

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-04-0932-PCO-EI  
ISSUED: September 22, 2004

ORDER DENYING MOTION FOR LEAVE TO INSPECT METERS

On August 24, 2004, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. ("Customers") filed a motion for leave to inspect the Customers' meters at issue in this proceeding. On August 31, 2004, Florida Power & Light Company (FPL) responded in opposition to the motion.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . ." Based upon this authority, and having considered the motion and response, my findings are set forth below.

Customers' Motion

In their motion, Customers state that in early July 2004 they informally asked FPL to allow them access to the meters that are the subject of this docket for the purpose of inspecting the meters. In a letter dated July 7, 2004, FPL responded by refusing to allow Customers access to the meters without authorization from the Commission.

Customers seek to inspect these meters to determine whether any components in the meters have failed or degraded or whether there have been physical changes to the meters that impact demand registration. Customers' theory of this case is that improper calibration of these meters has caused the meters to over-register. Customers note that FPL advocates a theory in which the meters degrade over time as the physical characteristics of the components change. Customers dispute FPL's theory and assert that they should be allowed access to inspect the meters to determine whether there have been any physical changes to the meters' components. Customers contend that without access to the meters in question, they have been prevented from making a determination of any cause of demand over-registration other than mis-calibration. Customers believe that confirmation of their theory would entitle them to refunds for the entire period that the meters were installed rather than the twelve month refund period supported by FPL.

Customers note that FPL has sole access to, and control of, the meters in question. Customers assert that it is necessary to have access to the meters as evidence in order to meet

DOCUMENT NUMBER-DATE

10257 SEP 22 04

FPSC-COMMISSION CLERK

their burden of proof. To support their position concerning the disputed period of potential refund, Customers argue that they are entitled to obtain the evidence necessary to meet this burden. In their motion, Customers propose a nine-point inspection and test plan, which is attached hereto as Attachment A and incorporated herein by reference, to achieve this end. Further, Customers request that FPL be required to produce these meters at hearing.

#### FPL's Response

In its response, FPL asserts that it could not grant Customers' informal request to inspect these meters without Commission approval. FPL notes that in its letter of July 7, 2004, in response to Customers' request, FPL pointed out that the meters at issue were the subject of a Commission docket and stressed the importance of maintaining the integrity of the meters. In its July 7 letter, FPL stated a concern that the Commission may require it to take further action with respect to the meters, therefore FPL did not want to compromise the condition of the meters through an inspection process. FPL further states that the requested tests and procedures on the meters are not captured in the Commission's rules. FPL states that it advised the Customers' counsel to set forth details of the proposed inspections with the Prehearing Officer so an order authorizing any actions could either be granted or denied.

FPL argues that Customers' motion should be denied as an "eleventh hour" attempt by Customers' to conduct discovery in an attempt to meet their burden of proof in this case. FPL contends that the issue of inspecting meters should have been resolved prior to the filing of all testimony in this case, and further states that there is not a good reason for the tardiness of this request. FPL asserts that if Customers needed additional time to complete discovery necessary to make their prima facie case, they should have done so prior to their prefiled direct testimony on July 12, 2004. FPL states that Customers should not be rewarded for a lack of diligence in pursuing a request through the Prehearing Officer that they believe necessary to meet their burden of proof. FPL asserts that it would be prejudiced in its efforts to prepare for final hearing in this docket by Customers' late request.

FPL states that if the Prehearing Officer determines it necessary to authorize some level of meter examination, "necessary restrictions" should be placed on any such inspections to ensure FPL's physical custody and control of the meters and that the integrity of the meters is maintained. FPL notes that Commission staff witness Matlock has filed testimony in this docket recommending that the meters at issue be retested. FPL asks that any proposed inspections be designed so as not to compromise the integrity and stability of the meters in the event the Commission orders retesting or some other further action with these meters. Specifically, FPL asks that the Commission prohibit inspections that involve touching or moving interior components of the meter.

Findings

Upon review of the motion and response, Customers' motion is hereby denied. Preliminarily, I note that Customers' motion is, in essence, a motion to compel FPL to respond to discovery that was never formally served on FPL. Whether this motion is the proper procedural vehicle for Customers to make their request to inspect meters is questionable. Rule 1.350, Florida Rules of Civil Procedure, is applicable to this proceeding through Rule 28-106.206, Florida Administrative Code, and allows a party to request inspection of documents and tangible things in the possession, custody, or control of another party, provided such things are within the scope of Rule 1.280(b), Florida Rules of Civil Procedure. Customers are clearly familiar with Rule 1.350 as they have previously, in this docket, requested inspection of tangible things from FPL pursuant to Rule 1.350.

I also note that Customers' motion comes after all direct and rebuttal testimony has been prefiled in this docket. Thus, although Customers broached the subject of inspecting these meters with FPL prior to filing their 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.

Further, FPL's concerns over maintaining the integrity of these meters are reasonable and justifiable concerns. As FPL suggests, this Commission could require some further testing or other action be taken with respect to these meters as a result of this proceeding. Given the lateness of Customers' motion in this proceeding and the need to provide the parties adequate time to prepare for hearing with some reasonable end to discovery, 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.

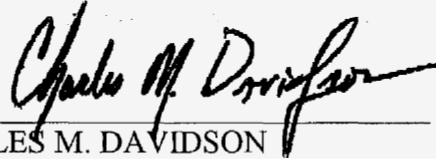
For these reasons, I deny Customers' motion for leave to inspect the meters at issue in this case.

Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that Customers' motion for leave to inspect meters is denied.

ORDER NO. PSC-04-0932-PCO-EI  
DOCKET NO. 030623-EI  
PAGE 4

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 22nd  
day of September, 2004.



CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

( S E A L )

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, 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.

**Exhibit "B"**

Our proposed inspection will include:

1. Visual inspection for any signs of tampering, holes in canopy, foreign objects that may obstruct movement of the disk or demand needles, etc.
2. Check that the reset lever strikes the black maximum pointer properly.
3. Removal of the canopy to visually inspect, adjustment springs(zero & full-scale) for corrosion, distortion, connection to linkage chains, tracking on capstans, etc.
4. Check that capstans are securely in place and do not rotate with slight pressure.
5. Visual inspection of all solder joints and wires for shorting, opens, or broken joints.
6. Visual inspection of indicating demand needles (pointers red and black) for bends, clearance for free movement, contact point to one another.
7. Visual inspection of red indicating pointer bearing for bends, clearance for free movement. Move black maximum pointer across the scale to determine adequate friction. Place black maximum pointer at any point on the scale without contact of the red needle and tap for friction check.
8. With ohm meter check for continuity of circuits, solder joints, and resistance of heater circuits. Visually check for any signs of arcing, burns, discoloration, melted components or other indications that lightening may have struck the meter or the meter may have experienced an extreme over load.
9. Visual inspection of front and rear bearings for foreign object contamination and signs of scoring or wear.