BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Complaint of Janet Knauss against FLORIDA POWER AND LIGHT COMPANY regarding Rebilling for Estimated usage of Electricity.	)	DOCKET NO. 910583-EI ORDER NO. PSC-92-0681-FOF-EI ISSUED: 7/21/92

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman
SUSAN F. CLARK
J. TERRY DEASON
BETTY EASLEY
LUIS J. LAUREDO

ORDER DENYING COMPLAINT

BY THE COMMISSION:

After Florida Power and Light Company (FPL) rendered a backbilling in the amount of $5,366.16, including investigative charges, Janet Knauss, through her attorney, filed a complaint with the Commission's Division of Consumer Affairs. An informal conference failed to resolve the dispute and the Commission approved Staff's recommendation that the backbilling was proper. Mrs. Knauss timely requested a Formal Proceeding and the matter was referred to the Division of Administrative Hearings.

On April 30, 1992, the Hearing Officer submitted the Recommended Order to the Commission. The Recommended Order is attached to this Order as Exhibit "A". A full recitation of the facts would be unduly repetitious. In summary, the Hearing Officer found that while attempting to access the meter at the Knauss residence, (which was behind a six foot high privacy fence), an FPL meter reader observed an individual remove an object from a hole in the meter canopy. The meter reader reported his observations to the current diversion department. An FPL investigator inspected the meter which was then removed and service to the residence terminated. The customer was advised that the meter would be tested and a backbilling rendered. The customer was advised that a $500 down payment would be required to reestablish service. Mrs. Knauss paid the down payment and service was restored. FPL rendered a backbilling based on the seasonally adjusted average percentage of usage method, including investigative charges. The Hearing Officer found that the rebilling was reasonable in amount and properly included investigative charges for this intentional current diversion. FPL required as a condition of continuing

service that Mrs. Knauss relocate the meter outside the privacy fence at her expense. The Hearing Officer found that while this condition was reasonable given the intentional nature of the diversion, FPL was without legal authority to require this change.

We find that the sixteen Findings of Fact are made by the Hearing Officer are soundly based on competent substantial evidence of record and are adopted as this agency's Findings of Fact. We believe that the Hearing Officer correctly applied the applicable law concerning a reasonable estimate of the unmetered electricity consumed and the appropriateness of including investigative charges.

The Hearing Officer concluded that while FPL's requirement that the meter be located outside the Petitioner's privacy fence at her expense was reasonable, FPL was without legal authority to order the relocation since it had already reestablished the service. We respectfully disagree. Rule 25-22.032 (9), Florida Administrative Code prohibits a utility from discontinuing service during a consumer complaint proceeding because of an unpaid bill. While FPL did restore service prior to the filing of the complaint, they were under no obligation to do so, absent payment of the full amount. Public policy, as well as the concept of fundamental due process favors keeping the service connected while the matter is pending. Having done more than what the law required, we do not believe FPL or, more importantly, its rate payers (who eventually bear the cost of unmetered electricity) should be estopped from requiring what they clearly had the right to do upon disconnection. Accordingly, we reject the conclusion that FPL cannot require relocation of the meter. All other Conclusions of Law are adopted in full as this agency's Conclusions of Law.

We believe that sixty days is a reasonable period for accomplishing the meter relocation. This will enable Mrs. Knauss to fully consider her appellate rights before having the work performed.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the complaint of Janet Knauss against Florida Power and Light Company is denied. It is further

ORDERED that Janet Knauss shall relocate the electric meter outside the privacy fence at her expense no later than sixty days after the date of this Order. It is further

ORDERED that this docket shall be closed.

By Order of the Florida Public Service Commission this 21st day of July, 1992.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

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by: Kay Flynn
Chief, Bureau of Records

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 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 or sewer 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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANET KNAUSS, Petitioner, vs. FLORIDA POWER AND LIGHT COMPANY, Respondent, and FLORIDA PUBLIC SERVICE COMMISSION, Intervenor.	)	CASE NO. 91-4910

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on January 10, 1992, in West Palm Beach, Florida.

APPEARANCES

For Petitioner: Donald P. Kohl, Esquire
Kohl & Mighdoll Law Offices
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West Palm Beach, Florida 33406

For Respondent: Steven H. Feldman, Esquire
Post Office Box 029100
Miami, Florida 33102-9100

For Intervenor: Robert V. Elias, Esquire
Florida Public Service Commission
Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

STATEMENT OF THE ISSUE

The issue presented is whether Respondent has correctly billed Petitioner in the amount of $5,366.16 for additional electricity consumed and for investigative charges.

PRELIMINARY STATEMENT

Florida Power and Light Company sent Petitioner a bill in the amount of $5,366.16 for unmetered consumption of electricity together with investigative costs incurred by Florida Power and Light Company, and Petitioner filed a complaint with the Florida Public Service Commission. After the Commission issued its Notice of Proposed Agency Action/Order Denying Complaint, Petitioner timely requested a formal hearing regarding that proposed agency action. This matter was thereafter transferred to the Division of Administrative Hearings for the conduct of that formal proceeding.

The Petitioner testified on her own behalf and presented the testimony of Randy Ferrari. The Respondent presented the testimony of Michael O. Menor, Ted Dyk, Emory B. Curry, and Jeffrey L. Stewart. Additionally, Petitioner's Exhibits numbered 1-7 and Respondent's Exhibits numbered 1-6 and 8-16 were admitted in evidence. The Intervenor presented no evidence.

Only the Petitioner and the Respondent submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Electric meter number 2C26657 was installed at 942 Jamaican Drive, West Palm Beach, Florida, in May of 1962. Petitioner has been the customer of record at that address from September 11, 1974, through the present time. As such,

Petitioner has benefitted from the use of electricity at that address.

2. Petitioner's meter is located behind a six-foot wooden privacy fence. The gate is locked from the inside and can be opened only from the inside. Special instructions from the customer pertaining to this account advise the meter reader that there are "three pit bulls--knock first" before reading the meter. Further, laundry, tools, debris, and other obstructions piled in front of the meter have required the meter reader to read the meter from a distance.

3. November 3, 1990, was a Saturday. On that date, Michael Menor, a meter reader employed by Respondent, as part of his regular meter reading route went to Petitioner's home to read the meter. Pursuant to Petitioner's standing instructions, Menor knocked at the front door to gain access to the fenced area. He then proceeded to the fenced area, where the gate was opened for him from the inside. As he approached the meter, Menor saw Petitioner's son remove an object from the top of the meter canopy. Ignoring the obstacles, Menor walked up to the meter and placed his hand on the top of the meter canopy. There was a hole in the top of the meter canopy.

4. Since Menor was unable to contact one of Respondent's current diversion investigators on Saturday, he recorded his observations on a current diversion report and contacted Respondent's investigators on Monday, November 5. Since no meter reader was available to assist the investigator on Monday, he scheduled an appointment with a meter reader to meet him at Petitioner's home on Tuesday, November 6.

5. On Tuesday, investigator Jeffrey Stewart and meter man Ted Dyk met at Petitioner's home, knocked on the front door, and were given access to the fenced area. When they inspected the electric meter, it was clear to both of them that the customer's meter had been physically altered. Their physical inspection revealed that there were heavy black drag marks on the disc, scratches on the meter disc and meter canopy, and a drilled hole in the top of the meter canopy. Heavy drag marks and scratches on the disc indicate that an object was preventing the disc from accurately registering energy consumption on the meter.

6. Since the type of tampering--placing a wire or pin down through the hole which was drilled in the top of the canopy so that the wire or pin slowed the rotation of the disc--required active participation, investigator Stewart determined that Petitioner's electrical service should be disconnected and not be restored until Petitioner made a down payment toward the anticipated rebilling. Pursuant to Stewart's instructions, Dyk removed and replaced the tampered meter with a glass cover and placed a Fort Knox lock on the meter can. Stewart advised Petitioner that service would be restored upon payment by her of $500 toward the amount to be rebilled. Stewart then transported the tampered meter to Respondent's locked storage room for safekeeping. No damage was done to the meter during this process.

7. On Wednesday, November 7, 1990, Petitioner paid the required $500 deposit against the anticipated rebilling. Respondent installed a new meter at her home the following day and re-commenced electrical service for her.

8. Also on November 8 Petitioner's tampered meter was tested by Respondent's employee Emory Curry. Without the object in the meter restricting the movement of the disc, the meter tested accurately and within the tolerances established by the Florida Public Service Commission. Curry's physical inspection of the meter revealed that the inner seal was missing, a hole existed in the meter canopy, dirt and scratches on the top of the meter were visible around the hole, and heavy black drag marks and scratches were on the disc. Curry also concluded that Petitioner's meter had been intentionally tampered with.

9. There are several approved methods for calculating the amount to be rebilled as a result of a tampered meter. If Petitioner's meter had been recording electrical usage by a certain reduced amount, then Petitioner's account could be rebilled by increasing her usage by that same amount. If Petitioner's electrical usage had drastically dropped at a certain point, then her account could be rebilled by utilizing her usage history prior to the point where the usage dramatically dropped. In this case, Petitioner's meter worked accurately without the object in the meter restricting the movement of the disc. Further, a review of Petitioner's account revealed that her kilowatt hour usage history was extremely erratic. Accordingly, neither of those two methods was available to Respondent for recalculating the amount to be billed to Petitioner. Therefore, Respondent backbilled Petitioner's account using the seasonally adjusted average percentage of usage method, another method approved by the Florida Public Service Commission.

10. Respondent used four separate meter readings for calculating the backbilling for Petitioner's account. Three meter readings were taken before the diversion was discovered. Those three readings were selected because they approximate months when no energy consumption manipulation appeared to be present. The fourth reading used in the calculation was an extrapolation from the few days between November 3 (the day the diversion was discovered) and November 6 (the day the tampered meter was removed). It was assumed that the reading for those several days would be accurate because Petitioner would not be likely to tamper with the meter immediately after the diversion was discovered. The meter reading for each month was then divided by an average percentage of usage figure, which then yielded a total yearly usage figure. To be as fair as possible, Respondent used the average of the four yearly usage calculations as the final figure to calculate the number of kilowatt hours to be rebilled.

11. Average percentage of usage figures are based upon seasonal costs developed from average residential usage in the geographical area where the customer is served. Respondent, by month, determines average billed residential kilowatt hour usage within the calendar year. This estimating formula is sensitive to, and takes into account, normal heating and cooling demands of the average residential customer.

12. The as-billed (previously billed) amount was then subtracted from the computer-generated rebilled amount to determine the amount to backbill. The rebilled amount was

determined by a computer program which takes into account the varying franchise fees, fuel adjustment rates, taxes, and other rates in effect for each month of the rebilled period. Based upon that computer program, Respondent backbilled Petitioner for an additional 63,575 kilowatt hours consumed.

13. The amount rebilled for an estimated unmetered 63,575 kilowatt hours was $5,095.78. The rebilled period was from January of 1985 (the earliest billing date for which Respondent had retained records) through November 6, 1990, the date on which the tampered meter was removed. Respondent rebilled from its earliest retained billing records because it appeared that electric current had been diverted throughout the record retention period based upon Petitioner's erratic usage history. Further, a comparison of Petitioner's kilowatt hour consumption after the tampered meter was discovered (November 3, 1990) and prior to the removal of the tampered meter (November 6, 1990) with past bills showed that Petitioner's electric consumption significantly increased during those few days. From November 3 to November 6 Petitioner used 305 kilowatt hours, an amount greater than the amount used during entire months according to Petitioner's kilowatt hour history.

14. In addition to the usage rebilling, investigative costs totalling $270.38 were billed because the type of diversion was an ongoing one that required active participation and knowledge of the diversion by someone at the residence.

15. Respondent properly backbilled Petitioner in the total amount of $5,366.16. The methodology utilized by

Respondent for calculating Petitioner's rebilling was a reasonable estimate for the unregistered electrical consumption due to the meter tampering. Although there was a method of calculation available to Respondent which would have resulted in a higher rebilling, Respondent chose not to use that method.

16. Considering the intentional nature of the type of diversion involved in this cause, the inside-latched privacy fence, the dogs, the cluttered back yard, and the need to "knock first" before gaining access to read the meter, it is reasonable that Petitioner be ordered to relocate the meter outside the privacy fence. Respondent has agreed to provide an overhead service drop to the meter can at no charge. However, Petitioner would be responsible for the cost associated with the relocation of her electrical service.

CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

Section 366.03, Florida Statutes, provides, in part, that "No public utility shall make or give any undue or unreasonable preference . . . to any person. . . ." In the case of Corp. De Gestion Ste-Foy, Inc. v. Florida Power & Light Co., 385 So.2d 124 (Fla. 3rd Dist. 1980), this statute was interpreted to mean that a public utility shall charge the same rates to all customers, that a public utility is required to collect undercharges from established rates even if the undercharges result from the public utility's own negligence, and that the

customer of a power company has no defense to charges for electricity which was actually furnished but which had previously been underbilled.

The Florida Public Service Commission has promulgated rules which govern this situation. Rule 25-6.104, Florida Administrative Code, provides that "In the event of . . . meter tampering, the utility may bill the customer on a reasonable estimate of the energy used." This Rule does not consider the guilt or innocence of the party who may be benefiting from the meter tampering. It does, however, authorize Florida Power and Light Company to recover lost revenues using a reasonable estimate when a tampering condition has been identified. Further, the one-year limitation on backbilling for undercharges does not apply in the case of meter tampering. Rule 25-6.106(1), Florida Administrative Code. Finally, Original Sheet No. 6.061, Section 8.3, of Respondent's approved tariff authorizes Respondent to discontinue service, to adjust prior bills for services rendered due to meter tampering, and to obtain reimbursement for all extra expenses incurred.

Respondent presented competent, substantial evidence to show that Petitioner's meter had been tampered. A visual inspection alone was sufficient to reveal that the meter had been tampered. Further, Respondent properly tested the meter in accordance with the rules of the Florida Public Service Commission. Petitioner's meter registered accurately and within the tolerances specified for a properly functioning meter required by Rule 25-6.052(1), Florida Administrative Code, when

there was no wire or pin inserted through the hole in the canopy to slow or stop the disc.

Respondent used a reasonable methodology for computing the amount of energy which had been consumed by Petitioner's household for which Petitioner had not been billed. The seasonally adjusted average percentage of usage method utilized by Respondent has been approved by the Florida Public Service Commission. Although other methods also have been approved, two of those methods were not available to Respondent in this case due to the accuracy of the meter when it was not being tampered with and due to Petitioner's erratic usage history. Lastly, Respondent could have used a different method of calculating which would have resulted in a higher backbilling to Petitioner but chose not to use that method.

Petitioner contends that no tampering occurred during the time she was the customer of record. Petitioner's contention has been rejected in this Recommended Order. Petitioner also contends that Respondent has distorted the amount of unbilled electricity utilized by her by selecting months with the highest consumption in calculating the backbilling. However, Respondent's choice of those months is reasonable since those months, being higher, were likely to represent months with little or no manipulation of Petitioner's meter. Petitioner further contends that Respondent failed to consider that her erratic kilowatt usage history resulted from Respondent's frequent use of estimated billings. However, Petitioner failed to present competent or substantial evidence in support of that allegation.

Next, Petitioner has suggested a different methodology for calculation of the amount of backbilling. However, no evidence was offered that Petitioner's proposed methodology has been approved by the Florida Public Service Commission, and no competent evidence was presented that Petitioner's proposed methodology is a reasonable method for estimating the electrical usage. Lastly, Petitioner argues that her electric bills for 1991 were much lower than the amount rebilled by Respondent for the period of January 1985 through November 6, 1990, and, therefore, Respondent's rebilling is clearly excessive. Petitioner's lower bills in 1991 can be the result of a number of different factors and does not, therefore, prove that Respondent's rebilling is excessive.

Respondent's recommendation that Petitioner be required to relocate her electric meter to outside the privacy fence at her own expense is reasonable since Petitioner's instructions allow Respondent to gain access to the meter only when Petitioner permits such access and since Petitioner has maintained the area around the meter so as to prevent easy access to the meter by Respondent's employees. However, Respondent has cited no legal authority for imposing such a condition. Rule 25-6.105, Florida Administrative Code, does provide that a public utility may impose conditions prior to restoring service when service has been disconnected for specified reasons. In the case at bar, service was restored to Petitioner without the imposition of conditions relating to the location of the meter. In the absence of any legal authority requiring Petitioner to relocate

her electrical service at this time, Respondent's recommendation must be rejected. It is noted that Section 8.1 of the Sixth Revised Sheet No. 6.060 of Respondent's tariff, admitted in evidence in this cause, does provide that Respondent will determine the location of meters and will install and properly maintain them at its own expense, while the customer is required to keep the meter location clear of obstructions at all times in order that the meter may be read, maintained, or replaced.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered finding that Respondent has correctly backbilled Petitioner in the amount of $5,366.16 for investigative costs and for additional electricity consumed between January of 1985 and November 6, 1990, with Petitioner being given credit for her $500 payment toward the backbilled amount.

DONE and ENTERED this 30th day of April, 1992, at Tallahassee, Florida.

Linda M. Rigot

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675 SC 278-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of April, 1992.

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 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.

Copies furnished:

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APPENDIX TO RECOMMENDED ORDER
DOAH CASE NO. 91-4910

1. Petitioner's proposed findings of fact numbered 4-10 and 13 have been adopted either verbatim or in substance in this Recommended Order.

2. Petitioner's proposed finding of fact numbered 1 has been rejected as being unnecessary to the issues involved herein.

3. Petitioner's proposed findings of fact numbered 2 and 11 have been rejected as not being supported by the weight of the competent evidence in this cause.

4. Petitioner's proposed findings of fact numbered 3, 12, and 14-17 are rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

5. Respondent's proposed findings of fact numbered 1-18 have been adopted either verbatim or in substance in this Recommended Order.