



Public Service Commission

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DATE: JULY 23, 1998

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

FROM: DIVISION OF LEGAL SERVICES (C. KEATING) *WCK*
 DIVISION OF CONSUMER AFFAIRS (MCHARGUE) *WCK*
 DIVISION OF ELECTRIC AND GAS (GING) *WCK* *Rwm* *JDJ*

RE: DOCKET NO. 980682-EI - COMPLAINT BY SUSAN K. CANDELORE AGAINST FLORIDA POWER CORPORATION REGARDING ALLEGED VIOLATION OF MEDICALLY ESSENTIAL SERVICE TARIFF THROUGH FAILURE TO GIVE REQUIRED 30-DAY NOTICE OF DISCONNECT.

AGENDA: 08/04/98 - REGULAR AGENDA - PROPOSED AGENCY ACTION - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\980682.RCM

CASE BACKGROUND

On May 26, 1998, Susan K. Candalore (Ms. Candalore) filed a complaint with the Commission alleging that Florida Power Corporation (Florida Power) violated its "Medically Essential Service" tariff (MES tariff) by failing to give 30 days' notice of discontinuance of service. Ms. Candalore receives service under the MES tariff because her minor son, Stephen Andrew McVey, is a post near-drowning victim who is totally dependent on electrical life-sustaining machines. On June 22, 1998, FPC timely filed an answer and affirmative defense to Ms. Candalore's complaint.

On July 2, 1997, Florida Power mailed to Ms. Candalore her regular account statement. This statement showed a past due balance of \$488.76 and current charges of \$388.42, with a delinquent date of July 24, 1997. When payment was not received by that date, Florida Power's computer generated a delinquent notice

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that showed a disconnect for nonpayment date of August 1, 1997. However, service was not disconnected on August 1. On August 6, 1997, Florida Power mailed another letter to Ms. Candelore which stated that failure to make payment for the outstanding account balance could result in service interruption on or after August 21, 1997.

On August 14, 1997, Ms. Candelore contacted the Commission's Division of Consumer Affairs to seek assistance in resolving this matter. She complained that Florida Power had not provided her with the 30-day notice required by the MES tariff. On August 20, 1997, however, Ms. Candelore paid the amount requested. Florida Power did not discontinue service, and the Division of Consumer Affairs closed the complaint file.

Ms. Candelore's current complaint seeks: (1) the Commission's determination that Florida Power violated its MES tariff; and (2) the imposition of any fine, discipline, or other relief that the Commission finds appropriate. According to the complaint, the Commission's determination will affect a cause of action filed in circuit court by Ms. Candelore against Florida Power.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission dismiss the complaint of Susan K. Candelore against Florida Power Corporation for failure to state a cause of action?

RECOMMENDATION: No. Ms. Candelore's complaint states a cause of action upon which the Commission may grant relief.

STAFF ANALYSIS: Florida Power states, as an affirmative defense to Ms. Candelore's complaint, that the complaint fails to state a cause of action. In determining whether a complaint fails to state a cause of action, the complaint must be considered in the light most favorable to the complainant.

Florida Power points out that Section 366.095, Florida Statutes, gives the Commission the power to impose a penalty "upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated

any lawful rule or order of the Commission or any provision of this chapter." Florida Power argues, essentially, that the complaint fails to state a cause of action because (1) the complaint does not allege that Florida Power "refused to comply with" or "willfully violated" its tariff and (2) in any event, the Commission does not have the power under Section 366.095, Florida Statutes, to penalize Florida Power for violating or failing to comply with its tariff. Staff believes, however, that neither of these arguments provides a basis for finding that Ms. Candelore's complaint fails to state a cause of action.

A. Commission Authority to Impose Penalties for Tariff Violations

The Commission has exclusive jurisdiction to "regulate and supervise each public utility with respect to its rates and service." Section 366.04(1), Florida Statutes; Trawick v. Florida Power & Light Company, 700 So.2d 770 (Fla. 2nd DCA 1997). Further, pursuant to Section 366.03, Florida Statutes, each public utility is required to furnish "reasonably sufficient, adequate, and efficient service upon terms as required by the Commission."

Section 366.05(1), Florida Statutes, establishes the Commission's power to prescribe terms of service, including, among other things, fair and reasonable service rules and regulations to be observed by each public utility. In implementing Section 366.05(1), the Commission promulgated Rule 25-9.004, Florida Administrative Code. Rule 25-9.004(1), Florida Administrative Code, provides that "each utility shall file with the Commission tariffs applicable to all territory served by it, showing . . . all rules and regulations relating thereto . . ."

Rule 25-6.033, Florida Administrative Code, extends this requirement specifically to electric utilities. Subsection (2)(a) of the rule requires each utility to include in its tariffs, among other things, rules governing procedures for disconnection and reconnection of service. Pursuant to Rules 25-6.033(4) and 25-9.001(3), Florida Administrative Code, no rule or regulation is effective until approved by order of the Commission.

Under this regulatory scheme, a utility's tariffs amount to terms of service required by the Commission. Thus, a utility's failure to abide by its Commission-approved tariff amounts to a violation of the utility's duty under Section 366.03, Florida Statutes, to furnish service upon terms required by the Commission.

Of particular relevance to this case is Rule 25-6.105(11), Florida Administrative Code, which provides that each utility shall

establish a procedure in its tariff for discontinuance of service when that service is medically essential. In compliance with this rule, Florida Power filed a tariff that was administratively approved on February 9, 1982. Therefore, Florida Power's failure to abide by its MES tariff, a term of service required by the Commission, would subject it to the provisions of Section 366.095, Florida Statutes.

In any event, staff believes that the Commission may make a finding concerning Florida Power's compliance with its tariff without necessarily invoking the penalty provisions of Section 366.095, Florida Statutes. The Commission has the authority to approve a tariff. It can address a utility's compliance with its approved tariff pursuant to the police powers conferred by Section 366.01, Florida Statutes. Thus, the Commission should not find that Ms. Candelore's complaint fails to state a cause of action.

B. Refusal to Comply or Willful Violation

In her complaint, Ms. Candelore alleges that Florida Power violated its MES tariff, but does not allege that they did so willfully or intentionally. Florida Power asserts that because Ms. Candelore fails to allege a willful violation of the tariff, the complaint fails to state a cause of action under Section 366.095, Florida Statutes.

Regardless of Ms. Candelore's characterization of the alleged tariff violation, the Commission has the authority to determine whether Florida Power willfully violated its tariff and penalize Florida Power as provided for in Section 366.095, Florida Statutes. Ms. Candelore's complaint should, therefore, not be dismissed for failure to allege that Florida Power willfully violated its tariff.

In any event, as stated above, staff believes that the Commission may make a finding concerning Florida Power's compliance with its tariff without necessarily invoking the penalty provisions of Section 366.095, Florida Statutes, for the reasons stated above. Thus, the Commission should not find that Ms. Candelore's complaint fails to state a cause of action.

C. Conclusion

In summary, Ms. Candelore's complaint states a cause of action for which the Commission may grant relief, and, therefore, the complaint should not be dismissed.

ISSUE 2: Should the Commission find that Florida Power Corporation violated the notice provision in its Medically Essential Service tariff in handling the account of Susan K. Candelore?

RECOMMENDATION: Yes. In handling Ms. Candelore's account, Florida Power Corporation violated its Medically Essential Service tariff by failing to give Ms. Candelore 30 days' notice of discontinuance of service.

STAFF ANALYSIS: Florida Power's MES tariff (Section No. IV, Sheet 4.100, Part 10.03), which was in effect at all material times, stated in its entirety:

The Company will give 30 days notice of discontinuance of service to any customer whose service is deemed to be medically essential. The Customer must provide a letter from a doctor of medicine or osteopathy, certified to practice medicine in the State of Florida, stating electric service is essential to the Customer's physical condition. This additional time period shall allow the Customer to make necessary arrangements for continuing service.

In its answer, Florida Power asserts that this 30-day notice is mailed separate and apart from the normal billing and is automatically generated by its computer system.

As stated above, Florida Power's computer generated a delinquent notice for Ms. Candelore's account on July 24, 1997, with a disconnect for nonpayment date of August 1, 1997. It appears that this notice was the type of notice normally sent to customers other than those receiving service under the MES tariff. Clearly, this delinquent notice did not provide the proper time for payment under the MES tariff. Florida Power apparently recognized this error and did not disconnect service on August 1. Ms. Candelore does not recall receiving the notice and makes no mention of it in her complaint. On August 6, 1997, Florida Power sent another letter to Ms. Candelore which stated that failure to make payment by August 20, 1997, for the outstanding account balance could result in service interruption on or after August 21, 1997.

Florida Power admits that its August 6, 1997, letter did not provide the 30-day notice required by its MES tariff. Further, Florida Power acknowledges that even calculating the 30-day notice period from the delinquent notice of July 24, 1997, results in only a 28-day notice period. Accordingly, the Commission should find

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that Florida Power violated the notice provision in its MES tariff by failing to give Ms. Candelore 30 days' notice of discontinuance of service.

ISSUE 3: Should the Commission impose any penalty upon, or otherwise discipline, Florida Power Corporation for violating the notice provision in its Medically Essential Service tariff in handling the account of Susan K. Candelore?

RECOMMENDATION: No. The Commission should not impose any penalty upon, or otherwise discipline, Florida Power Corporation for violating the notice provision in its Medically Essential Service tariff.

STAFF ANALYSIS: As stated above, Section 366.095, Florida Statutes, gives the Commission the power to impose a penalty "upon any entity subject to its jurisdiction under this chapter that is found to have refused to comply with or to have willfully violated any lawful rule or order of the Commission or any provision of this chapter." Accepting the analysis in Issue 1, this power extends to tariff violations.

In her complaint, Ms. Candelore does not specifically assert that Florida Power "refused to comply with" or "willfully violated" its MES tariff. Ms. Candelore does state in her complaint that Florida Power did not cooperate or assist her in extending the disconnect deadline.

Florida Power asserts that the insufficient notice period it provided was merely a clerical error, the result of a compound mistake caused by assuming that the 30-day notice period began with the July 24, 1997, delinquent notice, then miscalculating the 30-day period from that starting point. Florida Power also argues that because Ms. Candelore's service was not disconnected, the type of harm that the tariff was intended to prevent did not occur. Further, Florida Power asserts that although Ms. Candelore's account has been nearly constantly delinquent and eligible for disconnection over the past eight years, Florida Power has accommodated her by foregoing a literal application of its MES tariff.

Staff does not believe that imposition of a penalty or any other discipline in this case is appropriate. A review of our complaint files indicates that this tariff violation was an isolated event and is not indicative of a recurring problem at Florida Power. Further, Florida Power's MES tariff was amended effective January 24, 1998, to clarify the procedures for providing disconnect notices to customers receiving service under its MES tariff. The amended MES tariff should further reduce the likelihood of a similar tariff violation. Staff, therefore,

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believes it is unnecessary to invoke the penalty provisions of Section 366.095, Florida Statutes.

In making this recommendation, Staff is cognizant of Ms. Candelore's civil action against Florida Power for intentional infliction of emotional distress. Because Ms. Candelore made no specific allegations and the parties presented little argument and no evidence on the issue of whether Florida Power "refused to comply with" or "willfully violated" its MES tariff, staff is without sufficient knowledge and reluctant to recommend a finding either way on this issue that may affect the civil action on the issue of intent. For purposes of the Commission's resolution of this case, we believe, for the reasons stated in the previous paragraph, that imposition of a penalty or any other discipline is not appropriate.

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ISSUE 4: Should this docket be closed?

RECOMMENDATION: This docket should be closed if no person whose substantial interests are affected by the proposed action files a protest within the 21-day protest period.

STAFF ANALYSIS: At the conclusion of the protest period, if no protest is filed, this docket should be closed.