IN THE SUPREME COURT
OF THE STATE OF FLORIDA

Civil Action No. 83,530

JORY BRICKER,

Appellant,

v.

J. TERRY DEASON, et al.,

Appellees.

INITIAL BRIEF OF APPELLANT, JORY BRICKER

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QUESTION PRESENTED

Whether an electrical utility breaches its duty to protect a consumer's safety, when the utility does not reasonably inspect either its own equipment or the consumer's equipment and does not stop the flow of electricity to a consumer's home after the consumer tells the utility she received shocks from her appliances?

STATEMENT OF THE CASE

Proceeding pro se, Jory Bricker reported problems to the Public Service Commission (Commission) on March 1, 1993. R-I-91, 92. She reported high electric bills due to poor electrical service of Florida Power Corporation (Utility). R-I-92; R-II-27, 28. On March 22, 1993, the Utility told the Commission that Ms. Bricker's high bills were not due to defects in its electrical service. R-I-92; R-II-116, 117. By letters of March 26 and April 23, the Commission told Ms. Bricker that it had adopted the Utility's position. R-I-92.

On April 30, 1993, Ms. Bricker disputed the Commission's findings. R-I-92. In response, the Commission scheduled an informal conference. R-I-92. On May 12, 1993, the Commission told Ms. Bricker that it would permit the Utility to shut off her power, if she did not pay her electrical bill. R-I-92. At the informal conference on June 16, the parties resolved nothing. R-I-93. Consequently, Ms. Bricker requested a formal hearing. R-I-93.

On December 8, 1993, the Division of Administrative Hearings (DOAH) conducted a formal hearing. R-I-93. At the hearing, Ms. Bricker addressed legal and factual issues involving high

electrical bills and consumer safety. R-II-9, 10; R-II-97, 98; R-II-136. After the hearing, both Ms. Bricker and the Utility proposed findings of fact and conclusions of law. R-I-138; R-I-145. On January 18, 1994, DOAH filed an order with the Commission, recommending that the Utility's electrical service did not violate either state rules, regulations, or laws. R-I-91. On March 17, 1994, the Commission adopted DOAH's recommended order. R-I-116.

On April 14, 1994, Ms. Bricker appealed the Commission's order to this Court. R-I-134.

STATEMENT OF THE FACTS

In March of 1988, Jory Bricker requested that Florida Power Corporation (Utility) connect electrical service at her home on 2952 Webley Drive, Largo, Florida. R-I-94; R-II-102. Before connection, Ms. Bricker deposited $150 on account with the Utility. R-II-102. Until August of 1989, Ms. Bricker experienced no problems with the Utility's electrical service. R-II-19; R-II-80; R-II-105.

In August of 1989, Jory Bricker's appliances burned out. R-I-94; R-II-14, 15; R-II-80; R-II-105. A frayed power line, called a service drop line, to the Bricker home caused the appliances to burn out. R-I-94; R-II-22; R-II-105. During an investigation of the problem, the Utility found that its drop line was old. R-II-106. The Utility further found bad electrical connections at its weather head. R-II-106. Shortly after the Utility repaired the power line, Ms. Bricker bought used appliances to replace the burned out ones. R-II-75.

In early 1990, Ms. Bricker began receiving electrical shocks from several of her appliances, including the stove and the washer/dryer. R-II-27, 28; R-II-36; R-II-42; R-II-64; R-II-83. She received one especially severe shock from the stove. R-II-72. Ms. Bricker's housemate, John Wall, also received shocks. R-II-82; R-II-89. Both Ms. Bricker and Mr. Wall testified that Ms. Bricker verbally reported the shocks to the Utility from early 1990 until March of 1993. R-II-27, 28; R-II-36; R-II-82, 83. A Utility employee, Fran Middleton, admitted that Ms. Bricker reported shocks to her during a visit to the Bricker home in November of 1992. R-II-147, 148; R-II-154, 155. Fran Middleton left the premises without taking any action on Ms. Bricker's report beyond an electrical meter test. R-II-146, 147; R-II-150.

Although the hearing officer decided that the shocks had stopped once Ms. Bricker's appliances were grounded, he did not say when such grounding took place. R-I-95; R-I-96. Ms. Bricker clearly stated that the grounding took place near the time of a house call by Rudy Masi, the Utility's energy services specialist. R-II-51. Mr. Masi came to the Bricker home in March of 1993. R-II-168; R-II-189. When the Utility sent Rudy Masi to the Bricker home, his duty was to check the internal wiring and meter. R-II-160; R-II-162, 163. The Utility asked him to inspect the Bricker home due to alleged high bills and "wiring problems." R-II-163. Rudy Masi inspected the electrical service both inside and outside the home. R-II-163, 164. During his inspection, Mr. Masi found several electrical problems: flying splices, double lugging on the

breakers, and loose wires. R-II-164, 165.

Although the hearing officer concluded that the Utility had ensured that its equipment was reasonably safe within the provision of Florida Administrative Code Rule 25-6.040, no evidence established the cause of the shocks. R-I-101; R-I-143; R-II-195 to 202. Ms. Bricker and Mr. Wall relied on the Utility to find the cause of the shocks. R-II-95. The Utility's expert, Rudy Masi, admitted that the Utility had a duty to discover if the Utility's equipment caused the shocks. R-II-185; R-II-196; R-II-200. Yet, the Utility had only done an electrical meter test when Ms. Bricker reported shocks in November of 1992. R-II-147, 148. The shocks did not cease until near the time of Rudy Masi's visit in March of 1993. R-II-51; R-II-168; R-II-189. Mr. Masi may have fixed whatever problem or combination of problems caused the shocks. R-II-195 to 202.

The Utility knew that its equipment could cause shocks, because the Utility had previously found an open neutral at the Bricker home. R-II-202. According to Rudy Masi, an open neutral is a "hot" broken circuit, which can cause electrical shocks. R-II-182, 183. If a consumer had reported shocks from appliances to Rudy Masi, an open neutral at the service drop is the first thing he would look for. R-II-182; R-II-195, 196. Mr. Masi opines that it is "very common" for an open neutral to cause shocks. R-II-196. He states that an open neutral would likely cause an electrical shock to a consumer from her stove. R-II-197. Further, he states that consumers could not "have lived in a house with an open

neutral." R-II-201. Although the Utility had previously found an open neutral at Ms. Bricker's home, the Utility did not check for an open neutral after her report of shocks in November of 1992. R-II-142.

Based on these facts, this court should reverse the lower tribunal and find that the Utility failed to maintain reasonably safe electrical service to the Bricker home under law.

STANDARD OF REVIEW

This Court should apply a two-part standard of review: a legal standard and a factual standard. First, an administrative order must conform to the essential requirements of law. Education Dev. Center, Inc. v. City of West Palm Beach Bd. of Zoning Appeals, 541 So. 2d 106, 108 (Fla. 1989). While performing functions of all three governmental branches, an administrative agency cannot exceed either its quasi-legislative,[1] or its quasi-judicial authority.[2] If an agency misapplies law, its order is invalid. Florida Motor Lines, Inc. v. Railroad Comm'nrs, 100 Fla. 538, 129 So. 876, 885 (1930)(en banc). Second, an administrative order must draw support from competent substantial evidence. DeGroot v. Sheffield, 95 So.

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[1] See, e.g., United Tel. Co. of Fla. v. Public Serv. Comm'n, 496 So. 2d 116, 118 (Fla. 1986)("Such deference, however, cannot be accorded when the commission exceeds its authority. At the threshold, we must establish the grant of legislative authority to act since the commission derives its power solely from the legislature.").

[2] See, e.g., State ex rel. Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 492 (Fla. 1973)("However, since the adjudication of questions of law is in the last analysis purely a judicial prerogative, the exercise of this power by an administrative agency is reviewable by a court of competent jurisdiction.").

2d 912, 916 (Fla. 1957)(en banc). To qualify as substantial, evidence "must do more than create a suspicion of the fact to be established[.]" Laney v. Board of Pub. Instruction for Orange County, 15 So. 2d 748, 753 (Fla. 1943). To qualify as competent, evidence be reasonably relevant to support a legal conclusion. Sheffield, 95 So. 2d at 916.

In applying legal and factual standards of review, this Court should reverse the Commission's order due to consumer safety.

SUMMARY OF THE ARGUMENT

Utilities must make electricity safe for consumers. This court reviews the Commission's rulings on consumer safety. See, e.g., Utilities Comm'n of New Smyrna Beach v. Florida Pub. Serv. Comm'n, 469 So. 2d 731, 732 (Fla. 1985)(reversing Commission's ruling on public detriment of territorial agreement). Florida law requires utilities to provide "reasonably sufficient service" to the public. Storey v. Mayo, 217 So. 2d 304, 308 (Fla. 1968), cert. denied, 395 U.S. 909 (1969). Reasonably sufficient service means safe service. Every utility must honor a duty to provide safe electrical service. Statutes demand safety.[3] Common law demands safety.[4] Public policy demands safety.[5] The Utility did not

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[3] Fla. Stat. § 366.04(6) (1993); Florida Livestock Bd. v. Gladden, 76 So. 2d 291, 293 (Fla. 1954) (Administrative rules have the force and effect of statute.).

[4] Florida's seminal case for a duty at common law to ensure safe electrical service is Escambia County Elec. Light & Power Co. v. Sutherland, 61 Fla. 167, 55 So. 83 (1911).

[5] McCain v. Florida Power Corp., 593 So. 2d 500, 502-03 (Fla. 1992).

protect Jory Bricker from electrocution.

The Utility dishonored three duties of safety to Jory Bricker:

1. To inspect its own equipment after she reported shocks;

2. To stop the flow of electricity into her home after she reported shocks; and

3. To inspect her internal wiring in a timely manner after assuming a duty to do so.

The Commission ignored factual admissions by the Utility that triggered these duties. Affirming the Commission here would be tantamount to giving the Utility one free injury before requiring safety precautions.

The following supports reversal of the Commission's order:

ARGUMENT

I. THE COMMISSION MISAPPLIED 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.

The law on electrical safety is clear. First, the Utility has a duty to check its own equipment for safety. Fla. Admin. Code Ann. Rule 25-6.37. Second, the Utility has a duty to check a consumer's equipment where the utility knows of danger.[6] The Florida Administrative Code (FAC) generally addresses this duty in Rule 25-6.39, which requires each utility to "establish safe work practices." Yet, this court should look to common law for further guidance on these duties. As the facts show, the Utility did not

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[6] 18 Am. Jur., Electricity, § 102; 29 C.J.S. Electricity § 57.

fulfill its duties to ensure Ms. Bricker's safety.

There are several key facts that support reversal. The Commission ignored factual admissions that the Utility

1. Found a dangerous "open neutral" at the Bricker home before she reported shocks;

2. Suspected and later found defective wiring inside the home; and

3. Consciously disregarded Ms. Bricker's reports of shocks from her appliances.

Months before Jory Bricker reported shocks, the Utility came into her home to do energy conservation tests. When she reported shocks, the Utility did nothing more than a meter test and left the Bricker home. How can the Commission find that the Utility honored its duties of safety given these facts? As set out below, case law prescribes a duty where a utility knows of a potentially dangerous electrical problem in a consumer's home and leaves her to fend for herself. The law requires preventive, not remedial, measures. Given the Utility's knowledge of potential danger by electrocution, the facts trigger the Utility's duties to provide safe electrical service.

This court should reverse the Commission's order due to consumer safety based on the three following points of law:

A. WHEN A CONSUMER REPORTS SHOCKS, A UTILITY MUST REASONABLY INSPECT ITS OWN ELECTRICAL EQUIPMENT TO ENSURE HER SAFETY.

When Jory Bricker reported shocks from her appliances to Fran Middleton on November 19, 1992, the Utility had a duty to check all

of its electrical equipment for safety.[7] R-II-146, 147; R-II-154, 155; R-II-185; R-II-196; R-II-200. FAC Rule 25-6.37 commands the Utility to make **all** of its equipment safe to the point of delivery in a customer's home. If a consumer report of electrical shocks is not enough to invoke this duty, then what is? The Utility's own expert, Rudy Masi, clearly acknowledges the Utility's duty regarding its own equipment. R-II-185; R-II-196; R-II-200. Decisions across the United States show that the Utility had a duty to inspect all of its equipment for safety **immediately** after Jory Bricker reported shocks.

FAC Rule 25-6.37 reflects common law in Florida and elsewhere. See, e.g., Sutherland, 55 So. at 85 (utility's clear duty to consumer to check its equipment to point of delivery). A utility should routinely check safety whenever a consumer complains about service. While both the Commission and the Utility may characterize this case as one involving high electric bills, the law does not relieve the Utility of its duty to act with reasonable regard for the consumer's safety. Hall v Consolidated Edison Corp., 428 N.Y.S.2d 837, 840-41 (N.Y. Sup. Ct. 1980)(statute permitting utility to stop electrical service because of unpaid bills does not relieve utility of duties at common law). A Utility cannot confuse its duty of safety with consumer billing. See, e.g., Emile v. Florida Power & Light Co., 426 So. 2d 1152, 1152-53

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[7] A corporation "is charged with notice of all transactions had by those through whom it does business." St. Petersburg Coca-Cola Bottling Co. v. Cuccinello, 44 So. 2d 670 (Fla. 1950); accord, Sutherland, 55 So. at 88-89 (imputed negligence in case involving electrical safety).

(Fla. 3d DCA 1983(complaint for negligence against utility states claim where restoration of terminated service due to unpaid bill causes fire). When Jory Bricker reported shocks, the Utility did not fulfill its duty to inspect all of its equipment for safety.

In light of the law, several events triggered the Utility's duty to check all of its own equipment. By admission, the Utility knew that Jory Bricker reported shocks from her appliances. R-II-147, 148; R-II-154, 155. Does the Utility have the luxury of disregarding such reports without full inspection? The Utility could not know the source of the shocks without doing an inspection. On November 19, 1992, the Utility's single meter test may have been enough to reveal the defective meterbox that melted John Troszynski's hand. Compare R-II-146, 147 with Troszynski v. Commonwealth Edison Co., 356 N.E.2d 926, 928, 930 (Ill. App. Ct. 1976). The Utility's single meter test may have been enough to keep a water pump from electrocuting Ella Mae Snook. Compare R-II-146, 147 with Snook v. City of Winfield, 61 P.2d 101, 103 (Kan. 1936). But, a meter test would not have revealed wires within inches of the deadly union that killed young Louis Calvo. Compare R-II-146, 147 with Simon v. Tampa Elec. Co., 202 So. 2d 209, 211-12 (Fla. 2d DCA 1967). When Jory Bricker reported shocks from her stove, the Utility should have had its best and brightest out to check the grounds, meterbox, weather head, overhead wires, and natural impediments. The Utility should have checked **everything** up

to the point of delivery.[8]

What of Rudy Masi? When Jory Bricker reported shocks, the Utility had an expert, Rudy Masi, on staff who could have discovered the source of electrocution. R-II-160; R-II-162, 163. Although Ms. Bricker reported shocks in November of 1992, Rudy Masi did not come to the Bricker home until March of 1993. R-II-168; R-II-189. The Utility waited almost five months to call in Mr. Masi. When Fran Middleton heard of shocks, she should have called Rudy Masi out to the Bricker home immediately. If calling in Mr. Masi is not a standard safety precaution when someone reports shocks, then death may result. Compare Utility's disregard of Bricker report of shocks with utility crew's disregard of supervisor's safety instructions in Courtney v. Florida Transformer, Inc., 549 So. 2d 1061, 1063 (Fla. 1st DCA 1989)(supervisor electrocuted). This is nothing new. FAC Rules 25-6.34, 25-6.37, 25-6.39, and 25-6.40 all address these concerns. The Utility should have ordered Rudy Masi to the Bricker home sooner for obvious safety reasons.

Long before her report of shocks, the Utility found serious problems with its electrical service to the Bricker home. The Utility found a frayed power line and bad electrical connections on its own equipment in 1989. R-I-94; R-II-22; R-II-105; R-II-106. Rudy Masi claims to have read a company record of an open neutral

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[8] When a utility's employees are working around the power lines, the utility must proceed with the highest degree of care. Florida Power & Light Co. v. Brinson, 67 So. 2d 407, 410-11 (Fla. 1953). A utility should exercise the same degree of care to the public. Null v. Electric Power Bd. of City of Nashville, 210 S.W.2d 490, 492 (Tenn. Ct. App. 1948).

at the Bricker home. R-II-202. According to Mr. Masi, an open neutral is extremely dangerous. R-II-182, 183. In the face of this past experience, the Utility could not take Ms. Bricker's report of shocks lightly. Such notice triggers a duty to ensure safety. As the Supreme Court of Minnesota ruled in Ruberg v. Skelly Oil Co., 297 N.W.2d 746 (Minn. 1980),

> Notice that will trigger a gas supplier's duty exists where the supplier is in possession of facts that would suggest to a person of ordinary care and prudence that part of the gas system is leaking or is otherwise unsafe for the transportation or use of gas.

Ruberg, 297 N.W.2d at 751. Notice of potential danger invokes a duty to inspect at least a utility's own equipment. See, e.g., Ahearn v. Florida Power & Light Co., 129 So. 2d 457, 463-64 (Fla. 2d DCA), cert. denied, 135 So. 2d 741 (1961)(where utility knows that crane is working near power lines, negligence may arise from resulting electrocution).

In this case, the Utility did not "do all that human care, vigilance, and foresight can reasonably do, consistent with practical operation of its plant to protect those who use its electricity." Sutherland, 55 So. at 91. Credibility assessments aside, all it takes is one instance of danger to raise a red flag. The Bricker home swirled in a sea of red flags. The Utility found a frayed power line, an open neutral, bad electrical connections at the weather head, internal wiring problems, disconnected ground wiring, and a dramatic increase in energy consumption. In one case, high energy consumption alone was enough to place a utility on notice of potential danger. Ruberg, 297 N.W.2d at 751.

Dwarfing the other red flags, Ms. Bricker's admitted report of shocks implores the Utility to take preventive measures to avoid injury. Yet in response to Ms. Bricker's report, Fran Middleton offered the following for the record:

> Q. You left Jory Bricker's house in November 1992 without making further inspection of the premises after she told you she was receiving shocks from her appliances?
>
> A. We had checked the service into her home. Our service was good. And we advised her if she was still having those problems she should have an electrician check the service in her house.
>
> Q. So you left the premises after you made that statement; isn't that correct?
>
> A. I certainly did. And she said she would have someone check it out.

R-II-150. The Utility only tested the meter, and that test occurred before Ms. Bricker reported shocks. R-II-147; R-II-150. After her report, the Utility left the premises. R-II-150. Danger lurks. In Kiser v. Carolina Power & Light Co., 6 S.E.2d 713, 714 (N.C. 1940), a utility employee tied off a burned outside wire, told the consumer to get an electrician, and left the consumer's premises. A week later, the wire electrocuted the consumer's grandson. Id. When a utility knows of potential danger, Kiser imposes a duty to inspect upon the utility. Kiser, 6 N.E.2d at 714.

The Utility's duty to ensure Ms. Bricker's safety does not disappear, merely because Ms. Bricker sustained no permanent injuries from the shocks. McCain, 593 So. 2d at 502-03 ("As is obvious, a defendant might be under a legal duty of care to a

specific plaintiff, but still not be liable for negligence[.]"). A duty exists to prevent injury, not to remedy injury. Sutherland, 55 So. at 91, quoting Joyce on Electricity, § 445. The concept of preventive safety supports FAC Rules 25-6.34, 25-6.37, 25-6.39, and 25-6.40. Given past electrical problems at the Bricker home, the Utility did not honor its duty to inspect all of its equipment by doing a single meter test. Further, it is unlikely that the meter test was designed to discover the source of electrical shocks, since Ms. Bricker reported the shocks after the test was done. R-II-147.

By adopting the hearing officer's recommendation that the Utility "had complied with all relevant statutes, rules, orders, and utility tariffs and procedures in the provision of electrical service to Ms. Bricker's home[,]" the Commission overlooked its basic regulatory mission. R-I-116; Fla. Stat. § 366.04(6) (1993). "[T]he Commission must ensure that the **total effect** of any decision reached will not result in public detriment." Fort Pierce Util. Auth. v. Beard, 626 So. 2d 1356, 1357 (Fla. 1993) (emphasis added). The Commission's decision here flirts dangerously with a utility's duty to take preventive safety measures. Record evidence does not clearly point to a source for the shocks. To suggest that the shocks came from internal wiring after a single meter test is presumptuous in light of a past frayed power line and an open neutral on the Utility's own equipment. R-I-94; R-II-106; R-II-202. Even if the Utility's presumption that the shocks came from internal wiring was correct, no mere presumption should override a

concern for safety.

Since the law requires the Utility to do a thorough inspection of its own equipment where safety demands, this court should reverse the Commission's order as a matter of law.

B. WHEN A CONSUMER REPORTS SHOCKS, A UTILITY MUST STOP THE FLOW OF ELECTRICITY INTO THE CONSUMER'S HOME TO PROTECT THE CONSUMER'S SAFETY.

Numerous jurisdictions require a utility to stop the flow of power to a home, where a utility knows that a consumer's wiring may be defective.[9] Florida seems to follow this rule. White v. Orlando Util. Comm'n, 156 So. 2d 879 (Fla. 2d DCA 1963), quoting 32 A.L.R.2d 246, 247 (1953). By way of clarification, "it is the energizing of the line with knowledge of the conditions, and not the conditions themselves, which forms the basis of liability." Transportation Ins. Co. v. Clark, 189 N.E.2d 166, 167 (Ohio Ct. App. 1962). Since a utility's knowledge of electricity is presumably superior to that of its consumers, the rule makes sense.

Legal precedent factually address what "knowledge" is. For example, a Texas jury found a utility liable for failure to stop the flow of electricity to a consumer's building. International Elec. Co. v. Sanchez, 203 S.W. 1164, 1165 (Tex. Ct. App. 1918). In Sanchez, a utility knew that a consumer's wire was uninsulated, but did not stop electrical current. Knowledge of a defect in a consumer's wires beyond the meter charges the utility with a duty

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[9] Null, 210 S.W.2d at 492; Snook, 61 P.2d at 105; Clark, 189 N.E.2d at 167; Sanchez, 203 S.W. at 1165-66; Ambriz v. Petrolane, Ltd., 319 P.2d 1 (Cal. 1957)(en banc)(gas case); and Alabama Power Co. v. Emens, 153 So. 729 (Ala. 1934).

to stop current. Id. at 1165-66. By comparison to this case, the Utility knew of a potential defect in Jory Bricker's wiring when she reported shocks from her stove to Fran Middleton. R-II-147, 148; R-II-154, 155. A case exists where knowledge of a defective stove triggers a utility's duty to stop electrical current. Emens, 153 So. at 732. In Emens, the court stated,

> It is likewise well settled that where the distributor has knowledge of a defective condition and thereafter continues to furnish current, proximately causing injury and damage, it is liable.

Id. at 733-34. Knowledge of a defect requires preventive safety measures. Sutherland, 55 So. at 91.[10]

This Court can further determine the Utility's knowledge based on the fact that the Utility had previously discovered an open neutral at the Bricker home. R-II-202. While the Utility may have fixed the open neutral before Jory Bricker reported shocks, this Court may ask the same question as the Supreme Court of Wisconsin: "When they found that one of the defects had been corrected[,] were they justified in assuming that others had also been taken care of?" Snyder v. Oakdale Cooperative Elec. Ass'n, 69 N.W.2d 563, 564

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[10] FAC Rule 25-6.62 mandates:

> Where inspection is required by law to insure that the wiring and equipment of the customer is installed and maintained in accordance with National Code, local and utility requirements, the utility shall not make service connection until approval is granted by the authorized inspecting authority.

This administrative code provision codifies the spirit of the common law rule.

(Wis. 1955)(electrical fire burned down house). If the Utility's response is to send Rudy Masi to the Bricker home, then why did it take almost five months for him to be sent out? Compare Report of shocks in November 1992 at R-II-154, 155 with Rudy Masi's visit in March of 1993 at R-II-168. Where injury is foreseeable, the Utility should act within a reasonable time after notice of danger. Long v. City of Weirton, 214 S.E.2d 832, 863-64 (W. Va. 1975)(gas case). The Utility's reaction time of more than four months is not reasonable.

C. BY ENTERING PRIVATE PREMISES TO DO ENERGY CONSERVATION TESTING, THE UTILITY ASSUMED A DUTY TO INSPECT THE CONSUMER'S INTERNAL WIRING FOR DEFECTS THAT MAY ENDANGER HER SAFETY.

Even if this Court finds no duty to act upon notice of danger, Jory Bricker points to Restatement (Second) of Torts § 324(a):

> One who, being under no duty to do so, takes charge of another who is helpless adequately to aid or protect himself is subject to liability to the other for any bodily injury caused to him by (a) the failure of the actor to exercise reasonable care to secure the safety of the other while within the actor's charge.

Florida courts embrace this "assumed duty doctrine." Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. 2d DCA 1980). The Utility's representatives admittedly came to the Bricker home on several occasions. R-II-142 (December 1990); R-II-142 (November 1992); R-II-168 (March of 1993). They came into the Bricker home to do energy conservation testing on appliances. R-II-142. If the Utility undertakes energy conservation testing of appliances within the home, then the Utility assumes a duty to check the appliances for safety. The Utility assumes a duty to ensure the safety of

occupants in the Bricker home.

A utility may be gratuitous actor, where it assumes a duty to protect others. In Beury v. Hicks, 323 A.2d 788 (Pa. 1974), a utility trimmed a landowner's trees away from power lines, but one dead tree fell on a motorist and killed him. By trimming the trees, the utility may have assumed a duty to ensure the safety of motorists on an adjacent highway. Id. at 790. By analogy to this case, the Utility assumed a duty to ensure the safety of Ms. Bricker's appliances, although the Utility intended only to conduct energy conservation tests thereon. If the Utility endeavored to test Ms. Bricker's appliances for conservation, then the Utility should also have tested them for safety. Compare Utility's response to report of shocks from appliances at R-II-150 with Utility's energy conservation testing on appliances two years earlier at R-II-142. Safety is more important than energy conservation.

Jory Bricker relied on the Utility to discover the source of the electrical shocks. R-II-95. Jory Bricker relied on the Utility to inspect her premises for dangerous wiring. R-II-95. Jory Bricker relied on the Utility to keep people in her home from being electrocuted. The Utility should not have carte blanche to disregard such reliance, where the Utility makes visits to Jory Bricker's home to check its energy conservation program. R-II-142; See, e.g., DeCaire v. Public Serv. Co., 479 P.2d 964, 966-67 (Colo. 1971)(en banc)(once a utility begins inspection, a consumer can rely on a utility to find the defect). When the Utility entered

Ms. Bricker's private domain to do conservation testing, the Utility took a duty upon itself to ensure the safety of her internal wiring. Kuhlman v. Water, Light & Transit Co., 271 S.W. 788, 796 (Mo. 1925).

Whether the Utility's knowledge of potential danger triggered a duty to stop the flow of electricity to the Bricker home, or whether the Utility assumed a duty to ensure her safety by doing conservation testing on her appliances, the Utility ignored the law. This Court should reverse the Commission's order as a matter of law.

CONCLUSION

Appellant, Jory Bricker, requests that this Court reverse the Public Service Commission's Order, No. PSC-94-0306-FOF-EI, of March 17, 1994.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. mail on this 18th day of August, 1994 to:

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