

ORIGINAL

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November 21, 2005

VIA ELECTRONIC FILING

Bianca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
Tallahassee, Florida 32399-0870

Re: New Complaint

050891-EL

Dear Ms. Bayo:

On behalf of Kmart Corporation, I am enclosing for filing and distribution the original and 15 copies of the following:

- Complaint of Kmart Corporation against Florida Power and Light Company.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Very truly yours,

Howard & Howard Attorneys PC

s/ Rodger A. Kershner

Rodger A. Kershner

Enclosures

DOCUMENT NUMBER-DATE

11168 NOV 21 05

FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Complaint of Kmart Corporation against Florida Power and Light Company, was on this 21^h day of November, 2005 served via U.S. Mail to the following:

Garson Knapp, Attorney
FPL Energy Power Marketing, Inc.
700 Universe Boulevard
Juno Beach, FL 33408
Tel: (561) 304-5720
Fax: (561) 625-7504

Florida Power & Light Company
P.O. Box 025576
Miami, FL 33102

Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408

Respectfully submitted,
Kmart Corporation

Rodger A. Kershner
Howard & Howard, P.C.
39400 Woodward Ave., Ste. 101
Bloomfield Hills, MI 48304

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

**In re: Complaint of Kmart Corporation
Against Florida Power and Light Company**

**Docket No. 050891-EI
Filed November 21, 2005**

**COMPLAINT OF KMART CORPORATION AGAINST FLORIDA POWER AND
LIGHT COMPANY**

Pursuant to Rules 25-22.036 and 28-106.201 of the Florida Administrative Code ("FAC") Kmart Corporation ("Kmart"), through its undersigned qualified representatives, files its Complaint against Florida Power and Light Company ("FP&L") for violations of FAC 25-6.097 and alleges:

INTRODUCTION

1. The name, address and telephone number of Complainant is:

Kmart Corporation
3100 West Big Beaver Road
Troy, MI 48084
(248) 643-1000

2. The name, address and telephone of Complainant's representatives for service during the course of this proceeding are:

Rodger A. Kershner, Esq.
Howard & Howard, P.C.
39400 Woodward Ave., Ste. 101
Bloomfield Hills, MI 48304
(248) 723-0421 – Telephone
(248) 645-1568 – Facsimile

Lori K. Miller, Esq.
Assistant General Counsel
3333 Beverly Rd., B6-333A
Hoffman Estates, IL. 60179
(847) 286-2500 – Telephone
(847) 286-3911 - Facsimile

3. The name of the affected agency is the Public Services Commission

The Florida Public Service Commission
2450 Shumard Oak Blvd.
Tallahassee, FL. 32399-0870

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION OF FRK

STATUTORY AUTHORITY

4. This Complaint is filed pursuant Fl. St. § 366.07 and FAC 25-22.036, FAC 25-6.097, and FAC 28-106.201.

PARTIES

5. FP&L is an investor-owned electric utility subject to the Commission's jurisdiction. FP&L serves retail customers in a service area that encompasses much of south Florida and Florida's east coast.

6. Kmart is a corporation organized in 1916 under the laws of the State of Michigan doing business in Florida as a multi-line retailer.

KMART'S SUBSTANTIAL INTEREST

7. As set forth in more detail below, Kmart's substantial interests as a nonresidential consumer of electricity are affected significantly by FP&L's failure to comport with general principles of due process and FP&L's violation of the express terms and clear purpose of FAC 25-6.097. As set forth below, FP&L has unreasonably threatened to discontinue electric service to Kmart retail stores in the past if Kmart did not provide the total sum of \$1,100,000 as a deposit to secure payment, resulting in Kmart's decision to comply rather than risk injury to its business. FP&L has recently repeated the threat of discontinued service if Kmart did not comply with FP&L's further demand to enlarge the sums deposited by an additional \$299,320 within 30 days. Despite Kmart's prompt payment record, FP&L, without rational justification, demanded the additional deposit and has refused to return the earlier deposit from Kmart based on unsupported third-party opinions of the financial status of Sears Holding Company ("SHC"), the sole shareholder of Kmart. FP&L's demand for an additional deposit, which is based completely on the financial status of SHC, violates FAC 25-6.097 and prior decisions by this Commission.

FP&L's actions, if permitted, would grant unbridled discretion and would allow FP&L and other electric utilities arbitrarily to demand a deposit from any existing customer whenever and for whatever reason it chose. Such broad and arbitrary discretion vested in a monopoly provider of a commodity necessary to Kmart's ability to conduct business in Florida, is unreasonable, unfair, and a clear violation of FAC 25-6.097 and the constitutional and statutory principles supporting FAC 25-6.097 as defined by this Commission and the Supreme Court of Florida.

FACTS

8. Suddenly and without any reasonable basis, FP&L has demanded that Kmart provide an additional deposit to continue to receive from FP&L the electric service which is vital to Kmart's business operations. Kmart has consistently maintained a history of full payment of FP&L's bills when due and Kmart has already provided a deposit in the amount of \$1,100,000 as a condition to continued electric service. On October 10, 2005 Kmart received a "Notice of Requirement for Additional Deposit" (hereinafter "the Demand") (**Exhibit A**) from FP&L dated September 28, 2005.

9. The Demand purports to require Kmart to provide a deposit in the amount of \$299,320 in addition to the \$1,100,000 deposit already on hand with FP&L within thirty (30) days as a condition of continued electric service. The Demand for additional deposit states "FPL believes this additional deposit request is appropriate in light of [SHC's] current credit ratings." FP&L cannot and did not allege that Kmart is a new customer or that Kmart failed to maintain a prompt payment record. Unable to rely upon the criteria approved by this Commission to justify such a demand from an existing customer, FP&L has attempted to circumvent the terms and purpose of FAC 25-6.097 by claiming reliance upon demonstrably arbitrary information.

KMART'S ALLEGATIONS

As a Matter of Policy, this Commission Should not Permit Deposit Demands to Become an Unreasonable Burden on Business and Commerce

10. When a commercial customer pays a deposit the customer is effectively deprived of the use of those funds forever. If Kmart's \$1,100,000 deposit is not returned and/or Kmart is required to pay the additional \$299,320 deposit to FP&L, Kmart loses access to those funds as may be needed in the course of its business operations and is required to replace the funds at its highest marginal cost of capital.

11. While acknowledging that requiring additional deposits from every customer is bad policy, beginning in Order No. 9388, this Commission has urged utilities to be consistent in their application of their deposit requirements. To obtain consistent application the utilities must be required to set forth the basis for their determinations in their tariffs. Consistent with this Commission's decisions and good regulatory policy, this Commission should interpret the language of FAC 25-6.097 requiring that the "specific criteria for determining the amount of the initial deposit" be set forth in the tariff, to require advance public disclosure of the criteria a utility uses for determination of satisfactory credit. FP&L's tariff contains no information, specific or otherwise, explaining the criteria used by it to determine satisfactory credit. Consequently, this Commission should find that FP&L's tariff violates FAC 25-6.097 and demand that the tariff be redrafted to include the specific information.

FP&L's Demand for Deposit Violates Due Process

12. As a corporation engaged in furnishing electricity to a municipality or its inhabitants FP&L is performing services of a public nature, within the meaning of the Constitution and laws of Florida. Tampa Elec. Co. v. Garcia, 767 So. 2d 428 (Fla. 2000). As an electric company engaged in rendering such a public service, FP&L must do so in a reasonable

manner and subject to the requirements of due process of law. City of Gainesville v. Gainesville Gas & Electric Power Co., 65 Fla. 404, 62 So. 919 (1913).

13. When demanding an additional deposit from an existing customer as a condition of continued electric service which is vital to the customer's business operations, at a minimum due process appears to require: (1) Objective and transparent criteria; (2) Reasonable efforts to ascertain correctness of the facts the utility relies upon; (3) Criteria which bears a reasonable relationship to the likelihood of default; (4) An opportunity for the customer to be informed of the criteria to allow for an adequate response; and/or (5) An opportunity for appeal and review of the utility's decision prior to termination of service.

Dun & Bradstreet Reports are Demonstrably Arbitrary

14. It is an illegal delegation of authority for the State of Florida to allow a utility blindly to rely upon the unsupported opinions of third-parties who are not politically or legally accountable for their actions in setting the conditions upon which that utility would serve the public. As evidenced in this case and set forth in detail below, third-party evaluators are free to base their results on inaccuracies, illogical criteria and an opaque process. Subsequently, if a utility employs the unreasonable and unfair determinations of the third-party evaluator as a basis for demanding a deposit from a citizen of the state despite the customer's prompt payment record and other objective evidence of the customer's ability to pay the bills as they come due, due process is denied.

15. As demonstrated by a brief review of a recent comprehensive Dun & Bradstreet ("D&B") (**Exhibit B**) report of Kmart's sister company, Sears, Roebuck & Co., the sources are too arbitrary, and often times erroneous, especially as applied, to support a demand that an existing customer provide a deposit to continue to receive a electric service.

16. Reliance upon such demonstrably erroneous reports instead of objectively prompt payment records and evidence of ability to continue to pay from the same customer is unfair, unreasonable and arbitrary.

The Totality of the Circumstances Demonstrates that FP&L's Demand for a Deposit Violates the Intent, Purpose and this Commission's Interpretation of FAC 25-6.097

17. FP&L must treat each customer who applies for electric service equally. Recognizing the potential need for protection for all consumers, FAC 25-6.097 permits a utility to require a deposit from all customers. However, FAC 25-6.097 does not permit FP&L to arbitrarily require a deposit or demand an additional deposit, from selected customers on any basis it chooses.

18. By its grant of exclusive original jurisdiction, Fla. Stat. § 366.04 requires this Commission to both “regulate and supervise each public utility with respect to its rates and service.”

19. Fla. Stat. § 366.05 defines this Commission's authority as the “power to prescribe fair and reasonable . . . service rules and regulations.”

20. Fla. Stat. § 366.03 states “[a]ll rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable.”

21. Fla. Stat. § 366.03 provides additional clarification as to the requirement for fair and reasonable rules and regulations stating, “[n]o public utility shall . . . subject [a customer] to any undue or unreasonable prejudice or disadvantage in any respect.”

22. Pursuant to the statutory scheme providing its authority, this Commission is required to both regulate and supervise FP&L's service rules and regulations. Fla. Stat. § 366.04. This Commission is only authorized to enforce service rules which are on file with this

Commission. FAC 25-9.04. Although the Commission's interpretation of a service rule filed with this Commission is given considerable deference on review, actual filing requires stating the rule with sufficient detail as to allow this Commission to reasonably predict the utilities application of such a rule. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716 (1983).

23. FAC 25-6.097 states, that the tariff must include the "specific criteria for determining the amount of the initial deposit." As part of the criteria, the utility may establish a satisfactory credit standard. In Order 10733 this Commission indicated that "while it may be desirable to include more information," FP&L's statement in its tariff setting two months' bills as the "maximum amount" of the deposit satisfied FAC 25-6.097. However, if the purpose of FAC 25-6.097 only required a statement setting the maximum deposit amount, the sentence stating that the deposit "may not exceed twice the average bill" would either be surplusage or render the requirement for specific criteria meaningless. More importantly, as indicated by FP&L's action in this case, this interpretation of FAC 25-6.097 is inconsistent with this Commission's overall policies.

24. Even if a rule is on file with this Commission in sufficient detail, this Commission cannot authorize that rule to be applied in a way that subjects any customer to "any undue or unreasonable prejudice or disadvantage in any respect." Fla. Stat. § 366.03.

**A Review of the History of FAC 25-6.097(3):
New Deposit from Existing Customers and Additional Deposits are Only Authorized Under Limited Circumstances**

25. In July of 1969 this Commission promulgated FAC 25-6.97 and FAC 25-6.98. In May of 1976 FAC 25-6.97 (currently 25-6.097) was amended to include Subsection (3). FAC 6.97 has been amended several times since 1976; however, Subsection (3), which authorizes new

or additional deposits from existing customers under certain circumstances, has not been amended since its enactment in 1976.

26. During the rulemaking process in 1973, this Commission made the following statement regarding its purpose for allowing new or additional deposits under Subsection (3):

[w]e recognize, of course, that circumstances may dictate the necessity of requiring new or additional deposits from a customer. **Examples of such circumstances** would be **excessive slow payment, or a marked increase in consumption together with a slow payment record**. Provision is made, therefore, in new proposed Subsection (3) for means by which the utility can obtain a new or additional deposit.

1973 Fla. PUC LEXIS 214 (Fla. PUC 1973) (**EXHIBIT C**).

27. In the Order adopting the current Subsection (3) this Commission noted: “[n]o parties have questioned our proposal which allows a utility to obtain a new or additional deposit **under certain circumstances**. We are, therefore, adopting said Subsection [3] as originally proposed” 1974 Fla. PUC LEXIS162 (Fla. PUC 1974) (**EXHIBIT C-1**).

28. In Pan American World Airways v. Florida Power & Light, 82 FPSC 223 (1982) (“Order 10733”), this Commission determined, that consistent with the original purpose of Subsection (3), FP&L could demand a new deposit from an existing customer when a new corporate entity became responsible for paying the bills. FP&L maintained the position that it would not have required a deposit if Pan American World Airways could prove a new customer did not exist. Order 10733.

29. In Pan American World Airways v. FPSC, 427 So. 2d 716 (1983), the Florida Supreme Court upheld this Commission’s decision noting, as did this Commission, “that FPL use[d] the name change on accounts as a ‘triggering’ device which shifts the burden to the utility customer to show that there has been no actual change in the corporate entity responsible for the account.” Pan American, 427 So. 716, 718. Only because a new customer existed, “FPL was not

required to credit the [existing customer] with the good payment record [it] had established on its old accounts with FPL.” Id. Absent such a burden-shifting event, the burden of demonstrating the presence of the special circumstances which justify a new or additional deposit from an existing customer is on the utility.

30. In In re Pantry Pride Enterprises, Inc. v. Florida Power & Light Company, 82 FPSC 607, (“Order 10856”) this Commission found that the record clearly indicated the existing customer had failed to maintain prompt payment record and that the customer must be required to accept “the consequences of [its] poor payment record.” At the time of Order 10856, consistent with the clear purpose of FAC 25-6.097, FP&L’s tariff (sheet 6.040) contained the condition that FP&L has established justification for a subsequent or additional deposit from a customer previously eligible for waiver “if the customer fails to maintain a prompt payment record.” Order 10856 at 608.

31. As of 1995, when considering a proposal to amend a utility’s deposit tariff similar to FP&L’s, this Commission noted that the tariffs, “establish[] two conditions under which the requirement for a deposit may be waived. One is when an existing customer has established a satisfactory payment record . . . with the utility. Another is when a new customer submits evidence of a satisfactory payment record from another utility.” The Commission permitted the amendment of the second requirement to instead allow for credit evaluations. Even then this Commission noted, “in the case of a negative evaluation, like with any application process for a credit card, **the customer has the right to challenge the credit evaluation.**” 1995 Fla. PUC LEXIS 579 (Fla. PUC 1995) (**EXHIBIT C-2**).

32. It is unclear when FP&L deleted the condition from its tariff relied upon in Orders 10733 and 10856, and the record does indicate that this Commission specifically

authorized the amendment. Clearly, this Commission and the Florida Supreme Court have not interpreted Subsection (3) as authorizing FP&L to require an additional deposit from an existing customer with a “prompt payment record” and the burden is on FP&L if the customer is not a new customer.

Kmart is not a “New Customer” as Applied in Pan American World Airways, Inc. v. Florida Power and Light

33. In Order 10733 this Commission held FP&L’s specific policy of requiring a deposit was reasonable and permitted under Fl. St. § 366.03 and FAC 25-6.097(3).

34. In Order 10733, FP&L “consistently maintained” the demand for deposit was based on the fact that “Pan Am [was] a new customer” and not on the grounds that FP&L was “seeking an additional deposit from an existing customer.” Order 10733 at 223.

35. To further its argument FP&L “refined its policy with respect to new corporate name changes to provide that a corporate customer is considered a new customer only if a new corporate entity is responsible for paying the bill.” Id at 223.

36. Essentially, in Order 10733, FP&L led this Commission to believe that since Pan Am had a prompt payment record, it would not have demanded an additional deposit if Pan Am could prove that a new customer did not exist.

37. Kmart currently is, and has always been, the customer receiving electric service from FP&L and responsible for payment to FP&L. Kmart has not merged, consolidated, or changed its firm of acquisition since it was incorporated.

Kmart has a Satisfactory Payment Record

38. In Order 10856 this Commission held that FP&L’s tariff and policy was reasonable as applied to Pantry Pride because Pantry Pride was either a new customer as applied in Order 10733 or because Pantry Pride’s predecessor in interest had failed to maintain a prompt

payment record. In Order 10856, this Commission found that the record clearly indicated the customer had failed to maintain prompt payment record and that the customer must be required to accept “the consequences of [its] poor payment record.” Order 10856 at 608.

39. At the time of Order 10856, FP&L’s tariff (sheet 6.040) established the criteria that FP&L may request a subsequent or additional deposit from a customer previously eligible for waiver “if the customer fails to maintain a prompt payment record.” Id.

40. The condition “if the customer fails to maintain a prompt payment record” has been deleted from FP&L’s tariff and the current tariff sets forth no criteria for requiring a deposit from an existing customer to maintain electric service.

41. Although responsible for payment of bills addressed to several different locations, Kmart has consistently maintained a prompt payment record, especially in the context of the large amount of the deposit on hand with FP&L and the additional demand which are based on a consolidation of all of the individual accounts.

42. This Commission could have dismissed the matters in Orders 10733 and 10856 swiftly by stating that FP&L could demand a deposit from existing customers for any reason; instead, in both cases, and in other decisions, this Commission correctly evaluated the reasonableness of FP&L’s basis for demand.

FP&L’s Demand is Illegally Based on Consideration of SHC’s Financial Status

43. FAC 25-6.097 only allows FP&L to consider Kmart’s ability to pay for service as the bills come due, now and in the future. By its own terms, the Demand was based completely on FP&L’s consideration of SHC’s credit rating. As a mere shareholder of Kmart, SHC’s credit rating is completely irrelevant to any appropriate determination by FP&L regarding Kmart’s right to continue to receive electric service.

44. Allowing FP&L to consider SHC's status is completely inconsistent with this Commission's previous decisions to which FP&L was a party. To allow FP&L to consider the financial status of a third party would directly contradict the position FP&L took in Orders 10733 and 10856 and completely undermine any reliance upon this Commission's long-standing position.

45. Contrary to FP&L's former tariffs which this Commission reviewed in Orders 10733 and 10856, FP&L's current tariff (sheet 6.040) sets forth no guidelines regarding the criteria FP&L may use as a basis for the critical determinations to request a deposit from an existing customer as a condition of continued electric service. This Commission has not authorized an interpretation of FAC 25-6.097 which would allow FP&L to rely upon its vague tariff to demand a deposit based on inconsistent third-party evaluations of the alleged financial status of the customer's shareholder (or any noncustomer third-party).

46. Kmart has complied with FP&L's prior demand for deposits in the total amount of \$1,100,000 based on FP&L's threats to discontinue vital electric service. Suddenly and without any reasonable basis FP&L demands that Kmart provide another additional deposit to be entitled to continue to receive electric service which is vital to its business operations. Principles of due process, the mandate and purpose of its enabling statutory scheme, and its own decisions, prohibit this Commission from imposing FP&L's arbitrary, unfair and unreasonable demands for either the initial deposit or additional deposit against Kmart.

RELIEF REQUESTED

47. Under the authority of Fl. St. § 366.03 and FAC 25-6.097, Kmart respectfully requests that this Commission find that FP&L's tariff as applied is unfair, unreasonable and unjustly discriminatory and order FP&L to immediately return Kmart's deposit in the amount of

\$1,100,000 and to cease and desist from further threats of disconnection of electric service to any Kmart location for failure of Kmart to comply with FP&L's deposit demands in the amount of \$299,320 or any other amount.

48. Pursuant to Fl. St. § 366.05, Kmart respectfully requests that this Commission issue an order establishing standards for determining the satisfactory credit of existing customers which: (1) are objective and transparent; (2) require reasonable efforts to ascertain correctness of the facts the utility relies upon; (3) bear a reasonable relationship to the likelihood of payment default; (4) provide an opportunity for the customer to be sufficiently informed to prepare an adequate response; and (5) provide an opportunity for appeal and review of the utility's decision prior to termination of service.

WHEREFORE, Kmart respectfully requests the entry of an order demanding FP&L to return Kmart's initial deposit and prohibiting FP&L from discontinuing electric service to any Kmart location for failure of Kmart to comply with any unreasonable demand for deposit and an order requiring standards for establishing satisfactory credit which this Commissions determines fair and reasonable.

Respectfully submitted,
Kmart Corporation

s/ Rodger A. Kershner

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