

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mother's Kitchen ) Docket No. 970365-GU  
Ltd. against Florida Public Utilities) )  
Company regarding refusal or ) Filed: October 15, 1998  
discontinuance of service )

Motion to Strike Portions of Petitioners'  
Motion for Reconsideration of the  
Order Denying Complaint

Respondent, Florida Public Utilities Company ("FPUC"), hereby files its Motion to Strike Portions of Petitioners' Motion for Reconsideration of the Order Denying Complaint as being prohibited by the Florida Administrative Procedures Act, and as grounds states:

1. On September 22, 1998, the Florida Public Service Commission ("Commission") in this docket issued its Order Denying Complaint, Order No. PSC-98-1254-FOF-GU.

2. On October 6, 1998, Petitioners filed their "Motion for Reconsideration of PSC Order Issued September 22 1998 Denying the Complaint Under Docket No.970365GU." Respondent Florida Public Utilities Company ("FPUC") on October 15, 1998 filed its Response to Petitioners' Motion for Reconsideration.

3. Section 120.57(1)(h), F.A.C., states that findings of fact shall be based exclusively on the evidence of record and on matters

officially recognized. The documents which FPUC requests be stricken from Petitioners' motion for reconsideration do not meet this requirement. Sec. 120.57(1)(j), F.A.C., only allows an agency to reject or modify the ALJ's findings of fact in the recommended order if it first determines from a review of the entire record that the findings were not based upon competent substantial evidence or that the proceedings did not comply with essential requirements of law. The Public Service Commission may not consider documents which are outside the record in ruling on a motion for reconsideration.

4. A motion to strike non-record documents attached to a motion for reconsideration should be granted. Plante v. Dept. of Bus. and Prof. Reg., 716 So. 2d 790 (Fla. 4th DCA 1998). In Plante the Court found no error where the agency on remand for reconsideration granted a motion to strike from a pleading a non-record document. The Court reasoned that the information consisted of "additional facts which were not before the hearing officer, and therefore cannot be considered by the Division." Id. at 792. This principle is consistent with the administrative law principle that an appellate court will strike non-record documents from court filings where such documents were not record documents in an administrative hearing. E.g. Agency for Health Care Admin. v.

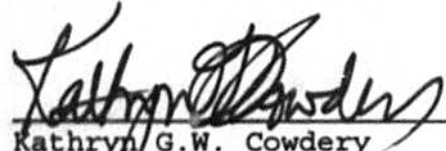
Orlando Regional H.S., 617 So. 2d 385, 389 (Fla. 1st DCA 1993);  
Arlotta v. Florida Parole and Probation Com'n., 419 So. 2d 1159  
(Fla. 1st DCA 1982).

5. All documents attached to Petitioners' motion for reconsideration should be stricken, including Petitioners' handwritten indices of the exhibits, as being not evidence of record, except Exhibit One (p. 22 of Recommended Order); FPUC receipt in amount of \$521.72, dated 8/28 (Resp. hearing Exh. #9) ; FPUC receipt in amount of \$290 dated 8/12 (Resp. Exh. #8); p. 2 of 31 of Resp. hearing Exh. #32 (FPUC computer record) (p. 1 of 31 must be stricken as having been annotated by Petitioners); 8/13/96 time log (Resp. Exh. #26); and hearing transcript excerpt, pp. 456-476.

WHEREFORE, Respondent FPUC respectfully requests that its motion to strike certain documents from Petitioners' motion for reconsideration be granted.

Dated this 15th date of October, 1998.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Bob Elias, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and by U.S. mail to Anthony Brooks, P.O. Box 1363, Sanford, Florida 32772, on this 15th day of October, 1998.



Kathryn G. W. Cowdery