BEFORE THE PUBLIC SERVICE COMMISSION

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| In re: Consumer complaint against Florida Power & Light Company by Leticia Callard. | DOCKET NO. 040208-EI<br>ORDER NO. PSC-04-0743-PCO-EI<br>ISSUED: August 3, 2004 |

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
LILA A. JABER
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER GRANTING LATE-FILED REQUEST FOR HEARING

BY THE COMMISSION:

Background

On October 4, 2002, Mr. Jorge Callard filed a complaint with this 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 investigative costs 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), we 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. We determined the reasonable amount of backbilling to be in the amount of $9,279.18 plus investigative costs of $348.21. Moreover, we 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, we 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, this Commission does not accept filings by facsimile.[1] 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.

This Order addresses the late-filed request for hearing. We have jurisdiction pursuant to Sections 366.05, 120.569, and 120.57, Florida Statutes, and administer consumer complaints pursuant to Rule 25-22.032, Florida Administrative Code.

Late-Filed Request for Hearing

Our staff telephoned the Callard residence on May 5, 2004, to advise that the Commission does not accept filings by facsimile, and was told that Mrs. Callard is generally not available during the work day and that she returns home at approximately 8 p.m. Our 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 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,

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[1] See Rule 25-22.028(1), Florida Administrative Code. This 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

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 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]

This Commission has invoked the doctrine of equitable tolling in the past to allow a late-filed objection to stand,[9] and we find it appropriate to invoke it to allow the late-filed protest to

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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.

[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

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 this 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 this Commission's policy of not accepting filings by facsimile.

Finally, we note that in prior cases, this Commission has accepted other late-filed protests when good cause has been demonstrated as to why the protest was untimely.[10] An example most on point is contained in Order No. PSC-95-0630-FOF-TC.[11] In that case, Vocal Motion, Inc. 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, Inc. 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 the 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 . . .;
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> * * *
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> (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

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days late, when customer attempted to timely file the objection by e-mail. This 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 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.

(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 our 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 this Commission with the jurisdiction to preliminarily rule on her complaint; namely Sections 366.03 and 366.05(1), Florida Statutes, and Rule 25-6.104, Florida Administrative Code.

Summary

For the foregoing reasons, we find it appropriate to invoke the doctrine of equitable tolling to grant the late-filed request for hearing. Moreover, we find that the late-filed request for hearing is in substantial compliance with Rule 28-106.201(2), Florida Administrative Code.

It is, therefore,

ORDERED by the Florida Public Service Commission that the late-filed request for hearing in protest of Order No. PSC-04-0397-PAA-EI is granted. It is further

ORDERED that this docket shall be kept open pending resolution of the protest.

By ORDER of the Florida Public Service Commission this 3rd day of August, 2004.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: /Kay Flynn/
Kay Flynn, Chief
Bureau of Records

(SEAL)

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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.

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.