

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of formal proceedings of
Complaint No. 1006767E of Edward
McDonald against Tampa Electric Company,
for alleged improper billing.

DOCKET NO. 110305-EI
ORDER NO. PSC-12-0252-FOF-EI
ISSUED: May 23, 2012

The following Commissioners participated in the disposition of this matter:

RONALD A. BRISÉ, Chairman
LISA POLAK EDGAR
ART GRAHAM
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING MOTION TO DISMISS

BY THE COMMISSION:

Case Background

On February 7, 2012, we issued Proposed Agency Action (PAA) Order No. PSC-12-0053-PAA-EI denying Mr. Edward McDonald's request for relief against Tampa Electric Company (TECO). In that Order, we determined that: (1) TECO's attempt to collect an outstanding balance of \$915.94 from Mr. McDonald did not violate any statute, rule, or order; (2) Mr. McDonald mother's bank recalled \$3,500 that Mr. McDonald made in overpayment to TECO from his mother's account, and TECO did not owe Mr. McDonald the \$3,500; and (3) we lacked jurisdiction to award Mr. McDonald's alleged attorneys fees of \$5,000 incurred in the circuit court.

On February 28, 2012, Mr. McDonald attempted to e-file his petition entitled Initiation of Formal Proceedings, but he was advised immediately that the petition did not conform to the e-filing requirements, was rejected, and should be refiled. On February 29, 2012, Mr. McDonald's petition was received by regular U.S. mail, postmarked February 27, 2012.

In his petition, Mr. McDonald asserted as material facts in dispute that: (1) the statute of limitations prohibited TECO from billing the \$915.94 and that he paid the \$915.94 with a payment of \$1,095.20 to TECO; and (2) TECO owed him \$3,500 plus interest in allegedly overpayment he made in 2004, as TECO returned the overpayment to his mother's bank and the bank did not recall the funds. He also stated that he does not owe the \$915.94 because collection of a seven-year-old debt is taking legal action that is barred by Section 95.11, Florida Statutes (F.S.). Mr. McDonald made these same allegations in his initial complaint.

On March 6, 2012, TECO filed a Motion to Dismiss Mr. McDonald's petition. On March 26, 2012, Mr. McDonald filed his Response to TECO's Motion to Dismiss. Neither party

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requested oral argument. We have jurisdiction over this matter pursuant to Chapters 120 and 366, F.S., and Chapter 28-106, F.A.C.

Discussion

Standard of Review

A motion to dismiss questions the legal sufficiency of a complaint.¹ In order to sustain a motion to dismiss, the moving party must show that, accepting all allegations as true and in favor of the complainant, the petition still fails to state a cause of action for which relief may be granted.² When making this determination, only the petition and documents attached to or incorporated therein by reference can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner.³ A court may not look beyond the four corners of the complaint in considering its legal sufficiency.⁴ However, the attachment of a document to the complaint that conclusively negates the complaint is sufficient grounds for dismissal.⁵ Pursuant to Section 120.569(2)(c), F.S., a petition shall be dismissed at least once without prejudice unless it conclusively appears from the face of the petition that the defect cannot be cured.⁶

TECO's Motion to Dismiss

TECO, in its Motion to Dismiss, asserted that Mr. McDonald's complaint should be dismissed, as it is legally deficient and failed to state a cause of action upon which relief can be granted. TECO stated the following:

- Chapter 95, F.S., is not applicable to administrative proceedings as seen in Sarasota County v. National City Bank of Cleveland, Ohio, 902 So. 2d 233 (Fla. 2nd DCA 2005), and TECO has not commenced a civil action or proceeding against Mr. McDonald.
- The \$915.94 and \$3,500 Mr. McDonald claimed are in dispute were fully investigated, and Mr. McDonald's petition failed to offer any new or different evidence or argument from that previously presented.

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

² *Id.* at 350. See also Wilson v. News-Press Publ'g Co., 738 So. 2d 1000, 1001 (Fla. 2d DCA 1999).

³ Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993); Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963).

⁴ Barbado v. Green and Murphy, P.A., 758 So. 2d 1173, 1174 (Fla. 4th DCA 2000)(citing Bess v. Eagle Capital, Inc., 704 So. 2d 621 (Fla. 4th DCA 1997)).

⁵ See Magnum Capital, LLC v. Carter & Assoc., LLC, 905 So. 2d 220, 221 (Fla. 1st DCA 2005)(citing Franz Tractor Co. v. J.I. Case Co., 566 So. 2d 524, 526 (Fla. 2d DCA 1990) and noting that "if documents are attached to a complaint and conclusively negate a claim, the pleadings can be dismissed").

⁶ See also Kiralla v. John D. and Catherine T. MacArthur Found, 534 So. 2d 774, 775 (Fla. 4th DCA 1988)(stating that a dismissal with prejudice should not be ordered without giving the plaintiff an opportunity to amend the defective pleading, unless it is apparent that the pleading cannot be amended to state a cause of action).

- Mr. McDonald completely omitted reference to Account No. 1501-000031-5 with the outstanding balance of \$1,095.20, a separate account than the account with the \$915.94 outstanding balance.

- Mr. McDonald acknowledged that TECO returned the \$3,500 to the bank at the bank's request and is now seeking damages against TECO with interest, which this Commission has no jurisdiction to award.

- Mr. McDonald did not file his petition within the time frame provided in this Commission's February 7, 2012 PAA Order, which was the close of business on February 28, 2012.

Mr. McDonald's Response to TECO's Motion to Dismiss

In his response to TECO's Motion to Dismiss, Mr. McDonald stated the following:

- TECO's inaccurate and unlawful billing violates Federal debt collection laws and he is entitled to the benefits of the Fair Credit Reporting Act, and the Fair Debt Collection Practices Act prohibits TECO from charging Mr. McDonald the outstanding \$915.94. Florida debt statutes provide that no state laws shall supersede or conflict with Federal laws.

- The \$915.94 was paid by the \$1,095.20 payment Mr. McDonald made as both accounts are the same, and the last digit in the account numbers reflects the order of account activity. The account, customer, service address, and meter (reading & usage) are identical.

- The record shows that TECO refused to return the \$3,500 in overpayment, which was cleared by the bank and posted to his account due to negligence and lack of due diligence.

- His petition was received by the office of commission clerk by close of business on February 28, 2012, he had attached proof of compliance with the notice, and the petition was timely received and fully complied with Rule 28-106.201, F.A.C.⁷

Analysis

Because Mr. McDonald is a pro se petitioner, we excused the lateness of the filing of his petition based on his attempted e-filing on February 28, 2012 and the receipt of his petition on February 29, 2012, which was postmarked on February 27, 2012.

Mr. McDonald sought restitution of \$3,500 that Mr. McDonald stated that TECO returned to Mr. McDonald mother's bank. Mr. McDonald also requested a determination from this Commission that he did not owe TECO \$915.94 for an outstanding balance. The petition stated that TECO returned the \$3,500 to the bank; therefore, there is no material dispute requiring further action by this Commission, as TECO no longer has possession of the \$3,500, and we lack

⁷Mr. McDonald attached a copy of a certified mail label and receipt as proof that his petition was mailed on February 25, 2012, by certified mail. However, Mr. McDonald's petition was received by regular mail on February 29, 2012, and was postmarked by the post office with a February 27, 2012 mailing date.

jurisdiction to award damages.⁸ Likewise, the petition failed to state a cause of action as there is no allegation that TECO violated any statute, rule, or order regarding the \$3,500. Therefore, there is also no requested relief in the petition that we have the authority to award.

Regarding the \$915.94 outstanding balance, the same statements in this petition were made in the initial complaint that were thoroughly reviewed by our staff. Additionally, TECO has not initiated a civil action and is not attempting to enforce a court ordered judgement with regards to the outstanding balance of \$915.94. The petition also failed to demonstrate an allegation that TECO violates any statutes, rules, or orders regarding the \$915.94 sufficient to constitute a cause of action.⁹ Therefore, there is no requested relief in the petition that we have the authority to award.

The petition also failed to comport with the pleading requirements of Rule 28-106.201, F.A.C., in that there are no demonstrated disputed issues of material facts, and Mr. McDonald failed to concisely state the specific facts he contends warrant reversal or modification of the PAA Order, or the specific rules or statutes that will require reversal or modification of the PAA Order, including an explanation of how the alleged facts relate to the specific rules or statutes.

In his petition, Mr. McDonald made assertions regarding damages from TECO for \$3,500 and allegations regarding the outstanding balance of \$915.94. However, these assertions and allegations do not constitute disputed issues of material facts or demonstrate the requisite facts and statutes that would require reversal or modification of the PAA Order. Pursuant to Section 120.569(2)(c), F.S., the petition shall be dismissed for failure to substantially comply with the uniform rules or if filed untimely. Therefore, we find it appropriate to dismiss Mr. McDonald's petition to initiate formal proceedings.

Pursuant to Section 120.569(2)(c), F.S., the dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. We find it appropriate to dismiss the petition without prejudice, and Mr. McDonald may file an amended petition. Should Mr. McDonald choose to file an amended petition, the petition must conform to the pleading requirements of Rule 28-106.201, F.A.C.

⁸ See Order No. PSC-10-0296-FOF-TP, issued on May 7, 2010, in Docket No. 090538-TP, In re: Complaint of Qwest Communications Company, LLC against MCImetro Access Transmission Services (d/b/a Verizon Access Transmission Services) et. al., for rate discrimination in connection with the provision of intrastate switched access services in alleged violation of Sections 364.08 and 364.10, F.S., (wherein we dismissed the petition stating that it lacked jurisdiction to award attorneys fees and damages).

⁹ See Order No. PSC-12-0066-FOF-EI, issued on February 13, 2012, in Docket No. 100459-EI, In re: Petition for authority to implement a demonstration project consisting of proposed time-of-use and interruptible rate schedules and corresponding fuel rates in the Northwest Division on an experimental basis and request for expedited treatment, by Florida Public Utilities Company.

We therefore grant TECO's Motion to Dismiss, without prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's Motion to Dismiss is hereby granted, without prejudice. It is further

ORDERED that if Mr. McDonald files an amended petition, the petition must conform to the filing requirements of Rule 28-106.201, Florida Administrative Code, and must be received by the Clerks office before 5:00 PM on June 12, 2012. It is further

ORDERED that if Mr. McDonald fails to timely file an amended petition, then the docket shall be closed, and a Consummating Order shall be issued reviving Order No. PSC-12-0053-PAA-EI, making it final and effective.

By ORDER of the Florida Public Service Commission this 23rd day of May, 2012.



ANN COLE
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

Copies furnished: A copy of this document is provided to the parties of record at the time of issuance and, if applicable, interested persons.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Office of Commission Clerk, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.