

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities)
Services, Inc., on behalf of various customers) Docket No.: 030623
against Florida Power and Light Company) Filed: August 23, 2004
concerning thermal demand meter error.)

CUSTOMERS' PRE-HEARING STATEMENT

Petitioners/Customers, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. (collectively referred to as "Customers"), pursuant to Public Service Commission Order Number 0581-PCO-EI, by and through their undersigned counsel, file their Prehearing Statement.

A. APPEARANCES:

William H. Hollimon
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Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle, Flanigan, Katz, Raymond and Sheehan, P.A.
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Tallahassee, Florida 32301

On behalf of Customers, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc.

B. WITNESSES:

George Brown: Exhibits:
Direct Testimony: 1 to 6
Rebuttal Testimony: GB-1 to GB-7
Subject Matter: All issues in dispute

Bill Gilmore: Exhibits:
Rebuttal Testimony: BG-1 to BG-4
Subject Matter: All issues in dispute

Bill Smith: Exhibits:
Direct Testimony: A to O
Subject Matter: Thermal Demand Meter Operations, Effects of
Miscalibration of Meter, Meters Over-Registering Demand

DOCUMENT NUMBER 0581-PCO-EI-001

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FPSC-COMMISSION CLERK

- Chuck Cain: FPL Employee; Adverse Witness
Subject Matter: Efforts to determine point in time meters failed, efforts to provide refunds to affected customers; goal of refund efforts, treatment of similarly situated customers
- Brian Faircloth: FPL Employee; Adverse Witness
Subject Matter: Test Process and Procedures Related to Testing, Calibrating of Thermal Demand Meters at FPL's Miami Meter Test Center; Testing of Thermal Demand meters and related issues
- Jim DeMars: FPL Employee - Chief Engineer; Adverse Witness
Subject Matter: Efforts to investigate cause of meter over-registration, effects of heat/sun on meters in dispute, reason for meter failure and efforts to determine point in time of meter failure
- Henry Hutchins: FPL employee; Adverse Witness
Subject Matter: Process of testing, calibrating thermal demand meters, test board operations, meter test process and procedures
- William Hamilton: FPL employee; Adverse Witness
Subject Matter: FPL policy, goals and previous treatment of customers whose thermal demand meters over-registered
- Geisha Williams: FPL employee; Adverse Witness
Subject Matter: FPL policy, goals and previous treatment of customers whose thermal demand meters over-registered

Corporate representative of Siemens Power Transmission and Distribution, Inc. most knowledgeable about thermal demand meters

- Sidney W. Matlock: Staff Witness
Subject Matter: Test process, refund calculations, related matters

All witnesses listed by FPL or for whom pre-filed testimony has been submitted, and all deponents.

These are the witnesses identified at this time who may be called. Discovery is continuing, and to the extent that other witnesses become known or available as discovery continues, the right to call additional witnesses is reserved.

C. EXHIBITS:

- Documents produced during discovery
- Documents listed by other parties
- Documents introduced in depositions
- Documents to be used during cross-examination
- Exhibits listed and Attached to Pre-filed Testimony

D. STATEMENT OF BASIC POSITION:

Customers seek to be fully compensated for monies FPL overcharged them due to FPL's use of faulty thermal demand meters which overregistered Customers' usage and demand charges. Customers contend that thermal demand meters in question overregistered demand from the date they were installed at Customer's locations. This position is supported by the observed change in demand registration that has occurred following meter replacement, the testimony of an engineer who worked at Duncan Landis and Gyr (the manufacturer of the meters in dispute) and who was involved in designing thermal demand meters, and by a statistical analysis demonstrating a statistically significant change in demand registration following meter replacement. FPL argues that a specific point in time where meter overregistration began cannot be fixed, therefore the refunds should be limited to a 12 month period of time as provided for by Rule 25-6.103(1).

The trier of fact is left with two distinct choices: Either the meter has overregistered demand since installation, as customers contend, or the meter gradually began to overregister demand over time while in use, as FPL argues. Compelling evidence suggests that the meters have overregistered demand since installation. In addition to expert testimony and statistical analysis, FPL did not adhere to proper calibration procedures when working on thermal demand meters, including the meters in this docket. All new thermal demand meters were tested and otherwise handled by FPL before being installed at the customers' business locations. Key FPL's meter testers never saw a copy of the manufacturer's owner's manual which explained how a meter should be properly tested and calibrated. It should come as no surprise, then, that FPL did not test and calibrate thermal demand meters in accordance with manufacturer guidelines. This evidence makes it more likely than not that the meters overregistered from the

date of installation, and the Customers should not be limited to 12 months in their recovery of monies wrongfully charged by FPL.

Customers should be repaid for monies that they were overcharged, not less and not more. FPL is suggesting an interpretation of PSC rules that will result in customers only receiving a portion of the amount overcharged. As identified in the pre-filed testimony of Customer witness George Brown and Commission witness Sidney W. Matlock, a meter test determines two forms of error: the full-scale error, and the “test point” error. Calculating refunds based on the full-scale meter error does not, and cannot, result in a refund that equals the “amount billed in error.” In fact, basing refunds on full-scale meter error guarantees that the Customers in this docket will pay more for demand than other FPL customers and that Customers will effectively be charged a rate that has not been approved by the Commission.

Customers argue that the method used to determine the percentage of error experienced by their meters should be the same method FPL used to determine the percentage of error for other, similarly situated customers who had thermal demand meters that registered outside of allowable tolerances. FPL, in determining a fair way to ascertain percentage of error of thermal demand meters which overregistered for its 1V thermal demand customers, decided to use the higher of: a) a “before and after” comparison of a customer’s billing history; or b) the test point percentage of error determined by a meter test. Thus, for FPL customers not before the PSC, FPL calculated refunds based on a methodology that best determines the amount of demand overregistration actually experienced. However, FPL now seeks to treat only the Customers before the PSC differently, and is refusing to consider either a “before and after” comparison of billing records, or to use the test point error as a basis to determine the change in demand registration. The PSC should following the statutory direction of section 366.03, Florida

Statutes, pertaining to the equal treatment of public utility customers who are similarly situated, and require the use of the higher of the “before and after” test or the test point error to determine the percentage of error for each meter in dispute.

To calculate the refunds, FPL should use the same rate schedule under which the accounts were billed through the defective meters. Under FPL’s rate structure, accounts whose monthly demands are between 21 and 499 kilowatts (kW) are generally required to take service under the General Service Demand (GSD-1) rate schedule. To qualify for service under the lower General Service Large Demand 1 (GSLD-1) rate, accounts must have monthly billing demands of at least 500 kW. As a result, when the historic billing demands of some accounts are adjusted downward to correct for over-registering thermal demand meters, it appears that the accounts may not have qualified for service under the GSLD-1 rate schedule under which they were originally billed.

FPL seeks to calculate refunds based on the rate that would have applied (i.e., the GSD-1 rate) had the meters been operating properly. Because the GSD-1 rate is higher than the GSLD-1 rate, such an adjustment results in lower refunds for the affected accounts. Such an adjustment is not appropriate. Although a different rate schedule may have been applied had the metering error not occurred, the adjustment unfairly penalizes customers who were billed on the incorrect rate through no fault of their own. It is the utility’s responsibility to ensure that its meters are operating properly and that customers are billed under the correct rate schedule based on their monthly demand. Additionally, Customers have a right to contract for the GSLD-1 rate should they desire. Since FPL’s faulty meters indicated, in error, that certain customers already qualified for the GSLD-1 rate, these customers were never provided information that could have lead them to contract for the GSLD-1 rate.

Finally, Customers argue, as a matter of law, that the interest rate to be applied to refunded sums should be the statutory interest rate set forth by Florida Statute 687.01 rather than the rate set forth in Rule 25-6.109(4) F.A.C.¹ Customers argue that the statute, not the rule, controls. See also Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988).

E. STATEMENT OF ISSUES AND POSITIONS:

ISSUE 1: Should Customers in this docket be treated the same way in which FPL treated other, similarly situated customers, for the purposes of determining the percentage of meter overregistration error?

Customers: Yes. In addition to the notions of fair play and good faith in dealing with customers captured by a monopoly, section 366.03, Florida Statutes provides in pertinent part that: “No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject same to any undue or unreasonable prejudice or disadvantage in any respect.” The same method FPL used to determine percent of meter error for all its other thermal demand customers, using the higher of: 1) a “before and after” review of billing records after the faulty thermal demand meter was replaced; or 2) the meter test point error, should be used to determine the meter error in this docket. To do otherwise would result in customers in this docket receiving an undue disadvantage, and other, similarly situated customers, receiving an undue preference.

¹ One of the Customers, Ocean Properties, has filed a rule challenge to Rule 25-6.109(4). See DOAH Case No. 04-2250 RX. The parties have agreed to abate the rule challenge pending the outcome of this proceeding and to allow the rule challenge to move forward should the Commission’s decision warrant continuation of the rule challenge. The Commission staff agreed to consider any Final Order on the rule challenge petition issued by an administrative law judge in making its recommendation on a timely filed Motion for Reconsideration.

ISSUE 2: What is the percentage of meter error for each meter that is in dispute in this docket?

Customers: Percentages of error are set forth in the chart below:

METER #	INSTALLED PERIOD	% ERROR FULL SCALE	% DIFF SINCE METER CHANGE
1V5885	6/1/91 to 11/6/2002	+4.84%	-8.91%
1V7001D	7/1/91 to 11/6/2002	+4.60%	-12.89%
1V5192D	7/1/92 to 11/11/2002	+4.36%	-10.62%
1V5025D	6/1/91 to 11/6/2002	+4.12%	-4.81%
1V7019D	5/14/93 to 11/12/2002	+4.12%	-12.16%
1V7032D	7/19/93 to 11/5/02	+4.84%	-6.12%
1V5887D	12/1/92 to 11/11/2002	+4.36%	-7.64%
1V5871D	5/14/97 to 8/10/2002	+6.7%	-9.26%
1V5159D	3/01/92 to 11/11/2002	+4.36%	-4.92%
1V7179D	1/27/93 to 1/7/2003	+4.31%	-9.07%
1V52475	5/1/96 to 11/4/2002	+4.12%	-1.67
1V52093	5/29/96 to 8/10/2002	+6.0%	-13.0%
DILLARDS			
1V7166D	10/1/90 to 12/5/2002	+2.08% KWH	-1.344%

ISSUE 3: Should customers receive a refund representing the amount of money they paid in error, and if so, how should this sum be determined?

Customers: Yes. Rule 25-6.103(1) states the Commission’s basic policy regarding “Adjustment of Bills for Meter Error,” and requires FPL “to refund to the customer the amount billed in error” However, as indicated in the testimony of Commission staff witness Sidney W. Matlock, while the Commission has adopted rules that specifically address the calculation of refunds for kWh over-registration, these rules do not specifically address refunds for demand over-registration. In an abundance of caution, Customers will file a Petition for

Variance or Waiver to ensure that the Commission is not somehow constrained from effecting the intent of Rule 25-6.103(1). As FPL witness Rosemary Morley also recognizes, the goal of this proceeding is to put Customers in the position they would have been in but for the meter error. Providing a refund that does not fully compensate Customers for overpayments, and adopting a process that ensures this result, results in FPL charging and collecting a rate that is not on file with the Commission, a violation of the requirements of section 366.06(1), Florida Statutes.

ISSUE 4: With respect to the meters in this docket, can a point in time be established for the purpose of providing a refund beyond 12 months?

Customers: Yes. The Customers meters registered in error from the date of installation at customers' business location until the meters were removed and replaced. This position is supported by the observed change in demand registration that has occurred following meter replacement, the testimony of an engineer who worked at Duncan Landis and Gyr (the manufacturer of the meters in dispute) and who was involved in designing thermal demand meters, and by a statistical analysis demonstrating a statistically significant change in demand registration following meter replacement. No evidence suggests that any component of the thermal demand meters in this docket caused them to gradually go bad over time, as FPL contends. FPL failed to follow manufacturer's recommended guidelines when testing and calibrating meters. FPL tested and handled all meters before installing them at Customers' businesses. Given the two options, that the meters overregistered demand from the date of installation versus the meters gradually

went bad over time, the evidence suggests the meters were overregistering when installed.

ISSUE 5: To calculate refunds, should FPL use the same rate schedule under which the accounts were billed by the faulty meters?

Customers: Yes. To calculate the refunds, FPL should use the same rate schedule under which the accounts were billed through the defective meters. Under FPL's rate structure, accounts whose monthly demands are between 21 and 499 kilowatts (kW) are generally required to take service under the General Service Demand (GSD-1) rate schedule. To qualify for service under the lower General Service Large Demand 1 (GSLD-1) rate, accounts must have monthly billing demands of at least 500 kW. As a result, when the historic billing demands of some accounts are adjusted downward to correct for over-registering thermal demand meters, it appears that the accounts may not have qualified for service under the GSLD-1 rate schedule under which they were originally billed.

FPL seeks to calculate refunds based on the rate that would have applied (i.e., the GSD-1 rate) had the meters been operating properly. Because the GSD-1 rate is higher than the GSLD-1 rate, such an adjustment results in lower refunds for the affected accounts. Such an adjustment is not appropriate. Although a different rate schedule may have been applied had the metering error not occurred, the adjustment unfairly penalizes customers who were billed on the incorrect rate through no fault of their own. It is the utility's responsibility to ensure that its meters are operating properly and that customers are billed under the correct rate schedule based on their monthly demand. Additionally,

Customers have a right to contract for the GSLD-1 rate should they desire. Since FPL's faulty meters indicated, in error, that certain customers already qualified for the GSLD-1 rate, these customers were never provided information that could have lead them to contract for the GSLD-1 rate.

ISSUE 6: Does a thermal demand meter that tests once within allowable tolerances when tested at one percentage of full scale, then subsequently tests outside allowable tolerance when tested at a different percentage of full scale (both tests between 25% and 100% of full-scale) demonstrate acceptable performance?

Customers: **No.** A meter's performance is acceptable only if it tests within allowable tolerances when tested at any point between 25% and 100% of full scale. In other words, the meter must be within allowable tolerances over this entire range, and its performance is not acceptable if it tests outside of tolerance at any point within this range. For the meters in this docket, FPL's test results indicate that the tested full-scale accuracy of a meter is dependent upon the test point chosen, and that full-scale meter error increases as the test load increases. In this circumstance, testing at a low percentage of full scale provides a false assurance that the meter is similarly accurate over its entire range. Moreover, it sets up a situation where a meter's performance may be acceptable when tested at a low percentage of full scale, but unacceptable in actual use registering a customer's demand. It is only be requiring that thermal demand meters be accurate over this entire range that utility customers can have some assurance that their meters perform acceptably as actually used.

ISSUE 7: What interest rate should be applied to refunds due?

Customers: The statutory scheme for determining an appropriate interest rate set forth in Florida Statute 687.01 and 55.03 should be applied. A rule cannot countermand or contradict a statute duly enacted by the Legislature. Rule 25-6.109(4) is not authorized by the Legislature and is the subject of a rule challenge on those grounds presently pending at DOAH. In a similar factual setting, the Florida Supreme Court affirmed the use of Florida Statute 687.01 to award interest on refund monies a public utility had overcharged a customer. Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988).

ISSUE 8: For each meter in this case, what is the amount of money FPL is to refund the Customer?

Customers: Amounts due pursuant to Customers' calculations are set forth in the chart below:

METER #	PRINCIPAL AMOUNT DUE
TARGET	
1V5885	\$54,524.05
1V7001D	\$87,563.61
1V5192D	\$66,554.47
1V5025D	\$27,634.36
1V7032D	\$36,052.00
1V5887D	\$40,976.19
1V5871D	\$33,411.84
1V5159D	\$29,717.52

METER #	PRINCIPAL AMOUNT DUE
JC PENNEY	
1V7179D	\$32,259.97
1V52475	\$11,868.36
OCEAN PROPERTIES	
1V52093	\$55,666.12
DILLARD'S	
1V7166D	\$22,684.28
1V5216D	\$15,979.81

F. STATEMENTS OF FACT, LAW AND POLICY AT ISSUE

Customers: In addition to the issues set forth above, the following issues are ripe for determination in this proceeding and involve significant policy issues confronting the Commission.

ISSUE 9: Does the sun or radiant heat affect the accuracy of thermal demand meters? If so, what action should the Commission take?

Customers: Yes, the sun or radiant heat affects the accuracy of thermal demand meters. The Commission should order FPL to remove the thermal demand meters still in use and replace them with more accurate electronic meters.

ISSUE 10: Did FPL validly determine that other classes of thermal demand meters passed the PSC-approved statistical sampling test?

Customers: No. After the 1V meter population failed as a class of meters, FPL tested other classes of thermal demand meters. However, after selecting a required sample size, FPL removed from the sample size any meters which it considered to be “outliers”, or meters that failed testing by a significant, undetermined degree. Customers contend this subjective removal of certain meters from the sample population renders the sample testing invalid, since the sample size is reduced by the removal of “outliers”. The “outliers” should have been included in the sample population and in the test results. For example, if a sample size of 100 is selected and 20 meters were deemed “outliers” by FPL, based on hazy criteria, the population sample is now 80. If 4 meters of the 80 failed, FPL would report an error rate of 5%. Customers contend the error rate should be 24% by summing the 20 “outliers” with the four regular failures.

G. STIPULATED ISSUES:

None at this time.

H. PENDING MOTIONS:

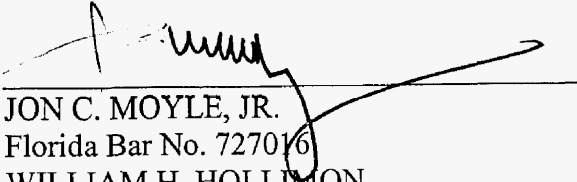
FPL has filed a Motion to Compel Discovery. Customers will be filing a Motion to Compel Discovery and To Allow Inspection of the Meters in Dispute. (Customers, in addition to permitting examination of the meters, seek to have the meters introduced into evidence at this proceeding. However, since FPL is in control of the meters and have refused to make them available to Customers by agreement, Customers have been unable to secure a method by which the meters can be inspected and introduced into evidence.)

I. RESERVATION OF RIGHT TO OBJECT TO EXPERT WITNESSES

FPL has failed to specifically and expressly identify any expert witnesses in pre-filed testimony. Thus, Customers are unsure which witnesses, if any, FPL plans to tender as experts at trial. Customers reserve their right to conduct *voir dire* and object to witnesses FPL may attempt to qualify as an expert.

J. OTHER MATTERS:

Customers are not aware of any provisions of the Scheduling Order with which they are unable to comply. Customers would request that up to 10 minutes be provided to each side for opening arguments. Customers incorrectly identified one meter, the Target store, Bonita Springs, Meter number 1V5774D, in their Petition for Formal Administrative Hearing. The correct meter is Target store located on State Road 7 in Boca Raton, meter number 1V5885D. This meter registered a meter error of +4.85% when tested by FPL on May 21, 2003 and should have originally been included in the Petition. Customers' and staff's prefiled testimonies address the correct meter, the Target store in Boca Raton. Customer Target seeks to include this meter in the docket. Target or Customers would not object to FPL providing testimony or seeking discovery related specifically to this meter should it be necessary.



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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 day the 23rd day of August, 2004.

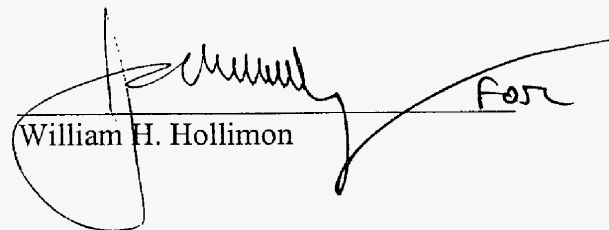
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A handwritten signature in black ink, appearing to read "William H. Hollimon", is written over a horizontal line. To the right of the signature, the word "for" is written in a cursive hand.

William H. Hollimon for