

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Susan K. Candelore against Florida Power Corporation regarding alleged violation of Medically Essential Service tariff through failure to give required 30-day notice of disconnect.

DOCKET NO. 980682-EI
ORDER NO. PSC-98-1127-FOF-EI
ISSUED: August 24, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

NOTICE OF PROPOSED AGENCY ACTION
ORDER ON COMPLAINT CONCERNING TARIFF VIOLATION

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029(2), Florida Administrative Code.

I. CASE BACKGROUND

On May 26, 1998, Susan K. Candelore (Ms. Candelore) filed a complaint with this Commission alleging that Florida Power Corporation (Florida Power) violated its "Medically Essential Service" tariff (MES tariff) by failing to give 30 days' notice of discontinuance of service. Ms. Candelore receives service under the MES tariff because her minor son, Stephen Andrew McVey, is a post near-drowning victim who is totally dependent on electrical life-sustaining machines. On June 22, 1998, FPC timely filed an answer and affirmative defense to Ms. Candelore's complaint.

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FLORIDA PUBLIC SERVICE COMMISSION

On July 2, 1997, Florida Power mailed to Ms. Candelore her regular account statement. This statement showed a past due balance of \$488.76 and current charges of \$388.42, with a delinquent date of July 24, 1997. When payment was not received by that date, Florida Power's computer generated a delinquent notice that showed a disconnect for nonpayment date of August 1, 1997. However, service was not disconnected on August 1. On August 6, 1997, Florida Power mailed another letter to Ms. Candelore which stated that failure to make payment for the outstanding account balance could result in service interruption on or after August 21, 1997.

On August 14, 1997, Ms. Candelore contacted our Division of Consumer Affairs to seek assistance in resolving this matter. She complained that Florida Power had not provided her with the 30-day notice required by the MES tariff. On August 20, 1997, however, Ms. Candelore paid the amount requested. Florida Power did not discontinue service, and the Division of Consumer Affairs closed the complaint file.

Ms. Candelore's current complaint seeks: (1) a determination that Florida Power violated its MES tariff; and (2) the imposition of any fine, discipline, or other relief that this Commission finds appropriate. According to the complaint, our determination will affect a cause of action filed in circuit court by Ms. Candelore against Florida Power.

II. FLORIDA POWER'S AFFIRMATIVE DEFENSE

Florida Power states, as an affirmative defense to Ms. Candelore's complaint, that the complaint fails to state a cause of action. We note that, in determining whether a complaint fails to state a cause of action, the complaint must be considered in the light most favorable to the complainant.

Florida Power points out that Section 366.095, Florida Statutes, gives this Commission the power to impose a penalty "upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission or any provision of this chapter." Florida Power argues, essentially, that the complaint fails to state a cause of action because (1) the complaint does not allege that Florida Power "refused to comply with" or "willfully violated" its tariff and (2) in any event, this Commission does not have the power under Section 366.095, Florida Statutes, to penalize

Florida Power for violating or failing to comply with its tariff. We find, however, that Ms. Candelore's complaint states a cause of action for which the Commission may grant relief and, therefore, should not be dismissed.

A. Commission Authority to Impose Penalties for Tariff Violations

This Commission has exclusive jurisdiction to "regulate and supervise each public utility with respect to its rates and service." Section 366.04(1), Florida Statutes; Trawick v. Florida Power & Light Company, 700 So.2d 770 (Fla. 2nd DCA 1997). Further, pursuant to Section 366.03, Florida Statutes, each public utility is required to furnish "reasonably sufficient, adequate, and efficient service upon terms as required by the Commission."

Section 366.05(1), Florida Statutes, establishes this Commission's power to prescribe terms of service, including, among other things, fair and reasonable service rules and regulations to be observed by each public utility. In implementing Section 366.05(1), we promulgated Rule 25-9.004, Florida Administrative Code, which provides that "each utility shall file with the Commission tariffs applicable to all territory served by it, showing . . . all rules and regulations relating thereto . . ."

Rule 25-6.033, Florida Administrative Code, extends this requirement specifically to electric utilities. Subsection (2)(a) of the rule requires each utility to include in its tariffs, among other things, rules governing procedures for disconnection and reconnection of service. Pursuant to Rules 25-6.033(4) and 25-9.001(3), Florida Administrative Code, no rule or regulation is effective until approved by order of this Commission.

Under this regulatory scheme, a utility's tariffs amount to terms of service required by this Commission. Thus, a utility's failure to abide by its Commission-approved tariff amounts to a violation of the utility's duty under Section 366.03, Florida Statutes, to furnish service upon terms required by the Commission.

Of particular relevance to this case is Rule 25-6.105(11), Florida Administrative Code, which provides that each utility shall establish a procedure in its tariff for discontinuance of service when that service is medically essential. In compliance with this rule, Florida Power filed a tariff that was administratively approved on February 9, 1982. Thus, Florida Power's failure to

abide by its MES tariff, a term of service required by this Commission, subjects it to the provisions of Section 366.095, Florida Statutes.

In any event, we have the authority to make a finding concerning Florida Power's compliance with its tariff without necessarily invoking the penalty provisions of Section 366.095, Florida Statutes. This Commission has the authority to approve a tariff. We can address a utility's compliance with its approved tariff pursuant to the police powers conferred by Section 366.01, Florida Statutes.

B. Refusal to Comply or Willful Violation

In her complaint, Ms. Candelore alleges that Florida Power violated its MES tariff, but does not allege that they did so willfully or intentionally. Florida Power asserts that because Ms. Candelore fails to allege a willful violation of the tariff, the complaint fails to state a cause of action under Section 366.095, Florida Statutes.

Regardless of Ms. Candelore's characterization of the alleged tariff violation, we have the authority to determine whether Florida Power willfully violated its tariff and to penalize Florida Power as provided for in Section 366.095, Florida Statutes. In any event, as stated above, we have the authority to make a finding concerning Florida Power's compliance with its tariff without necessarily invoking the penalty provisions of Section 366.095, Florida Statutes, for the reasons stated above.

III. VIOLATION OF MES TARIFF

Florida Power's MES tariff (Section No. IV, Sheet 4.100, Part 10.03), which was in effect at all material times, stated in its entirety:

The Company will give 30 days notice of discontinuance of service to any customer whose service is deemed to be medically essential. The Customer must provide a letter from a doctor of medicine or osteopathy, certified to practice medicine in the State of Florida, stating electric service is essential to the Customer's physical condition. This additional time period shall allow the Customer to make necessary arrangements for continuing service.

In its answer, Florida Power asserts that this 30-day notice is mailed separate and apart from the normal billing and is automatically generated by its computer system.

As stated above, Florida Power's computer generated a delinquent notice for Ms. Candelore's account on July 24, 1997, with a disconnect for nonpayment date of August 1, 1997. It appears that this notice was the type of notice normally sent to customers other than those receiving service under the MES tariff. Clearly, this delinquent notice did not provide the proper time for payment under the MES tariff. Florida Power apparently recognized this error and did not disconnect service on August 1. Ms. Candelore does not recall receiving the notice and makes no mention of it in her complaint. On August 6, 1997, Florida Power sent another letter to Ms. Candelore which stated that failure to make payment by August 20, 1997, for the outstanding account balance could result in service interruption on or after August 21, 1997.

Florida Power admits that its August 6, 1997, letter did not provide the 30-day notice required by its MES tariff. Further, Florida Power acknowledges that even calculating the 30-day notice period from the delinquent notice of July 24, 1997, results in only a 28-day notice period. Accordingly, we find that Florida Power violated the notice provision in its MES tariff by failing to give Ms. Candelore 30 days' notice of discontinuance of service.

IV. PENALTY OR OTHER DISCIPLINARY ACTION

As stated above, Section 366.095, Florida Statutes, gives this Commission the power to impose a penalty "upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission or any provision of this chapter." As we found above, this power extends to tariff violations.

In her complaint, Ms. Candelore does not specifically assert that Florida Power "refused to comply with" or "willfully violated" its MES tariff. Ms. Candelore does state in her complaint that Florida Power did not cooperate or assist her in extending the disconnect deadline.

Florida Power asserts that the insufficient notice period it provided was merely a clerical error, the result of a compound mistake caused by assuming that the 30-day notice period began with the July 24, 1997, delinquent notice, then miscalculating the 30-

day period from that starting point. Florida Power also argues that because Ms. Candelore's service was not disconnected, the type of harm that the tariff was intended to prevent did not occur. Further, Florida Power asserts that although Ms. Candelore's account has been nearly constantly delinquent and eligible for disconnection over the past eight years, Florida Power has accommodated her by foregoing a literal application of its MES tariff.

We do not believe that imposition of a penalty or any other discipline in this case is appropriate. A review of our complaint files indicates that this tariff violation was an isolated event and is not indicative of a recurring problem at Florida Power. Further, Florida Power's MES tariff was amended effective January 24, 1998, to clarify the procedures for providing disconnect notices to customers receiving service under its MES tariff. The amended MES tariff should further reduce the likelihood of a similar tariff violation. We find, therefore, that it is unnecessary to invoke the penalty provisions of Section 366.095, Florida Statutes.

In making this finding, we are cognizant of Ms. Candelore's civil action against Florida Power for intentional infliction of emotional distress. Because Ms. Candelore made no specific allegations and the parties presented little argument and no evidence on the issue of whether Florida Power "refused to comply with" or "willfully violated" its MES tariff, we are reluctant to make a finding either way on this issue that may affect the civil action on the issue of intent. For purposes of our resolution of this case, we believe, for the reasons stated in the previous paragraph, that imposition of a penalty or any other discipline is not appropriate.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Complaint of Susan K. Candelore against Florida Power Corporation states a cause of action for which this Commission may grant relief. It is further

ORDERED that this Commission finds that Florida Power Corporation violated the notice provision in its Medically Essential Service tariff by failing to give Susan K. Candelore 30 days' notice of discontinuance of service. It is further

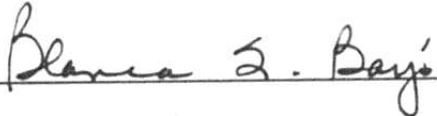
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ORDERED that no penalty or other discipline shall be imposed by this Commission upon Florida Power Corporation for violating the notice provision in its Medically Essential Service tariff. It is further

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 24th day of August, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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

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should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on September 14, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 of the effective date 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.