BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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 ORDER NO. PSC-04-0591-PCO-EI ISSUED: June 11,2004

ORDER DISMISSING SUSI **AS** A PETITIONER AND DENYING FPL'S MOTION TO STRIKE

I. Background

The Commission opened Docket No. 030623-EI to address complaints made by southeastern Utility Services, Inc. (SUSI) against Florida Power and Light Company (FPL) on behalf of **six** commercial retail electric customers concerning 28 individual accounts. The customers who raised issues with their Type 1V thermal demand meters were Target Stores, Inc., Dillards Department Stores, J. C. Penney Corporation, Best Buy Co., Inc., Ocean Properties, Ltd., and The Home Depot, Inc. At the time each of the complaints were made, with the exception of one complaint made by Target on January 24,2003, for **a** demand meter with a bent "pusher" point, there was no disagreement that each customer's meter had over-registered demand. **At** dispute was the appropriate refund amount. By Proposed Agency Action Order No. PSC-03-1320-PAA-E1 (PAA Order), issued November 19, 2003, the Commission attempted to resolve the complaints. In summary, the Commission found:

> We find that the appropriate method to determine the meter error from which refunds should be calculated is to use the absolute percentage error based upon the average calculation for the lowest and highest demand during the refund **period.** We also find that FPL shall not be required to backbill single account customers using Type 1V meters that under-registered billing demand, unless there is evidence of meter tampering or fraud. FPL shall aggregate the bills of customers with multiple accounts **and** refund any net over-billing. FPL shall not backbill customers with multiple accounts that show net under-billing. FPL shall not aggregate multiple accounts of customers who requested meter tests for specific meters before October 22, 2002. With respect to the calculation of a refund for the specific meter identified in SUSI's January 24, 2003, complaint on behalf of one Target account, we find that 6.7 percent is the appropriate percent error to calculate a refund for that meter. We find that the refunds shall be calculated over the 12-month period prior to removal of the Type 1V meter for all meters that over-registered demand outside of tolerance, including the meter for the specific Target complaint filed on January 24, 2003. Finally, we find that FPL shall use the same rate schedule under which the accounts were billed through the defective meters to calculate the refunds. Interest shall be assessed on the

> amounts to be refunded and calculated in accordance with Rule 25-6.109, Florida Administrative Code.

PAA Order, **p. 8.**

SUSI, some of the commercial customers mentioned above, and FPL protested the PAA order on December 10, 2003. The first petition for a formal administrative hearing was made by SUSI, Ocean Properties, J. C. Penney's, Dillards, and Target collectively. **SUSI** and the customers argued that their substantial interests had been affected and raised disputed issues of material fact concerning the inception date of meter error, the causes of meter error, the accuracy of meter testing, the 12-month refund period, the refund methodology, the refund amount, **and** the interest calculation for the refund. They also requested that their petition be referred to **the** Division of Administrative Hearings (DOAH) to enter a recommended order.

FPL filed its petition to preserve its "rights and legal positions for final hearing" even though it believed that the Commission's decision in the PAA Order taken as a whole was **a** fair resolution of the complaints. FPL raised disputed issues of material fact concerning the accuracy and results of meter testing, the inception date of meter error, the appropriate time period and conditions for backbilling, the refund methodology, and refund eligibility.

In addition, on January 5,2004, FPL moved to dismiss SUSI as a petitioner and strike the portions of **SUST** and the commercial customers' petition regarding the calculation of refund interest, as well as the statements concerning the testing of non-Type 1V thermal demand meters that were allegedly outside of the scope of the PAA Order. SUSI responded in opposition on January 12,2004. FPL's motion and SUSI's response are addressed below.

II. SUSI's Standing

A. FPL's Argument

FPL argues that SUSI should be dismissed as a petitioner because it does not have standing to protest the Commission's order. According to FPL, SUSI fails to meet the two-prong standing test set forth in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So. 2d 478,482 (Fla. 2nd DCA 1981), contrary to the assertions made by SUSI. Under Agrico, **a** petitioner must show:

> 1) that he will suffer injury in fact which is of sufficient 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.

Id. FPL contends that SUSI satisfies neither prong **of** the Agrico test.

FPL believes that SUSI, as the customers' representative, has not suffered an actual injury nor is it in danger of sustaining a direct injury due to the PAA Order. According to FPL, the only injury that SUSI has alleged is that its clients will suffer lower refunds because of the Commission's action. FPL argues that Village Park Mobile Home Association, Inc. v. Department of Business Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes, 506 So. 2d 426 (Fla. 1st **DCA** 1987)(park residents did not have standing to challenge a mobile home park's prospectus, which outlines the terms and conditions of park residence), supports its argument that SUSI has failed to show that it has suffered a sufficient injury to meet the first prong of the Agrico test.

FPL also argues that **SUSI** has not shown any zone of interest with respect to SUSI that is appropriate for consideration in the proceeding at hand. Cole Vision Corporation and Visionworks, Inc. v. Department of Business and Professional Regulation, Board of Optometry, 688 **So.** 2d 404 (Fla. 1st DCA 1997)(the injury must fall within the "zone of interest to be protected or regulated"). Again, any adverse impact that SUSI's clients may suffer does not translate into the type of injury that will support standing for SUSI. FPL alleges that SUSI most likely has a fee arrangement with its clients, **and** any impact on that fee arrangement is outside the zone of interest of this proceeding. Thus, FPL argues that SUSI also fails the second **prong** of the standing test.

B. SUSI's Response

SUSI responds in opposition to FPL's standing arguments. According to SUSI, it will suffer an injury if the Commission's proposed action becomes final. SUSI argues that it represented the customers in the complaint process that led to this proceeding and that its interests are commensurate with the customers, "which is to ensure Customers are fully and fairly **refunded** for the overcharges they have paid due to FPL's faulty meters." SUSI also contends it meets the second prong -- zone of interest requirement in Agrico. According to SUSI, the purpose of this proceeding is to set refund amounts due to FPL customers, and that its "interest is **in** recovering the overcharge refunds owed by FPL, which falls directly within the zone of interest of this proceeding." In summary, SUSI argues that there would be an "anomalous result" if SUSI were to be dismissed as a party, since it initiated this docket and has actively participated throughout the customer complaint process.

C. Ruling

Having reviewed the pleadings and relevant case law, I find that SUSI fails both prongs of the Agrico standing test. SUSI is a representative of the customers, who are the real parties of interest in this proceeding because their refunds are at issue. Since none of the meters in question measure electric service provided to SUSI, SUSI is not a potential candidate for a

refund.' SUSI can suffer no direct injury as a result of the Commission's decision. Because SUSI has failed to show that it "will suffer [an] injury in fact which is of sufficient immediacy to entitle [it] to a section 120.57 hearing," **SUSI** fails the first prong of the Agrico test. Moreover, this proceeding addresses the potential refunds to be made to the commercial customers who petitioned the Commission for a hearing. The purpose of the hearing **is** not to determine what recourse, if any, is available to SUSI, who is simply acting as a consultant to the customers. SUSI's interests do not fall within the zone ***of*** interest of this proceeding. SUSI has not shown that **its** injury, if any, "is of a type or nature which the proceeding is designed to protect." Therefore, SUSI also fails the second prong of the Agrico test. For these reasons, I find that SUSI lacks standing to protest the Commission's PAA order; thus, SUSI shall be dismissed as a petitioner from this proceeding.

111. Interest Calculation

In its PAA order, the Commission determined that the customers were entitled to interest on their refund amounts in accordance with Rule 25-6.109, Florida Administrative Code. This rule provides, in pertinent part:

> [w]ith 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.

In their petition, the customers argued that when awarding interest, Sections 487.01 and 55.03, Florida Statutes, apply instead of the Commission's rule. Section 687.01 states:

> [i]n 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.

Under Section 55.03, the Chief Financial Officer for the state is charged with establishing the interest rate applicable to judgments or decrees.

A. FPL's Motion to Strike

FPL seeks to have the Commission strike those portions of the customers' petition that request an award of interest pursuant to Sections 687.01 and 55.03. FPL argues that the statutory provisions raised by the customers govern the interest rate used by judicial tribunals in awarding interest for judgment or decrees. Because the Commission does not have authority to award judgments or decrees, these provisions have no application to Commission proceedings. FPL contends that Rule 25-6.109, Florida Administrative Code, controls the award of interest in this proceeding, and any argument to the contrary is unsupported and subject to attorneys fees under Section 57.105, Florida Statutes.

3. Customers' Response

In response, the customers argue that the standard for granting a motion to strike portions of a pleading **is** that the material must be "immaterial, redundant, impertinent, or scandalous." Lovi v. North Shore Bank, 137 ***So.*** 2d 585 (Fla. 3rd DCA 1962). According to the customers, FPL has failed to meet this standard. In addition, the customers argue that Section 687.01, Florida Statutes, provides that the interest rate established in Section 55.03 applies in "all cases where interest shall accrue without **a** special contract for the rate thereof. . .." The customers allege there is no contract rate that establishes special interest rates between FPL and the customers, and thus, under Section 687.01, the customers are entitled to an interest award under Section 55.03, Florida Statutes. Accordingly, the customers argue that FPL's motion to strike should be denied.

C. Ruling

Although the Commission is not bound by the Florida Rules of Civil Procedure unrelated to discovery, Rule 1.140 is instructional. This rule provides that "[a] **party** may move to strike or the court may strike redundant, immaterial, impertinent, or scandalous matter from any pleading at any time." Having reviewed the pleadings, relevant statutory authority, **and** case law, I find that FPL has failed to show that the customers' pleading is "redundant, immaterial, impertinent, or scandalous." Further, under Kissimmee Utility Authority v. Better Plastics, Inc., 526 So. **2d** 46 (Fla. 1988), statutory prejudgment interest on utility overcharge refunds **is** recoverable in judicial proceedings. The customers here assert that such statutory interest is likewise recoverable in refund proceedings before the Commission because there is no contract that establishes special interest rates between FPL and the customers that would supersede the statutory rate. FPL contends that the interest rate is controlled by Rule 25-6.109. In light of Kissimmee, I find there is a justiciable issue as to how the provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission. Accordingly, FPL's motion to strike is denied.

IV. Additional Meters

In paragraph 19(F) of their petition, the customers allege a disputed issue of material fact concerning the testing of 100 additional thermal meters that are not type 1V.

A. Arguments of the Parties

FPL argues that these additional meters are not at issue in the P M order, and that this paragraph should be stricken because it is irrelevant and outside the scope **of** the P M order. The customers did not respond to this argument.

B. Ruling

Having considered FPL's argument, I find that its motion to strike paragraph 19(F) from the customers' petition shall be denied. There may be policy questions raised in this docket that affect a broader range of thermal demand meters than Type 1V. Therefore, **I** find it to be premature to strike this issue at this time.

Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that FPL's motion to dismiss SUSI as a petitioner is granted. It is further

ORDERED that FPL's motions to strike the portions of the customers' pleadings concerning interest calculations and the testing **of** additional thermal meters is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 11th day of June, 2004

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(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,

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.