

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: September 8, 2005

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

FROM: Office of the General Counsel (Gervasi)
Division of Economic Regulation (Kummer)

RE: Docket No. 040208-EI – Complaint of Mrs. Leticia Callard against Florida Power & Light Company regarding backbilling.

AGENDA: 09/20/05 – Regular Agenda – Post-Hearing Decision on Reconsideration – No Oral Argument Requested

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 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.

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

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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.

Mrs. Callard filed a protest to the PAA Order and requested a hearing. On November 29 and December 30, 2004, the case was heard before an Administrative Law Judge (ALJ) at the Division of Administrative Hearings. The ALJ entered his Recommended Order on May 13, 2005, determining 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. The ALJ found that FPL's estimate of the amount of unmetered electricity significantly and unreasonably overstated Mrs. Callard's probable actual usage, and 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. The ALJ also found that FPL was not legally entitled to recover investigative costs. On May 31, 2005, FPL submitted exceptions to the Recommended Order. Mrs. Callard submitted exceptions to the Recommended Order on June 2, 2005.

By Order No. PSC-05-0806-FOF-EI, issued August 5, 2005 (Final Order), the Commission denied FPL and Mrs. Callard's exceptions to the Recommended Order and adopted the Recommended Order as its Final Order. On August 22, 2005, Mrs. Callard timely filed a request for reconsideration of the Commission's Final Order. FPL timely filed a response on August 29, 2005. Oral argument on the request for reconsideration was not requested. This recommendation addresses the request for reconsideration. The Commission has jurisdiction pursuant to Section 366.05(1), Florida Statutes, and Rule 25-6.104, Florida Administrative Code.

Discussion of Issues

Issue 1: Should Mrs. Callard's request for reconsideration of Order No. PSC-05-0806-FOF-EI be granted?

Recommendation: No, the request for reconsideration should be denied. (Gervasi)

Staff Analysis: The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law that the Commission overlooked or failed to consider in rendering its Order.¹ 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."²

In her request for reconsideration, Mrs. Callard states, among other things, that: 1) FPL violated the electrical code by ignoring the Callards' complaints about electrical problems in the past; 2) the so-called visible scratches on the protective glass of the meter were never seen by FPL's meter reader because they were not there to begin with; 3) the meter reader testified that it is possible to have read the meter incorrectly; 4) FPL improperly accessed the Callards' property and broke their fence; 5) FPL replaced the meter with one which was not presented and which will show false information on behalf of FPL; 6) the Callards have proven themselves to be innocent of the allegations against them and that FPL has failed to prove otherwise; and 7) the Callards have established witnesses' contradictions in their testimony concerning meter findings.

In its response, FPL states that Mrs. Callard's request is legally insufficient and should therefore be denied. FPL argues that Mrs. Callard does not cite to any statutes, administrative code provisions, or opinions which were overlooked or neglected by the Commission in rendering its Final Order and that therefore, Mrs. Callard's request for reconsideration must be denied as to any mistake of law. Moreover, FPL argues that although Mrs. Callard makes numerous unsubstantiated claims, none of her claims are set forth in the record. Rather, she makes a series of new claims with no basis contained in the record. FPL states that it would be error for the Commission to consider such claims. FPL cites to Order No. PSC-04-0942-FOF-TP for the proposition that "it is well established that it is inappropriate to raise new arguments in a motion for reconsideration."³ According to FPL, in most instances, the only way for FPL to respond to the new claims made by Mrs. Callard would be to also go outside of the record. If the PSC allowed such activity to occur, there would never be finality to matters brought before the Commission.

¹ See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). Moreover, 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)).

² Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

³ Issued September 23, 2004, in Docket No. 040301-TP, In Re: Supra Telecommunications and Information Systems, Inc.

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Staff agrees with FPL that Mrs. Callard's request for reconsideration fails to identify a point of fact or law that the Commission overlooked or failed to consider in rendering its Order. Nor are Mrs. Callard's arguments based upon specific factual matters set forth in the record and susceptible to review. Therefore, staff recommends that Mrs. Callard's request for reconsideration should be denied.

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Issue 1: Should this docket be closed?

Recommendation: Yes. The docket should be closed after the time for filing an appeal has run.
(Gervasi)

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