

BEFORE THE PUBLIC SERVICE COMMISSION

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

DOCKET NO. 030623-EI
ORDER NO. PSC-04-0922-PCO-EI
ISSUED: September 21, 2004

ORDER GRANTING IN PART AND DENYING IN PART
MOTION TO COMPEL

On January 14, 2004, Florida Power & Light Company ("FPL") propounded its First Set of Requests for Admissions (Nos. 1-8) and its First Set of Requests for Production of Documents (Nos. 1-12) in this docket to Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. ("Customers"). On February 14, 2004, Customers filed their Objections and Responses to both sets of FPL's discovery.

FPL filed a motion to compel answers to specified portions of these sets of discovery on February 27, 2004. Customers responded to the motion to compel on March 15, 2004. On March 19, 2004, FPL filed a motion to strike the customers' response as untimely. Customers responded to the motion to strike on March 29, 2004. This Order addresses FPL's motion to compel and its motion to strike.

FPL's Motion to Strike

In its motion to strike, FPL asserts that Customers' response to its motion to compel was required to be filed no later than March 10, 2004 - twelve days after its motion was served on Customers by U.S. Mail - pursuant to Rules 28-106.103 and 28-106.204, Florida Administrative Code. Instead, Customers' response was filed five days beyond this deadline.

In response, Customers' assert that their response was timely filed pursuant to the Florida Rules of Civil Procedure governing discovery. Customers note that Rule 28-106.206, Florida Administrative Code, adopts the Florida Rules of Civil Procedure governing discovery to apply in formal administrative proceedings. Further, Customers assert that FPL will suffer no prejudice if the Commission considers Customers' response to the motion to compel.

In reviewing these pleadings, I note that Customers have not cited which of the Florida Rules of Civil Procedure governing discovery supports its actions by authorizing a longer response time than that provided in Rules 28-106.103 and 28-106.204, Florida Administrative Code. Indeed, the Florida Rules of Civil Procedure governing discovery that apply to formal administrative proceedings (Rules 1.280 through 1.400) do not appear to establish any time frame for responses to motions to compel made pursuant to those rules. Accordingly, I find that

DOCUMENT NUMBER-DATE

10139 SEP 21 04

FPSC-COMMISSION CLERK

Customers response to FPL's motion to compel was untimely pursuant to Rules 28-106.103 and 28-106.204, Florida Administrative Code. Customers' response is therefore stricken. However, Customers' Objections and Responses will be considered in addressing the motion to compel.

FPL's Motion to Compel

In its motion to compel, FPL asks that Customers be compelled to respond to Requests for Admissions Nos. 1-7 and Requests for Production of Documents No. 4 and 6. Rather than restate in this Order each request and the parties' arguments concerning each request, FPL's motion, which states each request in dispute and restates Customers' objections to each such request, is attached hereto for reference and is incorporated herein. My findings concerning each discovery request are set forth below.

Requests for Admissions Nos. 1-3, 5, and 7

FPL's motion to compel is denied as to Requests for Admissions Nos. 1-3, 5, and 7. While these requests ask Customers to admit the truth of matters within the scope of Rule 1.280(b), Florida Rules of Civil Procedure, that relate to the application of law to fact (i.e., the application of the Commission's rules to the facts of this case), it is clear from the testimony and pleadings filed in this proceeding that the proper interpretation of the law to be applied is in dispute. In other words, these requests appear to seek admissions concerning not just application of the Commission's rules but also interpretation of those rules. Because requests for admissions directed to such conclusions of law are inappropriate,¹ FPL's motion to compel is denied as to Requests for Admissions Nos. 1-3, 5, and 7.

Request for Admission No. 4

FPL's motion to compel as to Request for Admission No. 4 is granted. This request asks Customers to admit the truth of matters within the scope of Rule 1.280(b), Florida Rules of Civil Procedure, that relate to statements or opinions of fact. If Customers believe that their response to this request would differ in the context of the meter's initial placement versus the meter's subsequent return to service, they may state so in their response.

Request for Admission No. 6

FPL's motion to compel as to Request for Admission No. 6 has been made moot by the Commission's findings that Southeastern Utility Services, Inc. ("SUSI") does not have standing to participate as a party to this docket.²

¹ See, e.g., City of Miami v. Bell, 253 So. 2d 742 (Fla. 3rd DCA 1971).

² Order No. PSC-04-0591-PCO-EI, issued June 11, 2004; upheld on reconsideration by Order No. PSC-04-0881-PCO-EI, issued September 8, 2004.

Request for Production of Documents No. 4

FPL's motion to compel as to Request for Production of Documents No. 4 is granted in part and denied in part. The request appears to be directed primarily at SUSI. At the time FPL's motion to compel was filed, SUSI was a party to this proceeding. As noted above, SUSI, upon FPL's motion, is no longer a party to this proceeding. Pursuant to Rule 1.351, Florida Rules of Civil Procedure, production of documents may be sought from non-parties pursuant to subpoena. Thus, FPL's motion to compel is denied with respect to production of the requested documents from SUSI. However, FPL's motion is granted with respect to production of the requested documents that are in the custody, control, and possession of Customers.

The inexact wording of the request could lead to the impression that the request seeks, among other things, "[a]ll documents sent or received by SUSI" without limitation as to time or subject matter. Thus, to the extent the request seeks all documents sent or received by SUSI without limitation, the motion to compel is denied. However, it appears that the request is intended solely to seek documents passed between SUSI and FPL customers who receive or received service through thermal demand meters during a specific period of time. Read in this context and in light of the limitation expressed in the above paragraph, the request is not overbroad, vague, and ambiguous. Customers are certainly capable of identifying documents passed between themselves and SUSI. The request is within the scope of discovery permitted by Rule 1.280(b), Florida Rules of Civil Procedure, because it is reasonably calculated to lead to the discovery of admissible evidence.

Request for Production of Documents No. 6

FPL's motion to compel as to Request for Production of Documents No. 6 is granted. The request appears to be within the scope of discovery permitted by Rule 1.280(b), Florida Rules of Civil Procedure, because it is reasonably calculated to lead to the discovery of admissible evidence. In this proceeding, Customers have called into question the calibration of thermal demand meters used on FPL's system and asserts that miscalibration has caused those meters to over-register. FPL is entitled to explore documents relied upon by Customers to support these assertions. I note that FPL's request refers to documents concerning "over-registration and calibration," contrary to the Customers' assertion that FPL seeks documents concerning over-registration or calibration. (Emphasis supplied.) Hence, FPL's request is not as broad as Customers assert.


For each request for which this Order compels a response, Customers shall respond to FPL in the manner specified in this Order by the close of business on Wednesday, September 22.

ORDER NO. FSC-04-0922-PCO-EI
DOCKET NO. 030623-EI
PAGE 4

Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that FPL's motion to compel is granted in part and denied in part as set forth in the body of this Order.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 21st day of September, 2004



CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

WCK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, 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 wastewater utility. A motion for reconsideration shall be filed with the Director,

ORDER NO. PSC-04-0922-PCO-EI.
DOCKET NO. 030623-EI
PAGE 5

Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

MAR - 1 2004

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: February 27, 2004

**FLORIDA POWER AND LIGHT COMPANY'S
MOTION TO COMPEL ANSWERS TO FIRST SET OF REQUESTS FOR
ADMISSIONS AND RESPONSES TO FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 28-106.206, Florida Administrative Code, and Rule 1.380, Florida Rules of Civil Procedure, hereby files this Motion to Compel and requests that the Prehearing Officer enter an order compelling Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc. and Target Stores, Inc. ("Customers") to respond to FPL's First Set of Requests for Admissions and First Set of Requests for Production of Documents. As grounds for this Motion to Compel, FPL states as follows:

On January 14, 2004, FPL propounded its First Set of Requests for Admissions (Nos. 1-8) and its First Set of Requests for Production of Documents (Nos. 1-12) to Customers. On February 13, 2004, Customers filed its Objections and Responses to both sets of FPL's Discovery Requests.

REQUESTS FOR ADMISSIONS

Set forth below are each of FPL's Request for Admissions, Customers' objections, and FPL's response thereto.

1 Request for Admission No. 1: Admit that under Rule 25-6.052(2)(a), Florida Administrative Code, a thermal demand meter test by FPL is not subject to a refund when the amount or level of over-registration does not exceed 4% in terms of full-scale value, when tested at

any point between 25% and 100% of full-scale value.

Customers' Response: Objection. This request is directed solely to a conclusion of law. Rule 25-6.052(2)(a), Florida Administrative Code speaks for itself.

FPL Response: Rule 1.370(a), Florida Rules of Civil Procedure, provides that a party may serve upon any other party a written request for the admission of truth of any matters within the scope of Rule 1.280(b), Florida Rules of Civil Procedure, that relate to statements or opinions of fact or the application of law to fact (emphasis added). The party who has requested the admissions may move to determine the sufficiency of the answers or objection, and unless the court determines that an objection is justified, it shall order that an answer be served. The Rule further states that a party who considers that a matter of which an admission has been requested presents a genuine issue for trial, may not object to the request on that ground alone. See, Salazar v. Valle, 360 So. 2d 132 (3 D.C.A. 1978), finding that requests for admissions asking defendants to admit allegations of negligence contained in plaintiff's complaint was not improper or objectionable and did call for a response. FPL's Request for Admission No. 1 properly requests Customers to admit or deny a specific statement as applied to the appropriate Commission Rule. The Request seeks Customers' position regarding the application of a Commission rule clearly at issue to the specific facts in this case. FPL requests that the Commission issue a ruling denying Customers' objection and compelling Customers to respond to FPL's Request for Admission No.1.

2. Request for Admission No. 2. Admit that under Rule 25-6.103(3), Florida Administrative Code, the average error that results from a test of a thermal demand meter is determined by the results of the meter test only.

Customers' Response: Objection. This request is directed solely to a conclusion of law. Rule 25-6.103(3), Florida Administrative Code speaks for itself.

FPL Response: FPL incorporates herein by reference its response to Customers' objection to Request for Admission No. 1.

3. Request for Admission No. 3. Admit that under Rule 25-6.103(1), Florida Administrative Code, a thermal demand meter that is tested and determined to have over-registered in excess of the tolerance allowed under Rule 25-6.052(2)(a), Florida Administrative Code, requires FPL to provide a refund to the customer of the amount billed in error as determined by Rule 25-6.058, Florida Administrative Code, for a period not to exceed twelve months unless the customer demonstrates that the error was due to some cause, the date of which can be fixed.

Customers' Response: Objection. This request is directed solely to a conclusion of law. Rules 25-6.103(1), 25-6.052(2)(a), and 26-6.058, Florida Administrative Code, speak for themselves.

FPL Response: FPL incorporates herein by reference its response to Customers' objection to Request for Admission No. 1.

4. Request for Admission No. 4. Admit that a thermal demand meter may over-register for a reason or reasons other than miscalibration of the meter when the meter is initially placed in or subsequently returned to service.

Customers' Response: Objection. The request is presented as a compound request.

FPL Response: Customers objection is improper and should be denied.

5. Request for Admission 5. Admit that Rule 25-6.109, Florida Administrative Code, applies to the calculation of interest on any refunds that may be ordered by the Commission in this proceeding.

Customers' Response: Objection. This request is directed solely to a conclusion of law. Rule 25-6.109, Florida Administrative Code, speaks for itself. This legal issue is presently

pending before the Commission.

FPL Response: FPL incorporates herein by reference its response to Customers' objection to Request for Admission No. 1.

6. Request for Admission No. 6. Admit that SUSI does not have standing to protest Order No. PSC-03-1320-PAA-EI issued in the above-numbered docket.

Customers' Response: Objection. This request is directed solely to a legal conclusion that is presently pending before the Commission.

FPL Response: FPL incorporates herein by reference its response to Customers' objection to Request for Admission No. 1.

7. Request for Admission No. 7. Admit that FPL tested all thermal demand meters of the Customers at issue in this docket in compliance with all applicable Florida Public Service Commission rules.

Customers' Response: Objection. This request calls for a legal conclusion to "all applicable Florida Public Service commission rules." Additionally, this request is overbroad in that it is not limited to specific tests of specific meters within a certain time frame.

FPL Response: FPL incorporates herein by reference its response to Customers' objection to Request for Admission No. 1. Customers' additional "overbroad" objection should also be denied. FPL's request is not overbroad; it goes to the heart of the issues raised in Customers' protest of Order No. PSC-03-1320-PAA-EI, and clearly requests Customers to admit that *their* thermal demand meters were tested in compliance with all applicable Commission rules. The Commission should deny Customers' objection and compel Customer to respond to FPL's Request for Admission No. 7

REQUESTS FOR PRODUCTION OF DOCUMENTS

As stated previously, FPL propounded its First Set of Requests for Production of Documents (Nos. 1-12) to Customers. On February 13, 2004, Customers filed its Objections and Responses to FPL's First Set of Requests of Production, asserting numerous general objections. In its Response, Customers agree to produce responsive documents, subject to the objections raised, to FPL's Requests Nos. 1-3, 5, and 7-12. Customers assert specific objections to FPL's Requests for Production of Documents Nos. 4 and 6. Set forth below are FPL's Requests Nos. 4 and 6, Customers' objections, and FPL's response thereto.

8. **Request for Production of Document No. 4:** All documents sent or received by SUSI and/or exchanged between SUSI and any customer of FPL (including but not limited to the Petitioner Customers) who receives or received electric service through thermal demand meters from the period of July 1, 2002 through January 14, 2004.

Customers' Response: In addition to the objections raised above, this request is objected to as being overbroad, vague, and ambiguous. The request is not limited to matters in dispute between the parties, but seeks "all documents sent or received by SUSI and/or exchanged between SUSI and any customer of FPL who receives or received electrical service through thermal demand meters from the period of July 1, 2002 through January 14, 2004." Besides seeking documents that may have nothing to do with this case, Customers are not in a position to know the identities of "any customer of FPL who receives or received electric service through thermal demand meters." Customers would need FPL to provide them with a list of all such customers, and seeks same in its Second Request for Production of Documents.

FPL Response: Customers' objections that FPL's Request No. 4 is "overbroad, vague, and ambiguous," and that the request is "not limited to matters in dispute," are improper and should

be denied. Customers do not quantify how this request is overbroad, stating only that Customers are not in a position to know the identities of any customer of FPL who receives or received electric service through thermal demand meters. See, First City Developments of Florida, Inc. v. Hallmark of Hollywood Condominium Assoc., 545 So.2d 502, at 503 (Fla. 1st DCA 1989), which states that a party objecting to discovery as overbroad and burdensome is required to show that the volume of documents, number of man hours required in their production, or some other quantitative factor made it so. FPL's Request clearly specifies the nature of the documents sought and limits the Request to a specific time frame. Further, as FPL's Request is directed to customers who received electric service through thermal demand meters from FPL, the Request clearly goes to the matter in dispute between the parties. Rule 1.350(a), Florida Rules of Civil Procedure, provides that any party may request the production of documents that constitute or contain matters within the scope of Rule 1.280(b), Florida Rules of Civil Procedure, that are in the possession or control of the party to whom the request is directed. In this case, the Customers are represented by SUSI. FPL has the right to request documents exchanged between Customers' consultant, SUSI, and other FPL customers. FPL's request is well within the broad scope of discovery as mandated by Rule 1.280(b), Florida Rules of Civil Procedure. Accordingly, FPL requests that the Commission issue a ruling denying Customers' objection and compel Customers to respond to FPL's Request for Production of Documents.

9. Request for Production of Document No. 6: All documents referring or related to over-registration and calibration of thermal demand meters.

Customers' Response: In addition to the objections previously raised, Customers object to this request as being overbroad; upon refinement, Customers are willing to respond and will produce any responsive documents related to the issues and meters in this case at their respective

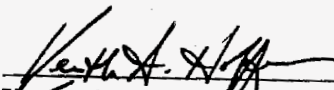
offices or at a location to be agreed upon by the parties upon reasonable notice being provided to the Customers.

FPL Response: Customers objection that FPL's Request No. 6 is overbroad is improper and should be denied. Once again, Customers fail to quantify exactly how this request is overbroad. Instead, Customers state a willingness to respond upon "refinement" of the Request. There is no need for refinement of the Request as it is straightforward and clear. The Commission should deny Customers' objection, and Customers should be compelled to respond to FPL's Request.

10. Pursuant to Rule 28-106.204(3), Florida Administrative Code, counsel for FPL has conferred with counsel for Customers, and is authorized to represent that Customers object to the relief sought in this Motion.

WHEREFORE, FPL respectfully requests that the Prehearing Officer issue an order compelling Customers to respond to FPL's First Set of Requests for Admissions Nos. 1-7, and FPL's First Set of Request for Production of Documents, Nos. 4 and 6.

Respectfully submitted,



Kenneth A. Hoffman, Esq.
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, Florida 32302
Telephone: 850-681-6788

-- and --

R. Wade Litchfield, Esq.
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, Florida 33408-0420
Telephone: 561-691-7101

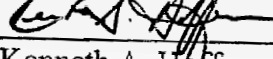
Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power and Light Company's Motion to Compel Answers to First Set of Requests for Admissions and Responses to First Set of Requests for Production of Documents of Documents has been furnished by U. S. Mail this 27th day of February, 2004, to the following:

Cochran Keating, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850

Jon C. Moyle, Jr., Esq.
Diana K. Shuman, Esq.
Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

By: 
Kenneth A. Hoffman, Esq.