

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PAT KINTZ and JAMES KISELAK,)
)
 Petitioners,)
)
vs.) CASE NO. 91-4909
)
)
FLORIDA POWER AND LIGHT COMPANY,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

This matter was heard by William R. Dorsey, Jr., the Hearing Officer designated by the Division of Administrative Hearings, on November 4, 1991, in Tallahassee, Florida.

APPEARANCES

For Florida Power K. Crandel McDougall, Esquire
and Light Company: Post Office Box 029100
 Miami, Florida 33102-9100

For Pat Kintz: No appearance

For James Kiselak: No appearance

For the Public No appearance
Service Commission:

STATEMENT OF THE ISSUES

The issues are whether Florida Power and Light may backbill James Kiselak for electricity diverted from a residential electric meter, and for costs of investigation, and whether it may decline to transfer the account for the residence at which the electricity was diverted to the name of Pat Kintz until the backbill and the costs of investigation are paid.

PRELIMINARY STATEMENT

Before this matter was referred by the Public Service Commission to the Division of Administrative Hearings on August 5, 1991, Commission staff held an unsuccessful informal conference on May 6, 1991, in an effort to resolve the dispute. The Commission then considered the matter informally under Section 120.57(2), Florida Statutes, and issued an order in favor of Florida Power and Light Company. That order gave Pat Kintz and James Kiselak the right to petition for a formal proceeding, which they requested, and the matter was then transferred to the Division of Administrative Hearings.

Although the notice of hearing was served on James Kiselak and Pat Kintz at the address which appears on their joint complaint to the Public Service Commission filed July 18, 1991, [which was 3987 NW 163rd Street, Miami (Opa Locka), Florida 33054], they did not appear at the time of the hearing. They had no written or oral communication with the Division of Administrative Hearings from the time the notice of hearing was mailed on October 4, 1991, through the day of the hearing on November 4.

At the opening of the hearing, Florida Power and Light moved to dismiss the proceeding pursuant to Rule 22I-6.022, Florida Administrative Code, which says:

Failure to appear at final hearing shall be grounds for entry of an order of dismissal or recommended order of dismissal, as appropriate.

The motion was denied. It is not clear which party bears the burden of proof in this proceeding. Although the first pleading was a complaint filed by Pat Kintz and James Kiselak with the Public Service Commission on July 18, 1991, their complaint arose from the attempt by Florida Power and Light to (a) charge Mr. Kiselak \$8,087.67 for diverted electricity and \$375.53 as costs of investigation, and (b) refuse to transfer the service into the name of Pat Kintz unless the bill was paid. Florida Power and Light had also threatened to deny further electric service at the residence where the diversion of current had taken place unless the backbill and costs of investigation were paid. It appears that the party which would be altering the status quo here is Florida Power and Light, which proposes to discontinue service. Consequently, even in the absence of an appearance by Pat Kintz or James Kiselak, it would be necessary for Florida Power and Light Company to present evidence to justify the entry of a final order which could permit the termination of electrical service and block transfer of the account into the name of Pat Kintz.

During the hearing the following witnesses testified on behalf of Florida Power and Light: Mr. Chase Vessels, Mr. Emory Curry, Mr. Joe Brenner, and Ms. Diann Thomas. Florida Power and Light Company exhibits 1-18 were received in evidence. Exhibits 2 and 3, the actual electric meter from which Florida Power and Light maintains current was diverted, and the wire which was inserted through the acrylic canopy of the meter to stop the meter disc from turning were returned to Florida Power and Light. The meter and wire have been kept under lock and key in a padlocked meter box since the meter had been removed from the residence, and Florida Power and Light has kept a log of all persons who have had access to the box and its padlock. Florida Power and Light will continue to keep a log of those persons, and Florida Power and Light is in a better position to safe-guard those items than is the Division of Administrative Hearings.

At the close of the hearing, Florida Power and Light Company waived its opportunity to file a proposed recommended order. No transcript of the proceeding will be prepared, although the proceeding was transcribed by the Public Service Commission.

FINDINGS OF FACT

1. Mr. James Kiselak has, for a number of years, been the customer of record for electric service provided by Florida Power and Light Company to a residence located at 3987 NW 163rd Street in Opa Locka, Florida. Mr. Kiselak had been accused in 1985 of current diversion by removing the meter and inverting it. After an investigation, Mr. Kiselak paid a back bill for current diversion.

2. As part of the resolution of the first current diversion matter, the old meter, #5C75910, was removed and replaced with meter #5C98980 on January 27, 1986. The meter was brand new at the time it was installed. This is not a situation where a new resident has become the customer of record at a home and "inherited" a meter which had been tampered with by a prior resident.

3. In August of 1989 Florida Power and Light Company received a tip that the customer at the Kiselak residence was removing the meter from the socket. A meterman was sent to investigate on September 17, 1989, who found only a hole in the acrylic canopy over the meter.

4. The meter was reinspected by Mr. Chase Vessels on March 18, 1990. He found a wire placed through the hole in the acrylic canopy which stopped the meter disc from turning and registering the use of electricity. At that time he saw that electricity was being consumed because a wall unit air conditioner was operating, a freezer located outside the home was operating, and the outside lights were on. That meter was removed and taken under lock and key where it was tested by Emory Curry on April 4, 1990. Mr. Curry found that the wire through the hole in the canopy had stopped the disc from turning, and that there were drag marks on the top of the disc. When the obstructing wire was removed, tests showed that the meter registered current usage appropriately. The meter has been kept in a locked meter box, and FPL has maintained a log of all persons who have had access to the meter in that box since that time. From the time the meter was tested by Mr. Curry on April 4, 1990, no other person has had access to the meter, the meter was locked again at the close of the hearing on November 4, 1991, in the meter box. The wire was maintained in a separate envelope and locked in the meter box as well.

5. An investigator for Florida Power and Light Company, Joe Brenner, observed the residence at 3987 NW 163rd Street on January 23, 24, and 25, 1991, February 4, 5, 6, 7, and 8, 1991, and February 11, 12, 13, and 14, 1991. In the yard in front of the home a Mazda truck was parked, as well as a Mazda RX7, 2-door automobile, which had no license tag. On January 23, Mr. Brenner saw a gentleman come out, go to the mailbox, remove mail, go through it in a manner consistent with receiving mail at his place of residence and re-enter the home. A credit report obtained by Florida Power and Light Company from Equifax Credit Information Services in North Miami Beach, Florida, shows that Mr. Kiselak has resided in the house from August 6, 1973, through the date of that report on October 30, 1991, and that he receives bills from his various creditors at that address. Mr. Brenner met this man at the informal hearing which was conducted by the Public Service Commission, who identified himself as James Kiselak. Mr. Kiselak drove to the informal hearing in the Mazda RX7, which then had a license plate. The records of the Dade County Auto Tag Agency which were admitted during the hearing show that the car was registered to James Kiselak at the address of 3987 NW 163rd Street in Opa Locka, Florida.

6. After the testing of the meter in April of 1990, a current diversion investigator for Florida Power and Light Company, Diann Thomas, met with Patricia Kintz at the residence where the current diversion occurred; she was accompanied by Roger Sweeney, who also works for Florida Power and Light.

7. At that time Ms. Kintz maintained that she was the owner of the house and its resident, that she was solely responsible for the payment of the electric bills and that she lived in the home alone.

8. Based upon the records of Florida Power and Light which have shown Mr. Kiselak as the customer at the residence since before 1986, his presence at the home on January 23, 1991, his receipt of mail there, the credit report showing that the residence is his billing address for his creditors, and the presence of the Mazda automobile at the residence during the period from January 23 to February 14, 1991, I find that Mr. Kiselak has been residing at the home continuously, and has received the benefit of the current diversion based on meter tampering. For a substantial period of time, at least since October 11, 1988, Ms. Kintz has also occupied the house and received the benefit of the current diverted, although there is no proof that she is (a) responsible for causing the diversion or (b) subject to a cause of action by Florida Power and Light Company for the value of the current diverted.

9. Ms. Diann Thomas has calculated a backbill for the current diverted at the Kiselak residence in a manner consonant with Rule 25-6.104, Florida Administrative Code, which permits a utility to bill the customer "on a reasonable estimate of the energy used" when there has been meter tampering.

10. The type of tampering involved would be manipulable from day-to-day or month-to-month. The bill during the month of April 1989 was for 2,079 kwh of electricity. Usage registered that month was high compared to other months and it is reasonable for the utility to regard this as an unmanipulated month, and to use that consumption as the basis for projecting the proper amount to be billed. For the entire year of 1989, on average for residential customers of Florida Power and Light Company, April bills represented 6.81 percent of all billings for the calendar year. Therefore, the projected electric utilization for the entire year would be 30,529 kwh. Stated another way, the average percentage of use calculation would also show an average use of 69 kwh per day.

11. After the diversion was detected and the new (i.e. third) meter was set on the residence, the use recorded for August and September of 1990 were 2,885 kwh and 3,333 kwh, which are consistent with the average percentage of use calculation based on the April 1989 actual usage. The projected usage for the bill delivered in March 1986 (the first full billing period after the meter had been placed on January 27, 1986), through April of 1990, after the diversion was discovered, is calculated in FPL exhibit 10. The actual bills paid for the Kiselak residence were deducted from the projected amounts in FPL exhibit 18. Based upon these calculations FPL is due \$6,871.65 for the diverted electricity; a franchise charge, which would have been added to each monthly bill based upon kilowatt hours used of \$284.69, is due, as is a city/county utility tax of \$591.80, and a current diversion investigation charge of \$375.53. The current diversion investigation charge is reasonable and is broken out on page 4 of FPL exhibit 10. The total due to FPL is therefore \$8,087.67.

12. The second issue raised is whether Florida Power and Light Company has properly declined to transfer service at the residence to the name of Ms. Kintz, without payment of the total amount due from Mr. Kiselak. The preponderance of the evidence shows that Mr. Kiselak has used the address as a mailing address for his credit cards, he has been observed frequenting the residence. Ms. Kintz has been also residing there since at least October 10, 1988, when her most current Florida drivers license was issued and she used the residence as her address on that license. Both Kiselak and Kintz continue to occupy the residence.

13. While only Mr. Kiselak is indebted to Florida Power and Light, its tariffs, which have been approved by the Commission, do address this situation. According to tariff sheet 6.010, on service agreements, section 1.5:

[Florida Power and Light] may refuse or discontinue service for failure to settle, in full, all prior indebtedness incurred by any customer for the same class of service at any one or more locations of such customer. [Florida Power and Light] may also refuse service for prior indebtedness by a previous customer provided that the current applicant or customer occupied the premises at the time the prior indebtedness occurred and the previous customer continues to occupy the premises.

Both Ms. Kintz and Mr. Kiselak benefited from the service during the period current had been diverted, for while the account had been in Mr. Kiselak's name, Ms. Kintz resided there too. Florida Power and Light may refuse to provide service to Ms. Kintz at 3987 NW 163rd Street pursuant to the tariff sheet.

14. The provisions of the tariff sheet are reasonable. It is specifically meant to cover situations such as this, though the more common situation would be one in which two college roommates occupy an apartment or residence, while the electric service is in the name of only one of them. After running up a substantial electric bill which they are unable to pay, the roommate not named on the FPL account may apply to have the service transferred to his (or her) name, and thereby attempt to avoid payment of the current bill, and avoid an interruption of service. Section 1.5 of tariff sheet 6.010 (FPL exhibit 13) is designed to prohibit such situations. It prohibits the transfer of the account into the name of Ms. Kintz here.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over this matter. Section 120.57(1), Florida Statutes.

16. The billing for current diversion here is authorized by Rule 25-6.104, Florida Administrative Code. A reasonable estimate of the energy used has been proven by Florida Power and Light. Mr. Kiselak is responsible to Florida Power and Light for diverted energy, associated taxes and investigation costs in the amount \$8,087.67.

17. Ms. Kintz is not entitled to have the electric service transferred into her name unless the amount due from Mr. Kiselak is paid, under the provisions of the Florida Power and Light tariff sheet 6.010, section 1.5, quoted in Finding 13. She resided in the residence at the time the diversion took place, and still resides there. She is not, however, currently indebted to Florida Power and Light in any amount.

RECOMMENDATION

It is RECOMMENDED that a final order be issued by the Florida Public Service Commission finding that Mr. Kiselak is indebted to Florida Power and Light in the amount of \$8,087.67, and that if this amount is not paid to Florida Power and Light within 10 days from the date of the Commission's final order, Florida Power and Light be authorized to cease providing electric service to that address. It is also recommended that Florida Power and Light not be required to transfer the account from the name of Mr. Kiselak to Ms. Kintz

unless Mr. Kiselak first pays the full amount due, because Ms. Kintz occupied the premises at the time the current diversion occurred and still continues to occupy those premises.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 12th day of November 1991.

WILLIAM R. DORSEY, JR.
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of November 1991.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.