



Public Service Commission

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DATE: APRIL 22, 1999

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (JAYE)
DIVISION OF ELECTRIC AND GAS (GING)

RE: DOCKET NO. 981923-EI - COMPLAINT AND PETITION OF JOHN CHARLES HEEKIN AGAINST FLORIDA POWER & LIGHT COMPANY

AGENDA: 05/04/99 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\981923.RCM

CASE BACKGROUND

On December 22, 1998, Mr. John Charles Heekin (Mr. Heekin, Petitioner) filed a formal complaint pursuant to Rule 25-22.036(4) (b) and (5), Florida Administrative Code, against Florida Power & Light Company (Company, FPL) alleging that FPL violated the following:

Section 810.02, F.S. (burglary); Section 810.115, F.S. (braking a fence); Fla.R.Civ.P. 1.280 (scope of discovery); Fla.R.Civ.P. 1.410 (subpoenas to non-parties); FAC 25-6.094 (full and prompt investigation of customer complaints); FAC 25-6.021 (records of complaints); Sections 934.01(4), F.S. (interception of oral communications prohibited); Section 810.14 F.S. (voyeurism prohibited). (Petition at 4).

Petitioner further alleges that:

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The actions which constitute the violation are set forth in the preceding paragraphs. To summarize, they are eavesdropping, voyeurism, breaking the fence and thereby forcibly entering the curtilage of the dwelling of the Petitioner and bad faith games-playing in the defense of the civil litigation, all of which are charged to the rate-paying public rather than to the tortfeasor.

FPL responded to Petitioner on February 8, 1999, by filing a motion to dismiss and a motion for more definite statement. Petitioner filed a response to these motions on February 19, 1999. This recommendation addresses the pending motions and the complaint.

The facts giving rise to these allegations have been described in answers to staff's discovery requests of both Petitioner and FPL as follows. Petitioner wished to prevent FPL meter readers and installers and other FPL personnel from entering his back yard to read the FPL meter located there. He put a sign on his gate advising anyone needing access should call his office. He made an appointment for August 11, 1998, with FPL to have a transponding meter installed to obviate the necessity of FPL's agents entering his yard. An FPL meter installer was in Petitioner's area on August 7, 1998, and proceeded to install the transponding meter ahead of schedule. Petitioner noticed that his gate was damaged on Sunday, August 9, 1998, at approximately 1:00 p.m. Petitioner discovered the FPL employee had installed the meter in his absence and ahead of the scheduled appointment when an FPL employee, Ms. Sherri Rayburn, contacted him on August 10, 1998, and told him the meter had already been installed and that FPL would not be at Petitioner's house on August 11, 1998, as previously arranged. Ms. Rayburn confirmed that the installer had entered through a gate to install the meter.

Petitioner disputed the possibility of this because all of the gates to his property were secured in one fashion or another. Ms. Rayburn contacted Petitioner a second time on August 10, 1998, with a response to his demand to know how the meter installer had accessed his premises. Ms. Rayburn responded that the meter reader had removed a wire (or variously a rope or string) to enter. At this point, Petitioner stated in response to staff interrogatories that he "invited Ms. Rayburn to come and inspect the damage for herself." FPL denied that its meterperson entered the Heekin premises through the damaged gate. It is at this point FPL was first aware of a potential damage claim by Petitioner. Petitioner and FPL are not in accord regarding the subsequent actions of either party, whether the Petitioner was directed to FPL's claims

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department or whether FPL simply ignored the Petitioner's requests to repair his gate.

Staff notes that there is a pending civil law suit arising from these facts.

DISCUSSION OF ISSUES

ISSUE 1: Should FPL's Motion to Dismiss Complaint and Petition of John Charles Heekin be granted?

STAFF RECOMMENDATION: Yes. The Motion to Dismiss Complaint and Petition of John Charles Heekin should be granted as to Counts One through Eight and Ten because the petition requests relief that is beyond the jurisdiction of the Commission to grant; as to Count Nine, because there was admittedly no violation of Rule 25-6.021, Florida Administrative Code, and the count therefore fails to state a cause of action; and, as to Count Ten, because the complaint is for damages and, therefore, is outside the jurisdiction of the Commission and, for the same reason, the complaint fails to state a cause of action under Rule 25-6.094, Florida Administrative Code.

STAFF ANALYSIS: For ease in referring to the various complaints put forth by Mr. Heekin, they will be referred to as follows: Count One, alleged violation of Section 810.02, Florida Statutes, burglary; Count Two, alleged violation of Section 810.115, Florida Statutes, maliciously breaking a fence; Count Three, alleged violation of Section 810.12, Florida Statutes, trespass; Count Four, alleged violation of Section 810.14, Florida Statutes, voyeurism prohibited; Count Five, Section 934.01(4), Florida Statutes, interception of oral communications prohibited; Count Six, Section 934.03, Florida Statutes, interception of oral communications prohibited; Count Seven, Fla.R.Civ.P. 1.280, scope of discovery; Count Eight, Fla.R.Civ.P. 1.410, Subpoena of non parties; Count Nine, Rule 25-6.021, Florida Administrative Code, requirement to keep records of written complaints; and, Count Ten, Rule 25-6.094, Florida Administrative Code, requirement to promptly respond to substantial objections of customers as to charges, facilities or service.

I. **FPL'S MOTION TO DISMISS THE COMPLAINT AND PETITION OF JOHN CHARLES HEEKIN**

In its motion to dismiss, FPL alleged that the Commission should dismiss with prejudice counts one through eight of the petition, regarding criminal activity allegedly engaged in by FPL's employees ranging from eavesdropping, interception of oral communications, and voyeurism to burglary, maliciously breaking fences and unauthorized entry on land, for failure to state a cause of action and lack of subject matter jurisdiction. FPL asserts that the petition's request for attorney's fees be dismissed with prejudice for failure to state a cause of action and lack of

subject matter jurisdiction. FPL's motion also states that the request for rate relief in the petition should be dismissed with prejudice for failure to state a cause of action. FPL finally states that the petition's claims that FPL has violated Rules 25-6.021 and 25-6.094, Florida Administrative Code, relating to the handling of customer complaints, should be dismissed without prejudice in order to allow the petitioner to handle the complaint under Rule 25-22.032, Florida Administrative Code.

FPL also filed a Motion for More Definite Statement in this docket. Staff will address this Motion in Issue Two below.

II. RESPONSE TO MOTION TO DISMISS AND FOR MORE DEFINITE STATEMENT

Mr. Heekin responded to both FPL's motion to dismiss and motion for a more definite statement in one response. The attachment to this response was filed by FPL in the civil action between FPL and Mr. Heekin. Mr. Heekin, in his response, states that FPL represented to the civil court that the civil court did not have jurisdiction over the facts involved in this case because this Commission granted FPL the right to trespass by approving FPL's fifth revised tariff sheet number 6.020.2.8. Mr. Heekin states that the same jurisdictional argument is being made by FPL to the Commission, that the Commission does not have jurisdiction over the instant facts because it lacks the legislative authority. Mr. Heekin seeks a determination of exactly who has the authority to penalize FPL for the actions allegedly committed by its employees.

III. LEGAL STANDARD FOR MOTIONS TO DISMISS

A motion to dismiss raises as a question of law whether the petition alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). Varnes v. Dawkins describes the standard for disposing of motions to dismiss as whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, the tribunal must consider only the petition. All reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

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).

IV. SUBJECT MATTER JURISDICTION AS TO COUNTS ONE THROUGH EIGHT AND TEN

The substantive law governing the causes of action set forth in counts one through eight and ten is found outside of Chapter 366, Florida Statutes, which is that portion of the Florida Statutes from which the Commission derives its authority.

Chapter 366, Florida Statutes, does not contemplate either financial penalties or conviction for criminal or tortious behavior by any entity regulated under that Chapter. Because staff does not believe that counts one through eight and ten of the petition come under the subject matter jurisdiction vested in this Commission, staff recommends that these counts be dismissed for lack of subject matter jurisdiction. "Jurisdiction over the subject matter refers to a court's power to hear and determine a controversy.... Generally, it is tested by the good faith allegations, initially pled, and is not dependent upon the ultimate disposition of the lawsuit." Calhoun v. New Hampshire Ins. Co., 354 So.2d 882, 883 (Fla.1978). "Jurisdiction of the subject matter does not mean jurisdiction of the particular case but of the class of cases to which the particular controversy belongs." Lusker v. Guardianship of Lusker, 434 So.2d 951, 953 (Fla. 2d DCA 1983). In any cause of action, a court must not only have jurisdiction over the parties but must also be vested with subject matter jurisdiction in order to grant relief. See Keena v. Keena, 245 So.2d 665 (Fla. 1st DCA 1971). Subject matter jurisdiction arises by virtue of law only; it is conferred by constitution or statute and cannot be created by waiver or acquiescence. See Board of Trustees of Internal Improvement Trust Fund of State v. Mobil Oil Corp., 455 So.2d 412 (Fla. 2d DCA 1984), quashed in part on other grounds by Coastal Petroleum Co. v. American Cyanamid Co., 492 So.2d 339 (Fla.1986). The Commission may not award monetary damages in resolving utility related disputes. Southern Bell Tel. Co. v. Mobile America Corp., Inc., 291 So.2d 199 (Fla. 1974). The Supreme Court of Florida has decreed that "Nowhere . . . is the PSC granted authority to enter an award of money damages . . . ; this is a judicial function within the jurisdiction of the circuit court pursuant to Art. V, s 5(b), Fla. Const." Southern Bell at 202.

Staff believes that if counts one through eight and ten of the petition are taken in the light most favorable to the petitioner, they do not state a cause of action for which the Commission may grant relief. Varnes v. Dawkins, at 350. It appears that counts

one through eight and ten involve a claim for monetary damages, an assertion of tortious liability or of criminal activity, all of which are outside this Commission's jurisdiction.

For the foregoing reasons, staff recommends that the Commission grant the motion to dismiss as to counts one through eight and ten for lack of subject matter jurisdiction.

V. ALLEGED VIOLATION OF RULE 25-6.021, FLORIDA ADMINISTRATIVE CODE

Staff recommends that Count Nine also be dismissed. Count Nine alleges that FPL violated Rule 25-6.021, Florida Administrative Code, by failing to keep a record of the complaint. Petitioner's complaint fails to assert that he filed a written complaint with the company which the company upon request was unable or unwilling to produce. Staff believes, therefore, that the Petition has failed to state a cause of action by failing to state the elements necessary to show the company violated Rule 25-6.021, Florida Administrative Code.

Further, in advancing beyond the Motion to Dismiss, in response to staff discovery in this case, both parties agreed that the complaint by Petitioner to the company was verbal. Mr. Heekin's response to staff interrogatory #2 states that "All that communication was verbal." FPL's response to staff interrogatory #1 states: "Mr. Heekin's complaint was verbal." Rule 25-6.021, Florida Administrative Code, states that "Each utility shall keep a record of all written complaints received" (emphasis added) Though it may be good business practice to make a notation of each verbal complaint received, the company is not required by rule to do so and has not violated this rule. Staff, therefore, recommends that Count Nine of the Petition be dismissed for failure to state a cause of action.

VI. ALLEGED VIOLATION OF RULE 25-6.094, FLORIDA ADMINISTRATIVE CODE

Staff believes that Count Ten of the Petition should also be dismissed for failure to state a cause of action. Petitioner alleges that FPL did not make a "full and prompt" investigation of his complaint as required under this rule. However, this rule only applies when there has been a: "substantial objection made to a utility by a customer as to its charges, facilities, or service." Staff believes that the Petitioner's complaint appears to be an objection to the allegedly tortious, criminal behavior of FPL's agent(s) resulting in a claim for damages to a gate. Ultimately,

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as a claim for damages, this count resides outside of the subject matter jurisdiction of this Commission. Because Petitioner's complaint does not constitute a "substantial objection to the utility's rates, charges, or service," Rule 25-6.094, Florida Administrative Code, is not applicable. Therefore, the complaint fails to state a cause of action. Staff recommends that Count Ten be dismissed both for lack of subject matter jurisdiction and for failure to state a cause of action.

ISSUE 2: Should the Commission grant FPL's Motion for More Definite Statement in the Complaint and Petition of John Charles Heekin?

STAFF RECOMMENDATION: The Motion for a More Definite Statement is moot if the Commission approves staff's recommendation on Issue One. If the Commission denies staff's recommendation on Issue One, however, staff recommends that the Commission grant FPL's Motion for a More Definite Statement.

STAFF ANALYSIS: If the Commission approves staff's recommendation on Issue One, staff recommends that the Commission deny FPL's motion for a more definite statement. If the Commission denies staff's recommendation on Issue One above, staff recommends that the Commission grant FPL's motion for a more definite statement.

I. FLORIDA POWER & LIGHT COMPANY'S MOTION FOR MORE DEFINITE STATEMENT

In its motion, FPL asserts that Mr. Heekin's petition fails to allege grounds for the Commission's jurisdiction in his petition as required by Rule 1.110, Florida Rules of Civil Procedure. FPL's motion further states that Mr. Heekin's petition fails to include a statement of ultimate facts showing that Mr. Heekin is entitled to relief or attorney's fees. FPL requests that the Commission, if it denies FPL's motion to dismiss, requires Mr. Heekin to amend his petition to correct the deficiencies described above as to counts four through six, and the prayer for attorney's fees.

II. PETITIONER'S RESPONSE TO FLORIDA POWER & LIGHT COMPANY'S MOTION

Mr. Heekin's response to FPL's motion is the same as for the FPL motion taken up in Issue One.

III. STAFF'S ANALYSIS

Staff points out that the form and substance of Mr. Heekin's petition is governed by Rules 25-22.036(3), (5), (6), (7)(b)(c)(e), and 28-106.201, Florida Administrative Code. Staff believes that FPL's motion for a more definite statement is reasonable and necessary should the Commission deny staff on Issue One.