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October 11, 2004

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Boulevard, Room 110
Tallahassee, FL 32399-0850

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Re: Docket No. 030623-EI

Dear Ms. Bayó:

Enclosed for filing on behalf of Florida Power & Light Company ("FPL") are an original and fifteen copies of:

1. FPL's Response in Opposition to Customers' Motion for Reconsideration of Order No. PSC-04-0932-PCO-EI 10957-04

2. FPL's Response in Opposition to Customers' Motion for Reconsideration of Order No. PSC-04-0934-PCO-EI 10958-04

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Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Please contact me if you have questions regarding this filing.

Thank you for your assistance with this filing.

Sincerely,

[Handwritten signature of Kenneth A. Hoffman]

Kenneth A. Hoffman

KAH/rd
Enclosures

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10957 OCT 11 04

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Complaints by Southeastern Utility Services,
Inc. on behalf of various customers, against)
Florida Power & Light Company concerning)
thermal demand meter error)

Docket No. 030623-EI

Filed: October 11, 2004

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE IN OPPOSITION TO
CUSTOMERS' MOTION FOR RECONSIDERATION OF
ORDER NO. PSC-04-0932-PCO-EI**

Florida Power and Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 25-22.0376(2), Florida Administrative Code, hereby files its Response in Opposition to Customers' Motion for Reconsideration of Order No. PSC-04-0932-PCO-EI, and states as follows:

1. The purpose of a motion for reconsideration is to identify a point of fact or law which was overlooked or which the Prehearing Officer failed to consider in rendering his order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So.2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So.2d 162 (Fla. 1st DCA 1981). A motion for reconsideration is not an appropriate vehicle to reargue matters that have already been considered by the Prehearing Officer. Sherwood v. State, 111 So.2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). Nor should a motion for reconsideration be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, 294 So.2d at 317.

2. Customers' Motion for Reconsideration should be denied as it fails to meet the standard for reconsideration outlined under Florida law.

3. The Customers pay lip service to the purpose of a motion for reconsideration¹ yet fail to bring to the Commission's attention the required point of fact or law which the Prehearing Officer allegedly misapprehended or overlooked. Instead, Customers attempt new arguments in the hope of persuading the Commission to reconsider and reverse the Prehearing Officer. This tactic, however, is expressly prohibited by Commission precedent which confirms that a motion for reconsideration may not be used as a vehicle to raise new arguments.²

4. In the Order, the Prehearing Officer noted that Customers failed to seek inspection of the meters through the proper procedural channel - - Rule 1.350, Florida Rules of Civil Procedure. In their Motion for Reconsideration, Customers do not question the correctness of the Order in addressing this issue. Instead, Customers now claim that it was necessary to file a "Motion to Inspect". . . "to avoid the delay, expense, and waste of resources associated with filing" a motion under Rule 1.350, Florida Rules of Civil Procedure.³ Customers' new contention is not a justification for failing to follow the Florida Rules of Civil Procedure applicable to discovery in Commission proceedings.

5. The Prehearing Officer found the Customers' lack of diligence to be particularly pertinent in view of Customers' stated purpose for seeking inspection of the meters. The Customers requested FPL to allow inspection of the meters to assist in the presentation of their direct case in their prefiled direct testimony.⁴ As confirmed in FPL counsel's letter dated July 7, 2004, to counsel

¹See Customers' Motion for Reconsideration, at paragraph 4.

²See, e.g., Order No. PSC-92-0132-FOF-TL issued March 31, 1992

³See Customers' Motion for Reconsideration, at paragraph 7.

⁴See Exhibit A to FPL's Response to Customers' Motion for Leave to Inspect Meters.

for Customers, FPL made it clear to Customers that because the meters at issue were the subject of a pending docket, it was imperative to maintain the integrity of the meters in the event further action was ordered by the Commission with respect to these meters. FPL counsel's letter also addressed the ambiguity in the Customers' request for "access" to the meters and requested Customers' counsel to provide specific details of requested actions, examinations and/or tests so that FPL would have the opportunity to respond to the specific requests and the Prehearing Officer could address and resolve these issues and preserve the integrity of the meters subject to this proceeding.⁵ As noted by the Prehearing Officer in the Order, Customers did nothing following the July 7 letter until the filing of their Motion for Leave to Inspect Meters on August 24 - - well after the time for the filing of prefiled direct and rebuttal testimony. These facts confirm, if nothing else, the lack of significance that Customers truly attached to access or inspection of these meters as Customers were content to allow the significant passage of time and forego the opportunity to file testimony on this so called "fundamental" issue.⁶

6. In denying Customers' Motion, the Prehearing Officer stated that "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."⁷ Customers' empty attempt to find fault with FPL for their own lack of diligence⁸ provides no basis for reconsideration. Finally,

⁵See July 7, 2004, letter attached as Exhibit A to Customers' Motion for Leave to Inspect Meters.

⁶See Customers' Motion for Reconsideration, at par. 10.

⁷Order, at 3.

⁸See Customers' Motion for Reconsideration, at paragraph 8 ("To now deny discovery to Customers on this basis has the effect of rewarding FPL for delaying allowable discovery.").

Customers' new argument raised in their Motion for Reconsideration, their request for access to or inspection of the meters at issue for potential cross-examination or redirect at the hearing, is speculative at best and, at worst, directly inconsistent with Customers' originally stated purpose for seeking access to the meters in this docket. Further, Customers' new argument is not a point of fact or law that was overlooked in the Prehearing Officer's Order and, thus, is not grounds for granting Customers' Motion.

7. The Customers now also contend, for the first time on reconsideration, that they should be allowed the opportunity to test a "defense" raised by FPL that "these meters have gradually, over time, come to over-register demand."⁹ FPL's position is that changes to the physical characteristics of the many components in these meters can cause gradual over-registration. Customers have already acknowledged this fact. Customers have never demonstrated that the inspections they sought would be sufficient to show that a particular component had not sustained a change in characteristic that could cause over-registration. Customers' attempt to imply such a conclusion is unsupported and provides no basis for concluding that the Prehearing Officer misapprehended or overlooked any fact in denying Customers' Motion.

8. In denying Customers' Motion, the Prehearing Officer also determined that:

FPL's concerns over maintaining the integrity of these meters are reasonable and justifiable concerns....Given the lateness of Customers' motion in this proceeding...I believe it would unduly burden FPL to require it to spend its time overseeing inspection of these meters to ensure that the integrity of the meters is not compromised.¹⁰

⁹Customers' Motion for Reconsideration, at paragraph 10.

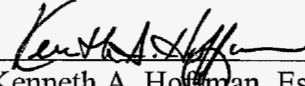
¹⁰Order, at 3.

Customers offer no point of law or fact on this point originally presented in their Motion that was misapprehended or overlooked by the Prehearing Officer. Their new contention that all of the inspections requested in Exhibit B to their Motion can be accomplished without disturbing the integrity of the meters is incorrect as reflected in FPL's Response to Customers' Motion. Similarly, their contention that none of these inspections would impact the future testing of the meters is also incorrect. Finally, the Prehearing Officer properly and correctly denied Customers' Motion for Leave to Inspect Meters. The discovery cut-off date was September 14, and Customers should not benefit from the last-minute postponement of the September 23 final hearing that resulted from Dillard's filing a Motion for Disqualification of the Commission and a subsequent Petition for Writ of Prohibition which was denied by the First District Court of Appeal.

9. Finally, Customers note that their Motion requested the Commission to order FPL to produce the meters at hearing. The Prehearing Officer failed to grant this request and Customers have offered no point of fact or law overlooked by the Prehearing Officer in connection with this request.

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Commission deny Customers' Motion for Reconsideration of Order No. PSC-04-0932-PCO-EI.

Respectfully submitted,


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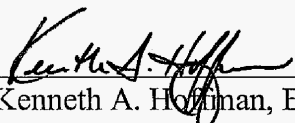
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Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Florida Power & Light Company's Response in Opposition to Customers' Motion for Reconsideration of Order No. PSC-04-0932-PCO-EI has been furnished by United States Mail this 11th day of October 2004 to the following:

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