

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: July 21, 2022

TO: Office of Commission Clerk (Teitzman)

FROM: Office of the General Counsel (Crawford) *JSC*
Office of Consumer Assistance and Outreach (Plescow) *JP*
Division of Economics (Coston) *JGH*

RE: Docket No. 20220038-EI – Complaint by Albert Arcuri against Duke Energy Florida, LLC.

AGENDA: 08/02/22 – Regular Agenda – Motion to Dismiss for Issue 1 (Oral Argument Not Requested; Participation is at the Commission’s Discretion) – Proposed Agency Action for Issue 2 (Interested Persons May Participate)

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: La Rosa

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On March 22, 2021, Mr. Albert Arcuri contacted Duke Energy Florida, LLC (Duke) requesting information for converting his existing overhead electric service to underground. Duke provided Mr. Arcuri with a cost of \$2,139.59 to complete the work, which included the trenching, installation of the cable and conduit, and removing the overhead service. After several conversations with Duke representatives addressing scheduling the undergrounding project and the breakdown of the attendant costs, Mr. Arcuri filed Informal Complaint No. 1377736E with the Commission on August 31, 2021. Duke reported that on August 30, 2021, it received a payment of \$2,139.59, and the conversion of the facilities was completed on October 14, 2021.

After requesting additional information from Duke, staff sent a letter to Mr. Arcuri on October 5, 2021, explaining how the cost to underground was calculated, and staff's opinion that the cost was reasonable and accurate, and consistent with Duke's Commission-approved tariff.

Mr. Arcuri expressed his disagreement with staff's letter, and the matter was referred to the Commission's Process Review Team (PRT) for review, in accordance with Rule 25-22.032, Florida Administrative Code (F.A.C.). By letter dated January 10, 2022, Commission staff advised Mr. Arcuri that his informal complaint had been reviewed by PRT, and it appeared that Duke had not violated any applicable statutes, rules, company tariffs, or Commission orders. Staff advised Mr. Arcuri that if he disagreed with the complaint conclusion, he could file a petition for initiation of formal proceedings for relief against Duke.

On January 17, 2021, Mr. Arcuri filed a formal complaint against Duke, stating he was overcharged for the cost of his underground conversion as opposed to the cost of a new underground installation.¹ Mr. Arcuri requested that the cost of his installation be refunded, and that funds be made available to him "to fight Duke's illegal activities and [the Commission]."

On March 17, 2022, Duke filed an Amended Motion to Dismiss (Motion) Mr. Arcuri's formal complaint.² Duke states that Mr. Arcuri's complaint fails to explain how Duke violated Rule 25-22.032, F.A.C. (regarding customer complaints), or provide any evidence that Duke violated any applicable statutes, rules, tariffs, or Commission orders. Duke contends that Mr. Arcuri has failed to state a cause of action upon which relief can be granted; therefore, his complaint should be dismissed.

This recommendation addresses whether Duke's Motion should be granted (Issue 1) and the appropriate disposition of Mr. Arcuri's formal complaint against Duke (Issue 2). The Commission has jurisdiction over this matter pursuant to Section 366.04, Florida Statutes (F.S.).

¹ DN 01335-2022, filed February 18, 2022.

² DN 01973-2022. The Amended Motion to Dismiss is material identical to the Motion to Dismiss Duke filed on March 14, 2022 (DN 01843-2022), but adds the pleading caption inadvertently omitted in the original filing, and properly labels the attached exhibits.

Discussion of Issues

Issue 1: Should the Commission grant Duke's Motion to Dismiss Mr. Arcuri's formal complaint?

Recommendation: No, the Commission should deny Duke's Motion. (Crawford)

Staff Analysis:

Legal Standard

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.³ 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. A sufficiency determination is confined to the petition and documents incorporated therein and the grounds asserted in the motion to dismiss.⁴ 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.⁵

Duke's Motion to Dismiss

Mr. Arcuri's formal complaint states that Duke has violated Rule 25-22.032, F.A.C., which addresses the process for handling customer complaints. Duke correctly points out, however, that Mr. Arcuri fails to state how Duke is in violation of the rule. Rather, the focus of Mr. Arcuri's complaint is his dissatisfaction with the costs incurred for undergrounding his electric service. Duke states it has been explained to Mr. Arcuri that Duke's tariffed charge for replacing an existing overhead lateral with underground service is \$1,762.00. The additional \$377.59 was for Duke to perform the trenching. While Mr. Arcuri believes he shouldn't be charged more for the existing service conversion than for a new underground service, it has been explained to him that more work is involved for a conversion of existing overhead service. Duke contends that Mr. Arcuri has failed to state a cause of action upon which relief can be granted; therefore, the Commission should dismiss Mr. Arcuri's formal complaint, or in the alternative, deny Mr. Arcuri's requested relief.

Analysis and Conclusion

The Commission has previously held *pro se* litigants such as Mr. Arcuri to a relaxed pleading standard, in order to prevent delay and promote resolution of litigants' claims. Staff believes that the petition states a cause of action – a dispute with respect to Duke's rates and service – that is within the Commission's jurisdiction as provided in Section 366.04(1), F.S. As stated in Duke's

³ See *Varnes v. Dawkins*, 624 So. 2d 349, 350 (Fla. 1st DCA 1993).

⁴ *Varnes* at 350.

⁵ 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).

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Motion, the substance of the formal complaint isn't about Duke's compliance with the customer complaint rule, but about Mr. Arcuri's disagreement with Duke's billing of his account for the conversion of his service from overhead to underground.

The documentation in this docket, including the informal complaint files, Mr. Arcuri's formal complaint, and Duke's Motion to Dismiss provide significant information about Mr. Arcuri's factual assertions and requested relief. Staff believes that these allegations relate to Duke's rates and service for Mr. Arcuri's electric account, and that the facts are sufficiently developed for the Commission to make a determination on the formal complaint, as recommended in Issue 2. As discussed in Issue 2, staff recommends that the Commission lacks the jurisdiction to award damages or equity relief as requested by Mr. Arcuri. While staff believes that particular relief would appropriately be subject to dismissal, Duke did not identify or discuss Mr. Arcuri's request for equity relief in its Motion. Staff therefore recommends that Duke's Motion to Dismiss should be denied in its entirety.

Issue 2: What is the appropriate disposition of Mr. Arcuri’s formal complaint?

Recommendation: Staff recommends that Mr. Arcuri’s formal complaint be denied. Mr. Arcuri’s account was properly billed in accordance with Florida statutes and rules and Duke’s tariffs. Duke did not violate any applicable statute, rule, company tariff, or order of the Commission in the processing of Mr. Arcuri’s account. Further, the Commission lacks equity jurisdiction to award Mr. Arcuri damages. (Crawford)

Staff Analysis: Pursuant to Rule 25-22.036(2), F.A.C., a complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction that affects the complainant’s substantial interests and that is in violation of a statute enforced by the Commission, or of any Commission rule or order. As discussed below, Mr. Arcuri’s petition fails to show that Duke’s billing of his account for the cost of undergrounding his electric service violates a statute, rule, order, or applicable provision of Duke’s Commission-approved tariff. Further, the Commission lacks equity jurisdiction, so Mr. Arcuri’s request for damages is inappropriate. Therefore, the Commission should deny Mr. Arcuri’s petition for relief.

Formal Complaint

In his complaint, Mr. Arcuri states that Duke charged him four times the amount to convert his overhead installation to underground service, as compared to the cost for undergrounding a new installation. He states that “the only difference is they have to cut the old power line down.” Mr. Arcuri requests that the costs for his installation be readjusted and refunded. He also requests that the Commission “make funds available to fight Duke’s illegal activities and this board [the Commission] who they control.”

Analysis

Based on all the information provided, Duke’s invoice of \$2,139.59 for the cost to underground an existing residential overhead service lateral is reasonable and accurate. Duke Tariff Sheet No. 4.115, Section 11.05 establishes the expected contribution for residential customers who wish to underground an existing residential overhead service lateral as \$1,762 (excluding trenching costs). This charge is determined based on the cost to remove the existing overhead service, the average cost to install underground service, the remaining undepreciated value of the overhead facilities, and the salvage value of the overhead facilities.

Mr. Arcuri has stated his dissatisfaction that the utility is permitted to charge more for the conversion of existing overhead service than for new underground service. The charge of \$641.00 for new underground service laterals is determined by the difference between the average cost to install an overhead service lateral and the average cost to install an underground service lateral. Duke requires customers to pay the additional costs of undergrounding up front, as the remaining cost for overhead service is included in residential rates. This charge would not be appropriate in the case of an underground conversion of an existing overhead service lateral, because it does not include the cost to remove the existing overhead facilities nor the remaining undepreciated value of the overhead facilities.

Tariff Sheet No. 4.115, Section 11.05 further requires that the customer also provide, at no cost to the Company, a suitable trench and perform the backfilling. If the customer requests the Company to supply the trench or remove any additional equipment other than the service lateral, the charge to the customer for this work will be based on a specific cost estimate. The additional charge of \$377.59 for Duke to perform the trenching is reasonable and similar to other trenching charges.

Pursuant to Rule 25-6.078(3), F.A.C., each utility is required to file supporting data and analyses at least once every three years to justify the utility's differential between underground and overhead residential distribution costs. The charges listed on Duke Tariff Sheet No. 4.115 were most recently approved by Commission Order No. PSC-2020-0266-TRF-EI, issued on July 27, 2020, in Docket No. 20200110-EI, *In re: Petition for approval of revised underground residential distribution tariffs, by Duke Energy Florida, Inc.*

Based on the information provided by Mr. Arcuri and Duke, staff recommends that the invoice for \$2,139.59 was reasonable for the cost to replace an existing overhead service lateral with an underground service lateral.

Conclusion

Staff recommends that Mr. Arcuri's formal complaint should be denied. Mr. Arcuri's account was properly billed in accordance with Florida statutes and rules and Duke's tariffs. Duke did not violate any applicable statute, rule, company tariff, or order of the Commission in the processing of Mr. Arcuri's account. To the extent that Mr. Arcuri is requesting damages or similar equitable relief, the Commission has previously stated that it has no jurisdiction to make such an award; therefore, this portion of the complaint should also be denied.⁶

⁶See *Southern Bell Telephone & Telephone Co. v. Mobile America Corp.*, 291 So.2d 199 (Fla. 1974); and Order No. PSC-2020-0029-PAA-EI, issued January 17, 2020, in Docket No. 20190167-EI, *In re: Petition to compel Florida Power & Light to comply with Section 366.91, F.S. and Rule 25.6-065, F.A.C., by Floyd Gonzales and Robert Irwin.*

Issue 3: Should this docket be closed?

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

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