BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by National Energy Raters 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.	DOCKET NO. 020084-EI ORDER NO. PSC-02-0995-FOF-EI ISSUED: July 23, 2002

The following Commissioners participated in the disposition of this matter:

LILA A. JABER, Chairman
J. TERRY DEASON
BRAULIO L. BAEZ
MICHAEL A. PALECKI
RUDOLPH "RUDY" BRADLEY

ORDER GRANTING MOTION TO DISMISS WITH PREJUDICE

BY THE COMMISSION:

BACKGROUND

On January 30, 2002, the National Energy Raters Association (NERA), a Florida Not For Profit Corporation, filed a formal complaint (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 BERS 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 in writing to FPL's Motion.

This Order addresses FPL's Motion to Dismiss. We have jurisdiction over the charge for energy audits pursuant to Section 366.82(5), Florida Statutes.

MOTION TO DISMISS

As stated above, NERA's Complaint alleges that FPL and FPC, and possibly other utilities, are marketing and providing 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 free, 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. FPL moved to dismiss this Complaint.

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, we must accept all allegations therein as true, and cannot look beyond the complaint when making our decision, and all reasonable inferences drawn must be made in favor of the complainant. Id. In order to determine whether the Complaint 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).

FPL alleges that we 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. Further, FPL alleges that we lack 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 its alleged action 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 argues 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 as required by Rule 25-22.036(2), Florida Administrative Code. 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 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 this 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. NERA did not respond in writing to FPL's Motion, but did address the Commission orally at the July 9, 2002, Agenda Conference. Also, we allowed representatives of FPL, FPC, and the Florida Solar Energy Center to address us on this matter at that same agenda.

Upon consideration of all of the above, we find 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, we find that NERA has failed to demonstrate that it will suffer injury in fact that is of sufficient immediacy to entitle it to any relief.

We also agree that NERA has failed to establish representative standing. However, this latter defect could be remedied, and would not be grounds for a dismissal with prejudice.

However, we find that NERA cannot remedy the fact that it fails the second part of the Agrico test which requires that it fall 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, we find that FPL's Motion to Dismiss should be granted, and the Complaint of NERA is dismissed with prejudice.

Based on the above, we need not address FPL's request that the Complaint be dismissed for lack of subject matter jurisdiction. Also, we need not consider the merits of the Complaint itself.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Power and Light Company's Motion to Dismiss the Complaint of the National Energy Rater's Association is granted, and the Complaint shall be dismissed with prejudice. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 23rd day of July, 2002.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative

hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.