

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: October 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (C. Keating)
Division of Economic Regulation (Floyd, Kummer, Matlock, Wheeler)
Division of Regulatory Compliance & Consumer Assistance (Mills, Ruehl)

RE: Docket No. 030623-EI – 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.

AGENDA: 11/2/04 – Regular Agenda – Proposed Agency Action (Issue 2) – Interested Persons May Participate

CRITICAL DATES: 11/22/04 – Petition for Rule Waiver or Variance is deemed approved if not granted or denied within 90 days of receipt of completed petition.

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030623.RCM3.DOC

Case Background

By Order No. PSC-03-1320-PAA-EI, issued November 19, 2003, as proposed agency action ("PAA Order"), the Commission addressed several complaints by Southeastern Utility Services, Inc. ("SUSI") on behalf of various commercial customers against Florida Power & Light Company ("FPL") concerning alleged over-registration of demand by 1V thermal demand meters. On December 10, 2003, SUSI, along with Ocean Properties, Ltd., J.C. Penney Corporation, Dillard's Department Stores, and Target Stores, Inc. (collectively, "Customers") protested the PAA Order by filing a petition for a formal administrative hearing on some of the complaints addressed in the PAA Order.¹ FPL filed a protest of the PAA Order on the same

¹ The Commission subsequently granted a motion by FPL to dismiss SUSI as a party from this proceeding for lack of standing. Order No. PSC-04-0591-PCO-EI, issued June 11, 2004 (reconsideration denied).

date. A formal administrative hearing to address these protests was scheduled for September 23, 2004, but was subsequently rescheduled for November 4, 2004.

On August 23, 2004, Customers filed a petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code, in this docket. The rule provides that "when a meter is found to be in error in excess of the prescribed limits, the figure to be used for calculating the amount of refund or charge . . . shall be that percentage of error as determined by the test."² Rather than calculating refunds based solely on the percentage of error determined by "the test," Customers' petition asks for a waiver to allow refunds to be calculated, in the context of the pending formal hearing, based on: (1) use of the standard reference test point for determining meter test error as opposed to use of the full scale for determining meter test error; and (2) use of the higher of the percent error determined by "the test" or the percent difference change in monthly demand readings after a new meter was installed.

Notice of the petition was published in the Florida Administrative Weekly on September 10, 2004. The comment period expired on September 24, 2004, and no comments were received. However, on September 13, 2004, FPL filed a motion to dismiss Customers' rule waiver petition. In its motion to dismiss, FPL indicated that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. Customers responded to FPL's motion to dismiss on September 20, 2004.

This recommendation addresses FPL's motion to dismiss and Customers' rule waiver petition. The Commission has jurisdiction over this matter pursuant to Section 120.542, Florida Statutes, and the provisions of Chapter 366, Florida Statutes.

² Rule 25-6.103, Florida Administrative Code, is attached hereto in its entirety as Attachment A.

Discussion of Issues

Issue 1: Should the Commission grant FPL's motion to dismiss Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code?

Recommendation: No. Customers have standing to file their petition for variance or waiver. (C. KEATING)

Staff Analysis:

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

FPL's Motion to Dismiss

In support of its motion to dismiss, FPL cites Section 120.542, Florida Statutes,³ and Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund⁴ for the proposition that only those who are subject to regulation by an agency rule may avail themselves of the variance or waiver provisions of the Florida Administrative Procedure Act. FPL states that in Mariner Properties, the First District Court of Appeal held that the Board of Trustees of the Internal Improvement Trust Fund was entitled to dismiss a petition requesting variance from and waiver of the provisions of certain administrative rules relating to petitioner's application to use certain sovereignty submerged land upon determining that the Section 120.542 variance and waiver process did not apply to the disputed rules insofar as the statute limited the variance and waiver process to persons subject to regulation. FPL states that the court found that the Board acted sometimes as a regulatory agency, but also had a duty to manage and control sovereignty lands. FPL quotes a portion of the court's decision:

The Section 120.542(1) limitation of the variance and waiver process to persons subject to regulation is reiterated at subsection (5), and the statute does not refer to proprietary action. ... Because the variance and waiver process in section 120.542 expressly pertained to regulatory rather than proprietary matters, and the statute should not be construed otherwise, the Board was entitled to dismiss the appellant's petition.

FPL asserts that none of the individual customers represented in this proceeding are subject to regulation by the Commission under Rule 25-6.103(3), Florida Administrative Code, thus, Customers do not have standing to file for a variance or waiver from Rule 25-6.103(3).

³ Section 120.542, Florida Statutes, is attached hereto in its entirety as Attachment B.

⁴ 743 So 2d 1121 (Fla. 1st DCA 1999)

FPL asserts that the rule applies to FPL, not to Customers, because it is FPL that is subject to any requirement for payment of refunds that may be ordered by the Commission pursuant to the rule.

FPL contends that Customers' petition for variance or waiver is "a belated attempt to hijack" this docket and transform it into a rule waiver proceeding. FPL notes that Customers' petition was filed more than nine months after the Commission's PAA Order indicating how the Commission proposed to apply Rule 25-6.103(3) to FPL in this docket. FPL asserts that it has addressed, in its prefiled testimony in this docket, the merits of Customers' arguments concerning how this rule should be applied. FPL asserts that Customers, having reviewed FPL's arguments on the merits, are using the rule waiver process improperly to attempt to resurrect their case.

FPL argues that even if Customers had standing to file their rule waiver petition, it was procedurally improper for Customers to file the petition just one month prior to the September 23 hearing date. FPL notes that a petition for variance or waiver sets into motion several procedural mechanisms: publication of notice; opportunity for public comment; 30 days for the agency to request additional information; 90 days for the agency to decide the matter; and the opportunity to request formal proceedings on the Commission's decision. FPL asserts that if the Customers wanted to consolidate two separate administrative proceedings, they should have done so earlier.

FPL further contends that Customers' petition should be dismissed because Customers did not follow the statutory and rule guidelines for filing a petition for variance or waiver. FPL asserts that Customers neglected to file a copy of their petition with the Joint Administrative Procedures Committee ("JAPC") as required by Section 120.542(5), Florida Statutes, and Rule 28-104.002, Florida Administrative Code.⁵ FPL states that this is not a mere technicality, because JAPC is required to maintain detailed information about agency orders granting or denying petitions for variance or waiver. Further, FPL asserts that Customers failed to include a statement in their petition, as required by Rule 28-104.002(i), indicating whether the requested variance or waiver is temporary or permanent.

Customers' Response

Customers assert that FPL's motion to dismiss should be dismissed as being untimely. Customers assert that their rule waiver petition should be treated as a motion, for which a response is due seven days after the petition was filed. Customers note that FPL's motion to dismiss was filed 20 days after Customers' rule waiver petition was filed.

Customers further assert that the Mariner Properties case cited by FPL is not applicable. Customers assert that Mariner Properties involved the Board dismissing a petition for variance or waiver on its own motion rather than addressing a motion to dismiss filed by a "third party." Customers characterize FPL as such a "third party" in this case. Customers assert that Section 120.542 allows third parties to file comments on rule waiver requests but does not authorize third parties to move to dismiss rule waiver requests. Further, Customers assert that the Mariner

⁵ Chapter 28-104, Florida Administrative Code, contains the Uniform Rules of Procedure governing petitions for variance or waiver of agency rules. It is attached hereto in its entirety as Attachment C.

Properties case simply holds that the Section 120.542 waiver/variance process pertains to regulatory rather than proprietary matters.

Customers contend that they are directly impacted by Rule 25-6.103(3) because the rule could impact the amount of any refund due to Customers. Thus, Customers assert that they are effectively subject to regulation by the rule to the extent the PSC is applying the rule in a manner that affects Customers' property, i.e., any refund due. Customers state that FPL has argued before the Commission and in circuit court proceedings that the PSC has exclusive jurisdiction to address the meter refund issues between FPL and Customers, but now attempts to make this jurisdiction a "one-way street upon which only FPL can travel . . ."

Finally, Customers assert that a copy of their rule waiver petition was filed with JAPC. Customers attached a copy of the petition stamped as received by JAPC on September 20, 2004. Customers also assert that a cursory review of the petition and filings in this docket indicate that the petition seeks a one-time, temporary waiver of Rule 25-6.103(3), as all of the disputed meters have been removed from service and will not be placed back into service.

Analysis

Staff recommends that FPL's motion to dismiss be denied. Assuming all allegations in Customers' rule waiver petition to be true and drawing all reasonable inferences from the petition in favor of Customers, staff believes the petition states a cause of action upon which relief may be granted.

As a preliminary matter, staff believes that Customers' characterization of their rule waiver petition as a "motion" is incorrect. Section 120.542, Florida Statutes, clearly indicates that the filing of a petition for variance or waiver of an agency rule initiates its own administrative proceeding. The statute and the relevant Uniform Rules of Procedure require notice of each such petition, a comment period for each such petition, and time frames for the agency to respond to each such petition. More importantly, Section 120.542(8) provides that an agency's decision to grant or deny such a petition must be supported by competent substantial evidence and is subject to a request for a formal administrative proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. Subsection (8) further states that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by Chapter 120, Florida Statutes. Thus, Customers' rule waiver petition initiated a separate proceeding and should not be taken as a "motion" for any purpose, including the determination of the deadline for FPL's response. FPL's motion to dismiss was timely filed within 20 days of the Customers' rule waiver petition.

Although FPL's motion to dismiss was timely filed, it nonetheless fails to state sufficient grounds for dismissal of Customers' rule waiver petition. First, FPL's reliance on Mariner Properties is misplaced. In Mariner Properties, the First District Court of Appeal noted that the Board of Trustees of the Internal Improvement Trust Fund acts in both a regulatory and proprietary capacity. The court found that Mariner Properties' rule waiver petition was directed at the Board's actions in its proprietary capacity. Noting that Section 120.542 limits the variance and waiver process to persons subject to regulation, the court held that the Board was entitled to dismiss a rule waiver petition directed at the Board's actions in its proprietary role, as opposed to

its regulatory role. The court did not address who has standing to seek a rule waiver or variance. The court simply held that the Section 120.542 waiver/variance process pertains to regulatory rather than proprietary matters. In the instant case, there is no question that the Commission is acting in a regulatory capacity.

Second, staff believes that whether or not Customers are attempting to use this rule waiver petition to “hijack” this docket and transform it into a rule waiver proceeding, as FPL suggests, is not relevant in the analysis of whether dismissal is appropriate. Customers’ intent is an issue distinct from Customers’ standing to pursue the rule waiver. Further, as discussed previously and further discussed below, Customers’ petition initiated a proceeding separate from the formal hearing proceeding, and Customers did not seek consolidation of the two proceedings.

Third, staff believes that the procedural flaws alleged by FPL do not constitute grounds for dismissal. With respect to FPL’s assertions that it was procedurally improper for Customers to file the petition just one month prior to the September 23 hearing date and that Customers should have filed earlier if they wanted to consolidate two separate administrative proceedings, staff believes that the timing of Customers’ rule waiver petition is not grounds for dismissal. Staff notes that there is no requirement that the Commission consolidate the formal hearing proceeding in this docket with the proceeding on Customers’ rule waiver petition. As noted above, Customers’ rule waiver petition initiates a new and separate proceeding. Customers have not asked to have these two proceedings consolidated. Further, Customers will not be able to seek a hearing on the Commission’s disposition of the rule waiver petition until the Commission has issued its proposed agency action order addressing that petition, which will take place, in the typical course of events, after the formal administrative hearing set for November 4. After the Commission’s post-hearing vote, further proceedings on Customers’ rule waiver petition may become barred by res judicata, as the issues raised in the rule waiver petition have also been raised for disposition in the formal hearing proceeding. Customers bear this risk as a consequence of filing their rule waiver petition when they did.

With respect to FPL’s assertions that Customers neglected to file a copy of their petition with the JAPC, staff notes that Customers appear to have subsequently filed their petition with JAPC. Regardless, FPL does not explain how failure to satisfy JAPC’s filing requirements would require dismissal of a petition filed before the Commission. With respect to FPL’s assertions that Customers failed to include a statement in their petition indicating whether the requested variance or waiver is temporary or permanent, staff believes that, drawing all reasonable inferences from the rule waiver petition in favor of Customers, Customers’ petition appears to seek a temporary rule waiver.

Staff believes that Customers have standing to seek a waiver of Rule 25-6.103(3). Section 120.542, Florida Statutes, uses three terms that describe who may seek a variance or waiver of an agency rule: “persons subject to regulation;” “person subject to the rule;” and “person who is subject to regulation by an agency rule.” As noted above, staff believes that Mariner Properties does not support dismissal of Customers’ petition because it sheds no light on who may seek a rule waiver. Staff has found no relevant case law on this issue. While Customers are not, in the strictest sense, persons subject to regulation by the Commission, the rates charged by FPL and paid by Customers are indeed subject to regulation by the Commission. Rule 25-6.103(3) governs refunds due to customers who have been overcharged

due to meter error. Staff believes it is reasonable to conclude that Customers have standing to seek a waiver of this rule because, assuming a refund is due, they are directly affected by the application of the rule. This conclusion is consistent with the Commission's past practice of hearing petitions filed by condominium developers and similar entities, as opposed to regulated utilities, seeking waiver of the Commission's individual metering requirements.⁶

For the reasons set forth above, staff recommends that FPL's motion to dismiss be denied.

⁶ See, e.g., Order No. PSC-04-0984-PAA-EU, issued October 11, 2004, in Docket No. 040762-EU, Petition for waiver of or variance from individual metering requirements of Rule 25-6049(5)(a), F.A.C., by Coastal Blue Development, LLC d/b/a Seychelles, a Condominium.

Issue 2: Should the Commission grant Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code?

Recommendation: No. Customers have failed to demonstrate that application of the rule would create a substantial hardship or violate principles of fairness. Further, the requested rule waiver is inappropriate given that the interpretation and application of Rule 25-6.103(3), as well as the method of calculating refunds for Customers, is at issue and is the subject of comprehensive prefiled testimony in litigation pending in this docket. (C. KEATING)

Staff Analysis:

Standard of Review

Section 120.542(1), Florida Statutes, provides a two-pronged test for determining when waivers and variances from agency rules shall be granted:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person **and** when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

(Emphasis added.)

Customers' Rule Waiver Petition

As noted in the Case Background, Customers seek a variance or waiver of Rule 25-6.103(3), Florida Administrative Code, in this docket. The rule provides that "when a meter is found to be in error in excess of the prescribed limits, the figure to be used for calculating the amount of refund or charge . . . shall be that percentage of error as determined by the test." Rather than calculating refunds based solely on the percentage of error determined by "the test," Customers' petition asks for a waiver to allow refunds to be calculated, in the context of the pending formal hearing, based on: (1) use of the standard reference test point for determining meter test error as opposed to use of the full scale for determining meter test error; and (2) use of the higher of the percent error determined by "the test" or the percent difference change in monthly demand readings after a new meter was installed.

Customers note that Rule 25-6.103 identifies Sections 366.03, 366.041(1), 366.05(1), 366.05(3), 366.05(4), and 366.06(1)⁷ as the statutory sections implemented by the rule. Customers assert that the purposes of these underlying statutes are to: (1) provide for a scheme of regulation that is "fair and reasonable" to both utilities and customers; (2) require utilities to treat their customers uniformly and fairly; (3) require utilities to verify the accuracy of metering equipment through testing; (4) provide utility customers the right to have meters tested; and (5)

⁷ These statutory sections are attached hereto as Attachment D.

to prevent a utility from, directly or indirectly, charging a customer with an effective rate (because of meter error) not on file with the Commission. Customers assert that these purposes will not only be achieved but enhanced by the requested variance or waiver. In addition, Customers assert that these purposes will be achieved through the evidence presented in this docket from which the Commission will be able to determine both the amount billed in error and the refund necessary to ensure that an unapproved rate is neither charged nor collected by FPL.

Customers contend that, to the extent Rule 25-6.103(3) requires use of a meter percentage error equal to a meter's full-scale test error for calculating refunds, application of the rule works a substantial hardship on Customers and violates principles of fairness. In support of this contention, Customers cite a portion of the prefiled testimony of Staff witness Sidney W. Matlock which states that "[f]or purposes of making refunds, the calculation of a percentage error based on the full-scale reading would not be fair to the customer." Customers suggest that FPL also recognizes the truth of the quoted portion of Mr. Matlock's testimony, noting that FPL did not calculate refunds based solely on the meter's tested full-scale error for all customers whose type 1V thermal demand meters – the type of meters at issue in this case – overregistered demand. Customers quote a portion of the prefiled direct testimony of FPL witness David Bromley which states that "to remove any perceptions from affected customers that they were not being treated fairly," FPL calculated refunds using "the higher of: (1) the [full-scale] meter test error; or (2) the actual percentage difference in the monthly demand readings of the newly installed meter, i.e., the one replacing the 1V compared to the same months of the previous year's 1V meter readings." Customers cite an FPL interrogatory response indicating that FPL provided refunds to 263 other customers using this "higher of" method. Customers assert that they are entitled to similar "fair" treatment.

FPL's Response

As noted in the Case Background, FPL indicated in its motion to dismiss that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. FPL has not filed comments within the 14 day comment period provided by Rule 28-104.003, Florida Administrative Code.

Analysis

Staff recommends denial of Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code. While staff believes that the purposes of the statutes underlying the rule will be achieved if the requested variance/waiver is granted, staff does not believe that Customers have demonstrated that application of the rule to Customers would create a substantial hardship or violate principles of fairness. Further, staff believes that the requested rule waiver is inappropriate given that the interpretation and application of Rule 25-6.103(3), as well as the method of calculating refunds for Customers in general, is at issue and is the subject of comprehensive prefiled testimony in litigation pending in this docket.⁸

⁸ The Prehearing Order in this docket (Order No. PSC-04-0933-PCO-EI, issued September 22, 2004) identifies the following issues implicated by Customers' rule waiver petition:

As a preliminary matter, staff does not believe that FPL's motion to dismiss tolled the time for FPL to file comments on Customers' petition. As noted above, FPL indicated in its motion to dismiss that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. FPL appears to believe that its motion to dismiss tolled the 14 day comment period that began on September 10, 2004, the date notice of Customers' petition was published in Florida Administrative Weekly, as well as the 90 day time frame within which the Commission must grant or deny the petition. However, FPL cites no authority to support this view, and staff is unaware of any such authority.

Rule 28-104.003(1), Florida Administrative Code, provides that "[a]ny interested person or other agency may submit written comments on the petition [for variance or waiver] within 14 days after the [Florida Administrative Weekly] notice required by Section 120.542(6), F.S." Nothing in Section 120.542 or in the relevant Uniform Rules of Procedure indicates that this time period may be extended, much less automatically extended due to the filing of a responsive pleading like FPL's motion to dismiss.

Further, Section 120.542(8), Florida Statutes, states in pertinent part:

An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested [by the agency] additional material, or the petitioner's written request to finish processing the petition.

Nothing in Section 120.542 indicates that this time period may be automatically extended due to the filing of a responsive pleading like FPL's motion to dismiss. If the Commission were to allow FPL time to file comments after addressing its motion to dismiss, the Commission, under the current agenda conference schedule, would not be able to address the merits of Customers' rule waiver petition within the 90 day time period specified by Section 120.542(8) and would thus risk having the petition granted by default.

Purpose of the Underlying Statutes

Staff believes that the requested variance or waiver would achieve the purposes of the statutes underlying Rule 25-6.103(3). Generally, staff agrees with Customers statement, set forth above, concerning the purposes of the statutes identified as those statutes implemented by the rule. Staff agrees that the calculation of refunds based on some method other than the percentage error measured by a test, such as the "higher of" method used by FPL to calculate refunds for other customers using 1V meters, may be consistent with the purpose of ensuring that customers

Issue 2: Pursuant to Rules 25-6.058 and 25-6.103, Florida Administrative Code, what is the appropriate method of calculating customer refunds for those thermal meters which test outside the prescribed tolerance limits? and

Issue 3: Should the customers in this docket be treated the same way in which FPL treated other, similarly situated customers, for the purposes of determining the percentage of meter overregistration error?

The relevant portions of the Prehearing Order are attached hereto as Attachment E.

are treated fairly and not charged an effective rate (due to meter error) not on file with the Commission.

Substantial Hardship / Principles of Fairness

Customers' petition for variance or waiver of Rule 25-6.103(3) asks the Commission to do two things: (1) interpret the rule's use of the phrase "percentage of error as determined by the test" to mean the percentage of error based on the test point rather than the meter's full-scale; and (2) require FPL to use the "higher of" method, rather than just the meter test result, to determine the appropriate refund amount due Customers.

With respect to the first item, staff notes that the interpretation of the phrase "percentage of error as determined by the test" in subsection (3) of the rule is at issue and is the subject of prefiled testimony in the formal hearing pending in this docket. In particular, the rule does not specify which or what type of test it is referring to. Staff witness Matlock has prefiled testimony stating that the language in subsection (3), when viewed in light of the remainder of Rule 25-6.103, is ambiguous, and he suggests that the Commission use the percentage of error based on the test point. FPL witness Bromley has prefiled testimony asserting that the language in subsection (3) should be read to require use of the percentage of error based on the meter's full scale. Through their rule waiver petition, Customers ask the Commission to decide the issue in favor of Mr. Matlock's interpretation because it is to their advantage in the pending formal hearing proceeding.

In essence, this portion of Customers' petition requests a variance or waiver not from the rule's requirements, but from a potential interpretation of the rule in FPL's favor. Because the manner in which the rule will be applied is currently unknown, staff does not believe that Customers have demonstrated, or even can demonstrate, that application of the rule to them will create a substantial hardship or violate principles of fairness. Staff strongly believes that the interpretation and application of the rule is best left for resolution through the pending formal hearing in this docket, rather than a rule waiver petition. Parties should not be permitted, through a rule waiver petition filed in the midst of pending litigation, to obtain what amounts to summary judgment on an issue set for hearing.⁹

Customers' second request implicates not only Issue 2 as identified in the Prehearing Order, but also Issue 3.¹⁰ Customers argue that because FPL has calculated refunds paid to other customers using the "higher of" method, application of Rule 25-6.103, which does not require this method, would violate principles of fairness. In other words, Customers claim that if the Commission does not grant the requested variance or waiver, FPL will be allowed to treat similarly situated customers differently, thus violating principles of fairness. This argument is nearly identical to Customers' position on Issue 3, as shown in Attachment E.

At page 19 of Mr. Bromley's prefiled direct testimony, he indicates that refunds have been calculated for the customers in this docket using the meter test error that FPL interprets the rules to require, but not the "higher of" method used to calculate refunds for other customers. In

⁹ See Issue 2 from the Prehearing Order attached hereto as Attachment E.

¹⁰ See Attachment E.

the Customers' deposition of Mr. Bromley, he explained that all customers, including those involved in this docket, were offered 12-month refunds to be calculated using the "higher of" method in an attempt to resolve the customers' refund claims.¹¹ Upon deposition by FPL, Customers' witness George Brown confirmed that the customers who pursued action in this docket did not accept FPL's settlement offer because they believed they were entitled to a refund for greater than 12 months.¹² Thus, through their rule waiver petition, Customers are asking the Commission to require FPL to give them the benefit of a favorable term that was offered by FPL as part of a settlement rejected by Customers.

Based on these facts, staff believes Customers have not demonstrated that application of Rule 25-6.103(3) to them will violate principles of fairness. Customers' assertion that they will be treated differently from similarly situated customers is misleading. Customers were offered the same settlement terms that every similarly situated customer was offered to resolve their refund claims. Customers rejected the settlement offer, choosing to pursue litigation before the Commission. Customers are not entitled to a rule waiver on grounds of "principles of fairness" when Customers themselves chose to be treated differently by rejecting the settlement offer that other customers accepted.

For the reasons set forth above, staff recommends that the Commission deny Customers' petition for variance or waiver of Rule 25-6.103(3).

¹¹ Transcript p.156, line 8, through p. 163, line 1, from deposition of Dave Bromley taken August 5, 2004, in this docket.

¹² Transcript p.90, line 8, through p.92, line 24, from deposition of George Brown taken August 27, 2004, in this docket.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open to allow this matter to proceed to hearing. (C. KEATING)

Staff Analysis: No. This docket should remain open to allow this matter to proceed to hearing.