BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities Services, Inc., on behalf of Ocean Properties, Ltd., J.C. Penney Corp., Dillards Department Stores, Inc., Target Stores, Inc., and Southeastern Utilities Services, Inc., against Florida Power and Light Company concerning thermal demand meter error.	)	Docket No.: 030623-EI Filed: March 14, 2005

CUSTOMERS' MOTION FOR RECONSIDERATION OF ORDER NO. PSC-05-0226-FOF-EI

Customers, pursuant to Rule 25-22.060, Florida Administrative Code, hereby request reconsideration of Order No. PSC-04-0932-PCO-EI, (Final Order Resolving Complaints, the "Order") issued on February 25, 2005, by a three-member panel of the Florida Public Service Commission, consisting of Commissioners Deason, Bradley and Davidson. The factual and legal grounds for this Motion are as follows:

Interest Rate for Refunds

1. The Final Order provides that the interest rate to be applied to refunds is the rate set forth in Commission Rule 25-6.109, Florida Administrative Code, rather than the interest rate authorized by Section 687.01, Florida Statutes. The Final Order relies on Rule 25-6.109 as the basis for its decision regarding the appropriate interest rate, and acknowledges that a rule challenge to this rule is currently pending before the Division of Administrative Hearings.[1]

2. The parties to the rule challenge proceeding previously agreed that this Commission would defer ruling on a timely-filed motion for reconsideration until after the entry of a final order in the rule challenge proceeding. The parties also agreed that

[1] See DOAH Case No. 04-2250RX.

the potential effect of a final order in the rule challenge matter should be considered in resolving any motion for reconsideration. (See Attachment 1). The Commission relies on the authority of Rule 25-6.109 for its interest rate decision. Should rule 25-6.109 be declared invalid for lack of statutory authority, the Commission would not be able to rely on this rule, and the interest rate calculation as set forth in section 687.01 and Kissimmee Utility Authority v. Better Plastics, Inc., 526 So. 2d 46 (Fla. 1988), should be applied to the refunds ordered in this case.

3. The parties are due to file proposed final orders in the rule challenge proceeding on April 11, 2005.

4. The purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was misapprehended or overlooked. Diamond Cab Company v. King, 146 So. 2d 889 (Fla. 1962). The Final Order did not detail the status of the pending rule challenge, including the parties' agreement to allow for a decision in the rule challenge matter to be considered in conclusively resolving the interest rate issue. This timely filed motion for reconsideration brings to the Commission's attention the parties agreement regarding the pending rule challenge, and consistent with the parties' agreement, seeks to have the result of that rule challenge considered in determining the disputed interest rate issue, issue VI in the Commission's Final Order. Thus, Customers seek reconsideration of the Commission's decision regarding the proper interest rate to be applied to refunds to allow consideration of the effect of a final order in the pending rule challenge to Rule 25-6.109.

Parties' Agreement Regarding 80% Test Point Also Governed
The Method for Determining Refund Amounts

5. Customers also seek reconsideration of the Commission's Final Order regarding the Determination of Meter Error for Refund Calculation Purposes, Issue II of the Final Order.

6. In addressing the meters eligible for refund, Issue I, the Commission found that "[b]oth parties agree, based on the tests that have been conducted by FPL, that these meters are eligible for refund. We accept this agreement and find that these meters are eligible for refunds for demand overregistration." See Order No. PSC-05-0226-FOF-EI at 3. The Commission also found "that the parties' agreement is within the range of reasonable interpretations of our rules, and we accept this agreement with respect to those eleven meters." *Id.* at 2. This finding was based on the parties' protocol agreement that is attached hereto as Attachment 2 (FPL Hearing Exh. No. 9). The protocol agreement, the validity of which was not contested, is binding in all respects, including with respect to how the parties agreed the refunds should be calculated.

7. It is inconsistent and incongruous for the Commission to rely upon an uncontroverted agreement for determining the meters eligible for refund, yet not use that same agreement as the basis for determining the meter error for refund calculation purposes. Surely the agreement to use a "before and after" approach, to the extent that it provides a benefit to a customer, does not violate any existing Commission rules, since the Commission was aware that this approach was used with other customers not parties to this docket. While the Final Order concludes that the "before and after" approach FPL used with other customers went beyond the requirements of Commission rules, there is nothing contained in any Commission rule that prevents the same agreement the

Commission used to resolve Issue 1 from also being recognized to resolve Issue 2, Determination of Meter Error for Refund Calculation Purposes. The Commission overlooked the fact that this protocol agreement was in place and binding in rendering its Final Order, evidenced by the fact that the nearly 6 full pages of Commission discussion and analysis of Issue II neglects to mention the parties' agreement.

8. The agreement did not become meaningless if other issues, such as the 12-month refund period, were litigated. For example, paragraph 6 of the agreement specifically addressed the 12-month refund issue, and contemplated that a demonstration of a meter error due to some cause that occurred on a fixed date could be made. The parties' agreement, which the Commission recognized for the purposes of resolving Issue I, did not link the 12-month refund issue to the "before and after" approach. Moreover, the agreement was not somehow extinguished or ineffective if litigation ensued, since the parties specifically contemplated that litigation might ensue. As set forth in paragraph 5 of the agreement, the parties agreed that "in the event of a disputed claim that is not resolved by the parties, no refund or credit shall be made pending final disposition of the claim." If the parties had intended for their agreement to be ineffective in its entirety in the event of litigation, they surely could have plainly stated that to be the case and FPL would have undoubtedly argued that the parties' agreement not be used as the basis for resolving Issue 1 regarding the meters eligible for refund.

9. The notion that Rule 25-6.103(3) somehow provides that any refund must be based on that percentage of error determined by the test can easily be reconciled with the "before and after" approach that FPL agreed to use as set forth in its May 2, 2004 letter to Mr. George Brown. First, FPL used this "before and after" approach with other

customers not parties to this docket. The Commission presumably would not have allowed a "before and after" approach if Rule 25-6.103(3) prevented a refund calculation using this methodology. Moreover, "the test" referenced in Rule 25-6.103(3) is relied upon to determine which meters are eligible for refund in the first place. Thus, those meters that were "tested" and found to be outside the range of acceptable tolerance error were eligible for refund. FPL was free to use a "before and after" approach with other customers, as the Commission rules do not prevent such an approach, just as it was able to contractually agree to use this approach with customers represented by Mr. Brown's company.

10. The Commission overlooked the fact that the parties had agreed to use the "before and after approach" to the extent that it benefits customers. Evidence showed that this approach indeed benefited customers, and it should be used for the purpose of refund calculation purposes.

Meter #V5871D – Bent Pointer

11. The Commission's Final Order finds that a bent maximum pointer on Meter #V5871D caused an erroneous deflection of approximately +2.5 divisions on the scale of the demand portion of the meter and that +2.5 divisions corresponds to 30 kilowatts of demand, or 3.57% of full-scale value.[2] The Commission's Final Order also recognizes that in five meter tests of this meter, the results varied from an error of 3.14% to 3.57% of full-scale value. The Commission cites Rule 25-6.052(2)(a), Florida Administrative Code, to support its conclusion that this meter is not eligible for a refund because it does not exceed 4% in terms of full scale value. However, the Commission overlooked the fact that it should have combined both the meter over-registration based

[2] On August 2, 2002, an independent meter test was also performed on this meter by Mr. Bob Armstrong.

on the meter test, with the over-registration attributable to bent pointer. Thus, the error would be in excess of 4% if any meter test error (from 3.14% to 3.57%) or the average of the 5 tests was combined with the error attributable to the bent pointer, +2.5 divisions or 3.57% of full scale value. Additionally, the Commission overlooked Rule 25-6.106(2) which provides that in the event of overbillings not provided for in Rule 25-6.103, the utility shall refund the overcharge to the customer for the overcharge based on available records, and if the overcharge cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer. The bent pointer is a factual circumstance that is contemplated by Rule 25-6.106(2) and for which a refund should be provided. The Commission determined that the bent needle resulted in +2.5 divisions of the demand scale, or 3.57% of full-scale value. Rule 25-6.106 does not contain any limitation on the percentage to be refunded, and accordingly, Meter #1V5871D, which overregistered due to a bent pointer, should be eligible for a refund. To deny any refund is inequitable, and inconsistent with Rule 25-6.106(2).

WHEREFORE, for the foregoing reasons, Customers respectfully requests reconsideration of Order No. PSC-05-0226-FOF-EI, Final Order Resolving Complaints, based on the grounds set forth above.

s/Jon C. Moyle, Jr.
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Attorneys for Customers.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail this day the 14th day of March, 2005 to the following parties of record

Cochran Keating
Florida Public Service Commission
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Natalie Smith
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

s/ Jon C. Moyle, Jr.
Jon C. Moyle, Jr.

ATTACHMENT 1

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OCEAN PROPERTIES, LTD.,	)	
	)	
Petitioner,	)	Case Number 04-2250RX
v.	)	
	)	
PUBLIC SERVICE COMMISSION	)	
	)	
Respondent.	)	
	)	

SFH

JOINT MOTION TO HOLD MATTER IN ABEYANCE

Petitioner, Ocean Properties, Ltd. (Ocean) , Respondent, Florida Public Service Commission (Commission) and Intervenor, Florida Power & Light Company (FPL), pursuant to Section 120.56(1)(c), Florida Statutes, jointly move that the Administrative Law Judge enter an order canceling the hearing currently scheduled for July 14, 2004 and holding this matter in abeyance until after a final order has been issued by the Commission in Docket No. 030623-EI. As grounds therefor, the Joint Movants state:

1. Ocean's rule challenge petition seeks a determination regarding the validity of Rule 25-6.109(4), Florida Administrative Code, relating to the interest rate to be applied to utility refunds as that rule may apply in the context of overcharges due to meter error.

2. The issues of the amount of refunds, if any, owed by FPL to Ocean as a result of alleged overcharges due to meter error and of what interest rate applies to any such refunds are currently pending before the Commission in Docket No. 030623-EI.

3. In order to avoid the expense of potentially unnecessary administrative litigation, the Joint Movants request that this rule challenge proceeding be held in abeyance until a final order has been issued by the Commission in Docket No. 030623-EI. No later than 15 days after

the entry of the Commission's final order in Docket No. 030623-EI, Ocean will either (a) advise the Administrative Law Judge that this case should be removed from abeyance and that a new hearing date should be established, or (b) voluntarily dismiss its petition.

4. In the event that Ocean chooses to proceed with this rule challenge following the issuance of a final order in Docket No. 030623-EI, and also files with the Commission a timely motion for reconsideration of that final order, the Commission will defer ruling on Ocean's motion for reconsideration until after the entry of a final order in this rule challenge proceeding and FPL will not object to such deferral. 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. The Commission staff agrees to address the potential effect of a final order in the rule challenge case in making its recommendation on the motion for reconsideration.

5. By joining in this motion, none of the parties waives any position or argument that is otherwise available to it in this proceeding, in Docket No. 030623-EI, or on appeal of the final order in either proceeding; provided, however, that if the Commission's final order applies the challenged rule to Ocean, and the challenged rule is subsequently invalidated in Case No. 04-2250RX, neither the Commission nor FPL will assert on appeal that Ocean is nevertheless bound by the invalidated rule based on the fact that the determination of invalidity came after the Commission's final order as opposed to having been issued in July, 2004.

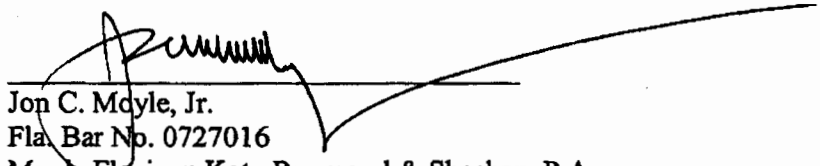
6. Ocean and the Commission have no objection to entry of an order granting FPL's Petition to Intervene in this proceeding.

WHEREFORE, the Joint Movants request that the Administrative Law Judge issue an order canceling the hearing currently scheduled for July 14, 2004 and holding this matter in

abeyance until after a final order has been issued by the Commission in Docket No. 030623-EI, as more fully set forth in the body of the motion.

RESPECTFULLY SUBMITTED this 8th day of July, 2004.

OCEAN PROPERTIES , LTD.



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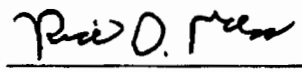
FLORIDA PUBLIC SERVICE COMMISSION



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Attorney for Intervenor

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Joint Motion to Hold Matter in Abeyance has been furnished by U.S. Mail this 8th day of July, 2004 to the following:

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Attorney

ATTACHMENT 2

May 6, 2003 FAX TO: (305) 552-4955

Mr. George Brown
Southeastern Utility Services, Inc.
7107 East 36th Avenue
Bradenton, FL 34208

Re: FPL\SUSI, Inc. Settlement Protocol for 1V Thermal Demand Meters

Dear Mr. Brown:

The purpose of this letter is to confirm the terms and conditions of the Settlement Protocol agreed to by and between Florida Power & Light Company ("FPL") and Southeastern Utility Services, Inc. ("SUSI") in connection with FPL customers who: (1) have received service through a 1V thermal demand meter; (2) are represented or may be represented in the future by SUSI; and (3) have notified FPL, through SUSI, of a claim for a refund. The terms of the Settlement Protocol are as follows:

1. Those 1V meters previously tested at 40% of full registration and demand registered >100% will be re-tested at 80%.

2. At the request of a customer, any meter will be re-tested pursuant to Rules 25-6.059(2) and 25-6.052(1) and (2)(a), Florida Administrative Code.

3. At the request of a customer, any 1V meter is subject to a meter test conducted by an independent meter testing facility of the customer's choosing. Such independent meter test shall be conducted in conformance with the requirements of Rule 25-6.059(4), Florida Administrative Code.

4. Those meters with test results exceeding the allowed tolerances under Rule 25-6.052(1) and/or (2)(a), Florida Administrative Code, will be eligible for refunds.

5. 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 actual customer usage (before and after), utilizing the application of a to be determined agreed upon uniform timeframe. Best efforts will be made by all parties to settle all refunds in an expeditious manner; however, in the event of a disputed claim that is not resolved by the parties, no

refund or credit shall be made pending final disposition of the claim.

6. Pursuant to Rule 25-6.103(1), Florida Administrative Code, refunds will be limited to 12 months, unless it can be demonstrated that the error was due to some cause that occurred at a fixed date, in which case such refund shall be computed back to but not beyond such fixed date based upon available records.

7. Net billing will be applied; provided, however, that backbilling for a meter that under-registers in excess of the allowed tolerance level will be limited to 12 months pursuant to Rule 25-6.103(2)(a), Florida Administrative Code.

To confirm your agreement on behalf of SUSI to the above terms and conditions, please sign and date this letter below and return it to me at your earliest convenience.

Sincerely,

Kenneth A. Hoffman

KAH/rl

I, GEORGE BROWN, individually and on behalf of Southeastern Utility Services, Inc., hereby confirm my agreement with the above-stated terms and conditions for the settlement of claims for refunds submitted by Southeastern Utility Services, Inc. to FPL on behalf of FPL customers who have received electric service through 1V thermal demand meters.

GEORGE BROWN, individually and as Vice President of Southeastern Utility Services, Inc.

Date May 6, 2003

cc: Daniel Joy, Esq.
FPL\rlw\a501.ltr