

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: September 12, 2013

TO: Office of Commission Clerk (Cole)

FROM: Office of the General Counsel (Lawson) *MLC JSC*
Office of Consumer Assistance and Outreach (Forsman, Hicks) *RH CM*
Division of Economics (King) *JK PD JWD*
Division of Engineering (Moses) *TBS*

RE: Docket No. 120176-EI – Complaint of Frederick Smallakoff against Progress Energy Florida, Inc. concerning alleged improper bills, Case No. 1059336E.

AGENDA: 09/25/13 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\120176.RCM.DOC

Case Background

On April 4, 2012, Mr. Frederick Smallakoff filed an informal complaint against Progress Energy Florida (now Duke Energy Florida, DEF) alleging overbilling, improper levying of penalties and harassment by the utility. This informal complaint was assigned Case Number 1059336E. After an investigation and administrative review Commission staff found no evidence that the utility had acted improperly and sent Mr. Smallakoff a final case disposition letter on June 4, 2012. On June 19, 2012 the Commission Clerk received a letter from Mr. Smallakoff to file a “formal proceeding/complaint” in this matter. By Proposed Agency Action Order No. PSC-13-0124-PAA-EI, issued March 13, 2013, the Commission denied Mr. Smallakoff’s complaint on the grounds that after a thorough investigation by Commission staff

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there was no evidence that the utility had improperly billed the customer or improperly assessed any penalties or other fees.

Any person whose substantial interests were affected by the proposed action could file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code (F.A.C.). On April 3, 2013, the Commission Clerk received a hand-written letter from Mr. Smallakoff purporting to request a formal proceeding. Order No. PSC-13-0184-PCO-EI was issued on April 30, 2013, finding that the letter did not meet the requirements of Rule 28-106.201 F.A.C., denying Mr. Smallakoff's request for a hearing, and allowing Mr. Smallakoff leave to refile his request in compliance with the requirements of the rule. On May 21, 2013 the Commission Clerk received a second hand-written letter from Mr. Smallakoff purporting to request a formal proceeding.

This recommendation addresses Mr. Smallakoff's filing and the appropriate disposition of Order No. PSC-13-0124-PAA-EI. The Commission has jurisdiction pursuant to Chapter 366.04, Florida Statutes (F.S.)

Discussion of Issues

Issue 1: Should the Commission grant Mr. Smallakoff's request for a hearing pursuant to Rule 28-106.201, F.A.C.?

Recommendation: No. Mr. Smallakoff's letter received May 21, 2012 does not meet the requirements outlined in Rule 28-106.201, F.A.C., particularly with regard to paragraphs 2(c), 2(d), 2(e), 2(f) and 2(g). Therefore Mr. Smallakoff's request for a hearing should be denied with prejudice and Order No. PSC-13-0124-PAA-EI should be made final. (Lawson)

Staff Analysis: When the Commission issues an order as a proposed agency action any person whose substantial interests are affected by the action proposed in the order may file a petition for a formal hearing, provided it meets the requirements outlined in Rule 28-106.201, F.A.C. Any substantially affected person generally has twenty-one days from the issuance of the order to file a petition with the Commission Clerk.

Rule 28-106.201(2), F.A.C., states that any request for a hearing must meet certain requirements including:

- (a) The name and address of each agency affected and each agency's file or identification number, if known;
- (b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;
- (c) A statement of when and how the petitioner received notice of the agency decision;
- (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, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
- (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
- (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

Mr. Smallakoff's first letter received on April 3, 2013 did not meet the requirements outlined in Rule 28-106.201, F.A.C., particularly with regard to paragraphs 2(c), 2(d), 2(e), 2(f)

and 2(g) as described above. Therefore, Mr. Smallakoff's request for a hearing was denied pursuant to Order No. PSC-13-0184-PCO-EI, with leave for him to re-file a petition for a formal proceeding by May 21, 2013. That order also instructed Mr. Smallakoff that any such petition must substantially conform to the requirements of Rule 28-106.201, F.A.C., a copy of which was attached to the Order.

On May 21, 2013, the Commission Clerk received a second letter from Mr. Smallakoff purporting to request a formal proceeding. This second letter again failed to materially comply with the requirements outlined in Rule 28-106.201, F.A.C., particularly with regard to paragraphs 2(c), 2(d), 2(e), 2(f) and 2(g) as described above.

Since Mr. Smallakoff has had two opportunities to submit a petition for a formal proceeding and neither request substantially or materially complies with Rule 28-106.201, F.A.C., his request for a hearing should be denied. Since the opportunity to refile his petition for a hearing effectively extended the time for filing well past the twenty-one days normally afforded individuals who wish to protest a proposed agency action, Mr. Smallakoff has had more than ample opportunity to properly file a request for formal hearing and the time for filing such a request has expired. Therefore, Mr. Smallakoff's request for a hearing should be denied with prejudice. Order No. PSC-13-0124-PAA-EI should accordingly be issued as final agency action.

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Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission agrees with staff's recommendation on Issue 1, this docket should be closed. (Lawson)

Staff Analysis: If the Commission agrees with staff's recommendation on Issue 1, this docket should be closed.