BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Globe International Realty & Mortgage Corporation Against Florida Power & Light Company Regarding Refusal to Provide Service	DOCKET NO. 941297-EI ORDER NO. PSC-96-0270-FOF-EI ISSUED: FEBRUARY 26, 1996

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON
DIANE K. KIESLING

Pursuant to Notice, a Hearing was held on Wednesday, September 27, 1995, in Fort Lauderdale, Florida, before Stuart M. Lerner, Hearing Officer for the Division of Administrative Hearings.

APPEARANCES:

KENNETH V. HEMMERLE, II, 1322 Northeast Fourth Avenue, Suite E, Fort Lauderdale, Florida 33304
On behalf of Globe International Mortgage and Realty Corporation.

ROBERT E. STONE, P.O. Box 029100, Miami, Florida 33102
On behalf of Florida Power & Light Company.

ROBERT V. ELIAS, Florida Public Service Commission, Division of Legal Affairs, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850
On behalf of the Commission Staff.

FINAL ORDER ADOPTING HEARING OFFICER'S RECOMMENDED ORDER

BY THE COMMISSION:

Background

On September 6, 1994, Matthew Renda d/b/a Globe International Realty and Mortgage Corporation (Globe or Renda) filed a complaint with the Commission's Division of Consumer Affairs against Florida Power and Light Company (FPL) for improper refusal to serve Globe at 808 N.E. Third Avenue, Fort Lauderdale, Florida. The complaint stated that FPL had refused to provide service to Globe because of

an unpaid balance for that location on an account held by his landlord, Hemmerle Development Corporation (HDC).

FPL responded to Globe's complaint by stating that the service account at 808 N.E. Third Avenue was in the name of HDC, and had been since 1975. FPL reported that HDC's account was in arrears in excess of $2000, and therefore, FPL had interrupted service. FPL indicated that Renda had applied for service to that same address in the name of Globe on August 29, 1994. After an investigation of Renda's application, FPL found that Kenneth Hemmerle, Sr. (Hemmerle), an officer and director of HDC, was also a director of Globe. In addition, Hemmerle was an officer and director of the dissolved Southern Atlantic Construction Corporation of Florida (Southern), the owner of the building at 808 N.E. Third Avenue. Based on these findings, FPL refused to restore service in Globe's name until the balance on the HDC account was paid in full.

On January 31, 1995, the Commission issued Order PSC-95-0144-FOF-EI, denying Globe's complaint. Mr. Renda filed a timely protest to that Order and requested a formal hearing. The matter was referred to the Division of Administrative Hearings (DOAH). A hearing was conducted by Stuart M. Lerner, DOAH hearing officer, on September 27, 1995, in Fort Lauderdale, Florida.

On December 5, 1995, the Hearing Officer filed his Recommended Order regarding Mr. Renda's complaint. On December 15, 1995, Globe timely filed exceptions to the Recommended Order. We considered this matter at our February 6, 1996 Agenda Conference. The Recommended Order is attached to this Order as "Attachment A" and Globe's exceptions are attached as "Attachment B."

Hearing Officer's Recommendation

The Hearing Officer recommended that Florida Power and Light Company was authorized pursuant to Rule 25-6.105(8)(a), F.A.C., to refuse to provide service to the 808 N.E. Third Avenue location at Globe's request. The Hearing Officer specifically concluded that:

> [A]t the time FPL refused Globe's request for service, the 808 account had a past due balance in excess of $2,000; the monies owed were for electric service supplied to the 808 Building during Globe's occupancy of the building; as a director, officer and agent of HDC who had actual knowledge of HDC's administrative dissolution, but nonetheless purported to act on HDC's behalf in his post-dissolution dealings with FPL in connection

> with the 808 Account, Hemmerle was personally liable under Section 607.1421(4), Florida Statutes, for payment of this debt; and Hemmerle continued to have access to the 808 Building until March of 1995, and thus would have benefited had the electric service requested by Globe been provided... (Conclusion of Law 60.)

The Hearing Officer recommended that we enter a final order dismissing Globe's complaint.

Globe's Exceptions

On December 15, 1995, Globe timely filed specific exceptions to the Findings of Fact and the Conclusions of Law contained in the Recommended Order. Pursuant to Rule 25-22.056(4)(b), F.A.C., such exceptions must fully state the alleged error, as well as the basis in law or in fact. Exceptions to findings of fact must be supported by citations to the record. We have reviewed these exceptions and reach the following conclusions:

I. EXCEPTIONS TO FINDINGS OF FACT

Exception 1

In its first exception, Globe objects to the portion of Paragraph 6 of the Recommended Order that states that Renda and Hemmerle both owned 250 shares of stock in Globe. Globe asserts that Hemmerle never owned stock in Globe, nor was any stock issued. We find that Globe's articles of incorporation on file with the Florida Department of State sufficiently support the Hearing Officer's finding that Hemmerle and Renda both held 250 shares of stock in Globe. See Respondent's Ex. 28, Deposition of Raymond Revell, Composite Ex. B. Thus, exception Number 1 is rejected.

Exceptions 2 and 3

Globe's exceptions Number 2 and 3 do not identify the portions of the Recommended Order with which Globe does not agree. These exceptions are merely a continuation of Globe's argument in this matter. These exceptions are improper under Rule 25-22.056(4)(b), Florida Administrative Code, and are, therefore, rejected.

Exception 4

In exception Number 4, Globe asserts that Paragraph 10 of the Recommended Order "clearly shows that Hemmerle had resigned 9-2-93, and, as such, was no longer affiliated with the Petitioner." Paragraph 10 does not show that Hemmerle was no longer affiliated with the Petitioner after September 2, 1993. Instead, Paragraph 10 merely presents a quote from Globe's 1995 annual report that Hemmerle had resigned by that date. We note that Paragraph 9 of the Recommended Order states that Globe's 1994 annual report, filed April 19, 1994, reflects that Hemmerle and Renda were the officers and directors of Globe. See also Respondent's Ex. 28, Deposition of Raymond Revell, 8 - 12. We, therefore, reject Globe's exception Number 4 because it contains assertions not supported by the record.

Exception 5

Globe's exception Number 5 addresses Paragraph 15 of the Recommended Order, but does not claim any error. Exception Number 5 merely elaborates on Globe's argument and is rejected as improper.

Exception 6

In exception Number 6, Globe objects to the portion of Paragraph 16 of the Recommended Order that states:

> Following the administrative dissolution of the corporation, Hemmerle continued to transact business with FPL in the corporation's name, notwithstanding that he was aware that the corporation had been administratively dissolved.

Globe argues that this finding is immaterial to the matter at issue in this case. The remaining portions of Globe's exception Number 6 present arguments regarding the validity of charges assessed against HDC and regarding FPL's compliance with Rule 25-22.032(10), Florida Administrative Code, in regards to HDC. Because Globe merely asserts that Paragraph 16 contains a statement which is immaterial, but not in error, exception Number 6 is rejected.

Exception 7

Globe's exception Number 7 does not set forth that portion of the Recommended Order which it claims to be in error, nor does it contain citations to the record, as required by Rule 25-22.056(4)(b), Florida Administrative Code. Thus, we reject exception Number 7 as improper.

Exception 8

Globe's exception Number 8 pertains to Paragraph 36 of the Recommended Order. Globe argues that the information in Paragraph 36 is immaterial. Globe does not, however, claim any error in Paragraph 36, nor does it contain citations to the record. We reject exception Number 8 as improper.

Exceptions 9 and 10

In exceptions Number 9 and 10, Globe objects to information in Paragraphs 37, 38, and 39 of the Recommended Order because it conflicts with Renda's and/or Hemmerle's testimony. The information is, however, supported by the testimony in the record of Gigi Marshall and Carol Sue Ryan. (Tr. at 169-207). Exception Numbers 9 and 10 are, therefore, rejected.

Exceptions 11 and 12

In exceptions 11 and 12, Globe asserts that neither Globe nor Renda had a contract with FPL for the account at 808 N.E. Third Avenue. Globe also asserts that FPL never notified Mr. Renda in writing of the refusal to hook up electrical service to that address. These exceptions do not claim that any portion of the Recommended Order is in error. These exceptions are also rejected.

Exception 13

In Globe's exception Number 13, Globe objects to Paragraph 41 of the recommended order which states that Thomas Eichas, an FPL fraud investigator, investigated Globe's application and determined that Globe's application should be denied based on the "prior indebtedness rule." Globe excepts to this paragraph because it claims the "prior indebtedness rule" does not apply to it. Paragraph 41 of the Recommended Order is, however, part of the Findings of Fact and not a conclusion by the Hearing Officer that the "prior indebtedness rule" applies to Globe. The information

contained in Paragraph 41 is supported by testimony in the record. (Tr. at 262-284). We, therefore, reject Globe's exception Number 13.

Exception 14

In exception Number 14, Globe objects to the information in Paragraph 43 of the Recommended Order pertaining to the past-due balance for service to 808 N.E. Third Avenue. Globe claims this information is immaterial to the resolution of Globe's complaint because Hemmerle still contests the amount and Globe is not responsible for the amount. The information in Paragraph 43 is supported by the record (Tr. at 147, Lines 21-25; 148, Lines 1-25), therefore, Globe's exception Number 14 is rejected.

Exception 15

Globe's exception Number 15 states that the portion of Paragraph 44 of the Recommended Order that says Hemmerle intended to again conduct business from the building at 808 N.E. Third Avenue following restoration of electrical service is incorrect. Globe argues that nothing in the record substantiates that assertion. We disagree. The record reflects that Mr. Hemmerle was an officer in Southern Atlantic Construction Corporation, which was the owner of the building at 808 N.E. Third Avenue. (Tr. at 109, Lines 11-23; 261, Lines 11-20). Mr. Hemmerle retained a key to that building, kept equipment in the building, and continued to use 808 N.E. Third Avenue as his mailing address after the electricity was shut off on September 6, 1994. (Tr. at 38; 88, Lines 22-23; and 93-101). The evidence in the record supports the hearing officer's conclusion that Hemmerle intended to conduct his business from 808 N.E. Third Avenue at some point in the near future. Thus, Globe's exception Number 15 is rejected.

II. EXCEPTIONS TO CONCLUSIONS OF LAW

Exception 16

In exception Number 16, Globe argues that Paragraph 54 of the Recommended Order should refer not only to the Commission's rule on filing customer complaints, Rule 25-22.032(1), F.A.C., but that it should also refer to Rule 25-22.032(10), Florida Administrative Code. Globe asserts that subsection 25-22.032(10), F.A.C. should be cited because that subsection refers to customer payment of undisputed portions of a utility bill during a

customer complaint proceeding. Globe argues that it does not have a dispute with FPL over any amount. Globe, therefore, asserts that it should be allowed to pay for the period of time during which Globe claims the utility service should have been in its name. Globe argues that it owes FPL for approximately 8 days of service. Globe does not assert that the rule cited in Paragraph 54 is misstated or misapplied.

Paragraph 54 need not include subsection 25-22.032(10), Florida Administrative Code. FPL never initiated service to 808 N.E. Third Avenue in Globe's name. Globe does not, therefore, have an outstanding bill from FPL. Any disputed bill would be in the name of Hemmerle Development Corporation. To this date, neither Mr. Hemmerle nor Hemmerle Development Corporation have filed a complaint with the Commission's Division of Consumer Affairs concerning the billing dispute with FPL. Exception Number 16 is, therefore, rejected.

Exception 17

Globe implies in its exception Number 17 that Paragraph 55 of the Recommended Order is incorrect in its citation to Rule 25-22.032(2) and (3), Florida Administrative Code, because Commission staff did not attempt to resolve this dispute in accordance with the rule cited. Globe is incorrect in making this assertion. On November 30, 1994, Commission staff held an informal conference that the parties attended. (Tr. at 110). A resolution was not reached at that conference. We, therefore, reject exception Number 17.

Exception 18

In exception Number 18, Globe asserts that Rule 25-6.105(a), F.A.C., has been misapplied in Paragraph 59 of the Recommended Order. Globe asserts that the previous customer does not occupy the premises and will not benefit from the restoration of service. Pursuant to Rule 25-6.105(a), F.A.C., Globe argues that it should not have been denied service. The record, however, supports a different conclusion. (Tr. at 38; 88, Lines 22-23; 93-101; 109, Lines 11-23; and 261, Lines 11-20). The previous customer will benefit from the restoration of service. Thus, we reject exception Number 18.

Second Exception 18

Due to an error in numbering, Globe has a second exception Number 18. In its second exception Number 18, Globe objects to Paragraph 60 of the Recommended Order.

Globe asserts that the record does not support FPL's position. Globe again argues that the disputed bill with HDC was not for a period in which Globe occupied the building, that Renda had no connection with HDC, and that no member of HDC had knowledge of HDC's administrative dissolution. In addition, Globe cites Futch v. Southern Stores, Inc. 380 So. 2d 444 (Fla. 1st DCA 1979), in asserting that neither fraud nor any action inducing reliance has been shown that would allow Hemmerle to be held liable for contracts made on behalf of HDC. Globe also argues that Hemmerle would not have benefitted from any service provided to Globe.

We disagree. There is sufficient evidence in the record to support FPL's position concerning Globe's application for service. Globe occupied the building at 808 N.E. Third Avenue during the period in which the disputed debt was incurred. (Tr. at 271-274). We find that the facts in Futch are distinguishable from this case. In Futch the court found that the appellant/director had never been active in running the corporation and that she did not have knowledge of the dissolution of the corporation. Id. at 445. In this matter, Hemmerle was an officer, director and registered agent for HDC. He was and continues to be active in matters relating to that corporation, as evidenced by his actions on behalf of HDC concerning the disputed bill for the account at 808 N.E. Third Avenue, even though the corporation was dissolved over three years ago. Clearly, Hemmerle may be deemed to have had actual notice of the dissolution of HDC. Thus, he may be held liable for the debt to FPL. See Barrie v. Buchsbaum, 547 So. 2d 1009 (Fla. 3rd DCA 1989). In addition, Hemmerle would benefit if service were restored in Globe's name. The building has only one meter. Any restoration of service would, therefore, be to the entire building, not just to Globe's offices. As one of two officers of the now dissolved company that owns the building, Hemmerle not only has an interest in the building, but he also still has access to it. (Tr. at 38 and 88). Globe's second exception Number 18 is also rejected.

Exception 19

Globe's exception Number 19 does not address any claimed error in the Recommended Order. Globe simply restates its argument that Williams v. City of Mt. Dora, 452 So. 2d 1143 (Fla. 5th DCA 1984) controls. The hearing officer is correct that Williams v. Mt. Dora can

be distinguished from this case. See Recommended Order, 17-18, n.8. Globe's exception Number 19 is, therefore, rejected.

Upon consideration, we reject Globe's exceptions since they are not supported by evidence in the record and do not correctly apply the applicable law to the facts in the record. We further find that the Recommended Order contains Findings of Fact that are supported by competent substantial evidence in the record and Conclusions of Law that accurately apply the applicable law to the facts of this case. We, therefore, adopt the Recommended Order in its entirety as our Final Order. Accordingly, we find that Florida Power and Light acted properly in refusing to provide electric service to the 808 Building pursuant to Globe's request and, therefore, dismiss Globe's complaint against Florida Power and Light for refusing said service.

Based on the foregoing, it is

ORDERED by the Florida Pubic Service Commission that the Recommended Order issued by the Hearing Officer of the Florida Division of Administrative Hearings on December 5, 1995, and attached to this Order as Attachment A, is hereby adopted as the Final Order of the Florida Public Service Commission in this docket and is by reference incorporated herein. It is further

ORDERED that Globe International Realty and Mortgage Corporation's Exceptions to the Recommended Order, which are attached as Attachment B, and by reference incorporated herein, are rejected. It is further

ORDERED that the Complaint of the Petitioner Globe International Realty and Mortgage Corporation, against the Respondent, Florida Power and Light Company, is hereby denied. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 26th day of February, 1996.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

BC/NSD

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900 (a), Florida Rules of Appellate Procedure.

ATTACHMENT A

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLOBE INTERNATIONAL REALTY AND MORTGAGE, INC.,	)	
Petitioner,	)	
vs.	)	**CASE NO. 95-2514**
FLORIDA POWER & LIGHT COMPANY,	)	
Respondent,	)	
and PUBLIC SERVICE COMMISSION,	)	
Intervenor.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 27, 1995, in Fort Lauderdale, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Florida Power & Light Company (hereinafter referred to as "FPL") properly refused the request of Globe International

Realty & Mortgage, Inc. (hereinafter referred to as "Globe") to supply electric service to the premises located at 808 Northeast Third Avenue, Fort Lauderdale, Florida?

PRELIMINARY STATEMENT

On January 31, 1995, the Florida Public Service Commission (hereinafter referred to as the "PSC") issued a Notice of Proposed Agency Action in which it announced its intention to find that "FPL was in compliance with applicable Commission rules and its tariffs in refusing to establish service in the name of Globe" at the premises located at 808 Northeast Third Avenue in Fort Lauderdale, Florida. On February 20, 1995, Globe, through its President, Matthew Renda, filed a petition requesting a Section 120.57 formal hearing on the PSC's proposed action. On May 16, 1995, the matter was referred to the Division of Administrative Hearings for the assignment of a hearing officer to conduct the formal hearing Globe had requested.

On July 21, 1995, the PSC filed a petition for leave to intervene in the instant case. By order issued August 9, 1995, the petition was granted.

The formal hearing was held, as scheduled, on September 27, 1995. A total of eleven witnesses testified at the hearing: Matthew Renda; Kenneth V. Hemmerle, Sr.; Bonnie Ammons; Philip Martin; Sandra Lowery; Gigi Marshall; Carol Sue Ryan; Longina Berti; Joy Wimberly; Linda Hart; and Thomas Eichas. In addition to the testimony of these eleven witnesses, twenty-eight exhibits (Respondent's Exhibits 1 through 28) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the Hearing Officer, on the record, advised the parties of their right to submit post-hearing submittals and established a deadline (30 days from the date of the Hearing Officer's receipt of the transcript of the hearing) for the filing of these submittals.

The Hearing Officer received the hearing transcript on October 16, 1995. On November 15, 1995, Globe, FPL and the PSC each timely filed proposed recommended orders. FPL's proposed recommended order was accompanied by a pleading entitled "Summary of Argument." These post-hearing submittals have been carefully considered by the Hearing Officer.

The parties' proposed recommended orders each contain what are labelled as "findings of fact." These "findings of fact" proposed by the parties are specifically addressed in the Appendix to this Recommended Order.

FINDINGS OF FACT

Based upon the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. Kenneth V. Hemmerle, Sr., is a real estate developer.

2. Matthew Renda is a real estate and mortgage broker.

3. Hemmerle and Renda have known each other since about 1986.

4. At the suggestion of Hemmerle, in February of 1993, Renda, along with Hemmerle, formed Globe. At the time, Hemmerle was involved in a development project on the west coast of Florida and he wanted Renda, through Globe, to handle "the selling and so forth for the project."

5. Globe was incorporated under the laws of Florida.

6. The articles of incorporation filed with the Department of State, Division of Corporations (hereinafter referred to as the "Division of Corporations") reflected that: Renda was the president of the corporation; Hemmerle was its secretary; Renda and Hemmerle were the incorporators of the corporation, owning 250 shares of stock each; they also comprised the corporation's board of directors; and the corporation's place of business, as well as its principal office, were located at 808 Northeast Third Avenue in Fort Lauderdale, Florida (hereinafter referred to as the "808 Building").

7. Globe is now, and has been since its incorporation, an active Florida corporation.

8. Annual reports were filed on behalf of Globe with the Division of Corporations in both 1994 (on April 19th of that year) and 1995 (on March 23rd of that year).

9. The 1994 annual report reflected that Renda and Hemmerle remained the officers and directors of the corporation.

10. The 1995 annual report reflected that Renda was still an officer and director of the corporation, but that Hemmerle had "resigned 9-2-93."

11. Both the 1994 and 1995 annual reports reflected that the 808 Building remained the corporation's place of business and its corporate address.

12. The 808 Building is a concrete block building with a stucco finish housing eight separate offices. The entire building is served by one electric meter.

13. At all times material to the instant case, Southern Atlantic Construction Corporation of Florida (hereinafter referred to as "Southern") owned the 808 Building.

14. Southern was incorporated under the laws of Florida in June of 1973, and administratively dissolved on October 9, 1992. Hemmerle owns a majority of the shares of the corporation's stock. The last annual report that Southern filed with the Division of Corporations (which was filed on June 10, 1991) reflected that: Hemmerle was the corporation's president and registered agent; he also served on the corporation's board of directors; Lynn Nadeau was the corporation's other officer and director; and the corporation's principal office was located in the 808 Building.

15. From 1975 until September 6, 1994, FPL provided electric service to the 808 Building. Charges for such service were billed to an account (hereinafter referred to as the "808 account") that had been established by, and was in the name of, Hemmerle Development Corporation (hereinafter referred to as "HDC").

16. HDC was incorporated under the laws of Florida in 1975, and administratively dissolved on October 9, 1992. At the time of HDC's incorporation, Hemmerle owned 250 of the 500 shares of stock issued by the corporation. The last annual report that HDC filed with the Division of Corporations (which was filed on June 10, 1991) reflected that: Hemmerle was the corporation's president and registered agent; he also served on the corporation's board of directors; Lynn Nadeau was the

corporation's other officer and director; and the corporation's principal office was located in the 808 Building. Following the administrative dissolution of the corporation, Hemmerle continued to transact business with FPL in the corporation's name, notwithstanding that he was aware that the corporation had been administratively dissolved.

17. At no time has Renda owned any shares of HDC's stock or served on its board of directors.

18. He and Hemmerle have served together as officers and directors of only two corporations: Globe and Hemmerle's Helpers, Inc. The latter was incorporated under the laws of Florida as a nonprofit corporation in March of 1992, and was administratively dissolved on August 13, 1993. Its articles of incorporation reflected that its place of operation, as well as its principal office, were located in the 808 Building.

19. Pursuant to arrangements Renda and Hemmerle had made (which were not reduced to writing), Globe occupied office space in the 808 Building from March of 1993, through September 6, 1994 (hereinafter referred to as the "rental period"). Renda and Hemmerle had initially agreed that the rent Globe would pay for leasing the space would come from any profits Globe made as a result of its participation in Hemmerle's Florida west coast development project. Renda and Hemmerle subsequently decided, however, that Globe would instead pay a monthly rental fee of $300 for each office it occupied in the building.[1] Globe (which occupied only one office in the building during the rental period) did not pay in full the monies it owed under this rental agreement.

20. The office Globe occupied in the 808 Building was the first office to the right upon entering the building. It was across the lobby from the office from which Hemmerle conducted business on behalf of his various enterprises.

21. Globe voluntarily and knowingly accepted, used and benefited from the electric service FPL provided to its office and the common areas in the building during the rental period.

22. Under the agreement Renda and Hemmerle had reached, Globe was not responsible for making any payments (in addition to the $300 monthly rental fee) for such service.

23. On July 26, 1994, the 808 account was in a collectible status and an FPL field collector was dispatched to the service address. There, he encountered Hemmerle, who gave him a check made out to FPL in the amount of $2,216.37. Hemmerle had noted the following on the back of the check: "Payment made under protest due to now [sic] owning [sic] of such billing amount to prevent discontinuance of power." The check was drawn on a Sunniland Bank checking account that was in the name of Florida Kenmar, Inc., (hereinafter referred to as "Kenmar"), a Florida corporation that had been incorporated in May of 1984,[2] and administratively dissolved on November 9, 1990. (The last annual report that Kenmar filed with the Division of Corporations, which was filed on June 10, 1991, reflected that: Hemmerle was the corporation's president and registered agent; he also served on the corporation's board of directors; and the corporation's principal office was located in the 808 Building.) Hemmerle told the field collector, upon handing him the check, that there were

no funds in the Kenmar checking account. Nonetheless, the field collector accepted the check.

24. FPL deposited the check in its account at Barnett Bank of South Florida.

25. The check was subsequently returned due to "insufficient funds."

26. On the same day that he was visited by the FPL field collector, Hemmerle telephoned Sandra Lowery, an FPL customer service lead representative for recovery, complaining about, among other things, a debit that he claimed had been improperly charged to the 808 account.

27. As a result of her conversation with Hemmerle, Lowery authorized the removal of the debit and all late payment charges associated with the debit from the 808 account.

28. Following the July 26, 1994, removal of the debit and associated late payment charges, the balance due on the account was $1,953.91, an amount that Hemmerle still disputed.

29. In an effort to demonstrate that a lesser amount was owed, Hemmerle sent Lowery copies of cancelled checks that, he claimed, had been remitted to FPL as payment for electric service billed to the 808 account.

30. Some of these checks, however, had been used to pay for charges billed to other accounts that Hemmerle (or corporations with which he was associated) had with FPL.

31. As of August 29, 1994, the 808 account had a balance due of $2,387.47. These unpaid charges were for service provided between March of 1993 and August 10, 1994.

32. On August 29, 1994, Hemmerle showed Renda a notice that he had received from FPL advising that electric service to the 808 Building would be terminated if the balance owing on the 808 account was not paid within the time frame specified in the notice. Hemmerle suggested to Renda that, in light of FPL's announced intention to close the 808 account and terminate service, Renda should either apply for electric service to the 808 Building in Globe's name or relocate to another office building.

33. Renda decided to initially pursue the former option.

34. Later that same day, Renda telephoned FPL to request that an account for electric service to the 808 Building be opened in Globe's name. Gigi Marshall was the FPL representative to whom he spoke. She obtained from Renda the information FPL requires from an applicant for electric service.

35. During his telephone conversation with Marshall, Renda mentioned, among other things, that Globe had been a tenant at the 808 Building since the previous year and that it was his understanding that FPL was going to discontinue electric service to the building because of the current customer's failure to timely pay its bills. Renda claimed that Globe was not in any way responsible for payment of these past-due bills.

36. From an examination of FPL's computerized records (to which she had access from her work station), Marshall confirmed, while still on the telephone with Renda, that the 808 account was in arrears and that FPL had sent a disconnect notice to the current customer at the service address.

37. Marshall believed that, under such circumstances, it would be imprudent to approve Globe's application for electric service without further investigation. She therefore ended her conversation with Renda by telling him that she would conduct such an investigation and then get back with him.

38. After speaking with Renda, Marshall went to her supervisor, Carol Sue Ryan, for guidance and direction. Like Marshall, Ryan questioned whether Globe's application for service should be approved. She suggested that Marshall telephone Renda and advise him that FPL needed additional time to complete the investigation related to Globe's application. Some time after 12:30 p.m. on that same day (August 29, 1994), Marshall followed Ryan's suggestion and telephoned Renda. Ryan was on the line when Marshall spoke with Renda and she participated in the conversation. Among the things Ryan told Renda was that a meter reader would be dispatched to the 808 Building the following day to read the meter so that the information gleaned from such a reading would be available in the event that Globe's application for service was approved.

39. At no time did either Marshall or Ryan indicate to Renda that Globe's application was, or would be, approved.

40. Ryan referred Globe's application to Larry Johnson of FPL's Collection Department, who, in turn, brought the matter to the attention of Thomas Eichas, an FPL fraud investigator.

41. After completing his investigation of the matter, which included an examination of the Broward County property tax rolls (which revealed that Southern owned the 808 Building), as well a

search of the records relating to Globe, HDC and Southern maintained by the Division of Corporations, Eichas determined that Globe's application for service should be denied on the basis of the "prior indebtedness rule." Eichas informed Johnson of his decision and instructed him to act accordingly.

42. Electric service to the 808 Building was terminated on September 6, 1994.

43. As of that date, the 808 account had a past-due balance that was still in excess of $2,000.00.

44. Although he conducted his business activities primarily from his home following the termination of electric service to the 808 Building, Hemmerle continued to have access to the building until March of 1995 (as did Renda).[3] During this period, Hemmerle still had office equipment in the building and he went there on almost a daily basis to see if any mail had been delivered for him. It was his intention to again actively conduct business from his office in the building if electric service to the building was restored. Hemmerle (and the corporations on whose behalf he acted) therefore would have benefited had there been such a restoration of service.

45. After discovering that electric service to the 808 Building had been terminated, Renda telephoned FPL to inquire about the application for service he had made on behalf of Globe. He was advised that, unless FPL was paid the more than $2,000.00 it was owed for electric service previously supplied to the building, service to the building would not be restored in Globe's name.

46. Thereafter, Renda, on behalf of Globe, telephoned the PSC and complained about FPL's refusal to approve Globe's application for service.

47. FPL responded to the complaint in writing. In its response, it explained why it had refused to approve the application.

48. On or about November 15, 1994, the Chief of PSC's Bureau of Complaint Resolution sent Renda a letter which read as follows:

> The staff has completed its review of your complaint concerning Florida Power & Light's (FPL) refusal to establish service in the name of Globe Realty, Inc. at the above-referenced location. Our review indicates that FPL appears to have complied with all applicable Commission Rules in refusing to establish service. Our review of the customer billing history indicates that the past-due balance is for service at this location and not attributable to the judgment against Mr. Hemmerle for service at another location.
>
> The interlocking directorships of Globe International Realty & Mortgage, Inc. and Hemmerle Development, Inc. suggest that the request to establish service in the name of Globe Realty is an artifice to avoid payment of the outstanding balance and not a result of any change in the use or occupancy of the building. Thus, FPL's refusal to establish service is in compliance with Rule 25-6.105(8)(a), Florida Administrative Code.
>
> Please note that this determination is subject to further review by the Florida Public Service Commission. You have the right to request an informal conference pursuant to Rule 25-22.032(4), Florida Administrative Code. Should that conference fail to resolve the matter, the staff will make a recommendation to the Commissioners for decision. If you are dissatisfied with the Commission decision, you may request a formal Administrative hearing pursuant to Section 120.57(1), Florida Statutes.

49. After receiving this letter, Renda, on behalf of Globe, requested an informal conference.

50. The informal conference was held on November 30, 1994.

51. At the informal conference, the parties explained their respective positions on the matter in dispute. No resolution, however, was reached.

52. Adopting the recommendation of its staff, the PSC, in an order issued January 31, 1995, preliminarily held that there was no merit to Globe's complaint that FPL acted improperly in refusing to provide electric service to the 808 Building pursuant to Globe's request.

53. Thereafter, Renda, on behalf of Globe, requested a formal Section 120.57 hearing on the matter.

CONCLUSIONS OF LAW

54. "Any customer of a utility regulated by [the PSC] may file a complaint with the [PSC's] Division of Consumer Affairs whenever he has an unresolved dispute with the utility regarding his electric . . . service. The complaint may be communicated orally or in writing. Upon receipt of the complaint a staff member designated by the Director of the Division [is required to] notify the utility of the complaint and request a response . . . . [which] explain[s] the utility's action in the disputed matter and the extent to which those actions were consistent with the utility's tariffs and procedures, applicable state laws, and [PSC] rules, regulations, and orders." Rule 25-22.032(1), Fla. Admin. Code.

55. It is the responsibility of the designated staff member to "investigate the complaint and attempt to resolve the dispute

informally" by "propos[ing] a resolution of the complaint based on his findings, applicable state laws, the utility's tariffs and [PSC] rules, regulations, and orders." Rule 25-22.032(2) and (3), Fla. Admin. Code.

56. "If a party objects to the proposed resolution, he may file a [written] request for an informal conference on the complaint . . . within 30 days after the proposed resolution is mailed or personally communicated to the parties. Upon receipt of the request the Director of the Division may appoint a staff member to conduct the informal conference or the Director may make a recommendation to the Commission for dismissal based on a finding that the complaint states no basis for relief under the Florida Statutes, Commission rules or orders, or the applicable tariffs." Rule 25-22.032(4), Fla. Admin. Code.

57. If an informal conference is held and settlement is not reached "within 20 days following the informal conference or the last post-conference filing, the appointed staff member [is required] to submit a recommendation to the [PSC] and . . . mail copies of the recommendation to the parties. The [PSC will] dispose of the matter at the next available agenda meeting by issuing a notice of proposed agency action or by setting the matter for hearing pursuant to section 120.57." Rule 25-22.032(8), Fla. Admin. Code.

58. In the instant case, Globe, through Renda, filed a complaint against FPL, a PSC-regulated electric utility, contesting FPL's refusal to provide electric service to the 808 Building pursuant to Globe's request. Although the PSC has

issued a Notice of Proposed Agency Action announcing its preliminary determination to find Globe's challenge without merit, there has been no final resolution of the matter. A dispute still exists which must be resolved by final agency action.

59. In responding to Globe's complaint, FPL has taken the position that the complained-of refusal to provide service was justified in light of Rule 25-6.105(8)(a), Florida Administrative Code,[4] which provides as follows:

> The following shall not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer:
>
> (a) Delinquency in payment for service by a previous occupant of the premises unless the current applicant or customer occupied the premises at the time the delinquency occurred and the previous customer continues to occupy the premises and such previous customer shall benefit from such service.

60. The preponderance of the record evidence supports FPL's position. It establishes that: at the time FPL refused Globe's request for service, the 808 account had a past-due balance in excess of $2,000; the monies owed were for electric service supplied to the 808 Building during Globe's occupancy of the building; as a director, officer and agent of HDC who had actual knowledge of HDC's administrative dissolution, but nonetheless purported to act on HDC's behalf in his post-dissolution dealings with FPL in connection with the 808 Account, Hemmerle was personally liable, under Section 607.1421(4), Florida Statutes,[5] for payment of this debt; and Hemmerle continued to have access to the 808 Building until March of 1995, and thus would have

benefited had the electric service requested by Globe been provided. Under such circumstances, FPL was authorized, pursuant to the provisions of Rule 25-6.105(8)(a), Florida Administrative Code,[6] to refuse to provide such service.

61. Accordingly, Globe's complaint contesting such action[7] should be dismissed.[8]

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the PSC enter a final order dismissing Globe's complaint that FPL acted improperly in refusing to provide electric service to the 808 Building pursuant to Globe's request.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 4th day of December, 1995.

STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of December, 1995.

ENDNOTES

[1] There was a possibility that Globe would soon expand its operations and therefore need more than one office in the building.

[2] At the time of Kenmar's incorporation, Hemmerle owned 50 of the 100 shares of stock issued by the corporation.

[3] Both Hemmerle and Renda had keys to the building.

[4] This is a Section 120.57 consumer complaint proceeding, not a Section 120.56 rule challenge proceeding. Accordingly, the validity of Rule 25-6.105(8)(a), Florida Administrative Code, is not at issue. See City of Palm Bay v. Department of Transportation, 588 So.2d 624, 628 (Fla. 1st DCA 1991)("duly promulgated agency rules . . . will be treated as presumptively valid until invalidated in a section 120.56 rule challenge"); Decarion v. Martinez, 537 So.2d 1083, 1084 (Fla. 1st DCA 1989)("[u]ntil amended or abrogated, an agency must honor its rules").

[5] Section 607.1421(4), Florida Statutes, provides as follows:

> A director, officer or agent of a corporation dissolved pursuant to this section, purporting to act on behalf of the corporation, is personally liable for the debts, obligations, and liabilities of the corporation arising from such action and incurred subsequent to the corporation's administrative dissolution only if he has actual notice of the administrative dissolution at the time such action is taken; but such liability shall be terminated upon the ratification of such action by the corporation's board of directors or shareholders subsequent to the reinstatement of the corporation under ss. 607.1401-607.14401.

[6] It need not be determined, and therefore the Hearing Officer will not address, whether, as FPL claims, its refusal to provide service was also authorized by Rule 25-6.105(5)(j), Florida Administrative Code, which allows a regulated utility to refuse service where there has been an "unauthorized or fraudulent use of service."

[7] In addition to contending that FPL improperly refused its request for service, Globe further argues in its proposed recommended order that FPL also acted improperly by failing to notify Globe in writing of the reason for such refusal, as required Rule 25-6.105(5) and (7), Florida Administrative Code. No such allegation, however, was made in the complaint that Globe filed with the PSC and that is the subject of this Section 120.57 consumer complaint proceeding. Accordingly, the allegation warrants no further discussion.

[8] Globe makes the argument in its proposed recommended order that "[t]his case is controlled by the decision of Williams v. City of Mt. Dora, 452 So.2d 1143 (Fla. 5th DCA 1984)," wherein the Fifth District Court of Appeal held that an electric utility

acted improperly in "requir[ing] an applicant for service to pay a delinquent bill for service previously rendered to some other occupant or owner of [the] premises as a condition to continuing or reinstating service to the new applicant at the same premises," where the "new applicant" was not "legally liable on any theory to the [utility] for the utility service represented by the delinquent bill." Globe's reliance on Williams is misplaced. Unlike the situation present in the instant case, in Williams, the "new applicant" had not "occupied the premises at the time the delinquency occurred" and the "previous customer" would not have benefited had service been supplied to the premises pursuant to the "new applicant's" request. The two cases are therefore factually distinguishable.

APPENDIX TO RECOMMENDED ORDER IN CASE NO. 95-2514

The following are the Hearing Officer's specific rulings on the "findings of facts" proposed by the parties in their proposed recommended orders:

Globe's Proposed Findings

1. Accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order.

2. First sentence: Accepted and incorporated in substance; Remaining sentences: Rejected as findings of fact because they are more in the nature of summaries of testimony adduced at hearing than findings of fact. See T.S. v. Department of Health and Rehabilitative Services, 654 So.2d 1028, 1030 (Fla. 1st DCA 1995)(hearing officer's factual findings which "merely summarize[d] the testimony of witnesses" were "insufficient").

3-4. Rejected as findings of fact because they are more in the nature of summaries of testimony adduced at hearing than findings of fact.

5-6. Accepted and incorporated in substance.

7. Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact.

8. First sentence: Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact; Second sentence: Accepted and incorporated in substance.

9. First and last sentences: Rejected as findings of fact because they are more in the nature of summaries of testimony

adduced at hearing than findings of fact; Remaining sentences: Accepted and incorporated in substance.

10. First sentence: Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact; Remainder: Accepted and incorporated in substance.

11-12. Rejected as findings of fact because they are more in the nature of summaries of testimony adduced at hearing than findings of fact.

13. To the extent that this proposed finding states that there was a dispute between Hemmerle (purporting to act on behalf of HDC) and FPL concerning the amount owed for electric service provided to the 808 Building, it has been accepted and incorporated in substance. Otherwise, it has been rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact.

14. Rejected as a finding of fact because it is more in the nature of a summary and recitation of, and commentary upon, testimony adduced at hearing than a finding of fact.

FPL's Proposed Findings

1-11. Accepted and incorporated in substance.

12. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

13-14. Accepted and incorporated in substance.

15. Rejected as a finding of fact because it is more in the nature of a summary of testimony adduced at hearing than a finding of fact.

16-17. Accepted and incorporated in substance.

18. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

19. Accepted and incorporated in substance.

20. First sentence: Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer; Second sentence: Accepted and incorporated in substance.

21-22. Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

23. Accepted and incorporated in substance.

24-25. Rejected because they lack sufficient evidentiary/record support.

26. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

27-31. Accepted and incorporated in substance.

32. To the extent that this proposed finding refers to telephone calls made on September 6, 1994, by Hemmerle and a Mr. Williams, it has not been incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer. Otherwise, it has been accepted and incorporated in substance.

33-34. Accepted and incorporated in substance.

35. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

36. Accepted and incorporated in substance.

37-38. Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

39-42. Accepted and incorporated in substance.

43. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

44-45. Accepted and incorporated in substance.

46. Not incorporated in this Recommended Order because it would add only unnecessary detail to the factual findings made by the Hearing Officer.

The PSC's Proposed Findings

1-9. Accepted and incorporated in substance.

10-11. Not incorporated in this Recommended Order because they would add only unnecessary detail to the factual findings made by the Hearing Officer.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this recommended order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period of time within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.

ATTACHMENT B

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLOBE INTERNATIONAL REALTY AND MORTGAGE, INC.,	*	
Petitioner,	*	
-VS-	*	**CASE NO.: 95-2514**
FLORIDA POWER & LIGHT COMPANY,	*	
Respondent,	*	
and **PUBLIC SERVICE COMMISSION,**	*	
Intervenor.	*	

EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, **GLOBE INTERNATIONAL REALTY AND MORTGAGE, INC.**, (hereinafter Petitioner) files the following Exceptions to the Recommended Order, and shows the following:

EXCEPTIONS TO FINDINGS OF FACT

The Symbol "T" will be used to reference the pages of the hearing transcript.

1. Petitioner excepts to that portion of ₱ 6 of the Recommended Order which states: . . . "Renda and Hemmerle were the incorportors of the corporation, owning 250 shares of stock each, the also comprised the corporation's board of directors;". . . Hemmerle has never owned any shares of stock in the corporation, nor was any stock issued.

2. Petitioner, operated a business out of 808 Northeast Third Avenue, Fort Lauderdale, Florida. (T. 16, lines 7-23) **MATTHEW RENDA**, Petitioner's President, and the owner and

holder of the license necessary for the operations of both, the real estate business and the mortgage business was the real party in interest, and HEMMERLE has never operated or managed either the real estate business or the mortgage business.

3. Renda stated that HEMMERLE came to my office and showed ma a notice from Florida Power and Light that they were going to cut the electric power off the building on September the 8th, and advised me, that I had two ways to go, either get another place or see if I can secure the power in Globe's name. (T. 18, lines 1-7).

4. Paragraph 10 of the Recommended Order clearly shows that HEMMERLE had resigned 9-2-93, and, as such, was no longer affiliated with the Petitioner.

5. Paragraph 15 of the Recommended Order establishes that from 1975 until September 6, 1994, FPL provided electric service to the 808 Building. Charges for such services were billed to an account that had been established by, and was in the name of Hemmerle Development Corporation. Since HDC was administratively dissolved on October 9, 1992 according the Recommended Order, and that neither Renda or the Petitioner had an interest in the dissolved corporation, it is unlikely that the Petitioner would be liable for any liabilities of the dissolved corporation, notwithstanding the fact that HEMMERLE denied owing that amount claimed by FPL regarding HDC.

6. Petitioner would except to that portion in ₱ 16 of the Recommended Order which states that: "Following the

administrative dissolution of the corporation, Hemmerle continued to transact business with FPL in the corporations's name, notwithstanding that he was aware that the corporation had been administratively dissolved." Whether or not Hemmerle continued to transact business with FPL by a corporation that had been administratively dissolved is immaterial to the issue of refusal to furnish electric to the Petitioner. Petitioner has no interest in HDC, (see ¶ 17) nor is it responsible for HDC'S, electric bills, if any. Respondent's naked allegation that bills were past due is without support, and as such, should not be alleged to support the position of FPL in its refusal to furnish electric to the Petitioner. A review of the charges claimed by FPL from July 26, 1994 to August 29, 1994 is in the sum of $433.56. It is clear that at no time was a billing in excess of $175.00 created at 808 Building. Had HEMMERLE been permitted to continue as a claimant in the administrative action, he claims that he could prove that the $2,387.47 due, claimed by FPL, was erroneous. Furthermore, HEMMERLE claims that not only was the claimed billing of $2,387.47 fictitious, he also claims that FPL disregarded the fact that HEMMERLE disputed this amount, and disregarded the clear terms of 25-22.032(10) which states: (10) During the pendency of the complaint proceedings, a utility shall not discontinue service to a customer because of an unpaid disputed bill. However, the utility may require the customer to pay that part of the bill which is not in dispute. If the parties cannot agree as to the amount in dispute, the staff

member will make a reasonable estimate to establish an interim disputed amount until the complaint is resolved. If the customer fails to pay the undisputed portion of the bill the utility may discontinue the customer's service pursuant to Commission rules.

7. Pursuant to § 120.57(8) Florida Statutes, the findings of fact shall be based exclusively on the evidence of record and on matters officially recognized. Here, the findings of fact are based on innuendoes, suppositions and speculation. No evidence submitted by the Respondent regarding the past duties, actions or abilities of either HDC or Kenneth Hemmerle, Sr., was admissible evidence in which to refrain from the duty to supply electric by a monopoly.

8. Paragraph 36 of the Recommended Order refers to computerized records which were in evidence and based on conflicting testimony of Marshall and Hemmerle. None of which is germane to the case sub judice.

9. Paragraphs 37 and 38 of the Recommended Order conflicts with the testimony proffered by Renda, with the exception of that portion of ¶ 38 which states: "Among the things Ryan told Renda was that a meter reader would be dispatched to the 808 Building the following day to read the meter so that the information gleaned from such a reading would be available in the event that Globe's application for service was approved."

10. Since ¶ 39 of the Recommended Order makes allegations conflicting with both Hemmerle and Renda's testimony,

such is a conclusion which has never been determined by proof of either party, as such, is excepted to.

11. Mr. Renda testified that he had no contract or obligation with FPL for the account that was existing at the 808 Building at the time of his application. (T. 32, lines 11-16).

12. Ms. Marshall, testified that FPL never notified Mr. Renda in writing of the refusal to hook up electrical service to the 808 Building (T. 190, lines 10-13).

13. Petitioner excepts to ₱ 41 of the Recommended Order which states: After completing his investigation of the matter, which included an examination of the Broward County property tax rolls (which revealed that Southern owned the 808 Building), as was a search of the records relating to Globe, HDC and Southern maintained by the Division of Corporations, Eichas determined that Globe' application for service should be denied on the basis of the "prior indebtedness rule." Eichas informed Johnson of his decision and instructed him to act accordingly. Since the "prior indebtedness rule" does not apply the Petitioner, the exception to ₱ 41 is proper and controlling.

14. Petitioner excepts to ₱ 43 of the Recommended Order which states that: As of September 6, 1994, the 808 Building had a past-due balance that was still in excess of $2,000.00. Since this amount is still contested by Kenneth Hemmerle, Sr., and that Petitioner cannot be responsible for past due amount of other parties, whether legitimate or otherwise, this finding of fact is not germane to the claims made by the

Petitioner.

15. Petitioner excepts to that portion of P 44 of the Recommended Order which states: It was his intention to again actively conduct business from his office in the building if electric service to the building was restored. Hemmerle (and the corporations on whose behalf he acted) therefore would have benefited had there been such a restoration of service. Since the record does not reflect that I intended to again conduct business from the 808 Building, this portion of the findings of fact are incorrect.

EXCEPTIONS TO CONCLUSIONS OF LAW

16. That part of P 54 . . .[which] explain[s] the utility's action is the disputed matter and the extent to which those actions were consistent with the utility's tariffs and procedures, applicable state law and [PSC] rules, regulations, on orders." Rule 25-22.032(1), Fla. Admin. Code., refers only to P 1, but fails to refer to P (10) which states:

> (10) During the pendency of the complaint proceedings, a utility shall not discontinue service to a customer because of an unpaid disputed bill. However, the utility may require the customer to pay that part of a bill which is not in dispute. If the parties cannot agree as to the amount in dispute, the staff member will make a reasonable estimate to establish an interim disputed amount until the complaint is resolved. If the customer fails to pay the undisputed portion of the bill the utility may discontinue the customer's service pursuant to Commission rules.

There has never been a question regarding the disputed bill, it

is now and always has been the argument of Kenneth Hemmerle, Sr., that the amount of the bill provided was in excess, and it was further clear from the testimony of Kenneth Hemmerle, Sr. that the original bill was overstated by $2,900.00 from its inception. Nevertheless, the Petitioner is not responsible for the existing bill whether overstated or not. Since Petitioner was not responsible for any billing, and since the service was to be put in its name in the latter part of August, Petitioner would be responsible for approximately eight (8) days of usage.

17. Paragraph 55 of the Conclusions of Law clearly states that "it is the responsibility of the designated staff member to "investigate the complaint and attempt to resolve the dispute informally" by "propos[ing] a resolution of the complaint based on his findings, applicable state laws, the utility's tariffs and [PSC] rules, regulations, and orders." Rule 25-22-032(2) and (3), Fla. Admin. Code. At no time has a designated staff member attempted to resolve the dispute pursuant to Rule 25-22-032 of the Fla. Admin. Code. The staff member at all times had knowledge that I was not responsible for HDC'S bills, nor did they attempt to ascertain the correctness of such bills. The staff member failed to investigate whether or not there was any amount owing, and it concluded that FPL had a right to refuse service to the 808 Building for the Petitioner. Nowhere in the testimony of the formal hearing on September 27, 1995 has it been shown that the Petitioner would be held responsible for HDC'S indebtedness, nor was it ever established the alleged

indebtedness was valid. Only naked allegations were made in support of FPL'S refusal to provide service to either Renda or the Petitioner. Testimony by Renda established that FPL agreed to provide electric service to the 808 Building for the Petitioner, however, the termination on September 6, 1994, was without cause or without notice, or an unpaid bill.

18. Paragraph 59 of the Conclusions of Law appears to show that Petitioner is entitled to service at the 808 Building pursuant to Rule 25-6.105(a), Florida Administrative Code, which provides as follows:

> The following shall not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer:
>
> (a) Delinquency in payment for service by a previous occupant of the premises unless the current applicant or customer occupied the premises at the time the delinquency occurred and the previous customer continues to occupy the premises and such previous customer shall benefit from such service. (Emphases added)

18. Petitioner excepts to all or most of P 60 of the Conclusions of Law which states: The preponderance of the record evidence supports FPL's position. It establishes that: at the time FPL refused Globe's request for service, the 808 account had a past due balance in excess of $2,000; the monies owed were for electric service supplied to the 808 Building during Globe's occupancy of the building; as a director, officer and agent of HDC who had actual knowledge of HDC's administrative dissolution, but nonetheless purported to act on HDC's behalf in his post-dissolution dealings with FPL in connection with the 808

Account, Hemmerle was personally liable, under Section 607.1421(4), Florida Statutes, for payment this debt, and Hemmerle continued to have access to the 808 Building until March of 1995, and thus would have benefited had the electric service requested by Globe been provided. Under such circumstances, FPL was authorized, pursuant to the provisions of Rule 25-6.105(8)(a), Florida Administrative Code, to refuse to provide such services. It is clear that the monies owed for electric service supplied to the 808 Building were in dispute; Said disputed amount was not for electric used during the time that Globe occupied the 808 Building; neither Petitioner or any member of Globe was a director, officer or agent of HDC, nor did any such member have knowledge of HDC's administrative dissolution, or did they purport to act on HDC's behalf in a post-dissolution dealing with FPL in connection with the 808 Account. Absence evidence of fraud or any action inducing reliance upon personal assets of inactive director and officer of corporation, inactive director could not be held liable for contracts made on behalf of corporation by another officer while it was involuntarily dissolved. *See* ***Futch v. Southern Stores, Inc.***. 380 So.2d 444 (1979) certorari denied 379 So.2d 205. It has never been established whether or not Kenneth Hemmerle, Sr. was the contracting party with FPL at any time whatsoever. Although Hemmerle continued to have access to the 808 Building until March of 1995, he did not have access to the office of Globe. Furthermore, he could not have benefited from the electric

service provided to Globe.

19. Petitioner again asserts that the case is controlled by the decision of ***Williams v. City of Mt. Dora***, 452 So.2d 1143 (Fla. 5th DCA 1984). The clear and unambiguous language in ***Williams***, clearly shows that Petitioner is not required to pay for services of a delinquent bill for service previously rendered to some other occupant or owner of a premises as a condition to continuing or reinstating service to the new applicant at the same premises. The ***Williams*** Court regarding the first issue was:

> If a person is not legally liable for payment of a particular delinquent utility bill for services supplied to a certain premises, can the public utility legally refuse to supply service to that person at the same premises until the delinquent bill is paid?

The Court answered that question in the negative, stating:

> Within the geographic territory a public utility has undertaken to serve and concerning which it has the exclusive legal right to provide necessary services, a public utility has a legal duty to provide services on and equal basis to all users who apply for service at reasonable and non-discriminatory rates and deposits. The providing of utility services by a municipality is a private or proprietary function in the exercise of which the municipality is subject to the same legal rules applicable to private corporations. The fact that a municipal utility may enact its rules and regulations as ordinances does not itself give it rights or duties with respect to users any different than those possessed by private utility companies. Because utility service is vested with a public interest, and the public utility by law is given an exclusive monopoly over services vital to the public, users are entitled to equal protection provisions of

> the law and utility service must be provided and administered in all respects fairly, reasonably, and free from opposition and discrimination. A public utility can attach no conditions to its duty to provide services which are unlawful, improper or personal to the user.
>
> In absence of an applicable and valid statute (and none has been cited or asserted in this case) liability for payment for utility services is based on usual contract law. While utility services may be provided at a particular premises it is a particular person, firm, corporation or other legal entity which is legally liable, on the basis of an express or implied contract, for payment of services rendered. To require an applicant for utility service to pay a debt for which the applicant is not legally liable is an impermissible conditions.

The next issue is whether appellant was legally liable on any theory to the city for the utility service represented by the delinquent bill.

> (1) If the utility had alleged and proved that the original account had been opened by appellant, he might be contractually liable for all service rendered to the premises without regard to who consumed, or benefited from the services provided. However, as noted above, the account was not opened by appellant but by Gordon Dake and then it was opened in a fictitious name. Because of the legal problem always created as to the entity, if any, legally liable on the account, it is never good business practice for a creditor to open or maintain an account receivable in a fictitious name.
>
> (2) If the utility had alleged and proved that appellant and Dake were business partners and that Dake was acting on behalf of the partnership in opening the original utility account, appellant may have been liable on that basis.

(3) If the utility had alleged and proved that appellant had actually used, and benefited from, the services supplied his liability on the theory of implied contract (quantum meruit) might have been possible.

(4) If the utility had alleged and proved that, as part of the consideration for the reconveyance of the premises to appellant from McRee, appellant had agreed to assume and pay the electric bill in question, appellant may possibly have been liable to the city as a third party creditor beneficiary.

(5) As noted above, the trial court held appellant personally liable on the basis of the writing he was required to sign to prevent the utility from terminating electric service to the premises. By that agreement appellant agreed "to pay the unpaid utility billing for this account in return for having power transferred to my name on this date." (emphasis supplied) The utility never told appellant, as it should have, that even if service under the existing account was terminated for delinquency, the city, as a public utility, had the duty, upon application by appellant, to open a new account with appellant and to supply him services at the premises on the same basis as to rates and deposits as offered and supplied all other consumers. It is obvious from the facts that appellant was wrongfully coerced to execute the writing and to assume a responsibility for a delinquent account for which it was not shown appellant was legally liable, as a condition to the opening of a new account in his name and that the only consideration he received for his promise was that to which he was already lawfully entitled. Therefore his writing is not binding on him.

FOOTNOTE 1 See generally Annot., "Liability of Premises, or Their Owner or Occupant, for Electricity, Gas, or Water Charges Irrespective of Who is the User," 19 ALR 3d 1227 (1968); 64 Am.Jr.2d, Public Utilities, 60, 67 (1972). Also see section

166.045, Florida Statutes (Ch. 84-292, Laws of Fla., effective June 19, 1994).

FOOTNOTE 2 See, ***e.g., Reid Development Corp. v. Parsippany-Troy hills Twp.***, 10 N.J. 229, 89 A.2d 667 (19523).

WHEREFORE, Petitioner having excepted to the finding and conclusions that would support Respondent position, and the cumulative effect of the argument and case law cited, it is respectfully requested that Recommended Order as submitted be denied, and that the conclusion in ***Williams v. City of Mount Dora*** be followed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U. S. Mail, postage prepaid to: **ROBERT E. STONE, ESQ.**, Post Office Box 029100, Miami, FL 33102; **ROBERT V. ELIAS, ESQ.**, Florida Public Service Commission, Gerald L. Gunter Building, 2540 Shumard Oak Boulevard, Tallahassee, FL 32399-0850, this 12th day of December, 1995.

Matthew Renda

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