

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: August 23, 2004

**FLORIDA POWER & LIGHT COMPANY'S
MOTION FOR PARTIAL SUMMARY FINAL ORDER**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(4), Florida Administrative Code, hereby moves for the issuance of a Partial Summary Final Order on Issues 3 and 4 in the Order Establishing Procedure.¹ As set forth below, there are no genuine issues of material fact with respect to those issues.² Accordingly, FPL respectfully requests that a Partial Summary Final Order be issued determining that:

- (1) Any refunds ordered by the Commission in this proceeding should be for a period of one year pursuant to Rule 25-6.103(1), Florida Administrative Code; and
- (2) Interest on such refunds should be calculated and added to such refunds in accordance with Rule 25-6.109(4), Florida Administrative Code.

In support of this Motion for Partial Summary Final Order, FPL hereby attaches as Composite Exhibit B the supporting Affidavits of David Bromley, Rosemary Morley and Edward C. Malemezian, P.E., and incorporates by reference all of the prefiled testimony and exhibits filed in this docket.

¹Order No. PSC-0581-PCO-EI issued June 9, 2004, at page 15, attached hereto as Exhibit A.

²Because disputed issues of fact and law remain with respect to Issues 1 and 2 in the Order Establishing Procedure, these issues should remain for the formal administrative hearing.

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FPSC-COMMISSION CLERK

A. BACKGROUND

Southeastern Utility Services, Inc. (“SUSI”) is a consulting company retained to pursue refunds for certain FPL customers.

On January 24, 2003, SUSI filed a complaint with the PSC seeking a refund on behalf of Target Corporation (“Target”) based upon a purported measurement error attributable to a certain 1V thermal demand meter that had been utilized by FPL to measure electric service for this particular Target account. The complaint alleged that during tests conducted by FPL, the particular 1V thermal demand meter at issue had over-registered demand beyond the four percent permitted by Rule 25-6.052(2)(a), Florida Administrative Code. In its complaint, SUSI sought refunds on behalf of Target for a period in excess of one year.

Commission Rule 25-6.103(1), Florida Administrative Code, sets forth the method for determining the period of time for calculating a refund required of a public utility when a meter is found to have registered in excess of the plus tolerance level allowed in Rule 25-6.052(2)(a), Florida Administrative Code. Rule 25-6.103(1) provides:

(1) Fast meters. Whenever a meter tested is found to have an error in excess of the plus tolerance allowed in Rule 25-6.052, the utility shall refund to the customer the amount billed in error as determined by Rule 25-6.058 for one-half the period since the last test, said one-half period shall not exceed twelve (12) months; except that if it can be shown that the error was due to some cause, the date of which can be fixed, the over charges shall be computed back to but not beyond such date based upon available records. The refund shall not include any part of any minimum charge.

SUSI subsequently submitted similar complaints on behalf of: (a) thirteen additional Target accounts; (b) two Dillard’s Department Stores, Inc. accounts; (c) two J. C. Penney Corp. accounts;

(d) three Best Buy accounts; (e) one Ocean Properties account; and (f) six Home Depot accounts. The twenty-eight accounts were made the subject of the instant docket.

On November 19, 2003, the Commission issued a Notice of Proposed Agency Action Order Resolving Complaints, Order No. PSC-03-1320-PAA-EI (the "PAA Order"). The PAA Order concluded, in pertinent part:

From the information received we have not been able to determine that the meter error for any of the meters in question was due to a cause the date of which can be fixed. Because of that uncertainty, we believe it is reasonable to limit any refunds to bills rendered during the twelve-month period preceding the date the meter was removed.

Interest should be assessed on the refunded amount and should be calculated in accordance with Rule 25-6.109, Florida Administrative Code.

PAA Order, at 9-10

On December 10, 2003, a Petition for Formal Administrative Hearing (the "Petition") protesting the PAA Order was filed by SUSI with respect to certain of the previously identified FPL meters/accounts. More specifically, the Petition was filed on behalf of Ocean Properties, J.C. Penney Corp., Dillard's Department Stores, and Target (the "Customers").³ There are fourteen FPL accounts remaining at issue in this proceeding.⁴

³Pursuant to Order No. PSC-04-0459-PCO-EI issued June 11, 2004, SUSI was dismissed as a petitioner in this proceeding. The Commission affirmed this dismissal by denying SUSI's motion for reconsideration by vote taken at the August 17, 2004 Agenda Conference.

⁴See FPL's Motion for Clarification of a Portion of Order No. PSC-04-0591-PCO-EI. This motion was granted by the Commission pursuant to a vote taken at the August 17, 2004 Agenda Conference.

The Customers' Petition requests the Commission to enter a final order:

- (a) Calculating the amount of influence caused by the sun or radiant heat on any level of over-registration on the meters at issue and adjusting the refund amount accordingly;
- (b) Determining that the meters at issue were faulty and in error when last calibrated by FPL and using the last calibration date as the fixed starting date for the refund period running to the date the meter at issue was removed from the Customer's premises; and
- (c) Awarding interest on the amount of refund pursuant to Section 55.03, Florida Statutes.

On December 10, 2003, FPL also filed a Petition on Proposed Agency Action. FPL filed its Petition in the event a petition was filed by SUSI or any of the FPL customers whose meters had been the subject of SUSI's complaints. FPL's protest petition asserts that, in the event the proposed resolution in the PAA Order is not accepted by a customer and the matter proceeds to final hearing, the Commission rules should apply to the disposition of all **issues in this docket**. As outlined in FPL's Petition, the rules provide that any of the 1V meters **removed by FPL and lawfully tested** between 25% and 100% of full scale value pursuant to Rule 25-6.052(2) and FPL's Commission-approved Test Procedures and Test Plans for Metering Devices, which over-registered above four percent, are entitled to a refund for a period of twelve months applying the rates that would apply after adjusting for the meter error.

B. GROUNDS FOR SUMMARY FINAL ORDER ON ISSUES 3 AND 4

Issue 3: Pursuant to Rule 25-6.103, Florida Administrative Code, what is the period for which refunds should apply?

As the Petitioners seeking affirmative relief in the form of multi-year refunds, the Customers bear the burden of proof to establish by a preponderance of competent and substantial evidence that the meter error reflected in the most recent test result “was due to some cause, the date of which can be fixed....” See, Rule 25-6.103(1), Florida Administrative Code; see e.g., Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So.2d 778, 788 citing Balino v. Dept. of Health & Rehab. Serv., 348 So.2d 349, 350 (Fla. 1st DCA 1977) (“burden of proof... is on the party asserting the affirmative of an issue before an administrative tribunal.”); In Re: Complaint of Mr. Thomas R. Fuller Against Florida Power Corporation regarding High Electric Bills in Orange County, Order No. PSC-96-0483-FOF-EI issued April 5, 1996 (Customer has burden of proof in overcharge proceeding and “must show by a preponderance of the evidence that he was overcharged.”).⁵ As described by Staff witness Matlock, this requires the customer to establish that the inaccuracy of the specific meter at issue “can be traced to a specific cause and a specific time.”⁶

1. There is no Genuine Issue of Material Fact Regarding Customer’s Contention that the Meters at Issue were Miscalibrated.

The prefiled testimony submitted by Mr. Brown and Mr. Smith on behalf of the Customers fails to establish any genuine issue of material fact that would support a refund claim beyond one year for any of the fourteen meters at issue. There is no evidence as to the specific cause or date of

⁵96 F.P.S.C. 4:120 at 125.

⁶Matlock Testimony at page 10, lines 23-25.

error for any of the meters at issue. The Customers' testimony contains general allegations that some FPL meter testers calibrated thermal demand meters in a manner inconsistent with the manufacturer's recommendations. The Customers have offered no evidence that any of the alleged defective meter testing practices were performed on the meters at issue in this proceeding. Notably absent from the prefiled testimony filed on behalf of the Customers is any allegation that FPL's meter testing practices violated a Commission order, statute or rule.⁷ In any case, the Commission does not need to reach the testing procedures issue in order to reject the miscalibration theory offered by the Customers.

Moreover, even if Customers' allegations regarding FPL's meter testing practices were found to have merit, Customers have presented no evidence quantifying the impact of any such alleged errors on the specific meters at issue. Customers have failed to meet their burden of demonstrating that any of the meters at issue were miscalibrated by FPL. Because the Customers have failed to establish the cause and the fixed date on which the purported error in the meters at issue occurred, a Partial Summary Final Order should be issued directing that a one-year refund is to be provided by FPL for the accounts at issue based upon Rule 25-6.103(1). Such an order will conclusively resolve Issue 3 in the Order Establishing Procedure.⁸

A Partial Summary Final Order is amply supported by the undisputed facts set forth in Mr. Bromley's rebuttal testimony which establish that six of the fourteen meters were manufactured in

⁷ All of the customer contentions are conclusively rebutted in the prefiled rebuttal testimony of Mr. Bromley and Mr. Malemezian filed on behalf of FPL.

⁸ See, e.g., In re: Application for transfer of Certificate No. 218-S in Lee County from Bonita County Club Utilities, Inc. to Realnor Hallandale, Inc., Order No. PSC-00-0341-PCO-SU issued February 18, 2000; 00 F.P.S.C. 2:353.

the year just prior to or the year of FPL's acceptance testing for these six meters; that these six new meters tested accurate and calibration adjustments were not made; and that these six meters were not tested again until late 2002 and/or early 2003 when FPL tested its entire 1V meter population. There was no intervening calibration by FPL and the first time these meters over-registered out of tolerance was during the testing of the entire 1V meter population.⁹ In other words, six of the fourteen meters at issue were **never calibrated by FPL**. Accordingly, there is no factual basis for the Customers' speculation that the error in these meters occurred because they were miscalibrated by FPL during a prior meter test.

The Customers "miscalibration" theory is advanced without any evidentiary support related to any of the fourteen meters at issue in this docket. Because Mr. Bromley's testimony unequivocally establishes that six of these fourteen meters were never even calibrated before being placed in the field, the Customers' miscalibration theory is not only unsupported by direct evidence, it is contravened by the undisputed facts.

In sum, the Commission should enter a Partial Summary Final Order determining that the Customers have not met their burden of proof and there is no factual support for their speculative efforts to extrapolate purported meter testing errors into a broad based miscalibration theory. Because there is no specific evidence establishing a fixed date for the cause of the alleged error for any of the meters at issue, any Commission-ordered refunds in this proceeding cannot exceed the one year period provided in Rule 25-6.103(1), Florida Administrative Code.

⁹Bromley Rebuttal Testimony, at page 4, line 9 through page 5, line 5, and Document Nos. DB-5 and DB-6.

2. There is No Genuine Issue of Fact Regarding Customers' Contention that the Meters at issue were Influenced by the sun or radiant heat.

The Petition in this case seeks a calculation of the impact of radiant heat on the purported over-registration. However, insufficient evidence is presented to support such a determination. On page 10, lines 10-11 of his direct testimony, Mr. Brown concedes that he “cannot say with certainty what part of these meters’ demand errors in the docket were affected by the sun.” FPL witness Malemezian, in his rebuttal testimony, explained that the potential effect of radiant heat on a meter will depend on where the sun hits the meter and that tests conducted by FPL on this phenomena demonstrated that external heating caused either no demand mis-registration or some demand under-registration. Other than Mr. Malemezian’s testimony that external heat tends, if anything, to cause a meter to under-register, there is no evidence in the record to support a finding that any customer’s demand billing for a given month was inaccurate due the effects of the sun.¹⁰

As with the miscalibration theory, the Customers have failed to meet their burden of even remotely demonstrating that the sun or radiant heat caused any of the meters to over-register, the level of any over-registration or the fixed date on which such an event occurred. There are no issues of material fact to be resolved regarding the Customers’ allegation that the sun or radiant heat influenced the level of over-registration experienced by any of the fourteen meters at issue in this proceeding. Accordingly, the Commission should enter a Partial Summary Final Order determining that Customers have failed to meet their burden of establishing the fixed date for meter error required under Rule 25-6.103(1) and, therefore, any Commission-ordered refunds for the meters at issue in this proceeding can only be for a period of one year.

¹⁰Malemezian Rebuttal Testimony, at page 27, line 6 through page 28, line 19.

Issue 4: What Interest Rate Should be Used to Calculate Customer Refunds?

In the PAA Order, the Commission determined that Rule 25-6.109 governs the payment of interest on any refunds ordered by the Commission in this proceeding. Subsection (1) of Rule 25-6.109 states:

(1) Applicability. With the exception of deposit refunds and refunds associated with adjustment factors, all refunds ordered by the Commission shall be made in accordance with the provisions of this Rule, unless otherwise ordered by the Commission.

Subsection (4) of Rule 25-6.109 sets forth the manner in which interest on refunds is calculated.

In their Petition for Hearing, Customers contend that interest on any refunds that are ordered should be calculated pursuant to Sections 687.01¹¹ and 55.03, Florida Statutes. On January 5, 2004, FPL moved to strike the portions of the SUSI/Customers' Petition seeking an award of interest pursuant to these statutes. The Prehearing Officer denied FPL's Motion to Strike on the grounds that FPL had failed to show that Customers' pleading was "redundant, immaterial, impertinent or scandalous" under Rule 1.140, Florida Rules of Civil Procedure, and that in light of the decision in Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988), "there is a justiciable issue as to how the provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission."¹²

The question of which interest rate should apply to calculate customer refunds is purely a legal issue. Rule 25-6.109(1) clearly provides that the interest rate provisions in Subsection (4) of

¹¹Section 687.01, Florida Statutes, states that "[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03."

¹²Order No. PSC-04-0591-PCO-EI, at 5.

the Rule apply to all refunds ordered by the Commission with the exception of deposit refunds, refunds associated with adjustment factors, or unless otherwise ordered by the Commission. This case does not concern deposit refunds or adjustment factors. Accordingly, the only question is whether there is any basis for the Commission to “otherwise order” refunds.

The Customers’ reliance on the Kissimmee Utility decision is misplaced. In Kissimmee Utility, a customer sued a municipal electric utility in circuit court for refunds. The circuit court granted summary judgment for the municipal utility concluding that interest was not due because the rule under which the refund was sought, Rule 25-6.106(2), Florida Administrative Code (overcharges), did not include provisions for the payment of interest. On appeal, the Fifth District Court of Appeal reversed based on the decision in Argonaut Insurance Company v. May Plumbing Co., 474 So.2d 212 (Fla. 1985). In Argonaut, the court held that a plaintiff in a civil action who was awarded a verdict liquidating the plaintiff’s financial losses to a specified sum is entitled to prejudgment interest dating back to the date of the loss. The Fifth District certified to the Supreme Court of Florida a question of great public interest, to-wit: “[i]s a regulated public utility in Florida liable to customers for prejudgment interest on overcharge refunds?” Better Plastics, Inc. v. Kissimmee Utility Authority, 511 So.2d 402, 403 (Fla. 5th DCA 1987).

On appeal, the Supreme Court of Florida upheld the right of a customer properly suing a municipal electric utility in circuit court to prejudgment interest under the precedent established in the Argonaut decision. Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988). The Kissimmee Utility decision did not address whether Rule 25-6.109, a rule not at issue in that case, applied to a refund ordered by the Florida Public Service Commission for payment by an electric utility that is subject to rate regulation by the Commission.

In an order issued approximately seven months after the Florida Supreme Court's opinion in the Kissimmee Utility case, the Commission directly addressed the applicability of its refund rules in Commission proceedings. In In re: Complaint by Kelly Tractor Company, Inc. against Meadow Brook Utility Systems, Inc. regarding refund for overpayments in Palm Beach County, Order No. 20474 issued December 20, 1988,¹³ a customer brought an action before the Commission for refunds against an investor-owned, rate-regulated water and wastewater utility. The customer claimed that the appropriate rate of interest for any refund ordered by the Commission was controlled by Section 687.01, Florida Statutes. The Commission carefully analyzed and rejected the potential application of the Kissimmee Utility decision and held that the interest to be applied to any refund should be calculated pursuant to Rule 25-30.360(4), Florida Administrative Code. The Commission expressly recognized in the Kelly Tractor order that Rule 25-30.360(4) parallels Rule 25-6.109(4) for electric utilities for the purpose of addressing the calculation of interest for Commission-ordered refunds.¹⁴

In the Kelly Tractor order, the Commission noted that the generally applicable refund and interest rate rule for public utilities that are subject to Commission rate regulation - - Rule 25-6.109 - - was not at issue in the Kissimmee Utility case. The Commission further noted that Rules 25-30.360 (water and wastewater) and 25-6.109 (electric) apply by their terms only to Commission-ordered refunds. The Commission recognized that the Kissimmee Utility decision is “[f]lawed by false premises... and cannot be accepted as dispositive because of the superficial strength of the

¹³88 F.P.S.C. 12:275.

¹⁴88 F.P.S.C. 12:275 at 277.

Florida Supreme Court’s affirmative answer to the question that was certified to it.”¹⁵ As the Commission put it: “We believe that our rules should apply to the utilities we regulate.”¹⁶ In determining that Kissimmee Utility was not controlling, the Commission emphasized that the defendant municipal electric utility was a governmentally owned utility and the extent of the Commission’s jurisdiction over that utility was limited to rate structure. By contrast, the utility in the Kelly Tractor proceeding was an investor-owned water and sewer utility and subject to rate base regulation by the Commission - - as is the case with FPL.

Accordingly, the Commission has previously resolved the interest rate issue raised by the Customers. Pursuant to the plain language of Rule 25-6.109 and the Kelly Tractor order, the Commission should determine that Rule 25-6.109(4) applies to the calculation of interest to be paid by FPL, an investor-owned utility that is subject to Commission rate regulation, on any refunds ordered by the Commission in this proceeding.

WHEREFORE, for the foregoing reasons, FPL respectfully requests that the Commission enter a Partial Summary Final Order determining:

A. That there is no genuine issue of material fact as to Issues 3 and 4 in the Order Establishing Procedure;

B. That Customers have failed to meet their burden of establishing the cause and a fixed date for the cause for the purported error with respect to any meter at issue in this proceeding;

¹⁵88 F.P.S.C. 12:275 at 277 (emphasis supplied).

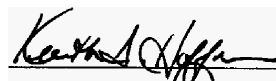
¹⁶88 F.P.S.C. 12:275 at 277 (emphasis supplied).

C. That because there is no evidence establishing a fixed date or cause for any of the meters at issue in this case, any refunds ordered by the Commission shall be for the maximum period of one year pursuant to Rule 25-6.109(1), Florida Administrative Code;

D. That interest on such refunds is to be calculated pursuant to Rule 25-6.109(4), Florida Administrative Code; and

F. That the resolution of Issues 1 and 2 in the Order Establishing Procedure be reserved for final hearing.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Motion for Partial Summary Final Order has been furnished by Hand Delivery this 23rd day of August, 2004, to the following:

Cochran Keating, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
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Jon C. Moyle, Jr., Esq.
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By: 
Kenneth A. Hoffman, Esq.

FPL\summaryfinal order

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utility Services, Inc., on behalf of various customers, against Florida Power & Light Company concerning thermal demand meter error.

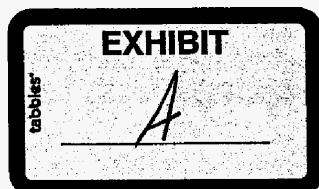
DOCKET NO. 030623-EI
ORDER NO. PSC-0581-PCO-EI
ISSUED: June 9, 2004

ORDER ESTABLISHING PROCEDURE**I. Case Background**

The Commission opened Docket No. 030623-EI to address complaints made by Southeastern Utility Services, Inc. (SUSI) against Florida Power and Light Company (FPL) on behalf of six commercial retail electric customers concerning 28 individual accounts. By Proposed Agency Action Order No. PSC-03-1320-PAA-EI (PAA Order), issued November 19, 2003, the Commission attempted to resolve these complaints. SUSI, the commercial customers, and FPL protested the Commission's order. Accordingly, this matter has been scheduled for a formal evidentiary proceeding.

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III. Governing Provisions

Formal hearing proceedings before the Florida Public Service Commission are governed by Chapter 120, Florida Statutes, and Chapters 25-22, 25-40, and 28-106, Florida Administrative Code. To the extent provided by Section 120.569(2)(g), Florida Statutes, the Florida Evidence Code (Chapter 90, Florida Statutes) shall apply. To the extent provided by Section 120.569(2)(f), Florida Statutes, and unless otherwise modified by the Prehearing Officer, the Florida Rules of Civil Procedure shall apply.

Rule 28-106.211, Florida Administrative Code, specifically provides that the presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of the case. This Order is issued pursuant to that authority. The scope of this proceeding shall be based upon the issues raised by the parties up to and during the prehearing conference, unless modified by the Commission.

IV. Issue Identification / Tentative Issues

A list of the issues identified thus far in this proceeding is attached to this order as Appendix A. Prefiled testimony, exhibits, and prehearing statements shall address the issues set forth in the appendix.

V. Filing Procedures

A. General

In accordance with Rule 25-22.028, Florida Administrative Code, parties shall submit the original document and the appropriate number of copies to the Division of the Commission Clerk and Administrative Services for filing in the Commission's docket file. Filing may be made by mail, hand delivery, or courier service. Please refer to the rule for the requirements of filing on diskette for certain utilities. Filings pertaining to this docket should identify the assigned docket number and should be addressed to:

Director, Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

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B. Document Identification

Unless modified by the Prehearing Officer for good cause shown, each page of every document produced pursuant to requests for production of documents shall be identified individually through the use of a Bates Stamp or other equivalent method of sequential identification. Parties should number their produced documents in an unbroken sequence through the final hearing. An example of the typical sequential identification format is as follows:

[company initials] 000001

C. Public Access to Records

All files at the Commission shall be open to public inspection, unless otherwise prohibited by law, regulation or court order, or when upon motion and order the Commission or Prehearing Officer otherwise has the authority or discretion to prohibit public inspection. All hearings shall be open to the public unless prohibited by law, regulation, or court order or unless closed by order of the Commission or the Prehearing Officer for good reason.

The Division of the Commission Clerk and Administrative Services shall make available for public inspection upon reasonable request during the regular business hours of the Commission all of the public records of the Commission, as defined by Chapter 119, Florida Statutes, subject to any privilege or confidential treatment of those records. The Commission Clerk may charge a fee to recover reasonable costs of copying as specified by Section 119.07(1)(a), Florida Statutes.

D. Ex Parte Communications Prohibition

Pursuant to Section 350.042, Florida Statutes, a party or counsel for a party shall not initiate any oral or written communication with a Commissioner pertaining to a matter before the Commission unless prior consent of all other parties or their counsel has been obtained. Copies of all pleadings or correspondence filed with the Commission by any party shall be served upon all other parties or their counsel.

All parties are cautioned to follow the requirements of Rule 25-22.033, Florida Administrative Code, relating to disclosure of meetings between parties, their representatives, and Commission staff.

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VI. Prefiled Testimony, Exhibits, & Exhibit Identification

Each party shall prefile, in writing, all testimony and exhibits that it intends to sponsor. An original and 15 copies of all testimony and exhibits shall be prefiled with the Director, Division of the Commission Clerk and Administrative Services, by 5:00 p.m. on the date due. A copy of all prefiled testimony and exhibits shall be served by regular mail, overnight mail, or hand delivery to all other parties and staff no later than the date filed with the Commission. Failure of a party to timely prefile exhibits and testimony from any witness in accordance with the foregoing requirements may bar admission of such exhibits and testimony.

Testimony shall be typed on 8 inch x 11 inch transcript-quality paper, double spaced, with 25 numbered lines, on consecutively numbered pages, with left margins sufficient to allow for binding (1.25 inches).

When a witness supports his or her prefiled testimony with one or more exhibits, each exhibit submitted shall:

- (1) have been previously produced except for good cause shown;
- (2) be identified individually through some method of sequential identification (See (4)(c) below), with the pages numbered sequentially within each attached exhibit;
- (3) be attached to that witness testimony when filed; and
- (4) have the following in the upper right-hand corner of each page:
 - (a) the docket number;
 - (b) the witness name;
 - (c) the word Exhibit followed by a blank line for the exhibit number;
 - (d) the word Page followed by a blank line for the page number and the word of followed by a blank line for the total number of pages in the exhibit; and
 - (e) the title of the exhibit.

An example of the typical exhibit identification format is as follows:

Docket No. 12345-TL
J. Doe Exhibit No. _____, Page ____ of ____
Cost Studies for Minutes of Use by Time of Day

All known exhibits shall be marked for identification at the prehearing conference. If a demonstrative exhibit or other demonstrative tools are to be used at hearing, they must also be identified by the time of the prehearing conference. After an opportunity for opposing parties to object to introduction of the exhibits and to cross-examine the witness sponsoring them, exhibits

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may be offered into evidence at the hearing. Exhibits accepted into evidence at the hearing shall be numbered sequentially.

VII. Discovery Procedures

A. General

Discovery shall be conducted in accordance with the provisions of Chapters 120, 366, and 367, Florida Statutes, Rules 25-22, 25-40, and 28-106, Florida Administrative Code, and the Florida Rules of Civil Procedure (as applicable), as modified herein or as may be subsequently modified by the Prehearing Officer.

When discovery requests are served and the respondent intends to request clarification of the discovery request, such request for clarification shall be made within ten calendar days of service of the discovery request. This procedure is intended to reduce delay in resolving discovery disputes.

The hearing in this docket is currently set for September 28, 2004. Unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Discovery shall be completed by September 14, 2004.
- (2) Discovery requests shall be served by e-mail, fax, hand delivery, or overnight mail.
- (3) All interrogatories, requests for admissions, and requests for production of documents shall be numbered sequentially in order to facilitate their identification.
- (4) Discovery requests shall be numbered sequentially within a set.
- (5) Subsequent discovery requests shall continue the sequential numbering system.
- (6) Discovery responses shall be served within 20 calendar days (inclusive of mailing) of receipt of the discovery request and shall be followed by hard copy within 2 calendar days if served electronically.
- (7) **For good cause shown, additional time for mailing shall be afforded at the Prehearing Officer's discretion.**
- (8) **Discovery requests and responses shall also be served on staff.**

Pursuant to Rule 28-106.206, Florida Administrative Code, unless subsequently modified by the Prehearing Officer, the following shall apply:

- (1) Interrogatories, including all subparts, shall be limited to 250.
- (2) Requests for production of documents, including all subparts, shall be limited to 100.

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- (3) Requests for admissions, including all subparts, shall be limited to 75.

B. Confidential Information Provided Pursuant to Discovery

Confidential information, and requests that information be deemed confidential, shall be governed by Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code. In response to discovery requests, parties may need to provide information that another party in this proceeding deems, or may deem, confidential. When the submitting party is aware that such information may be deemed confidential, the submitting party shall notify the other party prior to submitting the information, which shall be submitted with an accompanying Notice of Intent to Request Confidential Classification. This procedure is to ensure conformance with this Commission's rules regarding the handling and continued confidential treatment of such information pending a formal ruling by the Commission.

Any information provided pursuant to a discovery request for which proprietary confidential business information status is requested shall be treated by the Commission and the parties as confidential. The information shall be exempt from Section 119.07(1), Florida Statutes, pending: (i) a formal ruling on such request by the Commission; or (ii) return of the information to the person providing the information. Information that has not been made a part of the evidentiary record in the proceeding, shall be returned to the party providing it within: (i) one week of the hearing where no determination of confidentiality has been made; or (ii) the time period set forth in Section 366.093, Florida Statutes, where a determination of confidentiality has been made.

C. Depositions

Parties may conduct discovery by means of deposition. While parties may have a designated corporate representative present at a deposition, each party shall ensure that individuals other than its attorney and a corporate representative shall not be present at the depositions of any other witnesses in this docket. This prohibition shall apply to depositions conducted in person, by telephone, or by any other applicable means.

VIII. Motions

Motions shall be determined pursuant to Chapters 120 and 366, Florida Statutes, Chapters 25-22, 25-40, and 28-106, Florida Administrative Code, and the Florida Rules of Civil Procedure (as applicable), as modified herein. The Prehearing Officer retains authority to adjust any time frames regarding motions for good cause shown.

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IX. Settlements & Stipulations

The Commission shall be notified promptly of all settlements, stipulations, agency orders, or any other action terminating a matter before the Commission. A copy of such settlement, stipulation, agency order, or any other document reflecting an action terminating a matter before the Commission shall be filed with the Commission.

X. Telephonic/Electronic Proceedings

Where technically feasible, when all parties are in agreement, and subject to the explicit approval of the Presiding Officer, or as appropriate, the Prehearing Officer, parties may appear at administrative Commission hearings or prehearings via the use of telephonic, video, or other electronic means in lieu of appearing in person.

XI. Prehearing Procedures

A. Prehearing Statements

All parties in this docket and staff shall file a prehearing statement. The original and 15 copies of each prehearing statement shall be prefiled with the Director of the Division of the Commission Clerk and Administrative Services by 5:00 p.m. on the date due. A copy of the prehearing statement shall be served on all other parties and staff no later than the date it is filed with the Commission.

Failure of a party to timely file a prehearing statement shall be a waiver of any issue not raised by other parties or by the Commission. In addition, such failure shall preclude the party from presenting testimony in support of its position.

Prehearing statements shall set forth the following information in the sequence listed below:

- (1) The name of all known witnesses that may be called by the party and the subject matter of their testimony.
- (2) A description of all known exhibits that may be used by the party (including individual components of a composite exhibit) and the witness sponsoring each.
- (3) A statement of the party's basic position in the proceeding.
- (4) A statement of each question of fact the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue.

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- (5) A statement of each question of law the party considers at issue and the party's position on each such issue.
- (6) A statement of each policy question the party considers at issue, the party's position on each such issue, and which of the party's witnesses will address the issue.
- (7) A statement of issues to which the parties have stipulated.
- (8) A statement of all pending motions or other matters the party seeks action upon.
- (9) A statement identifying the party's pending requests or claims for confidentiality.
- (10) A statement as to any requirement set forth in this order that cannot be complied with, and the reasons therefore.
- (11) Any objections to a witness's qualifications as an expert. Failure to identify such objection may result in restriction of a party's ability to conduct voir dire.

B. Attendance at Prehearing Conference

Pursuant to Rule 28-106.209, Florida Administrative Code, a prehearing conference will be held August 30, 2004, at the Betty Easley Conference Center, 4075 Esplanade Way, Tallahassee, Florida. Unless excused by the Prehearing Officer for good cause shown, or in accordance with the Prehearing Officer's approval of appearance by electronic means under Section X, each party (or designated representative) shall personally appear at the prehearing conference. Failure of a party (or that party's representative) to appear shall constitute waiver of that party's issues and positions, and that party may be dismissed from the proceeding.

C. Waiver of Issues

Any issue not raised by a party prior to the issuance of the prehearing order shall be waived by that party, except for good cause shown. A party seeking to raise a new issue after the issuance of the prehearing order shall demonstrate each of the following:

- (1) The party was unable to identify the issue because of the complexity of the matter.
- (2) Discovery or other prehearing procedures were not adequate to fully develop the issue.
- (3) Due diligence was exercised to obtain facts touching on the issue.
- (4) Information obtained subsequent to the issuance of the prehearing order was not previously available to enable the party to identify the issue.
- (5) Introduction of the issue would not be to the prejudice or surprise of any party.

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Specific reference shall be made to the information received and how it enabled the party to identify the issue.

Unless a matter is not at issue for that party, each party shall diligently endeavor in good faith to take a position on each issue prior to issuance of the prehearing order. When a party is unable to take a position on an issue, it shall bring that fact to the attention of the Prehearing Officer. If the Prehearing Officer finds that the party has acted diligently and in good faith to take a position, and further finds that the party's failure to take a position will not prejudice other parties or confuse the proceeding, the party may maintain no position at this time prior to hearing and thereafter identify its position in a post-hearing statement of issues. In the absence of such a finding by the Prehearing Officer, the party shall have waived the entire issue. When an issue and position have been properly identified, any party may adopt that issue and position in its post-hearing statement.

D. Expectations of Parties at Prehearing Conference

A draft prehearing order shall be circulated to the parties by the Commission's legal staff prior to the prehearing conference. To maximize the efficiency at the prehearing conference for the Commission and the parties, parties shall be prepared to:

- (1) define and limit, if possible, the number of issues;
- (2) determine the parties' positions on the issues;
- (3) determine what facts, if any, may be stipulated;
- (4) dispose of any motions or other matters that may be pending; and
- (5) consider any other matters that may aid in the disposition of this case.

XII. Hearing Procedures

A. General

As provided by Sections 120.569 and 120.57, Florida Statutes, formal hearings will be held before the full Commission or assigned panel of Commissioners. The Commission will give notice of a hearing in a manner consistent with Chapters 120, 350, and 366, Florida Statutes. All hearings shall be transcribed, and the transcripts shall become part of the record. All witnesses shall present testimony that is sworn or affirmed and shall be subject to cross-examination. Unless authorized by the Presiding Officer for good cause shown, parties shall not conduct discovery during cross-examination at the hearing.

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B. Attendance at Hearing

Unless excused by the Presiding Officer for good cause shown, or in accordance with approval of appearance by electronic means under Section X, each party (or designated representative) shall personally appear at the hearing. Failure of a party, or that party's representative, to appear shall constitute waiver of that party's issues, and that party may be dismissed from the proceeding.

Likewise, all witnesses are expected to be present at the hearing unless excused by the Presiding Officer upon the staff attorney's confirmation prior to the hearing date of the following:

- (1) All parties agree that the witness will not be needed for cross examination.
- (2) All Commissioners assigned to the panel do not have questions for the witness.

In the event a witness is excused in this manner, his or her testimony may be entered into the record as though read following the Commission's approval of the proposed stipulation of that witness testimony.

C. Evidence

As provided by Sections 120.569 and 120.57, Florida Statutes, the Commission may consider the Florida Evidence Code (Chapter 90, Florida Statutes) as a guide, but may rely upon any evidence of a type commonly relied upon by a reasonably prudent person in the conduct of their affairs.

D. Use of Confidential Information at Hearing

It is the policy of this Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 366.093(2), Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding. Therefore, any party wishing to use any proprietary confidential business information, as that term is defined in Section 366.093, Florida Statutes, at the hearing shall adhere to the following:

- (1) Any party intending to use confidential documents for which no prior ruling has been made must be prepared to present their justifications to the Commission for a ruling at the hearing.
- (2) Any party wishing to use proprietary confidential business information shall notify the Prehearing Officer and all parties of record by the time of the

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prehearing conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing. Such notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute. Failure of any party to comply with the seven-day requirement described above shall be grounds to deny the party the opportunity to present evidence that is proprietary confidential business information.

- (3) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the court reporter, in red envelopes clearly marked with the nature of the contents. Any party wishing to examine the confidential material that is not subject to an order granting confidentiality shall be provided a copy in the same fashion as provided to the Commissioners, subject to execution of any appropriate protective agreement with the owner of the material.
- (4) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise confidentiality. Therefore, confidential information should be presented by written exhibit when reasonably possible.

At the conclusion of that portion of the hearing that involves confidential information, all copies of confidential exhibits shall be returned to the proffering party. If a confidential exhibit has been admitted into evidence, the copy provided to the court reporter shall be retained in the Division of the Commission Clerk and Administrative Services confidential files.

XIII. Post-Hearing Procedures

A. Bench Decision

The Commission (or assigned panel of Commissioners) may render a bench decision at the time of the hearing or render a decision without any post hearing submissions by the parties, as deemed appropriate. Such a determination may be with or without the oral or written recommendation of the Commission staff, at the Commission's (or assigned panel's) discretion.

B. Statements of Issues & Positions and Briefs

If the Commission (or assigned panel) does not make a bench decision at the hearing, it may allow each party to file a post-hearing statement of issues and positions. In such event, a summary of each position of no more than 50 words, set off with asterisks, shall be included in that statement. If a party's position has not changed since the issuance of the prehearing order, the post-hearing statement may simply restate the prehearing position. However, the position must be reduced to no more than 50 words. If a post-hearing statement is required and a party

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fails to file in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

Pursuant to Rule 28-106.215, Florida Administrative Code, a party's proposed findings of fact and conclusions of law, if any, statement of issues and positions, and brief, shall together total no more than 40 pages and shall be filed at the same time, unless modified by the Presiding Officer.

XIV. Controlling Dates

The following dates have been established to govern the key activities of this case:

- | | | |
|-----|---------------------------------------|--------------------|
| (1) | Direct testimony and exhibits (all) | July 12, 2004 |
| (2) | Staff testimony and exhibits, if any | August 2, 2004 |
| (3) | Rebuttal testimony and exhibits (all) | August 16, 2004 |
| (4) | Prehearing Statements | August 23, 2004 |
| (5) | Prehearing Conference | August 30, 2004 |
| (6) | Discovery Cutoff | September 14, 2004 |
| (7) | Hearing | September 28, 2004 |
| (8) | Briefs | October 26, 2004 |

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In addition, all parties should be on notice that the Prehearing Officer may exercise his discretion to schedule additional prehearing conferences or meetings of the parties as deemed appropriate. Such meetings will be properly noticed to afford the parties an opportunity to attend.

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Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that the provisions of this Order shall govern this proceeding unless modified by the Commission.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 9th day of June, 2004.

/s/ Charles M. Davidson

CHARLES M. DAVIDSON

Commissioner and Prehearing Officer

This is a facsimile copy. Go to the Commission's Web site, <http://www.floridapsc.com> or fax a request to 1-850-413-7118, for a copy of the order with signature.

(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.

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Appendix A

Tentative Issues List

1. Pursuant to Rule 25-6.052, Florida Administrative Code, what is the appropriate method of testing the accuracy of the thermal demand meters subject to this docket?
2. Pursuant to Rules 25-6.058 and 25-6.103, Florida Administrative Code, what is the appropriate method of calculating customer refunds for those thermal meters which test outside the prescribed tolerance limits?
3. Pursuant to Rule 25-6.103, Florida Administrative Code, what is the period for which refunds should apply?
4. What interest rate should be used to calculate customer refunds?

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

AFFIDAVIT OF DAVID BROMLEY


BEFORE ME, the undersigned authority, personally appeared David Bromley, who after being duly sworn, deposes and says:

1. That he has prepared and caused to be filed prefiled direct testimony and exhibits in the above-captioned docket on July 12, 2004; and that he has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.

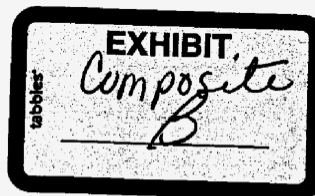
2. That the answers provided in the foregoing testimony are true and correct and that he has no changes or revisions to his direct or rebuttal testimony filed in the above-captioned docket with the exception of the following corrections to his prefiled direct testimony and Document No. DB-4 attached and incorporated therein:

- a. Page 3, lines 8 and 9: "5" should be "4".
- b. Document No. DB-4: under the Column entitled "Scale," the third number from the bottom should be changed from "3.5" to "7" and the number on the bottom (where there is no number) should be "7".

3. Further Affiant sayeth not.



DAVID BROMLEY

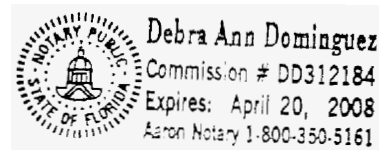


Sworn to and subscribed before me this 20 day of August, 2004, by DAVID BROMLEY, who is personally known to me _____ or produced the following identification

Debra Ann Dominguez
NOTARY PUBLIC - STATE OF FLORIDA

My commission expires: April 20, 2008

FPLBROMLEYAFFIDAVIT



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

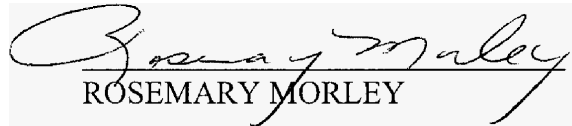
AFFIDAVIT OF ROSEMARY MORLEY

BEFORE ME, the undersigned authority, personally appeared Rosemary Morley, who after being duly sworn, deposes and says:

1. That she has prepared and caused to be filed prefiled direct testimony and exhibits in the above-captioned docket on July 12, 2004; and that she has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.

2. That the answers provided in the foregoing testimony are true and correct and that she has no changes or revisions to her direct or rebuttal testimony filed in the above-captioned docket.

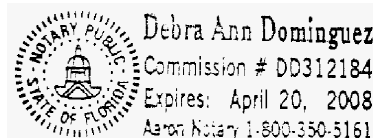
3. Further Affiant sayeth not.


ROSEMARY MORLEY

Sworn to and subscribed before me this 20 day of August, 2004, by ROSEMARY MORLEY, who is personally known to me, _____ or produced the following identification


NOTARY PUBLIC - STATE OF FLORIDA

My commission expires: April 20, 2008



BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

STATE OF FLORIDA)
COUNTY OF MARTIN)

AFFIDAVIT OF EDWARD C. MALEMEZIAN

BEFORE ME, the undersigned authority, personally appeared , who after being duly sworn,
deposes and says:

1. That he has prepared and caused to be filed prefiled rebuttal testimony and exhibits in the above-captioned docket on August 18, 2004.
2. That the answers provided in the foregoing testimony are true and correct and that he has no changes or revisions to his rebuttal testimony filed in the above-captioned docket.
3. Further Affiant sayeth not.

Edward C. Malemezian

EDWARD C. MALEMEZIAN

Sworn to and subscribed before me this 20 day of Aug., 2004, by EDWARD C. MALEMEZIAN, who is personally known to me or produced the following identification *D.H.*



NOTARY PUBLIC - STATE OF FLORIDA

Patricia Decker
My commission expires:

4-20-07