

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaints by Ocean Properties, Ltd.,  
J.C. Penney Corp., Target Stores, Inc., and  
Dillard's Department Stores, Inc. against  
Florida Power & Light Company concerning  
thermal demand meter error.

DOCKET NO. 030623-EI  
ORDER NO. PSC-04-0933-PHO-EI  
ISSUED: September 22, 2004

Pursuant to Notice and in accordance with Rule 28-106.209, Florida Administrative Code, a Prehearing Conference was held on August 30, 2004, in Tallahassee, Florida, before Commissioner Charles M. Davidson, as Prehearing Officer.

APPEARANCES:

KENNETH A. HOFFMAN, ESQUIRE, AND J. STEPHEN MENTON,  
ESQUIRE, Rutledge, Ecenia, Purnell & Hoffman, P. A., P. O. Box 551,  
Tallahassee, Florida 32302 and NATALIE SMITH, ESQUIRE, Florida Power &  
Light Company, 700 Universe Boulevard, Juno Beach, Florida 33408-0420  
On behalf of Florida Power & Light Company (FPL).

WILLIAM H. HOLLIMON, ESQUIRE, AND JON C. MOYLE, JR., ESQUIRE,  
Moyle, Flanigan, Katz, Raymond and Sheehan, P. A., The Perkins House, 118  
North Gadsden Street, Tallahassee, Florida 32301  
On behalf of Ocean Properties, Ltd., J. C. Penney Corp., Dillards Department  
Stores, Inc., and Target Stores, Inc. (Customers).

WM. COCHRAN KEATING IV, ESQUIRE, Florida Public Service Commission,  
2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850  
On behalf of the Florida Public Service Commission.

**PREHEARING ORDER**

I. CONDUCT OF PROCEEDINGS

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, 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, to

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prevent delay, and promote the just, speedy, and inexpensive determination of all aspects of this 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 or Prehearing Officer.

II. CASE BACKGROUND

On November 19, 2003, the Commission issued Order No. PSC-03-1320-PAA-EI in this docket as proposed agency action to resolve complaints made by Southeastern Utility Services, Inc. (SUSI) against FPL on behalf of six commercial retail electric customers concerning inaccuracies in the customers' thermal demand meters. SUSI, four of the customers it represents (Ocean Properties, Ltd., J. C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc.), and FPL protested the Commission's proposed agency action and requested a formal administrative hearing on these matters. Subsequently, by Order No. PSC-04-0591-PCO-EI, issued June 11, 2004, which was upheld on reconsideration, SUSI was dismissed as a party to this proceeding.

This matter has been set for a formal administrative hearing on September 23, 2004.

III. ATTENDANCE AT HEARING: PARTIES AND WITNESSES

Unless excused by the Presiding Officer for good cause shown, 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 that:

- (i) all parties agree that the witness will not be needed for cross examination; and
- (ii) 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.

IV. PENDING MOTIONS

The following related motions are pending as of the issuance of this Prehearing Order:

- A. FPL's September 13, 2004, Motion to Compel George Brown to Respond to Questions Posed at August 27, 2004, Deposition and Additional Questions which Arise During the Continuation of the Deposition, Motion for Sanctions, and Request for Ruling on Claimed Confidential Portions of Deposition Transcript.
- B. Customers' September 20, 2004, Motion for Protective Order.

V. PROPOSED STIPULATIONS

There are no proposed stipulations at this time.

VI. OPEN PROCEEDINGS AND PROCEDURE FOR HANDLING CONFIDENTIAL INFORMATION

- A. Confidential information should be treated in accordance with the provisions of the Order Establishing Procedure previously issued in this docket.
- B. It is the policy of the Florida Public Service Commission that all Commission hearings be open to the public at all times. The Commission also recognizes its obligation pursuant to Section 364.183, Florida Statutes, to protect proprietary confidential business information from disclosure outside the proceeding.
  - 1. Any party intending to utilize confidential documents at hearing for which no ruling has been made, must be prepared to present their justifications at hearing, so that a ruling can be made at hearing by the Commission.
  - 2. In the event it becomes necessary to use confidential information during the hearing, the following procedures will be observed:
    - a) Any party wishing to use any proprietary confidential business information, as that term is defined in Section 364.183, Florida Statutes, shall notify the Prehearing Officer and all parties of record by the time of the Prehearing Conference, or if not known at that time, no later than seven (7) days prior to the beginning of the hearing, unless approved by the Prehearing Officer for good cause shown. The notice shall include a procedure to assure that the confidential nature of the information is preserved as required by statute.

- b) Failure of any party to comply with 1) above shall be grounds to deny the party the opportunity to present evidence which is proprietary confidential business information.
- c) When confidential information is used in the hearing, parties must have copies for the Commissioners, necessary staff, and the Court Reporter, in 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.
- d) Counsel and witnesses are cautioned to avoid verbalizing confidential information in such a way that would compromise the confidential information. Therefore, confidential information should be presented by written exhibit when reasonably possible to do so.
- e) 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.

VII. PENDING CONFIDENTIALITY MATTERS

There are no pending confidentiality matters.

VIII. OPENING STATEMENTS

Opening Statements, if any, shall not exceed 20 minutes per party.

IX. WITNESSES: OATH, PREFILED TESTIMONY, EXHIBITS, AND CROSS-EXAMINATION

The Commission frequently administers the testimonial oath to more than one witness at a time. Therefore, when a witness takes the stand to testify, the attorney calling the witness is directed to ask the witness to affirm whether he or she has been sworn.

Testimony of all witnesses to be sponsored by the parties has been prefiled and will be inserted into the record as though read. However, all testimony remains subject to appropriate objections. Upon insertion of a witness' testimony into the record, exhibits appended thereto may be marked for identification.

Following affirmation that the witness has been sworn, the witness shall then be tendered for cross-examination by all parties and staff. Commissioners may also pose questions as they deem appropriate. Witnesses are reminded that, on cross examination, responses to questions calling for a simple yes or no answer shall be so answered first, after which the witness may explain his or her answer. After all parties and staff have had the opportunity to object and cross-examine, exhibits may be moved into the record. All other exhibits may be similarly identified and entered into the record at the appropriate time during the hearing.

X. ORDER OF WITNESSES

Witnesses will be heard in the following order except that where a witness has submitted both direct and rebuttal testimony, his or her direct and rebuttal testimony will be heard at the same time.

| <u>Witness</u>             | <u>Proffered By</u> | <u>Issues #</u> |
|----------------------------|---------------------|-----------------|
| <u>Direct</u>              |                     |                 |
| David Bromley              | FPL                 | 1, 2, 5         |
| Rosemary Morley            | FPL                 | 2, 4, 6, 8      |
| George Brown               | Customers           | 1-8             |
| Bill Smith                 | Customers           | 1-8             |
| Sidney W. Matlock          | Staff               | 1, 2            |
| <u>Rebuttal</u>            |                     |                 |
| David Bromley              | FPL                 | 1, 2, 5         |
| Rosemary Morley            | FPL                 | 2, 4, 6, 8      |
| Edward C. Malemezian, P.E. | FPL                 | 1, 2, 5         |
| George Brown               | Customers           | 1-8             |

| <u>Witness</u> | <u>Proffered By</u> | <u>Issues #</u> |
|----------------|---------------------|-----------------|
| Bill Gilmore   | Customers           | 1-8             |

XI. EXHIBIT LIST

| <u>Witness</u>  | <u>Proffered By</u> | <u>I.D. No.</u>  | <u>Description</u>  |
|-----------------|---------------------|------------------|---|
| <u>Direct</u>   |                     |                  |   |
| David Bromley   | FPL                 | <u>DB-1</u>      | 1V meter removal authorization letter for the FPSC's General Counsel                                  |
| David Bromley   | FPL                 | <u>DB-2</u>      | Front view picture of a 1V meter  |
| David Bromley   | FPL                 | <u>DB-3</u>      | FPL's approved test procedures (4 pages)  |
| David Bromley   | FPL                 | <u>DB-4</u>      | Meter test results (14 accounts)  |
| Rosemary Morley | FPL                 | <u>RM-1</u>      | Summary of Accounts Eligible for Refunds  |
| Rosemary Morley | FPL                 | <u>RM-2</u>      | Adjusted kW Demands and Refunds by Account  |
| Rosemary Morley | FPL                 | <u>RM-3</u>      | Derivation of Refunds by Account  |
| George Brown    | Customers           | <u>Exhibit 1</u> | FPL's Test Records for Meters   |
| George Brown    | Customers           | <u>Exhibit 2</u> | Excerpts from Deposition Testimony of FPL Employee Keith Herbster, Brian Faircloth and Jim Teachman.  |
| George Brown    | Customers           | <u>Exhibit 3</u> | Graph of the Demand by One Account Before, During and After Installation of the Thermal Demand Meter. |

| <u>Witness</u> | <u>Proffered By</u> | <u>I.D. No.</u>  | <u>Description</u>   |
|----------------|---------------------|------------------|--|
| George Brown   | Customers           | <u>Exhibit 4</u> | E-Mail Authored by Mr. DeMars on Sept. 24, 2002.                 |
| George Brown   | Customers           | <u>Exhibit 5</u> | Composite Exhibit on Demand Change.                              |
| George Brown   | Customers           | <u>Exhibit 6</u> | Composite Exhibit Showing Appropriate Refund for Customers.      |
| Bill Smith     | Customers           | <u>Exhibit A</u> | Excerpt from Deposition Testimony of Keith Herbster              |
| Bill Smith     | Customers           | <u>Exhibit B</u> | Excerpt from Deposition Testimony of Brian Faircloth             |
| Bill Smith     | Customers           | <u>Exhibit C</u> | Excerpt from Deposition Testimony of Jim Teachman                |
| Bill Smith     | Customers           | <u>Exhibit D</u> | FPL Answer to Staff Request for Data, 8/18/2003.                 |
| Bill Smith     | Customers           | <u>Exhibit E</u> | Landis & Gyr Manual.   |
| Bill Smith     | Customers           | <u>Exhibit F</u> | History of Thermal Demand Meter Overregistration Refund Dispute. |
| Bill Smith     | Customers           | <u>Exhibit G</u> | Meter Test Center Operations 9/23/93.                            |
| Bill Smith     | Customers           | <u>Exhibit H</u> | Thermal Meter Board Procedures.                                  |
| Bill Smith     | Customers           | <u>Exhibit I</u> | E-Mail from David Bromley to John Easterling.                    |
| Bill Smith     | Customers           | <u>Exhibit J</u> | King's Point Billing History & Chart.                            |
| Bill Smith     | Customers           | <u>Exhibit K</u> | Responses to Questions re: Meter Issues & Discussion Items.      |

| <u>Witness</u>    | <u>Proffered By</u> | <u>I.D. No.</u>  | <u>Description</u>  |
|-------------------|---------------------|------------------|---|
| Bill Smith        | Customers           | <u>Exhibit L</u> | FPL Document -- "Facts About Demand Meters".                              |
| Bill Smith        | Customers           | <u>Exhibit M</u> | E-Mail from Jim DeMars to Magda Rothman.                                  |
| Bill Smith        | Customers           | <u>Exhibit N</u> | Meters for Independent Testing .  |
| Bill Smith        | Customers           | <u>Exhibit O</u> | Excerpt from Deposition Testimony of David Bromley.                       |
| Sidney W. Matlock | FPSC                | <u>SWM-1</u>     | Thermal Demand Meters Included in Protest of Order No. PSC-03-1320-PAA-EU |
| Sidney W. Matlock | FPSC                | <u>SWM-2</u>     | Demand Meter Test Data and Interpolations                                 |
| <u>Rebuttal</u>   |                     |                  |   |
| David Bromley     | FPL                 | <u>DM-5</u>      | Landis & Gyr Meters by Serial Number/Year                                 |
| David Bromley     | FPL                 | <u>DM-6</u>      | Test Records for 6 of the Meters  |
| Rosemary Morley   | FPL                 | <u>RM-4</u>      | Summary of Accounts Eligible for Refund                                   |
| George Brown      | Customers           | <u>GB-1</u>      |   |
| George Brown      | Customers           | <u>GB-2</u>      | Page Showing Calibration Test Point.                                      |
| George Brown      | Customers           | <u>GB-3</u>      | C. R. Collinsworth Letter Dated April 5, 1982 to Richard Miller.          |
| George Brown      | Customers           | <u>GB-4</u>      | F. B. Breedlove Letter to Dick Miller Dated May 28, 1982.                 |



| <u>Witness</u> | <u>Proffered By</u> | <u>I.D. No.</u> | <u>Description</u>  |
|----------------|---------------------|-----------------|---|
| George Brown   | Customers           | <u>GB-5</u>     | FPL Response to Staff's Interrogatory No. 3.  |
| George Brown   | Customers           | <u>GB-6</u>     | Excerpts From Duncan Landis & Gyr Manual.   |
| George Brown   | Customers           | <u>GB-7</u>     | Analysis of Change in Demand After Meter Replacement  |
| Bill Gilmore   | Customers           | <u>BG-1</u>     | Summary Analysis Proving That Ratio of Consumption to Demand is Valid. Relationship Between Demand & Consumption. |
| Bill Gilmore   | Customers           | <u>BG-2</u>     | Charts Containing Raw Data for Each Meter in Docket.  |
| Bill Gilmore   | Customers           | <u>BG-3</u>     | XMR Control Chart and Data  |
| Bill Gilmore   | Customers           | <u>BG-4</u>     | Summary of Control Chart Analysis   |

## XII. BASIC POSITIONS

**FPL:** The meters at issue in this proceeding are known as 1V thermal demand meters. These meters have been used by FPL in the provision of electric service to certain commercial customers. After the 1V meter population failed a statistical sampling test conducted by FPL in the summer of 2002, FPL requested and received approval from the Commission's General Counsel to remove the approximately 3900 1V meters from its meter population in the field. The removal of the 1V meters began in November 2002 and was completed by January 2003. All 1V meters were tested in accordance with Rule 25-6.052, Florida Administrative Code, and FPL's Commission-approved Test Procedures and Test Plans for Metering Devices.

The protest Petition filed by Southeastern Utility Services, Inc., which has since been dismissed as a party, and by Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc. and Target Stores, Inc. (the "Customers"), placed 14 of these 1V meters at issue in this proceeding.

With respect to each of the 14 meters at issue per Customers' Petition, FPL's basic position is as follows:

(1) FPL conducted its testing consistent with Rule 25-6.052, Florida Administrative Code, and FPL's Commission-approved Test Procedures and Test Plans for Metering Devices.

(2) That in calculating the amount of refunds for meters that over-registered above the 4% tolerance level per Commission rule, FPL has tested each meter and determined the meter test error consistent with Rules 25-6.052, 25-6.058 and 25-6.103, Florida Administrative Code, and FPL's Commission-approved Test Procedures and Test Plans for Metering Devices.

(3) That the period for the refund for each meter at issue in this proceeding is one year. To qualify for a refund beyond one year, Rule 25-6.103(1), Florida Administrative Code, requires the establishment of the fixed date of the cause for the over-registration reflected in the meter test for each meter at issue. Customers have failed to meet this burden. Customers' speculation that each meter at issue in this proceeding was miscalibrated requiring refunds dating back to the prior meter test in the early or mid-1990s has no factual support and is completely undermined by the fact that six of the meters at issue were never calibrated by FPL before being placed in the field. Further, the random allegations that certain meter testers employed by FPL tested thermal demand meters in a manner not consistent with the manufacturer's recommendations are without merit. More importantly, there is no evidence that any of these procedures criticized by Customers was performed on any of the 14 meters at issue. Finally, Customers have presented no evidence that the meters at issue were affected by the sun or radiant heat. In fact, Customers admit that they cannot say with certainty whether any of the meters in this docket were affected by the sun.

(4) Interest on refunds should be calculated pursuant to the methodology set forth in Rule 25-6.109(4), Florida Administrative Code.

Based on the foregoing, total refunds, with interest, for the meters at issue in this proceeding that are eligible for refunds are \$31,377.53.

FPL also has provided for consideration a modification to its process for testing customer-requested thermal demand meter tests. This process utilizes a customer's 24-month actual historical average percentage of full scale as the test point rather than, for example, the 40% or 80% of full scale used by FPL to perform annual sampling tests. However, no meter test would be performed at

less than 40% of full scale. **FPL believes that this** method more closely resembles what the meter actually experienced in the field.

**Customers:** 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. Customers argue that the statute, not the rule, controls. See also *Kissimmee Utility Authority v. Better Plastics, Inc.*, 526 So.2d 46 (Fla. 1988).

**Staff:** Staff's positions are preliminary and based on materials filed by the parties and on discovery. The preliminary positions are offered to assist the parties in preparing for the hearing. Staff's final positions will be based upon all the evidence in the record and may differ from the preliminary positions.

### XIII. ISSUES AND POSITIONS

**ISSUE 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?

#### **POSITIONS:**

**FPL:** The appropriate methods of testing the accuracy of the watt-hour and demand portions of the thermal demand meters subject to this docket are set forth in Rule 25-6.052, Florida Administrative Code, and FPL's Commission-approved Test Procedures and Test Plans for Metering Devices. With respect to kW demand, Rule 25-6.052(2)(a) authorizes a testing point "at any point between 25 percent and 100 percent of full-scale value." FPL's Test Procedures and Test Plans for Metering Devices, approved by the Commission pursuant to Rule 25-6.052(4), F.A.C. provide that "[d]emand is tested between 25 and 100% of full scale." The watt-hour portion of these meters was tested at light load (10% rated test ampere) and heavy load (one test at 100% power and another test at 50% lagging power factor). The demand portion of these meters was tested at test points between 25% and 100% of full-scale value.

FPL also has provided for consideration a modification to its process for testing customer-requested thermal demand meter tests. This process utilizes a customer's 24-month actual historical average percentage of full scale as the test point rather than, for example, the 40% or 80% of full scale used by FPL to perform annual sampling tests. However, no meter test would be performed at

less than 40% of full scale. FPL believes that this method more closely resembles what the meter actually experienced in the field. (Bromley, Malemezian).

**Customers:** Rule 25-6.052 does not specify an appropriate method for testing the accuracy of thermal demand meters (“TDM’s”). This rule only addresses performance, and does not address the appropriate point, or points, at which TDM’s should be tested to verify performance. The TDM’s at issue in this docket were all manufactured by Landis & Gyr. These meters have certain operational and design characteristics that affect meter accuracy. As a result of these operational and design characteristics, TDM’s are most accurate at the high end of the meter scale. In other words, based on these characteristics, a meter tested at 100% of full scale and exhibiting a certain full scale error, would be expected to exhibit a lower full scale error when tested at any point lower than 100% of full scale. The converse is also true. Any TDM tested at 40% of full scale and exhibiting a certain full scale error, would be expected to exhibit a higher full scale error when tested at 80% of full scale. Therefore, it is only by testing at the highest practicable percent of full scale that the Commission can be best assured that the *performance* of TDM’s, as required by Rule 25-6.052(2)(a), is acceptable over the range of 25% to 100% of full scale. This is also why the meter manufacturer and ANSI C12.1 recommend testing at or above 50% of full scale and why Landis & Gyr provided a calibration warranty for these meters based on a test conducted at 75% of full scale. Therefore, the appropriate method of testing the accuracy of thermal demand meters subject to this docket is to test at the highest practicable percentage of full scale.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 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?

**POSITIONS:**

**FPL:** For the watthour portion, utilize the average meter error (the light load is given a weight of 1, the heavy load test at 100% power factor is given a weight of 4 and the heavy load test at 50% lagging power factor is given a weight of 2). For demand, utilize the error stated in terms of full-scale value to calculate the customer’s adjusted kWh usage and/or kW demand to remove the effects of the meter error and apply FPL’s tariffed rates and charges to the adjusted billing determinants. (Bromley, Malemezian, Morley).

**Customers:** 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 rule 25-6.058 that specifically address the determination of average meter error for kW registration, this rule does not specifically address how to determine the meter error for demand over-registration. The determination of meter error is critical to both determining the "amount billed in error" and to calculating the appropriate refund. Rule 25-6.103(3), if interpreted to mean that the full-scale error should be used in determining the refund, is inconsistent with the requirement in 25-6.103(1) that the refund equal the "amount billed in error." This is because the full-scale error, by definition, understates the actual impact on the customer unless the meter is both tested at 100% of full scale (to determine the full-scale error) and is used by the customer at 100% of full scale. In an abundance of caution, Customers have filed 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.

Thus, the proper method of testing is to use 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. To do otherwise would result in customers in this docket receiving an undue disadvantage, and other, similarly situated customers, receiving an undue preference.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 3:** **Should the 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?**

**POSITIONS:**

**FPL:** No. The Commission should determine the percentage of meter over registration error pursuant to Rule 25-6.103(3), Florida Administrative Code. The Customers

in this docket, like customers whose meters are not at issue in this docket, were offered a KW demand billing differential for purposes of calculating a one-year refund together with a one year refund as part of a mechanism for settling the 1V meter accounts. The Customers in this docket, through Mr. Brown, rejected this proposal.

**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.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 4:** **What rate schedule should be applied in calculating customer refunds?**

**POSITIONS:**

**FPL:** The rate schedule that should be applied in calculating customer refunds is the rate schedule that would apply to the Customer’s kw demand if the Customer’s meter had registered zero error.

**Customers:** 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.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 5:** Pursuant to Rule 25-6.103, Florida Administrative Code, what is the period for which refunds should apply?

**POSITIONS:**

**FPL:** Customers have failed to demonstrate the fixed date of the cause for the error resulting in over-registration for each meter at issue in this proceeding. Accordingly, under Rule 25-6.103(1), Florida Administrative Code, the period for which any Commission-ordered refunds should apply is one year. (Bromley, Malemezian).

**Customers:** 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.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 6:** **What interest rate should be used to calculate customer refunds?**

**POSITIONS:**

**FPL:** Interest on any Commission-ordered refunds should be calculated pursuant to the methodology set forth in Rule 25-6.109(4), Florida Administrative Code. (Morley).

**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).

**Staff:** Refunds should be calculated using the interest rate specified in Rule 25-6.109, Florida Administrative Code.

**ISSUE 7:** **Did the sun or radiant heat affect the accuracy of any of the meters subject to this docket? If so, how do such effects impact the determination of which meters are eligible for a reward or the amount of any refund due?**

**POSITIONS:**

**FPL:** No. There is no evidence that the sun or radiant heat affected the accuracy of any of the meters subject to this docket. Therefore, there is no effect on the determination of which meters are eligible for a refund or the amount of any refund due.

**Customers:** Yes, the sun or radiant heat affects the accuracy of thermal demand meters, increasing the amount of refunds that would otherwise be due customers.

**Staff:** No position pending evidence adduced at hearing.

**ISSUE 8:** What is the appropriate customer refund for each thermal demand meter subject to this docket that tests outside the prescribed tolerance limits?

**POSITIONS:**

**FPL:** The Commission should order one-year refunds plus interest calculated pursuant to Rule 25-6.109(4), Florida Administrative Code. The total amount of refunds plus interest is \$31,377.53 for the twelve meters eligible for refunds. The breakdown of the refund plus interest for each meter is set forth in document No. RM-4 attached to Ms. Morley's rebuttal testimony.

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

| METER # | PRINCIPAL AMOUNT DUE | METER #          | PRINCIPAL AMOUNT DUE |
|---------|----------------------|------------------|----------------------|
| TARGET  |                      | JC PENNEY        |                      |
| 1V5885  | \$54,524.05          | 1V7179D          | \$32,259.97          |
| 1V7001D | \$87,563.61          | 1V52475          | \$11,868.36          |
| 1V5192D | \$66,554.47          | OCEAN PROPERTIES |                      |
| 1V5025D | \$27,634.36          | 1V52093          | \$55,666.12          |
| 1V7019D | \$72,038.10          | DILLARD'S        |                      |
| 1V7032D | \$36,052.00          | 1V7166D          | \$22,684.28          |
| 1V5887D | \$40,976.19          | 1V5216D          | \$15,979.81          |
| 1V5871D | \$33,411.84          |                  |                      |
| 1V5159D | \$29,717.52          |                  |                      |

**Staff:** The calculation of any refunds due is a fallout of Issue 1-7. Thus, staff takes no position on this issue pending the evidence adduced at hearing on Issues 1-7.

**XIV. POST-HEARING PROCEDURES**

If the Commission does not make a bench decision at the hearing, each party shall file a post-hearing statement of issues and positions. 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 party fails to file a post-hearing statement in conformance with the rule, that party shall have waived all issues and may be dismissed from the proceeding.

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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.


XV. RULINGS

Customers' Motion for Leave to Late-File Rebuttal Testimony is granted. FPL shall be entitled to submit a three page response to Customers' late-filed rebuttal testimony.

It is therefore,

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that this Prehearing Order shall govern the conduct of these proceedings as set forth above unless modified by the Commission.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 22nd day of September, 2004.



CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

(SEAL)

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.