

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Ocean Properties, Ltd., J.C. Penney Corp.,
Dillards Department Stores, Inc., Target
Stores, Inc., and Southeastern Utilities
Services, Inc.,

Petitioners,

vs.

PSC Docket No. 030623-EI
Filed December 10, 2003

Florida Public Service Commission,
Respondent,

and

Florida Power & Light Company, Inc.,
Respondent.

**PETITION FOR FORMAL ADMINISTRATIVE HEARING
PURSUANT TO SECTIONS 120.569 AND 120.57(1), FLORIDA STATUTES**

Petitioners, Ocean Properties, Ltd., J.C. Penney Corporation, Dillards Department Stores, Inc., Target Stores, Inc., and Southeastern Utilities Services, Inc., hereby file this Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes (F.S.), and Rules 25-22.029 and 28-106.201, Florida Administrative Code (F.A.C.), and in support thereof state the following:

1. Petitioners in this proceeding are: Ocean Properties, Ltd., 1000 Portsmouth, New Hampshire, 03801 (FPL service address: 100 Riverfront Boulevard, Bradenton, FL); J.C. Penney Company, Inc., 6501 Legacy Drive, Plano, Tx 75024 (FPL service addresses: 303 U.S. Highway 301, Suite 701, Bradenton, FL; 2076 9th St. North, Naples, FL); Dillards Department Stores, Inc., 1600

Cantrell Road, Little Rock, Arkansas 72203 (FPL service addresses: 1441 Tamiami Trail, Port Charlotte, FL; 9001 West Atlantic Boulevard, Coral Springs, FL); Target Stores Inc., 1000 Nicollet Mall, Minneapolis, MN 55403 (FPL service addresses: 4271 Tamiami Trail South, Venice, FL; 3251 Hollywood Boulevard # 300, Hollywood, FL; 1400-A Tamiami Trail, Port Charlotte, FL; 6150 14th St. West, Bradenton, FL; 5350 Fruitville Road, Sarasota, FL; 1200 Linton Boulevard, Delray Beach, FL; 26831 South Tamiami Trail, Bonita Springs, FL; 13711 South Tamiami Trail, Fort Myers, FL; 1901 North Congress Ave, Boynton Beach, FL); and Southeastern Utilities Services, Inc. (“SUSI”), 7107 East 36 Avenue, Bradenton, Florida 34208, telephone: 941-747-9503. Petitioners are represented in this matter by Jon C. Moyle, Jr., and Cathy M. Sellers, Moyle Flanigan Katz Raymond & Sheehan, P.A., 118 North Gadsden Street, Tallahassee, FL 32301, telephone: 850-681-3828.

2. Respondent, Florida Public Service Commission (“FPSC”) is an agency of the State of Florida, created pursuant to Chapter 350, F.S., and located at 2540 Shumard Oak Boulevard, Tallahassee, FL 32399.

3. Respondent, Florida Power & Light Company, Inc. (“FPL”), is an incorporated public utility headquartered at 700 Universe Boulevard, Juno Beach, FL 33408-0420.

4. Petitioners received notice of the FPSC’s November 19, 2003 Proposed Agency Action (“PAA”), Order No. PSC-03-1320-PAA-EI, on November 21, 2003, via U. S. Mail. Pursuant to Rule 25-22.029(1), F.A.C., the 21-day period for filing this Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes expires on December 10, 2003.

This Petition is timely filed.

Factual Background and Statement of Petitioners’
Substantial Interests in this Proceeding.

5. To have standing to challenge the FPSC’s proposed agency action in this proceeding, Petitioners must demonstrate that, as a result of the FPSC’s proposed agency action, they will suffer injury-in-fact of sufficient immediacy to entitle them to a hearing in this proceeding, and that the alleged substantial injury is of the nature or type this proceeding is designed to protect. *Agrico Chemical Co. v. Department of Env’tl Reg.*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). Petitioners clearly meet this standard in this proceeding.

6. Petitioners, with the exception of SUSI, are commercial retail electric service customers of FPL (hereafter referred to as “Customers”)¹ who filed complaints with the FPSC through SUSI, which served as their representative in the informal complaint process conducted under Rule 25-22.032, F.A.C.²

7. Customers’ complaints filed in the informal complaint process alleged -- and Customers hereby renew those allegations -- that their retail electric service demand was measured by Type 1V thermal demand meters that were owned and installed by FPL; that these meters inaccurately over-registered Customers’ electric service demand; and that as a result of this over-

¹ For brevity and clarity purposes in this Petition, the commercial retail electric service customers are referred to as “Customers” and Southeastern Utilities Services, Inc., is referred to as “SUSI.”

² Rule 25-22.032(9), F.A.C., provides in pertinent part: “[a]t any point during the complaint proceedings, a participant has the right to be represented by an attorney or other representative. For purposes of this rule a representative may be any person the party chooses, unless the Commission sets the matter for hearing. If the Commission sets the matter for hearing, the participants may be represented by an attorney or qualified representative as prescribed in Rule 28-106.106, F.A.C., or may represent themselves....” Fla. Admin. Code R. 25-22.032(9). As provided in this rule, the Customers who are Petitioners in this formal administrative proceeding were represented by SUSI in the informal complaint process.

registration of demand, Customers have been overcharged by FPL for retail electric service.

8. With respect to determining the refund due Customers as a result of FPL's overcharges attributable to its faulty meters, in the informal complaint process SUSI presented information on Customers' behalf showing that FPL's meters were faulty and in error when they were last calibrated by FPL. This information enables a fixed date to be determined for purposes of refunding the overcharges due Customers under Rule 25-6.103(1), F.A.C. Notwithstanding, the FPSC's PAA instead proposes to allow FPL to refund overcharges due to Customers only for the 12-month period immediately preceding the date the faulty meter was removed by FPL from Customers' premises. This determination will result in the refund of substantially smaller amounts than those to which the Customers are entitled under Rule 25-6.103(1), F.A.C., thereby causing Customers to suffer a direct, immediate injury, which meets the *Agrico* "injury-in-fact" requirement. *Agrico*, 406 So. 2d at 482.

9. SUSI also presented documentation and other information showing that thermal demand meters, such as the 1V meters at issue in this case, are influenced by the sun or radiant heat. This causes the meters to erroneously measure energy demand at levels of error greater than is reflected in the laboratory testing conducted provided by FPL. The meters at issue in this proceeding over-registered demand at an error rate greater than that reflected in the laboratory testing performed by FPL, resulting in Customers being over-charged at a rate greater than that proposed to be compensated under the PAA. Customers are entitled to be compensated for the actual amount of over-charge they paid rather than the amount based on inaccurate simulated laboratory condition testing that results in Customers being paid a lesser amount. Again, this will cause Customers to suffer an immediate, direct injury which meets the *Agrico* "injury-in-fact" requirement. *Agrico*, 406

So. 2d at 482.

10. Customers' alleged injuries indisputably are within the zone of interest of this proceeding, which is defined by Rules 25-6.058, 25-6.103, and 25-6.109, F.A.C., and Sections 366.03, 366.041(1), 366.05(1), 366.05(3), 366.05(4), and 366.06 (1), Florida Statutes, which are cited by as the statutes authorizing and being implemented by these rules. The respective purposes of these rules are to determine meter error, determine billing adjustments due electric service customers for meter errors resulting in overcharges, and to determine interest due on refunds to retail customers due to over-charges. Customers have alleged facts purporting to show that they will suffer direct, immediate injury as a result of the FPSC's incorrect application of these rules as discussed in the PAA. This proceeding will challenge the FPSC's proposed application of these rules to Customers in a manner that will result in their being directly and immediately injured. This proceeding is designed to protect against the very type of injuries Customers allege in this case. Accordingly, Customers' alleged substantial injuries fall within the zone of interest of this proceeding. Customers have standing to challenge the FPSC's PAA. *Agrico*, 406 So. 2d at 482.

11. SUSI also has standing to challenge the FPSC's PAA in this proceeding. SUSI is a Florida corporation whose clients include the commercial entities that are Customers in this proceeding (see footnote 1 herein). Pursuant to Rule 25-22.032, F.A.C., SUSI filed the complaints on behalf of Customers in this proceeding, which have resulted in the FPSC's issuance of the PAA being challenged by this Petition for Formal Administrative Hearing. SUSI, as Customers' representative in this proceeding, will be injured by the FPSC's PAA because the PAA will result in substantially reduced overcharge refunds being awarded to SUSI's clients, which have retained SUSI and directed it to seek and obtain the refunds. Further, as the representative of Customers in

the complaint process that resulted in the PAA at issue, SUSI is a specifically named that is entitled to participate in this proceeding. Section 120.52(12), F.S.

Factual Background and Statement of
Disputed Issues of Material Fact in this Proceeding

12. As discussed in paragraphs 6 through 11 above, which are hereby incorporated into this section of this Petition, Customers are commercial retail electric service customers of FPL that have been overcharged for electric service by FPL for years due to faulty meters. As Customers' representative, SUSI filed complaints on their behalf to obtain an order from the FPSC requiring FPL to refund the overcharges.

13. FPL does not dispute that the Customers' meters registered overdemand. The dispute in this proceeding centers on the amount of refund FPL owes Customers for the overcharges due to the faulty meters.

14. In the complaint process SUSI submitted information to the FPSC on behalf of Customers to show that FPL's overcharges would be more accurately determined, and, therefore should be determined, by taking the higher of: (1) the error observed during the testing of the old meter, or (2) the average error observed in comparing the new meter billing demands with the old meter billing demands for comparable months. Specifically, SUSI's information showed that when the percentage of error was extrapolated from the test point to the full scale of the meter, the refund percentage was then determined by the full scale value. That percentage for refund value would never equal the true percentage of the recorded error and any calculations for refund would always result in a refund less than the actual overcharges experienced by Customers. In several cases, FPL

used an arbitrary ten percent (10%) difference of demand when comparing the “before” and “after” effect of the meter change to determine eligibility of a customer to receive a refund back to 1993 – approximately a ten-year period.

15. SUSI also presented documentation and other information showing that thermal demand meters, such as the IV meters at issue in this case, are influenced by the sun or radiant heat. This causes the meters to erroneously measure energy demand at levels of error greater than is reflected in the laboratory tests conducted by FPL. The meters at issue in this proceeding over-registered demand at an error rate greater than that reflected in the laboratory testing performed by FPL, resulting in Customers being over-charged at a rate greater than that proposed to be compensated under the PAA.

16. Further, SUSI submitted information on behalf of Customers to show that FPL’s meters at issue were faulty and in error when they were last calibrated by FPL rather than gradually becoming faulty over a period of time – thereby enabling a fixed date to be determined for purposes of refunding the overcharges under Rule 25-6.103(1), F.A.C. Specifically, the information submitted by SUSI consisted of testing procedures prescribed by the meter manufacturer and the written testimony of a retired Senior Engineer of Land and Gyr stating that in his numerous years of experience, he had never observed the thermal component of a thermal demand meter to gradually increase in value over time. Also, the physics and mechanics of the meter are such that the thermal demand meters should not start over-registering over time. FPL has never provided an explanation to support its version of how gradual over-registering could ever occur.

17. Again, notwithstanding the information submitted by SUSI to support its position, the FPSC proposes in its PAA to determine that FPL’s meters became faulty over an extended time

period rather than being faulty when last calibrated by FPL. Acceptance of FPL's contention that the subject meters became faulty over an extended period of time renders it virtually impossible to fix a date for purposes of computing overcharges back to that definitive date, so that FPL is only required to refund the overcharges for the 12-month period immediately preceding removal of the faulty meter.

18. Finally, the FPSC proposes to calculate the interest on the amounts to be refunded to Customers as provided in Rule 25-6.109(4), which provides that the average monthly interest rate to be awarded on the overcharges is based on the 30-day commercial paper rate as specified in that rule. However, Title 39 of Florida Statutes, entitled "Commercial Relations," specifies in Section 687.01, F.S., that "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate specified in s. 55.03." Here, a commercial relationship clearly exists between FPL and Customers, who are FPL's electric retail service customers. No special interest rate has been provided by contract between FPL and Customers. Accordingly, Section 687.01, F.S. – which is a statutory provision specific addressing interest rates under circumstances like those in this case – controls, instead of an administrative rule which purports to implement statutory provisions that do not specifically address setting interest rates with respect to refunds ordered by the FPSC. *Gretz v. Florida Unemployment Appeals Comm'n*, 572 So.2d 1384, 1386 (Fla.1991) (more specific statute controls); *Adams v. Culver*, 111 So.2d 665, 667 (Fla.1959) (well settled that special statute covering a particular subject matter controls over general statutory provision covering same and other subjects in general terms); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n*, 794 So. 2d 696, 701 (Fla. 1st DCA 2001). Section 55.03, F.S., requires the Chief Financial Officer ("CFO") of the State of Florida to set the interest rate payable on judgments

and decrees for the year beginning the following January 1. Pursuant to Section 687.01, F.S., the rate of interest applicable to the refunds ordered in this case are determined according to the annual interest rate set by the CFO.

19. Based on these facts, the following are disputed issues of material fact in this proceeding:

A. Whether FPL's meters at issue were faulty and in error when last calibrated by FPL? Petitioners contend that the meters were faulty and in error when they were last calibrated by FPL.

B. Whether a definite date can be fixed on which FPL's meters were faulty and in error, and, if so, what is that date? Petitioners contend that a definite date on which the meters were faulty and in error can be fixed, and, further, contend that date is the date on which the meters were last calibrated by FPL.

C. Whether FPL's meters gradually became faulty and in error over a period of time? Petitioners contend that FPL's meters were faulty and in error when they were last calibrated by FPL and did not gradually become faulty and in error over a period of time.

D. Whether the sun influences the accuracy of the 1V thermal demand meters and caused them to inaccurately over-register energy demand by Customers? Petitioners contend that the sun influenced the performance of FPL's 1V thermal meters and caused them to over-register Customers' energy demands.

E. Whether radiant heat from the sun causes thermal demand meters to record energy demand in the field at error rates greater than the error rates recorded in laboratory testing of the meters? Petitioners contend that the sun's radiant heat caused the meters at issue in this case to record energy demand in the field at error rates greater than those recorded in laboratory testing.

F. Whether FPL accurately simulated actual field conditions when testing fifty (50) Type 1V thermal demand meters and one hundred (100) additional thermal demand meters of various types? Petitioners contend that the test conditions for these meters did not simulate actual field conditions, rendering the test results unreliable for purposes of determining meter field accuracy and error.

G. Whether refunds should be calculated over a time period greater than twelve (12) months? Petitioners contend that a 12-month limitation on the refund period is not factually supportable.

H. Whether there is any physical mechanism, other than miscalibration, that would cause the Type 1V meters in dispute to over-register energy demand? Petitioners contend that the only physical mechanism that could have caused the over-registration of energy demand by the Type 1V meters in dispute is miscalibration by FPL.

I. Whether Type 1V meters, such as those in dispute in this case, can gradually over-register and under-register energy demand over an extended time period? Petitioners contend that there is no such mechanism.

Statutes and Rules at Issue in this Proceeding

20. The statutes and rules at issue in this proceeding are as follows:

A. Rule 25-6.058, F.A.C. This rule addresses the means for determining the average meter error. Petitioners contend that a correct application of this rule dictates that the alternative methods they have proposed for determining meter error, discussed above, dictate that the FPSC accept the methods Petitioners advocate, rather than the method stated in the PAA.

B. Rule 25-6.103, F.A.C. This rule provides the means for determining the period of time for which refunds must be given. Based on the information provided by SUSI in the complaint process, the date on which the meters were faulty and in error for purposes of the refund period can be fixed as the date on which FPL last calibrated the meters. Pursuant to Rule 25-6.103, Customers are entitled to refunds dating back to the date on which FPL's meters were last calibrated.

C. Rule 35-6.109, F.A.C. This rule establishes the FPSC's interest to be awarded on refunds for over-charges by electric utilities. The PAA's proposal to award Customers interest based on this rule rather than on Section 687.01, F.S., is incorrect. As discussed herein, Section 687.01, F.S., is the correct provision of law that should be applied to determine the interest due in this case.

D. Sections 366.03, 366.041(1), 366.05(1), 366.05(3), 366.05(4), and 366.06 (1), Florida Statutes, which are cited by the FPSC as the statutes implemented by the rules cited in subparagraphs A. through C. above, pursuant to which this Petition is filed. Petitioners contend that, for the reasons cited in subparagraphs A. through C. above, these statutory provisions dictate that Petitioners' positions stated herein must be applied by the FPSC in this proceeding.

E. Section 687.01, F.S, which mandates that the interest rate applicable to the refunds in this case be determined based on the rate set by the CFO pursuant to Section 55.03, F.S.

Relief Requested

21. For the reasons set forth herein, Petitioners respectfully request the FPSC, pursuant to Section 120.57(1)(a), F.S., to forward this Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), F.S., to the Division of Administrative Hearings for the conduct of a formal administrative hearing, and, upon rendition of the Administrative Law Judge's

Recommended Order, to enter a Final Order:

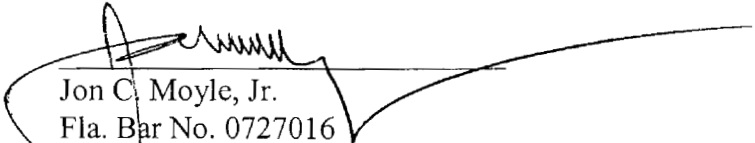
A. Finding that the sun or radiant heat influences the thermal demand meters in question such that the meter readings recorded in laboratory conditions reflect an error rate less than would be recorded had the meter been field-tested;

B. Calculating the amount of influence caused by the sun or radiant heat and adjusting the refund amount accordingly;

C. Determining that FPL's meters at issue were faulty and in error when they were last calibrated by FPL, so that the date for purposes of computing overcharge refunds due to Customers must be fixed at the date of FPL's last calibration of the meters, and the amount of overcharges that must be refunded must be calculated using this fixed date as the beginning of the refund period, which runs until the date the meters were removed from Customers' premises; and

D. Awarding interest on the amount of refund to Customers pursuant to the method set forth in Section 55.03, Florida Statutes.

Respectfully submitted this 10th day of December, 2003.



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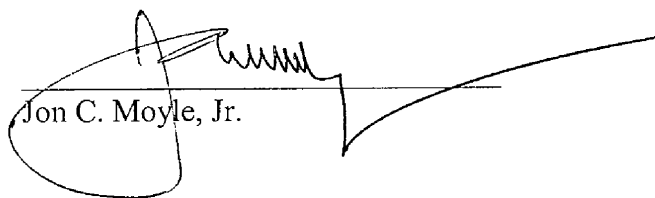
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes, was served by U.S. Mail this 10th day of December, 2003, on the following:

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