

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Ocean Properties, Ltd., J.C. Penney Corp.,
Dillards Department Stores, Inc., Target
Stores, Inc., and Southeastern Utilities
Services, Inc.,

Petitioners,

vs.

PSC Docket No. 030623-EI
Filed March 15, 2004

Florida Public Service Commission,
Respondent,

and

Florida Power & Light Company, Inc.,
Respondent.

**PETITIONERS' RESPONSE TO FLORIDA POWER & 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**

Petitioners, Ocean Properties, Ltd., J.C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc. (collectively referred to as "Customers"), through their undersigned counsel and pursuant to Rule 1.380, Fla.R.Civ.P., and Rule 28-106.206, F.A.C., hereby file this Response to Florida Power & Light Company's (FPL) Motion to Compel Answers to First Set of Requests for Admissions and Responses to First Set of Requests for Production of Documents.

RESPONSES TO REQUESTS FOR ADMISSIONS

Set forth below are FPL's request for admissions, Petitioners' response to each request for admission, and Petitioners' argument regarding the propriety of each answer provided.

DOCUMENT NUMBER-DATE

03491 MAR 15 3

FPSC-COMMISSION CLERK

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.

If your answer is anything but an unqualified "yes," describe the basis for your answer.

Petitioners' Response

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

Argument

FPL seeks to have Petitioners' agree with FPL's interpretation of this Rule. The interpretation of a rule or a statute is a pure matter of law. As such, the interpretation of this Rule is solely within the purview of the Public Service Commission ("PSC"), and the parties' interpretations are not binding on the PSC, but rather, are mere argument.

This request could alternatively be stated, "admit that Rule 25-6.052(2)(a) says" Clearly, this is not a proper request for admission as it does nothing to advance this case because Petitioners' response cannot be binding upon Petitioner or the PSC.

Finally, this is not a request regarding the "application of law to fact" as FPL argues. If FPL's request instead had asked, "under the facts of this case, admit that Rule 25-6.052(2)(a) applies," this would be a proper admission applying law to fact. As stated by FPL, this request seeks an admission regarding an interpretation of the Rule, not application of the rule.

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.

If your answer is anything but an unqualified “yes,” describe the basis for your answer.

Petitioners’ Response

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

Argument

Petitioners adopt their arguments in response to RFA No. 1.

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 demonstrated that the error was due to some cause, the date of which can be fixed.

If your answer is anything but an unqualified “yes,” describe the basis for your answer.

Petitioners’ 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.

Argument

Petitioners adopt their arguments in response to RFA No. 1.

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.

If your answer is anything but an unqualified “yes,” describe the basis for your answer.

Petitioners’ Response

Objection. The request is presented as a compound request.

Argument

This is two requests for admissions that FPL has attempted to role into one. These two requests are:

1. 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 service.
2. Admit that a thermal demand meter may over-register for a reason or reasons other than miscalibration of the meter when the meter is subsequently returned to service.

Petitioners object to this request because it requests that two separate questions be answered with only one answer. This is plainly a trick question which the fundamental rules of discovery are designed to eliminate. Moreover, when separated into its two constituent parts, it is becomes strikingly clear that the second request is unanswerable as vague and ambiguous because there is absolutely no indication as to what occurred to the meter before it is “subsequently returned to service.”

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.

Petitioners' 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.

Argument

Petitioners adopt their arguments in response to RFA No. 1. Further, this request most clearly demonstrates Petitioners' objections to these requests. Petitioners have made a good faith argument that, as a matter of law, Rule 25-6.109, does not apply because Section 687.01, Florida Statutes, controls. See Kissimmee Utility Authority v. Better Plastics, Inc., 526 So. 2d 46, 47 (Fla. 1988) (holding that section 687.01 applies to a utility's refund to a customer for the customer's overpayment). This is a purely legal matter, currently pending before the Commission, that is not properly within the province of any party to admit or deny.

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.

If your answer is anything but an unqualified "yes," describe the basis for your answer.

Petitioners' Response

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

Argument

Petitioners adopt their arguments in response to RFA No.s 1 and 5.

Request for Admission No. 7.

Admit the FPL tested all thermal demand metes of the Customers at issue in this docket in compliance with all applicable Florida Public Service Commission rules.

If your answer is anything but an unqualified “yes,” describe the basis for your answer.

Petitioners’ Response

Objection. This request calls for a legal conclusion as 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 frames.

Argument

Petitioners stand by their initial response.

RESPONSES TO REQUESTS FOR PRODUCTION

Request for Production 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.

Petitioners’ 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.

Argument

Petitioners stand by their response. Additionally, Petitioners assert that this request is needlessly confusing. This request seeks two categories of documents:

1. All documents sent or received by SUSI; and/or
2. All documents 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.

Broken into its constituent parts, it is readily apparent that Petitioner’s objections are well founded.

Request for Production No. 6

All documents referring or related to over-registration and calibration of thermal demand meters.

Petitioners’ 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.

Argument

Petitioners potentially possess many documents that “refer” or “relate” to the “over-registration” or “calibration” of “thermal demand meters.” However, this request in no way seeks to limit itself to only documents that refer or relate to specific thermal demand meters, or even broad classes of thermal demand meters, that are at issue in this litigation. Without such limitation, FPL seeks documents that are irrelevant to this litigation.

WHEREFORE, Petitioners respectfully request that the Commission deny FPL’s Motion to Compel Answers to First Set of Requests for Admissions and Responses to First Set of Requests for Production of Documents.

Respectfully submitted this 15th day of March, 2004.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this 15th day of March, 2004.

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