

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-04-0935-PCO-EI  
ISSUED: September 22, 2004

ORDER DENYING MOTION TO COMPEL

On April 8, 2004, Southeastern Utility Services, Inc. ("SUSI") and Ocean Properties, Ltd. served Florida Power & Light Company ("FPL") with a Request for Entry Upon Land for Inspection and Other Purposes and Production of Documents, enumerating eight requests to inspect, test, measure, or photograph specific items and four requests for production of documents. FPL filed its Response and Objections to this request on May 10, 2004.

On August 26, 2004, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. ("Customers") filed a motion to compel FPL to comply with this request. FPL responded to the motion to compel on September 2, 2004. This Order addresses Customers' motion to compel.

Customers' Motion to Compel

In their motion to compel, Customers assert that they "seek to inspect FPL's meter test board and standard meters to independently verify the accuracy of this equipment." Customers assert that their request is proper discovery made pursuant to Rule 1.350(a)(3), Florida Rules of Civil Procedure, which is applicable to this proceeding through Rule 28-106.206, Florida Administrative Code. Customers state that their requested inspections are outside the Commission's rules dealing with meter testing because Customers seek to test FPL equipment other than Customers' meters, i.e., the equipment that FPL has used to test Customers' meters.

Customers contend that their requested inspections are critical to their ability to demonstrate that they are entitled to refunds for a period of greater than twelve months by showing that their meters have been over-registering since initially installed. Customers note that FPL relied on the results of meter tests conducted prior to meter installation and following meter removal to rebut Customers' contention that refunds for a period of greater than twelve months are required. Customers assert that the tests made prior to meter installation were conducted on meter test boards different from those used to conduct the tests made following meter removal. Thus, Customers seek access to these meter test boards to determine if there is a difference between the boards that would explain the results of the more recent testing.

DOCUMENT NUMBER-DATE

10267 SEP 22 3

FPSC-COMMISSION CLERK

FPL's Response

In its response, FPL contends that Customers' motion to compel is not truly a motion to compel, but is instead an additional discovery request to the extent it seeks access to items not requested in its April 8, 2004, request. FPL asserts that none of the twelve items listed in Customers' April 8 request, to which the motion to compel purports to apply, seek the same access that Customers' seek in their motion to compel.

Further, FPL contends that Customers' motion to compel is an attempt by Customers to conduct a "trial by ambush." FPL states that since Customers propounded their April 8 request and FPL filed its response and objections, Customers have failed to pursue the request that they now deem "critical" to showing an entitlement to refunds beyond twelve months. FPL also states that in the roughly four months between Customers' April 8 request and Customers' motion to compel, FPL had not heard from the Customers in relation to the April 8 request. FPL notes that in that time all parties had prefiled testimony in accordance with the Order Establishing Procedure in this docket and asserts that Customers' motion to compel was filed as parties were concluding discovery and preparing for hearing. FPL argues that Customers are inappropriately attempting to use this motion to secure information to support their case-in-chief well after the deadline for filing testimony in this docket. FPL contends that it should not be prejudiced or deterred in its efforts to prepare for final hearing as a result of Customers' delay in raising these discovery issues.

FPL asserts that if Customers truly had concerns over FPL's meter test boards, they could have availed themselves of their right to an independent meter test under Rule 25-6.059(4), Florida Administrative Code, but chose not to do so. FPL further asserts that it has made "significant and sufficient information" available to Customers in the nature of what is sought in the motion to compel by: (1) having made available all documents requested in the April 8 request; (2) having conducted a tour of FPL's Meter Test Center at which Customers were able to visually inspect the meter test boards and standard reference meters and ask numerous questions of FPL employees; and (3) having agreed to allow Customers to inquire into attorney-client privileged matters concerning test boards during the continued deposition of FPL witness David Bromley, although Customers did not question Mr. Bromley on the subject of such test boards or standard reference meters during the continued deposition.

Finally, FPL asserts that Customers have made no allegation or showing that they are qualified to conduct any type of test procedure on FPL's standard reference meters or FPL's thermal demand test boards. FPL requests that, if any aspect of Customers' 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.

Findings

Upon review of the motion and response, Customers' motion is hereby denied. I note that Customers' motion comes after all direct and rebuttal testimony has been prefiled in this docket. Customers initially asked FPL to provide them access to the meter test board and standard meters in early April 2004 but waited over three months from the time of FPL's objections to formally pursue this matter, well after the time at which Customers could present the results of any inspections or tests of this equipment as part of their direct or rebuttal case.

Through Items 1 - 5 and 8 - 10 of Customers' April 8 request,<sup>1</sup> Customers seek inspection and testing of FPL's standards reference meters used on its thermal demand meter test boards or other equipment used by FPL in relation to its thermal demand test boards. However, Customers have given no indication as to how they wish to proceed with testing and inspecting FPL's standards reference meters. Customers do not identify who would conduct these tests and inspections, the specific procedures to be performed in conducting the tests and inspections, or the qualifications of the individual(s) who would perform the specific procedures. FPL justifiably states a concern that if any aspect of Customers' motion to compel is granted, procedures and conditions should be put in place to assure that FPL's equipment, standard reference meters, and meter test boards are not damaged or impaired by Customers' requested tests and inspections. Given the lateness of Customers' motion to compel and the need to provide the parties adequate time to prepare for hearing with some reasonable end to discovery, this Commission is given inadequate time to fashion procedures and conditions to address FPL's reasonable concerns over the maintenance of its equipment. Because this situation has been created by the Customers' tardiness in bringing their motion to compel, I deny the motion to compel. To provide otherwise at this late stage would unduly prejudice FPL in its efforts to prepare for hearing in this docket.

In addition, Item 3 of Customers' April 8 request seeks access to test and inspect an electronic transfer standard used by FPL to test meters that are not covered under the complaints being addressed in this docket. Thus, Item 3 is beyond the scope of discovery permissible under Rule 1.280(b), Florida Rules of Civil Procedure.

Customers' motion to compel appears to be moot with respect to Items 6, 7, 11, and 12 of its April 8 request. Customers' motion to compel does not address these items, which specifically request documents as opposed to access to test and inspect equipment. Further, FPL indicates in its response to the motion to compel that it has provided all documents requested pursuant to Customers' April 8 request.

For these reasons, I deny Customers' motion to compel.

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<sup>1</sup> Customers' April 8 request is attached hereto as Attachment A and is incorporated herein by reference.

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Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that Customers' motion to compel is denied.

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

  
CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

(SEAL)

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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

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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.

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaints by )  
Southeastern Utility Services, ) Docket No.: 030623-EI  
Inc., on behalf of various " )  
Customers, against Florida Power ) Date: April 8, 2004  
& Light Company concerning )  
thermal demand meters. )  
\_\_\_\_\_ )

APR - 8 2004

**REQUEST OF SOUTHEASTERN UTILITY SERVICES, INC. AND  
AND OCEAN PROPERTIES, LTD., TO FLORIDA POWER & LIGHT  
COMPANY FOR ENTRY UPON LAND FOR INSPECTION AND  
OTHER PURPOSES AND PRODUCTION OF DOCUMENTS**

Southeastern Utility Services, Inc. and Ocean Properties, Ltd. (hereinafter "Select Petitioners"), by and through its undersigned counsel, file this Request for Entry Upon Land for Inspection and Other Purposes pursuant to Rule 1.350, Florida Rules of Civil Procedure, and Rule 28-106.206, Florida Administrative Code, and request that **FLORIDA POWER & LIGHT COMPANY** (hereinafter "FPL"), permit entry to its property located at 6001 NW 70<sup>th</sup> Avenue, Miami, FL 33166 for the purpose of inspecting, testing and photographing FPL's meter testing board that was used for testing thermal demand meters. The testing and inspection that Petitioners seek to perform is set forth with reasonable particularity as set forth below in paragraphs 1 to 12. Select Petitioners seek access to the property and for the purposes described herein at 9:30 a.m. on May 11, 2004. Petitioners also seek the production of certain documents as set forth herein. The term "thermal demand meter test boards" means the testing boards FPL has in place that have been used or are being used used to test thermal demand meters, and includes the eastern specialty thermal demand testing gang boards.

1. Petitioners seek to inspect and test the standards reference meter or meters FPL has in place at its thermal demand meter test boards.

2. Petitioners seek to test a proofed transfer electronic standard meter referenced to the Kentucky Public Service Commission standards that they have in their possession against the standards reference meter or meters that FPL has in place at its thermal demand meter test boards.

3. Petitioners seek to inspect and test the electronic transfer standard FPL used as a reference for independent testing of certain meters in Bradenton, Florida on or about March 29, 2004 and March 30, 2004 against the standards reference meter or meters FPL uses at its thermal demand test boards.

4. Petitioners seek to test and inspect any standard meters used by FPL at its thermal demand test boards while testing the thermal demand meters that are the subject of this docket.

5. Petitioners seek to photograph all standard meters used by FPL to test or otherwise evaluate the thermal demand meters that are the subject of this docket.

6. Petitioners seek all documents related to the accuracy of FPL's thermal demand test boards.

7. Petitioners seek to inspect and photograph or copy any written directions, instructions, guidelines or other documents relied upon by FPL's meter testers when testing or calibrating thermal demand meters that are the subject of this docket.

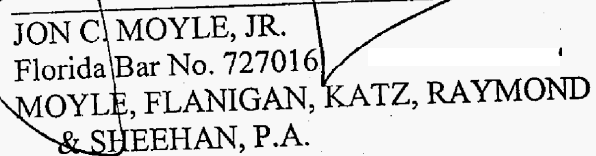
8. Petitioners seek to inspect, test, and photograph all tools used by FPL meter testers in the last five years when testing or calibrating thermal demand meters that are the subject of this docket.

9. Petitioners seek to measure the voltage and amperage applied to meters being tested on FPL's thermal demand meter test boards.

10. Petitioners seek to measure the voltage and amperage applied to FPL standard demand meters used in testing on FPL's thermal demand meter test boards.

11. Petitioners seek to inspect, photograph or copy all records reflecting the maintenance of FPL's standards reference meter or meters for the last five years.

12. Petitioners seek to all documents related to the maintenance, repair, or upkeep of FPL's thermal demand test boards.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 8th day of April, 2004, to those listed below without an asterisk, and by hand delivery to those marked with an asterisk:


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