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Public Service Commission

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COMMISSION
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DATE: March 24, 2011

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Harris) *JH*
Division of Economic Regulation (Kummer) *AK*
Division of Regulatory Analysis (Beard) *CB*

CSB *BM*

RE: Docket No. 100175-TL – Complaint against AT&T d/b/a BellSouth for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and AT&T regulations pertaining to billing of charges and collection of charges, fees, and taxes.

Docket No. 100312-EI – Complaint against Florida Power & Light Company for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and FPL tariffs pertaining to billing of charges and collection of charges, fees, and taxes.

AGENDA: 04/05/11 – Regular Agenda – Motion for Reconsideration – Oral Argument Not Requested – Participation at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\100175.RCM.DOC

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Case Background

On April 7, 2010, Petitioner¹ filed a formal Complaint (“AT&T Complaint”) against AT&T Florida, Inc. (“AT&T”), and on May 28, 2010, Petitioner filed a substantially similar Complaint (“FPL Complaint”) against Florida Power & Light Company (“FPL”). The substance of both Complaints involved Petitioner’s position that she is not required to pay any taxes, fees, or charges except for direct charges for telephone and electrical service. Both AT&T and FPL filed Motions to Dismiss the Complaints, and Petitioner filed Responses to the Motions to Dismiss. This matter was brought before the Commission as a combined item on the Commission’s February 8, 2011, Agenda Conference, and after considering the item, including providing the Petitioner with an opportunity to address the Commission, the Commission voted to dismiss both complaints, with prejudice.² The Commission’s final order dismissing both Complaints was issued February 17, 2011, as Order No. PSC-11-0117-FOF-PU.

Shortly following the Commission’s vote, Petitioner filed a Notice and Motion for Reconsideration (“Motion”), seeking reconsideration of the Commission’s vote and a formal administrative hearing. On February 14, 2011, FPL filed a Response to Petitioner’s Request for Reconsideration (“FPL Response”). On February 16, 2011, AT&T filed a Response in Opposition to Motion for Reconsideration (AT&T Response). On February 22, 2011, Petitioner filed a Response To Respondents’ Oppositions To Reconsideration. On February 24, FPL filed a Reply to Petitioners’ Response to Respondent’s Oppositions to Reconsideration. On March 4, 2011, Petitioner filed a Reply to FPL’s February 24, 2011, Reply. Staff notes that, pursuant to Rule 25-22.0376, Florida Administrative Code (“F.A.C.”), a party may respond to a motion for reconsideration within 7 days of service of the motion. Neither Rule 25-22.0376, Florida Administrative Code (“F.A.C.”), nor any other PSC or Uniform Rule provide an opportunity for replies to responses to a motion for reconsideration, nor “replies to replies.”

Petitioner did not request oral argument on her Motion for Reconsideration. Pursuant to Rule 25-22.0022(1), F.A.C., a request for oral argument must “be made by separate written request filed concurrently with the motion.” Furthermore, the Rule states that “[f]ailure to timely file a request for oral argument **shall** constitute waiver thereof.” (emphasis added).

Standard Of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that

¹ The Petitioner has requested confidentiality of her name and identifying information. There is no statutory or rule authority for an exception from Florida’s Public Records laws regarding the identity of a customer making a complaint. However, the staff, AT&T, and FPL have redacted the Petitioner’s name from their written materials as a voluntary accommodation.

² The Commission granted the Motions to Dismiss with prejudice, with no opportunity to amend, due in part to its finding that the Commission lacked jurisdiction to grant any relief to Petitioner based on the underlying facts and substance of Petitioner’s Complaints.

have already been considered. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 3 15, 3 17 (Fla. 1974).

The Commission has jurisdiction under Chapters 120, 364 and 366, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant Petitioner's Motion for Reconsideration?

Recommendation: No. Petitioner fails to identify any point of fact or law which the Commission overlooked or failed to consider, and the Motion should be denied. (Harris)

Staff Analysis:

Petitioner's Motion for Reconsideration

As stated in the case background, within hours of the Commission's decision on this matter at the February 8, 2011, Agenda Conference, Petitioner filed a Motion for Reconsideration. The entirety of the Motion is reproduced below:

NOTICE AND MOTION FOR RECONSIDERATION

Petitioner moves for reconsideration and a formal hearing, and as grounds: Petitioner inquired about how February 8, 2011 informal proceeding would proceed. Larry Harris, Esq., Commission Staff indicated there would be opportunity for Petitioner to rebut comments by opposing Counsel. However, such opportunity to oppose inaccuracies stated was denied by Commission Chairman. Petitioner was not permitted a brief rebuttal so not heard fully according to law. Law trumps legal that with respect to legal interpretation versus ordinary interpretation, courts have upheld that the latter holds precedence. THEREFORE Petitioners seek reconsideration and formal hearing.

Rule 25-22.060, F.A.C., requires that a Motion for Reconsideration be filed within 15 days after issuance of the Order. Despite the fact that Petitioner's Motion was made well before the issuance of the Commission's Order, staff recommends that the Commission treat the Motion as timely filed and address the substance of the Motion.³

³ As was noted in the previous recommendation on this matter, Petitioner is not a lawyer, and staff, the Parties, and the Commission have made significant efforts to accommodate Petitioner's lack of legally sufficient pleadings and procedures in an effort to accommodate the substance of her complaints and allow her full and fair resolution of her concerns.

FPL's Reply to Petitioner's Motion

On February 14, 2011, FPL filed a Reply to Petitioner's Motion for Reconsideration ("Reply"). In its Reply, FPL asserts that the Motion should be denied "because it falls far short of the well established requirements that must be pled in a Request for Reconsideration." FPL avers that the purpose of reconsideration is to bring to the Commission's attention some point which it overlooked or failed to consider, and is not intended as a procedure to reargue the case. FPL maintains that Petitioner has not identified any fact or question of law which has been overlooked by the Commission, and which would have led to a different decision by the Commission. FPL states that Petitioner was given full notice of the pending decision, fully participated in the Agenda Conference, and is now simply rearguing that she should be given a chance to make reply comments. FPL concludes that Petitioner's motion does not raise any new fact or question of law, and the Motion for Reconsideration should be denied.

AT&T's Response in Opposition

On February 16, 2011, AT&T filed a Response in Opposition to Petitioner's Motion for Reconsideration ("Response"). In its Response, AT&T states Petitioner was present via telephone at the February 8, 2011, Agenda Conference, and presented her arguments supporting her complaints. AT&T argues Petitioner makes no attempt identify either a point of fact or law that the Commission failed to consider or overlooked during its deliberations, and that Petitioner's Motion is simply an attempt to seek more time and another opportunity to argue, which is improper in a motion for reconsideration. AT&T further argues that Petitioner's Motion is premature, in that it was filed prior to the issuance of the Commission's Order in violation of Rule 25-22.060(1)(a), F.A.C., and that Petitioner continues to fail to serve AT&T Florida with her pleadings in violation of Rule 28-106.110, F.A.C. AT&T concludes that Petitioner's Motion utterly fails to establish any basis for reconsideration and is procedurally defective; accordingly Petitioner's Motion for Reconsideration should be denied.

Staff Analysis

Petitioner's Motion appears to raise two grounds which Petitioner believes merit reconsideration of the Commission's vote on this item: that Petitioner was not granted the opportunity to be fully heard and oppose inaccuracies of opposing counsel; and that ordinary interpretation is superior to legal interpretation.⁴ Staff recommends that neither ground constitutes or clearly identifies a point of fact or law that was overlooked or was not considered by the Commission.

A review of the February 8, 2011, Agenda Conference transcript confirms that Petitioner was given an opportunity to address the Commission and argue her points. While additional time to address the Commission following the comments of AT&T and FPL, or following the Commission's questions to staff, might have made Petitioner feel she had been "heard fully," Petitioner has no right to any specific "point-counterpoint" type of exchange. Staff further does not believe that Petitioner's reliance on staff counsel's recitation of the general choreography of

⁴ It is unclear what Petitioner believes should be given "ordinary" interpretation versus "legal" interpretation.

an Agenda Conference can be in any way relied upon as a point of law binding upon the Commission. Finally, Petitioner's Motion does not identify any specific point of fact or law which the Commission overlooked or failed to consider, which she would have raised if given additional opportunity to address the Commission, and most importantly, which "would have necessitated a different decision." Jaytex, 105 So. 2d at 818.

Furthermore, Petitioner's statement regarding the precedence of "ordinary" over "legal" interpretation is completely devoid of context, and fails to even arguably meet the purpose of a Motion for Reconsideration, which is "an orderly means of directing the court's attention to its inadvertence." Id. Petitioner's complete lack of detail fails to draw the Commission's attention to any fact(s) or law(s) to which Petitioner alleges the Commission applied the incorrect "legal" versus "ordinary" interpretation. Finally, staff recommends that the following precedent from Jaytex is directly on point:

Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay the termination of litigation.

Jaytex at 818-819. (emphasis added.)

Given that "the sole and only purpose of a petition for rehearing is to call to the attention of the court some fact, precedent or rule of law which the court has overlooked in rendering its decision," (Id. at 818), and Petitioner has totally failed to so identify any specific facts, laws, or precedents which the Commission has overlooked or failed to consider, staff recommends Petitioner's Motion for Reconsideration be denied.

Docket Nos. 100175-TL, 100312-EI
Date: March 24, 2011

Issue 2: Should this docket be closed?

Recommendation: Yes. The docket should be closed upon the expiration of the time for appeal.
(Harris)

Staff Analysis: The docket should be closed upon the expiration of the time for appeal.