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 8, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Gervasi)
Division of Economic Regulation (Kummer)

RE: Docket No. 040208-EI – Consumer complaint against Florida Power & Light Company by Leticia Callard.

AGENDA: 07/02/04 – Regular Agenda – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040208.RCM.DOC

Case Background

On October 4, 2002, Mr. Jorge Callard filed a complaint with the Commission's Division of Consumer Affairs (CAF) on behalf of his wife, Mrs. Leticia Callard (customer of record) against Florida Power & Light Company (FPL or utility). According to Mr. Callard, FPL has inappropriately backbilled the Callard residence at 7860 SW 18th Terrace, Miami, Florida, in the amount of $9,398 for alleged unbilled energy, when the Callards had not diverted or otherwise tampered with the meter. In response to the complaint, FPL stated that upon finding physical evidence of meter tampering, it backbilled Mrs. Callard's account from January 2, 1997, when a noticeable and sustained drop in consumption began, until July 24, 2002, when a new meter was installed. The original billing for this period, totaling $8,660.82, was canceled and rebilled at $17,591.79, showing a difference of $8,930.97, plus investigation charges of $348.21. The total backbilled amount in dispute is $9,279.18 ($8,930.97 + $348.21).

Upon review of the complaint and FPL's documentation and calculations provided in response thereto, by letter dated December 24, 2002, CAF advised Mrs. Callard that it appeared that FPL had backbilled her account in compliance with Commission rules, and that no adjustment was appropriate. An informal conference was requested, and was held on June 25,

2003. Mrs. Callard asserted that she has paid FPL what she owes the company and that she will not pay any additional amount. No agreement was reached.

By Proposed Agency Action Order No. PSC-04-0397-PAA-EI, issued April 16, 2004 (PAA Order), the Commission found there to be sufficient cause to determine that meter tampering occurred at the Callard residence to allow FPL to backbill the Callard account for unmetered kilowatt hours, and that because the account was in Mrs. Callard's name during the entire period, she should be held responsible for a reasonable amount of backbilling. The Commission determined the reasonable amount of backbilling to be in the amount of $9,279.18 plus investigative costs of $348.21. Moreover, the Commission encouraged the customer to contact FPL immediately to make payment arrangements for that amount in order to avoid discontinuance of service without notice, which is authorized pursuant to Rule 25-6.105(5)(i), Florida Administrative Code. Finally, the Commission placed the customer on notice that pursuant to Rule 25-6.105(5)(f), Florida Administrative Code, FPL is also authorized, upon sufficient notice, to refuse or discontinue service for neglect or refusal to provide safe and reasonable access to the utility for the purpose of reading meters or inspection and maintenance of equipment owned by the utility.

The deadline for the filing of a petition for a formal proceeding in protest of the PAA Order was May 7, 2004. On May 5, 2004, Mrs. Callard faxed a letter of protest to the Division of the Commission Clerk and Administrative Services. Although the facsimile was received within the protest period, the Commission does not accept filings by facsimile. On May 12, 2004, five days after the protest period expired, Mrs. Callard filed a copy of the letter of protest in the docket file. A copy of the letter of protest is appended to this recommendation as Attachment A. This recommendation addresses whether the late-filed request for hearing should be granted.

The Commission has jurisdiction pursuant to Sections 366.05, 120.569, and 120.57, Florida Statutes, and administers consumer complaints pursuant to Rule 25-22.032, Florida Administrative Code.

Discussion of Issues

Issue 1: Should the late-filed request for formal hearing on PAA Order No. PSC-04-0397-PAA-EI be granted?

Recommendation: Yes, the doctrine of equitable tolling should be invoked to grant the late-filed request for hearing. Moreover, the request substantially complies with the requirements of Rule 28-106.201(2), Florida Administrative Code. (Gervasi, Kummer)

Staff Analysis: As stated in the case background, the deadline for the filing of a petition for a formal proceeding in protest of the PAA Order was May 7, 2004. On May 5, 2004, Mrs. Callard faxed a letter of protest to the Division of the Commission Clerk and Administrative Services. Although the facsimile was received within the protest period, the Commission does not accept filings by facsimile.[1] Staff telephoned the Callard residence on May 5, 2004, to advise of same, but was told that Mrs. Callard is generally not available during the work day and that she returns home at approximately 8 p.m. The staff attorney telephoned the residence at 9 p.m. that same evening, but there was no answer. Therefore, a detailed voice mail was left advising that the protest period would end on May 7, 2004, and suggesting that Mrs. Callard should send her letter of protest via overnight mail. On May 11, 2004, Mrs. Callard telephoned the staff attorney to advise that she did not access her voice mail until that day and that she would place her letter of protest in overnight mail immediately. The next day, on May 12, 2004, five days after the protest period expired, a copy of the letter of protest was filed in the docket file. FPL has not filed any type of responsive pleading to the request for hearing.

This matter is governed by Section 120.569(2)(c), Florida Statutes, which covers administrative decisions affecting substantial interests, and provides, in pertinent part, that a petition or request for hearing shall be dismissed if it has been untimely filed.[2] Additionally, Rule 28-106.111(4), Florida Administrative Code, states that "[a]ny person who receives written notice of an agency decision and who fails to file a written request for a hearing or mediation within 21 days waives the right to request a hearing or mediation on such matters."

Equitable Tolling

Florida courts have consistently held that the late filing of a request for an administrative hearing is not a jurisdictional defect.[3] Failure to comply with a protest filing deadline is not an absolute bar to a hearing, but is more analogous to statutes of limitation, which are subject to

[1] See Rule 25-22.028(1), Florida Administrative Code. The Commission also accepts electronic filings, but not filings by facsimile.

[2] This language, requiring the dismissal of an untimely request, was added to the statute by Chapter 98-200, Section 4, at 1831, Laws of Florida. In Patz v. Department of Health, Florida Board of Medicine, 864 So. 2d 79, 81, (Fla. 3rd DCA 2003), the court concluded that this amendment overruled two prior district court of appeal decisions to the extent those cases held that an untimely administrative appeal could proceed if the delay was a result of excusable neglect.

[3] Patz v. Department of Health, Florida Board of Medicine, 864 So. 2d at 81.

equitable considerations such as tolling.[4] "The doctrine [of equitable tolling] serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules."[5] The doctrine "is used in the interests of justice to accommodate . . . a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing."[6] "Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."[7] The application of the doctrine is dependent, in part, upon a showing that the litigant has not "slept on its rights."[8]

The Commission has invoked the doctrine of equitable tolling in the past to allow a late-filed objection to stand,[9] and staff believes that the doctrine should be invoked to allow the late-filed protest to stand in this case. Mrs. Callard attempted to timely file her letter of protest by way of facsimile transmission. She placed her letter of protest in overnight mail on the same day that she learned that the Commission does not accept filings by facsimile. Therefore, she cannot be said to have "slept on her rights." Moreover, although the Notice of Further Proceedings or Judicial Review" attached to the PAA Order did not contain misleading language concerning her right to request a hearing, it also did not advise her of the Commission's policy of not accepting filings by facsimile.

Finally, staff notes that in prior cases, the Commission has accepted other late-filed protests when good cause has been demonstrated as to why the protest was untimely.[10] An

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[4] Machules v. Department of Administration, 523 So. 2d 1132, 1133 n2 (Fla. 1988). "The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period." Id. at 1133.

[5] Id. at 1134 (citation omitted).

[6] Id.

[7] Id.

[8] Jancyn Mfg. Corp. v. State of Florida, Dept. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999) (citing Machules, 523 So. 2d at 1135).

[9] See Order No. 961530-WU, issued July 1, 1997, in Docket No. 961531-WU, In Re: Application for amendment of Certificate No. 347-W to add territory in Marion County by Marion Utilities, Inc. (allowing objection to stand which was filed one day late); Order No. PSC-00-1649-PCO-WS, issued September 15, 2000, in Docket No. 000277-WS, In Re: Application for transfer of facilities and Certificates Nos. 353-W and 309-S in Lee County from MHC Systems, Inc. d/b/a FFEC-Six to North Fort Myers Utility, Inc., holder of Certificate No. 247-S; amendment of Certificate No. 247-S; and cancellation of Certificate No. 309-S (allowing objection to stand which was filed 42 days late, when customer attempted to timely file the objection by e-mail. The Commission did not permit electronic filings at that time.)

[10] See Order No. PSC-98-0513-FOF-WS, issued April 15, 1999, in Docket No. 970696-WS, In Re: Application by Florida Cities Water Company for extension of water service in Lee County, amendment of Certificates 27-W and 24-S to include territory in Lee County, and deletion of a portion of territory in Certificate No. 72-W by Gulf Utility Company in Lee County. See also Order No. PSC-95-1386-FOF-WS, issued November 8, 1995, in Docket No. 950695-WS, In Re: Application for Transfer of Certificates Nos. 374-W and 323-S in Volusia County from Terra Mar Village (River Park) to Terra Mar Village Utilities, Inc. (denying the utility's motion to dismiss untimely filed

example most on point is contained in Order No. PSC-95-0630-FOF-TC.[11] In that case, Vocal Motion attempted to file a petition for a formal proceeding via facsimile transmission on the due date. After learning that Commission Rules do not allow for such filings, Vocal Motion sent its pleading to the Commission via overnight mail. In allowing the protest, the Commission stated that it was fair and appropriate to exercise its discretion in granting Vocal Motion's petition.

Rule 28-106.201(2), Florida Administrative Code

Rule 28-106.201(2), Florida Administrative Code, requires petitions to contain, in pertinent part::

> (b) The . . . telephone number of the petitioner . . .;
>
> * * *
>
> (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 as well as the rules and statutes which entitle the petitioner to relief; . . .

Although the request for hearing does not contain the petitioner's phone number, Mrs. Callard has been contacted by Commission staff on numerous occasions and her phone number is on record at the Commission. The request contains numerous statements of disputed issues of material fact. Although there is not a concise statement of the ultimate facts alleged, or of the rules and statutes which entitle the petitioner to relief, it is obvious from the face of the petition that Mrs. Callard ultimately does not agree that she owes any backbilled amount. Moreover, the rules and statutes which govern the proceeding and which would entitle Mrs. Callard to relief if she prevails are the same rules and statutes which vested the Commission with the jurisdiction to preliminarily rule on her complaint; namely Sections 366.03 and 366.05(1), Florida Statutes, and 25-6.104, Florida Administrative Code.

Summary

For the foregoing reasons, staff recommends that the doctrine of equitable tolling should be invoked to grant the late-filed request for hearing, and that the late-filed request for hearing is in substantial compliance with Rule 28-106.201(2), Florida Administrative Code.

Staff notes that general denials and nonspecific allegations contained in petitions are no longer sufficient, and that "agencies are to review petitions for completeness before forwarding

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objection to transfer application when the objection was filed five days late); and Order No. PSC-96-1184-FOF-WS, issued September 20, 1996, in Docket No. 950966-WS, In Re: Application for staff assisted rate case in Highlands County by Sebring Ridge Utilities, Inc. (granting an untimely petition for formal proceeding which was two days late).

[11]Issued May 23, 1995, in Docket No. 940719-TC, In Re: Initiation of show cause proceedings against VOCAL MOTION, INC. for violation of Rule 25-24.510, F.A.C., Certificate of Public Convenience and Necessity Required, and Commission Order 24101.

them on to DOAH."[12] If the Commission concludes that the request for hearing in this case is not in substantial compliance with the rule, it should dismiss the request without prejudice to petitioner's filing a timely amended petition curing the defect, pursuant to Rule 28-106.201(4), Florida Administrative Code. Staff further notes that Rule 28-106.201(5), Florida Administrative Code, requires the Commission to promptly give written notice to all parties of the action taken on the petition, state with particularity its reasons if the petition is not granted, and state the deadline for filing an amended petition if applicable. Therefore, if the Commission finds that the request for hearing does not substantially comply with Rule 28-106.201, staff suggests that Mrs. Callard be given 21 days from the date of the Order to amend her petition to comply with Rule 28-106.201(2)(b), (d), and (e), Florida Administrative Code.

[12] Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, 870 So. 2d 834 (Fla. 3d DCA 2003).

Issue 2: Should Docket No. 040208-EI be closed?

Recommendation: No, Docket No. 040208-EI should be kept open pending resolution of the protest to PAA Order No. PSC-04-0397-PAA-EI. (Gervasi)

Staff Analysis: Docket No. 040208-EI should be kept open pending resolution of the protest to PAA Order No. PSC-04-0397-PAA-EI.

ORIGINAL

ATTACHMENT A

Public Svc. Comm:

This is to follow up on a fax request for an appeal for case #

PSC inq 494349E.

Docket 040208-EI

PSC-04-0397-PAA.

As per your recorded message we are requesting by mail for we were notified the fax was not acceptable after the fact.

Thank You,

[signature]

CMP ____
COM ____
CTR ____
ECR ____
GCL ____
OPC ____
MMS ____
RCA ____
SCR ____
SEC 1
OTH Kim

DOCKET NO. 040208-EI
DATE: JULY 8, 2004

ATTACHMENT A

Leticia and Jorge Callard
7860 S.W 18 terr.
Miami Dade County
33155 Florida

Docket:040208-EI
PSC-04-0397-PAAI
Issued: April 16, 2004

RE: PSC INQUIRY 494349E

Petiton of Appeal

The following commissioners participated in the disposition of this matter:

Braulio Baez
J. Terry Deason
Lila A. Jaber
Rudolph "Rudy" Bradley
Charles M.

We are appealing the decision that the commission has made because we believe that it was unjustlyand a paralized decision.
FPL has not found vaild facts in none of their evidence, evidence that has been made up and manipulated.
FPL has not demonstrated that the meter was changed November 1,1979, it is soley they did.
The commission has not been impartial, because the evidence that was presented by FPL, alot of it has been false, and theres proof that they have invented such evidence.
In the final resume the Commission hasn't documented nothing that can perjer FPL and that have been proven.
Inresponsibly they put as at risk of an accident of incapeable dimensions.
The commission has not manifested in what is our electronic equipment losts due to technicians when they did not connect the neutral.
The commission has not manifested in what is penitration of your personel in my property against our will.
When they did this act theydestroyed the door that gave us access to the backyard and they left mud all over the deck to our pool.
They did this to change the meter, using a method that is used in other countries such as Cuba and Iraq, where theres no rights, and is totalitarian.
The commission has given that right that is unconstitutional, and you have misrepresented my position giving the understanding that I am a violent man.
I refused to let him in because I wanted in writing, what he was going to be working on and I don't find anything wrong with that.
I ask myself, why did they have to change the meter that day?
Could the meter have put FPL at risk?
I had already complained to Carmen Peña that I could see that the meter was moving pretty fast, even though we turn off most of the lights in the house.
I would like the opportunity for an appeal, and be represented by a lawyer because we know that it is difficult to accuse somebody without evidence.

DOCKET NO. 040208-EI
DATE: JULY 8, 2004

ATTACHMENT A

MBE MAIL BOXES ETC.

Westchester Shopping Center
Tel: 305.261.9091 Fax: 305.2619432

FAX TRANSMITTAL

To: DIRECTOR. DIVISION OF THE COMMISSION CLERK AND ADMINISTRATIVE

Fax number: 1800 511 0809

From: LETICIA & JORGE L. CALLARD

Date: 5/5/04

Regarding: PSC INQUIRY 494349E
DOCKET: 040208-EI
PSC 04-0397-PAAI

Pages: 2
(Including this page)

8567 Coral Way Miami, Florida 33155