State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: September 9, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (C. Keating, Gervasi)
Division of Economic Regulation (Floyd, Kummer, Matlock, Wheeler)
Division of Regulatory Compliance & Consumer Assistance (Mills, Ruehl)

RE: Docket No. 030623-EI – Complaints by Ocean Properties, Ltd., J.C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning thermal demand meter error.

AGENDA: 09/21/04 – Regular Agenda – Decision Prior to Hearing – Oral Argument Not Requested – Participation Is at the Discretion of the Commission

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030623.RCM.DOC

Case Background

On November 19, 2003, the Commission issued Order No. PSC-03-1320-PAA-EI in this docket as proposed agency action to resolve complaints made by Southeastern Utility Services, Inc. (SUSI) against Florida Power & Light Company (FPL) on behalf of six commercial retail electric customers concerning inaccuracies in the customers' thermal demand meters. SUSI, four of the customers it represents (Ocean Properties, Ltd., J. C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc., collectively referred to as "customers"), and FPL protested the Commission's proposed agency action and requested a formal administrative hearing on these matters.[1] Consequently, this matter has been set for a formal administrative hearing on September 23, 2004.

[1] Subsequently, by Order No. PSC-04-0591-PCO-EI, issued June 11, 2004, SUSI was dismissed as a party to this proceeding. The Commission affirmed this dismissal by denying SUSI's motion for reconsideration by Order No. PSC-04-0881-PCO-EI, issued September 8, 2004.

On August 23, 2004, FPL filed a motion for partial summary final order on two of the issues, issues 3 and 4, set forth in Appendix A to Order No. PSC-0581-PCO-EI at page 15, issued June 9, 2004 (the Order Establishing Procedure). On August 30, 2004, the customers timely filed a response to the motion, or, alternatively, a cross motion for partial summary final order on issue 4. This recommendation addresses these matters. The Commission has jurisdiction pursuant to Sections 366.04, 366.05, and 120.57(1)(h), Florida Statutes.

Discussion of Issues

Issue 1: Should FPL's motion for partial summary final order be granted?

Recommendation: No. FPL's motion for partial summary final order on issue 3 should be denied and the issue should proceed to hearing. FPL's motion for partial summary final order on issue 4, as well as the customers' alternative cross motion for partial summary final order on that issue, should also be denied. Any possible disputed issues of material fact with respect to issue 4 should proceed to hearing, after which time the parties may brief the remaining legal issue. (C. Keating, Gervasi)

Staff Analysis:

Standard of Review

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[2] The burden is on the movant to demonstrate that the opposing party cannot prevail.[3] "A summary judgment should

[2] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[3] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

not be granted unless the facts are so crystallized that nothing remains but questions of law."[4] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[5] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[6] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[7]

Moreover, staff notes that this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[8] the Commission found that

> We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that
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> > [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

[4] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[5] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[6] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[7] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[8] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re: Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

Motion and Alternative Cross Motion for Partial Summary Final Order

FPL moves for the issuance of a partial summary final order on issues 3 and 4 set forth in Appendix A to the Order Establishing Procedure. Accordingly, FPL requests that a partial summary final order be issued determining that: 1) any refunds ordered by the Commission in this proceeding should be for a period of one year pursuant to Rule 25-6.103(1), Florida Administrative Code; and 2) interest on such refunds should be calculated and added to such refunds in accordance with Rule 25-6.109(4), Florida Administrative Code. Copies of these rules are appended to this recommendation as Attachment A. FPL attached the supporting Affidavits of David Bromley, Rosemary Morley, and Edward C. Malemezian, P.E., all of whom have prefiled testimony in this docket, and incorporates by reference all of the prefiled testimony and exhibits filed in the docket. Copies of the supporting Affidavits are appended to this recommendation as Attachment B.

The customers respond that summary final order should not be granted in favor of FPL on either issue. The period of time for which refunds should be provided is a disputed issue of fact about which conflicting testimony has been filed. The Affidavit of George Brown is attached to the customers' response, and is appended to this Recommendation as Attachment C. Additionally, discovery is outstanding on this issue and related issues, making entry of a final summary order inappropriate. Moreover, the interest calculation is the subject matter of a pending rule challenge, which the parties agreed could be reactivated within 15 days after the entry of the Commission's final order in this case. Determining the issue by partial summary final order may interfere with that agreement. Alternatively, the customers argue that should a partial final summary order be entered on issue 4, it should be entered in favor of the customers.

Issue 3 – Pursuant to Rule 25-6.103, Florida Administrative Code, What Is the Period for which Refunds Should Apply?

FPL's Argument

With respect to Issue 3 of the Order Establishing Procedure, concerning the period for which refunds should apply, FPL argues that as the petitioners seeking affirmative relief in the form of multi-year refunds, the customers bear the burden of proof to establish that the meter error reflected in the most recent test result "was due to some cause, the date of which can be fixed," as required by Rule 25-6.103(1).[9] According to FPL, this requires the customer to establish that the inaccuracy of the specific meter at issue "can be traced to a specific cause and a specific time."[10]

[9] FPL cites to Florida Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1981) (citing Balino v. Florida Dept. of Health & Rehab. Serv., 348 So. 2d 349, 350 (Fla. 1st DCA 1977), for the proposition that the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal; and to Order No. PSC-96-0483-FOF-EI, issued April 5, 1996, In Re: Complaint of Mr. Thomas R. Fuller against Florida Power Corporation regarding high electric bills in Orange County, for the proposition that a customer has the burden of proof in an overcharge proceeding and must show by a preponderance of the evidence that he was overcharged.

[10] Prefiled testimony of staff witness Matlock, at p. 10, lines 23-25.

FPL argues that the prefiled testimony submitted by George Brown and Bill Smith on behalf of the customers fails to establish any genuine issue of material fact that would support a refund claim beyond one year for any of the fourteen meters at issue. There is no evidence as to the specific cause or date of error for any of the meters tested. The customers' testimony contains general allegations that some FPL meter testers calibrated thermal demand meters in a manner inconsistent with the manufacturer's recommendations. However, the customers have offered no evidence that any of the alleged defective meter testing practices were performed on the meters at issue in this proceeding. Nor do the customers allege that FPL's meter testing practices violated a Commission order, statute, or rule. Moreover, the customers have presented no evidence quantifying the impact of any such alleged errors on the specific meters at issue. FPL witness Bromley's rebuttal testimony establishes that six of the fourteen meters at issue were never even calibrated by FPL. According to FPL, there is no genuine issue of material fact regarding the customers' contention that the meters at issue were miscalibrated, and a partial summary final order should be issued directing that a one-year refund is to be provided by FPL for the accounts at issue based upon Rule 25-6.103(1). FPL cites to Order No. PSC-00-0341-PCO-SU[11] in arguing that such an order will conclusively resolve issue 3.

FPL further argues that there is no genuine issue of fact regarding the customers' contention that the meters at issue were influenced by the sun or radiant heat. The customers have presented insufficient evidence to support such a determination. In his direct testimony, Mr. Brown concedes that he "cannot say with certainty what part of these meters' demand errors in the docket were affected by the sun."[12] In his rebuttal testimony, FPL witness Malemezian explained that the potential effect of radiant heat on a meter will depend on where the sun hits the meter and that tests conducted by FPL on this phenomena demonstrated that external heating caused either no demand mis-registration or some demand under-registration.[13] FPL argues that the Commission should accordingly enter a partial summary final order determining that the customers have failed to meet their burden of establishing the fixed date for meter error required under Rule 25-6.103(1) and that therefore, any Commission-ordered refunds for the meters at issue can only be for a period of one year.

Customers' Argument

The customers argue that Rule 25-6.103(1) requires a utility to refund monies to customers for meters that exceed an acceptable degree of tolerance. After imposing a 12-month limitation on refunds, the rule provides that "if it can be shown that the error was due to some cause, the date of which can be fixed, the over charges shall be computed back to but not beyond such date based upon available records." The customers contend that the meters in dispute were over-registering from the date of installation at the customers' business. Thus, the date for which the meter error should be calculated is established.

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[11] Issued February 18, 2000, in Docket No. 990975-SU, In Re: Application for Transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to Realnor Hallandale, Inc.

[12] Brown direct testimony at page 10, lines 10-11.

[13] Malemezian rebuttal testimony at page 27 line 6, through page 28 line 19.

The customers assert that evidence is also offered to show the cause of the over-registration. According to the customers, FPL did not calibrate and test the meters in question in accordance with the manufacturer guidelines, suggesting that the meters were likely miscalibrated or otherwise mishandled when originally installed.[14] Testimony from an engineer, the meter manufacturer, and FPL meter technicians indicate that they know of nothing that could gradually cause a thermal demand meter like the ones in question to gradually go bad over time.[15] Additionally, the customers assert that evidence in the record suggests that the sun or thermal heat can have an affect on thermal demand meters, placing another fact in dispute about which conflicting evidence exists.[16] The customers argue that because conflicting evidence exists regarding the point in time the meters began over-registering, a summary final order on this issue is inappropriate.

The customers also argue that evidence is still being gathered in the case and key discovery is still outstanding. Therefore, additional evidence regarding the cause and date of meter over-registration is likely to be forthcoming. Depositions have been scheduled of two FPL witnesses. Moreover, the customers have a pending motion to require FPL to provide access and testing of the meters in dispute. Requests for production of documents and interrogatories are also outstanding. According to the customers, it is not appropriate for the Commission to enter a summary final order when the opposing party has not completed discovery.[17]

Issue 4 – What Interest Rate Should Be Used to Calculate Customer Refunds?

FPL's Argument

Issue 4 concerns the question of which interest rate should apply to calculate customer refunds. According to FPL, this is purely a legal issue. FPL argues that Rule 25-6.109(4), Florida Administrative Code, clearly applies to the calculation of interest to be paid by FPL on any refunds ordered by the Commission in this proceeding. In their petition for hearing, the customers contend that interest on any ordered refunds should be calculated pursuant to Sections 687.01 and 55.03, Florida Statutes. Copies of these statutes are appended to this recommendation as Attachment D. (For a copy of Rule 25-6.109(4), see Attachment A.) By Order No. PSC-04-0591-PCO-EI,[18] the Prehearing Officer denied FPL's motion to strike this portion of the customers' petition upon a finding that FPL had failed to show that the customers'

[14] George Brown direct testimony at page 4, lines 18-25, and pages 8-9, lines 5-12; Bill Smith direct testimony at page 8, line 23 to page 13, line 23.

[15] George Brown direct testimony at page 6, line 23 to page 7, line 5.

[16] George Brown direct testimony at page 9, line 18 to page 10, line 15; Bill Smith direct testimony at page 14, lines 4-22. Staff notes that the customers did not provide a supporting Affidavit attesting to the veracity of Mr. Smith's testimony.

[17] Fleet Finance & Mortgage, Inc. v. Carey, 707 So. 2d 949 (Fla. 4th DCA 1998). See also Villages at Mango Key Homeowners Ass'n., Inc. v. Hunter Development, Inc., 699 So. 2d 337 (Fla. 5th DCA 1977); Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932 (Fla. 2nd DCA 1995).

[18] Issued June 11, 2004, in the instant docket.

pleading was "redundant, immaterial, impertinent or scandalous" under Rule 1.140, Florida Rules of Civil Procedure, and that in light of the decision in Kissimmee Utility Authority v. Better Plastics, Inc.,[19] "there is a justiciable issue as to how the provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission."[20]

FPL argues that Rule 25-6.109(1), Florida Administrative Code, clearly provides that the interest rate provision in Subsection (4) of the rule applies to all refunds ordered by the Commission with the exception of deposit refunds, refunds associated with adjustment factors, or unless otherwise ordered by the Commission. This case does not concern deposit refunds or adjustment factors. Accordingly the only question is whether there is any basis for the Commission to "otherwise order" refunds.

According to FPL, the customers' reliance on the Kissimmee decision is misplaced. In that case, the Florida Supreme Court upheld the right of a customer properly suing a municipal electric utility in circuit court to prejudgment interest. The Kissimmee decision did not address whether Rule 25-6.109, a rule not at issue in the case, applied to a refund ordered by the Commission for payment by an electric utility that is subject to rate regulation by the Commission. Moreover, by Order No. 20474,[21] In re: Complaint by Kelly Tractor Co., Inc. against Meadowbrook Utility Systems, Inc., the Commission determined that Kissimmee was not controlling with respect to a determination of whether the Commission's refund and interest rate rules apply for public utilities that are subject to Commission rate regulation. The defendant municipal electric utility in Kissimmee was a governmentally owned utility and the extent of the Commission's jurisdiction over that utility was limited to rate structure. FPL argues that pursuant to the plain language of Rule 25-6.109 and the Kelly Tractor order, the Commission should determine that Rule 25-6.109(4) applies to the calculation of interest to be paid by FPL on any refunds ordered by the Commission in this proceeding.

Customers' Argument

The customers argue that interest on refunds should be calculated in accordance with Section 687.01, Florida Statutes, not Rule 25-6.019, Florida Administrative Code, which is the subject of a pending rule challenge petition.[22] The customers argue that interest sums cannot be determined until the refund amounts have been liquidated or otherwise ascertained with certainty. The customers believe that the better way to address this issue is by means of a final order after hearing.

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[19] 526 So. 2d 46 (Fla. 1988).

[20] Order No. PSC-04-0591-PCO-EI at page 5.

[21] Issued December 20, 1988, in Docket No. 880606-WS. This order was issued approximately seven months after the Florida Supreme Court's opinion in the Kissimmee case.

[22] A copy of the rule challenge petition is attached to the customers' response as Exhibit B.

Moreover, the customers argue that FPL seeks to dodge the import of the Kissimmee decision. The court ruled that a regulated electric utility in Florida is liable to customers for prejudgment interest on overcharge refunds, and stated that, in the absence of a controlling contractual provision, the rate is set by the Legislature as directed in Section 687.01, Florida Statutes.[23] Because FPL is a regulated public utility, the customers argue that it ought to be bound by this precedent. As spelled out in the pending rule challenge petition, the Legislature has not provided the Commission with express authority to enact a rule regulating interest rates that overrides Section 687.01. Finally, the customers argue that Commission Order No. 20474 (the Kelly Tractor order) did not involve an electric utility or electric utility rules, and that the Commission should follow the Kissimmee decision in this case.

The customers request that FPL's motion be denied, or alternatively, that the customers' cross motion for partial summary final order regarding how interest should be calculated on refunds due be granted, and that interest be calculated in accordance with Section 687.01, Florida Statutes.

Analysis and Recommendation

In order to determine whether any genuine issue of material fact exists with regard to either of the issues for which partial summary final order is requested, staff has reviewed the pleadings, attachments thereto, and the relevant testimony prefiled in the docket for which Affidavits have been provided attesting to the truth and accuracy of the testimony.[24] Staff believes that genuine issues of material fact exist, or could exist, with respect to both issues 3 and 4 of the Order Establishing Procedure.

With respect to issue 3, the customers argue that conflicting evidence exists regarding the point in time the meters began over-registering, and that therefore, a genuine issue of material fact exists concerning the period for which refunds should apply. Drawing every possible inference in favor of the customers, staff agrees. FPL has not conclusively demonstrated that the customers cannot prevail on this issue.[25] Moreover, a summary final order should not be entered on issue 3 because good faith discovery on the issue is still pending.[26]

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[23] Section 687.01, Florida Statutes, states that "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03." The Chief Financial Officer establishes the rate on an annual basis as set forth in Section 55.03, Florida Statutes.

[24] See Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (finding that "[a] Florida court may not consider an unauthenticated document in ruling on a motion for summary judgment, even where it appears that the such [sic] document, if properly authenticated, may have been dispositive.") See also BiFulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997).

[25] FPL's reliance on Order No. PSC-00-0341-PCO-SU in arguing to the contrary is unpersuasive. By that order, the Commission granted a motion for summary final order on an issue involving ownership of a utility system upon finding that a circuit court order clearly stated that the certificate of title at issue conveyed title to one party over the other. The basis for the order did not involve the weighing of conflicting testimony, but instead involved a finding that the circuit court order conclusively resolved the issue.

[26] Fleet Finance & Mortgage, Inc. v. Carey, 272 So. 2d at 950 (finding that it is reversible error to grant summary judgment where depositions are still pending); Villages at Mango Key Homeowners Ass'n., Inc. v. Hunter

Issue 4 is primarily a legal issue involving the question of whether the interest on any ordered refunds should be calculated pursuant to Sections 687.01 and 55.03, Florida Statutes, or by Commission rule. Nevertheless, staff does not believe that FPL has conclusively demonstrated that the facts are so crystallized that nothing remains but a question of law. FPL points out that Rule 25-6.109(1), Florida Administrative Code, provides that the interest rate provision in Subsection (4) of the rule applies to all refunds ordered by the Commission with the exception of deposit refunds, refunds associated with adjustment factors, or unless otherwise ordered by the Commission, and that because this case does not concern deposit refunds or adjustment factors, there remains a question as to whether there is any basis for the Commission to "otherwise order" refunds. FPL has not conclusively demonstrated that any such basis does not involve a disputed issue of material fact. Moreover, by Order No. PSC-04-0591-PCO-EI issued in this case, the Prehearing Officer found that "there is a justiciable issue as to how the provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission." Certainly the resolution of issue 4 will involve issues as to the interpretation of the facts, even assuming *arguendo* that the relevant facts are undisputed.

In light of the foregoing, staff recommends that FPL's motion for partial summary final order on issue 3 should be denied and the issue should proceed to hearing. Moreover, staff believes that the possibility of a disputed issue of material fact exists with respect to issue 4. Therefore, staff recommends that FPL's motion for partial summary final order on issue 4, as well as the customers' alternative cross motion for partial summary final order on that issue, should also be denied. Any possible disputed issues of material fact with respect to issue 4 should proceed to hearing, after which time the parties may brief the remaining legal issue.

Development, Inc., 699 So. 2d at 338 (finding that summary judgments should not be entered when properly noticed depositions are pending unless a protective order has been sought or entered.)

Issue 2: Should this docket be closed?

Recommendation: No, this docket should remain open in order to proceed to hearing to resolve the protests to Order No. PSC-03-1320-PAA-EI. (C. Keating, Gervasi)

Staff Analysis: This docket should remain open in order to proceed to hearing to resolve the protests to Order No. PSC-03-1320-PAA-EI.

method of collection of a franchise fee, if a municipality or county, having authority to do so, charges a franchise fee.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.03, 366.04(2), 366.041(1), 366.05(1), 366.06(1), F.S.
History: New 2/25/76, Amended 4/13/80, 6/28/82, 5/16/83.

25-6.101 Delinquent Bills. Bills shall not be considered delinquent prior to the expiration of twenty (20) days from the date of mailing or, delivery by the utility.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.03, 366.05(1), F.S.
History: New 2/25/76.

25-6.102 Conjunctive Billing.

(1) Conjunctive billing means totalizing metering additive billing, plural meter billing, conjunctional metering, and all like or similar billing practices which seek to combine, for billing purposes, the separate consumptions and registered demands of two or more points of delivery serving a single customer.

(2) A single point of delivery of electric service to a user of such service is defined as the single geographical point where a single class of electric service, as defined in a published rate tariff, is delivered from the facilities of the utility to the facilities of the customer.

(3) Conjunctive billing shall not be permitted. Bills for two or more points of delivery to the same customer shall be calculated separately for each such point of delivery.

(4) A customer operating a single integrated business, under one name in two or more buildings and/or energy consuming locations may request a single point of delivery and such request shall be complied with by the utility providing that:

(a) Such buildings or locations are situated on a single unit of property; or

(b) Such buildings or locations are situated on two or more units of property which are immediately adjoining, adjacent, or contiguous; or

(c) Such buildings or locations are situated on two or more units of property which would be immediately adjoining, adjacent or contiguous except for intervening streets, alleys or highways.

In all cases arising in sub-paragraph (a), (b), or (c), it shall be the customer's responsibility to provide the electrical facilities necessary for distributing the energy beyond the single delivery point.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.03, 366.05(1), F.S.
History: New 7/29/69.

25-6.103 Adjustment of Bills for Meter Error.

(1) Fast meters. Whenever a meter is found to have an error in excess of the plus tolerance allowed in Rule 25-6.052, the utility shall refund to the customer the amount billed in error as determined by Rule 25-6.058 for one half the period since the last test, said one half period shall not exceed twelve (12) months; except that if it can be shown that the error was due to some cause, the date of which can be fixed, the overcharges shall be computed back to but not beyond such date based upon available records. The refund shall not include any part of any minimum charge.

(2) Slow meters.

(a) Except as provided by this paragraph, a utility may backbill in the event

(11) Each utility shall submit, as a tariff item, a procedure for discontinuance of service when that service is medically essential.
Specific Authority: 366.05, F.S.
Law Implemented: 366.03, 366.04(2)(c), 366.04(5), 366.041(1), 366.05(1), 366.06(1), F.S.
History: New 2/25/76, Amended 2/3/77, 2/6/79, 4/13/80, 11/26/80, 1/1/91, 1/11/93.

25-6.106 Underbillings and Overbillings of Energy.
(1) A utility may not backbill customers for any period greater than twelve (12) months for any undercharge in billing which is the result of the utility's mistake. The utility shall allow the customer to pay for the unbilled service over the same time period as the time period during which the underbilling occurred or over some other mutually agreeable time period. Nor may the utility recover in a ratemaking proceeding any lost revenues which inure to the utility's detriment on account of this provision. This rule shall not apply to underbillings provided for in Rules 25-6.103 or 25-6.104.
(2) In the event of other overbillings not provided for in Rule 25-6.103 the utility shall refund the overcharge to the customer for the period during which the overcharge occurred based on available records. If commencement of the overcharging cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer. The amount and period of the adjustment shall be based on the available records. The refund shall not include any part of a minimum charge.
(3) In the event of an overbilling, the customer may elect to receive the refund as a credit to future billings or as a one-time payment.
Specific Authority: 366.05(1), F.S.
Law Implemented: 366.03, 366.041(1), 366.05(1), 366.06(1), F.S.
History: New 4/13/80, Amended 5/3/82. 11/21/82.

25-6.107 - 25-6.108 Reserved

25-6.109 Refunds.
(1) Applicability. With the exception of deposit refunds and refunds associated with adjustment factors, all refunds ordered by the Commission shall be made in accordance with the provisions of this rule, unless otherwise ordered by the Commission.
(2) Timing of Refunds. Refunds must be made within ninety (90) days of the Commission's order unless a different time frame is prescribed by the Commission. Unless a stay has been requested in writing and granted by the Commission, a motion for reconsideration of an order requiring a refund will not delay the timing of the refund. In the event that a stay is granted pending reconsideration, the timing of the refund shall commence from the date of the order disposing of any motion for reconsideration. This rule does not authorize any motion for reconsideration not otherwise authorized by Chapter 25-22, Florida Administrative Code.
(3) Basis of Refund. Where the refund is the result of a specific rate change, including interim rate increases and the refund can be computed on a per customer basis, that will be the basis of the refund. In such cases, refunds may be made by either recalculating the affected customer's bill or by applying an appropriate refund factor to the consumption used by the customer during the refund period. However, where the refund is not related to specific rate changes, such as a refund for overearnings, the refund shall be made to customers of record as of a date specified by the Commission. In such case, refunds shall be made on the

basis of consumption. Per customer refund refers to a refund to every customer receiving service during the refund period. Customer of record refund refers to a refund to every customer receiving service as of a date specified by the Commission.

(4) Interest.

(a) In the case of refunds which the Commission orders to be made with interest, the average monthly interest rate until the refund is posted to the customer's account shall be based on the thirty (30) day commercial paper rate for high grade, unsecured notes sold through dealers by major corporations in multiples of $1,000 as regularly published in the Wall Street Journal.

(b) This average monthly interest rate shall be calculated for each month of the refund period:

1. By adding the published interest rate in effect for the last business day of the month prior to each month of the refund period and the published rate in effect for the last business day of each month of the refund period divided by twenty four (24) to obtain the average monthly interest rate;
2. The average monthly interest rate for the month prior to distribution shall be the same as the last calculated average monthly interest rate.

(c) The average monthly interest rate shall be applied to the sum of the previous month's ending balance (including monthly interest accruals) and the current month's ending balance divided by two (2) to accomplish a compounding effect.

(d) Interest Multiplier. When the refund is computed for each customer, an interest multiplier may be applied against the amount of each customer's refund in lieu of a monthly calculation of the interest for each customer. The interest multiplier shall be calculated by dividing the total amount refundable to all customers, including interest, by the total amount of the refund, excluding interest. For the purpose of calculating the interest multiplier, the utility may, upon approval by the Commission, estimate the monthly refundable amount.

(e) Commission staff shall provide applicable interest rate figures and assistance in calculations under this Rule upon request of the affected utility.

(5) Method of Refund Distribution. For those customers still on the system, a credit shall be made on the bill. In the event the refund is for a greater amount than the bill, the remainder of the credit shall be carried forward until the refund is completed. If the customer so requests, a check for any negative balance must be sent to the customer within ten (10) days of the request.

For customers entitled to a refund but no longer on the system, the company shall mail a refund check to the last known billing address except that no refund for less than $1.00 will be made to these customers.

(6) Security for Money Collected Subject to Refund. In the case of money being collected subject to refund, the money shall be secured by a bond unless the Commission specifically authorizes some other type of security such as placing the money in escrow, approving a corporate undertaking, or providing a letter of credit. The Commission may require the company to provide a report by the 10th of each month indicating the monthly and total amount of money subject to refund as of the end of the preceding month. The report shall also indicate the status of whatever security is being used to guarantee repayment of the money.

(7) Refund Reports. During the processing of the refund, monthly reports on the status of the refund shall be made by the 10th of the following month. In addition, a preliminary report shall be made within thirty (30) days after the date

ATTACHMENT B

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaints by Southeastern Utility Services, Inc. on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error	Docket No. 030623-EI

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

AFFIDAVIT OF DAVID BROMLEY

BEFORE ME, the undersigned authority, personally appeared David Bromley, who after being duly sworn, deposes and says:

1. That he has prepared and caused to be filed prefiled direct testimony and exhibits in the above-captioned docket on July 12, 2004; and that he has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.

2. That the answers provided in the foregoing testimony are true and correct and that he has no changes or revisions to his direct or rebuttal testimony filed in the above-captioned docket with the exception of the following corrections to his prefiled direct testimony and Document No. DB-4 attached and incorporated therein:

a. Page 3, lines 8 and 9: "5" should be "4".

b. Document No. DB-4: under the Column entitled "Scale," the third number from the bottom should be changed from "3.5" to "7" and the number on the bottom (where there is no number) should be "7".

3. Further Affiant sayeth not.

DAVID BROMLEY

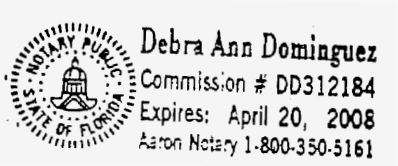
EXHIBIT
Composite
B

Sworn to and subscribed before me this 20 day of August, 2004, by DAVID BROMLEY, who is personally known to me ____ or produced the following identification

Debra Ann Dominguez
NOTARY PUBLIC - STATE OF FLORIDA

My commission expires: April 20, 2008

FPL\BROMLEYAFFIDAVIT



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaints by Southeastern Utility Services, Inc. on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error	Docket No. 030623-EI

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

AFFIDAVIT OF ROSEMARY MORLEY

BEFORE ME, the undersigned authority, personally appeared Rosemary Morley, who after being duly sworn, deposes and says:

1. That she has prepared and caused to be filed prefiled direct testimony and exhibits in the above-captioned docket on July 12, 2004; and that she has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.

2. That the answers provided in the foregoing testimony are true and correct and that she has no changes or revisions to her direct or rebuttal testimony filed in the above-captioned docket.

3. Further Affiant sayeth not.

Rosemary Morley
ROSEMARY MORLEY

Sworn to and subscribed before me this 20 day of August, 2004, by ROSEMARY MORLEY, who is personally known to me, ____ or produced the following identification

Debra Ann Dominguez
NOTARY PUBLIC - STATE OF FLORIDA

My commission expires: April 20, 2008

FPL\MORLEYAFFIDAVIT

Debra Ann Dominguez
Commission # DD312184
Expires: April 20, 2008
Aaron Notary 1-800-350-5161

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaints by Southeastern Utility Services, Inc. on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error	Docket No. 030623-EI

STATE OF FLORIDA)
COUNTY OF MARTIN)

AFFIDAVIT OF EDWARD C. MALEMEZIAN

BEFORE ME, the undersigned authority, personally appeared , who after being duly sworn, deposes and says:

1. That he has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.

2. That the answers provided in the foregoing testimony are true and correct and that he has no changes or revisions to his rebuttal testimony filed in the above-captioned docket.

3. Further Affiant sayeth not.

Edward C. Malemezian

EDWARD C. MALEMEZIAN

Sworn to and subscribed before me this 20 day of Aug., 2004, by EDWARD C. MALEMEZIAN, who is personally known to me ___ or produced the following identification DL.

PATRICIA DECKER
Notary Public - State of Florida
My Commission Expires Apr 20, 2007
Commission # DD185950
Bonded By National Notary Assn.

NOTARY PUBLIC - STATE OF FLORIDA
Patricia Decker
My commission expires:
4-20-07

FPL\MALEMEZIANAFFIDAVIT

ATTACHMENT C

AFFIDAVIT

STATE OF FLORIDA
COUNTY OF MANATEE

BEFORE ME, this day personally appeared George Brown, who being duly sworn, deposes and says that the following information is true and correct, and within his personal knowledge:

1. My name is George Brown. I am 59 years of age and am of sound mind and am competent to testify to the matters set forth herein. I give the following information of which I have personal knowledge, both freely and truthfully and without any threat of coercion or promise of reward.

2. I have reviewed Florida Power and Light Company's Motion of Partial Summary Final Order filed August 23, 2004.

3. I have reviewed the testimony I have caused to be filed in this matter as it relates to the period of time for which refunds should be provided to Customers and the reasons therefore. I believe Customers have set forth, and will provide at hearing, evidence establishing that refunds should extend beyond a 12 month time frame.

4. My testimony is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYETH NAUGHT.

GEORGE BROWN

STATE OF FLORIDA
COUNTY OF MANATEE

Sworn to and subscribed before me by George Brown this 30th day of August, 2004.

___ he/she is personally known to me, **OR**
✓ has produced FLDL as identification.

NOTARY PUBLIC

(NOTARY STAMP)

Print Name

EXHIBIT
Exhibits
A

CHAPTER 687

INTEREST AND USURY; LENDING PRACTICES

687.01 Rate of interest in absence of contract.—In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03.

History.—s. 1, ch. 1483, 1866; ss. 1, 2, ch. 1562, 1866; RS 2320; GS 3103; RGS 4849; CGL 6936; s. 1, ch. 22745, 1945; s. 1, ch. 82-42; s. 10, ch. 94-239.

687.02 "Usurious contracts" defined.—

(1) All contracts for the payment of interest upon any loan, advance of money, line of credit, or forbearance to enforce the collection of any debt, or upon any obligation whatever, at a higher rate of interest than the equivalent of 18 percent per annum simple interest are hereby declared usurious. However, if such loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, then no contract to pay interest thereon is usurious unless the rate of interest exceeds the rate prescribed in s. 687.071.

(2) As amended by chapter 79-592, Laws of Florida, chapter 79-274, Laws of Florida, which amended subsection (1):

(a) Shall apply only to loans, advances of credit, or lines of credit made on or subsequent to July 1, 1979, and to loans, advances of credit, or lines of credit made prior to that date if the lender has the legal right to require full payment or to adjust or modify the interest rate, by renewal, assumption, reaffirmation, contract, or otherwise; and

(b) Shall not be construed as diminishing the force and effect of any laws applying to loans, advances of credit, or lines of credit, other than to those mentioned in paragraph (a), completed prior to July 1, 1979.

History.—s. 1, ch. 4022, 1891; GS 3104; s. 1, ch. 5960, 1909; RGS 4850; CGL 6937; s. 1, ch. 29705, 1955; s. 1, ch. 73-298; ss. 12, 15, ch. 79-274; s. 1, ch. 79-592; s. 1, ch. 80-310.

687.03 "Unlawful rates of interest" defined; proviso.—

(1) Except as provided herein, it shall be usury and unlawful for any person, or for any agent, officer, or other representative of any person, to reserve, charge, or take for any loan, advance of money, line of credit, forbearance to enforce the collection of any sum of money, or other obligation a rate of interest greater than the equivalent of 18 percent per annum simple interest, either directly or indirectly, by way of commission for advances, discounts, or exchange, or by any contract, contrivance, or device whatever whereby the debtor is required or obligated to pay a sum of money greater than the actual principal sum received, together with interest at the rate of the equivalent of 18 percent per annum simple interest. However, if any loan, advance of money, line of credit, forbearance to enforce the collection of a debt, or obligation exceeds $500,000 in amount or value, it shall not be usury or unlawful to reserve, charge, or take interest thereon unless the rate of interest exceeds the rate prescribed in s. 687.071. The provisions of this section shall not apply to sales of bonds in excess of $100 and mortgages securing the same, or money loaned on bonds.

(2)(a) The provisions of this section and of s. 687.02 shall not apply to loans or other advances of credit made pursuant to:

1. A commitment to insure by the Federal Housing Administration.

2. A commitment to guarantee by the United States Department of Veterans Affairs.

3. A commitment to purchase a loan issued by the Federal National Mortgage Association; Government National Mortgage Association; Federal Home Loan Mortgage Corporation; any department, agency, or instrumentality of the Federal Government; or any successor of any of them, pursuant to any provision of the acts of Congress or federal regulations.

(b) This act shall apply only to loans or advances of credit made subsequent to the effective date of this act. All present laws shall remain in full force and effect as to loans or advances of credit made prior to the effective date of this act.

CHAPTER 55

JUDGMENTS

55.01 Judgments; general form.—

(1) In all actions where either party recovers a sum of money, the amount to which he or she is entitled may be awarded by the judgment generally, without any distinction being therein made as to whether such sum is recovered by way of debt or damages.

(2) Each final judgment shall contain thereon the address and the social security number, if known to the prevailing party, of each person against whom judgment is rendered. Errors in names, addresses, or social security numbers or failure to include same shall in no way affect the validity or finality of a final judgment.

History.—s. 40, ch. 1096, 1861; RS 1171; GS 1598; RGS 2800; CGL 4486; s. 9, ch. 67-254; s. 1, ch. 79-387; s. 9, ch. 93-250; s. 293, ch. 95-147.

55.03 Judgments; rate of interest, generally.—

(1) On December 1 of each year, the Chief Financial Officer shall set the rate of interest that shall be payable on judgments or decrees for the year beginning January 1 by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged federal discount rate. The Chief Financial Officer shall inform the clerk of the courts and chief judge for each judicial circuit of the rate that has been established for the upcoming year. The interest rate established by the Chief Financial Officer shall take effect on January 1 of each following year. Judgments obtained on or after January 1, 1995, shall use the previous statutory rate for time periods before January 1, 1995, for which interest is due and shall apply the rate set by the Chief Financial Officer for time periods after January 1, 1995, for which interest is due. Nothing contained herein shall affect a rate of interest established by written contract or obligation.

(2) Any judgment for money damages or order for a judicial sale and any process or writ directed to a sheriff for execution shall bear, on its face, the rate of interest that is payable on the judgment. The rate of interest stated in the judgment accrues on the judgment until it is paid.

(3) The interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid.

(4) A sheriff shall not be required to docket and index or collect on any process, writ, judgment, or decree, described in subsection (2), and entered after the effective date of this act, unless such process, writ, judgment, or decree indicates the rate of interest. For purposes of this subsection, if the process, writ, judgment, or decree refers to the statutory rate of interest described in subsection (1), such reference shall be deemed to indicate the rate of interest.

History.—s. 1, ch. 1562, 1866; RS 1176; GS 1604; RGS 2806; CGL 4493; s. 1, ch. 16051, 1933; s. 9, ch. 67-254; s. 7, ch. 77-354; s. 8, ch. 79-396; ss. 1, 2, ch. 80-110; s. 1, ch. 81-113; s. 37, ch. 81-259; s. 8, ch. 94-239; s. 4, ch. 98-410; s. 101, ch. 2003-261

55.04 Judgments; rate of interest, bonds of county, etc.—All judgments and decrees rendered on any bonds or other written evidence of debt of any county, special road and bridge districts or any county for the use and benefit of any special road and bridge districts or incorporated city or town or taxing district bear interest at the rate of 5 percent a year. When a judgment or decree is rendered on a bond or other written evidence of debt providing for a lesser rate of inter-