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January 5, 2004

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

**HAND DELIVERY**

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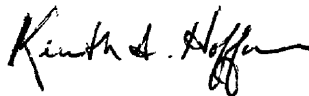
Re: Docket No. 030623-EI

Dear Ms. Bayo:

Enclosed herewith for filing on behalf of Florida Power & Light Company ("FPL") are an original and fifteen copies of FPL's Motion to Dismiss Southeastern Utility Services, Inc. as a Petitioner and Motion to Strike Portions of Customers/SUSI's Petition for Formal Administrative Haering.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

- AUS \_\_\_\_\_
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM 5 \_\_\_\_\_
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Enclosures

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R. V. N.  
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

00063 JAN-5 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: January 5, 2004

**FLORIDA POWER & LIGHT COMPANY'S  
MOTION TO DISMISS SOUTHEASTERN UTILITY  
SERVICES, INC. AS A PETITIONER AND MOTION  
TO STRIKE PORTIONS OF CUSTOMERS/SUSI'S  
PETITION FOR FORMAL ADMINISTRATIVE HEARING**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby moves that the Florida Public Service Commission ("Commission") enter an order:

1. Dismissing Southeastern Utility Services, Inc. ("SUSI") as a petitioner in this proceeding;
2. Striking those portions of the Petition for Formal Administrative Hearing filed by Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., Target Stores, Inc. (hereinafter referred to collectively as the "Customers") and SUSI that address and request the Commission to award interest on any refunds ordered by the Commission pursuant to Sections 687.01 and 55.03, Florida Statutes; and
3. Striking that part of the Customers/SUSI Petition which alleges a disputed issue of material fact concerning the testing of non-Type 1V thermal demand meters which were not addressed in and within the scope of the Proposed Agency Action Order No. PSC-03-1320-PAA-EI ("PAA Order"), portions of which were protested by Customers/SUSI.

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00063 JAN-5 04

FPSC-COMMISSION CLERK

In support of these motions, FPL states as follows:

**A. Background**

1. On November 19, 2003, the Commission issued the PAA Order. The PAA Order was issued in response to complaints filed by SUSI on behalf of several customers whose Type 1V thermal demand meters were found to have over-registered demand pursuant to meter tests performed by FPL. The complaints filed by SUSI on behalf of the Customers sought refunds in excess of those proposed by FPL.

2. Customers and SUSI filed a Petition for Formal Administrative Hearing directed to parts of the PAA Order. FPL also filed a Petition on Proposed Agency Action addressing the PAA Order in its entirety. FPL advised the Commission that the individual determinations in the PAA Order, taken as a whole, reflected a fair and equitable mechanism for settlement. However, FPL went on to state in its Protest, that if any of the customers whose meters were addressed in the PAA Order or any other intervenor filed a Protest to the PAA Order, that FPL reserved its right to proceed to final hearing under strict application of the applicable Commission rules.

**B. Motion to Dismiss SUSI as a Petitioner**

3. The Petition for Formal Administrative Hearing filed by the Customers directing itself to portions of the PAA Order includes SUSI as a petitioner. SUSI has no standing to protest the PAA Order and should be dismissed as a petitioner.

4. The Customers point the Commission to the oft-cited case of *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981) which sets forth the correct and applicable legal standard for determining whether, as the Customers put it, one “ha[s]

standing to challenge the FPSC's Proposed Agency Action in this proceeding . . . ."<sup>1</sup> Under the *Agrico* test, a petitioner must show:

(1) that he will suffer injury in fact which is of significant immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect.

*Agrico*, at 482.

5. As recently put by the First District Court of Appeal in *Ybor III, Ltd. v. Florida Housing Finance Corporation*, 843 So. 2d 344, 346 (Fla. 1<sup>st</sup> DCA 2003):

The first prong of the *Agrico Chem. Co.* test "deals with the degree of injury," whereas the second prong "deals with the nature of the injury. *Id.* (*Agrico*, at 482). To prove standing, Appellant has to satisfy both prongs.

6. In this case, the Petition for Formal Administrative Hearing filed by Customers and SUSI fails to meet the two-prong *Agrico* test as applied to SUSI. In paragraph 11 of the Petition, SUSI claims that the Customers in this Proceeding are "clients" of SUSI and that SUSI represented these Customers in connection with the complaints for refunds that ultimately led to the issuance of the PAA Order. The Petition goes on to state that "as Customers' representative in this proceeding, (SUSI) will be injured by the FPSC's PAA because the PAA will result in substantially reduced overcharge refunds being awarded to SUSI's clients . . . ." *Id.*

7. The allegations in paragraph 11 of the Petition referenced above fail to demonstrate that SUSI has sustained an actual injury at the time of the filing of the Petition or that SUSI is immediately in danger of sustaining some direct injury as a result of the PAA Order. *See Village Park Mobile Home Association, Inc. v. Department of Business Regulation*, 506 So. 2d 426, 433

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<sup>1</sup>Customers/SUSI Petition for Formal Administrative Hearing, at par. 5.

(Fla. 1<sup>st</sup> DCA 1987) (mobile home owners lacked standing to challenge approval of mobile home park owner's proposed prospectus by Department of Business Regulation as approval of the prospectus, essentially a disclosure document, could not cause any direct, immediate injury to the mobile home owners and the statutes at issue did not contemplate mobile home owner participation in prospectus approval). Although SUSI fails to come out and directly say it in its Petition, the clear implication of the statements in paragraph 11 of the Petition are that SUSI has some form of compensation arrangement with the Customers who have protested the PAA Order and that SUSI's compensation arising from potential refunds to Customers will be adversely affected by the PAA Order. Such a notion, even if more explicitly set forth in the Petition, clearly fails to satisfy the first prong of the *Agrico* test, as explained in the *Village Park* decision. SUSI, a firm that serves as a consultant to the Customers, has no more standing to appear as a petitioner in this proceeding than the law firm who also serves as the Customers' representative in this proceeding and filed the Petition for Formal Administrative Hearing.

8. The allegations in the Petition also fail to satisfy the second prong of the *Agrico* test.

The issue here is whether the alleged injury to SUSI falls:

. . . within the "zone of interest to be protected or regulated" by the promulgating statute or other related statutes . . . (citations omitted).

*Cole Vision v. Department of Business & Professional Regulation*, 688 So. 2d 404, 407 (Fla. 1<sup>st</sup> DCA 1997).

9. In this case, SUSI has failed to directly allege any injury in fact that it will suffer by virtue of the PAA Order. It only alleges that it will be injured because SUSI's clients will receive lower refunds. Again, the implication — although not openly and directly alleged — is that SUSI

has a fee arrangement with FPL's Customers that will be adversely impacted by the PAA Order. Clearly, the impacts on fee arrangements, including contingency fee arrangements, that consultants like SUSI enter into through solicitations to FPL's customers, are not the type of injury that falls within the zone of interest to be protected by the statutes and rules that will be at issue in this hearing.

10. For these reasons, FPL requests that the Commission enter an Order dismissing SUSI as a petitioner in this proceeding.

**C. Motion to Strike**

11. FPL also requests the Commission to strike those portions of the Customers/SUSI Petition which address: (a) a request for an award of interest pursuant to Sections 687.01 and 55.03, Florida Statutes; and (b) FPL's prior tests of thermal demand meters that are not at issue in the PAA Order.

12. With respect to the interest rate issue, Customers/SUSI assert that any final order determining refunds in this proceeding should be accompanied by interest awarded pursuant to Sections 687.01 and 55.03, Florida Statutes. The two statutes govern the interest rate that is utilized by judicial tribunals in awarding interest for judgment or decrees. The two statutes have absolutely no application to refund claims brought to the Commission.

13. Section 687.01, Florida Statutes, states that:

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.

Section 55.03(1), Florida Statutes, provides that the Chief Financial Officer of the state "shall set the rate of interest that shall be payable on judgments or decrees . . . ." Subsection (2) of Section

55.03 provides further that “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.” Subsection (3) of the same statute goes on to provide that “the interest rate established at the time a judgment is obtained shall remain the same until the judgment is paid.”

14. The provisions of Section 55.03, Florida Statutes, cited above, clearly and indisputably apply to judicial actions resulting in judgments or decrees, including judgments for money damages and order for judicial sales. The Commission does not issue judgments or decrees. The Commission, like any other agency subject to Chapter 120, Florida Statutes, issues orders, including final orders. See Section 120.569(1) and Section 120.68(1) and (2), Florida Statutes. The Commission has no authority to enter a judgment for money damages. See *Southern Bell Telephone & Telegraph Company v. Mobile America Corporation*, 291 So. 2d 199 (Fla. 1974). Nor does the Commission have any statutory authority to order judicial sales.

15. The Commission has a rule that addresses the calculation of interest on any refunds ordered by the Commission. That rule is Rule 25-6.109, Florida Administrative Code. Rule 25.6.109(1), Florida Administrative Code, states:

(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.

16. The Customers have filed a Petition for Formal Administrative Hearing *with the Commission* requesting the Commission to order increased refunds. In seeking these refunds, the Petition expressly and openly concedes that the purpose of Commission Rule 25-6.109, F.A.C., is

“to determine interest due on refunds to retail customers due to over-charges.”<sup>2</sup> The Petition also acknowledges that “Rule 35(sic)-6.109, F.A.C. . . . establishes the FPSC’s interest to be awarded for refunds for over-charges by electric utilities.”<sup>3</sup> That is exactly what the Customers are contending in this proceeding — that FPL overcharged the customers.

17. The interest on any refunds that may be ordered in this proceeding is controlled by and calculated under Rule 25-6.109. Vague assertions that Rule 25-6.109 may, for some reason, be legally deficient, are irrelevant.<sup>4</sup> Rule 25-6.109 applies unless and until a party, at some point in the future, maintains a successful challenge to the rule.

18. During the 2003 legislative session, the Legislature amended Section 57.105, Florida Statutes, to authorize the award of attorney’s fees in administrative proceedings if the criteria in Section 57.105 is met.<sup>5</sup> Section 57.105(1) authorizes an award of attorney’s fees in connection with any claim or defense if it is determined “that the losing party or the losing party’s attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: . . . (b) would not be supported by the application of then - existing law to those material facts.” Subsection (5) of Section 57.105 applies the 57.105 attorney’s fee provisions to administrative proceedings. In the words of one recent author, the purpose of the amendment to section 57.105 was

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<sup>2</sup>See Customers/SUSI Petition, at par. 10.

<sup>3</sup>*Id.*, at par. 20(C).

<sup>4</sup>*Id.*, at par. 18.

<sup>5</sup>See Ch. 2003-94, Laws of Florida, s. 9.



to “discourag[e] unsupported claims and dilatory actions.” (footnote omitted).<sup>6</sup>

19. In short, any argument that Rule 25-6.109 does not apply to this proceeding, in the event refunds are ordered, is completely unsupported. The Commission only has that authority granted by statute<sup>7</sup> and there is no authority under Chapter 366 to award interest pursuant to the statutory interest rate provisions of Section 687.01 and Chapter 55, Florida Statutes, applicable in civil actions. FPL maintains that by raising this issue, the Customers/SUSI would be subject to an award of attorney’s fees under the criteria set forth in Section 57.105, Florida Statutes.<sup>8</sup> However, FPL does not seek attorney’s fees at this time. FPL only asks that the Commission strike from the Customers/SUSI Petition all references to and requests for interest pursuant to sections 687.01 and 55.03, Florida Statutes.

20. In addition, at paragraph 19(F) of their Petition, Customers/SUSI allege that there is

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<sup>6</sup>*The 2003 amendments to the Florida APA*, Florida Bar Journal, October 2003 (Lawrence E. Sellers, Jr.).

<sup>7</sup>*See, e.g., City of Cape Coral v. GAC Utilities, Inc. of Florida*, 281 So. 2d 493, 495-96 (Fla. 1973) (“the Commission’s powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State . . . any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof . . . and the further exercise of the power should be arrested.”) *See also Lee County Elec. Coop., Inc. v. Jacobs*, 820 So. 2d 297, 300 (Fla. 2002).

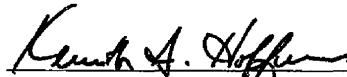
<sup>8</sup>The Customers/SUSI indulge themselves in an irrelevant discussion of statutory construction case law in an attempt to show that the Commission’s Refund Rule does not apply in this proceeding. *See* par. 18 of Petition. FPL would make one particular point in the area of statutory construction. The Legislature is perfectly capable of taking a historically civil statute - - like Section 57.105 - - and amending it to apply to administrative proceedings - - as the Legislature did in 2003. The Legislature has taken no such action with regard to Section 687.01 or Chapter 55, Florida Statutes. Had the Legislature intended these statutes to apply to administrative proceedings, it would have been simple enough to amend the language as the Legislature did in fact do under Section 57.105. *See, e.g., Sumner v. Board of Psychological Examiners*, 555 So. 2d 919, 921 (Fla. 1<sup>st</sup> DCA 1990).

a disputed issue of material fact concerning FPL's testing of 100 additional thermal demand meters of various types. The Customers/SUSI are referring to the testing of thermal demand meters that are not the 1V thermal demand meters that are at issue in the PAA Order. FPL requests that this passage in paragraph 19(F) of the Customers/SUSI Petition be stricken as irrelevant and outside the scope of the PAA Order.

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Commission enter an order:

- (A) Dismissing Southeastern Utility Services, Inc. as a petitioner in this proceeding;
- (B) Striking paragraphs 18, 20(E) and 21(D) of the Customers/SUSI Petition concerning the award of interest pursuant to sections 687.01 and 55.03, Florida Statutes; and
- (C) Striking that portion of paragraph 19(D) which attempts to place at issue non-1V thermal demand meters that were not addressed and subject to the determinations of the PAA Order.

Respectfully submitted,



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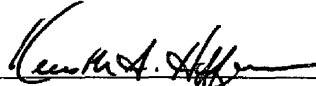
Attorneys for FPL

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was furnished by Hand Delivery to the following this 5<sup>th</sup> day of January 2004.

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