

## BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mr. Arturo Taboada )	DOCKET NO. 900643-EI
against FLORIDA POWER & LIGHT COMPANY )	ORDER NO. 25330
regarding backbilling of estimated )	ISSUED: 11/13/91
usage of electricity )	
_____ )	

The following Commissioners participated in the disposition of this matter:

THOMAS M. BEARD, Chairman  
 SUSAN F. CLARK  
 J. TERRY DEASON  
 BETTY EASLEY  
 MICHAEL MCK. WILSON

ORDER AFFIRMING BACKBILLING

BY THE COMMISSION:

After Florida Power and Light Company (FPL) rendered a backbilling in the amount of \$5,070.51, Arturo Taboada 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. Mr. Taboada requested a Formal Proceeding and the matter was referred to the Division of Administrative Hearings. The hearing was held in Miami, Florida on April 16, 1991.

On July 22, 1991 the Hearing Officer submitted the Recommended Order to the Commission. This Order is attached to this Recommendation as "Exhibit A". The Recommended Order includes 14 specific findings of fact concerning the condition of the meter (tampered) and the propriety of FPL's backbilling (a reasonable estimate of the electricity used but not billed during the relevant period). The Hearing Officer concluded that FPL had complied with all applicable statutes, rules and tariff provisions in rendering the backbilling.

On August 5, 1991 Mr. Taboada filed with the Commission a document titled "Objection of Petitioner Mr. Arturo Taboada on the recommendation of Ms. Linda M. Rigot, Hearing Officer dated July 22, 1991." We are treating this document as timely filed exceptions to the Recommended Order.

After review of the record, including the Recommended Order, we find that the Findings of Fact are supported by competent

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substantial evidence. Accordingly, the Hearing Officer's Findings of Fact are adopted in full as the Public Service Commission's Findings of Fact.

We find that the Hearing Officer correctly applied the law concerning the prohibition against a utility from giving any undue preference and requiring a utility to render a backbilling in the event it discovers it has underbilled a customer. The Hearing Officer correctly interpreted the Commission's rules concerning a "reasonable estimate" of the energy used and the proper backbilling time frame in the event of a tampered meter. Accordingly, the Hearing Officer's Conclusions of Law are adopted in full as the Public Service Commission's Conclusions of Law.

Petitioner submitted a seven page post recommended order filing which we have chosen to treat as exceptions. The essence of Mr. Taboada's exceptions is that since FPL no longer has the actual meter, no fair independent test of the meter could be made, and therefore no determination as to whether or not any electricity had been used without being metered. The record contains competent substantial evidence including:

- a) the testimony of the meter reader who discovered the tampered meter;
- b) the meter reader's report;
- c) the testimony of the meter tester; and
- d) the meter tester's report

to support the assertion that the meter in question had been tampered with and was only registering 33.1% of the actual consumption. Petitioner presented no evidence in contravention of the testimony/reports of the meter reader/tester. Petitioner's protests amount to nothing more than reargument of factual determinations that were resolved contrary to his position by the Hearing Officer. In an administrative proceeding it is permissible to use reports and testimony to establish the condition of the meter. Accordingly:

Petitioner's exception labelled as Section 1 in his post Recommended Order filing is rejected, as the record contains competent substantial evidence to support the Finding made by the Hearing Officer, which was contrary to the position of the Petitioner;

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Petitioner's exception labelled as Section 2 in his post Recommended Order filing is rejected, as the record contains competent substantial evidence to support the Finding made by the Hearing Officer, which was contrary to the position of the Petitioner;

Petitioner's exception labelled as Section 3 in his post Recommended Order filing is rejected, as the record contains competent substantial evidence to support the Finding made by the Hearing Officer, which was contrary to the position of the Petitioner; and

Petitioner's exception labelled as Section 4 in his post Recommended Order filing is rejected, as the record contains competent substantial evidence to support the Finding made by the Hearing Officer, which was contrary to the position of the Petitioner.

We recognize that the meter is the best evidence of a tampering condition, and due care should be taken in all instances to assure the proper handling, chain of custody and preservation of the meter in all meter tampering/current diversion cases. FPL must establish procedures to assure that tampered meters are preserved as evidence until the disposition of any consumer complaint or criminal prosecution.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Hearing Officer's Findings of Fact are adopted in full as this agency's Findings of Fact. It is further

ORDERED that the Hearing Officer's Conclusions of Law are adopted in full as this agency's Conclusion's of Law. It is further

ORDERED that the complaint of Arturo Taboada against Florida Power and Light Company regarding the backbilling of estimated usage of electricity is DENIED. It is further

ORDERED that the backbilling in the amount of \$5,070.51 by Florida Power and Light Company for estimated usage of electricity is AFFIRMED. It is further

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ORDERED that Florida Power and Light Company shall develop procedures to assure that tampered meters are preserved as evidence until the disposition of any consumer complaint or criminal prosecution. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission, this 13th  
day of NOVEMBER, 1991.

\_\_\_\_\_  
STEVE TRIBBLE, Director  
Division of Records and Reporting

( S E A L )

RVE

9006430.RVE

by: Kay Flynn  
Chief, Bureau of Records

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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.

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STATE OF FLORIDA  
 DIVISION OF ADMINISTRATIVE HEARINGS

ARTURO TABOADA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91-0331
	)	
FLORIDA POWER & LIGHT COMPANY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
FLORIDA PUBLIC SERVICE COMMISSION,	)	
	)	
Intervenor.	)	
	)	

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on April 16, 1991, in Miami, Florida.

APPEARANCES

For Petitioner:	Mr. Arturo Taboada, <u>pro se</u> 981 S.W. 137th Court Miami, Florida 33184
For Respondent:	Steve Feldman, Esquire Florida Power & Light Company Post Office Box 029100 Miami, Florida 33102-9100
For Intervenor:	Robert V. Elias, Esquire Florida Public Service Commission 101 East Gaines Street Fletcher Building - Room 226 Tallahassee, Florida 32399

ISSUE PRESENTED

The issue presented is whether Respondent has correctly billed Petitioner in the amount of \$5,070.51 for additional



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2. Petitioner connected electrical service at that address on March 18, 1977, when he, his wife, and his daughter moved into a mobile home located at that address. They continued to reside there until approximately January 31, 1987. Petitioner was the customer of record during that time period and benefitted from the use of electricity at that address.

3. On September 30, 1986, Kevin Burke, a meter man employed by Respondent, inspected meter #5C50349 at Petitioner's residence. His physical inspection revealed that there were drag marks on the meter disc and that the disc had been lowered. Drag marks and a lowered disc indicate that energy consumption is not being accurately registered on the meter. In addition, the customer's air conditioner was on, but the disc was not rotating.

4. It was clear to Burke that the customer's meter had been physically altered. He replaced the tampered meter with a new meter on that same date. He carefully positioned the tampered meter in a foam-bottom meter can container and transported it to Respondent's storage room for safekeeping. The physical alterations to the meter were not, and could not have been, caused by improper handling by Burke.

5. On November 18, 1986, Petitioner's tampered meter was tested by Respondent's employee Emory Curry. He performed a physical inspection of the meter which revealed that the inner canopy seal had possibly been glued back together, the bearings had been tampered with, the disc had been lowered, and drag marks appeared on the bottom of the disc.



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6. Curry then performed a watt-hour test. The full load portion of the test registered only 41.4%, and the light load registered 0. Each test should have resulted in a reading of 100%, plus or minus 2%. The mathematical weighted average for Petitioner's meter was 33.1%. This means that only 33.1% of the electricity actually used in the Taboada household was being recorded on the meter. In effect, Petitioner was not being charged for 66.9% of the energy being consumed at the household.

7. Respondent verifies the accuracy of its watt-hour test weekly in accordance with industry standards. The watt-hour test has been sanctioned by the Florida Public Service Commission.

8. A veri-board test was also performed on the meter. The results of that test were 20 over 8. This means that Petitioner's meter was only registering 8 kw when 20 kw was placed on the meter. The meter should have registered 20 kw.

9. Using the weighted average registration of 33.1% from the meter test card, Respondent backbilled Petitioner's account for the 66.9% of the energy consumed that the meter was not registering. The as-billed amount was 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 61,379 kilowatt hours consumed. Respondent's methodology for

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calculating rebillings is a reasonable estimate for determining the amount of energy consumed where there has been meter tampering.

10. Petitioner's account was backbilled \$5,070.51 from January, 1983, to September 30, 1986, the date on which the new meter was set. The January, 1983, date was selected because Respondent had not retained Petitioner's billing records prior to January, 1983.

11. Since Respondent's investigation did not determine whether Petitioner physically altered the meter or whether it was altered by someone else, Respondent treated Petitioner's account as an inherited diversion. Accordingly, Respondent seeks no relief from Petitioner other than payment for the estimated electrical usage.

12. A comparison of Petitioner's bills after the new meter was set on September 30, 1986, with past bills shows that Petitioner's electric consumption almost doubled. Since electrical usage varies throughout the year, a comparison is done by comparing the same month for consecutive years. For example, January bills are compared to January bills, and February bills are compared to other February bills. A valid comparison cannot be done by comparing November to December and December to January.

13. In response to Petitioner's complaint that his tampered meter had been accurate but the new replacement meter was running fast, Respondent removed the replacement meter, replacing it with yet another. The replacement meter was then tested by Respondent and was determined to be 100% accurate.

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14. Although Petitioner had some gas appliances, the electrical appliances which existed in his mobile home were capable of consuming the kilowatt hours per month which were rebilled by Respondent.

#### CONCLUSIONS OF LAW

The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. 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 &

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Light Company to recover lost revenues using a reasonable estimate when a tampering condition has been identified. The methodology used by Respondent to calculate the amount to be rebilled to Petitioner is a reasonable estimate of the amount of energy consumed by Petitioner. 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 adjust prior bills for services rendered due to meter tampering.

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 and the manufacturer's instructions. The tampered meter registered a weighted average of 33.1% of the electricity consumed, which is well below the 98% weighted average standard for a properly functioning meter required by Rule 25-6.052(1), Florida Administrative Code.

Respondent used a reasonable methodology for computing the amount of energy which had been consumed at Petitioner's household for which Petitioner had not been billed. Since Respondent had not retained records prior to January of 1983, it was unable to determine when the tampering occurred. It therefore assumed that Petitioner had inherited the tampered meter and limited the relief it sought against Petitioner to the undercharged amount only and only back to January of 1983.

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Further, in pursuing its claim against Petitioner, Respondent noted that Petitioner's energy consumption increased when his tampered meter was replaced with a new meter. In response to Petitioner's claim that his tampered meter was correct and that his new meter was running fast, Respondent removed the new meter and tested it. Those test results indicated that the new meter was accurately registering the amount of electricity being consumed. Respondent also verified that the amount of electrical equipment contained in Petitioner's mobile home was sufficient to use the amount of energy for which Respondent is seeking payment.

Petitioner contends that Respondent has made a mistake, that the alterations to his meter occurred after the meter was removed from his residence, that he did not have sufficient electrical equipment at home to justify Respondent's billing, and that Respondent's testing was incomplete. Petitioner presented no competent evidence in support of his allegations, and Respondent has presented competent, substantial evidence to clearly refute Petitioner's allegations. Respondent tested Petitioner's meter and calculated his rebilling in accordance with Florida Statutes, the Rules of the Florida Public Service Commission, and Respondent's approved tariff regarding tampered meters, and Petitioner has presented no competent evidence to the contrary.

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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 \$5,070.51 for additional electricity consumed between January of 1983 and September 30, 1986.

DONE and ENTERED this 22<sup>nd</sup> day of July, 1991, 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

Filed with the Clerk of the Division of Administrative Hearings this 22<sup>nd</sup> day of July, 1991.

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:  
See next page

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Copies furnished:

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APPENDIX TO RECOMMENDED ORDER  
DOAH CASE NO. 91-0331

1. Petitioner's proposals labeled introduction and evidence #3 have been rejected as not being supported by the weight of the evidence in this cause.
2. Petitioner's proposal labeled evidence #1 has been rejected as not being supported by any evidence in this cause.
3. Petitioner's proposal labeled evidence #2 has been rejected as not constituting a finding of fact but rather as constituting argument.
4. Petitioner's proposal labeled evidence #4 has been rejected as being unnecessary for determination of the issues herein.
5. Respondent's proposed findings of fact numbered 1-19 and 22 have been adopted either verbatim or in substance in this Recommended Order.
6. Respondent's proposed findings of fact numbered 20 and 21 have been rejected as being unnecessary for determination of the issues herein.
7. Respondent's proposed findings of fact numbered 23 and 24 have been rejected as not constituting findings of fact but rather as constituting conclusions of law or argument of counsel.

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