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October 15, 1998

Blanca S. Bayo, Director
Division of Records & Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

VIA HAND DELIVERY

Re: Docket No. 970365-GU
Complaint of Mother's Kitchen Ltd. against Florida Public
Utilities Company regarding refusal or discontinance of
service.

Dear Ms. Bayo:

Enclosed on behalf of Florida Public Utilities Company, for
filing in the above docket, are an original and fifteen (15) copies
of following:

1. Florida Public Utilities Company's Response to
Petitioners' Motion for Reconsideration; and ~~11540-98~~
2. Motion to Strike Portions of Petitioners' Motion for
Reconsideration of the Order Denying Complaint ~~11541-98~~

UCK _____ Please acknowledge receipt of the foregoing by stamping the
WFA _____ enclosed extra copy of this letter and returning same to my
APP _____ attention. Thank you for your assistance.

CAF 1
SAL _____
CTR _____
EAG _____
LEG 1
LIN 5
OPC _____
RCH _____
SEC 1
WAS _____
OTH _____

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[Signature]
FPSC-BUREAU OF RECORDS

Sincerely,

[Signature]
Kathryn G. W. Cowdery

KGC/l dv
Enclosures

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mother's Kitchen) Docket No. 970365-GU
Ltd. against Florida Public Utilities)
Company regarding refusal or) Filed: October 15, 1998
discontinuance of service)

FLORIDA PUBLIC UTILITY COMPANY'S RESPONSE TO
PETITIONERS' MOTION FOR RECONSIDERATION

Florida Public Utility Company ("FPUC"), by and through its undersigned counsel and pursuant to Fla. R. Admin Pro. 25-22.060(1)(b), hereby responds to Petitioners' Motion for Reconsideration, and in support states the following:

1. The correct standard of review for determining whether reconsideration is appropriate, and which is consistently applied by the Florida Public Service Commission ("Commission"), is as expressed in Commission order No. PSC-95-0788-FOF-SU:

On May 30, 1995, OPC filed a motion for reconsideration of Order No. PSC-0612-PCO-SU. Rule 25-22.060, Florida Administrative Code, permits a party who is adversely affected by an order of the Commission to file a motion for reconsideration of that order. The standard for determining whether reconsideration is appropriate is set forth in Diamond Cab Company of Miami v. King, 146 So.2d 889 (Fla. 1962). In Diamond Cab, the Court held that the purpose of a petition for reconsideration is to bring to an agency's attention a point which was overlooked or which the agency failed to consider when it rendered its order. That point is generally a mistake in law or a mistake in fact. In Stewart Bonded Warehouses v. Revis, 294 So.2d 315 (Fla. 1974), the Court held that a petition for reconsideration

should be based upon specific factual matters set forth in the record and susceptible to review. We have applied this rationale in our review of OPC's motion.

* * *

After a review of that order, we find that all relevant points were considered and that no point or [sic] law or fact was overlooked. OPC has not demonstrated that we overlooked a point of fact or law, and has not met the standard for reconsideration set forth in Diamond Cab. Therefore, OPC's motion for reconsideration is denied.

In Re: North Fort Myers Utility, Inc., 95 FPSC 6:452, 453, 455(1985). Petitioners' motion does not meet this standard, and must be denied.

2. The "Case Background" section of Petitioners' motion is an inflammatory, argumentative version of certain facts as perceived by Plaintiffs, which alleges Staff bias in the proceedings, wrongful and arbitrary rulings by the ALJ, and reargument of Petitioners' arguments made during various filings preceding Petitioners' exceptions being stricken as untimely. Petitioners do not allege an overlooked or mistaken point of fact or law relating to the issues and facts which were before the ALJ. Additional argument on these points is raised in the "Request for Reconsideration" section of Petitioners' motion.

3. Petitioners raise arguments which have been previously raised and argued and which may not be raised on reconsideration. These arguments are, essentially, that 1)

FPUC's Motion to Strike Mother's Kitchen's exceptions to the ALJ's Recommended Order should not have been granted, 2) FPUC's motion to strike Petitioner's response should not have been granted, 3) the Commission should not have adopted the ALJ's recommended order because it should have believed Petitioners' version of the facts, in essence asking the Commission to reweigh the evidence which was before the ALJ (motion for reconsideration arguments 1(A)-(E), pp. 6-11).

4. A motion for reconsideration is not intended as a procedure for rearguing the whole case merely because the losing party disagrees with the order. Diamond Cab Company v. King, 146 So. 2d at 891. The Commission has in the past denied motions for reconsideration which reargue the merits of the case. E.g. In Re: Tamiami Village Utility, Inc., 95 F.P.S.C. 8:152, 154-157.

5. Petitioners argue that Staff had a "racially motivated" bias against their case, and that the Final Order should be reconsidered on this basis. However, the so-called "evidence of this bias and discriminatory action" is merely that the ALJ accepted FPUC's evidence and made findings of fact in FPUC's favor and against Petitioners, that Staff did not accept Petitioners' version of the facts, and that Staff is to blame for Petitioners' belief that their exceptions did not have to be

filed with the agency, but that service would suffice (pp. 6-11). There is no mistake of law or fact in this regard, no merit to Petitioners' argument, and no support whatsoever for reconsideration on this basis.

6. Petitioners state that they have set forth allegations of "racially motivated" "bias, discrimination and misrepresentation" throughout the proceedings. Although these allegations have been made by Petitioners on and off since they filed their initial complaint, there were no such issues raised by Petitioners as part of the formal administrative hearing before the Division of Administrative Hearings Administrative Law Judge. See the Prehearing Stipulation, setting forth the issues in the case, attached hereto as Attachment "A" hereto. There is no evidence on the record whatsoever to support Petitioners' allegations.

7. Petitioners' vague and unsupported allegations of bias do not support a motion for reconsideration of the Final Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974) (The granting of a petition for reconsideration by an agency should not be based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review; reweighing the evidence is not sufficient ground for

reconsideration.)

8. The ALJ's findings of fact may not be overturned by the Commission because Petitioners believe that the Staff was wrong to adopt the ALJ's Recommended Order. This argument amounts to a request for the Commission to reweigh the evidence, which is prohibited by Ch. 120, Fla. Stat.

9. Petitioners' complain that the ALJ excluded certain of their documents from evidence. The Commission does not have "substantive jurisdiction" over the evidentiary questions decided at hearing by the ALJ. The APA mandates that even if a conclusion of law is overturned by an agency, that agency may not alter findings of fact for that reason. Revisions to the Administrative Procedures Act are intended to foreclose altogether evidentiary rulings in a final order entered after entry of a recommended order. Florida Power & Light Co. v. State, 693 So. 2d 1025, 1028 (Fla 1st DCA 1997). Thus, Petitioners' arguments that the Commission should consider documents excluded from evidence by the ALJ should be denied.

10. Petitioners argue that the Commission should consider "newly discovered evidence." This request for the Commission to consider information outside the record must be denied.

11. As stated by the First District Court of Appeals:

Chapter 120, Florida Statutes, directs an agency to

review a recommended order based on the record that was before the hearing officer. An agency is not authorized by section 120.57(1)(b)10 to reopen the record, receive additional evidence and make additional findings. [citation omitted].

Lawnwood Med. Ctr. v. Agency for Health Care, 678 So. 2d 421 (Fla. 1st DCA 1996), rev. den. 690 So. 2d 1299 (Fla. 1997). Ch. 120, Fla. Stat., does not authorize or permit the Commission to allow reconsideration of a Final Order based upon the sort of nonrecord documents suggested by Petitioners. See also Miami Jewish Home v. Health Care Admin., 710 So. 2d 77 (Fla. 3rd DCA 1998); Florida Dept. of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 783-784 (Fla. 1st DCA 1981), followed in Collier Med. Center v. State Dept. of HRS, 462 So. 2d 83, 86, (Fla. 1st DCA 1985) ("Moreover, this court has previously noted that to allow a party to produce additional evidence after the conclusion of an administrative hearing below would set in motion a never-ending process of confrontation and cross-examination, rebuttal and surrebuttal evidence, a result not contemplated by the Administrative Procedures Act."). The Commission acts consistent with these court rulings. E.g. In Re: Tamiami Village Utility, Inc., 95 F.P.S.C. 8:152, 154-157 (the Commission would not go outside of the record in order to make a new finding on reconsideration).

12. Furthermore, the documents attached to Petitioners'

motion for reconsideration are not "newly discovered evidence" but documents already of record, documents produced in discovery but not introduced into evidence at hearing, documents which the ALJ specifically excluded from the evidence at hearing, and/or documents which were in the possession of Plaintiffs, but not used at hearing. These documents may not be used to support a motion for reconsideration.

13. Petitioners' argument for reconsideration incorrectly relies on, and misinterprets, two federal court cases, neither of which recognize the established line of Florida court cases which address the issue of reconsideration and "new evidence" in the context of the administrative hearings held pursuant to the Administrative Procedure Act. Painewebber Income Properties Three Ltd. Partnership v. Mobil Oil Corp., 902 F. Supp. 1514, 1521 (M.D. Fla. 1995), cited by Petitioners for the proposition that a motion for reconsideration should raise new issues, must be interpreted in conjunction with other principles regarding reconsideration. The Court did not mean that a party on reconsideration must raise substantive issues new to the case, but that a party must raise "issues" of mistake in law or fact apparent from the record, and which were not previously brought to the Commission's attention. Petitioners' reasoning in this regard is flawed, and its "new issues" may not be heard on reconsideration.

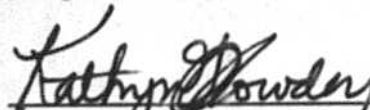
14. Publishers Resource, Inc. v. Walker-Davis Publications

Inc., 762 F. 2d 557, 561 (7th Cir. 1985), even if it were applicable to this docket, would not support Petitioners' arguments. There, the Court denied reconsideration because "as the district court recognized, all of the evidence on which Walker-Davis' new arguments rest was available to it at the time it responded to plaintiff's summary judgment motion and Walker-Davis was obligated to make these arguments at that time."

15. Respondent FPUC has this same date filed a Motion to Strike portions of Petitioners' motion for reconsideration for the reasons stated therein.

DATED this 15th day of October, 1998.

Respectfully submitted,

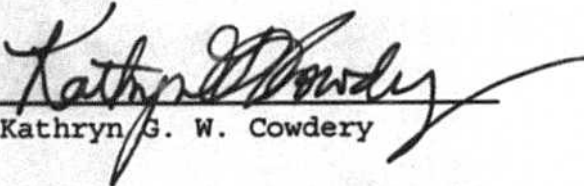


Kathryn G.W. Cowdery
Ruden, McClosky, Smith, Schuster
& Russell, P.A.
215 S. Monroe St., Suite 815
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(850) 681-9027

Attorneys for
Florida Public Utilities Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Bob Elias, Esquire, Division of Legal Services, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, and by U.S. mail to Anthony Brooks, P.O. Box 1363, Sanford, Florida 32772, on this 15th day of October, 1998.


Kathryn G. W. Cowdery

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

Mother's Kitchen Ltd.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 97-4990
)	970365-GU
Florida Public Utilities)	
Company,)	
)	
Respondent,)	
)	
and)	
)	
Public Service Commission)	
)	
Intervenor.)	
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PREHEARING STIPULATION

Petitioners, Anthony L. Brooks, Danielle M. Dow-Brooks, Arthur Brooks, and Eddie Hodges, d/b/a Mothers Kitchen Ltd., Respondent, Florida Public Utilities Company (FPUC), and Intervenor, the State of Florida, Public Service Commission, hereby enter into this Prehearing Stipulation, in compliance with this Court's Amended Initial Order.

Disputed Issues of Ultimate Fact

The parties stipulate that the disputed issues of ultimate fact in this case are as follows:

1. Establishment of the Original Account. Whether Respondent FPUC acted in compliance with all applicable statutes and Commission rules, including Rule 25-7.083(4)(a), concerning

establishment of service and customer deposits.

2. Establishment of a New Account. Whether Petitioners made a deposit of \$500 at any time to establish a new account and, whether FPUC acted in compliance with all applicable statutes and Commission rules, including Rule 25-7.083(4)(a), concerning establishment of service and customer deposits.

3. Disconnection and Refusal to Reconnect Service.

a) Whether Respondent FPUC acted in compliance with Fla. Admin. Code R. 25-7.089(2)(g) and the notice provisions contained therein in disconnecting service for nonpayment.

b) Whether Fla. Admin. Code R. 25-7.089(3) is applicable to this case, and, if so, whether Respondent FPUC violated its provisions, which state: "service shall be restored when cause for discontinuance has been satisfactorily adjusted."

c) Whether Fla. Admin. Code Rule 25-7.089(5) is applicable to the facts of this case, and, if so, whether Respondent FPUC violated its provisions, which state: "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."

d) Whether Fla. Admin. Code R. 25-7.089(6)(a) is applicable to the facts of this case, and, if so, whether Respondent FPUC violated its provisions, which state that: "[d]elinquency in payment for service by a previous occupant of the premises" is not 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 continues to occupy the premises and such previous customer will receive benefit from such service."

e) Whether Fla. Admin. Code. R. 25-7.089(6)(e) is applicable to the facts of this case, and, if so, whether Respondent FPUC violated its provisions, which state that: "[f]ailure to pay the bill of another customer as guarantor thereof" does not constitute sufficient cause for refusal or discontinuance of service.

Disputed Issues of Law

The parties stipulate that the disputed issues of law in this case are as follows:

1. Whether Respondent, FPUC, acted in compliance with all applicable Commission rules and Florida Statutes as set forth in the Disputed Issues of Ultimate Fact with respect to Petitioners.

2. Whether Respondent FPUC should be required to provide a refund of all or any part of the deposit made on the Mothers Kitchen Ltd. account or any amounts paid for service or fees on the Mothers Kitchen Ltd. account.

Stipulations of Fact

Petitioners and Respondent stipulate to, and the Intervenor, Florida Public Service Commission, takes no position on the following facts:

1. Mr. Alfred Byrd received a deposit receipt dated March 21, 1996, in the amount of \$200.00.

2. On March 22, 1996, FPUC Serviceman Polizzi connected

service for Mothers Kitchen.

3. Department of Revenue Certificate of Registration 69-11-058918-08, listed as the mailing address: Mothers Kitchen Ltd., Alfred Byrd/Daniele Dow/ Eddie Hodges, P.O. Box 134, Sanford, FL 32772-0134, and certified that "Mother's Kitchen Ltd., Alfred Byrd/Daniele Dow/Eddie Hodges, 1744 West Airport Blvd., Sanford, FL 32771-0134" is authorized to collect sales tax in Florida.

4. On May 23, 1996, FPUC received a \$150.00 Mothers Kitchen check #1074 as payment on the Mothers Kitchen gas account. The check is signed by Anthony Brooks. A receipt in the name of "Mothers Kitchen" was issued.

5. The \$150.00 payment made by Mothers Kitchen on May 23, 1996, was returned to FPUC by the bank for insufficient funds ("NSF").

6. On June 11, 1996, a cash payment of \$170.00 was received for reimbursement of the \$150.00 "NSF" check and a \$20.00 service charge. A receipt in the name of "A. Byrd" was issued by FPUC for this payment.

7. On July 11, 1996, FPUC received a \$160.00 cash payment on the gas account. A receipt in the name of "A. Byrd" was issued.

8. On July 24, 1996, FPUC received a \$211.72 payment on the gas account by Mothers Kitchen check # 1131, signed by Alfred Byrd. A receipt in the name of "Mothers Kitchen" was issued.

9. The Mothers Kitchen July 24, 1996 payment to FPUC, check #1131 for \$211.72, was returned by the bank to FPUC for

insufficient funds ("NSF").

10. On August 12, 1996, in the morning, the Mothers Kitchen gas account was disconnected.

11. On August 12, 1996, FPUC received a cash payment of \$290 on the Mother's Kitchen account. A receipt was issued in the name of "Mothers Kitchen."

12. On August 13, 1996, an FPUC Serviceman reconnected gas service to Mothers Kitchen.

13. On September 12, 1996, the Mothers Kitchen account was disconnected for non-payment of \$230.04 past due.

14. On September 13, 1996, FPUC serviceman Bill McDaniel arrived at the Mothers Kitchen restaurant.

15. On September 13, 1996, FPUC Serviceman Bill McDaniel, "red tagged" the range, and filled out and left at the Mothers Kitchen restaurant a Report of Hazardous Condition or Corrective Action Required.

16. Mr. Anthony Brooks refused to sign the September 13, 1996, Report of Hazardous Condition.

Stipulation of Law

The parties stipulate to the following issue of law:

1. Respondent, Florida Public Utilities Company, is a natural gas utility company regulated by the Florida Public Service Commission pursuant to Ch. 366, Fla. Stat., and Chapter 25-7, Fla. Admin. Code.

Authenticity of Documents

Petitioners and Respondent stipulate to, and the Intervenor,

Florida Public Service Commission, takes no position on the authenticity of the following documents:

1. Copy of Department of Revenue Certificate of Registration 69-11-058918-08.

2. Copy of the 3/21/96 deposit receipt.

3. Copy of the \$150.00 Mothers Kitchen check #1074 signed by Anthony Brooks as payment on the Mothers Kitchen gas account.

4. Copy of the receipt for \$170.00 issued in the name of "A. Byrd" for reimbursement of the \$150.00 "NSF" check and a \$20.00 service charge.

5. Copy of the receipt issued in the name of "A. Byrd" for \$160.00 cash payment on the gas account.

6. Copy of the receipt issued in the name of "Mother's Kitchen" for a \$211.72 payment on the gas account by Mothers Kitchen check # 1131.

7. Copy of the receipt issued in the name of "A. Byrd, Mothers Kitchen," for a \$290 cash payment on the gas account.

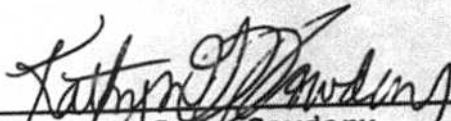
8. A copy of the Mothers Kitchen check #1131 in the amount of \$211.72 on the gas account, signed by Alfred Byrd.

9. A copy of the September 13, 1996 Report of Hazardous Condition or Correction Action Required.

Other

The parties stipulate that the entire or portions of the

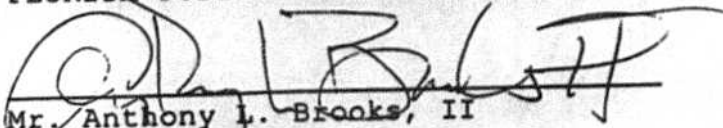
February 17, 1998 deposition of Mr. Dino Kramsky may be used at final hearing because the witness will be out of the state, at a greater distance than 100 miles from the place of hearing.



Kathryn G.W. Cowdery
Gatlin, Schiefelbein & Cowdery, P.A.
3301 Thomasville Road, Suite 300
Tallahassee, Florida 32312
(850) 385-9996

3/2/98
Date

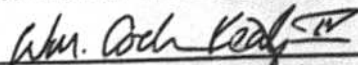
Attorneys for Respondent
FLORIDA PUBLIC UTILITIES COMPANY



Mr. Anthony L. Brooks, II
P.O. Box 1363
Sanford, Florida 32772

2/27/98
Date

Qualified Representative for Petitioners
Daniele M. Dow-Brooks, Arthur Brooks,
Eddie Hodges, Anthony L. Brooks, II, d/b/a
Mothers Kitchen Ltd.

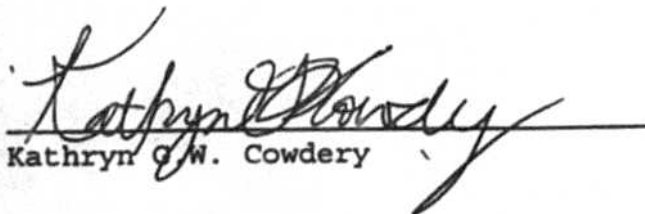


Wm. Cochran Keating, IV
Staff Counsel
Florida Public Service Commission, Intervenor
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

3/2/98
Date

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to Mr. Anthony L. Brooks, Representative, Mothers Kitchen Ltd., P.O. Box 1363, Sanford, Florida 32772, and by hand delivery to Wm. Cochran Keating, IV, Staff Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399, on this 2nd day of March, 1998.


Kathryn G.W. Cowdery