

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities Services, Inc., on behalf of Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., Target Stores, Inc., and Southeastern Utilities Services, Inc., against Florida Power and Light Company concerning thermal demand meter error.)

Docket No.: 030623
Filed: October 4, 2004

**CUSTOMERS' MOTION FOR RECONSIDERATION
OF ORDER NO. PSC-04-0932-PCO-EI**

Customers, pursuant to Rule 25-22.0376, Florida Administrative Code, hereby request reconsideration of Order No. PSC-04-0932-PCO-EI (the "Order") issued on September 22, 2004, by the Prehearing Officer. The factual and legal grounds for this Motion are as follows:

1. On August 24, 2004, Customers filed their Motion for Leave to Inspect Meters.
2. The discovery deadline in this docket, as established in the June 9, 2004, Order Establishing Procedure, Order No. PSC-0581-PCO-EI, was September 14, 2004.
3. On September 22, 2004, the Prehearing Officer issued Order No. PSC-04-0591-PCO-EI denying Customers' Motion for Leave to Inspect Meters.
4. The purpose of a motion for reconsideration is to bring to the Commission's attention a point of fact or law which was misapprehended or overlooked by, in this case, the Prehearing Officer. Diamond Cab Company v. King, 146 So. 2d 889 (Fla. 1962).

5. Pursuant to Rule 28-106.206, F.A.C., and the Order Establishing Procedure, discovery in this docket has been conducted pursuant to the Florida Rules of

Civil Procedure, Rules 1.280 through 1.400, as modified by the Order Establishing Procedure. For discovery purposes, the Prehearing Officer is authorized by Rule 28-106.206 to “issue appropriate orders to effectuate the purposes of discovery and to prevent delay” Regarding discovery, the Prehearing Officer serves a role similar to a trial or administrative law judge.

6. In this capacity, the Prehearing Officer possesses broad discretion in overseeing discovery and should accomplish discovery in the most expeditious and practical way possible so that resources are burdened the least. See Rojas v. Ryder Truck Rental, 641 So. 2d 855, 857 (Fla. 1994) (recognizing the broad discretion of a trial judge to accomplish discovery in a manner not strictly in compliance with Rule 1.350, Florida Rules of Civil Procedure).

7. In the Order, the Prehearing Officer questions whether Customers’ Motion to Inspect is the correct vehicle to obtain the requested discovery. (Order, p. 3). This is apparently one reason the Prehearing Officer denied Customers’ Motion. Exhibit A to Customers’ Motion is a letter from FPL’s counsel to Customers’ counsel. In this letter, it is abundantly clear that, absent an order from the Commission, FPL will not allow the requested inspection. Therefore, to avoid the delay, expense, and waste of resources associated with filing a Motion for Entry Upon Land under Rule 1.350, then a Motion to Compel under Rule 1.380, Customers filed their Motion to Inspect. Customers respectfully submit that the Prehearing Officer has the discretion to allow this discovery as the most expeditious and practical way to obtain the desired discovery while imposing the least burden on resources. See Id.

8. The Prehearing Officer also finds that denial of this Motion is proper because “although Customers broached the subject of inspecting these meters with FPL prior to filing testimony, Customers waited to formally pursue this matter until a point at which Customers can no longer present the results of any meter inspections as part of their direct or rebuttal case.” (Order, p. 3) Customers submit that the proper question is whether the requested discovery is relevant and proper under Rule 1.280. If so, then FPL would have had no basis to refuse such discovery in July 2004. To now deny discovery to Customers on this basis has the effect of rewarding FPL for delaying allowable discovery. Customers further submit that the opportunity to present information obtained from this discovery may arise through cross-examination or redirect testimony at hearing. Therefore, this discovery should not be denied simply because it could not be obtained until after the deadline for pre-filing testimony.¹

9. Finally, the Prehearing Officer finds that FPL’s concern about protecting the “integrity” of the meters constitutes a basis for denying Customers’ Motion. Customers respectfully submit that the Prehearing Officer may have overlooked Exhibit B to its Motion that details the inspections that Customers seek to make. These inspections can be made simply by removing the meter cover. Removing the meter cover does not disturb the integrity of the meter - in fact, it is a required step in FPL’s procedure if calibration of these meters is required. None of the requested inspections would have any meaningful impact on the future testing of the meters, and Customers

¹ Customers note that the Order Establishing Procedure sets a July 12, 2004, date for prefiled direct testimony, and a discovery cut-off of September 14, 2004. The Order Establishing Procedure does not, in any way, limit or restrict the discovery that may be conducted following the cut-off for prefiled testimony but prior to the discovery cut-off.

would gladly waive any right to object to the validity of future Commission ordered testing based on the inspections sought to be conducted.

10. Moreover, this basis for denial implicates the fundamental fairness of this proceeding. FPL has consistently argued that Customers have the burden of proof with regard to establishing entitlement to refunds longer than twelve months. Further, FPL has asserted that it is not possible to determine a specific point in time where over-registration began because these meters have gradually, over time, come to over-register demand. FPL supports its position with the argument (and speculation) that changes to the physical characteristics of meter components causes this gradual over-registration. Customers simply seek the opportunity to conduct the limited inspection outlined in Exhibit B to ascertain whether, in fact, there is any validity to FPL's position. It is fundamentally unfair to allow FPL to postulate a theory of defense and then deny Customers discovery that could either prove, or disprove, this defense.

11. Finally, Customers' Motion also requests that the Commission order FPL to produce these meters at hearing. Producing these meters at hearing will not disturb the "integrity" of the meters and will provide the Commission with relevant, and informative evidence regarding this dispute.

WHEREFORE, for the foregoing reasons, Customers respectfully requests reconsideration of Order No. PSC-04-0932-PCO-EI, and that Customers' Motion for Leave to Inspect Meters be granted, or alternatively, that FPL be ordered to produce the meters in this docket at hearing.



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CERTIFICATE OF SERVICE

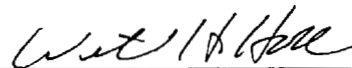
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 4th day of October, 2004.

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