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September 13, 2004

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Boulevard, Room 110
Tallahassee, FL 32399-0850

RECEIVED-FPSC
SEP 13 PM 4:35
COMMISSION
CLERK

Re: Docket No. 030623-EI

Dear Ms. Bayó:

Enclosed for filing in the above-referenced docket on behalf of Florida Power & Light Company ("FPL") are the original and fifteen copies of FPL's (1) Motion to Dismiss Customers' Petition for Variance or Waiver of Rule 25-6.103(3).

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Please contact me if you have questions regarding this filing.

Sincerely,

[Handwritten signature of Kenneth A. Hoffman]

Kenneth A. Hoffman

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DOCUMENT NUMBER-DATE

09964 SEP 13 04

FPSC-COMMISSION CLERK

**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

Filed: September 13, 2004

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**FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO DISMISS CUSTOMERS' PETITION FOR  
VARIANCE OR WAIVER OF RULE 25-6.103(3)**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves to dismiss the Petition for Variance or Waiver of Rule 25-6.103(3) (the "Petition") filed by Ocean Properties, Ltd., Target Stores, Inc., J.C. Penney Corp., and Dillard's Department Stores, Inc. ("Customers") on August 23, 2004, and states:

1. This docket was opened in the summer of 2003 to address complaints for refunds regarding alleged thermal demand meter errors filed by Southeastern Utility Services, Inc. ("SUSI") on behalf of a number of FPL customers. On November 19, 2003, the Commission issued a Notice of Proposed Agency Action Order Resolving Complaints, Order No. PSC-03-1320-PAA-EI ("the PAA Order"), which stated in relevant part:

SUSI proposes that refunds be based on 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. This "higher of" method has no basis in the Commission's rules. In addition, while the first component of SUSI's proposed method is consistent with the requirement in Rule 25-6.103(3) that refunds be calculated based on the error demonstrated in a meter test, the second component is inconsistent with that requirement and does not have any basis in any Commission rule.

See PAA Order, at p. 5. In the PAA Order, the Commission found that the "appropriate method to determine the meter error from which refunds should be calculated is to use the absolute percentage error

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based upon the average calculation for the lowest and highest demand during the refund period.” See id. at p. 11.

2. On December 10, 2003, Customers and SUSI filed a petition protesting the PAA Order. FPL also filed a petition on the PAA Order on that date.

3. The Order Establishing Procedure in this Docket, Order No. PSC-04-0581-PCO-EI, issued June 9, 2004, established time frames for the activities in this docket and set out four proposed issues for resolution of the case, including as follows:

[Issue 2] Pursuant to Rules 25-6.058 and 25-6.103, Florida Administrative Code, what is the appropriate method of calculating customer refunds for those thermal meters which test outside the prescribed tolerance limits?

4. Prehearing statements were filed on August 23, 2004. In their prehearing statement, Customers identified a new “proposed” Issue 3 for the docket:

Should customers receive a refund representing the amount of money they paid in error, and if so, how should this sum be determined?

See Customers’ Prehearing Statement, p. 7. Customers’ position on this proposed issue was as follows:

Yes. Rule 25-6.103(1) states the Commission’s basic policy regarding “Adjustment of bills for Meter Error,” and requires FPL “to refund to the customer the amount billed in error ... .” However, as indicated in the testimony of Commission staff witness Sidney W. Matlock, while the Commission has adopted rules that specifically address the calculation of refunds for kWh over-registration, these rules do not specifically address refunds for demand over-registration. In an abundance of caution, Customers will file a Petition for Variance or Waiver to ensure that the Commission is not somehow constrained from effecting the intent of Rule 25-6.103(1).

See Customers’ Prehearing Statement, pp. 7-8 (emphasis added).<sup>1</sup>

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<sup>1</sup> At the Prehearing Conference held August 30, 2004, the Prehearing Officer determined, on Staff’s recommendation, that Customers’ proposed Issue 3 was subsumed within existing Issue 2, the appropriate method of calculating customer refunds for meters that test outside of the prescribed tolerance limits pursuant to Rules 25-6.058 and 25-6.103.

5. On the same date Customers filed their prehearing statement, Customers filed a Petition for Variance or Waiver of Rule 25-6.103(3), Florida Administrative Code. Customers' Petition requests a variance or waiver of Rule 25-6.103(3) to allow: (1) the use of the standard reference test point for determining the meter test error; and (2) the use of the higher of before and after billings or a meter test to determine the appropriate refund amount.

6. Customers do not have standing to file the Petition for Variance or Waiver of Rule 25-6.103(3) because only those who are "subject to regulation by an agency rule" may avail themselves of the variance or waiver provision of the Florida Administrative Procedure Act. See § 120.542(1), (5), Fla. Stat. (2003); Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 743 So. 2d 1121, 1122 (Fla. 1<sup>st</sup> DCA 1999) ("Mariner Properties"). In Mariner Properties, the First District Court of Appeal held that the Board of Trustees of the Internal Improvement Trust Fund (the "Board") was entitled to dismiss a petition requesting variance from and waiver of the provisions of certain administrative rules relating to petitioner's application to use certain sovereignty submerged land upon determining that the Section 120.542, Florida Statutes, variance and waiver process did not apply to the disputed rules insofar as the statute limited the variance and waiver process to persons subject to regulation. The court found that the Board acted sometimes as a regulatory agency, but also had a duty to manage and control sovereignty lands. According to the court:

The section 120.542(1) limitation of the variance and waiver process to persons subject to regulation is reiterated at subsection (5), and the statute does not refer to proprietary action. ... Because the variance and waiver process in section 120.542 expressly pertained to regulatory rather than proprietary matters, and the statute should not be construed otherwise, the Board was entitled to dismiss the appellant's petition.

See id. at 1123.

7. Section 120.542, Florida Statutes, and Mariner Properties require the Commission to dismiss Customers' Petition for Variance or Waiver of Rule 25-6.103(3) without an evidentiary hearing because one must be subject to Commission regulation for the variance and waiver process to apply. Neither Ocean Properties, Ltd., Target Stores, Inc., Dillard's Department Stores, Inc., nor J.C. Penney Corp. are subject to regulation by the Florida Public Service Commission. Accordingly, Customers lack standing and their Petition must be dismissed.

8. Customers recognize that the Rule applies to FPL and not to Customers because it is FPL that is subject to any requirement for payment of refunds that may be ordered by the Commission pursuant to the Rule. Customers argue that their Petition for Rule Waiver is appropriate "[t]o the extent that application of Rule 25-6.103(3) requires use of a meter percentage error (for calculating refunds) equal to a meter's full-scale test error." See Petition for Rule Waiver, ¶ 10. Nothing in Section 120.542, Florida Statutes, or Chapter 28-104 of the Uniform Rules, related to variance or waiver, contemplates that a Petition for Rule Waiver is appropriate when the petitioner is not subject to regulation by an agency rule.

9. Customers' Petition for Rule Waiver is a belated attempt to hijack the docketed matter that is set for hearing in just 10 days and transform it into a rule waiver proceeding. Customers' Petition for Variance or Waiver was filed more than 9 months after the Commission issued the PAA Order indicating how it proposed to apply Rule 25-6.103(3), Florida Administrative Code, to FPL in this docket. As a substantive matter, FPL has addressed the merits of Customers' arguments regarding the "higher of" method in FPL's prefiled testimony in Docket No. 030623-EI. After reviewing FPL's arguments on the merits of Customers' "higher of" method, Customers are searching for a means of resurrecting their case. Customers have no standing to misuse the rule waiver process for this purpose.

10. Even if Customers were subject to regulation such that the variance and waiver process applied to them, it was procedurally improper for Customers to file their Petition for Rule Waiver just one month before the scheduled hearing in this docket. When a petition for variance or waiver is filed, a number of procedural mechanisms are set into action. There are provisions for notice and an opportunity to comment. See § 120.542(6), Fla. Stat. (2003); Rule 28-104.003, Florida Administrative Code. Section 120.542(7), Florida Statutes, gives the agency 30 days from the date of the petition to review the petition and request submittal of additional information. The agency has 90 days to make its decision before the petition is deemed approved. See Section 120.542(8). The agency's decision to grant or deny the petition must be supported by competent substantial evidence and is subject to request by a substantially interested party for proceedings pursuant to Sections 120.569 and 120.57. See id. Had the Customers wanted to consolidate two separate administrative proceedings, they should have done so far sooner.

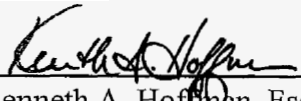
11. Also, the Customers' Petition should be dismissed because the Customers did not follow the statutory and rule guidelines for filing a Petition for Rule Waiver. Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, establish a number of procedures for granting and denying petitions for rule variance or waiver. For example, a petition for rule waiver must be filed with the agency that adopted the rule with a copy to the Joint Administrative Procedures Committee ("JAPC") of the Florida Legislature. See § 120.542(5), Fla. Stat. (2003); Rule 28-104.002, Florida Administrative Code. Customers neglected to file the Petition with JAPC. See Petition for Rule Waiver, Certificate of Service. This requirement is not a mere technicality. JAPC is required to maintain detailed information about agency orders granting or denying petitions for variance or waiver and agencies are required to report to the Governor and the Florida Legislature each year the number of petitions for

variance or waiver filed and the disposition of all petitions. See § 120.542(8), (9), Fla. Stat. (2003). Further, there is no statement in the Petition about whether the variance or waiver is temporary or permanent, which is required by Rule 28-104.002(i).<sup>2</sup>

12. Should the Commission elect not to dismiss Customers' Petition for variance or waiver of Rule 25-6.103(3), FPL reserves its right to address the merits of Customers' claims of "substantial hardship" and "principles of fairness" during the comment period required pursuant to Section 120.542(6), Florida Statutes.

**WHEREFORE**, FPL respectfully requests that the Commission dismiss Customers Petition for Variance or Waiver of Rule 25-6.103(3).

Respectfully submitted,

  
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-- and --

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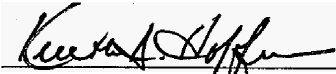
<sup>2</sup> The requirement that a petitioner for variance or waiver state whether the variance or waiver is temporary or permanent is further evidence that the process applies only to those "subject to regulation." It is necessary that one be subject to regulation to require temporary or permanent relief from such regulation.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Florida Power & Light Company's Motion to Dismiss Customers' Petition for Variance or Wavier of Rule 25-6.103(3) has been furnished by Hand Delivery this 13<sup>th</sup> day of September, 2004, to the following:

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By:   
Kenneth A. Hoffman, Esq.