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**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

Civil Action No. 83,530

JORY BRICKER,
Appellant,

v.

J. TERRY DEASON, et al.,
Appellees.

On Appeal from the Florida Public Service Commission

BRIEF OF APPELLEE FLORIDA POWER CORPORATION

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INTRODUCTION

Appellee, FLORIDA POWER CORPORATION, submits this its Answer Brief in response to appellant's Initial Brief pursuant to Rule 9.210 of the Florida Rules of Appellate Procedure.

OPINIONS BELOW

Appellant, JORY BRICKER, filed a complaint on March 1, 1993 with the Division of Consumer Affairs of the Florida Public Service Commission against Florida Power Corporation for high electric bills, pursuant to Rule 25-22.032, Florida Administrative Code (F.A.C.). On August 11, 1993 the Florida Public Service Commission ("Commission") issued Proposed Agency Action Order No. PSC-93-1180-FOF-EI holding that Florida Power had billed Appellant Bricker properly.

On September 3, 1993, Ms. Bricker filed a Notice of Appeal requesting that a formal administrative hearing be conducted on her claim. The request was referred to the Division of Administrative Hearings pursuant to Rule 25-22.0355, F.A.C. On December 8, 1993, a formal administrative hearing was held before Hearing Officer J. Lawrence Johnston. On January 13, 1994, Hearing Officer Johnston entered a Recommended Order of Dismissal of Ms. Bricker's Complaint. No Exceptions to the Recommended Order were filed and on March 17, 1994, the Commission adopted the hearing officer's Recommended Order and dismissed Ms. Bricker's complaint. A timely appeal was filed invoking the jurisdiction of this Court pursuant to Rule 9.030(a)(1)(b)(ii), Florida Rules of Appellate Procedure on April 12, 1994.

STATEMENT OF THE CASE

Appellee, Florida Power Corporation ("Florida Power"), disagrees with the Statement of the Case as set forth by Appellant Jory Bricker as it is incomplete and misleading and therefore would add the following:

While Ms. Bricker was not represented by counsel when she initially filed a formal complaint with the Commission, she was represented by counsel during the formal administrative hearing. R-I-91. Ms. Bricker's complaint involved purportedly high electric bills but did not allege poor electrical service by Florida Power as asserted in Ms. Bricker's recitation of the case. R-I-92; R-II-116.

Florida Power alleged that Ms. Bricker did not want to, or could not, pay the electric bills due and that the complaint was part of a strategy for negotiating a reduction in the amount owed and gaining more time to pay. R-I-92. Prior to scheduling an informal conference, the Commission assigned a staff member to determine what portion of the outstanding electric bills was actually disputed. R-I-92. The Commission told Ms. Bricker on May 12, 1993, that: 1) an interim determination had been made pursuant to Rule 25-22.032(1) F.A.C. ; 2) a portion of the outstanding bills was undisputed, and 3) that portion should be paid by May 27, 1993 to avoid discontinuation of electric service. When Ms. Bricker failed to make any payment, electric service was terminated on May 28, 1993. R-I-92; R-II-103-104.

STATEMENT OF THE FACTS

Appellee Florida Power disagrees with the Statement of the Facts as submitted by Appellant Bricker in that it includes findings specifically rejected below and omits facts which are important for this Court to consider. Ms. Bricker did not file any written exceptions to the recommended order entered in this case. The Commission completely adopted the findings of fact contained in the recommended order. R-I-116. Having filed no exceptions to the findings of fact contained in the recommended order,

Ms. Bricker has thereby waived any objection to those findings of fact. Environmental Coalition of Florida, Inc. v. Broward County, 586 So.2d 1212 (Fla. 1st DCA 1991). The specific points Florida Power disagrees with or believes should have properly been included are as follows:

In June or July, 1989, Appellant Bricker had a hot tub installed at her house. The hot tub wiring was not properly installed. R-I-94; R-II-59, 170-171. The hot tub was used virtually every month of the year and was drawing approximately 26 kilowatts of electricity per day which was more than a hot tub normally should use. R-II-59, 143, 144.

When Ms. Bricker's appliances burned out in August 1989, she called an electrician to determine the cause. The electrician discovered a frayed service line and advised Appellant to contact Florida Power. R-II-14-15. The electrician hired by Ms. Bricker did not check for ground wiring problems. R-II-65. Florida Power repaired the service line leading to Ms. Bricker's home and reached a settlement with Ms. Bricker for the damages to her appliances R-I-94; R-II-105, 106. Ms. Bricker also was paid an insurance claim for the damages to the appliances. R-I-94; R-II-65-66. The used replacement appliances purchased by Ms. Bricker were not grounded properly. R-I-105, R-II-72-73, 76.

Ms. Bricker has filed four high bill complaints with the Commission since she began receiving electric service from Florida Power in 1989. R-II-102, 106, 109, 110 and 116. Contrary to the assertions of Ms. Bricker, in each instance Florida Power sent representatives to Ms. Bricker's home to conduct inspections, recommend a variety of energy conservation measures and recommend that she hire an electrician to check internal wiring. R-I-96, 98; R-II-108-113, 115-117. In November 1992, Ms. Bricker mentioned to Florida Power, for the first time, that she was receiving shocks from her appliances. Florida Power conducted a voltmeter test and again advised Ms. Bricker to hire an electrician. R-I-96; R-II-147-148, 154. Once an electrician or appliance repairman hired by Ms. Bricker properly grounded Ms. Bricker's appliances she received no more shocks from her appliances. R-I-96; R-II-76.

In March 1993, Florida Power sent Rudi Masi, a commercial industrial power quality specialist to Ms. Bricker's residence to inspect for problems. Residential inspections were not a part of his normal responsibilities. R-II-160-161. Florida Power's responsibility is to provide correct voltage and electricity to the customer at the top side of the meter and overhead service. R-II-124. Ms. Bricker goes to great lengths to suggest that Florida Power failed to check for an open neutral once she complained of shocks. However, the record is replete with explanations of Florida Power responses to Ms. Bricker's complaints R-I-110-112; R-II-105-117; 163-172.

On May 28, 1993, Florida Power disconnected electric service to Ms. Bricker's residence for failure to pay the portion of her electric bill that the Commission determined was not in dispute. R-II-103. The electric service was disconnected a second time on June 2, 1993, after Florida Power discovered electricity had been restored unlawfully. R-II-119.

SUMMARY OF ARGUMENT

The decision of the Commission adopting the Recommended Order of the Hearing Officer from the Division of Administrative Hearings is supported by competent substantial evidence and thus, should be affirmed. Where there is some evidentiary support for the findings of fact, and the law has correctly been applied thereto, the Court may not overturn the decision of the agency. In this case, the factual findings are supported by competent substantial evidence and the conclusions of law based thereon are a correct application of the law.

Appellant Bricker has failed to meet her burden of establishing that the Order of the Commission is invalid, arbitrary or unsupported by the evidence. The Standard of Review articulated by Appellant is not applicable to these proceedings. Appellant's entire argument on appeal focuses on Florida Powers' alleged "failure to provide safe electricity to Ms. Bricker and its failure to protect Jory Bricker from electrocution". The Appellant's contention that the Commission ignored "factual admissions" actually

a proper basis for modifying or rejecting findings of fact. All relevant admissible evidence was considered by the Hearing Officer and given appropriate weight.

As held by the Commission, Florida Power properly billed Ms. Bricker; she was not entitled to a credit for over billing; and Florida Power was not required to restore electric service to Ms. Bricker without full payment of \$1,157.24 in overdue electric service charges.

The Commission properly held that Florida Power's requirements for the provision of electricity were met and that its responsibility for electric facilities stops at the customer's meter. Florida Power is not responsible for proper wiring, grounds and other related matters on the customer's side of the meter and inside the customer's home.

ARGUMENT

I. THE DECISION OF THE COMMISSION IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The Florida Supreme Court must accept the findings of fact adopted by the Florida Public Service Commission unless those findings are not based upon "competent substantial evidence." The Administrative Procedure Act provides:

If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of s. 120.57 of the Act, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court, shall, however, set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record. Section 120.68(10), Fla. Stat.

Accordingly, the inquiry before the Court in the present action is whether there is competent substantial evidence in the record from which the Commission's findings could be inferred. Westchester General Hospital v. Department of Health and Rehabilitative Services, 419 So.2d 705 (Fla. 1st DCA 1982). On review, the Supreme Court should not reweigh or re-evaluate evidence, but only determine whether the Commission's decision comports with the essential requirements of law and is supported by competent, substantial evidence. Manatee County v. Marks, 504 So.2d 763 (Fla. 1987); Pan Am World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716, 717 (Fla. 1983). If so, the findings must be accepted. Id. Orders of the Commission come before a reviewing court clothed with the presumption of validity. This presumption of validity can be overcome only where the Commission's error either appears plainly on the face of the order or is shown by clear and satisfactory evidence. General Telephone Co. v. Carter, 115 So.2d 554, 556-557 (Fla. 1959). The "competent substantial evidence" requirement of Section 120.68 has been defined as such evidence that "a reasonable man would accept as adequate to support a conclusion." Pauline v. Lee, 147 So.2d 359, 363 (Fla. 2d DCA 1962).

In applying that standard of review, the Court must refrain from substituting its judgment for that of the Commission. Id. In Shevin v. Yarborough, 274 So.2d 505 (Fla. 1973), this Court stated:

[W]e will not overturn an order of the Commission because we have arrived at a different result had we made the initial decision; something more is needed. However, we will not affirm a decision of the Commission if it is arbitrary and unsupported by substantial competent evidence, or in violation of a statute or a constitutionally guaranteed right. 274 So.2d at 509.

II. APPELLANT BRICKER HAS FAILED TO MEET HER BURDEN OF DEMONSTRATING THAT THE ORDER OF THE COMMISSION IS INVALID, ARBITRARY, OR UNSUPPORTED BY THE EVIDENCE

The burden on a party seeking review of a Public Service Commission order is to demonstrate that the Commission's determination was arbitrary, invalid, or unsupported by the evidence. Manatee County v. Marks, 504 So.2d 763 (Fla. 1987); Shevin v. Yarborough, 274 So.2d 505 at 508 (Fla. 1973). Appellant Bricker has not met this burden. In fact, based upon the arguments set forth in Appellant's brief, counsel for Appellee Florida Power hardly recognizes this as the same case litigated below. Ms. Bricker has grossly misstated the appropriate standard of review for this Court and has cited numerous cases which are inapposite. Consequently, her argument fails to address the issues which would compel this Court to consider granting her requested relief.

Ms. Bricker contends in Point I of her argument that the Commission misapplied the law by "finding that a utility supplies safe electricity to a consumer, when the utility neither adequately inspects its own equipment, nor a consumer's equipment, nor stops the flow of electricity to a consumer's home, after a consumer reports shocks from her appliances." See Appellant's Brief p.7. The points of "law" which Ms. Bricker contends were "misapplied" are actually findings of fact with which Ms. Bricker disagrees. Her entire argument centers around an alleged failure, or series of failures, by Florida Power once Ms. Bricker filed complaints with the Commission reporting shocks. Ms. Bricker's argument however, entirely misses the mark. Even assuming, *arguendo*, that Ms. Bricker articulated an

appropriate standard of review, her argument should fail. There is simply no record evidence to support the assertion by Ms. Bricker that Florida Power either "failed to adequately inspect its own equipment, or failed to stop the flow of electricity to her home."

Ms. Bricker began filing complaints with the Commission as early as 1989. R-I-94; R-II-105. Not until November, 1992, did Ms. Bricker complain to Florida Power about receiving electric shocks. R-I-96; R-II-147-148, 154-155. Yet, from the time Ms. Bricker's complaints began until her electric service was disconnected in May, 1993, Florida Power made several trips to her residence in an effort to resolve the complaints then known. R-I-94-97; R-II-105-117. During virtually every visit to Ms. Bricker's residence, Florida Power representatives recommended that Ms. Bricker hire an electrician to inspect her home's internal wiring. R-II-148-149. When Ms. Bricker followed that advice and hired an electrician or appliance repairman to check her appliances, she learned that her appliances were not grounded properly. Once the appliances were grounded properly, Ms. Bricker never received another shock. R-II-73-76. Nevertheless, Ms. Bricker continued to complain to the Commission about high electric bills. In response to her March, 1993, complaint, Florida Power sent Rudi Masi to her home to inspect in a further effort to assist Ms. Bricker in understanding the reasons for the amount of her electric bill. R-II-163. Mr. Masi found a host of problems with the Bricker residence's electrical wiring which had not been previously identified. R-II-164-171.

On May 28, 1993 Florida Power disconnected electric service to Ms. Bricker's residence over her strong objections. R-II-103. Her housemate, John Wall, illegally reconnected Ms. Bricker's electric service requiring Florida Power to again disconnect it on June 2, 1993. R-II-119. In spite of this, in her initial brief, Appellant Bricker astonishingly takes the position that Florida Power should have "stopped the flow of electricity into [her] home to protect [her] safety." Excusing the fact that Ms Bricker is now improperly taking a position not raised below, the "new" position is not supported by any admissible evidence. (See Environmental Coalition of Florida, Inc. supra). The record is clear that when Florida

Power learned that Ms. Bricker's appliances burned out in August, 1989, immediate action was taken to correct any problems which may have been caused by Florida Power. R-II-105-106. When Ms. Bricker complained of shocks in November, 1992, Florida Power immediately checked the utility connections leading into Ms. Bricker's home, installed a voltage meter to check the voltage going into the home, and advised Ms. Bricker to hire an electrician to check her home's internal wiring. R-II-150-152. All other complaints by Ms. Bricker had nothing to do with safety. Rather, she only complained about her electric bill being too high.

Florida Power is not responsible for wiring, grounds and other related matters on a customer's property and inside a person's home. R-I-97; R-II 178-182. Florida Power's responsibilities stop at the top side of the customer's meter. R-I-98. The Hearing Officer heard all of the evidence presented by Ms. Bricker regarding the alleged failures of Florida Power and simply did not give it the weight Ms. Bricker erroneously believes it deserves. Where evidence supports two inconsistent findings, it is the Commission's role to decide the issue and the Court may not reject the Commission's decision unless there is no evidence to support it, even if the Court would have reached a contrary result. City of Lake Wales v. Public Employees Relations Comm'n, 402 So.2d 1224 (Fla. 2d DCA 1981). " Evidence is weighed by the administrative agency and not by the courts." Pauline v. Lee, 147 So.2d 359, 363 (Fla. 2d DCA 1962).

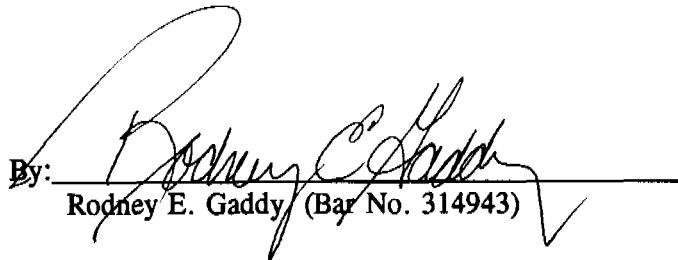
The Court must accept the order of the Florida Public Service Commission because the findings of fact clearly are supported by competent substantial evidence, and the conclusions of law based on the findings of fact are a correct application of the law.

CONCLUSION

Based upon the foregoing, Appellee, Florida Power, requests that the Court enter an Order affirming the order of the Florida Public Service Commission and dismiss the appeal in this action.

Respectfully submitted this 8th day of September, 1994.

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By: 
Rodney E. Gaddy (Bar No. 314943)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Appellee's Answer Brief has been served upon the following individual via United States Mail, postage prepaid, addressed as follows:

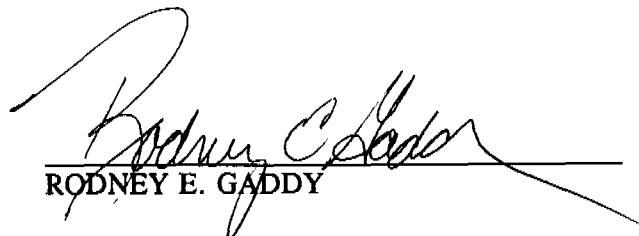
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This 8th day of September, 1994.


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