

**Timolyn Henry**

**From:** Estes, Ron L [REstes@HowardandHoward.com]  
**Sent:** Tuesday, December 27, 2005 4:16 PM  
**To:** Filings@psc.state.fl.us  
**Cc:** Garson\_Knapp@fpl.com; Kershner, Rodger A.  
**Subject:** Docket No. 050891-EI Response to FPL's Motion to Dismiss Kmart's Complaint

**Attachments:** Kmart Final Response MTN to Dismiss.doc



Kmart Final  
Response MTN to [

This e-mail message to which the document is attached includes the following information, in the order listed:

a. The full name, address, telephone number, and e-mail address of the person responsible for the electronic filing, Rodger A. Kershner  
Howard & Howard Attorneys, P.C.  
39400 Woodward Ave., Ste. 101  
Bloomfield Hills, MI 48304  
(248) 723-0421 - Telephone  
(248) 645-1568 - Facsimile  
rkershner@howardandhoward.com

b. The docket number is 050891-EI and the title is:  
Complaint of Kmart Corporation.  
Against Florida Power & Light Company and Motion to Compel FPL to Continue Electric Service and to Cease and Desist Demands for Deposit Pending Final Decision

c. The name of the party on whose behalf the document is filed,  
Kmart Corporation

d. The total number of pages in each attached document:  
1. Kmart's Response to FPL's Motion to Dismiss - 10 pages

e. A brief but complete description of each attached document.  
1. Kmart Corporation's Response to FPL's Motion to Dismiss Kmart's Complaint

Thank you for your assistance.

Best regards,

Ron L. Estes  
Howard & Howard Attorneys, P.C.  
The Pinehurst Office Center, Suite 101  
39400 Woodward Avenue  
Bloomfield Hills, MI 48304

Direct: 248.723.0492  
Fax: 248.645.1568  
Mobile: 248.835.7955  
E-Mail: RLE@H2Law.com  
Website: www.H2Law.com

CMP \_\_\_\_\_  
COM \_\_\_\_\_  
CTR \_\_\_\_\_  
ECR \_\_\_\_\_  
GCL \_\_\_\_\_  
OPC \_\_\_\_\_  
RCA \_\_\_\_\_  
SCR \_\_\_\_\_  
SGA \_\_\_\_\_  
SEC 1  
OTH \_\_\_\_\_

\*\*\*\*\*

This electronic message, and all of its contents, contains information from the law firm of Howard & Howard, which is privileged, confidential or otherwise protected from

DOCUMENT NUMBER-DA

11913 DEC 27 4

CCA Official Filing

12/27/2005 4:14 PM\*\*\*\*\*

4:14 PM\*\*\*\*\*

Timolyn Henry\*\*\*\*\*2

disclosure. The information is intended to be for the addressee only. If you are not the addressee, any disclosure, copying, distribution or use of the contents of this message is prohibited. If this communication was not intended for you, please reply via e-mail immediately and permanently delete this message and all attachments from your system.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code; or (ii) promoting, marketing or recommending to another party any transaction or tax-related matter addressed herein.

**ORIGINAL**

December 27, 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: Kmart Corporation's Complaint Against Florida Power & Light Co.

Dear Ms. Bayo:

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

- Kmart Corporation's Response to Florida Power & Light Company's Motion to Dismiss

Thank you for your assistance.

Very truly yours,

s/ Rodger A. Kershner

---

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

Enclosures

DOCUMENT NUMBER-DATE

11913 DEC 27 05

FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Kmart Corporation	)	Docket No. 050891-EI
Against Florida Power & Light Company	)	
	)	
_____	)	Filed: December 27, 2005

**KMART CORPORATION'S RESPONSE IN OPPOSITION TO  
FLORIDA POWER & LIGHT COMPANY'S MOTION TO DISMISS  
KMART'S COMPLAINT**

Pursuant to Rules 25-22.036 and 28-106.201 of the Florida Administrative Code ("FAC") Kmart Corporation ("Kmart") through its undersigned attorney files this response to Florida Power & Light Company's ("FPL") Motion to dismiss Kmart's Complaint (the "Complaint.") FPL's motion to dismiss (the "Motion") should be denied in its entirety and in support Kmart states:

**STANDARD OF REVIEW**

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a complaint to state a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). The standard applied in reviewing FPL's motion to dismiss is whether, assuming all allegations set forth in the Complaint are true, no cause of action exists for which the Commission may grant relief. Varnes, supra. The Commission must confine its consideration to the four corners of the Complaint and the legal grounds asserted in the Motion to determine whether a cause of action has been alleged. Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958). All material allegations must be construed against the moving party in determining if a complainant has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960). As the moving party, FPL has the burden of proving that no claim exists for which the Commission may grant Kmart relief and the Motion must specify the

DOCUMENT NUMBER-DATE

11913 DEC 27 05

FPSC-COMMISSION CLERK

grounds requiring dismissal of the Complaint. The Commission has previously stated that “[d]ismissal is a drastic remedy and is only appropriate when the legal standard has been clearly met.” Order No. PSC-05-1126-FOF-TX, Docket No. 50200-TX (Issued November 8, 2005). The Commission should apply this standard of review strictly and should deny FPL’s Motion.

### ANALYSIS

1. Kmart filed the Complaint pursuant to Rule 25-22.036 FAC, which governs initiation of proceedings, and states in part that: “a complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.”

2. In the Motion, FPL fails to set forth the standard by which the Commission should review the Complaint’s sufficiency. FPL asserts that the Complaint is a petition for review of a final agency decision governed by The Uniform Rules of Procedure (“The Uniform Rules”)<sup>1</sup> and alleges that Kmart is required to “specifically state the facts, rules and laws that warrant relief.” (Motion ¶ 5). However, even if the Uniform Rules require the level of specificity asserted by FPL, they only prescribe the procedures for filing petitions seeking review of a final agency action.<sup>2</sup> Only the Commission’s determination regarding the legality of FPL’s actions and proposed or final resolution of the Complaint will constitute the “final agency action” required to file a petition pursuant to Rule 28-106.201 FAC. Although the facts in the Complaint sufficiently allege a cause of action for a violation of Rule 25-6.097 FAC, the degree of

---

<sup>1</sup> Rule 28-106.201(2), (e)-(g), FAC.

<sup>2</sup> Rule 28-106.201 FAC.

specificity allegedly mandated by The Uniform Rules is not required for the simple and obvious reason that these proceedings before the Commission will adduce many facts for the first time.

3. Under the proper legal standard, if taken as true, the allegations set forth in the Complaint establish a cause of action upon which relief may be granted; the Motion must be denied. The Commission should review the Complaint according to the legal standard in Rule 25-22.036 FAC. A complaint filed pursuant to Rule 25-22.036 must state:

- (a) The actions that constitute violation;
- (b) The substantial interest of the effected party;
- (c) The rule, order, or statute that has been violated; and
- (d) The specific relief requested, including any penalty sought.

Based on a reasonable and necessary interpretation of a rule subject to the Commission's jurisdiction, Kmart alleges a sufficient factual basis to establish actions by FPL which violate a Commission rule and affect Kmart's substantial interests.

4. Rule 25-6.097(3) FAC authorizes a utility to request a new or additional deposit from existing customers; but, requests pursuant to Rule 25-6.097(3) are subject to limitations not applicable to demands for deposits from new customers.<sup>3</sup> Specifically, Rule 25-6.097(3) only authorizes a new or additional deposit when a utility has a "reason" to "secure payment of current bills" and the rule requires the utility to "explain the reason to the customer." Kmart alleges that FPL's actions were arbitrary, unreasonable and not necessary to secure Kmart's payment of current bills and that FPL failed to adequately explain its reason in violation of Rule 25-6.097(3) FAC.

5. After decades as a customer, FPL sent Kmart a "Notice of Deposit Requirement" (hereinafter the "Demand") without any reasonable basis, demanding that Kmart provide a new

---

<sup>3</sup> Rule 25-6.097(1) FAC.

deposit in the amount of \$299,320 in addition to the \$1,100,000 deposit already on hand with FPL. Despite the fact that Kmart is the only party responsible for payment on accounts with FPL and that Kmart has consistently maintained a history of full, timely, payment, FPL's demand was based exclusively on the credit rating of Kmart's sole shareholder, Sears Holding Company ("SHC").

6. Kmart's substantial interests as a nonresidential consumer of electricity are affected significantly by the loss of use of more than one million dollars or the loss of electric service, effectively putting Kmart out of business in FPL's service areas.

7. Kmart seeks relief based on a reasonable and necessary interpretation of a rule and does not seek to amend the rule. FPL completely mischaracterizes the nature of Kmart's claims and misstates Kmart's request for relief as an untimely rulemaking challenge. Kmart asserts that: (1) FPL's "reason" for demanding a new deposit is arbitrary and a deposit is not reasonably required to "secure payment of current bills" and thus is not authorized; and (2) the Demand, defined by FPL as the "notice," fails to adequately explain the alleged reason for the demand and violates Rule 25-6.097(3).

8. FPL argues that the rule's plain meaning authorizes a utility to require a new deposit from an existing customer at the utility's sole discretion, subject only to the limitation in amount found in Rule 25-6.097(1) FAC. FPL claims that the rule is unambiguous and that the Commission cannot limit FPL's discretion to demand new deposits or require FPL to explain the basis of its determinations without amendment to the rule taken in accordance with formal rulemaking procedures.<sup>4</sup> (Motion ¶ 2). The Complaint sets forth a clear statutory mandate that the Commission approve and enforce only fair and reasonable service rules and regulations and precludes enforcement of any utility actions which "subject [a customer] to any undue or unreasonable . . .

---

<sup>4</sup> Administrative Procedures Act, Chapter 120 Florida Statutes (the "APA").

disadvantage in any respect.” Fla. Stat. § 366.03. Kmart asserts that FPL’s interpretation is a statutory violation<sup>5</sup> and would render the rule unconstitutional.<sup>6</sup>

9. Kmart also alleges that FPL’s interpretation contradicts the terms of the rule and is inconsistent with the Commission’s prior orders which clearly demonstrate that Rule 25-6.097(3) is not a grant of unbridled discretion to utilities.<sup>7</sup> The tariffs reviewed by the Commission in prior adjudications specifically precluded the type of demand FPL now makes of Kmart.<sup>8</sup> Conspicuously absent in FPL’s current tariffs are the guidelines relied upon to support the reasonableness of deposit demands in prior adjudications before the Commission. Pan American World Airlines v. Florida Public Serv. Comm’s, 427 So. 2d 716 (Fla. 1983) and Pantry Pride Enterprises v. Florida Power and Light Co., Order No. 10856, Docket No. 820026-EU (Issued June 4, 1982).

10. Kmart alleges that FPL’s interpretation of its new, vague tariff to authorize complete utility discretion, as evidenced by FPL’s reliance upon demonstrably erroneous reports of the credit rating of an irrelevant non-customer, to the exclusion of more objective criteria, is prohibited by

---

<sup>5</sup> Fla. St. § 120.52(8) prohibits an agency rule which grants discretion that is not provided in the statute if the rule does not provide standards to guide the discretion. “An administrative rule which creates discretion not articulated in the statute it implements must specify the basis on which the discretion is to be exercised. Otherwise the ‘lack of . . . standards . . . for the exercise of discretion vested under the . . . rule renders it incapable of understanding . . . and incapable of application in a manner susceptible of review.’” Cortes v. Florida, 655 So. 2d 132, 140 (Fla. 1<sup>st</sup> DCA 1995) citing Staten v. Couch, 507 So. 2d 702 (Fla. 1st DCA 1987).

<sup>6</sup> As stated in the Complaint, as an electric company engaged in rendering such a public service, FPL 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).

<sup>7</sup> Rule 25-6.097 FAC contains separate provisions for new customers and existing customers and FPL interprets (3) to grant a utility unbridled discretion in its determinations to seek new and additional deposits. In prior challenges to the reasonableness of demands for new or additional deposits the Commission evaluated the reasonableness of the FPL’s demand based on the facts and never adopted the position that the rule was subject to only one interpretation. Pan Am, 427 So. 2d 716 (1983) and Pantry, Order No. 10856.

<sup>8</sup> Order No. 10856, Docket No. 820026-EU represents the Commission’s most recent evaluation of FPL’s tariff and deposit policy. FPL has made significant changes to the tariffs reviewed at that time and has deleted the language “if the customer fails to maintain a prompt payment record,” which was the condition FPL relied upon to establish an authorized reason for an additional deposit from a customer previously eligible for waiver . (Complaint ¶ 30, citing Order No. 10856 at 608.)



statute<sup>9</sup> and would violate basic principles of due process. The Commission has not and could not authorize such a flawed interpretation of its own rule.<sup>10</sup>

11. Kmart asserts that FPL's procedure for demanding new and additional deposits from existing customers is not authorized by Rule 25-6.097(3) and requests the Commission to "order FPL 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" in reliance upon Rule 25-6.097(3). (Complaint ¶ 47). The Commission certainly has the authority to prohibit FPL from retaining or demanding a deposit that is not authorized by the Commission's rules

12. Additionally, Kmart requests relief in the form of an order requiring FPL to provide more objective standards for determining a need to secure payment of current bills from existing customers. (Complaint ¶ 48). Pursuant to Fl. St. § 366.05, the Commission has the authority to prescribe fair and reasonable rules and upon a finding that the tariff as applied is unreasonable, the Commission is authorized to prescribe the appropriate standard.

13. An agency's ability effectively to set policy by promulgating rules is limited. Dependable Air Conditioning and Appliances, Inc. v. Office of Treasurer and Ins. Com'r, 400 So. 2d 117 (Fla. 4<sup>th</sup> DCA 1981). Responsible and effective agency action is consistent with the statutory purpose and is foretold to the public as fully as practicable through both formal rules and the refinement of those rules to particular situations through orders in individual cases. Anheuser-Busch, Inc. v. Dept. of Business Regulation, 393 So. 2d 1177 (Fla. 1<sup>st</sup> DCA 1981); McDonald v. Dept. of Banking and Finance, 346 So. 2d 569 (Fla. 1<sup>st</sup> DCA 1976). Adjudication is the appropriate

---

<sup>9</sup> See Cortes v. Florida, 655 So. 2d 132 (Fla. App. 1<sup>st</sup> DCA 1995)(invalidating an agency rule which granted the discretion to assess a fee but did not require the assessment or provide sufficient guidelines to allow for review of the exercise of the discretion.)

<sup>10</sup> Consistent with principles of statutory interpretation, the Commission should resolve all doubts as to the validity of a rule in favor of its constitutionality and can give the rule a fair construction that is consistent with the Florida and federal Constitutions and with legislative intent. State v. Globe Communications Corp., 648 So. 2d 110 (Fla. 1<sup>st</sup> DCA 1994).

administrative process when, as in this matter, the parties dispute the meaning of the applicable rule and the Commission has not addressed the rule's application to the particular circumstances.<sup>11</sup>

### CONCLUSION

14. Kmart challenges FPL's method for determining the existence of a need for a new deposit to secure current payment of bills and FPL's method of explaining the alleged need. Kmart asserts that it will present facts to show that it has been and will continue to be unduly disadvantaged by FPL's unreasonable actions and that such actions violate the Commission's rules and orders. Kmart requests relief in the forms of a Commission order to FPL to return Kmart's funds previously demanded to secure payment of current bills, an order to cease demands for an additional deposit and an order requiring FPL to provide specific criteria for determining the existence of a need to secure payment of current bills from existing customers that are consistent with the rule and the Commission's orders. FPL's motion to dismiss must be denied because FPL fails to establish legal grounds that demonstrate no cause of action exists for a violation of Rule 25-6.097(3) or that the Commission cannot grant the relief requested.

ACCORDINGLY, based on the foregoing, Kmart respectfully requests that the Commission deny FPL's motion to dismiss and proceed with the resolution of this matter as set forth in the Complaint.

Respectfully submitted,  
Kmart Corporation

s/ Rodger A. Kershner

---

Rodger A. Kershner  
Howard & Howard Attorneys, P.C.  
39400 Woodward Ave., Ste. 101

---

<sup>11</sup> Although the APA requires rulemaking for policy statements of general applicability, the APA also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases. C.H. Barco Contracting Co. v. State, Dept. of Transp., 483 So. 2d 796, 11 F.L.W. 393 (Fla. Dist. Ct. App. 1st Dist. 1986); McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. Dist. Ct. App. 1st Dist. 1977).

Bloomfield Hills, MI 48304

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Kmart Corporation's Response to Florida Power & Light Company's Motion to Dismiss was served via electronic mail (\*) and U.S. Mail this 27<sup>th</sup> day of December, 2005 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

s/ Rodger A. Kershner

---

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