



Public Service Commission

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RECORDS AND REPORTING

DATE: AUGUST 24, 1998

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

FROM: DIVISION OF LEGAL SERVICES (ELIAS) *RVE dd*
 DIVISION OF CONSUMER AFFAIRS (PLESCOW) *RT JFree*
 DIVISION OF ELECTRIC AND GAS (MAKIN) *[Signature]*

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

AGENDA: 09/01/98 - REGULAR AGENDA - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: Commission decision required by September 9, 1998

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\970365.RCM

CASE BACKGROUND

On September 17, 1996, Mr. Anthony Brooks II, on behalf of Mother's Kitchen Restaurant ("Mother's Kitchen") filed a complaint with the Division of Consumer Affairs ("CAF") of the Florida Public Service Commission ("Commission") against Florida Public Utilities Company ("FPUC" or "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

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teleconference between Orlando, Florida, and Tallahassee, Florida, on April 1, 1998.

On June 11, 1998, the Administrative Law Judge entered his Recommended Order. A copy of the Recommended Order is attached to this recommendation as "Attachment A". 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.

Since the entry of the Recommended Order, the parties have made six different filings with the Commission. Each is listed, and briefly summarized, below:

1) On June 29, 1998, Mother's Kitchen filed exceptions to the Recommended Order. The Petitioners' assert numerous errors in the Recommended Order.

2) On July 2, 1998, FPUC filed a Motion to Strike Mother's Kitchen's exceptions. FPUC asserts that the filing deadline for exceptions ran on June 26, 1998.

3) On July 8, 1998, FPUC filed a Response to Mother's Kitchen's Exceptions. In essence, FPUC asserts that the Administrative Law Judge's Findings were supported by competent, substantial evidence and that Mother's Kitchen failed in its filing to demonstrate otherwise.

4) On July 24, 1998, Mother's Kitchen filed a Response to FPUC's Motion to Strike of July 2, 1998. In essence, Mother's Kitchen claims that because Rule 1.090, Florida Rules of Civil Procedure, provides that when service is made by mail, five days shall be added to the time period for response. Therefore, Mother's Kitchen asserts its response was timely.

5) On July 28, 1998, FPUC filed a Motion to Strike Petitioner's Response to FPUC's July 2, 1998, Motion to Strike.

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FPUC claims that Mother's Kitchen's Response should have been filed no later than July, 14, 1998. FPUC claims that the pleading contains documents and refers to documents not in the record. FPUC further asserts that Mother's Kitchen used the vehicle of a response to argue additional exceptions on the merits of the case.

6) On August 11, 1998, Mother's Kitchen filed a pleading titled: Complainant's Response to Respondent's Motion to Strike Petitioner's Response. In essence, Mother's Kitchen asserts that all its post-hearing filings were timely and that FPUC's Motion's should be denied.

Each of these six post-hearing filings is addressed in Issues 1, 2, and 3. The Recommended Order is addressed in Issue 4.

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DISCUSSION OF ISSUES

ISSUE 1: Should FPUC's Motion to Strike be granted?

RECOMMENDATION: Yes. Mother's Kitchens exception's were not timely filed. Further, Mother's Kitchen has not demonstrated excusable neglect or circumstances which would warrant the application of the doctrine of equitable tolling.

STAFF ANALYSIS: This Issue addresses the Motion to Strike filed July 2, 1998, by FPUC. FPUC's Motion to Strike asserts that Mother's Kitchen's exceptions were filed after the deadline, and thus, should be stricken as untimely. FPUC further alleges that Mother's Kitchen failed to offer any proof of excusable neglect. Therefore, FPUC asserts, the exceptions should not be considered.

Mother's Kitchen asserts, in a Response dated July 18, 1998, mailed to staff counsel on July 20, 1998, received by staff counsel on July 22, 1998, and filed (by staff counsel) with the clerk's office on July 24, 1998, that its exceptions were timely filed, when the five days for mailing are added pursuant to Rule 1.090, Florida Rules of Civil Procedure.

Staff notes that neither Mother's Kitchen's exceptions filed June 29, 1998, nor its Response to FPUC's Motion to Strike, filed July 24, 1998, nor its Response to Respondent's Motion to Strike Petitioner's Response, filed August 11, 1998, were timely.

The Administrative Law Judge's Recommended Order was entered on June 11, 1998. The Order notifies the parties of their right to submit exceptions to the agency within fifteen days of the entry of the Recommended Order. This right is granted by Section 120.57(1)(i), Florida Statutes, which states in pertinent part: "The agency shall allow each party 15 days in which to submit exceptions to the recommended order." In this case, the fifteen day period ran on June 26, 1998.

Because of the timing of this docket, both the Commission's adopted procedural rules (Chapter 25-22, Florida Administrative Code), and the Uniform Rules of Procedure (Chapters 28-101 through 28-110, Florida Administrative Code), which became operative for this agency on July 1, 1998, could be applicable. However, under either set of procedural rules, the exceptions were not timely filed.

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Rule 25-22.056(4)(b), Florida Administrative Code permits a party to file exceptions within 14 days of service of the recommended order. In the instant case, the Recommended Order was served on June 11, 1998. Thus, the 14 day period expired on June 25, 1998, 4 days before the exceptions were filed. Staff notes that Rule 25-22.056(4)(b), Florida Administrative Code further provides that a "party's failure to serve or timely file written exceptions shall constitute a waiver of any objections to the recommended or proposed order."

Rule 28-106.217, Florida Administrative Code, states in pertinent part: "Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of entry of the recommended order... no additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail." Under this rule, Mother's Kitchen's exception were filed 3 days after the deadline.

Mother's Kitchen's response to FPUC's Motion to Strike was also untimely. FPUC filed and served its motion by mail on July 2, 1998. Rules 28-106.204, and 28-106.103, Florida Administrative Code require that a response to the motion be filed, if at all, within 12 days (7 days, plus 5 when service is by mail). In the instant case, this time expired on July 14, 1998. Mother's Kitchen's response was dated July 18, 1998, mailed to staff counsel on July 20, 1998, received by staff counsel on July 22, 1998, and filed (by staff counsel) with the clerk's office on July 24, 1998. Construed in the light most favorable to Mother's Kitchen, this filing was received on July 22, 1998, 8 days after the deadline. Staff notes that in a filing where Mother's Kitchen asserts that by the addition of time for mailing, its previous filing was timely, it ignores the same requirement to timely file a response.

FPUC filed a second Motion to Strike, its Motion to Strike Mother's Kitchen Response on July 28, 1998. This motion is addressed in the next issue. Mother's Kitchen again filed an untimely response. Allowing 7 days for a response, plus 5 for mailing, Mother's Kitchen response would have been due on August 9, 1998. Since August 9, 1998, was a Sunday, the response would have been due to be filed on the 10th. Mother's Kitchen's response was filed on August 11, 1998.

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Staff notes that Mother's Kitchen is not represented by counsel in this proceeding. However, Anthony Brooks II, an owner of Mother's Kitchen, sought to and was authorized to appear as Mother's Kitchen's qualified representative. Mr. Brooks was required by the Order of the Administrative Law Judge to submit an affidavit detailing, among other things, his knowledge of the substantive law and applicable rules of procedure. See Rule 60Q-2.008, Florida Administrative Code. Mr. Brooks further agreed to abide by the Standards of Conduct for Administrative Proceedings which require, among other things, that "(a) representative shall exercise due diligence in the filing...of any motion or pleading to insure that the motion or pleading is filed and argued in good faith." Rule 60Q-2.009, Florida Administrative Code.

In the nearly two years this matter has been pending, numerous filings have been required both at the Commission and before the Division of Administrative Hearings. Mother's Kitchen and its qualified representative knew or should have known that "filing" is effected by physically delivering the filing to the appropriate clerk.

Given this required standard of conduct, the repeated failures to timely file post Recommended Order filings do not appear to staff to demonstrate "excusable neglect" which would support further consideration of these untimely filings. Mother's Kitchen's post Recommended Order filings simply maintain that the filings were timely and offer no information which would support a finding of excusable neglect. See Hamilton County Bd. of County Comm'rs v. State of Florida, Dep't of Env'tl. Regulation, 587 So.2d 1378 (Fla. 1st DCA 1991).

Nor do these circumstances appear to warrant the application of the doctrine of equitable tolling. The doctrine of equitable tolling "is used in the interests of justice to accommodate . . . a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing." Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). The doctrine has been applied "when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." By this decision, the Florida Supreme Court adopted the doctrine of equitable tolling in proceedings pursuant to the Florida Administrative Procedures Act.

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The Commission previously applied this doctrine in Order No. PSC-97-0781-FOF-WU, issued July 1, 1997, in Docket No. 961531-WU. In holding that an untimely-filed objection to a water certificate amendment should be considered on the merits, the Commission noted that the notice provided by the utility was misleading, "whether or not intended as such". In that Order, the doctrine was applied to prevent a default, rather than an adjudication on the merits.

In this case, there is no default. A fact finder has heard the evidence and argument and submitted a Recommended Order to this agency. Nor does it appear that Mother's Kitchen was lulled to inaction. The notice provided by the Recommended Order and the applicable rules are specific and clear. Staff believes Mother's Kitchen has merely waived the opportunity to submit an optional post-hearing filing. The final order issued as a result of this decision will include the appropriate Notice of Further Proceedings or Judicial Review. Therefore, staff recommends that FPUC's Motion to Strike should be granted.

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ISSUE 2: Should FPUC's Motion to Strike Petitioner's Response be granted?

RECOMMENDATION: Yes. Mother's Kitchen's response was not timely. Mother's Kitchen's response contains documents and references not in the record of this proceeding. Further, Mother's Kitchen's response argues additional exceptions to the Recommended Order addressing the substance of the case.

STAFF ANALYSIS: This issue addresses FPUC's Motion to Strike Petitioner's Response, filed July 28, 1998. As detailed in the Staff Analysis of the previous issue, all three of Mother's Kitchen's post Recommended Order pleadings were not timely filed. As to the pleading FPUC seeks to strike, it was not signed until four days after the filing due date; mailed to staff counsel (rather than to the Division of Records and Reporting) two days later; and received by the staff counsel two days later. Upon confirmation two days later that the document had not been furnished to the Division of Records and Reporting by Mother's Kitchen, staff counsel forwarded the filing to the Division of Records and Reporting.

On August 11, 1998, Mother's Kitchen filed a pleading styled Complainant's Response to Respondent's Motion to Strike Petitioner's Response. Mother's Kitchen first reasserts that its exceptions, filed June 29, 1998, were timely.

Mother's Kitchen then asserts that its Response to Florida Public Utility's Motion to Strike of July 2, 1998 was timely filed. The pleading states in pertinent part:

The best evidence of Petitioner's/Complainant's compliance with all applicable rules relating to this issue is to be found in the Commission's own records which demonstrate timely filing was indeed done. Since the record contains evidence of timely filings; Respondent's arguments and citations should therefore be considered moot and all Motions to Strike denied.

The pleading then proceeds to argue additional matters related to the substance of the case which are not relevant to the consideration of this Issue.

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Similarly, paragraphs 5 - 11 of Mother's Kitchen's Response to FPUC's Motion to Strike of July 2, 1998 offer argument on the merits of the case and make reference to documents and include documents not part of the record of this proceeding. This is not permitted in a formal administrative hearing pursuant to Sections 120.569 and 120.57, Florida Statutes.

Therefore, staff recommends that FPUC's Motion to Strike Petitioner's Response be granted.

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ISSUE 3: How should the Commission rule On Mother's Kitchen's exceptions to the Administrative Law Judge's Recommended Order? (This Issue is moot if Staff's recommendation for Issue 1 is approved).

RECOMMENDATION: Mother's Kitchen's exceptions should be denied.

STAFF ANALYSIS: In the foregoing Issues, staff has recommended striking Mother's Kitchen's exceptions. Therefore, if that recommendation is approved, the need to address these exceptions on the merits is obviated. However if the Commission denies staff's recommendation on Issue 1, the following analysis discusses Mother's Kitchen's exceptions, paragraphs 5 - 11 of Mother's Kitchen's June 29, 1998, filing.

Paragraph 5: In essence, Mother's Kitchen asserts that the Recommended Order suggests that both the March 4, 1998, and April 1, 1998, hearings were held in Orlando. In fact, the March 4, 1998, hearing was held in Sanford. This fact is reflected in the transcript as well as other portions of the Recommended Order.

FPUC responded that this statement "is merely a recitation of the procedural history of the case and is not a 'finding of fact.' Petitioners fails to cite any authority for the proposition that a 'flaw' of this nature invalidates or in any way voids the findings contained in a Recommended Order." As more fully discussed in the staff analysis of the following issue, staff believes this is addressable as a scrivener's error. It is not an "exception" to a finding of fact or conclusion of law, and therefore staff recommends that this exception be denied.

Paragraph 6: Mother's Kitchen asserts that by the use of the word "specifically" in reference to the appropriate rules in the statement of issues, the Administrative Law Judge departed from the Prehearing Stipulation. A review of the Prehearing Stipulation and the Recommended Order suggests that Mother's Kitchen's use of the term "specifically" is taken out of context. A review of the Prehearing Stipulation and the Recommended Order shows that the Administrative Law Judge appropriately decided the issues in the statement of issues, the conclusions of law, and the various recommendations. Therefore, staff recommends that this exception should be denied.

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Paragraph 7: In Paragraph 7 of it's Exceptions, Mother's Kitchen argues that Administrative Law Judge's findings concerning the initial establishment of the account are an "arbitrary and inappropriate departure from documented evidence".

FPUC responds:

However, it is well-settled that "[i]t is the [ALJ's] function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, and reach ultimate findings of fact based on competent substantial evidence." Heifetz v. Department of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Petitioners do not, nor could they, in good faith, assert that the findings of fact are not based on competent, substantial evidence. FPUC submitted numerous records and several witnesses in defense of this action. "If, as is often the case, the evidence presented supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other.

Staff believes that Mother's Kitchen's exception should be rejected. Mother's Kitchen merely objects to the Administrative Law Judge's finding of fact and conclusions of law after consideration of competing evidence, without any showing of a lack of competent substantial evidence to support the findings.

Paragraphs 8 and 9: Similarly, in Paragraphs 8 and 9, Mother's Kitchen's objects to the Recommended Order's findings of fact and conclusions of law concerning the handling of amounts paid and allegedly paid on the account. Additionally, Mother's Kitchen relies on documents not part of the record in its argument.

Staff believes that Mother's Kitchen's exceptions should be rejected. Mother's Kitchen merely objects to the Administrative Law Judge's finding of fact and conclusions of law after consideration of competing evidence, without any showing of a lack of competent substantial evidence to support the findings.

Paragraph 10: In Paragraph 10, Mother's Kitchen takes exceptions to the Administrative Law Judge's findings and conclusions concerning FPUC's refusal to reconnect the customer after the customer refused to correct a leak (hazardous condition) in an appliance.

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FPUC responds:

In Petitioner's words, "[t]his is perhaps [sic] the most absurd [sic] departure from actual fact in record of this matter Factfinder makes." The substance of this exception is yet another attempt to argue the merits, and nothing more. There is no basis for rejecting the findings of fact complained of because they were supported by competent, substantial evidence.

Staff believes Mother's Kitchen merely disagrees with the findings of fact and conclusions of law of the Administrative Law Judge concerning FPUC's refusal to reconnect without any showing of a lack of competent substantial evidence to support the findings. Therefore, Mother's Kitchen's exception should be denied.

Paragraph 11: Paragraph 11 consists of only one sentence: "Actual review and analysis of the transcripts, exhibits and record in this matter demonstrate that the conclusions of the Factfinder are unjust, unwarranted and without factual basis."

This general assertion is not an exception to a specific finding of fact or conclusion of law. Therefore, staff recommends that, to the extent that a ruling is necessary, the exception should be denied.

Paragraph 12: Paragraph 12 of the filing is labeled "Judicial Error" and cites Rule 1.470 of the Rules of Civil Procedure. Rule 1.470, Florida Rules of Civil Procedure, is not applicable to this proceeding. Therefore, to the extent that a ruling is necessary, the exception should be denied.

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ISSUE 4: Should the Administrative Law Judge's Recommended Order be adopted as the Commission's final order?

RECOMMENDATION: Yes, with a scrivener's error in the Recommended Order concerning the location of the hearing corrected to reflect that the first hearing was held in Sanford, rather than Orlando, Florida.

STAFF ANALYSIS: The order recommended that FPUC be found to have: 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.

The first page of the Recommended Order states that the hearing held March 4, 1998, was held in Orlando. As noted elsewhere in the Recommended Order, in the Notice of Hearing and in the transcript, this hearing was actually held in Sanford, Florida. Staff believes that this is a scrivener's error and should be corrected.

The Administrative Law Judge's Findings of Fact are based on competent, substantial evidence of record. The Conclusions of Law appropriately apply the provisions of Florida Statutes and the Florida Administrative Code. If considered at all, Mother's Kitchen's exceptions to the Recommended Order should be rejected, as discussed in Issue 3. Therefore, staff recommends that the Administrative Law Judge's Recommended Order, with the appropriate correction for a scrivener's error, should be adopted as this agency's final order.

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ISSUE 5: Should this docket be closed?

RECOMMENDATION: The docket should be closed after the time for filing an appeal has run.

STAFF ANALYSIS: The docket should be closed 32 days after issuance of the order, to allow the time for filing an appeal to run.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOTHER'S KITCHEN, LTD.,)
Petitioner,)
vs.) Case No. 97-4990
FLORIDA PUBLIC UTILITIES COMPANY,)
Respondent,)
and)
PUBLIC SERVICE COMMISSION,)
Intervenor.)

RECOMMENDED ORDER

A formal hearing was held by the Division of Administrative Hearings, before Administrative Law Judge, Daniel M. Kilbride, in Orlando, Florida, on March 4, 1998, and April 1, 1998. The following appearances were entered:

APPEARANCES

For Petitioner: Anthony Brooks, II
Qualified Representative
Mother's Kitchen, Ltd.
Post Office Box 1363
Sanford, Florida 32772

For Respondent: Kathryn G. W. Cowdery, Esquire
Gatlin, Schiefelbein & Cowdery, P.A.
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312

For Intervenor: Wm. Cochran Keating, IV, Esquire
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

Whether the Respondent, Florida Public Utilities Company, established the natural gas account for Mother's Kitchen Restaurant in compliance with all applicable statutes, and Florida Public Service Commission (PSC) rules concerning establishment of service and customer deposits, specifically Rule 25-7.083(4)(a), Florida Administrative Code.

Whether Petitioner, Mother's Kitchen, Ltd., provided a deposit of \$500 to Respondent at any time to establish a new account for Mother's Kitchen Restaurant.

Whether Respondent administered the account of Mother's Kitchen Restaurant in compliance with all applicable statutes and PSC rules concerning refusal or discontinuance of service, specifically Rules 25-7.089(2)(g), (3), (5), (6)(a) and (e), Florida Administrative Code.

Whether Respondent should be required to provide a refund of all or any part of any deposit made to establish an account for Mother's Kitchen Restaurant or any amounts paid for natural gas usage, service charges, returned check charges, or other fees charged to that account.

PRELIMINARY STATEMENT

Petitioner filed a complaint against Respondent on September 20, 1996, with the PSC's Division of Consumer Affairs.

On September 29, 1997, the PSC issued a Notice of Proposed Agency Action. On October 16, 1997, Petitioner timely filed a petition requesting a Section 120.57(1), Florida Statutes, formal hearing on the PSC's proposed action. The PSC referred this

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matter to the Division of Administrative Hearings to conduct a formal hearing on October 27, 1997.

On December 17, 1997, a preliminary order was issued in regard to standing and parties.

On December 23, 1997, the PSC filed a Motion for Leave to Intervene in this proceeding. By order issued January 23, 1998, the PSC's motion was granted. A prehearing conference was held on February 23, 1998.

A formal hearing was held on March 4, 1998, in Sanford, Florida, and was continued on April 1, 1998, by video teleconference between Orlando, Florida, and Tallahassee, Florida. Petitioner presented the testimony of Eddie Hodges, Arthur L. Brooks; Linda D. Brooks Jackson; Anthony L. Brooks, II; Harry L. Johnson; and Christopher Singletary. Respondent presented the testimony of Alfred Byrd; Donald Middleton; Diane Keitt; William R. McDaniel; and Darryl Troy. Petitioner's Exhibits 1 through 7 and Respondent's Exhibits 1 through 34 were offered and received into evidence. Intervenor presented no witnesses and offered no evidence. The transcript of the hearing was filed on April 20, 1998. Petitioner filed its proposed finding of fact and conclusions of law and final argument on April 30, 1998. Respondent and Intervenor also filed their proposals on April 30, 1998. Respondent filed a Motion to Strike Petitioner's Proposals. The motion is DENIED. Respondent also filed a Motion for Attorney's Fees under Sections 120.595(1) and 120.569(2)(c), Florida Statutes. The motion is DENIED.

Each of the proposals have been given careful consideration in the preparation of this order.

FINDINGS OF FACT

1. Petitioner, Mother's Kitchen, Ltd., is a partnership formed to operate a restaurant under the name of Mother's Kitchen Restaurant. The partners consist of Anthony Brooks, II; Daniele M. Dow-Brooks; Eddie Hodges; and Arthur L. Brooks. Mr. Alford Byrd was an original partner, but has since withdrawn from the partnership. At all times in dispute, Mother's Kitchen Restaurant was physically located at 1744 West Airport Boulevard, Sanford, Florida 32772-0134.

2. Respondent, Florida Public Utilities Company, is a natural gas utility regulated by the Florida Public Service Commission (PSC) pursuant to Chapter 366, Florida Statutes, and Chapter 25-7, Florida Administrative Code.

3. On March 21, 1996, Mr. Alfred Byrd (Byrd), a partner in Mother's Kitchen Ltd., signed a Job-Work Contract authorizing Respondent to prepare and connect appliances at Mother's Kitchen Restaurant to receive natural gas service.

4. On March 21, 1996, Byrd provided, in person at Respondent's Sanford Office, a \$200 deposit on behalf of the partnership to Respondent in order to establish a gas account for Mother's Kitchen Restaurant.

5. Byrd received a deposit receipt from Respondent dated March 21, 1996, in the amount of \$200.

6. On March 21, 1996, Respondent established account number 0131-07252 in the name of "Alfred Byrd, d/b/a Mother's Kitchen"

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with a mailing address of "P. O. Box 134, Sanford, Florida 32772-0134." This was based on the information provided by and the instructions of Byrd.

7. On March 22, 1996, Respondent's serviceman prepared and connected a range and a fryer at Mother's Kitchen Restaurant for gas service, pursuant to the March 21, 1996, Job-Work Contract, and turned on the gas supply to Mother's Kitchen Restaurant.

8. On March 31, 1996, Respondent billed Byrd \$126.59 for the labor and materials required to prepare and connect the appliances under the March 21, 1996, Job-Work Contract.

9. On April 9, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$67.32, consisting of \$46.32 for gas usage from March 22, 1996, through April 2, 1996, and a \$21.00 turn on charge from March 22, 1996.

10. On April 23, 1996, Respondent credited \$126.59 to the "Alfred Byrd d/b/a Mother's Kitchen" account, paid by Mother's Kitchen check No. 1013, dated April 22, 1996.

11. On May 8, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$297.07, consisting of \$229.75 for gas usage from April 2, 1996, through May 1, 1996, and \$67.32 in arrears.

12. On May 23, 1996, Respondent credited \$150.00 to the "Alfred Byrd d/b/a Mother's Kitchen" account, paid by Mother's Kitchen check No. 1074, dated May 20, 1996, and signed by Anthony Brooks (Brooks). Respondent issued a receipt in the name of "Mother's Kitchen" for this payment.

13. On June 3, 1996, Byrd signed a Job-Work Contract authorizing Respondent to clean the pilot light on the gas oven at Mother's Kitchen Restaurant. Respondent's serviceman completed this work the same day.

14. On June 7, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$391.72, consisting of \$244.65 for gas usage from May 1, 1996, through May 31, 1996, and \$147.07 in arrears.

15. On June 7, 1996, Mother's Kitchen check No. 1074 was returned for insufficient funds. Respondent imposed a \$20.00 service charge on the "Alfred Byrd d/b/a Mother's Kitchen" account for the returned check.

16. On June 11, 1996, Respondent credited \$170.00 to the "Alfred Byrd d/b/a Mother's Kitchen" account, paid in cash on June 10, 1996, as reimbursement for the \$150.00 returned check No. 1074 and the corresponding \$20.00 service charge. Respondent issued a receipt in the name of "A. Byrd" for this payment.

17. On July 9, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$657.36, consisting of \$265.64 for gas usage from May 31, 1996, through July 1, 1996, and \$371.72 in arrears.

18. On July 11, 1996, Respondent credited \$160.00 to the "Alfred Byrd d/b/a Mother's Kitchen" account, paid in cash on July 11, 1996. Respondent issued a receipt in the name of "A. Byrd" for this payment.

19. No person paid a \$500.00 deposit on behalf of Petitioner to establish a new gas account with Respondent for

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Mother's Kitchen Restaurant on July 11, 1996. At no time during the month of July did any person pay such a deposit.

20. On July 15, 1996, Respondent added a service charge of \$30.00 to the "Alfred Byrd d/b/a Mother's Kitchen" account for service performed pursuant to the June 3, 1996, Job-Work Contract.

21. On July 25, 1996, Respondent credited \$211.72 to the "Alfred Byrd d/b/a Mother's Kitchen" account, paid by Mother's Kitchen check No. 1131, dated July 24, 1996, and signed by Alfred Byrd. Respondent issued a receipt in the name of "Mother's Kitchen" for this payment.

22. On August 7, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$540.04, consisting of \$224.40 for gas usage from July 1, 1996, through July 31, 1996, \$285.64 in arrears, and the \$30 service charge added on July 15, 1996.

23. On August 8, 1996, Mother's Kitchen check No. 1131 was returned for insufficient funds. Respondent imposed a \$20.00 service charge on the "Alfred Byrd d/b/a Mother's Kitchen" account for the returned check.

24. On August 12, 1996, Respondent discontinued gas service to Mother's Kitchen Restaurant for nonpayment of \$285.64 in arrears on the "Alfred Byrd d/b/a Mother's Kitchen" account.

25. On August 12, 1996, Brooks hand-delivered a \$290.00 cash payment to Respondent's Sanford Office to be applied to the "Alfred Byrd d/b/a Mother's Kitchen" account. Respondent issued a receipt in the name of "Mother's Kitchen" for this payment. This payment was not credited to the account until August 28,

1996. The delayed crediting of this payment had no effect on any notices or bills concerning the account.

26. On August 12, 1996, Brooks, in person at Respondent's Sanford office, requested that the mailing address for the "Alfred Byrd d/b/a Mother's Kitchen" account be changed to the physical address of Mother's Kitchen Restaurant. Respondent made the requested change that same day.

27. On August 13, 1996, Respondent's serviceman reconnected gas service to Mother's Kitchen Restaurant based on the August 12, 1996, cash payment of \$290.00.

28. On August 28, 1996, Respondent credited \$521.72 to the "Alfred Byrd d/b/a Mother's Kitchen" account. This credit consisted of the \$290 cash payment made August 12, 1996, and a \$231.72 payment made August 28, 1996. The \$231.72 payment was made as reimbursement for the \$211.72 returned check No. 1131 and the corresponding \$20 service charge. Respondent prepared an in-house receipt for this credit.

29. No person made a \$521.72 payment to Respondent for the "Alfred Byrd d/b/a Mother's Kitchen" account on August 28, 1996.

30. On August 30, 1996, Respondent mailed a disconnect notice for the "Alfred Byrd d/b/a Mother's Kitchen" account to the physical address of Mother's Kitchen Restaurant. This notice stated that gas service to the restaurant would be discontinued if payment of \$230.04 in arrears on the account was not made by September 10, 1996.

31. On September 9, 1996, Respondent billed the "Alfred Byrd d/b/a Mother's Kitchen" account \$471.29, consisting of

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\$221.25 for gas usage from July 31, 1996, through August 29, 1996, and \$230.04 in arrears. This bill was mailed to the physical address of Mother's Kitchen Restaurant.

32. On September 12, 1996, Respondent discontinued gas service to Mother's Kitchen Restaurant for nonpayment of \$230.04 in arrears on the "Alfred Byrd d/b/a Mother's Kitchen" account.

33. On September 12, 1996, Harry Johnson, an employee of Petitioner, hand-delivered a \$261.04 cash payment, consisting of payments for the \$230.04 in arrears and a \$31 reconnect fee, to Respondent's Sanford office to be applied to the "Alfred Byrd d/b/a Mother's Kitchen" account. Respondent issued a receipt in the name of "Mother's Kitchen" for this payment.

34. On September 13, 1996, Respondent's serviceman was dispatched between 8:30 a.m. and 9:00 a.m. to reconnect gas service to Mother's Kitchen Restaurant.

35. On September 13, 1996, between 8:30 a.m. and 9:00 a.m., Byrd, in person at Respondent's Sanford office, spoke to Diane Keitt (Keitt) and requested that gas service be discontinued on the "Alfred Byrd d/b/a Mother's Kitchen" account. Keitt contacted the serviceman by radio as he was en route to Mother's Kitchen Restaurant and instructed him to tell someone at the restaurant to call Keitt at Respondent's Sanford office.

36. The serviceman arrived at Mother's Kitchen Restaurant at approximately 9:00 a.m. Upon entering the restaurant's kitchen, the serviceman told the occupants that someone needed to call Keitt immediately at the Respondent's Sanford office. Next, he inspected the restaurant's natural gas appliances to make sure

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there were no open gas lines then exited the building to perform a meter test to check for the possibility of a gas leak on the customer's side of the meter.

37. After natural gas service has been discontinued on any existing account, Respondent performs a meter test before reestablishing service in order to determine if there is a leak on the customer's side of the meter.

38. The serviceman's meter test revealed a gas leak on the customer's side of the meter. He searched for the leak by inspecting the gas appliances and applying a soapy solution used to detect leaks to the gas connections on each appliance. The serviceman located the leak on a worn pilot adjustment screw on the range. The leak could not be repaired without replacing the pilot adjustment screw.

39. Brooks was present at the restaurant and called Keitt while the serviceman was performing the meter test. Keitt informed Brooks that Byrd had requested discontinuance of service to the restaurant. Keitt also told Brooks that Respondent would continue providing service on a temporary basis, in order to provide Petitioner time to pay a \$500 deposit to establish a new account.

40. Keitt then called Respondent's Vice President Darryl Troy (Troy) at Respondent's home office in West Palm Beach, Florida, to inform him of the situation.

41. Brooks called Troy, who confirmed Keitt's statements concerning Byrd's desire to have service discontinued and the necessity of providing a new deposit to establish a new account.

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The serviceman interrupted this phone conversation to tell Brooks that there was a gas leak on the restaurant's range. Brooks was upset that the serviceman had not yet restored gas service. Brooks refused to authorize or pay for repairs to the range.

42. The serviceman prepared a Report of Hazardous Condition or Corrective Action Required to document the gas leak on the range and inform the customer of the necessary repairs. Brooks refused to sign this form.

43. The serviceman capped the gas connection to the range, plugged the range, and placed the Report of Hazardous Condition or Corrective Action Required and a red tag on the range. He determined that the fryer could be operated safely, so he lit its pilot before exiting the restaurant.

44. The serviceman spoke with Keitt by radio and told her that he had located a gas leak and that Brooks refused to authorize its repair. Keitt then called Troy for instructions on how to handle the account. Troy felt that Brooks did not believe a gas leak was present on the range. Troy was concerned that someone at the restaurant may attempt to reconnect the range, so he instructed Keitt to have the meter turned off and locked. The meter was turned off and locked due only to safety concerns; Byrd's request to discontinue service to the restaurant played no part in Troy's decision.

45. Keitt contacted the serviceman by radio and instructed him to turn the meter off and lock it. The serviceman turned off the meter and locked it. He then notified Brooks that he had

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turned off the meter and locked it upon instructions from Keitt. The serviceman left the restaurant at approximately 10:00 a.m.

46. That afternoon, Brooks, in person at Respondent's Sanford office, requested that Keitt provide him a refund of the \$261.04 payment made September 12, 1996. Keitt refused to refund this amount.

47. No record evidence exists to show that Petitioner paid a \$500 deposit, or a deposit of any amount, to establish a new account with Respondent after gas service to Mother's Kitchen Restaurant was disconnected on September 12, 1996.

48. On September 16, 1996, a serviceman took a final reading from the gas meter at Mother's Kitchen Restaurant and officially turned off the meter.

49. On September 16, 1996, Respondent charged \$100.50 to the "Alfred Byrd d/b/a Mother's Kitchen" account for gas usage from August 29, 1996, through September 16, 1996, to finalize the account.

50. On September 19, 1996, Respondent applied Petitioner's \$200.00 deposit from March 21, 1996, to the outstanding, final balance of \$310.75 on the "Alfred Byrd d/b/a Mother's Kitchen" account.

51. No record evidence exists to show that any person paid a \$500 deposit, or a deposit of any amount, on behalf of Petitioner to establish a new account with Respondent for gas service to Mother's Kitchen Restaurant since the "Alfred Byrd d/b/a Mother's Kitchen" account was established on March 21, 1996.

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CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.569(2)(a) and 120.57(1), Florida Statutes.

53. Respondent is a natural gas utility regulated by the PSC pursuant to Chapter 366, Florida Statutes, and Chapter 25-7, Florida Administrative Code. Section 366.07(1), Florida Statutes, establishes the PSC's jurisdiction to regulate and supervise each public utility's rates and service.

54. Section 120.80(13)(b) provides that "a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated." Therefore, this proceeding may only address the issues disputed in Petitioner's petition for a formal hearing.

55. Petitioner has the burden of establishing evidence on the record which supports their claim. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So. 2d 1330, 1334 (Fla. 1st DCA 1995). Petitioner must prove, by a preponderance of the evidence, that Respondent has violated the rule provisions stipulated to be at issue. Section 120.57(1)(h), Florida Statutes.

56. A "preponderance" is "[the] greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability." Black's Law Dictionary 1064 (5th ed. 1979). See Department of Health and

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Rehabilitative Services v. M. B., 701 So. 2d 1155, 1163 n. 12
(Fla. 1997).

Establishment of the Original Account

57. Rule 25-7.083(4), Florida Administrative Code, requires utility companies to keep records of all deposits received, and, specifically, subparagraph (a) requires utilities to keep records to show the name of each customer making the deposit.

58. Petitioner contends that the gas account for Mother's Kitchen Restaurant was inappropriately established in the name of "Alfred Byrd d/b/a Mother's Kitchen." The preponderance of the record evidence shows, however, that Respondent established the gas account for Mother's Kitchen Restaurant pursuant to the instructions of Alfred Byrd, a partner in Mother's Kitchen, Ltd., who made the deposit and signed the work order for the initial service connection. In addition, the evidence shows that Respondent complied with Rule 25-7.083(4)(a), Florida Administrative Code, by keeping records which show that Alfred Byrd made the deposit. At no time did Byrd present any document to support setting up the account in the name of the business entity. No evidence has been offered to show that Respondent failed to comply with any other statute or PSC rule concerning establishment of service or customer deposits when the Mother's Kitchen Restaurant account was established.

Establishment of a New Account

59. Petitioner has failed to prove by a preponderance of the evidence that they ever paid a \$500 deposit for the establishment of a new account in July 1996.

60. Petitioner contends that it paid a separate \$500.00 deposit to Respondent on July 11, 1996, in order to establish a new account for Mother's Kitchen Restaurant, but that Respondent never opened a new account for the restaurant.

61. The preponderance of the record evidence, however, shows that Petitioner did not pay a separate \$500.00 deposit to Respondent at any time: Respondent's regularly-kept business records revealed no deposit or payment of \$500 during the month of July 1996. Respondent^{"Petitioner" (?)} offered no receipt, cancelled check, or other documentation as proof of such a deposit; and Petitioner's initial written complaint to the PSC discussed in detail the events of July 11, 1996, but made no mention of any deposit made that day or at any other time. Further, no record evidence exists to indicate that the \$521.72 credit on August 28, 1996, represented a deposit to establish a new account for Mother's Kitchen Restaurant. Accordingly, no statute or PSC rule concerning establishment of service or customer deposits is applicable here.

Discontinuance of Service

62. Rule 25-7.089, Florida Administrative Code, Refusal or Discontinuance of Service by Utility, states in pertinent part:

(2) If the utility refuses service for any reason specified in this subsection, the utility shall notify the applicant for service as soon as practicable, pursuant to subsection (5), of the reason for refusal of service. . . . The 5-day notice provision does not apply to paragraphs (h) As applicable, each utility may refuse or discontinue service under the following conditions:

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(g) For nonpayment of bills. . . .

(h) Without notice in the event of a condition known to the utility to be hazardous.

* * *

(3) Service shall be restored when cause for discontinuance has been satisfactorily adjusted.

* * *

(5) In case of refusal to establish service, or whenever service is discontinued, the utility shall notify the applicant or customer in writing of the reason for such refusal or discontinuance.

(6) The following shall not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer.

(a) Delinquency in payment for service by a previous occupant of the premises unless the current applicant or customer occupied the premises at the time the delinquency occurred and the previous customer continues to occupy the premises and such previous customer will receive benefit from such service.

* * *

(e) Failure to pay the bill of another customer as guarantor thereof.

63. Petitioner contends that Respondent did not give notice before discontinuing its gas service on September 12, 1996. The record evidence, however, shows that Respondent made frequent phone calls to Petitioner seeking payment on the account and mailed a written turn-off notice dated August 30, 1996, separate from any bill for service, to Petitioner at the physical address of Mother's Kitchen Restaurant. Accordingly, Respondent complied

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with the five-day notice requirement, in accordance with the requirements of Rule 25-7.089(2)(g), Florida Administrative Code.

Reconnection of Service

64. Also at issue is whether Rule 25-7.089(3), Florida Administrative Code, is applicable to the facts of this case, and if so, whether Respondent violated its provisions, which state: "[s]ervice shall be restored when cause for discontinuance has been satisfactorily adjusted."

65. Petitioner contends that its service should have been restored on September 13, 1996, the day after it made payment to bring the Mother's Kitchen Restaurant account current and have service restored. Petitioner further contends that the Respondent serviceman sent to restore service on September 13, 1996, intentionally created a leak on the restaurant's range in order to avoid restoring service to the restaurant.

66. Rule 25-7.037, Florida Administrative Code, requires all gas utilities to make a general inspection and adjustment of all appliances affected by a change in character of service, including a change in gas pressure or any other condition or characteristic which would impair the safe and efficient use of the gas in the customer's appliances. The preponderance of the record evidence shows that Respondent's serviceman did not create a leak on the range, either intentionally or otherwise, but detected a leak on the range during a routine meter test designed to check for leaks before restoring service to Petitioner. Beyond mere suspicions, Petitioner offered only uncorroborated hearsay in support of its contention.

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67. Rule 25-7.089(2)(h), Florida Administrative Code, provides that a utility may refuse or discontinue service "[w]ithout notice in the event of a condition known to the utility to be hazardous." The preponderance of the evidence shows that Respondent, on September 13, 1996, was justified in refusing to restore service under this rule. Anthony Brooks, the Petitioner's representative who dealt with Respondent that day, testified that he was upset and screaming about not having service restored to the restaurant. Brooks further testified that he refused to sign a Hazardous Condition Report prepared by the Respondent's serviceman. Respondent feared that he or someone else at the restaurant would attempt to reconnect and operate the range before repairing the leak. Accordingly, Respondent did not violate Rule 25-7.089(3), Florida Administrative Code, since the cause for discontinuance of service had not been satisfactorily adjusted.

Written Reason for Disconnection

68. Petitioner alleged a violation of Rule 25-7.089(5), Florida Administrative Code. The Rule states in pertinent part: "[i]n case of refusal to establish service, or whenever service is discontinued, the utility shall notify the applicant or customer in writing of the reason for such refusal or discontinuance."

69. Petitioner contends that Respondent did not give notice before discontinuing its gas service on September 12, 1996. As stated above, however, the record evidence shows that Respondent mailed a written turn-off notice dated August 30, 1996, to

Petitioner at the physical address of Mother's Kitchen Restaurant. Further, no record evidence exists to indicate that Respondent failed to comply with Rule 25-7.089(5), Florida Administrative Code, on any other occasion.

Refusing New Service

70. Petitioner alleged a violation of Rule 25-7.089(6)(a), Florida Administrative Code. The Rule, which states that "[d]elinquency in payment for service by a previous occupant of the premises" does not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer "unless the current applicant or customer occupied the premises at the time the delinquency occurred and the previous customer will receive benefit from such service."

71. This rule is not applicable to the facts of this case. No record evidence exists to show that Respondent refused or discontinued service to Mother's Kitchen Restaurant for the delinquency of a previous tenant. The preponderance of the evidence shows that Alfred Byrd was the account's customer-of-record and "current occupant" from the inception of the account until its termination. Petitioner never opened another account with Respondent separate from the account established by Byrd.

72. Furthermore, the account was not delinquent on September 13, 1996, and Respondent never refused to grant Petitioner new service after that date.

73. Petitioner's argument that Respondent should have substituted Brooks, or some other partner, as customer-of-record whenever one of the partners made payments on this account is

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wholly without merit. A utility is under no obligation to do so, under either the Florida Administrative Code or the Florida Statutes. Respondent violated no provision of law by maintaining Byrd as customer-of-record, despite its receipt of payments from other individuals toward the account.

74. The Petitioner failed to prove, in any credible way, misconduct on the part of any Respondent's employee with regard to the handling, set-up, and ultimate disconnection of this account. The Petitioner failed to prove its claim that Respondent's personnel deliberately tampered with Mother's Kitchen cooking equipment.

Discontinuance of Service

75. Petitioner has alleged a violation of Rule 25-7.089(6)(e), Florida Administrative Code, which states in pertinent part: "[f]ailure to pay the bill of another customer as guarantor thereof" does not constitute sufficient cause for refusal or discontinuance of service.

76. This rule is not applicable to the facts of this case. No record evidence exists to indicate that Petitioner was a guarantor of the Mother's Kitchen Restaurant account or that Respondent discontinued service on the basis stated in Rule 25-7.089(6)(e), Florida Administrative Code.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that Respondent be found to have acted in compliance with Public Service Commission rules concerning the

establishment of new service and management of customer deposits when service was established in the name of Alfred Byrd, d/b/a Mother's Kitchen on March 21, 1996. It is further

RECOMMENDED the Respondent be found to have properly administered the account at issue here at all times leading up to its disconnection on September 13, 1996, and that Respondent be found to have acted in compliance with all Commission rules regarding that disconnection and refusal to reconnect. It is further

RECOMMENDED that Respondent not be required to provide a refund of any part of the deposit made on this account or any amounts paid for service or fees on the account.

DONE AND ENTERED this 11th day of June, 1998, at Tallahassee, Leon County, Florida.



DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of June, 1998.

COPIES FURNISHED:

Anthony Brooks, II
Qualified Representative
Mother's Kitchen, Ltd.
Post Office Box 1363
Sanford, Florida 32772

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Kathryn G. W. Cowdery, Esquire
Gatlin, Schiefelbein & Cowdery, P.A.
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312

Wm. Cochran Keating, IV, Esquire
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Blanca Bayo, Director of Records
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

William D. Talbott, Executive Director
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

Rob Vandiver, General Counsel
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.