

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: December 5, 2013

TO: Office of Commission Clerk (Stauffer)

FROM: Office of the General Counsel (Lawson) *MLV*
Office of Consumer Assistance and Outreach (Forsman, Hicks) *SC NET RH*
Division of Economics (King) *PD J.W.D.*
Division of Engineering (Moses) *JS*

RE: Docket No. 120176-EI – Complaint of Frederick Smallakoff against Progress Energy Florida, Inc. concerning alleged improper bills, Case No. 1059336E.

AGENDA: 12/17/13 – Regular Agenda – Decision on Motion for Reconsideration – Oral Argument Not Requested – Participation is at the Commission’s Discretion

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Balbis

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

On April 4, 2012, Mr. Frederick Smallakoff filed an informal complaint against Progress Energy Florida, Inc. (now Duke Energy Florida, Inc. or DEF) alleging overbilling, improper levying of penalties, and harassment by the utility. This informal complaint was assigned Case Number 1059336E. After an investigation and administrative review, Commission staff found no evidence that the utility had acted improperly and sent Mr. Smallakoff a final case disposition letter on June 4, 2012. On June 19, 2012, the Commission Clerk received a letter from Mr. Smallakoff to file a “formal proceeding/complaint” in this matter. By Proposed Agency Action Order No. PSC-13-0124-PAA-EI, issued March 13, 2013, the Commission denied Mr. Smallakoff’s complaint on the grounds that after a thorough investigation by Staff there was no

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evidence that the utility had improperly billed the customer or improperly assessed any penalties or other fees.

Any person whose substantial interests were affected by the proposed agency action could file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code (F.A.C.). On April 3, 2013, the Commission Clerk received a hand-written letter from Mr. Smallakoff purporting to request a formal proceeding. Order No. PSC-13-0184-PCO-EI was issued on April 30, 2013, finding that the letter did not meet the requirements of Rule 28-106.201, F.A.C., denying Mr. Smallakoff's request for a hearing, and allowing Mr. Smallakoff leave to refile his request in compliance with the requirements of the rule. On May 21, 2013 the Commission Clerk received a second hand-written letter from Mr. Smallakoff purporting to request a formal proceeding. Upon review of this second letter, the Commission issued Order No. PSC-13-0468-FOF-EI on October 14, 2013, denying Mr. Smallakoff's second request for a formal hearing with prejudice and stating that Order No. PSC-13-0124-PAA-EI shall be effective and final.

On October 29, 2013, the Commission Clerk received a hand written letter from Mr. Smallakoff titled as a motion for reconsideration of Order No. PSC-13-0468-FOF-EI. No request for oral argument was filed as required by Rule 25-22.0022, F.A.C.

This recommendation addresses Mr. Smallakoff's motion for reconsideration of Order No. PSC-13-0468-FOF-EI. The Commission has jurisdiction pursuant to Section 366.04, Florida Statutes (F.S.).

Discussion of Issues

Issue 1: Should Mr. Smallakoff's motion for reconsideration in this matter be granted?

Recommendation: No, the Commission should deny Mr. Smallakoff's motion for reconsideration, as it does not identify any point of fact or law that was overlooked, or that the Commission failed to consider in rendering any of its decisions in this matter. (Lawson)

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law the Commission overlooked or failed to consider in rendering its order.¹ The alleged overlooked fact or law must be such that if it were considered, the Commission would reach a different decision than the decision in the order.² In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered.³ Furthermore, it is not necessary to respond to every argument and fact raised by each party, and "[a]n opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant."⁴

Analysis

In his Motion for Reconsideration, Mr. Smallakoff asserted that final Order No. PSC-13-0468-FOF-EI did not address his complaints. He stated he wished to re-apply the facts and evidence presented in his previous pleadings. He also stated that he believed he had complied with Rule 28-106.201, F.A.C., in his two prior requests for a rehearing. Mr. Smallakoff's motion does not identify any point of fact or law that was overlooked, or that the Commission failed to consider in rendering any of its decisions in this matter. Furthermore, Mr. Smallakoff's letter does not allege any legal basis or argument of any kind in support of his motion.

¹ See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981).

² See Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962).

³ See Sherwood v. State, 111 So. 2d 96 (Fla. 3d DCA 1959), citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). See also Order No. PSC-07-0783-FOF-EI, issued September 26, 2007, in Docket No. 050958-EI, In re: Petition for approval of new environmental program for cost recovery through Environmental Cost Recovery Clause by Tampa Electric Company; Order No. PSC-07-0561-FOF-SU; issued July 5, 2007, in Docket No. 060285-SU, In re: Application for increase in wastewater rates in Charlotte County by Utilities, Inc. of Sandalhaven; and Order No. PSC-06-1028-FOF-EU, issued December 11, 2006, in Docket No. 060635-EU, In re: Petition for determination of need for electrical power plant in Taylor County by Florida Municipal Power Agency, JEA, Reedy Creek Improvement District, and City of Tallahassee.

⁴ See Jaytex Realty, 105 So. 2d at 818.

A Motion for Reconsideration must demonstrate an omission in facts or law which, had they been considered, would have resulted in a different ruling by this Commission.⁵ Here, Mr. Smallakoff's Motion for Reconsideration did not allege or show any omission of fact or law which, if considered could result in a different ruling than that in Order No. PSC-13-0468-FOF-EI or any other ruling in this docket. By explicitly repeating the exact same arguments that he presented at the September 25, 2013 Agenda Conference, Mr. Smallakoff is merely rearguing his position, rather than pointing out a matter of fact or law the Commission overlooked in rendering its decision.

Therefore, staff recommends that Mr. Smallakoff's motion for reconsideration should be denied.

⁵ See Order No. PSC-11-0224-FOF-EI, issued on May 16, 2011, in Docket No. 100009-EI, In re: Nuclear cost recovery clause; and Order No. PSC-09-0156-FOF-TP, issued on March 16, 2009, in Docket No. 070736-TP, In re: Petition by Intrado Communications, Inc. for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with BellSouth Telecommunications, Inc. d/b/a AT&T Florida (denying Motion for Reconsideration).

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Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission approves staff's recommendation on Issue 1, this docket should be closed. (Lawson)

Staff Analysis: If the Commission approves staff's recommendation on Issue 1, this docket should be closed.