

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: August 5, 2004

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

FROM: Office of the General Counsel (C. Keating)
Division of Economic Regulation (Floyd, Kummer, Matlock, Wheeler)
Division of Regulatory Compliance & Consumer Assistance (Mills, Ruehl)

RE: Docket No. 030623-EI – Complaints by Southeastern Utility Services, Inc., on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error.

AGENDA: 08/17/04 – Regular Agenda – Decision Prior to Hearing – Motions for Reconsideration and Clarification of Non-Final Order – Oral Argument Not Requested; Participation at the Commission’s Discretion

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030623\030623.RCM.DOC

Case Background

By Order No. PSC-03-1320-PAA-EI, issued November 19, 2003, as proposed agency action (“PAA Order”), the Commission addressed several complaints by Southeastern Utility Service, Inc. (“SUSI”) on behalf of various commercial customers against Florida Power & Light Company (“FPL”) concerning type 1V thermal demand meters that over-registered demand of those customers. On December 10, 2003, SUSI, along with Ocean Properties. Ltd., J.C. Penney Corporation, Dillards Department Stores, and Target Stores, Inc., protested the PAA Order by filing a petition for a formal administrative hearing on some of the complaints addressed in the PAA Order. FPL filed a protest to the PAA Order on the same date.

On January 5, 2004, FPL moved to dismiss SUSI as a party from this proceeding for lack of standing. SUSI responded in opposition to FPL’s motion on January 12, 2004. By Order No.

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PSC-04-0591-PCO-EI, issued June 11, 2004, the Prehearing Officer, among other matters, granted FPL's motion to dismiss SUSI as a party.

On June 21, 2004, SUSI filed a motion for reconsideration of that portion of Order No. PSC-04-0591-PCO-EI dismissing SUSI as a party. FPL filed its own motion for clarification of a portion of Order No. PSC-04-0591-PCO-EI on the same date. On June 28, 2004, FPL filed a response in opposition to SUSI's motion for reconsideration. There was no response to FPL's motion for clarification.

This recommendation addresses SUSI's motion for reconsideration and FPL's motion for clarification. The Commission has jurisdiction pursuant to Chapter 366, Florida Statutes, including Sections 366.04 and 366.05, Florida Statutes.

Discussion of Issues

Issue 1: Should the Commission grant SUSI's motion for reconsideration of that portion of Order No. PSC-04-0591-PCO-EI dismissing SUSI as a party to this proceeding?

Recommendation: No. SUSI's motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order dismissing SUSI as a party. (C. KEATING)

Staff Analysis: The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the 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 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that 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." Steward Bonded Warehouse, Inc. v. Bevis.

In its motion for reconsideration, SUSI asserts that the Prehearing Officer failed to consider that the Commission's resolution of some of the issues identified for hearing in this docket may have some precedential impact on persons who are not parties to this docket. SUSI states that as a result of a recent meeting between the parties and staff concerning the scope of this docket, SUSI understands that this case will address not only the specific meters at issue but also "generic" issues that may relate to claims of other persons not parties to this docket. SUSI contends that resolution of these "generic" issues will affect its substantial interests.

In its response, FPL asserts that SUSI fails to identify any relevant point of fact or law that the Prehearing Officer overlooked or failed to consider. FPL states that the Commission's decisions routinely have a precedential effect on similarly situated parties. FPL contends that the potential precedential effects of a decision in this proceeding are irrelevant to the issue of SUSI's standing to participate as a party to this docket.

In dismissing SUSI as a party, the Prehearing Officer found that SUSI, as a consultant to the customers whose meters are at issue, failed to satisfy the two-prong standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2nd DCA 1981). Under Agrico, a petitioner must show "(1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect." In particular, the Prehearing Officer stated:

Having reviewed the pleadings and relevant case law, I find that SUSI fails both prongs of the Agrico standing test. SUSI is a representative of the customers, who are the real parties of interest in this proceeding because their refunds are at issue. Since none of the meters in question measure electric service provided to

SUSI, SUSI is not a potential candidate for a refund. SUSI can suffer no direct injury as a result of the Commission's decision. Because SUSI has failed to show that it "will suffer [an] injury in fact which is of sufficient immediacy to entitle [it] to a section 120.57 hearing," SUSI fails the first prong of the Agrico test. Moreover, this proceeding addresses the potential refunds to be made to the commercial customers who petitioned the Commission for a hearing. The purpose of the hearing is not to determine what recourse, if any, is available to SUSI, who is simply acting as a consultant to the customers. SUSI's interests do not fall within the zone of interest of this proceeding. SUSI has not shown that its injury, if any, "is of a type or nature which the proceeding is designed to protect." Therefore, SUSI also fails the second prong of the Agrico test.

Order No. PSC-04-0591-PCO-EI, pp. 3-4.

SUSI fails to identify any point of fact or law that the Prehearing Officer overlooked in this analysis. The basis for SUSI's motion for reconsideration – that the resolution of certain issues in this proceeding may establish some precedent that may be applied to similar complaints brought in the future – is irrelevant to the issue of SUSI's standing. As the Prehearing Officer recognized, SUSI can suffer no direct injury as a result of the Commission's decision in this proceeding because it is simply a *consultant* to the customers whose substantial interests are affected by this proceeding. SUSI does not allege that it may ever be in a position to bring a complaint against FPL as an individual FPL customer using the type of meter at issue in this proceeding or be affected in any other way as a result of the Commission's decision in this proceeding so as to give it standing. In fact, in a footnote to its motion, SUSI reaffirms the basis for the Prehearing Officer's decision by noting its indirect economic interest in this proceeding as a consultant:

While SUSI considers the details of its business arrangement with customers confidential, proprietary and protected as trade secrets, SUSI's compensation is affected by the amount of refund a SUSI client receives.

SUSI cannot, of course, vest itself with standing through its consulting fee arrangements with true parties in interest. For these reasons, staff recommends that the Commission deny SUSI's motion for reconsideration.

In addition, staff wishes to clarify that the "generic" issues mentioned by SUSI are, for purposes of this proceeding, generic only with respect to the meters at issue in this proceeding. Certainly, as staff and the parties have discussed, resolution of those "generic" issues may have some precedential value with respect to additional complaints on this subject. As noted above, however, the potential precedential impact of the Commission's decision on these issues does not confer standing on SUSI.

In sum, staff recommends that the Commission deny SUSI's motion for reconsideration.

Issue 2: Should the Commission grant FPL's motion for clarification of Order No. PSC-04-0591-PCO-EI?

Recommendation: Yes. The Commission should clarify Order No. PSC-04-0591-PCO-EI to properly reflect the background of this case with respect to the degree of dispute concerning the accuracy of the meters at issue. (C. KEATING)

Staff Analysis: In establishing the background of this docket, Order No. PSC-04-0591-PCO-EI states at page 1, in pertinent part:

At the time each of the complaints were made . . . there was no disagreement that each customer's meter had over-registered demand.

In its motion for clarification, FPL maintains that some of the meters at issue in this proceeding, when tested by FPL pursuant to Rule 25-6.052, Florida Administrative Code, did not over-register demand beyond the tolerance level set forth in that rule. Thus, FPL asks that the Commission clarify the above-quoted passage from Order No. PSC-04-0591-PCO-EI to properly reflect that at the time the complaints were made, there was some disagreement as to whether some of the meters at issue in this proceeding had over-registered demand.

Staff recommends that the Commission grant FPL's motion for clarification. The clarification sought by FPL will properly reflect the background of this case with respect to the degree of dispute concerning the accuracy of the meters at issue.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open. (C. KEATING)

Staff Analysis: This docket is set for a formal administrative hearing on September 28, 2004, and should remain open to allow the case to proceed to hearing.