

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Ocean Properties, Ltd., J.C. Penney Corp.,
Dillards Department Stores, Inc., Target
Stores, Inc., and Southeastern Utilities
Services, Inc.,

Petitioners,

vs.

PSC Docket No. 030623-EI
Filed January 12, 2004

Florida Public Service Commission,
Respondent,

and

Florida Power & Light Company, Inc.,
Respondent.

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**RESPONSE TO FLORIDA POWER & LIGHT
COMPANY'S MOTION TO DISMISS
SOUTHEASTERN UTILITIES SERVICES, INC., AS A PETITIONER
AND RESPONSE TO MOTION TO STRIKE**

Petitioners, Southeastern Utilities Services, Inc. (SUSI) and Ocean Properties, Ltd., J.C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc. (collectively referred to as "Customers"), through their undersigned counsel and pursuant to Chapter 25-22, Florida Administrative Code (F.A.C.), and Rule 28-106.204, F.A.C., hereby file this Response to Florida Power & Light Company's (FPL) Motion to Dismiss SUSI as a Petitioner and Motion to Strike a portion of the Petition for Formal Administrative Hearing filed by Petitioners in this proceeding. In support, SUSI states the following:

SUSI has Standing as an Entity whose Substantial Interests are Affected by the PAA.

1. SUSI has properly alleged and shown in the Petition for Formal Administrative Hearing filed on December 10, 2003, on behalf of itself and Customers, that it has standing as an entity whose substantial interests are affected in this proceeding pursuant to Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981). As alleged in the Petition, SUSI filed customer complaints in this proceeding, Docket No. 030623-EI, on behalf of Customers pursuant to Rule 25-22.032, Florida Administrative Code. As a direct result of SUSI's actions and efforts in this docket, the Florida Public Service Commission (FPSC) has issued the Proposed Agency Action (Order No. PSC-03-1320-PAA-EI) (PAA) that is being challenged in this formal administrative proceeding.

2. As discussed in the Petition for Formal Administrative Hearing, SUSI, as Customers' representative in this proceeding, will be injured by the FPSC's PAA because the PAA, if it becomes final as proposed, will result in substantially smaller refunds being awarded to Customers, whose interests SUSI represented in the complaint process that led to this proceeding, and whose interests are commensurate with SUSI's in this proceeding – which is to ensure Customers are fully and fairly refunded for the overcharges they have paid due to FPL's faulty meters. To the extent FPL owes refunds to Customers, SUSI's interests in obtaining such refunds are coextensive to those of Customers that SUSI represents. SUSI meets the injury in fact requirement of the Agrico standing test.

3. Further, SUSI meets the zone of interest requirement of the Agrico standing test. The purpose of this proceeding is to determine and recover refunds owed to Customers by FPL. SUSI's interest is in recovering the overcharge refunds owed by FPL, which falls directly within the zone

of interest of this proceeding.

4. Finally, to dismiss SUSI from this proceeding would produce an anomalous result, given that SUSI initiated this docket proceeding and has participated actively as a party to this docket throughout the customer complaint process conducted under Rule 25-22.032, F.A.C., which has now resulted in the issuance of the PAA that Customers and SUSI now challenge. The administrative process is designed to encourage and accommodate participation in proceedings by persons seeking to redress injuries that will be addressed in those proceedings. *See Florida Home Builders Ass'n. v. Department of Labor and Employment Security*, 412 So. 2d 351, 352 (Fla. 1982)(Administrative Procedure Act was designed to enhance public access to agency processes).

FPL's Motion to Strike a Portion of the Petition must be Denied.

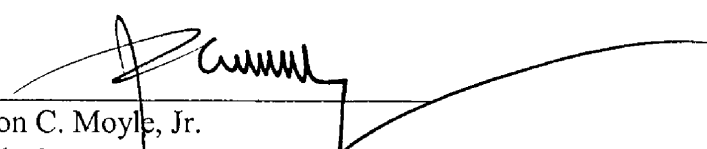
5. On pages 5 through 8 of its Motion to Dismiss and Motion to Strike, FPL argues that provisions in the Petition seeking the award of interest pursuant to section 687.01, Florida Statutes, should be stricken. The standard for granting a Motion to Strike a pleading, or portions of a pleading, is that the material to be stricken must be "immaterial, redundant, impertinent, or scandalous." *Lovi v. North Shore Bank*, 137 So. 2d 585 (Fla. 3rd DCA 1962). In its Motion, FPL fails to allege any facts or law showing that provisions of the Petition seeking the interest rate provided in section 687.01, Florida Statutes, meet this extremely burdensome standard.

6. Contrary to FPL's discussion in its Motion to Strike, Customers have not alleged that the PSC's Orders are judgments or decrees, nor is it necessary that they be considered judgments or decrees in order for section 687.01, Florida Statutes, to govern the interest rate applicable to any refunds awarded Petitioners in this proceeding. This is because chapter 687, Florida Statutes,

establishes interest rate terms applicable to commercial relationships that apply in the absence of more specific statutory interest provisions applicable to a relationship. In this case, there is no statutory provision in chapter 366, Florida Statutes, that establishes an interest rate in the types of proceedings, such as the one at bar. Consequently, chapter 687 applies, and controls over the interest rate set by rule in Rule 25-6.109, F.A.C. – which, Petitioners assert, is not supported by any statutory authority in chapter 366, Florida Statutes. Section 687.01 provides that the interest rate identified in section 55.03, Florida Statutes, applies in “all cases where interest shall accrue without a special contract for the rate thereof....” As explained more fully in the Petition for Formal Administrative Hearing, the customer - service provider relationships that exist between Customers and FPL do not entail contracts that establish special interest rates. Accordingly, section 687.01 applies to this case to enable the award of interest to Petitioners in the amount as specified in section 55.03, Florida Statutes. This position is legally colorable, relevant, and pertinent, and is not impertinent, scandalous, irrelevant, or redundant, and FPL has utterly failed to allege any facts or law showing otherwise. Thus, FPL’s Motion to Strike portions of the Petition concerning the applicable interest rate should be denied.

7. For the reasons set forth herein, Petitioner SUSI respectfully requests the Commission to enter an Order denying Florida Power & Light Company’s Motion to Dismiss SUSI as a party from this proceeding, and denying FPL’s Motion to Strike portions of the Petition addressing the applicable interest rate.

Respectfully submitted this 12th day of January, 2004.



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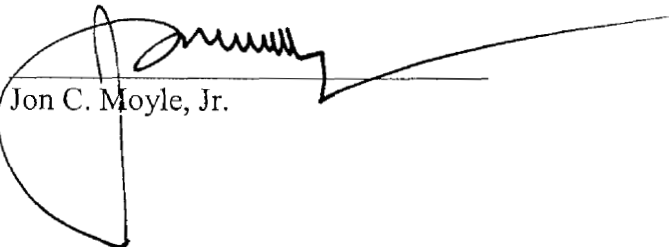
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Florida Power & Light Company's Motion to Dismiss Southeastern Utilities Services, Inc., as a Petitioner and Motion to Strike was served by U.S. Mail this 12th day of January, 2004, on the following:

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