

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mr. Mario P. Martinez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity.

DOCKET NO. 980332-EI
ORDER NO. PSC-98-1078-FOF-EI
ISSUED: August 10, 1998

The following Commissioners participated in the disposition of this matter:

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

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING COMPLAINT
AND APPROVING BACKBILLING DUE TO METER TAMPERING

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

Background

On August 5, 1997, Mr. F. David Famulari filed a complaint with the Division of Consumer Affairs (CAF) on behalf of his client Mario P. Martinez against Florida Power & Light Company (FPL). FPL backbilled Mr. Martinez in the amount of \$8,513.84 for alleged unbilled energy from May 31, 1990, through June 20, 1995, and investigative charges. Mr. Martinez disputes the amount of the backbilling as well as his liability therefore.

In a report provided to CAF, FPL stated that the backbilled amount was for service provided to 4891 S.W. 5th Terrace, Miami,

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Florida, in the name of Mario P. Martinez. FPL alleges that meter tampering occurred at this location from May 31, 1990, through June 20, 1995.

FPL provided a report detailing the events leading up to Mr. Martinez' complaint. The report presented the events as follows:

- November 1, 1994 - An FPL meter reader reported low usage at 4891 S.W. 5th Terrace, Miami, FL.
- March 21, 1995 - An FPL revenue protection meterman documented a missing outer seal and a hole in the meter canopy. A new seal (#0006392) was installed.
- June 18, 1995 - An FPL revenue protection investigator documented a wire through the hole in the canopy preventing the recording dial from turning.
- June 20, 1995 - A new meter was installed.
- August 14, 1995 - Mr. Martinez was interviewed and denied knowledge of the tampering.
- March 18, 1996 - Service was disconnected for non-payment.
- June 21, 1996 - Service was turned on at 4891 S.W. 5th Terrace in the name of Evelio Beltran but later turned off when it was determined that the Martinezes were still residing at the location.

In addition to the above-stated events, there have been two court cases against Mr. Martinez, a criminal proceeding and a civil proceeding. The criminal trial, State of Florida v. Mario Martinez Pastor, Case No. M95-46177A, was brought on charges of trespass and larceny of a utility pursuant to Florida Statutes Section 812.14. After a jury trial, Mr. Martinez was found not guilty.

The civil case, Florida Power & Light Co. v. Mario P. Martinez et al., Case No. 96-9101-CA-21, was based on open account, account stated, services sold and delivered, and requested treble damages pursuant to Florida Statutes, Section 812.14. A Partial Summary Judgment, issued March 19, 1997, found Mr. Martinez liable to FPL on the account stated, open account and services sold and delivered claims and awarded damages in the amount of \$9,319.73. Counsel for

the Defendant filed a Motion for Rehearing, in which it was argued that the court did not have jurisdiction to specify the dollar amount for which the Defendant is liable and requested that a decision regarding the dollar amount to be deferred to the Florida Public Service Commission. Apparently persuaded by the Motion For Rehearing, the Circuit Court Judge modified the Partial Summary Judgment. The amended judgment found Mr. Martinez liable for the open account, account stated and goods sold and delivered claims but deferred a determination of the amount due to the Commission. The Order On Defendant's Motion For Rehearing, issued July 21, 1997, states:

2. Plaintiff's Motion for Summary Judgment is **Granted** as to Counts II, III, and IV of the Complaint. Accordingly, Defendant, Mario P. Martinez, a/k/a Mario Pastor Martinez, a/k/a Mario Martinez Pastor is liable to Plaintiff, Florida Power & Light Company in an amount to be determined by the Florida Public Service Commission pursuant to the applicable provisions of the Florida Administrative Code.

Order On Defendant's Motion For Rehearing, pg.1.

On September 8, 1997, based on FPL's report, CAF sent a letter to Mr. Martinez' attorney, F. David Famulari, indicating that FPL appeared to be in compliance with Commission rules in its backbilling of service to the Martinez account. On September 25, 1997, Mr. Famulari requested an informal conference regarding the matter.

An informal conference was held via video from the Miami District Office on January 22, 1998. In attendance were, Mr. Martinez along with his attorney Mr. Famulari, representatives from FPL, and staff. At the conference, Mr. Martinez again stated that since he was found not guilty in the criminal trial, he was not responsible for backbilling of the alleged unbilled energy. An FPL representative explained that regardless of the criminal trial decision, because he benefited from the use of the diverted electricity, Mr. Martinez was responsible for paying the backbilled amount. Mr. Martinez also stated that he did not agree with the amount of energy backbilled. An FPL representative then explained the backbilling methodology. After Mr. Martinez discussed his options with his attorney, Mr. Famulari stated that Mr. Martinez would attempt to borrow the money in order to pay FPL. Both

parties accepted this arrangement and agreed to report on the status of the agreement to CAF by February 3, 1998. On February 3, 1998, Mr. Famulari notified CAF that Mr. Martinez could not obtain a loan and requested that the matter be brought before the Commission for resolution

Evidence Of Meter Tampering

Prima facie evidence of meter tampering documented in FPL's reports, as well as during the informal conference, demonstrates that meter tampering occurred. In support of its conclusion that meter tampering occurred at 4891 S.W. 5th Terrace, FPL documented several events. "Low use" was reported at the above address on November 1, 1994. It is common for meter readers to report locations where usage does not appear in-line with other residences in the immediate area. Following the report of "low use", on March 21, 1995, an FPL revenue protection meter reader observed a hole in the meter canopy. At that time, notwithstanding the observed hole, meter tampering was not readily apparent. However, on June 18, 1995, an FPL revenue protection investigator observed a wire through the hole in the canopy. The wire was preventing the recording disc from turning, which prevents energy consumed under these conditions from being registered and billed. On June 20, 1995, the altered meter was removed and replaced with a new meter known to record accurately.

Usage recorded for the two months following the meter change out was 3,071 kilowatt hours (kWh) and 2,192 kWh respectively. Both of these amounts are considerably larger than any previous months' billed usage since the inception of Mr. Martinez' account in May 1990. In addition, the new tenant's usage subsequent to the Martinez' residency at 4891 S.W. 5th Terrace was consistent with the above recorded usage. Throughout the first ten months of 1997, the new tenants averaged 2,345 kWh of usage per month.

After establishing direct benefit of the unbilled energy, the utility may bill the customer based on a reasonable estimate of usage. Rule 25-6.105, Florida Administrative Code states that "[i]n the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used." FPL has clearly demonstrated that the meter at 4891 S.W. 5th Terrace was altered in order to prevent an accurate recording of the energy used.

In sum, FPL has proffered sufficient evidence to determine that meter tampering occurred at the Martinez residence at 4891 S.W. 5th Terrace, Miami. Therefore, FPL shall be allowed to backbill the Martinez account for unmetered kilowatt hours.

Reasonableness Of Backbilled Amount

Florida Power & Light Company's calculation of the backbilled amount of \$8,513.84, which includes investigation charges of \$356.63, is a reasonable approximation of the unbilled energy plus investigative costs.

Based on its investigation, FPL concluded that as a result of meter tampering, the billed amount of kWh from May 31, 1990, to June 20, 1995, was substantially less than the actual amount of energy consumed. When FPL believes that meter tampering has occurred, it will install a new meter that has been tested for accuracy. FPL then estimates the unbilled usage based on the subsequent months' readings. Specifically, the subsequent months' readings are divided by an established monthly percentage usage which yields an annualized estimate. The monthly percentage usage is determined by dividing the recorded monthly residential kWh sales by the annual residential kWh sales for each calendar year. Since FPL's territory is so extensive, the monthly percentage usage is developed for specific areas. Usually estimates are calculated for two or more months and then averaged to provide a single annual estimate. Once the annual estimate is derived, usage for months in previous years can be estimated. This methodology is considered the most accurate because it considers seasonal usage. FPL used this methodology for the Martinez account.

On June 20, 1995, a new meter was installed at the Martinez residence. The recorded kWh for the following two reading months of August and September was 3071 kWh and 2192 kWh, respectively. The above methodology yielded an average annual usage of 25,863 kWh or 2,155 kWh per month. Billing records indicate that the Martinez' registered usage never reached this amount. In fact, Mr. Martinez was billed more than 1,000 kWh only four times since inception of the account in May, 1990, with the highest being 1,455 kWh. Based on this comparison, FPL determined that current diversion occurred at the Martinez residence since the account was opened. This conclusion is further supported by the energy usage of renters at the same address subsequent to the Martinez' occupancy. Through the first ten months of 1997, the tenants at 4891 S.W. 5th Terrace averaged 2,345 kWh of usage per month.

Because Mr. Martinez was the beneficiary of energy beyond that which was billed, we agree that it is appropriate to backbill his account for non-billed usage from May 31, 1990, through June 20, 1995.

In order to arrive at the total backbilled amount, FPL employed the Average Percentage Use Method approved in In Re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI, issued September 24, 1996. The backbilled amount was determined by subtracting the billed kWh from the estimated monthly kWh. Instead of using a level 2,155 kWh for the estimated monthly kWh, FPL multiplied the annual estimate of 25,863 kWh to the specific monthly percentage usage, which as stated above is determined for each month in each year. This step reconciles seasonal usage. The difference between the billed amount and the estimated amount was applied to the appropriate billing amounts and tax factors to arrive at the individual monthly amounts. The sum of the monthly totals makes up \$8,157.21 of the backbilled amount. The remaining is the total of the investigative costs.

We reviewed FPL's calculations and agree that the billing amounts and tax factors were applied appropriately and recognize the change in the factors over time. Therefore, we find that the total backbilled amount of \$8,513.84 for unbilled consumption from May 31, 1990, to June 20, 1995, including \$356.63 for investigative charges, was calculated in a reasonable manner as required by Rule 25-6.104, Florida Administrative Code.

Liability For Unbilled Energy

Mr. Martinez is personally liable for a reasonable amount of backbilling for unbilled energy at 4891 S.W. 5th Terrace, Miami. Because the account was in Mr. Martinez' name and Mr. Martinez received the benefit of the unbilled energy, he should be held responsible for a reasonable amount of backbilling. We have jurisdiction to determine liability notwithstanding the Circuit Court's order on the matter in the civil case because the issue was raised by Mr. Martinez during the informal conference.

Our jurisdiction to regulate rates, fees and charges of public utilities is established by statute. Florida Statutes, Section 366.05(1) states: "...the commission shall have power to prescribe

fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility....” Our jurisdiction to regulate and supervise public utilities with respect to rates and service is exclusive. “The jurisdiction conferred upon the commission shall be exclusive and superior to that of all other boards, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail.” Florida Statutes, Section 366.04(1).

Rule 25-22.032, Florida Administrative Code, establishes procedures for customer complaints. The Rule states that “[a]ny customer of a utility regulated by this Commission may file a complaint with the Division of Consumer Affairs whenever he has an unresolved dispute with the utility....” Rule 25.22.032(1), Florida Administrative Code. In the instant case, the customer has unresolved disputes with FPL regarding the rebilled amount and his liability for the alleged meter tampering.

Mr. Martinez’ unresolved dispute regarding his liability to pay for the unbilled energy is based on his opinion that the jury verdict of not guilty in the criminal trial exculpates him in the instant proceeding. Because the issue was raised in this customer complaint proceeding, resolution thereof is within our jurisdiction. We disagree with Mr. Martinez’ assessment of the alleged precedent effect of the criminal court jury verdict.

The standard of proof for determining liability for unbilled energy is substantially different from the burden of proof in a criminal trial. In In re: Complaint of Fadylla Abdallah against Florida Power and Light Company regarding backbilling for estimated usage of electric consumption, Docket No. 930688-EI, Order No. PSC-93-1325-FOF-EI, issued September 9, 1993, we held that notwithstanding the fact that current diversion was an inherited condition, the customer was properly backbilled for unbilled energy because the customer received the direct benefit from the current diversion. Thus, under our precedent, the only proof necessary to establish liability for unbilled energy is that the customer of record received the direct benefit of the unbilled energy. In the instant case, there is ample evidence establishing that Mr. Martinez did receive the direct benefit of the unbilled energy. Mr. Martinez has not contested the fact that he was the customer of record during the period of backbilling.

We recognize that the Circuit Court of the Eleventh Judicial Circuit in Dade County entered an order finding Mr. Martinez liable for open account, account stated and services sold and delivered for the unbilled electric energy. On rehearing, the Court retreated from its previous order as to the specific amount due and owing and deferred that decision to us. While the Circuit Court had jurisdiction to decide the open account and treble damage claims, it is within our exclusive jurisdiction to resolve the customer complaint brought pursuant to our rules including liability for any balance owed. Richter v. Florida Power Corp., 366 So.2d 798 (Fla. 2d DCA 1979) (Held that the PSC has exclusive jurisdiction to decide whether the consumer was overcharged.); Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990) (Held that the PSC must be allowed to act when it has as least a colorable claim that the matter under consideration falls within its exclusive jurisdiction as defined by statute.) In this case, the Circuit Court order does not conflict with our decision. However, in the event of a conflict between the Circuit Court and the Commission, our order would prevail.

In sum, based on Florida Statutes, Florida Administrative Code, and relevant caselaw, the Commission has jurisdiction to determine the liability issue as well as the amount to be backbilled in a customer complaint. Because we have exclusive jurisdiction to resolve matters arising in customer complaint proceedings, the matter has been addressed in this proceeding. The evidence supports a finding that Mr. Martinez received the benefit of the meter tampering, and meter tampering has been demonstrated pursuant to Rule 25-6.105, Florida Administrative Code. Therefore, we find that Mr. Martinez shall be held liable for the unbilled energy at 4891 S.W. 5th Terrace as set forth herein.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that meter tampering occurred at the Martinez residence at 4891 S.W. 5th Terrace, Miami, and that Florida Power & Light Company shall be allowed to backbill the Martinez account for unmetered kilowatt hours. It is further

ORDERED that the backbilled amount of \$8,513.84 for unbilled energy consumption at the Martinez residence is reasonable. It is further

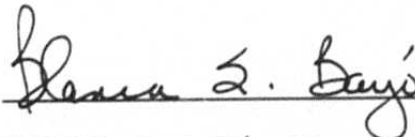
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ORDERED that Mr. Martinez is liable for the unbilled energy at 4891 S.W. 5th Terrace.

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 10th day of August, 1998.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

LJP

NOTICE OF FURTHER PROCEEDINGS OR 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.

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Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 31, 1998.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by 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 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 of the effective date 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.