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-05-1034-FOF-EI ISSUED: October 21, 2005

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY

ORDER DENYING MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Background

On November 19, 2003, this Commission issued Order No. PSC-03-1320-PAA-EI as proposed agency action to resolve complaints made by Southeastern Utility Services, Inc. ("SUSI") against Florida Power & Light Company ("FPL" or the "Company") on behalf of six commercial retail electric customers concerning inaccuracies in the customers' thermal demand meters. SUSI, four of the customers it represents (Ocean Properties, Ltd., J.C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc., collectively referred to as "Customers"), and FPL protested our proposed agency action and requested a formal administrative hearing on these matters.[1] Consequently, an administrative hearing was held on November 4, 2004.

Prior to the conduct of this hearing, Ocean Properties, Ltd., initiated a proceeding at the Division of Administrative Hearings ("DOAH") to challenge the validity of Rule 25-6.109(4), Florida Administrative Code, which specifies the interest rate to be applied to Commission-ordered refunds. Recognizing that Customers had also raised an issue concerning the appropriate interest rate in the pending hearing before us, Ocean Properties, the Commission, and FPL jointly requested that the assigned Administrative Law Judge ("ALJ") hold the rule challenge proceeding in abeyance pending our final order in this docket. The joint motion provided that in the event that Ocean Properties chose to proceed with the rule challenge following the issuance of a final order and also filed a timely motion for reconsideration of that order, we would defer ruling on the motion for reconsideration until after the entry of a final order in the rule challenge proceeding. The joint motion indicated that our staff would address the potential effect of a final

[1] Subsequently, by Order No. PSC-04-0591-PCO-EI, issued June 11, 2004, SUSI was dismissed as a party to this proceeding. By Order No. PSC-04-0881-PCO-EI, issued September 8, 2004, we affirmed this dismissal by denying SUSI's motion for reconsideration.

order in the rule challenge in making its recommendation on the motion for reconsideration. The ALJ granted the joint motion to hold the rule challenge proceeding in abeyance.

On February 25, 2005, we issued Order No. PSC-05-0226-FOF-EI as our final order in this docket. Among other things, we took the following actions: (1) found that there was no dispute among the parties that eleven meters were eligible for a refund due to erroneous demand registration; (2) specified the method by which refunds for those meters should be calculated; (3) found twelve months to be the appropriate refund period for those meters; and (4) determined that Rule 25-6.109(4), Florida Administrative Code, specified the appropriate interest rate to apply in calculating the refunds for those meters.

On March 14, 2005, Customers filed a motion for reconsideration of our final order. FPL filed its response to Customer's motion on March 21, 2005. Among other things discussed further in this Order, Customers sought reconsideration of our decision to apply Rule 25-6.109(4) to calculate interest on the refunds, thus restarting the rule challenge proceeding pursuant to the arrangement set forth in the parties' joint motion at DOAH. After stipulating to the relevant facts and waiving an administrative hearing, Ocean Properties, the Commission, and FPL filed proposed final orders at DOAH concerning the validity of Rule 25-6.109(4). The ALJ dismissed Ocean Properties' rule challenge.

Because a final order has been issued in the rule challenge proceeding, we now address Customer's motion for reconsideration. We have jurisdiction over this subject matter pursuant to sections 366.04, 366.05, and 366.06, Florida Statutes.

Standard of Review

The appropriate standard of review for reconsideration of a Commission order is whether the motion identifies a material and relevant point of fact or law that the Commission overlooked or failed to consider when it rendered the Order. Diamond Cab v. King, 146 So. 2d 889 (Fla. 1962); Pingree v. Quaintance, 394 So. 2d 161, (Fla. 1st DCA 1981). The mere fact that a party disagrees with the order is not a basis for rearguing the case. Diamond Cab. Additionally, reweighing the evidence is not a sufficient rationale for granting reconsideration. State ex. rel. Jaytex Realty Co. v. Green, 105 So.2d 817 (Fla. 1st DCA 1958). A motion for reconsideration should not 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, Inc. v. Bevis, 294 So.2d 315, 317 (Fla. 1974).

Arguments of the Parties

Customers' Motion

In their motion for reconsideration, Customers seek reconsideration of three portions of our final order. First, Customers seek reconsideration of that portion of our final order addressing the interest rate to be applied to the refunds at issue. Customers point out that this Commission, noting that a rule challenge was pending at the time, used the interest rate specified in Rule 25-6.109(4), Florida Administrative Code, to calculate interest on the refunds.

Customers assert that the final order did not detail the status of the rule challenge proceeding, including the parties' agreement to allow for a decision in the rule challenge to be considered in resolving the interest rate issue. Customers state that their motion for reconsideration brings the parties' agreement to our attention and, consistent with that agreement, seeks to have the result of the rule challenge considered in determining the interest rate issue. Customers contend that if Rule 25-6.109(4), Florida Administrative Code, were to be declared invalid for lack of statutory authority, this Commission would not be able to rely on it for the refunds ordered in this case and would have to apply the interest rate specified in Section 687.01, Florida Statutes, as Customers argued in their post-hearing brief.

Second, Customers seek reconsideration of that portion of the final order that specified the method to be employed in determining meter error for purposes of calculating refunds. Customers note that, with respect to this issue, we found that "[b]oth parties agree, based on the tests that have been conducted by FPL, that these meters are eligible for refund. We accept this agreement and find that these meters are eligible for refunds for demand overregistration." Customers assert that we were referring to a "protocol agreement" (also referred to herein as the "settlement protocol") between the parties marked as Hearing Exhibit 9. Customers contend that this protocol agreement is binding in all respects, including with respect to how refunds should be calculated. Customers assert that we erred by not relying on this agreement to determine meter error for refund calculation purposes while at the same time relying on the agreement for purposes of determining the meters eligible for a refund.

Customers note that the protocol agreement provided for the use of a "before and after" approach to determining meter error for refund calculation purposes. Under this approach, refunds would be calculated based on the higher of the meter error determined through a meter test or the meter error determined by comparing customer usage both before and after replacement of the faulty meter. As they argued at hearing and in their post-hearing brief, Customers argue that we should apply a "before and after" approach to calculating refunds in this case.

Third, Customers seek reconsideration of that portion of the final order that found Meter #1V5871D not eligible for a refund. Customers assert that we erred in our determination that the error associated with this meter did not exceed the 4% threshold specified by Commission rule. Specifically, Customers assert that the overregistration determined as a result of the meter test should have been combined with the overregistration attributable to the meter's bent pointer, resulting in a meter error in excess of 4% of full-scale value.

In addition, Customers allege that we overlooked Rule 25-6.106(2), Florida Administrative Code, which provides that "in the event of overbillings not provided for in Rule 6.103, Florida Administrative Code, the utility shall refund the overcharge to the customer for the overcharge based on available records, and if the overcharge cannot be fixed, then a reasonable estimate of the overcharge shall be made and refunded to the customer." Customers allege that the bent pointer on Meter #1V5871D is a factual circumstance that is contemplated by Rule 25-6.106(2), thus a refund should be provided regardless of whether the meter error exceeds the 4% threshold.

FPL's Response

In response, FPL argues that Customers' motion should be denied. With respect to the interest rate applied to refunds, FPL notes that our final order recognized the pendency of the challenge to Rule 25-6.109(4), Florida Administrative Code, and thus did not overlook the existence of that proceeding. FPL argues that even if the rule were to be declared invalid, the interest rate specified in Section 687.01, Florida Statutes, would not apply to the calculation of refunds ordered in this case for three reasons. First, FPL asserts that if the rule were prospectively invalidated, such a determination could not be retroactively applied to service that has already been provided. Second, FPL asserts that Section 687.01 is a civil statute applicable to certain money judgments entered in civil actions – not to regulatory proceedings before this Commission. Third, FPL notes that Section 687.01, by its own terms, applies only in cases where there is entitlement to interest but no special contract exists to address an applicable interest rate. While noting that Customers presented no evidence to show whether there is or is not such a special contract between FPL and Customers, FPL alleges that there is such a contract in the form of its filed tariffs which incorporate the Commission's rules, including Rule 25-6.109(4).

With respect to the method to be employed in determining meter error for purposes of calculating refunds, FPL notes that we decided to utilize a straight-line interpolation method and rejected Customers' arguments in support of the "before and after" approach that Customers are pursuing in their motion for reconsideration. FPL notes that the Commission-approved approach was based largely on an April 5, 1982 letter from Landis & Gyr, a meter manufacturer. FPL contends that Customers "embraced" this letter at hearing but now are abandoning support for the letter in the hope of increased financial benefit.

FPL notes that the "protocol agreement" referenced by Customers provided that for purposes of refund eligibility, "[t]hose 1V meters previously tested at 40% of full registration and demand registered >100% will be re-tested at 80%." Citing the testimony of witness Bromley at hearing, FPL states that it applied this aspect of the settlement protocol to utilize the test result that provided each customer with the greatest benefit, even though FPL felt that the initial test at 40% of full scale satisfied the requirements of the Commission's rules and its approved Test Plan. FPL states that the hearing record also makes clear that the settlement protocol as a whole was not applied to the Customers in this docket because Customers rejected a separate provision of the protocol that provided for a one-year refund. FPL asserts that Customers want this Commission to selectively use the "before and after" approach from the settlement protocol but not use the refund period provisions in the protocol. Citing pages 8 and 9 of our final order, FPL states that we have already rejected the Customers' position. Thus, FPL asserts that Customers' motion for reconsideration on this point amounts to improper reargument.

With respect to the eligibility of Meter #1V5871D, FPL notes that Customers argued that an error of 6.7% should be used for this meter. Citing page 3 of the final order, FPL asserts that we correctly determined that this figure was not based on a test result as required by Commission rules but was simply a figure that was used by the parties as part of failed settlement discussions. Thus, FPL argues, Customers' position is reargument of their position that was rejected at

hearing. Further, FPL notes that Customers, in their motion for reconsideration, argue for the first time that to deny a refund for this meter would be inconsistent with Rule 25-6.106(2), Florida Administrative Code. FPL asserts that new arguments or better explanations are not a basis for reconsideration, and, in any event, Rule 25-6.106(2) has no application because it applies only to "other overbillings not provided for in Rule 25-6.103," which is the rule applicable to the refund complaints in this case.

Analysis and Findings

We deny Customers' motion for reconsideration because Customers have not demonstrated that this Commission overlooked or failed to consider a material and relevant point of fact or law in rendering its final order. We address each of Customers' arguments below.

Interest Rate Applied to Refunds

In Section VI of our final order, we found that the interest rate provisions of Rule 25-6.109, Florida Administrative Code, were applicable to the refunds at issue. In that section of the final order, we explicitly recognized the pending challenge to Rule 25-6.109(4), Florida Administrative Code, and thus did not overlook the existence of that proceeding. More importantly, as noted above, the rule challenge was dismissed at DOAH. Customers' motion for reconsideration was premised solely on the success of its failed rule challenge and alleges no other grounds for reconsideration on this issue. Thus, Customers have not demonstrated that we overlooked or failed to consider a material and relevant point of fact or law in rendering our final order on this issue.[2]

Determining Meter Error for Purposes of Calculating Refunds

In Section II of our final order, we found that, for purposes of calculating refunds for eligible demand meters, a straight-line interpolation of the existing test results for each meter at 40% and 80% of full-scale should be used to determine meter error at each customer's average demand over the refund period. In that section of our final order, at pages 4 and 5, we expressly rejected the "before and after" approach proposed by Customers:

> Customers witness Brown proposes that refunds be based on the actual change in demand registration that has occurred following the replacement of the inaccurate thermal demand meters with electronic demand meters. We must reject witness Brown's proposal, because we find no basis in our rules for supporting this proposed method of calculating refunds. As noted above, we recognize that there is ambiguity in our rules and that a clear method for determining the amount billed in error for the demand portion of these meters is not specified in the rules. However, Rule 25-6.103(3), cited above, states that any refund should be based

[2] In addition to the rationale set forth in our final order, we find merit in FPL's argument that the interest rate specified in Section 687.01 cannot apply to Commission-ordered utility refunds. Section 687.01 is applicable only in the absence of an interest rate specified by contract; the utility's tariff, which incorporates the Commission's rules – including Rule 25-6.109(4) – by reference, is a contract between the utility and its customers with the force and effect of law. See, e.g., BellSouth Telecommunications v. Jacobs, 834 So. 2d 855 (Fla. 2002).

> on "that percentage of error determined by *the test.*" (Emphasis added.) Thus, our rules clearly envision that any refund be based on the results of a meter test.
>
> Further, we agree with FPL witness Morley that there are two technical flaws in witness Brown's proposed method.

After discussing the technical flaws it found with Customers' proposed "before and after" approach, we explained the basis for our decision on this issue at pages 5 and 6 of the final order:

> Recognizing that our rules do not specify a clear method for determining the amount billed in error for the demand portion of these meters but clearly envision using meter test results to calculate refunds, we find in the record of this proceeding a mechanism consistent with our rules and suitable for determining meter error for refund calculation purposes in this case. Staff witness Matlock testified that straight-line interpolation could be used to interpolate the results of FPL's previous tests of each meter at 40% and 80% of full scale to determine the error at each customer's maximum monthly demand. We believe that this method can practically and easily be used to determine the percentage error for the eleven meters eligible for a refund for inaccurate demand readings while avoiding the need for extensive retesting of these meters. (Footnote omitted) However, instead of using each customer's maximum monthly demand over the refund period, as witness Matlock proposes, we believe that each customer's average demand over the refund period should be used to better reflect the customer's actual usage. . . .
>
> This straight line interpolation method is similar to and consistent with the method proposed by a manufacturer of thermal demand meters, Landis & Gyr, in an April 5, 1982, letter that was introduced into evidence.

Customers assert that we erred in making these findings because we did not rely on the "before and after" method outlined in the settlement protocol between the parties while relying on another provision of the settlement protocol to determine which meters were eligible for refund. Customers' argument is flawed because its premise – that we determined which meters were eligible for refund based on the provisions of the settlement protocol – is incorrect. In determining which meters were eligible for refund, we recognized that the record indicated no disagreement among the parties that eleven of the demand meters in question were eligible for a refund. At page 2 of our final order, we stated:

> With respect to determining the appropriate method of testing the accuracy of the demand portion of these meters, we find that our rules are ambiguous and direct our staff to pursue rulemaking to clarify these rules. Based on the facts before us, however, we need not interpret our rules to determine how the accuracy of the demand component of these meters should be tested. For eleven meters, the record indicates that the parties agree that those meters are eligible for a refund for erroneous demand registration. We find that the parties' agreement is within

> the range of reasonable interpretations of our rules, and we accept this agreement with respect to those eleven meters.

In their motion for reconsideration, Customers incorrectly take the reference to "the parties' agreement" to mean the settlement protocol. There is no reference to the settlement protocol in our final order, our deliberations and vote, or our staff's recommendation on this issue. Rather, we recognized that both parties, through their testimony, assumed use of the test results at 80% of full scale to determine which meters were eligible for a refund in this case and thus agreed that eleven of the demand meters at issue were eligible for a refund.

Customers' assertion that the settlement protocol is binding is improper reargument of positions it took in this proceeding. While we did not explicitly address any potential legal effects of the settlement protocol in our final order, our findings make clear that we did not consider the settlement protocol binding on our resolution of the issues litigated before us in this case. The settlement protocol was taken for what it was – a framework by which the parties agreed to *attempt* to settle Customers' outstanding complaints. This attempt to settle the complaints failed, as made evident by the formal litigation that ultimately resulted in this docket. By our final order, we did not bind the parties, in the midst of litigation, to the terms of a failed attempt to settle the very same issues being litigated.

In sum, Customers have not demonstrated that we overlooked or failed to consider a material and relevant point of fact or law in rendering our final order on this issue.

Eligibility of Meter #1V5871D for Refund

In Section I of our final order, we found, among other things, that Meter #1V5871D was not eligible for a refund. We recognized that the record showed that in five tests of the meter, the results varied from an error of 3.14% to 3.57% of full-scale value. Because these figures fell below the 4% error tolerance threshold set forth in our rules for this type of meter, we found that the meter was not eligible for a refund.

In their motion for reconsideration, Customers point out that this meter had a bent needle and argue that we should have combined the meter over-registration based on the meter tests with the over-registration attributable to the bent pointer for purposes of determining whether the meter was eligible for a refund. However, Customers' motion provided no explanation as to why the two errors should be combined and did not explain why the meter tests performed on this meter did not already include the effect of the bent pointer. As we recognized in our final order, Customers' witness Brown admitted at hearing that the percentage error he presented for that meter – 6.7% – was not based on a test result but was simply a figure used by the parties as part of failed settlement discussions. On the facts presented, we cannot conclude that we erred in determining that Meter #1V5871D was not eligible for a refund.

Customers also argue that we erred by not ordering a refund for this meter under Rule 25-6.106(2), Florida Administrative Code. Yet Customers did not, at any point in this proceeding, suggest that Rule 25-6.106(2) should be applied to any meter at issue in this proceeding. Customers now suggest in conclusory fashion that the bent needle on Meter #1V5871D is a

factual circumstance contemplated by Rule 25-6.106(2). By its terms, Rule 25-6.106(2) applies to "overbillings not provided for in Rule 25-6.103." It does not specify any particular factual circumstance to which it applies. The applicability of Rule 25-6.106(2) to the circumstance of a meter with a bent needle is by no means clear and was not asserted through the testimony or post-hearing brief of any party in this proceeding. There was no record basis for us to decide the question. Thus, we did not overlook or fail to consider a material and relevant point of fact or law in rendering our final order on this issue.

Conclusion

In conclusion, we deny Customers' motion for reconsideration because Customers have not demonstrated that we overlooked or failed to consider a material and relevant point of fact or law in rendering our final order.

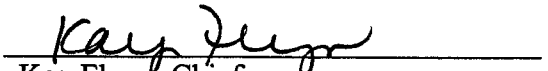
Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Customers' motion for reconsideration of Order No. PSC-05-0226-FOF-EI is denied. It is further

ORDERED that this docket shall be closed after the time for filing an appeal has expired.

By ORDER of the Florida Public Service Commission this 21st day of October, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

By: 
Kay Flynn, Chief
Bureau of Records

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NOTICE OF 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.

Any party adversely affected by the Commission's final action in this matter may request 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 by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, 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.