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March 21, 2005

VIA HAND DELIVERY

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

Re: Docket No. 030623-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are the original and fifteen copies of FPL's Response in Opposition to Customers' Motion for Reconsideration.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Please contact me if you have questions regarding this filing.

Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

KAH/rl
Enclosures

CMP
COM 3
CTR
ECR
GCL
OPC
MMS
RCA
SCR
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OTH Kim P.

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaints by Ocean Properties, Ltd., J. C. Penney Corp., Target Stores, Inc., and Dillard's Department Stores, Inc. against Florida Power & Light Company concerning Thermal demand meter error.	)))))	Docket No. 030623-EI Filed: March 21, 2005

FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO CUSTOMERS' MOTION FOR RECONSIDERATION

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rules 25-22.060(1)(b) and 28-106.204(1), Florida Administrative Code, hereby files its response to the Motion for Reconsideration of Order No. PSC-05-0226-FOF-EI (the "Motion for Reconsideration") filed by Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc. and Target Stores, Inc. (hereinafter referred to collectively as "Customers") with respect to the Final Order issued by the Florida Public Service Commission ("Commission") on February 25, 2005. In opposition to the Motion for Reconsideration, FPL states as follows:

1. At the outset, it is important to review the legal standards applicable to a motion for reconsideration. The purpose of a motion for reconsideration is to identify a point of fact or law which was overlooked or which the Commission failed to consider in rendering its order. See, Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981). A motion for reconsideration is not an appropriate vehicle to reargue matters that have already been considered by the Commission. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959) citing State ex. Rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). In addition, "[n]either new arguments nor better explanations are appropriate matters for reconsideration." In re: Development

of local exchange company cost study methodology(ies), 92 F.P.S.C. 3:666 (March 31, 1992). A motion for reconsideration cannot be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, 294 So.2d at 317.

Interest Rate for Refunds

2. In their Motion for Reconsideration, Customers note that a challenge to the validity of Rule 25-6.109(4), Florida Administrative Code, is currently pending before the Division of Administrative Hearings. The Commission's Final Order also notes the pendency of that rule challenge proceeding.[1] Thus, the Commission has not overlooked the existence of that ancillary proceeding.

3. The Customers have attached the Joint Motion to Hold Matter in Abeyance (the "Joint Motion for Abeyance") filed in the rule challenge proceeding as Exhibit A to their Motion for Reconsideration. That Joint Motion for Abeyance speaks for itself. However, FPL does not concur with the suggestion in the Motion for Reconsideration that, in the event the rule is invalidated, then the interest rate calculation set forth in Section 687.01, Florida Statutes, should be applied to the calculation of the refunds ordered in this case.

4. It is important to recognize that at no time has FPL or the Commission Staff ever conceded any position or argument regarding the relevance of the final order in the rule challenge proceeding or the effect of such a final order in the instant docket. The Joint Motion for Abeyance clearly states that:

[1]Final Order, page 14, Section VI.

> Without conceding its relevance or potential effect, FPL agrees that the Commission is entitled to consider the final order in the rule challenge case in resolving any such motion for reconsideration.[2]

5. There is no merit to Customers' assertion that Section 687.01, Florida Statutes, should be applied if the Commission's rule is invalidated. Rule 25-6.109(4) sets forth the adopted, effective and applicable interest rate rule in place when the Customers' consumed the electric service for which refunds have been ordered and when the complaints were filed by the Customers with the Commission. Even if Rule 25-6.109(4) is prospectively invalidated, such a determination could not be retroactively applied to service that has already been provided. See, Board of Optometry v. Florida Society of Ophthalmology, 538 So.2d 878 (Fla. 1st DCA 1989).

6. Further more, even if there is a future determination that the Commission's interest rate rule is invalid, Section 687.01 would not apply in the instant case. Section 687.01 is a civil statute applicable to certain money judgments entered in civil actions (not regulatory proceedings before the Commission), as effectively determined in the Commission's Final Order and underscored by Customers' citation in their Motion for Reconsideration to Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988).

7. Section 687.01 can only be applied in cases where there is entitlement to interest but there is no special contract addressing an applicable interest rate.[3] In the present case, FPL's tariffs on file with the Commission (which may be officially recognized by the Commission) incorporate

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[2]Joint Motion to Hold Matter in Abeyance filed in DOAH Case No. 04-2250RX, at par. 4 (emphasis supplied).

[3]Customers failed to present any evidence at the final hearing as to whether there is or is not such a contract between FPL and Customers. For that reason alone, there is no record basis for the Commission to determine whether Section 687.01, Florida Statutes could be applied.

the Commission's refund rules including the interest rate provisions. Each rate schedule in FPL's tariffs contain the following language:

> Service under this schedule is subject to orders of governmental bodies having jurisdiction and to the currently effective "General Rules and Regulations for Electric Service" on file with the Florida Public Service Commission. In case of conflict between any provision of this schedule and said "General Rules and Regulations for Electric Service" the provision of this schedule shall apply.

As a matter of law, the above tariff language is a part of the contract between FPL and the Customers for the provision of electric service, and such contract has the force and effect of law. See, e.g., BellSouth Telecommunications v. Jacobs, 834 So.2d 855, 859 (Fla. 2002). Because the tariffed contract between FPL and the Customers incorporates by reference Rule 25-6.109(4), Florida Administrative Code, the triggering provision for application of Section 687.01, Florida Statutes, does not exist. Instead, a contract exists between the parties which provides an interest rate in those cases where refunds are ordered by the Commission in accordance with Rule 25-6.103(1).

8. Even if the rule setting the applicable interest rate is prospectively invalidated, Section 687.01 would not be applicable to the Customers' refund claims arising from electric service delivered and billed under the then-existing tariffs. Section 687.01 expressly incorporates the interest rate provisions in Section 55.03, Florida Statutes. Section 687.01 provides 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.

Because the two statutes address the same subject - - the applicable statutory rate of interest in civil actions - - they should be read in pari materia. See, e.g., Florida Dept. of Education v. Cooper, 858 So.2d 394, 396 (Fla. 1st DCA 2003) citing Palm Beach County Canvassing Bd. v. Harris, 772 So.2d 1273 (Fla. 2000) ("... statutes which relate to the same subject must be read in pari materia and

construed in such a manner as to give meaning and effect to each part."). Section 55.03 confirms that the statutory mechanism for the calculation and imposition of prejudgment interest is a scheme intended by the Legislature to apply only to certain judgments entered by a civil court. Specifically, the term "judgment" or "judgment for money damages" is sprinkled throughout each of the four subsections of Section 55.03, Florida Statutes. The Commission, of course, has no authority to enter judgments or money judgments. Nor does the Commission have any statutory authority to interpret or enforce Sections 687.01 or 55.03, Florida Statutes.[4] There is simply no legal basis for the Commission to use Section 687.01, Florida Statutes to apply the interest rate provisions of Section 55.03 even if Rule 25-6.109(4) is invalidated in the rule challenge proceeding.

Agreement Regarding 80% Test Point

9. The Customers also seek reconsideration of the Commission's decision in Section II of the Final Order to utilize a straight-line interpolation method to determine the meter error for the refunds ordered in this docket. The Commission's decision is based on an April 5, 1982 letter from Landis & Gyr to FPL (Exhibit 7; George Brown Rebuttal Ex. GB-3). It is of course ironic that Mr. Brown repeatedly embraced the April 5, 1982 letter in advocating components of a refund calculation (Tr. 169, 173), but now on reconsideration the Customers seek to distance themselves from the theory in the Landis & Gyr April 5, 1982 letter. The Customers' inconsistent position provides no basis for reconsideration.

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[4]It is well established that the Commission has only such powers, duties and authority as conferred expressly or impliedly by statute. City of Cape Coral v. GAC Utilties, Inc., of Florida, 281 So.2d 493, 496 (Fla. 1973). In the past, the Commission has recognized its lack of statutory authority to interpret or remedy violations of statutes that do not fall within the Commission's jurisdiction. See Order No. PSC-94-0472-DS-SU issued April 20, 1994 and Order No. PSC-95-0062-FOF-WS issued January 11, 1995.

10. In abandoning their support of the Landis & Gyr letter, the Customers rehash Mr. Brown's repeated arguments that the Commission should adopt the so-called "before and after" meter change approach (see Tr. 159-60, 163-66, 174-76) included in FPL's settlement protocol agreement (Exhibit 9).[5] The Customers contend that, because the Commission accepted the agreement of the parties to use the higher test result for meters that were tested at 40% and 80% of full scale to determine refund eligibility, the Commission is somehow obligated to now utilize the "before and after" approach that was included in FPL's settlement protocol. Such an argument is simply a reflection of the Customers' willingness to sacrifice their credibility in the hope of increased financial benefit.

11. The settlement protocol specifically provided that for purposes of refund eligibility, "[t]hose 1V meters previously tested at 40% of full registration and demand registered > 100% will be re-tested at 80%." As Mr. Bromley confirmed during the hearing, FPL applied this aspect of the settlement protocol to utilize the test result that provided the customer with the greatest benefit even though the initial test at 40% of full scale satisfied the requirements of Rule 25-6.052(2)(a) as well as FPL's approved Test Plan. (Tr. 46). Mr. Bromley's testimony also made it clear that the settlement protocol was not applied to the Customers in this docket who rejected it in favor of pursuing multi-year refunds before the Commission. (Tr. 47). Mr. Brown acknowledged that he rejected that portion of the settlement protocol which included a one year refund unless it was demonstrated that the error in the meter was due to some cause that occurred at a fixed date. (Tr.

[5]The settlement protocol agreement, Item 5, states: "Refund amounts will be determined pursuant to Rules 25-6.103(3) and 25-6.058, Florida Administrative Code. To the extent it provides a benefit to a customer, refund amounts will be based upon the actual customer usage (before and after), utilizing the application of a to be determined agreed upon uniform time frame."

223). Essentially, the Customers want to have their cake and eat it too. The Customers' position at the hearing, as confirmed by Mr. Brown, was that they wanted the Commission to selectively utilize the "before and after" billing differential approach from the settlement protocol but didn't want to follow the refund period provisions used for other similarly situated 1V meter customers who received refunds under the settlement protocol. (Tr. 223-4). The Commission rejected Customers' position and Mr. Brown's testimony and held:

> The record is clear that FPL treated Customers in this docket the same as other similarly situated customers with respect to the calculation of refunds for meter error in type 1V thermal demand meters. FPL calculated refunds for all such customers based on a 12-month refund period and the higher of method described above. The record indicates that FPL used the higher of method, which goes beyond the requirements of the relevant Commission rules... to remove any perception from affected customers that they were not being treated fairly. Thus, FPL went beyond the requirements of our rules in this regard in an attempt to avoid litigation concerning calculation of refunds.
>
> On behalf of Customers, witness Brown rejected this method of calculating refunds and sought refunds for greater than 12 months. Through this litigation, Customers now seek the benefit of the higher of method along with a refund period much greater than twelve months. Thus, Customers themselves have chosen to be treated differently than similarly situated customers.
>
> We find that FPL treated Customers in the docket the same as any other similarly situated customer with respect to the calculation of refunds for meter error in type 1V thermal demand meters. By seeking to hold FPL to one part of the formula it used to calculate refunds - a part not required by our rules - but seeking larger refunds by litigating another part of the formula, Customers have chosen to be treated differently than similarly situated customers.

Final Order, at 8-9.

12. All the arguments advanced by Customers in the Motion for Reconsideration in favor of the "before and after" approach, an approach which the Commission correctly determined to have no basis in the Commission's rules,[6] have previously been argued by Customers[7] and rejected by the Commission. Customers' reiteration of these same arguments provides no basis for reconsideration and should be denied by the Commission.

Meter No. V5871D (Target - Fruitville Road) - Bent Pointer

13. Customers make two arguments on reconsideration in their attempt to reverse the Commission's decision that this meter is not eligible for a refund. First, Customers argue that "the Commission overlooked the fact that it should have combined both the meter over-registration on the meter test, with the over-registration attributable to bent pointer." This argument was advanced by Mr. Brown in his testimony (Tr. 171-2). The Commission rejected Mr. Brown's testimony and refused to accept Mr. Brown's position that a 6.7% error figure should be used. The Commission correctly determined that this figure was not based on a test result as required by Commission rules but simply a figure that had been utilized by the parties as part of failed settlement discussions.[8] In sum, the Commission has already considered the Customers' testimony and position on this issue and has rejected it. Customers' attempt to reargue their position provides no basis for reconsideration.

14. The Customers' second argument with respect to this meter is untimely and meritless. The Customers now argue for the first time in their Motion for Reconsideration that to deny a refund

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[6]Final Order at 4.

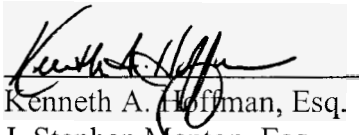
[7]See Customers' Post-Hearing Brief at 6.

[8] Final Order at 3.

for Meter No. V5871D would be "inconsistent with Rule 25-6.106(2)."[9] Customers did not raise the application of Rule 25-6.106 as an issue in this proceeding and did not discuss this particular rule in their testimony or posthearing brief. As previously noted, new arguments or better explanations are not an appropriate basis for reconsideration. In any event, Rule 25-6.106(2) has no application as the rule only applies to "other overbillings not provided for in Rule 25-6.103," which is the refund rule applicable to the refund complaints in this proceeding.

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Commission deny Customers' Motion for Reconsideration of Order No. PSC-05-0226-FOF-EI.

Respectfully submitted,



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[9]Customers' Motion for Reconsideration, at 6.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response in Opposition to Customers' Motion for Reconsideration has been furnished by United States Mail this 21st day of March, 2005, to the following:

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By: _____
Kenneth A. Hoffman, Esq.

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