

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) *PHH SML*
Office of Consumer Assistance and Outreach (Hicks, Plescow) *RA*
Division of Economics (Ollila) *S.O. PE*

RE: Docket No. 20170138-EI – Petition for initiation of formal proceedings pursuant to Rule 25-22.036, F.A.C., by Devonson A. Walker.

AGENDA: 12/12/17 – Regular Agenda – Issue 2 is Proposed Agency Action - Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Graham

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. 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 September 8, 2016, Devonson Walker filed an informal complaint with the Commission against Florida Power & Light Company (FPL). In his complaint, Mr. Walker stated that he

wanted FPL to return his deposit for electric service because his electric service was being provided by solar panels only since February 2016. Later, on September 13, 2016, Mr. Walker filed a second complaint stating that he was trying to establish service with FPL but the service was being denied because of an unpaid final balance. He states that FPL billed and overbilled him for “services not rendered.” FPL backbilled him due to meter tampering at his premises and billed him for investigative costs related to FPL’s investigation of the meter tampering.

On May 1, 2017, staff advised Mr. Walker that his informal complaint had been reviewed and that staff found that FPL had made a total credit adjustment of \$322.61 to his account. Staff also informed Mr. Walker that he had an opportunity to file a petition for formal proceedings.

Mr. Walker filed a petition for initiation of formal proceedings on May 26, 2017. In the formal complaint, Mr. Walker claims that he notified FPL that electric service was no longer needed at his address. Mr. Walker further alleges that on three separate occasions FPL entered his property without provocation or probable cause and that FPL did not have a permit to enter his property in violation of the Fourth Amendment to the U.S. Constitution and Article I, Section 12 of the Florida Constitution. He also charges that FPL “billed and overbilled” for electric service not provided by FPL.

On June 16, 2017, FPL filed a Motion to Dismiss the Complaint. FPL asserts that the complaint does not comply with Rule 25-22.036, F.A.C., because it fails to state the rule, order, or statute that has allegedly been violated by FPL and does not state any cause of action for which relief could be granted by the Commission. Mr. Walker has not filed a response to the Motion to Dismiss the Complaint or provided any other information in support of his complaint.

This recommendation addresses whether FPL’s Motion to Dismiss the Complaint should be granted and the appropriate disposition of Mr. Walker’s complaint against FPL. The Commission has jurisdiction over this matter pursuant to Section 366.04, F.S.

Discussion of Issues

Issue 1: Should the Commission grant FPL's Motion to Dismiss the Complaint?

Recommendation: The Commission should grant in part and deny in part FPL's Motion to Dismiss the Complaint. (Page)

Staff Analysis: In its Motion to Dismiss the Complaint, FPL asserts that Mr. Walker's formal complaint should be dismissed because it fails to follow the pleading requirements of Rule 25-22.036, F.A.C. FPL states that the Complaint fails to contain the rule, order, or statute that FPL has violated, and does not state a cause of action for which relief could be granted by the Commission.

To sustain a motion to dismiss, the moving party must show that, accepting all allegations as true, the petition fails to state a cause of action for which relief may be granted. *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960). A sufficiency determination is confined to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss. *Varnes* at 350. Thus, the trial court may not "look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side." *Id.* All allegations in the petition must be viewed as true and in the light most favorable to the petitioner in order to determine whether there is a cause of action upon which relief may be granted. *See, e.g., Ralph v. City of Daytona Beach*, 471 So. 2d 1173 (Fla. 4th DCA 2000); *Kest v. Nathanson*, 216 So. 2d 233, 235 (Fla. 4th DCA 1986); *Ocala Loan Co. v. Smith*, 155 So. 2d 711, 715 (Fla. 1st DCA 1963).

Section 120.569(2)(c), F.S., states that the Commission shall dismiss a petition for failure to substantially comply with the uniform rules. Section 120.569(2)(c), F.S., provides that the dismissal of a petition should, at least once, be without prejudice to the petitioner to allow the filing of a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. However, the Commission has previously held *pro se* litigants such as Mr. Walker to a relaxed pleading standard in order to prevent delay and promote resolution of parties' disputes.¹

¹ *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 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.

Rule 25-22.036, F.A.C., prescribes the criteria that must be addressed in a petition for initiation of formal proceedings:

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.

In his petition for initiation of formal proceedings, Mr. Walker alleges that FPL has billed and overbilled him for services not rendered. He also states that he notified FPL that electric service was no longer required and requested that his meter be removed.

Staff believes that the petition states a cause of action within the Commission's jurisdiction as provided in subsection 366.04(1), F.S., and should not be dismissed. Mr. Walker's allegations concern FPL's billing and overbilling him for electric service not provided. As stated by FPL in its Motion to Dismiss the Complaint, the petition is about Mr. Walker's disagreement with FPL's billing of his account for services rendered. Staff believes that these allegations relate to FPL's rates and service for Mr. Walker's electric account.

Staff also believes the facts and law in this docket are sufficiently developed and a complaint in strict compliance with Rule 25-22.036, F.A.C., is not required for the Commission to make a determination on Mr. Walker's petition. The informal complaint files, Mr. Walker's formal complaint, FPL's Motion to Dismiss the Complaint, and the record correspondence between staff and Mr. Walker provide relevant information about Mr. Walker's arguments, factual assertions, and requested relief. Staff believes this information is sufficient to allow the Commission to make a decision on the substance of Mr. Walker's complaint and does not believe it would be an effective use of the parties' and the Commission's resources to require Mr. Walker to amend his complaint to comply with technical pleading rules.

In his formal complaint, Mr. Walker also alleges that his Fourth Amendment rights have been violated. Staff agrees with FPL's Motion to Dismiss the Complaint in this regard and recommends that this allegation be dismissed with prejudice because the Commission is without jurisdiction under Chapter 366, F.S., to adjudicate Fourth Amendment complaints.

Therefore, staff recommends that the Commission grant in part and deny in part FPL's Motion to Dismiss the Complaint as discussed above.

Issue 2: What is the appropriate disposition of Mr. Walker's complaint?

Recommendation: Mr. Walker's formal complaint should be denied. FPL properly handled Mr. Walker's account in compliance with Commission rules, statutes, and orders and FPL's tariffs. (Page)

Staff Analysis: Mr. Walker alleges that FPL backbilled and overbilled for services not rendered. As discussed in more detail below, staff believes that FPL backbilled Mr. Walker's account on the basis of a reasonable estimate for electric service provided for which he did not pay due to unauthorized conditions at the meter site.

Meter Tampering

On March 7, 2016, based upon a reduction in service usage, FPL's Revenue Protection Department initiated an investigation of meter tampering on Mr. Walker's premises. On April 4, 2016, an FPL service crew, accompanied by police, went to the service address and determined that at this time meter tampering had occurred. The FPL service crew observed that there was no meter in the meter can and unauthorized jumpers were providing unmetered electric service.

On April 22, 2016, FPL billed Mr. Walker's account \$284.17 for current diversion investigative costs as provided in FPL's tariffs. The FPL service crew observed that the meter was missing and unauthorized jumpers were present at Mr. Walker's premises. However, FPL's current diversion investigation did not result in any photographs of the tampering. On October 10, 2016, staff notified FPL that because there were no photographs of the meter tampering, FPL should credit Mr. Walker's account balance for \$284.17 in investigative costs. On October 17, 2016, FPL issued a credit adjustment to Mr. Walker's account in the amount of \$284.17.

Backbilling

Staff believes the FPL service crew's observation of the state of the meter is sufficient to conclude that unauthorized use of energy occurred at Mr. Walker's premises. Pursuant to Rule 25-6.104, F.A.C., FPL backbilled Mr. Walker's account based on an estimate of the energy used and not paid for because of the unauthorized use. Staff reviewed the backbilling calculations and notified FPL of a mathematical error on the estimated calculation of kWh used from March 21, 2016, through April 4, 2016, when the unauthorized use was discovered by FPL. On November 4, 2016, FPL issued a credit adjustment on the account in the amount of \$38.44 due to FPL's miscalculation of the estimated kWh used from March 21, 2016, through April 4, 2016. Staff believes that with the credit adjustment issued by FPL on November 4, 2016, FPL's backbilling of Mr. Walker's account comports with Rule 25-6.104, F.A.C.

Account Balance

Staff notes that Mr. Walker has a zero balance on his FPL account. On February 25, 2017, Mr. Walker requested that his account be closed and FPL closed the account. FPL's final bill for Mr. Walker's account was \$102.67. On March 1, 2017, Mr. Walker's \$450.00 deposit was applied to this final bill, which yielded a credit balance on the account in the amount of \$347.33. On March 9, 2017, Mr. Walker cashed FPL's refund check for \$347.33, bringing his account to a zero balance.

Conclusion

Mr. Walker alleges that FPL billed and overbilled him for services not rendered and he is due an additional refund or credit from FPL. Staff identified two areas of concern in the billing of Mr. Walker's account. As discussed above, when staff notified FPL regarding the current diversion investigative costs, FPL made a credit adjustment to Mr. Walker's account. FPL also issued a credit to Mr. Walker's account when advised by staff that a mathematical error had been made in FPL's calculation of backbilling for unauthorized use of energy. Staff believes that FPL has properly handled Mr. Walker's account in compliance with Commission rules, statutes and orders and FPL's tariffs and that no additional refunds to Mr. Walker are required. Therefore, Mr. Walker's formal complaint should be denied.

Issue 3: Should this docket be closed?

Recommendation: If no person whose substantial interests are affected by the proposed agency action in Issue 2 files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. (Page)

Staff Analysis: If no person whose substantial interests are affected by the proposed agency action in Issue 2 files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.