigate their loss." These allegations do not comply with the requirements of Rule 28-106.201 (d), (e), and (f), F.A.C., as they are not a statement of disputed issues of material fact or a concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.

Mr. Malcolm's petition cites to the Florida Supreme Court's opinion in *Citizens of State of Florida v. Graham*, 191 So. 3rd 897 (Fla. 2016), which addressed the Commission's jurisdiction to consider FPL's Woodford Project. The opinion has no relevance to Mr. Malcolm's complaint against FPL. Although he does cite to certain sections of Chapter 366, F.S., these citations are not a statement of the specific rules or statutes he contends require reversal or modification of the PAA Order. This language fails to meet the requirements of Rule 28-106.201, F.A.C.

Nowhere in his petition does Mr. Malcolm make reference to the PAA Order that denied his complaint on the basis that FPL properly handled his account in accordance with Commission rules, statutes, and orders and FPL's tariffs. Mr. Malcolm makes no statement of the specific rules or statutes he contends require reversal or modification of the PAA Order. He does not explain how the alleged facts relate to the specific rules or statutes he contends require reversal or modification of the PAA Order. Because of these deficiencies, the petition does not comply with Rule 28-106.201(f), F.A.C.

Mr. Malcolm also states "the Public Service Commission has failed in their duty to regulate FPL charges that are patently unfair and unreasonable." Pursuant to Section 366.05(1)(a), F.S., the Commission has the power to prescribe "fair and reasonable rates and charges." However, the PAA Order regarding Mr. Malcolm's complaint in no way addresses the establishment of rates and charges for FPL. Thus, this allegation also fails to meet any requirement of Rule 28-106.201, F.A.C.

Docket No. PSC-11-0305-EI; and *In re: Complaint by James DiGirolamo vs. Florida Power & Light Company*, Order No. PSC-15-0522-PAA-EI, issued November 3, 2015, in Docket No. 150169-EI.

In concluding his petition for formal hearing, Mr. Malcolm states, “FPL abused its monopoly Power in demanding 3 years alleged revenue loss and demanding payment within 48 hours even after being advised that a complaint had been filed.” He further alleges, “[i]n addition FPL abused its monopoly power by refusing to open an account in my name after by[sic] dad had died on 10/20/2017 at 6:15 am.” The allegations of abuse of monopoly power are not within the Commission’s jurisdiction pursuant to Chapter 366, F.S. Although the claim that FPL refused to open an account in Mr. Malcolm’s name is within the Commission’s jurisdiction, this allegation does not comply with any of the required elements of a petition for formal hearing pursuant to Rule 28-106.201, F.A.C.

Mr. Malcolm’s petition for formal hearing does not meet the requirements of Rule 28-106.201, F.A.C. Section 120.569(2)(c), F.S., states that the dismissal of a petition that does not substantially comply with the requirements of Rule 28-106.201, F.A.C., shall, at least once, be without prejudice:

Upon receipt of a petition or a request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to a petitioner’s filing a timely amended petition, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Thus, Mr. Malcolm’s petition should be dismissed with an opportunity to cure the defects in the petition.

Conclusion

Mr. Malcolm’s petition for formal hearing on his complaint against FPL should be dismissed for failure to comply with the pleading requirements of Rule 28-106.201, F.A.C., without prejudice to file a timely amended petition pursuant to Section 120.569(2)(c), F.S. Mr. Malcolm should be given 10 days after the issuance of the Commission order dismissing his petition to file an amended petition.

Issue 2: Should this docket be closed?

Recommendation: Yes. This docket should be closed if Mr. Malcolm does not file an amended petition within 10 days of the issuance of the Commission's order dismissing his petition. (Page)

Staff Analysis: This docket should be closed if Mr. Malcolm does not file an amended petition within 10 days of the issuance of the Commission's order dismissing his petition.