

MEMORANDUM

FEBRUARY 8, 1999

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RECORDS AND
REPORTING

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (ELIAS) *RVE*

RE: DOCKET NO. 970365-~~9~~⁰ - COMPLAINT OF MOTHER'S KITCHEN LTD.
AGAINST FLORIDA PUBLIC UTILITIES COMPANY REGARDING
REFUSAL OR DISCONTINUANCE OF SERVICE.

99-0186-FOF

Attached is an ORDER GRANTING MOTION TO STRIKE AND DENYING
MOTION FOR RECONSIDERATION to be issued in the above-referenced
docket. (Number of pages in order - 8)

RVE/js
Attachment

cc: Division of Electric and Gas (Makin)
Division of Consumer Affairs (Plescow)
I:970365o.rve

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mother's
Kitchen Ltd. against Florida
Public Utilities Company
regarding refusal or
discontinuance of service.

DOCKET NO. 970365-GU
ORDER NO. PSC-99-0186-FOF-GU
ISSUED: February 3, 1999

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JULIA L. JOHNSON
E. LEON JACOBS, JR.

ORDER GRANTING MOTION TO STRIKE AND
DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

I. CASE BACKGROUND

On September 17, 1996, Mr. Anthony Brooks II, on behalf of
Mother's Kitchen, Ltd. (Mother's Kitchen or Petitioners or
Complainant) filed a complaint with the Division of Consumer
Affairs (CAF) of the Florida Public Service Commission (Commission)
against Florida Public Utilities Company (FPUC or the company).
Mother's Kitchen claimed that gas service was improperly
disconnected by FPUC.

By Proposed Agency Action Order No. PSC-97-1133-FOF-GU, issued
September 29, 1997, the Commission found that FPUC acted in
compliance with the applicable provisions of Florida Administrative
Code in all aspects of its handling of this account. Mother's
Kitchen timely protested the Commission's proposed action. The
matter was referred to the Division of Administrative Hearings for
assignment of an Administrative Law Judge. A formal hearing was
held in Sanford, Florida, on March 4, 1998, and continued by video
teleconference between Orlando, Florida, and Tallahassee, Florida,
on April 1, 1998.

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

On June 11, 1998, the Administrative Law Judge entered his Recommended Order. The Recommended Order recommended that FPUC: 1) "acted in compliance with Public Service Commission rules concerning the establishment of service and management of customer deposits"; 2) "properly administered the account at issue here at all times leading up to its disconnection on September 13, 1996"; and 3) "acted in compliance with all Commission rules regarding that disconnection and refusal to reconnect". The Administrative Law Judge further recommended that FPUC should not be required to provide a refund of any part of the deposit made on this account or any amount paid for service or fees on the account.

After the entry of the Recommended Order, the parties filed several pleadings with the Commission. On June 29, 1998, Mother's Kitchen filed Exceptions to the Recommended Order. On July 2, 1998, FPUC filed a Motion to Strike those exceptions. On July 24, 1998, Mother's Kitchen filed a Response to FPUC's Motion to Strike. On July 28, 1998, FPUC filed a Motion to Strike Mother's Kitchen's July 24, 1998, response.

On September 22, 1998 we entered our final order, Order No. PSC-98-1254-FOF-GU, adopting (with a correction for a scrivener's error concerning the location of the first hearing) the Administrative Law Judge's Recommended Order. The final order also granted both Motions to Strike.

On October 6, 1998, Mother's Kitchen timely filed a Motion for Reconsideration. Included as an attachment to that motion are more than 50 pages of what the Petitioners refer to as exhibits.

On October 15, 1998, FPUC filed a Response to the Motion for Reconsideration and a Motion to Strike Portions of the Motion for Reconsideration.

On October 26, 1998, Mother's Kitchen filed a Response to the Motion Strike. This order addresses the Motion to Strike and the Motion for Reconsideration.

II. FPUC's Motion to Strike Portions of Petitioners' Motion for Reconsideration

On October 15, 1998, FPUC filed a Motion to Strike Portions of Petitioner's Motion for Reconsideration. FPUC moved to strike most of the documents attached to Mother's Kitchen's Motion for

Reconsideration. FPUC claims that the subject documents are not part of the evidentiary record of this proceeding and are therefore, not appropriate for consideration by the Commission.

As support for its motion, FPUC asserts that Section 120.57(1)(h), Florida Statutes limits the basis for Findings of Fact to the evidence of record and to matters officially recognized. Further, FPUC suggests that consideration of these matters in the context of a Motion for Reconsideration would be violative of Section 120.57(1)(j), Florida Statutes, which only permits an agency to reject or modify the findings in a Recommended Order if it first determines from a review of the entire record that those findings were not based on competent substantial evidence, or that the proceeding did not comply with the essential requirements of law.

FPUC also cites several court opinions as authority for its motion. In Plante v. Dept. Of Business and Professional Regulation, 716 So.2d 790 (Fla. 4th DCA 1998), the court affirmed an agency order striking a non-record document in the context of a remand for reconsideration. FPUC states "(t)he 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." FPUC also notes two cases where appellate courts have stricken non-record documents from court filings where such documents were not record documents in the administrative hearing Agency for Health Care Administration v. Orlando Regional Health Services, 617 So.2d 385, 389 (Fla. 1st DCA 1993); and Arlotta v. Florida Parole and Probation Commission, 419 So.2d, 1159 (Fla. 1st DCA 1982).

FPUC notes that some of the documents attached to Mother's Kitchen's Motion for Reconsideration are part of the evidentiary record. Except where one of those documents has been annotated by the Petitioner, FPUC does not seek to have those documents stricken.

On October 26, 1998, Mother's Kitchen filed a response to the motion titled Petitioners' Response to the Respondent's Motion to Strike Portions of Petitioners' Motion for Reconsideration of the Order Denying Complaint. The pleading states in part:

Throughout the entire record of these proceedings, the Petitioners have voiced objections to what they perceived to be bias and unjust actions on the part of Commission

Staff; and since Staff is a part of the Commission; and the decision making process upon which Commission Orders are based; the Commission was obligated to address any assertion or allegation of bias during proceedings prior to making a final decision in this matter.

Mother's Kitchen's response does not address any of the statutes or cases cited by FPUC in its Motion to Strike. The cases cited by Mother's Kitchen (paragraphs 4 and 5 of the response) appear to be irrelevant and non-responsive to the question of whether or not the consideration of extra-record documents in the context of a Motion for Reconsideration is permitted pursuant to Chapter 120, Florida Statutes.

The only possible relevant argument in the Response is found in paragraph 3. The Petitioners infer that Diamond Cab Company of Miami v. King, 146 So.2d, 889 (Fla. 1962) is authority for the proposition that it is appropriate to raise matters outside the record in the context of a Motion for Reconsideration. We disagree. The matters which were "overlooked or which the agency failed to consider" are limited to evidence of record or applicable law. Mother's Kitchen does not dispute FPUC's assertion the subject documents are not part of the evidentiary record.

We believe the authority cited by FPUC is controlling and dispositive. Under the Administrative Procedures Act, it simply is not permitted for an agency to reconsider a Recommended Order based on extra-record material. Additionally, Section 120.57(1)(b), Florida Statutes mandates that all parties have an "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination, and submit rebuttal evidence." Consideration of these documents in this context would deny FPUC these rights. Further, some of the material included with Mother's Kitchen's motion appears to be hearsay, which pursuant to section 120.57(1)(c), Florida Statutes, could be excluded from consideration by the fact-finder. Therefore, we find that FPUC's Motion to Strike Portions of Petitioner's Motion for Reconsideration of the Order Denying Complaint shall be granted.

III. Mother's Kitchen's Motion for Reconsideration

On October 6, 1998, Mother's Kitchen timely filed a pleading titled Petitioner's Motion for Reconsideration of PSC Order Issued September 22, 1998, Denying Complaint under Docket No. 970365-GU. Mother's Kitchen requests that the Commission:

1. Find that Mother's Kitchen's exceptions were timely filed, or in the alternative, that equitable circumstances prevented timely filing;
2. Find that FPUC's two Motions to Strike post Recommended Order filings which were granted in the Commission's final order should be denied;
3. Find that Mother's Kitchens' exceptions were based on "sound principles"; and
4. Find that Mother's Kitchen's complaint should be sustained.

On October 15, 1998, FPUC filed a response to the Motion for Reconsideration. On page 2 of its response, FPUC states:

Petitioners' motion is an inflammatory, argumentative, version of certain facts perceived by Plaintiffs, which alleges Staff bias in the proceedings, wrongful and arbitrary rulings by the ALJ, and reargument of Petitioners' arguments made during various filings preceding Petitioners' exceptions being stricken as untimely. Petitioners do not allege an overlooked or mistaken point of law relating to the issues and facts which were before the ALJ.

FPUC further states that "A motion for reconsideration is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the order." Response at page 3.

In addition, FPUC states on pages 3 and 4 of its response that:

Petitioners argue that staff had a "racially motivated" bias against their case, and that the Final Order should be reconsidered on this basis. However, the so-called "evidence of this bias and discriminatory action" is merely that the ALJ accepted FPUC's evidence and made findings of fact in FPUC's favor and against Petitioners, that staff did not accept Petitioners' version of the facts, and that staff is to blame for Petitioners' belief that their exceptions did not have to be filed with the agency, but that service would suffice (pp. 6-11). There is no mistake of law or fact in this regard, no merit to

Petitioner's argument, and no support whatsoever for reconsideration on this basis.

In at least 11 statements in Mother's Kitchen's Motion for Reconsideration, Mother's Kitchen has alleged bias on the part of staff. Staff categorically denied any bias whatsoever in favor of or against either party to this proceeding. Moreover, such allegations are belied by the procedural history of this proceeding and the safeguards explicit in the Administrative Procedures Act.

Mother's Kitchen did raise the issue of bias in its protest of Proposed Agency Action Order No. PSC-97-1133-FOF-GU, issued September 29, 1997. With due regard for this allegation, this matter was referred to the Division of Administrative Hearings. The evidentiary hearing was conducted by a neutral Administrative Law Judge, not employed by or associated with this agency.

The matter was vigorously litigated by Mother's Kitchen and FPUC. Both parties conducted extensive discovery. Over two full days of hearing, both parties offered extensive testimony and numerous exhibits. Both parties submitted Proposed Recommended Orders. The ALJ then issued his Recommended Order, which was based on extensive consideration of the evidence and argument of both Mother's Kitchen and Florida Public Utilities Company. As previously discussed in this order, an agency has extremely limited authority to overrule the findings of fact made by and Administrative Law Judge. In the instant case, those findings of fact were adopted in full by the agency. Further, the attorney who represented the Commission at the hearing had no involvement in either the presentation to the Commission of the Recommended Order, or the issuance of the Final Order.

Much of Mother's Kitchen Motion for Reconsideration discusses actions which took place before the protest of the PAA Order. A formal proceeding pursuant to Chapter 120, Florida Statutes, is a de novo proceeding. The Commission's decision may only be based on the record before the Administrative Law Judge. Mother's Kitchen disputes the findings made by the Administrative Law Judge. However, Mother's Kitchen has not shown that those findings were not based on competent substantial evidence. As such, Mother's Kitchen has not made the showing necessary to grant a motion for Reconsideration. Further, Mother's Kitchen has not shown error in the Commission's decision to grant FPUC's motions to strike.

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In its motion, Mother's Kitchen alleges that equitable circumstances prevented the timely filing of its exceptions, specifically, the ill health of its qualified representative in late June, when the exceptions were due. We do not find this argument credible. In its post hearing filings made June 29, 1998, July 24, 1998, and August 11, 1998, Mother's Kitchen repeatedly insisted that its filings were timely. No mention by Mother's Kitchen of any illness is found until after the issue of equitable circumstances was analyzed in staff's August 24, 1998, Recommendation.

The purpose of a motion for reconsideration is to bring to the attention of the agency some matter which it overlooked or failed to consider when it rendered its Order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962). The mere fact that a party disagrees with the Order is not a basis for rearguing the case. Id. Nor is reweighing the evidence a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958).

Mother's Kitchen's Motion For Reconsideration fails to demonstrate mistake, inadvertence, or some matter which the Commission overlooked or failed to consider when the Commission rendered the Order. Therefore, we find that the Petitioner's Motion for Reconsideration of PSC Order Issued September 22, 1998, Denying Complaint under Docket No. 970365-GU shall be denied.

Based on the foregoing, it is

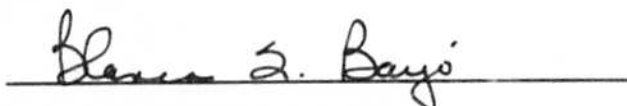
ORDERED by the Florida Public Service Commission that Florida Public Utilities Company's Motion to Strike Portions of Petitioner's Motion for Reconsideration of the Order Denying Complaint is granted. It is further

ORDERED that the Petitioner's Motion for Reconsideration of PSC Order Issued September 22, 1998, Denying Complaint under Docket No. 970365-GU is denied. It is further

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ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd day of February, 1999.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.