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September 2, 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

RECEIVED FPSC
SEP - 2 PM 4: 27
COMMISSION
CLERK

Re: Docket No. 030623-EI

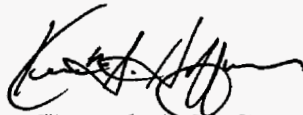
Dear Ms. Bayó:


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 to Compel.

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.

CMP _____
COM 3
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____ KAH/rl
RCA _____ Enclosures
SCR _____
SEC 1
OTH _____

Sincerely,


Kenneth A. Hoffman

RECEIVED & FILED

FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DAT
09649 SEP-2 8
FPSC-COMMISSION CLERK

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: September 2, 2004

**FLORIDA POWER & LIGHT COMPANY'S RESPONSE
TO CUSTOMERS' MOTION TO COMPEL**

Florida Power & Light Company ("FPL"), by and through its undersigned counsel, hereby files this Response to the Motion to Compel filed on August 26, 2004, by Ocean Properties, Target, J. C. Penny and Dillard's (the "Customers") and states as follows:

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

2. On April 8, 2004, Southeastern Utility Services, Inc. ("SUSI") and Customers filed a discovery request with the Commission titled "Request for Entry Upon Land for Inspection and Other Purposes and Production of Documents." The "April 8 Request" is attached as Exhibit A to Customers' August 26, 2004, Motion to Compel.

3. On May 10, 2004, FPL filed its Response and Objection to SUSI and Customers' April 8 Request. FPL's Response and Objection is attached as Exhibit B to Customers' August 26, 2004, Motion to Compel.

4. Per the Order Establishing Procedure in this Docket, Order No. PSC-0581-PCO-EI, prefiled direct testimony in this proceeding was due to be filed with the Commission on July 12, 2004. Customers filed the prefiled direct testimony and exhibits of George Clinton Brown and Bill Smith in support of their direct case on July 12, 2004. FPL filed the prefiled direct testimony and exhibits of David Bromley and Rosemary Morley on July 12, 2004.

DOCUMENT NUMBER-DATE

09649 SEP-28

FPSC-COMMISSION CLERK

5. On August 18, 2004, Customers filed the prefiled rebuttal testimony and exhibits of George Brown and Bill Gilmore. On the same date, FPL filed the prefiled rebuttal testimony and exhibits of David Bromley, Rosemary Morley and Edward Malemezian, P.E. Two days later, Customers filed a motion to file additional prefiled rebuttal testimony of Mr. Gilmore together with the proposed additional prefiled rebuttal testimony.

6. Subsequent to the filing of FPL's Response and Objection to the April 8 Request almost four months ago, FPL has not heard from counsel for Customers nor received any correspondence whatsoever from counsel for Customers related to the Request filed with the Commission. Counsel for the parties have corresponded on numerous matters throughout this proceeding, but this matter was never raised. Then, on August 26, 2004, just two business days before the Prehearing Conference in this Docket and as the parties were concluding discovery and beginning to prepare for hearing, Customers filed their Motion to Compel purportedly related to the April 8 Request. Customers did not confer with FPL before filing their Motion to Compel nor did they make any attempt to informally resolve the matter with FPL.¹

7. The Customers' Motion to Compel is yet another 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

¹ The Uniform Rules of Procedure require the movant to confer with the other party before filing a Motion to Compel. See Rule 28-106.204(3), Florida Administrative Code ("Motions, other than a motion to dismiss, shall include a statement that the movant has conferred with all other parties of record and shall state as to each party whether the party has any objection to the motion.")

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.² 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, in clear violation of the Order Establishing Procedure and Commission precedent. In another "eleventh-hour" move, Customers waited until all testimony was filed to make a belated request to examine the meters at issue in an attempt to meet their burden of proof in this case. And now, as in the case with the last minute request to inspect meters, which could have and should have been raised and resolved months before direct testimony was due, Customers' Motion to Compel now surfaces at the tail end of this case without explanation or justification by the Customers for the tardiness of the Motion.

8. FPL should not be prejudiced or deterred in its efforts to prepare for final hearing as a result of Customers' delay in raising discovery issues in this proceeding. That is particularly true in connection with the unsupported and unnecessary inspections sought through their Motion to Compel, matters on which Customers have taken no action for almost four months.

9. In their August 26 Motion to Compel, Customers allege that "information [about demand boards 1, 2, 3 and 4] is critical to Customers' ability to demonstrate their entitlement to refunds longer than 12 months."³ The characterization of this information as "critical" to the Customers is undermined by the Customers' prolonged failure to address this issue in this

² FPL has challenged the Customers' attempt to present such "rebuttal" testimony in a Motion to Strike filed August 23, 2004.

³See Customers' Motion to Compel at ¶ 9.

proceeding. Specifically, if the Customers truly viewed these inspection requests as critical, then Customers should have sought a resolution of this issue prior to the filing of their prefiled direct testimony. Customers' attempt to use their Motion to Compel to secure information to support their case-in-chief should be summarily rejected. Customers' failure to timely pursue this Motion to Compel undermines their characterization of the "critical" nature of the information to support their case.

10. According to the Motion, Customers "critical" need for this information is based on their "suspicion" that there may be variances between two test boards. This "suspicion" in turn is based on the fact that a meter tested twice over a 10 year period did not show the same test result.⁴ FPL would be surprised if there were not variances between the two test results, even if the tests occurred on the same demand boards. The Commission rules would allow for a 4% level of over- or under-registration for thermal demand meters in recognition of a permissible and expected level of variance between tests. Further, with respect to Customers' allegation about FPL's use of different demand boards to test the same meters when initially placed in service and then when removed from service, a number of years have passed since the initial tests. It should not be surprising that FPL would use new or different demand boards during the meter test upon removal than it used 11 years earlier during the meter test prior to installation – and in fact that is the case. Finally, if Customers truly had concerns with FPL's meter test boards, Customers could have availed themselves of their right to an independent test under Rule 25-6.059(4), Florida Administrative Code. Customers elected not to request independent tests of the meters at issue.

⁴Id.

11. Further, FPL has made available to Customers significant and sufficient information in the nature of what is sought in the Motion to Compel. First, FPL has made available to Customers all of the documents requested in the April 8 Request that show how the tests are performed. Also, Customers' authorized representatives and counsel and Staff toured FPL's Meter Test Center in Miami on August 4 and were able to visually inspect the meter test boards and standard reference meters and ask numerous questions of FPL employees. Additionally, during the deposition of FPL witness David Bromley on May 5, 2004, Customers asked a number of questions about test boards the answers to which were protected by attorney-client privilege. Despite the privilege, FPL agreed that Customers could inquire into those areas during the continued deposition of David Bromley on August 5, 2004, and Customers said that was one of the primary reasons it needed to continue Mr. Bromley's deposition. Then, Customers asked not one question of Mr. Bromley during the continued August 5, 2004, deposition related to such test boards or standard reference meters.

12. Moreover, in the rebuttal testimony of FPL witness Malemezian, the relevant portions of which are attached as Exhibit A to this Response [pp. 35-36], FPL included the information sought by Customers related to FPL's meter test boards and thermal reference standard. FPL submits that between the documents provided by FPL, the meter tests witnessed by Customers and the information included in Witness Malemezian's rebuttal testimony, Customers have more than adequate information regarding the testing of FPL's meter test boards and standard reference meter. Moreover, Customers will be taking the deposition of Mr. Malemezian on September 8, 2004.

13. Customers' Motion to Compel in fact is not a Motion to Compel, but is instead an additional discovery request filed with the Commission to the extent it seeks access to items not requested in the April 8 request. In the Motion to Compel, Customers seek "access to these demand

boards to determine if there is a difference between these boards that explains the demand over-registration observed in the most recent testing” [presumably demand boards numbered 2 and 4 considering the preceding sentence in that paragraph].⁵ However, none of the 12 items enumerated in the April 8 Request to which the Motion to Compel purportedly applies, seeks the same access that is sought in the Motion to Compel.

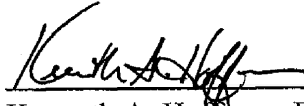
14. Finally, with respect to the inspections and tests sought through the Motion to Compel, Customers have not alleged or made any showing that they are qualified to conduct any type of test procedure of FPL’s standard reference meters or FPL’s thermal demand test boards. FPL reaffirms its position that the Motion to Compel should be denied; however, to the extent any aspect of the Motion to Compel is granted, procedures and conditions must be put in place to assure that FPL’s equipment, standard reference meters and meter test boards are not damaged or impaired by Customers.

15. With respect to the documents requested in the Motion to Compel, FPL has previously made the documents available to Customers.

WHEREFORE, FPL respectfully requests that the Prehearing Officer deny Customers’ Motion to Compel filed August 26, 2004.

⁵See Motion to Compel, at ¶ 9.

Respectfully submitted,



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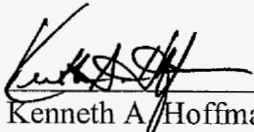
Attorneys for Florida Power & Light Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Florida Power & Light Company's Response to Customers' Motion to Compel has been furnished by Hand Delivery this 2nd day of September, 2004, to the following:

Cochran Keating, Esq.
Office of the General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
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.

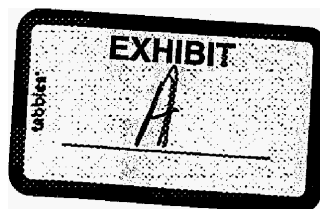
**BEFORE THE FLORIDA
PUBLIC SERVICE COMMISSION**

**DOCKET NO. 030623-EI
FLORIDA POWER & LIGHT COMPANY**

**IN RE: COMPLAINTS BY SOUTHEASTERN UTILITY
SERVICES, INC. (SUSI) ON BEHALF OF VARIOUS
CUSTOMERS, AGAINST FLORIDA POWER & LIGHT
COMPANY CONCERNING THERMAL DEMAND
METERS**

REBUTTAL TESTIMONY OF:

EDWARD C. MALEMEZIAN, P.E.



1 registration error that was greater than the error determined by the
2 independent test, so I'm not sure what issue Mr. Brown is raising.

3
4 **Q. On page 16, lines 6-24 of his direct testimony, Mr. Smith describes**
5 **concerns with the procedures used in the calibration of FPL's thermal**
6 **demand meter test boards. Are any of Mr. Smith's concerns warranted?**

7 A. No. FPL takes appropriate measures to ensure these thermal test boards are
8 calibrated accurately. The FAC rules, FPL's approved Test Procedures and
9 Test Plans for Metering Devices, dated April 3, 1997, and ANSI C12.1 are all
10 silent on the requirement for calibrating demand test boards. Therefore, FPL
11 utilizes the manufacturer's recommendations as a minimum set of
12 requirements for calibration of the test boards. The two thermal boards are
13 both Catalog Number 1132 by Eastern Specialty Company. Eastern Specialty
14 Bulletin No. 134, page 7, section 18, provides guidance on the method to be
15 employed in testing the calibration of the thermal board's reference standard.
16 Through the years, FPL has performed these calibration tests on a yearly
17 basis, a practice that remains in effect today.

18
19 As a follow-up to Messrs. Brown and Smith's concerns on the calibration
20 accuracy FPL's thermal test boards, FPL conducted a test using product
21 transfer standards ("PTS") to verify the calibration accuracy of the two
22 thermal test boards. This test involved taking two production (regular)
23 demand meters into the standards laboratory to determine their accuracy with

1 a high degree of certainty. The PTS meters were then taken to the thermal
2 boards, loaded up with 10 other demand meters, where they were all tested as
3 demand meters. The registration of the PTS meters were compared against
4 the reference standard and conclusions were then drawn on the accuracy of the
5 thermal reference standard. The results of those tests are as follows:

<u>Standard Reference Meter</u>	<u>PTS #1</u>	<u>PTS #2</u>
7 Test Board 3: 1.21	1.22	1.22
8 Test Board 4: 1.21	1.20	1.20

9 As a result of these PTS tests, FPL concluded that the reference standard
10 meters in both thermal test boards were reading within acceptable accuracy
11 limits.

12
13 **Q. On page 9, lines 4-17 of his direct testimony, Mr. Matlock describes a**
14 **proposed method for determining the percent error to be used in**
15 **calculating customer refunds or backbills. Is Mr. Matlock's proposed**
16 **method consistent with FPSC rules?**

17 **A.** For the most part, Mr. Matlock's proposed method is consistent with FPSC
18 rules. There is, however, one exception worthy of discussion. Rule 25-
19 6.103(3) states that "... when a meter is found to be in error in excess of the
20 prescribed limits, the figure to be used for calculating the amount of the
21 refund or charge ... shall be that percentage of error as determined by the
22 test." In the case of the demand meters, the "test" requirement of Rule 25-⁶_^
23 103(3) is provided by Rule 25-6.052(2), which states that the error of