

February 26, 2002

Charles A. Guyton
850.222.3423

By Hand Delivery

Blanca S. Bayó, Director
Division of the Commission Clerk &
Administrative Services
Florida Public Service Commission
4075 Esplanade Way, Room 110
Tallahassee, Florida 32399-0850

020084-EI

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In Re: Complaint by National Energy Raters
Association against Florida Power and
Light Company, Docket No. 020082-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original
and fifteen (15) copies of FPL's Motion to Dismiss in Docket No. 020082-EI.

020084-EI Law

If you or your Staff have any questions regarding this transmittal, please contact me.

Very truly yours,

Charles A. Guyton

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

020084-EI

In Re: Complaint by National Energy)
Raters Association to)
Florida Power & Light Company)
and Florida Power Corporation)

Docket No. ~~020082-EI~~

Filed: February 26, 2002

**FLORIDA POWER & LIGHT COMPANY'S
MOTION TO DISMISS THE COMPLAINT OF
THE NATIONAL ENERGY RATER'S ASSOCIATION**

Florida Power & Light Company ("FPL") hereby files pursuant to Rule 28-106.204, Florida Administrative Code, this Motion to Dismiss the Complaint ("Complaint") of the National Energy Rater's Association ("NERA"). The Florida Public Service Commission ("Commission") should dismiss the Complaint because NERA fails to adequately state a cause of action in that the Complaint contains no allegation pursuant to rule 25-22.036(2), Florida Administrative Code, as to NERA's substantial interest in requested agency action concerning FPL's alleged violations of rule 25-17.003(4)(a), Florida Administrative Code. Further, the Commission lacks subject matter jurisdiction under chapter 350 or chapter 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 this Motion to Dismiss, FPL states:

1. FPL is a public utility subject to the jurisdiction of the Commission under Chapter 366, Florida Statutes. FPL's general offices are located at 9250 West Flagler Street, Miami, Florida 33174.

2. Any pleading, motion, notice, order or other document required to be served upon the complainant or filed by any party to this proceeding should be served upon the following individuals:

William G. Walker
Vice President, Regulatory Affairs
Florida Power & Light Co.
215 S. Monroe St., Suite 810
Tallahassee, FL 32301

Charles A. Guyton, Esq.
Steel Hector & Davis LLP
215 S. Monroe St., Suite 601
Tallahassee, FL 32301

3. This Motion to Dismiss is timely filed pursuant to Rules 28-106.204(2) and 28-106.103 of the Florida Administrative Code.

4. In the Complaint, NERA alleges a violation by FPL of Rule 25-17.003(4)(a), Florida Administrative Code, providing requirements for residential energy audits by regulated utilities.

5. The alleged action of FPL that forms the basis of the Complaint and request for relief is FPL's alleged marketing of ratings and provision of audits under the Building Energy Efficiency Rating System (BERS) "free of charge" for residential customers in Florida. Complaint at 1.

6. The Complaint asserts that, by means of the alleged rule violation, FPL allegedly (1) has caused FPL's recovery from ratepayers for the BERS program without the required offset by revenues obtained through homeowner audit charges and without a corresponding increase in energy efficiency; (2) has created a virtual monopoly for home energy ratings and thus has "decimated" the business of independent home energy raters; and (3) has caused declining revenues for the Florida Solar Energy Center, which trains and licenses independent energy raters through a contract with the Florida Department of Community Affairs.

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

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

9. As relief, NERA asks the Commission to “direct the utilities to allow independent raters to sign up eligible builders for PSC approved utility builder programs and not interfere in the provision of energy ratings to a builder by the independent rater.” Complaint at 5.

10. As relief, NERA requests that the Commission “direct the utilities to enter into an agreement with NERF for the provision of services by independent energy raters for conducting audits for eligible customers.” Complaint at 5.

11. As relief, NERA requests that the Commission “[p]rohibit utilities from recommending specific measures for adoption in the course of a utility conducted audit.” Complaint at 5.

12. As relief, NERA requests that the Commission “[a]ssure that there is no cross subsidization of utility services that result from utility conducted audits.” Complaint at 5.

13. As relief, NERA requests that the Commission “[r]equire that utilities disclose the actual cost of a BERS audit in any promotional materials, which are disseminated to their customers.” Complaint at 5.

14. As relief, NERA requests that the Commission “[c]reate a marketing and education program, to be funded by utility contributions (which may be recovered through ECCR) for the purpose of encouraging customers to obtain a BERS audit.” Complaint at 5.

15. The Complaint should be dismissed. The Commission should dismiss with prejudice the sole count of the Complaint, an alleged violation of section 25-17.003(4)(a), for failure to state a cause of action due to lack of standing and for lack of subject matter jurisdiction.

FAILURE TO STATE A CAUSE OF ACTION

16. 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. NERA lacks standing to file a third-party complaint. Thus, NERA cannot cure the defective complaint by adequately alleging that its substantial interest is affected by FPL’s alleged rule violation.

17. Complaints filed with the Commission are governed by Rule 25-22.036(2), Florida Administrative Code, which provides:

(a) Complaint. A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant’s substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

(b) Complaint. Each complaint, in addition to the requirements of paragraph (a) above shall also contain: 1. The rule, order, or statute that has been violated; 2. The actions that constitute the violation; 3. The name and address of the person against whom the complaint is lodged; 4. The specific relief requested, including any penalty sought.

(Emphasis added.)

18. 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.

19. Further, NERA cannot state a cause of action because it has failed to meet the standing requirements set forth in Agrico Chemical Co. v. Dep't 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.) The primary injury alleged in the Complaint is that independent energy raters have been economically decimated by subsidized "free" ratings." Complaint at 2. This allegation of economic injury offers only a conclusory statement by NERA with no attempt to meet to either prong of the Agrico test as to immediacy and nature of injuries as required in Agrico and its progeny.

20. 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.

21. In this case, the economic interests asserted by NERA fail both the “immediate injury” and “zone of interest” tests of Agrico. 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, 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.

22. The relevant statutes implemented by Rule 25-17.003(4), the rule that FPL allegedly violated, are Chapters 120, 350 and 366, Florida Statutes. These statutes regulate the Public Service 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. Chapter 120, the Administrative Procedure Act, as its name clearly states, has the sole purpose of providing a system of procedure for administrative agencies in Florida. The legislative intent of Chapter 350 was to designate the Public Service Commission as “an arm of the legislative branch of government.” § 350.001, Fla. Stat. Chapter 366 provides solely for the regulation of public utilities “in the public interest” and “for the protection of the public welfare.” § 366.01, Fla. Stat. Thus, the relevant statutes in no way contemplate the consideration of the economic interests of third parties such as NERA.

23. The Florida Supreme Court held in Ameristeel Corp. v. Clark, 691 So. 2d 473 (Fla. 1997), that AmeriSteel’s assertions as to economic injury did not confer upon AmeriSteel standing to intervene in a territorial agreement proceeding. 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, 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.

24. Aside from NERA's failure in the Complaint to satisfy the Agrico standing tests, the Complaint also is deficient in its failure to establish representative standing. In Farmworkers Rights Organization, Inc. v. Department of Health and Rehabilitative Services, 417 So. 2d 753 (Fla. 1st DCA 1982), the First District Court of Appeal established the following criteria for a trade organization to have standing in a section 120.57 proceeding:

- (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.

25. NERA's complaint fails to satisfy any of these necessary criteria. It does not demonstrate that a substantial number of its members are substantially affected by the alleged rule violation. It does not assert that the subject matter of the rule is within the association's general scope of interest and security. It does not request relief of a type appropriate for a trade association to receive on behalf of its members.

26. Therefore, based NERA's complete failure and inability to assert standing to file its claims, the Complaint should be dismissed.

LACK OF SUBJECT MATTER JURISDICTION

27. The Commission lacks subject matter jurisdiction to consider NERA's claims as to alleged economic injuries to NERA and the Solar Energy Center. The Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973). Rule 25-17.003(4)(a) of the Florida Administrative Code, which implements chapter 366, 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.

The Commission has authority to adjudicate a claim of a violation of this rule by a person who could show that his or her substantial interest is affected. Rule 25-22.036(2), F.A.C. As previously discussed, NERA has failed to make such a showing and the economic interest it seeks to protect is not a substantial interest protected by chapters 350 or 366, Florida Statutes.

28. NERA also claims that FPL has created a virtual monopoly for home energy ratings and thus has "decimated" the business of independent home energy raters and also has caused declining revenues for the Florida Solar Energy Center. Nothing in chapter 366 or elsewhere in the Florida Statutes or the Commission rules grants the Commission the jurisdiction or authority to adjudicate alleged injuries to the economic interests of third parties who object to FPL's operation of a legislatively mandated program. The Commission does not have jurisdiction over the creation of monopolies or the economic viability of the business of home energy raters. Thus, even if NERA or the Solar Energy Center had standing to assert these claims, the Commission would not have jurisdiction to hear or adjudicate them.

29. Further, nothing in Chapter 366 or elsewhere in the Florida Statutes or administrative rules grants the Commission the authority to grant most of the relief sought in the Complaint. The Commission has no authority to create trust funds for low-income customers to

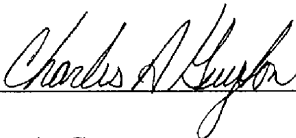
be administered by NERF, to condition the approval of prospective conservation programs that have not yet come before it, to create utility builder programs or direct utilities to allow raters to sign up eligible builders, to order utilities to enter into agreements with NERF to conduct audits, to prohibit utilities from recommending conservation measures in an audit, or to create a marketing and education program (the costs of which are to be recovered through the Conservation Cost Recovery Clause) to promote customers' obtaining a BERS audit.

WHEREFORE, FPL hereby files this Motion to Dismiss the Complaint of NERA pursuant to rule Rules 28-106.204(2) and 28-106.103 of the Florida Administrative Code, for its failure to adequately state substantial interest in the Commission action sought in this docket. The Complaint also should be dismissed because it seeks to expand the scope of Commission jurisdiction beyond that conferred in Chapters 120 and 366, Florida Statutes.

DATED this 26th day of February, 2002.

Respectfully submitted,

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By: 

Charles A. Guyton
Florida Bar No. 0398039
Elizabeth C. Daley
Florida Bar No. 0104507

**ATTORNEYS FOR FLORIDA
POWER & LIGHT COMPANY**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 26, 2002, a true and correct copy of Florida Power & Light Company's Motion to Dismiss Complaint was served by United States Mail upon:

Dennis J. Stroer
NERA President
145 Wekiva Springs Road, Suite 187
Longwood, Florida 32779

By: Charles A. Guepka

Tal/1998/41827