

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: July 7, 2005

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

FROM: Office of the General Counsel (Gervasi, Halloran)
Division of Economic Regulation (Kummer)
Division of Regulatory Compliance & Consumer Assistance (Plescow)

RE: Docket No. 040208-EI – Consumer complaint against Florida Power & Light Company by Leticia Callard.

AGENDA: 07/19/05 – Regular Agenda – Posthearing Decision - Participation is limited to Commissioners and Staff

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040208.RCM.DOC

Case Background

On October 4, 2002, Mr. Jorge Callard filed a complaint with the 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 had 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 charges of \$348.21. The total backbilled amount in dispute was \$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 held on June 25, 2003. Mrs. Callard asserted that she had paid FPL what she owed the company and that she would not pay any additional amount. No agreement was reached.

By Proposed Agency Action Order No. PSC-O4-0397-PAA-EI, issued April 16, 2004 (PAA Order), the Commission 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. The Commission determined the reasonable amount of backbilling to be in the amount of \$9,279.18, which included investigative costs of \$348.21. Moreover, the Commission encouraged the customer to contact FPL immediately to make payment arrangements in order to avoid discontinuance of service without notice, which is authorized pursuant to Rule 25-6.105(5)(i), Florida Administrative Code. Finally, the Commission placed the customer on notice that pursuant to Rule 25-6.105(5)(f), Florida Administrative Code, FPL was 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, the Commission does not accept filings by facsimile. 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. FPL did not file any type of responsive pleading to the request for hearing. On August 3, 2004, the Commission issued Order No. PSC-04-0743-PCO-EI granting the late-filed request for hearing.

On November 29 and December 30, 2004, the case was heard before an Administrative Law Judge (ALJ) at the Division of Administrative Hearings. A full evidentiary hearing was conducted by video teleconference at sites in Miami and Tallahassee. On May 13, 2005, the ALJ entered his Recommended Order, a copy of which is attached to this recommendation as Attachment A. The ALJ determined that it was more likely than not that meter tampering had occurred, which prevented FPL from fully charging Mrs. Callard for her actual electricity consumption. Yet, the ALJ also determined that FPL's estimate of the amount of unmetered electricity significantly overstated Mrs. Callard's probable actual usage and was not reasonable, a violation of Rule 25-6.104, Florida Administrative Code.

On May 31, 2005, FPL submitted exceptions to the Recommended Order. Mrs. Callard submitted exceptions to the Recommended Order on June 2, 2005. This recommendation addresses whether the Commission should adopt the ALJ's Recommended Order or accept the parties exceptions to the Recommended Order.

Section 120.57(1)(l), Florida Statutes, establishes the standards an agency must apply in reviewing a Recommended Order following a formal administrative proceeding. The statute provides that the agency may adopt the Recommended Order as the Final Order of the agency or may modify or reject the Recommended Order. An agency may only reject or modify an Administrative Law Judge's findings of fact if, after a review of the entire record, the agency determines and states with particularity that the findings of fact were not based on competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.¹

Section 120.57(1)(l), Florida Statutes, also states that an agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and the interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.²

In regards to parties' exceptions to the ALJ's Recommended Order, section 120.57(1)(k), Florida Statutes states that an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.³

The Commission has jurisdiction pursuant to Sections 366.05, 120.569, and 120.57, Florida Statutes, and administers consumer complaints pursuant to Rule 25-22.032, Florida Administrative Code.

¹ § 120.57(1)(l), F.S. (2004).

² § 120.57(1)(l), F.S. (2004).

³ § 120.57(1)(k), F.S. (2004).

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission accept Mrs. Callard's exceptions to the Recommended Order?

RECOMMENDATION: No. Mrs. Callard's exceptions should be rejected. Mrs. Callard has failed to demonstrate that the factual findings in the Recommended Order are not based on competent, substantial evidence.

STAFF ANALYSIS: In the exceptions to the Recommended Order, a copy of which is attached to this recommendation as Attachment B, Mrs. Callard disagreed with the ALJ's factual findings that concluded meter tampering had occurred at her residence beginning in January 1999. She claims that "FPL failed to provide any evidence of tampering or failed to show any evidence of any back reading of the meter."⁴ In *Heifetz v. Dept. of Business Reg.*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985), the First District Court of Appeal held that "factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact." In the Recommended Order, the ALJ concluded that FPL had provided enough credible evidence to allow the determination that "more likely than not, meter #5C35633 was tampered with, preventing FPL from fully charging Callard for her actual electricity consumption."⁵ Mrs. Callard's exceptions to the Recommended Order directly contradict the ALJ's factual findings. However, the ALJ's findings of fact on the issue of whether or not meter tampering occurred are susceptible to ordinary methods of proof and are not infused with policy considerations. Thus, Mrs. Callard's exceptions should not be substituted for the ALJ's judgment of the facts.

Furthermore, Mrs. Callard's exceptions were not properly cited to the record, as required by section 120.57(1)(k), Florida Statutes. Nine of the eleven exceptions filed by Mrs. Callard included no citations to the record whatsoever.⁶ Therefore, the Commission is not legally required to rule on these exceptions.

The two exceptions that are cited to the record, however, are improperly taken out of context. In Exceptions 9 and 12, Mrs. Callard cites a portion of the record she claims illustrates that the Recommended Order found no meter tampering to have occurred. However, her assertion is based on an incomplete quote from paragraph 8 of the endnotes of the Recommended Order. In full, paragraph 8 reads:

It is noted that the EAUs for January 2001, March 2001, April 2002, and May 2002 are greater than 31128 and hence out of the range established by the July 2001 check readings and the initial reading of the replacement meter in August 2002. The undersigned considers it possible that Callard tampered with the meter during these months and (whether by accident or design) overstated her true usage. Because there is no evidence suggesting that such occurred, however, the

⁴ Leticia Callard's Exceptions to the Recommended Order.

⁵ Recommended Order, paragraph 12 at 6.

⁶ Leticia Callard's Exceptions to the Recommended Order, No. 1-8, 10.

undersigned has decided that treating the 'as billed' kwhs for these months as true and correct figures is more reasonable than any alternative.⁷

All of Mrs. Callard's exceptions are generally inconsistent with the fact that the ALJ had found there to be sufficient evidence that meter tampering had occurred at the Callard residence beginning in January 1999, as noted above. The question at issue in paragraph 8 cited by Mrs. Callard regarded when meter tampering began, not if meter tampering had occurred. While Mrs. Callard cited Exceptions 9 and 12 to a specific part of the record, the exceptions should be disregarded as being insufficient rejections of the ALJ's factual findings.

Finally, Exceptions 9 and 12 largely recast facts that were presented to the ALJ for consideration at the administrative hearing. Most of the issues raised by the exceptions are addressed in the factual findings made by the ALJ. While the ALJ did not share Mrs. Callard's view as to the significance of certain matters, it was entirely appropriate for the ALJ to make his own independent judgment as to the relevant and persuasive portions of the evidence presented. Despite Mrs. Callard's wishes, review of the ALJ's Recommended Order by the Commission is not an opportunity to reconsider or re-weigh the evidence.⁸

Mrs. Callard has not demonstrated that the ALJ's findings of fact were not based on competent, substantial evidence, and her version of the facts should not be substituted for the ALJ's factual findings. Furthermore, the exceptions primarily re-weigh the evidence presented at the administrative hearing and are improperly cited to the record. Thus, staff recommends that the exceptions to the Recommended Order be denied.

⁷ Recommended Order, paragraph 8 at 26.

⁸ McDonald v. Dept. of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977).

ISSUE 2: Should the Commission accept FPL's exceptions to the Recommended Order?

RECOMMENDATION: No. FPL's exceptions should be rejected. FPL has failed to demonstrate that the factual findings in the Recommended Order are not based on competent, substantial evidence. Furthermore, FPL has failed to show that the ALJ's conclusions of law erroneously apply the relevant law.

STAFF ANALYSIS: On May 31, 2005, FPL filed exceptions to the Recommended Order, a copy of which is attached to this Recommendation as Attachment C. FPL contested the ALJ's findings of fact in regards to the methodology used in calculating the backbill for the Callards' unmetered electricity. FPL also claimed that the ALJ departed from the law when he ruled that it was not legally entitled to recover the costs of investigating the meter tampering at the Callard residence.

In regards to methodology, FPL contested the ALJ's use of the Callard's Percentage of Annual Use, Monthly (PAUM), instead of the Seasonal Average Percentage Use method, to calculate the reasonable amount that should be backbilled. FPL cited eleven cases where the Commission employed the Seasonal Average Percentage Use method, which utilizes average FPL customer's PAUM to calculate a reasonable estimate of the amount that should be charged to individuals in backbilling cases. However, Rule 25-6.104, Florida Administrative Code, under which FPL based its claim in the record, does not specify one specific method which must be employed. Thus, it was the prerogative of the ALJ as the fact-finder to choose the method he believed was best suited to the specific facts in the record. Using the customer's own PAUM numbers may be a different method than the Commission typically employs, but with no rule specifying one particular method over another, it cannot be said that the ALJ's determination is an invalid departure from the law. Therefore, staff recommends that the Commission find that FPL did not meet the standard for rejecting the methodology used by the ALJ to calculate the reasonable amount to be backbilled because it did not show that the ALJ's factual findings were not based on competent, substantial evidence in the record.

In its exceptions, FPL also contested the ALJ's conclusions of law in regards to the issue of \$348.21 in costs incurred while investigating the meter tampering at the Callard residence. In the record of the case, FPL relies solely on Rule 25-6.104, Florida Administrative Code, which is silent on the issue of investigative costs. Thus, the ALJ held that the rule under which FPL was traveling did not provide a valid, legal basis for awarding such costs.⁹

However, FPL argued that it did provide sufficient legal basis for the award. FPL first claimed that awarding investigative costs was established Commission policy and procedure, as illustrated in Order No. PSC-96-1216-FOF-EI.¹⁰ Yet, in the Recommended Order, the ALJ pointed out that the Commission did not cite any legal authority when proposing that FPL recover investigative charges in that case. Furthermore, there is at least one case where the

⁹ Recommended Order, paragraph 59 at 23.

¹⁰ Issued September 24, 1996, in Docket No. 960903-EI, In re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity.

Commission has refused to grant investigative costs in a backbilling case because the utility failed to admit sufficient evidence into the record.¹¹ See Order No. PSC-87-17850-FOF-EI.

FPL then argued that it was entitled to recover the extra expenses incurred pursuant to its tariff on file with the Commission. FPL specifically cited tariff provisions 1.7 and 5.2, which state that the customer must pay for all extra expenses incurred on account of violations of the tariff or rules and regulations established by the PSC.¹² However, FPL failed to include these tariff provisions in the record for consideration by the ALJ at the administrative hearing. Only in its exceptions, filed two weeks after the full evidentiary hearing, did FPL cite the tariff agreements as a ground for recovery of investigative costs. Thus, staff recommends that it is not necessary for the Commission to rule on FPL's exceptions to the Recommended Order in regards to investigative costs, as the tariff provisions were not properly contained in the record pursuant to section 120.57(1)(k), F.S.

Staff believes that FPL has not demonstrated that the ALJ's findings of fact were not based on competent, substantial evidence. Furthermore, FPL's exceptions fail to meet the standard for properly rejecting an ALJ's conclusions of law, since a valid, legal basis for awarding investigative costs was not contained in the record. FPL has not presented any legally justifiable basis for deviating from or modifying any portion of the Recommended Order. Therefore, staff recommends that FPL's exceptions to the Recommended Order be denied.

¹¹ Issued July 15, 1987, in Docket No. 860091-EI, In re: Petition of Kenneth Tuch to Initiate Formal Complaint Against Florida Power and Light Company on Backbilling Charges.

¹² FPL's Exceptions to the Recommended Order at 3.

ISSUE 3: Should the Administrative Law Judge's Recommended Order be adopted as the Commission's Final Order in this case?

RECOMMENDATION: Yes. The Administrative Law Judge's Findings of Fact are based on competent, substantial evidence in the record. The Conclusions of Law appropriately apply the provisions of the Florida Statutes and the Florida Administrative Code.

STAFF ANALYSIS: At the formal hearing, the ALJ heard testimony from seven witnesses and received seven exhibits into evidence. After considering the weight of the evidence, the ALJ concluded that it was more likely than not that the Callards' meter had been tampered with, preventing FPL from fully charging the accurate amount of electricity consumed.¹³ However, the ALJ also determined that FPL's estimate of the amount of unmetered electricity significantly overstated the Callards' probable actual usage, and hence, was not reasonable.¹⁴ In the Recommended Order, a copy of which is attached to this Recommendation as Attachment C, the ALJ recommended that the Commission enter a Final Order "authorizing FPL to retroactively bill Mrs. Callard \$3,975.66 for the unmetered energy she used from January 1999 through July 2002."¹⁵

The ALJ used a different method to compute the Callard's unmetered energy than what has typically been employed by FPL in backbilling cases. FPL typically uses the Seasonal Average Percentage Use method for calculating the amount of energy used in backbilling cases. The Seasonal Average Percentage Use method factors in the PAUM of an average FPL customer. PAUM shows what part of an average FPL customer's annual energy consumption occurred in a given month. This number is then used to compute what a typical level of energy consumption would have been during the months when meter tampering was occurring. The average FPL customer PAUM typically forms the basis for the amount of unmetered electricity consumption for which an individual customer is backbilled in meter tampering cases.

In this particular case, however, the ALJ found that FPL had not provided competent, substantial evidence in the record to support the use of the FPL average customer PAUM. Yet, the ALJ did believe that FPL introduced enough data into the record for the fact-finder to reasonably determine the amount of unmetered electricity that the Callards consumed between January 1999 and July 2002. Thus, the ALJ estimated and employed the Callard's own PAUM, as opposed to the average FPL customer's PAUM, to compute more precisely the amount of unmetered electricity that should be backbilled.

In its exceptions, FPL contested the findings of fact in regards to the methodology used by the ALJ. Yet, the rule on which FPL based its claim does not explicitly require one method over another. Rule 25-6.104, Florida Administrative Code, provides that "in the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used."¹⁶ The ALJ determined that using the Callards' PAUM, instead of the average FPL customer's PAUM, was most appropriate in this particular case.

¹³ Recommended Order, paragraph 12 at 6.

¹⁴ Recommended Order, paragraph 15 at 7.

¹⁵ Recommended Order at 24.

¹⁶ Rule 25-6.104, Florida Administrative Code.

Since the rule does not specify one specific method that must be employed, it was the prerogative of the ALJ as the fact-finder to choose the method he believed was best suited to the specific facts in the record. Using the customer's own PAUM may be a different method than the Commission has typically employed, but with no rule specifying one particular method over another, it cannot be said that the ALJ's determination is an invalid departure from the law. Adopting the ALJ's Recommended Order does not set a precedent for the calculation of a customer's PAUM in future backbilling cases because the decision on the PAUM method was based on the particular facts introduced into the record in this case. Therefore, the ALJ's methodology need not be used by the Commission or FPL on a going forward basis. Nonetheless, the ALJ's factual findings are supported by competent, substantial evidence in the record and should be accepted.

FPL also contested the ALJ's determination that it was not entitled to recover investigative costs as a matter of law. However, the ALJ correctly observed that there is nothing in Rule 25-6.104, Florida Administrative Code, that requires that investigative costs be granted. Furthermore, although the Commission has previously granted investigative costs in meter tampering cases, as mentioned by FPL, it did not cite legal authority when granting the award. Thus, the ALJ's decision to deny investigative costs in this case was not an invalid departure from the law.

Upon review of the record, staff believes the Administrative Law Judge's findings of fact are based on competent, substantial evidence in the record. The conclusions of law appropriately apply the provisions of the Florida Administrative Code. Therefore, staff recommends that the Commission adopt the ALJ's Recommended Order as its Final Order.

Docket No. 040208-EI

Date: July 7, 2005

ISSUE 4: Should this docket be closed?

RECOMMENDATION: Yes. The docket should be closed after the time for filing an appeal has run.

STAFF ANALYSIS: The docket should be closed after the time for filing an appeal has run.