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August 31, 2004

VIA HAND DELIVERY

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
Betty Easley Conference Center
2540 Shumard Oak Boulevard, Room 110
Tallahassee, FL 32399-0850

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Re: Docket No. 030623-EI

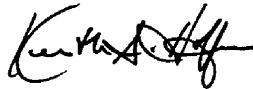
Dear Ms. Bayó:

Enclosed for filing in the above-referenced docket on behalf of Florida Power & Light Company ("FPL") are the original and fifteen copies of FPL's Response to Customers' Motion for Leave to Inspect Meters.

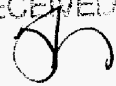
Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the copy to me. Please contact me if you have questions regarding this filing.

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Sincerely,



Kenneth A. Hoffman

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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 31, 2004

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
TO CUSTOMERS' MOTION FOR LEAVE
TO INSPECT METERS**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, hereby files this Response to the Motion for Leave to Inspect Meters filed by Ocean Properties, Ltd., Target, J. C. Penney and Dillard's (the "Customers"), and states as follows:

1. This docket was opened in the Summer of 2003. Discovery, including depositions, has been conducted by Customers as far back as January 2004.

2. The Customers' Motion for Leave to Inspect Meters is but the latest attempt by the Customers to conduct a trial by ambush. First, Customers served rebuttal testimony on August 18th containing substantial testimony and "analysis" reflecting customer billing data before and after thermal demand meters were replaced that was not responsive to FPL's direct testimony and clearly required as part of the Customers' direct case so that FPL would have had the opportunity under the Order Establishing Procedure to respond in rebuttal testimony. FPL has challenged the Customers' attempt to present such "rebuttal" testimony in a Motion to Strike filed August 23, 2004. Second, it was only as recently as August 23rd that FPL **first learned**, through Customers' Prehearing Statement filed that day, that Customers may attempt to call a series of FPL employees as live witnesses as part of the Customers' direct case. None of these individuals' depositions were filed as prefiled testimony as part of the Customers' direct case. Now, in their latest "eleventh-hour" move, Customers have waited until all testimony has been filed to make a belated request to examine

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the meters at issue in an attempt to meet their burden of proof in this case. Customers' Motion for Leave to Inspect Meters, ¶ 7. The issue of inspecting meters, which could have and should have been raised and resolved months before direct testimony was due, now surfaces at the tail end of this case without explanation or justification by the Customers for the tardiness of their request.

3. As the Customers note in paragraph 1 of their Motion, their attorney e-mailed a request for access to the meters in this docket on July 2, 2004. See e-mail attached hereto as Exhibit A. As Customers note in paragraph 2 of their Motion, counsel for FPL responded to the e-mail by letter dated July 7, 2004. That letter made it clear that the meters at issue were the subject of a Commission docket and therefore it was imperative to maintain the integrity of the meters in the event FPL was directed to take further action with respect to these meters by the Commission as a result of this proceeding. FPL counsel's letter also pointed out that the description of the desired test provided by Customers' counsel at that time indicated a desire to perform tests or procedures on the meters that are not captured in the Commission's rules. In view of the ambiguity of the Customers' request to "access" the meters, FPL's counsel advised Customers' counsel to set forth the specific details of the actions, examinations and/or tests requested by the Customers in a motion filed with the Prehearing Officer so that FPL would have the opportunity to respond to the specific requests and the Prehearing Officer could enter an order authorizing any actions that might be ordered in connection with these meters that remain the subject of this Commission proceeding.

4. The e-mail from counsel for Customers said their request was to gather whatever information might be gleaned from an examination of the meters to be used in the Customers' prefiled direct testimony. Had Customers taken specific inspection requests to the Prehearing Officer in early July, as advised by FPL, then any results of the examination of the meters could have

been included in their direct testimony.¹ Had Customers taken such steps, FPL would have had the opportunity to respond through prefiled rebuttal testimony, consistent with the language and intent of the Order Establishing Procedure issued in this docket² and standard Commission practice. Instead, Customers' response to FPL's July 7 letter was to do nothing until the filing of the Motion for Leave to Inspect Meters on August 24.

5. Customers attempt to support their request by misstating the facts reflected in the testimony to date. In paragraph 3 of their Motion, Customers allege that they "know that their meters, when tested, over-register demand beyond allowable tolerance. That statement is not true for two of the meters at issue in this docket. Customers also state that they "know that, upon 1V meter replacement, their demand registration dropped significantly when compared to all prior years in which the 1V meters were installed." That is another untrue statement. First, as reflected in the rebuttal testimony of FPL witness Rosemary Morley, an annual drop in KW was not a new phenomenon for any of these accounts. In the majority of the cases (7 of the 12), the accounts did not reach new historically low levels of demand in the 12 months following the meter change-out. Of the five accounts that did reach historical lows following the meter change-out, in 4 of the 5 cases, the drop in demand was a continuation of a trend that began before the meter change-out.

6. In paragraph 4 of their Motion, Customers admit that their position that the "most likely cause of demand over-registration is improper calibration" is no more than a "theory." Their

¹If Customers needed a few days' extension of time to file their direct testimony to accomplish an approved examination of the meters at issue, they could have sought such an extension. They chose not to do so.

²See Order No. PSC-0581-PCO-EI, at 4.

theory falls woefully short of meeting their burden of proof under Rule 25-6.103(1), Florida Administrative Code, of establishing a fixed date for the cause of the meter error and that fatal defect in Customers' direct case has been raised by FPL in support of a Motion for Partial Summary Final Order filed by FPL on August 23, 2004.

7. The glaring problem with the Customer's Motion is summarized in paragraph 7 where Customers state that they "seek to demonstrate entitlement to refunds longer than 12 months." As noted in FPL's Motion for Partial Summary Final Order, the time for the Customers to have made that showing was when prefiled direct testimony was filed on July 12, 2004. If Customers needed additional time to complete discovery necessary to make their prima facie case, they should have requested it from the Prehearing Officer. Instead, they did nothing and remained silent, lying low until all testimony was filed in this proceeding.

8. Customers argue that "FPL should not be allowed to argue that Customers have failed to meet their burden of proof, while also denying Customers access to critical evidence necessary to meet this burden." Customers' Motion for Leave to Inspect Meters, ¶ 6. FPL did not "deny access" to the meters at issue but instead advised the Customers to seek approval of the specifics of any "examination" from the Prehearing Officer per the July 7 letter. FPL maintains that the Customers' lack of diligence in pursuing a request through the Prehearing Officer that they believe necessary to meet their burden of proof should not be rewarded.

9. Worse, Customers mislead by alleging that "FPL... has chosen not to conduct any investigation or analysis to actually determine if any of the meter components have experienced failure, degradation, or characteristic change...." Customers' Motion for Leave to Inspect Meters, ¶ 6. All meters at issue in this docket were subject to Commission-refereed tests. Further, as

demonstrated in Document No. DB-1 to Mr. Bromley's prefiled direct testimony, in approving FPL's request to remove the 1V meter population, the Commission's General Counsel specifically stated that "with regard to referee test meters, FPL is expected to maintain and document a continuous chain of custody for such meters which may be reviewed by the Commission." (Emphasis supplied)

10. For the reasons stated above, FPL respectfully requests that the Prehearing Officer deny Customers' Motion for Leave to Examine Meters. Customers are clearly prohibited from using this "eleventh hour" discovery to supplement their prefiled testimony and FPL should not be prejudiced in its efforts to prepare for the final hearing. If the Prehearing Officer determines it to be appropriate to authorize some limited level of meter examination, FPL respectfully requests that the Prehearing Officer place necessary restrictions on any meter inspection by Customers to ensure FPL's physical custody and control of the meters and that the integrity of the meters is maintained. Again, FPL wishes to ensure that any proposed inspections approved by the Prehearing Officer do not compromise the integrity and stability of the meters should future testing be ordered by the Commission (as recommended by Staff witness Matlock).

11. In the event of an order authorizing some level of inspection of the meters at issue, FPL requests that any such order prohibit inspections that involve touching or moving interior components of the meter. FPL does not object to allowing the visual inspections called for in proposed inspection numbers 1, 2 and 3 because there is little risk of disturbing the meter as a result of these tests. FPL requests that the Prehearing Officer place restrictions on the inspections called for in numbers 5, 6, 7 and 8 and deny Customers' proposed inspection numbers 4 and 9 for the reasons stated below.

12. In proposed inspection No. 4, Customers propose to “Check that capstans are securely in place and do not rotate with slight pressure.” This is a destructive test. Checking involves touching and most likely moving the capstans. **Capstans are part of the zero and full-scale adjustment screws**, and moving the capstans could change the calibration of the meter.

13. Customers’ proposed inspections numbers 5 and 8 request:

5. **Visual inspection** of all solder joints and wires for shorting, opens, or broken joints.

8. With ohm meter check for continuity of circuits, solder joints, and resistance of heater circuits. Visually check for any signs of arching, burns, discoloration, melted components or other indications that lightening may have struck the meter or the meter may have experienced an extreme over load.

FPL does not object to a visual inspection along these lines. However, to the extent Customers are unable to see to reach all of these components without removing the scaleplate and perhaps some other components, FPL requests that the Prehearing Officer order that only visual inspection of these components is allowed so that the integrity of the meters is preserved.

14. Customers’ proposed inspections numbers 6 and 7 request:

6. Visual inspection of indicating demand needles (pointers red and black) for bends, clearance for free movement, contact point to one another.

7. Visual inspection of red indicating pointer bearing for bends, clearance for free movement. Move black maximum pointer across the scale to determine adequate friction. Place black maximum pointer at any point on the scale without contact of the red needle and tap for friction check.

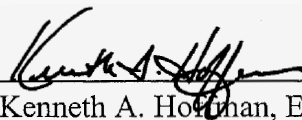
FPL does not object to visual inspection. However, to the extent inspection involves manually pushing the demand needles or pointer bearing up and downscale, the request should be denied

because such manual pushing could be destructive if, for example, there are problems with the grease or trash in the bearings. FPL request that the Prehearing Officer order that only visual inspection of the demand needles and pointer bearing be allowed so that the integrity of the meter is preserved.

15. In proposed inspection number 9, Customers propose “Visual inspection of front and rear bearings for foreign object contamination and signs of scoring or wear.” FPL requests that the Prehearing Officer deny Customers’ request to conduct proposed inspection number 9. This proposed inspection is very destructive because the bearings are not visible without major disassembly of the entire thermal unit. Such an inspection would destroy the integrity of the meter and should not be permitted.

WHEREFORE, FPL respectfully requests that the Prehearing Officer enter an order denying in full Customers’ Motion for Leave to Inspect Meters. In the event the Prehearing Officer authorizes some limited level of inspections, FPL respectfully requests that the Prehearing Officer’s order: (a) place terms and conditions on such inspections consistent with those set forth in paragraphs 10 and 11 above; (b) place restrictions on the inspections requested in inspection numbers 5, 6, 7 and 8 as set forth in paragraphs 13 and 14 above; and (c) deny the inspections requested in inspection numbers 4 and 9 as set forth in paragraphs 12 and 15 above.

Respectfully submitted,



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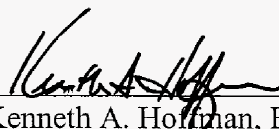
Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Customers' Motion for Leave to Inspect Meters has been furnished by Hand Delivery this 31st day of August, 2004, to the following:

Cochran Keating, Esq.
Office of the General Counsel
Florida Public Service Commission
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Tallahassee, Florida 32399-0850

Jon C. Moyle, Jr., Esq.
William Hollimon, Esq.
Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301

By: 
Kenneth A. Hoffman, Esq.

From: "JON MOYLE, JR." <jmoylejr@moylslaw.com>
To: "KEN HOFFMAN" <Ken@reuphlaw.com>
Date: 7/2/04 3:28PM
Subject: Access to Meters in Dispute

Ken: I will need access to the meters in dispute next week at a mutually convenient time, as direct testimony is due to be filed on July 12. I wish to have the meters reviewed and examined by an expert. The review and examination will not alter, damage or destroy the evidence. Please advise me promptly of your client's position regarding same. Also, I would like see if we can agree that the meters will go in as evidence in the proceeding. Thanks. Jon

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CC: "Cochran Keating" <WKeating@PSC.STATE.FL.US>, "BIL..."

