State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: JUNE 27, 2002

TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)

FROM: OFFICE OF THE GENERAL COUNSEL (JAEGER)
DIVISION OF ECONOMIC REGULATION (FLOYD, JENKINS, KUMMER)

RE: DOCKET NO. 020084-EI - COMPLAINT BY NATIONAL ENERGY RATER'S ASSOCIATION AGAINST FLORIDA POWER & LIGHT COMPANY, FLORIDA POWER CORPORATION, AND ANY OTHER UTILITY ENGAGED IN THE PRACTICE, FOR ALLEGED VIOLATION OF RULE 25-17.003(4)(A), F.A.C., WHICH REQUIRES EVERY PUBLIC UTILITY TO CHARGE FOR A BUILDING ENERGY EFFICIENCY RATING SYSTEM (BERS) AUDIT.

AGENDA: 7/9/02 - REGULAR AGENDA - ISSUE NO. 1 ADDRESSES A MOTION TO DISMISS, INTERESTED PERSONS MAY PARTICIPATE AT THE COMMISSION'S DISCRETION ON ISSUE 1 - PROPOSED AGENCY ACTION FOR ISSUE 2 - INTERESTED PERSONS MAY PARTICIPATE IN ISSUE 2

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\GCL\WP\020084.RCM

CASE BACKGROUND

On January 30, 2002, the National Energy Raters Association (NERA), a Florida Not For Profit Corporation, filed a formal complaint against Florida Power and Light Company (FPL), Florida Power Corporation (FPC), and any other utility engaged in the provision of Building Energy-Efficiency Rating System (BERS) Audits without charging the customer the prescribed cost for the audit. NERA alleges that FPL and FPC have filed tariffs with the Commission establishing the fee that will be charged for Energy Audits, but that, in practice, the utilities are not charging the

prescribed fees. NERA alleges that this is a violation of Rule 25-17.003(4)(a), Florida Administrative Code.

Rule 25-17.003(4)(a), Florida Administrative Code, provides:

> Every public utility shall charge an eligible customer for a BERS Audit. The amount of this charge, which shall reflect actual cost, shall first be filed with the Commission as part of the utility's tariff.

On February 26, 2002, FPC filed its answer to NERA's Complaint. Also, on that same date, FPL filed its Motion to Dismiss NERA's Complaint (Motion). NERA did not respond to the Motion.

This recommendation addresses FPL's Motion to Dismiss and the appropriate disposition of NERA's Complaint. If the Commission agrees with staff's analysis on Issue 1 that NERA does not have standing to bring the Complaint, it need not address the merits of the Complaint in Issue 2. The Commission has jurisdiction over the charge for energy audits pursuant to Section 366.82(5), Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Florida Power & Light Company's Motion to Dismiss the Complaint of the National Energy Raters Association be granted?

RECOMMENDATION: Yes, Florida Power & Light Company's Motion to Dismiss the Complaint of the National Energy Raters Association should be granted based on the National Energy Raters Association's lack of standing, and the Complaint should be dismissed with prejudice. If the Commission dismisses the Complaint on this basis, it need not rule on Florida Power and Light's request that the Complaint be dismissed for lack of subject matter jurisdiction, and it need not address Issue 2. (JAEGER, KUMMER, FLOYD)

STAFF ANALYSIS: As stated above, NERA has filed its Complaint alleging that FPL and FPC, and possibly other utilities, are marketing and providing Building Energy-Efficiency Rating System (BERS) Audits free of charge in violation of Rule 25-17.003(4)(a), Florida Administrative Code, and the utilities' tariffs. NERA alleges that these services were never meant to be a free service, that utilities who offer such services at no charge are in direct violation of both the statutes and rules governing BERS, and that the resulting impact has been extremely detrimental to the citizens of Florida and the natural evolution of a competitive, market-driven industry.

On February 26, 2002, FPL filed, pursuant to Rule 28-104.204, Florida Administrative Code, its Motion. Also, on February 26, 2002, FPC filed its answer to the Complaint.

Legal Standard for Motions to Dismiss

A motion to dismiss raises as a question of law whether the complaint alleges sufficient facts to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). When deciding whether the complaint states a cause of action, the Commission must accept all allegations therein as true. Id. The Commission cannot look beyond the complaint when making its decision, and all reasonable inferences drawn must be made in favor of the petitioner. Id.

In order to determine whether the petition states a cause of action upon which relief may be granted, it is necessary to examine the elements needed to be alleged under the substantive law on the

matter. All of the elements of a cause of action must be properly alleged in a pleading that seeks affirmative relief. If they are not, the pleading should be dismissed. Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957).

Motion to Dismiss

FPL alleges that the Commission should dismiss the Complaint with prejudice because NERA fails to adequately state a cause of action because the Complaint contains no allegation pursuant to Rule 25-22.036(2), Florida Administrative Code, demonstrating NERA's substantial interest in the requested agency action concerning FPL's alleged violations of Rule 25-17.003(4)(a), Florida Administrative Code. Further, FPL alleges that the Commission lacks subject matter jurisdiction under Chapters 350 or 366, Florida Statutes, to adjudicate several of the claims that NERA asserts or to provide most of the relief that NERA requests in the Complaint.

In support of its Motion, FPL states that the Motion is timely filed pursuant to Rules 28-104.204(2) and 28-106.103, Florida Administrative Code. FPL notes that the alleged action of FPL that forms the basis of the Complaint and request for relief is FPL's alleged marketing of ratings and provision of audits under BERS "free of charge" for residential customers in Florida. FPL further notes that the Complaint asserts that, by means of the alleged rule violation, FPL allegedly has: (1) caused FPL to recover from ratepayers the cost of the BERS program without the required offset by revenues obtained through homeowner audit charges and without a corresponding increase in energy efficiency; (2) created a virtual monopoly for home energy ratings and thus has "decimated" the business of independent home energy raters; and (3) caused declining revenues for the Florida Solar Energy Center (FSEC), which trains and licenses independent energy raters through a contract with the Florida Department of Community Affairs.

FPL notes that NERA has requested the following relief and corrective measures:

1. The Commission demand that the utilities deposit the cost of each audit into a trust fund for audits for low-income ratepayers to be administered by the National Energy Ratings Foundation (NERF). Complaint at 4.

2. The Commission refrain from approving any conservation program which involves the provision of energy ratings without stipulating that the state mandated fees will be charged accordingly, and borne by the customer, or builder, but not by the general body of ratepayers. Complaint at 4.

3. The Commission "direct the utilities to allow independent raters to sign up eligible builders for PSC approved utility builder programs and not interfere in the provision of energy ratings to a builder by the independent rater." Complaint at 5.

4. The Commission "direct the utilities to enter into an agreement with NERF for the provision of services by independent energy raters for conducting audits for eligible customers." Complaint at 5.

5. The Commission "[p]rohibit utilities from recommending specific measures for adoption in the course of a utility conducted audit." Complaint at 5.

6. The Commission "[a]ssure that there is no cross subsidization of utility services that result from utility conducted audits." Complaint at 5.

7. The Commission "[r]equire that utilities disclose the actual cost of a BERS audit in any promotional materials, which are disseminated to their customers." Complaint at 5.

8. The Commission "[c]reate a marketing and education program, to be funded by utility contributions (which may be recovered through ECCR [Energy Conservation Cost Recovery]) for the purpose of encouraging customers to obtain a BERS audit." Complaint at 5.

A. Failure to State a Cause of Action and Lack of Standing

FPL states that NERA's complaint is insufficient in that NERA has failed to adequately allege that its substantial interest is affected by FPL's alleged rule violation. FPL alleges that NERA lacks standing to file a third-party complaint, and that NERA cannot cure the defective complaint by adequately alleging that its substantial interest is affected by FPL's alleged rule violation.

FPL cites Rule 25-22.036(2), Florida Administrative Code, which provides:

> (a) Complaint. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.
>
> (b) Complaint. Each complaint, in addition to the requirements of paragraph (a) above shall also contain: 1. The rule, order, or statute that has been violated; 2. The actions that constitute the violation; 3. The name and address of the person against whom the complaint is lodged; 4. The specific relief requested, including any penalty sought.

(Emphasis added)

FPL argues that:

> NERA has not alleged its substantial interest in any alleged injuries caused by the acts alleged to be in violation of Rule 25-17.003(4)(a), Florida Administrative Code. NERA alleges that FPL's BERS program, as administered, adversely impacts ratepayers and homeowners. Complaint at 2. However, NERA does not claim to be an association representing ratepayers or homeowners. NERA further alleges that FPL's BERS program, as administered, adversely impacts the livelihoods of 80 independent energy raters in Florida. Complaint at 3. However, NERA fails to state in the Complaint that even one of these 80 independent energy raters is a member of the Association. NERA alleges that FPL's BERS program, as administered, adversely affects

the Florida Solar Energy Center. Complaint at 3-4. NERA fails to state in the Complaint that it represents or has any affiliation with the Florida Solar Energy Center.

FPL also cites Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981), "in which the court held that 'substantial interest' in the context of the Chapter 120, Florida Statutes, requires a showing of degree and nature of injury such that the person seeking to participate (1) will suffer injury in fact that is of sufficient immediacy to entitle him or her to a factfinding hearing under section 120.57, Florida Statutes (degree of injury); and (2) that the injury is substantial and 'of a type or nature which the proceeding is designed to protect (nature of injury).'" Id. at 482. (Emphasis added by FPL.) FPL argues that the mere alleging of economic decimation does not meet either prong of the Agrico test as to immediacy and nature of injuries.

In Florida Medical Association, Inc. v. Dep't of Professional Regulation, 426 So. 2d 1112 (Fla. 1st DCA 1983), the Court held that, under Agrico, a claim of substantial interest based solely upon economic interests is not sufficient unless the relevant statute itself contemplates consideration of economic interests. Id. at 1118. FPL alleges that the economic interests asserted by NERA fail both the "immediate injury" and "zone of interest" tests. FPL argues that "NERA has alleged no immediate economic injury to NERA and has not stated that it represents individual energy raters whom it alleges have been injured." Moreover, FPL argues that the "economic injury to energy raters does not fall within the 'zones of interest' protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code."

Rule 25-17.003, Florida Administrative Code, states that it implements Sections 350.115, 366.04(2)(a) and (f), and 366.82(5) and (7), Florida Statutes. FPL alleges that these statutes regulate the Commission "and electric utilities and contain no mention of an express or implied legislative intent to protect the economic interests of the practitioners of any profession or trade." Moreover, FPL argues that the "legislative intent of Chapter 350 was to designate the Public Service Commission as 'an arm of the legislative branch of government,'" and that "Chapter 366 provides solely for the regulation of public utilities 'in the public interest' and 'for the protection of the public welfare.'" Therefore, FPL concludes that "the relevant statutes in no way

contemplate the consideration of the economic interests of third parties such as NERA."

Citing the Florida Supreme Court's holding in AmeriSteel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997), FPL notes that the "Court held that AmeriSteel's claim of economic injury was not of sufficient immediacy and that its claimed interest in the proceedings were not the kind designed to be protected by the Commission's proceedings to approve territorial agreements between utilities." Similarly, FPL argues that:

> the economic injuries alleged by NERA are not of the kind to be protected by the Commission. The Commission exists to protect utility customers' economic interests in rates, not the competitive economic interest of energy raters.

FPL also asserts that the Complaint is deficient in its failure to establish representative standing. Citing Farmworkers Rights Organization, Inc. v. Department of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982), FPL notes that the First District Court of Appeal established certain criteria for a trade organization to have standing in a section 120.57 proceeding, which include:

> (1) the association demonstrates that a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule;
>
> (2) the subject matter of the challenged rule is within the association's general scope of interest and security; and
>
> (3) the relief requested is of a type appropriate for a trade association to receive on behalf of its members.

Id. at 754.

FPL claims that NERA's complaint fails to satisfy any of these necessary criteria, in that: (1) it does not demonstrate that a substantial number of its members are substantially affected by the alleged rule violation; (2) it does not assert that the subject matter of the rule is within the association's general scope of interest and security; and (3) it does not request relief of a type

appropriate for a trade association to receive on behalf of its members.

Based on NERA's complete failure and inability to assert standing to file its claims, FPL states that the Complaint should be dismissed with prejudice. As stated in the Case Background, NERA did not respond to FPL's Motion to Dismiss.

Staff agrees with FPL that: "The Commission exists to protect utility customers' economic interests in rates, not the competitive economic interest of energy raters." Therefore, staff also agrees that the "economic injury to energy raters does not fall within the 'zones of interest' protected by any of the statutes implemented by Rule 25-17.003(4), Florida Administrative Code." Moreover, staff agrees that NERA has failed to demonstrate that it will suffer injury in fact that is of sufficient immediacy to entitle it to any relief.

Finally, staff agrees that NERA has failed to establish representative standing. Although it appears that this latter defect could be remedied, and would not be grounds for a dismissal with prejudice.

However, staff does not believe that NERA could ever remedy the fact that it most certainly fails the second part of the Agrico test which requires that it falls within the "zones of interest" protected by any of the statutes implemented by Rule 25-17.003(4). Based on NERA's lack of standing and apparent inability to demonstrate that it could ever have standing, staff recommends that FPL's Motion to Dismiss the Complaint of NERA be granted, and the Complaint should be dismissed with prejudice.

B. Lack of Subject Matter Jurisdiction

FPL also alleges that the Commission lacks subject matter jurisdiction to consider NERA's claims as to alleged economic injuries to NERA and the FSEC. Citing City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973), FPL states that the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute. FPL agrees that the Commission has authority to adjudicate a claim of violation of Rule 25-17.003(4)(a), Florida Administrative Code, by a person who could show that his or her substantial interest is affected. However, as previously discussed, FPL argues that NERA

has failed to make such a showing and the economic interest it seeks to protect is not a substantial interest protected by chapters 350 or 366, Florida Statutes.

FPL also claims that nothing in Chapter 366, or elsewhere in the Florida Statutes, or the Commission rules, grants the Commission the jurisdiction or authority to adjudicate alleged injuries to the economic interests of third parties who object to FPL's operation of a legislatively mandated program. FPL asserts that even if NERA or the FSEC had standing to assert these claims, the Commission would not have jurisdiction to hear or adjudicate them.

Further, FPL argues that nothing in Chapter 366 or elsewhere in the Florida Statutes or administrative rules grants the Commission the authority "to create trust funds for low-income customers to be administered by NERF, to condition the approval of prospective conservation programs that have not yet come before it, to create utility builder programs or direct utilities to allow raters to sign up eligible builders, to order utilities to enter into agreements with NERF to conduct audits, to prohibit utilities from recommending conservation measures in an audit, or to create a marketing and education program (the costs of which are to be recovered through the Conservation Cost Recovery Clause) to promote customers' obtaining a BERS audit."

Staff agrees that most of the relief requested by NERA is outside the Commission's authority to grant. However, if the Commission agrees with staff's recommendation that NERA's Complaint be dismissed for lack of standing, the Commission need not address FPL's argument that the Commission lacks subject matter jurisdiction.

ISSUE 2: If the Commission denies Florida Power and Light's Motion to Dismiss the Complaint of the National Energy Raters Association, what is the appropriate disposition of the Complaint?

RECOMMENDATION: The Complaint should be dismissed because the utilities appear to be charging the approved rates and implementing conservation programs approved by the Commission. (JAEGER, KUMMER, FLOYD)

STAFF ANALYSIS: As noted above, NERA's Complaint alleges that FPL and FPC, and possibly other electric companies are providing BERS audits at no charge, contrary to the requirements of Commission Rule 25-17.003(4)(a), Florida Administrative Code, and the companies' tariffs. In its answer filed on February 26, 2002, FPC states that this "allegation is absolutely wrong," and that FPC is charging "the tariff-prescribed fee for every BERS audit it has performed."

FPC states that "NERA appears to have confused Florida Power's BERS audit program with an audit-like certification procedure conducted under one of Florida Power's other separate and distinct Demand-Side Management (DSM) programs." FPC notes that it "offers a number of different energy audits under its various Commission-approved DSM programs, and except for BERS audits, none of them are required by Rule 25-17.003(4) to impose a fee." FPC states that in "addition to the fee-based BERS audits (also referred to as 'Energy Gauge' audits), these offerings include home energy walk-through audits and home energy mail-in audits that are performed at no charge, and home energy computer-assisted audits and commercial/industrial energy audits that are performed for a fee." FPC also conducts energy rating inspections under its ACT new construction program to determine a builder's eligibility for certification in accordance with the "Energy Star" initiative sponsored by the federal Environmental Protection Agency (EPA). As approved by the Commission, no fee is charged for these certification inspections.

FPC argues that the BERS audit program and its new construction program are readily distinguishable, and cites the tariff which was attached to NERA's complaint as Exhibit F. This tariff sheet notes that it is applicable "to *residential customers* with single family homes (mobile, manufactured homes excluded)." (Emphasis added.) FPC argues that "the BERS audit program and Energy Star certifications under the new construction program are mutually exclusive," the former being for residential customers,

and the latter for builders of new homes. As such, FPC argues that builders are not even eligible for these audits. Moreover, FPC argues that BERS audits are a limited, stand-alone program, *i.e.*, the audits are the program's sole activity and achieve benefits only one house at a time, and in fact, are requested by customers very infrequently. Given the relatively high cost of the BERS audits ($195), FPC states that it would in all likelihood "charge a fee for performing these audits even if a fee were not mandatory."

FPC seems to imply that BERS audits are only applicable for individual existing homes (where a 'residential' account has been established). Staff notes that Rule 9B-60.0004(2), Florida Administrative Code, clearly provides for applying these audits to new construction, and that BERS audits could be used to raise the efficiency level of multiple-unit developments. However, FPC maintains that its Energy Star certifications differ from the BERS audit, and NERA has provided no analysis to show that the two types of audits are sufficiently similar in manner and intent to preclude FPC from making the distinction.

FPC argues that the Energy Star certification inspections can affect the energy efficiency of hundreds, and in some cases, thousands of new homes. FPC states that it does not charge for these inspections because it "requires the inspection as part of the Energy Star certification procedure that the builder must satisfy in order to be eligible for the program's highest rating," and that convincing "a prospective participant to comply with the program's stringent requirements is difficult enough, without the awkward task of trying to convince the builder that it must also pay Florida Power a fee for complying with the Company's own requirements."

Also, FPC states that a fee is unnecessary, because the "cost of certification inspections is a very small portion, less than 5%, of the new construction program's overall costs," and that the program benefits "easily satisfy the Commission's RIM cost-effectiveness test." FPC also argues that imposing:

> such a fee would not only eliminate growth in program participation, but would actually result in a significant reduction in participants. This would diminish the program's benefits and thus its cost effectiveness, which in turn would require the program to be scaled back to

> achieve necessary cost reductions, which would further detract from the program's attractiveness to existing and potential participants, and so on.

FPC also argues that even if a fee were imposed, "it would not resolve the kind of competitive disadvantage NERA erroneously alleges from free BERS audits." Because the utility audit fees are cost based, and NERA's independent raters perform their audits for a profit, FPC alleges that if it "were to perform Energy Star certification inspections at the equivalent cost-based fee of $195 charged for BERS audits, compared to NERA raters' fees of approximately $300 to $400, a substantial competitive disadvantage would remain."

In its answer, FPC concludes that it does not perform BERS audits for free. Moreover, FPC states that its "Energy Star certification inspections under its new construction program, which NERA apparently confuses with the Company's BERS audits, are conducted by Florida Power without a fee to participating builders in accordance with Commission-approved program procedures, which are based on sound and compelling reasons."

In a letter dated May 23, 2001, to a Commission staff member, FPL responded to a letter sent by Mr. Stroer to FSEC concerning BERS Audits and the provision of Class 1 ratings by FPL. FPL noted that it performed Class 1 ratings under two situations: (1) A BERS audit performed as required by Rule 25-17.003(3)(a), Florida Administrative Code, and that it charged the tariffed rate of $230 for this audit; and (2) Through its BuildSmart Program where the cost is shared by the customer and FPL. The cost depending on the service the customer selects, and being from $175 to $300 for Bronze, from $75 to $200 for Silver, and $0 to $125 for Gold.

FPL notes in this letter that:

> Gold homes in the BuildSmart program qualify for the EPA's Energy Star Certification. This certification is achieved through a BERS rating. However, it is of interest to note that for the year 2000, of the 189 BuildSmart homes certified at the Gold level, only 34 of these were also certified as Energy Star at the customers' requests. This clearly indicates that FPL is not actively pursuing the market via this "free of charge" venue.

In that same letter, FPL opined "that Mr. Stroer's real concern is the investment he made to become a Class 1 rater based on information from FSEC indicating that there would be a vibrant market in Florida for such a business," and that such a market had "not materialized." FPL concluded the letter by maintaining that they were "not 'intruding' in the home energy rating profession."

Moreover, in its motion to Dismiss, FPL addressed each of the eight requests for relief of NERA. NERA has asked the Commission to consider the following corrective measures:

1. Demand that the utilities repay the cost of each audit offered for free to be deposited into a trust fund for audits for low-income ratepayers to be administered by the National Energy Ratings Foundation (NERF).

2. The PSC will not approve any conservation program which involves the provision of energy ratings without stipulating that the state mandated fees will be charged accordingly, and borne by the customer, or builder, but not the general body of ratepayers.

3. Direct the utilities to allow independent raters to sign up eligible builders for PSC approved utility builder programs and not interfere in the provision of energy ratings to a builder by the independent rater.

4. Direct the utilities to enter into an agreement with NERF for the provision of services by independent energy raters for conducting audits for eligible customers.

5. Prohibit utilities from recommending specific measures for adoption in the course of a utility conducted audit.

6. Assure that there is no cross subsidization of utility services that result from utility conducted audits.

7. Require that utilities disclose the actual cost of a BERS audit in any promotional materials, which are disseminated to their customers.

8. Create a marketing and education program, to be funded by utility contributions (which may be recovered through ECCR), for the purpose of encouraging customers to obtain a BERS audit.

In addressing those requests for relief, FPL notes that nothing in Chapter 366 or elsewhere in the Florida Statutes or administrative rules grants the Commission the authority "to create trust funds for low-income customers to be administered by NERF, to condition the approval of prospective conservation programs that have not yet come before it, to create utility builder programs or direct utilities to allow raters to sign up eligible builders, to order utilities to enter into agreements with NERF to conduct audits, to prohibit utilities from recommending conservation measures in an audit, or to create a marketing and education program (the costs of which are to be recovered through the Conservation Cost Recovery Clause) to promote customers' obtaining a BERS audit.

Staff has also looked at each of the requests for relief, and basically agrees with FPL. For Request for Relief No. 1, staff does not believe that the Commission does have the authority to fund audits by a third party. For Request for Relief No. 2, staff believes that the Commission has already reviewed the conservation programs approved, and has appropriate tariffs on file and the appropriate charge for each audit pursuant to Rule 25-9.004(1), Florida Administrative Code (usually at cost). For Request for Relief Nos. 3 and 4, staff notes that utilities are held to performance standard (conservation goals), and that the Commission does not micromanage, but would only intercede if it received a complaint that the utility was unable or unwilling to provide a service that was tariffed or otherwise required. Also, staff questions the propriety of directing a utility to do business with a single outside party. For Request for Relief No. 5, staff believes that the purpose of audits is to encourage changes to improve energy efficiency, and prohibiting discussion of remedies would seem to be counter productive. In considering conservation programs, there is only a problem if a utility directs a customer to a utility affiliate as the only or the preferred provider of a specific remedy. For Request for Relief No. 6, staff notes that costs recovered through ECCR are reviewed annually, and if there is

improper cross-subsidization, it may be addressed in the ECCR docket. For Request for Relief No. 7, while this may be reasonable, staff notes that the costs of a BERS audit is in the utility's tariff, and if the utility does not consider an audit to be a BERS audit, this would provide NERA no relief. For Request for Relief No. 8, staff questions the propriety of promoting a specific audit program.

Even if NERA could show that it had standing by representing individual contractor/raters who were harmed by such free audits, staff does not believe that it has shown or could show that the audits in question were performed for the primary purpose of meeting the BERS requirements. The utilities have several different kinds of audits approved by the PSC, some of which may accomplish purposes similar to a BERS audit and still not technically be a BERS audit. FPC has specifically disputed that it is performing BERS audits without the proper charge, and NERA has not provided any proof that the audits they are contesting are audits subject to the BERS tariff.

Based on the above, it appears to staff that the utilities are charging the tariffed rates and are not in violation of Rule 25-17.003(4)(a), Florida Administrative Code. Moreover, the utilities appear to be following conservation programs approved by this Commission. Finally, staff believes that the requests for relief of NERA are not so much designed to promote conservation, as to promote the economic well-being of NERA in its provision of BERS audits.

Therefore, if the Commission declines to approve the staff recommendation in Issue 1, staff recommends that the Complaint of NERA against FPL, FPC, and any other utility for alleged violation of Rule 25-17.003(4)(a), Florida Administrative Code, which requires every public utility to charge for a BERS audit should be dismissed, because the utilities appear to be charging the approved rates and implementing conservation programs approved by the Commission.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, this docket should be closed. If the Commission denies staff's recommendation in Issue 1, but approves staff's recommendation in Issue 2, and no substantially affected person files a protest within 21 days of the issuance of the Order, this docket should be closed upon issuance of a Consummating Order.

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, this docket should be closed. If the Commission denies staff's recommendation in Issue 1, but approves staff's recommendation in Issue 2, and no substantially affected person files a protest within 21 days of the issuance of the Order, this docket should be closed upon issuance of a Consummating Order.