

State of Florida



Public Service Commission

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DATE: October 21, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (C. Keating) *WCK* *Walt* *sum 23* *DFW* *RLT*
Division of Economic Regulation (Floyd, Kummer, Matlock, Wheeler)
Division of Regulatory Compliance & Consumer Assistance (Mills, Ruehl) *JOS* *AMT/10*

RE: Docket No. 030623-EI – 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.

AGENDA: 11/2/04 – Regular Agenda – Proposed Agency Action (Issue 2) – Interested Persons May Participate

CRITICAL DATES: 11/22/04 – Petition for Rule Waiver or Variance is deemed approved if not granted or denied within 90 days of receipt of completed petition.

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\030623.RCM3.DOC

Case Background

By Order No. PSC-03-1320-PAA-EI, issued November 19, 2003, as proposed agency action (“PAA Order”), the Commission addressed several complaints by Southeastern Utility Services, Inc. (“SUSI”) on behalf of various commercial customers against Florida Power & Light Company (“FPL”) concerning alleged over-registration of demand by 1V thermal demand meters. On December 10, 2003, SUSI, along with Ocean Properties, Ltd., J.C. Penney Corporation, Dillard’s Department Stores, and Target Stores, Inc. (collectively, “Customers”) protested the PAA Order by filing a petition for a formal administrative hearing on some of the complaints addressed in the PAA Order.¹ FPL filed a protest of the PAA Order on the same

¹ The Commission subsequently granted a motion by FPL to dismiss SUSI as a party from this proceeding for lack of standing. Order No. PSC-04-0591-PCO-EI, issued June 11, 2004 (reconsideration denied).

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date. A formal administrative hearing to address these protests was scheduled for September 23, 2004, but was subsequently rescheduled for November 4, 2004.

On August 23, 2004, Customers filed a petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code, in this docket. The rule provides that "when a meter is found to be in error in excess of the prescribed limits, the figure to be used for calculating the amount of refund or charge . . . shall be that percentage of error as determined by the test."² Rather than calculating refunds based solely on the percentage of error determined by "the test," Customers' petition asks for a waiver to allow refunds to be calculated, in the context of the pending formal hearing, based on: (1) use of the standard reference test point for determining meter test error as opposed to use of the full scale for determining meter test error; and (2) use of the higher of the percent error determined by "the test" or the percent difference change in monthly demand readings after a new meter was installed.

Notice of the petition was published in the Florida Administrative Weekly on September 10, 2004. The comment period expired on September 24, 2004, and no comments were received. However, on September 13, 2004, FPL filed a motion to dismiss Customers' rule waiver petition. In its motion to dismiss, FPL indicated that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. Customers responded to FPL's motion to dismiss on September 20, 2004.

This recommendation addresses FPL's motion to dismiss and Customers' rule waiver petition. The Commission has jurisdiction over this matter pursuant to Section 120.542, Florida Statutes, and the provisions of Chapter 366, Florida Statutes.

² Rule 25-6.103, Florida Administrative Code, is attached hereto in its entirety as Attachment A

Discussion of Issues

Issue 1: Should the Commission grant FPL's motion to dismiss Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code?

Recommendation: No. Customers have standing to file their petition for variance or waiver. (C. KEATING)

Staff Analysis:

Standard of Review

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). The standard to be applied in disposing of a motion to dismiss is whether, with all allegations in the petition assumed to be true, the petition states a cause of action upon which relief may be granted. Id. When making this determination, only the petition can be reviewed, and all reasonable inferences drawn from the petition must be made in favor of the petitioner. Id.

FPL's Motion to Dismiss

In support of its motion to dismiss, FPL cites Section 120.542, Florida Statutes,³ and Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund⁴ for the proposition that only those who are subject to regulation by an agency rule may avail themselves of the variance or waiver provisions of the Florida Administrative Procedure Act. FPL states that in Mariner Properties, the First District Court of Appeal held that the Board of Trustees of the Internal Improvement Trust Fund was entitled to dismiss a petition requesting variance from and waiver of the provisions of certain administrative rules relating to petitioner's application to use certain sovereignty submerged land upon determining that the Section 120.542 variance and waiver process did not apply to the disputed rules insofar as the statute limited the variance and waiver process to persons subject to regulation. FPL states that the court found that the Board acted sometimes as a regulatory agency, but also had a duty to manage and control sovereignty lands. FPL quotes a portion of the court's decision:

The Section 120.542(1) limitation of the variance and waiver process to persons subject to regulation is reiterated at subsection (5), and the statute does not refer to proprietary action. ... Because the variance and waiver process in section 120.542 expressly pertained to regulatory rather than proprietary matters, and the statute should not be construed otherwise, the Board was entitled to dismiss the appellant's petition.

FPL asserts that none of the individual customers represented in this proceeding are subject to regulation by the Commission under Rule 25-6.103(3), Florida Administrative Code, thus, Customers do not have standing to file for a variance or waiver from Rule 25-6.103(3).

³ Section 120.542, Florida Statutes, is attached hereto in its entirety as Attachment B.

⁴ 743 So 2d 1121 (Fla. 1st DCA 1999)

FPL asserts that the rule applies to FPL, not to Customers, because it is FPL that is subject to any requirement for payment of refunds that may be ordered by the Commission pursuant to the rule.

FPL contends that Customers' petition for variance or waiver is "a belated attempt to hijack" this docket and transform it into a rule waiver proceeding. FPL notes that Customers' petition was filed more than nine months after the Commission's PAA Order indicating how the Commission proposed to apply Rule 25-6.103(3) to FPL in this docket. FPL asserts that it has addressed, in its prefiled testimony in this docket, the merits of Customers' arguments concerning how this rule should be applied. FPL asserts that Customers, having reviewed FPL's arguments on the merits, are using the rule waiver process improperly to attempt to resurrect their case.

FPL argues that even if Customers had standing to file their rule waiver petition, it was procedurally improper for Customers to file the petition just one month prior to the September 23 hearing date. FPL notes that a petition for variance or waiver sets into motion several procedural mechanisms: publication of notice; opportunity for public comment; 30 days for the agency to request additional information; 90 days for the agency to decide the matter; and the opportunity to request formal proceedings on the Commission's decision. FPL asserts that if the Customers wanted to consolidate two separate administrative proceedings, they should have done so earlier.

FPL further contends that Customers' petition should be dismissed because Customers did not follow the statutory and rule guidelines for filing a petition for variance or waiver. FPL asserts that Customers neglected to file a copy of their petition with the Joint Administrative Procedures Committee ("JAPC") as required by Section 120.542(5), Florida Statutes, and Rule 28-104.002, Florida Administrative Code.⁵ FPL states that this is not a mere technicality, because JAPC is required to maintain detailed information about agency orders granting or denying petitions for variance or waiver. Further, FPL asserts that Customers failed to include a statement in their petition, as required by Rule 28-104.002(i), indicating whether the requested variance or waiver is temporary or permanent.

Customers' Response

Customers assert that FPL's motion to dismiss should be dismissed as being untimely. Customers assert that their rule waiver petition should be treated as a motion, for which a response is due seven days after the petition was filed. Customers note that FPL's motion to dismiss was filed 20 days after Customers' rule waiver petition was filed.

Customers further assert that the Mariner Properties case cited by FPL is not applicable. Customers assert that Mariner Properties involved the Board dismissing a petition for variance or waiver on its own motion rather than addressing a motion to dismiss filed by a "third party." Customers characterize FPL as such a "third party" in this case. Customers assert that Section 120.542 allows third parties to file comments on rule waiver requests but does not authorize third parties to move to dismiss rule waiver requests. Further, Customers assert that the Mariner

⁵ Chapter 28-104, Florida Administrative Code, contains the Uniform Rules of Procedure governing petitions for variance or waiver of agency rules. It is attached hereto in its entirety as Attachment C.

Properties case simply holds that the Section 120.542 waiver/variance process pertains to regulatory rather than proprietary matters.

Customers contend that they are directly impacted by Rule 25-6.103(3) because the rule could impact the amount of any refund due to Customers. Thus, Customers assert that they are effectively subject to regulation by the rule to the extent the PSC is applying the rule in a manner that affects Customers' property, i.e., any refund due. Customers state that FPL has argued before the Commission and in circuit court proceedings that the PSC has exclusive jurisdiction to address the meter refund issues between FPL and Customers, but now attempts to make this jurisdiction a "one-way street upon which only FPL can travel . . ."

Finally, Customers assert that a copy of their rule waiver petition was filed with JAPC. Customers attached a copy of the petition stamped as received by JAPC on September 20, 2004. Customers also assert that a cursory review of the petition and filings in this docket indicate that the petition seeks a one-time, temporary waiver of Rule 25-6.103(3), as all of the disputed meters have been removed from service and will not be placed back into service.

Analysis

Staff recommends that FPL's motion to dismiss be denied. Assuming all allegations in Customers' rule waiver petition to be true and drawing all reasonable inferences from the petition in favor of Customers, staff believes the petition states a cause of action upon which relief may be granted.

As a preliminary matter, staff believes that Customers' characterization of their rule waiver petition as a "motion" is incorrect. Section 120.542, Florida Statutes, clearly indicates that the filing of a petition for variance or waiver of an agency rule initiates its own administrative proceeding. The statute and the relevant Uniform Rules of Procedure require notice of each such petition, a comment period for each such petition, and time frames for the agency to respond to each such petition. More importantly, Section 120.542(8) provides that an agency's decision to grant or deny such a petition must be supported by competent substantial evidence and is subject to a request for a formal administrative proceeding pursuant to Sections 120.569 and 120.57, Florida Statutes. Subsection (8) further states that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by Chapter 120, Florida Statutes. Thus, Customers' rule waiver petition initiated a separate proceeding and should not be taken as a "motion" for any purpose, including the determination of the deadline for FPL's response. FPL's motion to dismiss was timely filed within 20 days of the Customers' rule waiver petition.

Although FPL's motion to dismiss was timely filed, it nonetheless fails to state sufficient grounds for dismissal of Customers' rule waiver petition. First, FPL's reliance on Mariner Properties is misplaced. In Mariner Properties, the First District Court of Appeal noted that the Board of Trustees of the Internal Improvement Trust Fund acts in both a regulatory and proprietary capacity. The court found that Mariner Properties' rule waiver petition was directed at the Board's actions in its proprietary capacity. Noting that Section 120.542 limits the variance and waiver process to persons subject to regulation, the court held that the Board was entitled to dismiss a rule waiver petition directed at the Board's actions in its proprietary role, as opposed to

its regulatory role. The court did not address who has standing to seek a rule waiver or variance. The court simply held that the Section 120.542 waiver/variance process pertains to regulatory rather than proprietary matters. In the instant case, there is no question that the Commission is acting in a regulatory capacity.

Second, staff believes that whether or not Customers are attempting to use this rule waiver petition to “hijack” this docket and transform it into a rule waiver proceeding, as FPL suggests, is not relevant in the analysis of whether dismissal is appropriate. Customers’ intent is an issue distinct from Customers’ standing to pursue the rule waiver. Further, as discussed previously and further discussed below, Customers’ petition initiated a proceeding separate from the formal hearing proceeding, and Customers did not seek consolidation of the two proceedings.

Third, staff believes that the procedural flaws alleged by FPL do not constitute grounds for dismissal. With respect to FPL’s assertions that it was procedurally improper for Customers to file the petition just one month prior to the September 23 hearing date and that Customers should have filed earlier if they wanted to consolidate two separate administrative proceedings, staff believes that the timing of Customers’ rule waiver petition is not grounds for dismissal. Staff notes that there is no requirement that the Commission consolidate the formal hearing proceeding in this docket with the proceeding on Customers’ rule waiver petition. As noted above, Customers’ rule waiver petition initiates a new and separate proceeding. Customers have not asked to have these two proceedings consolidated. Further, Customers will not be able to seek a hearing on the Commission’s disposition of the rule waiver petition until the Commission has issued its proposed agency action order addressing that petition, which will take place, in the typical course of events, after the formal administrative hearing set for November 4. After the Commission’s post-hearing vote, further proceedings on Customers’ rule waiver petition may become barred by *res judicata*, as the issues raised in the rule waiver petition have also been raised for disposition in the formal hearing proceeding. Customers bear this risk as a consequence of filing their rule waiver petition when they did.

With respect to FPL’s assertions that Customers neglected to file a copy of their petition with the JAPC, staff notes that Customers appear to have subsequently filed their petition with JAPC. Regardless, FPL does not explain how failure to satisfy JAPC’s filing requirements would require dismissal of a petition filed before the Commission. With respect to FPL’s assertions that Customers failed to include a statement in their petition indicating whether the requested variance or waiver is temporary or permanent, staff believes that, drawing all reasonable inferences from the rule waiver petition in favor of Customers, Customers’ petition appears to seek a temporary rule waiver.

Staff believes that Customers have standing to seek a waiver of Rule 25-6.103(3). Section 120.542, Florida Statutes, uses three terms that describe who may seek a variance or waiver of an agency rule: “persons subject to regulation;” “person subject to the rule;” and “person who is subject to regulation by an agency rule.” As noted above, staff believes that Mariner Properties does not support dismissal of Customers’ petition because it sheds no light on who may seek a rule waiver. Staff has found no relevant case law on this issue. While Customers are not, in the strictest sense, persons subject to regulation by the Commission, the rates charged by FPL and paid by Customers are indeed subject to regulation by the Commission. Rule 25-6.103(3) governs refunds due to customers who have been overcharged

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due to meter error. Staff believes it is reasonable to conclude that Customers have standing to seek a waiver of this rule because, assuming a refund is due, they are directly affected by the application of the rule. This conclusion is consistent with the Commission's past practice of hearing petitions filed by condominium developers and similar entities, as opposed to regulated utilities, seeking waiver of the Commission's individual metering requirements.⁶

For the reasons set forth above, staff recommends that FPL's motion to dismiss be denied.

⁶ See, e.g., Order No. PSC-04-0984-PAA-EU, issued October 11, 2004, in Docket No. 040762-EU, Petition for waiver of or variance from individual metering requirements of Rule 25-6049(5)(a), F.A.C., by Coastal Blue Development, LLC d/b/a Seychelles, a Condominium.

Issue 2: Should the Commission grant Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code?

Recommendation: No. Customers have failed to demonstrate that application of the rule would create a substantial hardship or violate principles of fairness. Further, the requested rule waiver is inappropriate given that the interpretation and application of Rule 25-6.103(3), as well as the method of calculating refunds for Customers, is at issue and is the subject of comprehensive prefiled testimony in litigation pending in this docket. (C. KEATING)

Staff Analysis:

Standard of Review

Section 120.542(1), Florida Statutes, provides a two-pronged test for determining when waivers and variances from agency rules shall be granted:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person **and** when application of the rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

(Emphasis added.)

Customers' Rule Waiver Petition

As noted in the Case Background, Customers seek a variance or waiver of Rule 25-6.103(3), Florida Administrative Code, in this docket. The rule provides that "when a meter is found to be in error in excess of the prescribed limits, the figure to be used for calculating the amount of refund or charge . . . shall be that percentage of error as determined by the test." Rather than calculating refunds based solely on the percentage of error determined by "the test," Customers' petition asks for a waiver to allow refunds to be calculated, in the context of the pending formal hearing, based on: (1) use of the standard reference test point for determining meter test error as opposed to use of the full scale for determining meter test error; and (2) use of the higher of the percent error determined by "the test" or the percent difference change in monthly demand readings after a new meter was installed.

Customers note that Rule 25-6.103 identifies Sections 366.03, 366.041(1), 366.05(1), 366.05(3), 366.05(4), and 366.06(1)⁷ as the statutory sections implemented by the rule. Customers assert that the purposes of these underlying statutes are to: (1) provide for a scheme of regulation that is "fair and reasonable" to both utilities and customers; (2) require utilities to treat their customers uniformly and fairly; (3) require utilities to verify the accuracy of metering equipment through testing; (4) provide utility customers the right to have meters tested; and (5)

⁷ These statutory sections are attached hereto as Attachment D

to prevent a utility from, directly or indirectly, charging a customer with an effective rate (because of meter error) not on file with the Commission. Customers assert that these purposes will not only be achieved but enhanced by the requested variance or waiver. In addition, Customers assert that these purposes will be achieved through the evidence presented in this docket from which the Commission will be able to determine both the amount billed in error and the refund necessary to ensure that an unapproved rate is neither charged nor collected by FPL.

Customers contend that, to the extent Rule 25-6.103(3) requires use of a meter percentage error equal to a meter's full-scale test error for calculating refunds, application of the rule works a substantial hardship on Customers and violates principles of fairness. In support of this contention, Customers cite a portion of the prefiled testimony of Staff witness Sidney W. Matlock which states that "[f]or purposes of making refunds, the calculation of a percentage error based on the full-scale reading would not be fair to the customer." Customers suggest that FPL also recognizes the truth of the quoted portion of Mr. Matlock's testimony, noting that FPL did not calculate refunds based solely on the meter's tested full-scale error for all customers whose type 1V thermal demand meters – the type of meters at issue in this case – overregistered demand. Customers quote a portion of the prefiled direct testimony of FPL witness David Bromley which states that "to remove any perceptions from affected customers that they were not being treated fairly," FPL calculated refunds using "the higher of: (1) the [full-scale] meter test error; or (2) the actual percentage difference in the monthly demand readings of the newly installed meter, i.e., the one replacing the 1V compared to the same months of the previous year's 1V meter readings." Customers cite an FPL interrogatory response indicating that FPL provided refunds to 263 other customers using this "higher of" method. Customers assert that they are entitled to similar "fair" treatment.

FPL's Response

As noted in the Case Background, FPL indicated in its motion to dismiss that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. FPL has not filed comments within the 14 day comment period provided by Rule 28-104.003, Florida Administrative Code.

Analysis

Staff recommends denial of Customers' petition for variance or waiver of Rule 25-6.103(3), Florida Administrative Code. While staff believes that the purposes of the statutes underlying the rule will be achieved if the requested variance/waiver is granted, staff does not believe that Customers have demonstrated that application of the rule to Customers would create a substantial hardship or violate principles of fairness. Further, staff believes that the requested rule waiver is inappropriate given that the interpretation and application of Rule 25-6.103(3), as well as the method of calculating refunds for Customers in general, is at issue and is the subject of comprehensive prefiled testimony in litigation pending in this docket.⁸

⁸ The Prehearing Order in this docket (Order No. PSC-04-0933-PCO-EI, issued September 22, 2004) identifies the following issues implicated by Customers' rule waiver petition:

As a preliminary matter, staff does not believe that FPL's motion to dismiss tolled the time for FPL to file comments on Customers' petition. As noted above, FPL indicated in its motion to dismiss that it reserved the right to address the merits of Customers' petition during the comment period provided by statute, if the Commission chose not to dismiss Customers' petition. FPL appears to believe that its motion to dismiss tolled the 14 day comment period that began on September 10, 2004, the date notice of Customers' petition was published in Florida Administrative Weekly, as well as the 90 day time frame within which the Commission must grant or deny the petition. However, FPL cites no authority to support this view, and staff is unaware of any such authority.

Rule 28-104.003(1), Florida Administrative Code, provides that "[a]ny interested person or other agency may submit written comments on the petition [for variance or waiver] within 14 days after the [Florida Administrative Weekly] notice required by Section 120.542(6), F.S." Nothing in Section 120.542 or in the relevant Uniform Rules of Procedure indicates that this time period may be extended, much less automatically extended due to the filing of a responsive pleading like FPL's motion to dismiss.

Further, Section 120.542(8), Florida Statutes, states in pertinent part:

An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested [by the agency] additional material, or the petitioner's written request to finish processing the petition.

Nothing in Section 120.542 indicates that this time period may be automatically extended due to the filing of a responsive pleading like FPL's motion to dismiss. If the Commission were to allow FPL time to file comments after addressing its motion to dismiss, the Commission, under the current agenda conference schedule, would not be able to address the merits of Customers' rule waiver petition within the 90 day time period specified by Section 120.542(8) and would thus risk having the petition granted by default.

Purpose of the Underlying Statutes

Staff believes that the requested variance or waiver would achieve the purposes of the statutes underlying Rule 25-6.103(3). Generally, staff agrees with Customers statement, set forth above, concerning the purposes of the statutes identified as those statutes implemented by the rule. Staff agrees that the calculation of refunds based on some method other than the percentage error measured by a test, such as the "higher of" method used by FPL to calculate refunds for other customers using IV meters, may be consistent with the purpose of ensuring that customers

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? and

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?

The relevant portions of the Prehearing Order are attached hereto as Attachment E.

are treated fairly and not charged an effective rate (due to meter error) not on file with the Commission.

Substantial Hardship / Principles of Fairness

Customers' petition for variance or waiver of Rule 25-6.103(3) asks the Commission to do two things: (1) interpret the rule's use of the phrase "percentage of error as determined by the test" to mean the percentage of error based on the test point rather than the meter's full-scale; and (2) require FPL to use the "higher of" method, rather than just the meter test result, to determine the appropriate refund amount due Customers.

With respect to the first item, staff notes that the interpretation of the phrase "percentage of error as determined by the test" in subsection (3) of the rule is at issue and is the subject of prefiled testimony in the formal hearing pending in this docket. In particular, the rule does not specify which or what type of test it is referring to. Staff witness Matlock has prefiled testimony stating that the language in subsection (3), when viewed in light of the remainder of Rule 25-6.103, is ambiguous, and he suggests that the Commission use the percentage of error based on the test point. FPL witness Bromley has prefiled testimony asserting that the language in subsection (3) should be read to require use of the percentage of error based on the meter's full scale. Through their rule waiver petition, Customers ask the Commission to decide the issue in favor of Mr. Matlock's interpretation because it is to their advantage in the pending formal hearing proceeding.

In essence, this portion of Customers' petition requests a variance or waiver not from the rule's requirements, but from a potential interpretation of the rule in FPL's favor. Because the manner in which the rule will be applied is currently unknown, staff does not believe that Customers have demonstrated, or even can demonstrate, that application of the rule to them will create a substantial hardship or violate principles of fairness. Staff strongly believes that the interpretation and application of the rule is best left for resolution through the pending formal hearing in this docket, rather than a rule waiver petition. Parties should not be permitted, through a rule waiver petition filed in the midst of pending litigation, to obtain what amounts to summary judgment on an issue set for hearing.⁹

Customers' second request implicates not only Issue 2 as identified in the Prehearing Order, but also Issue 3.¹⁰ Customers argue that because FPL has calculated refunds paid to other customers using the "higher of" method, application of Rule 25-6.103, which does not require this method, would violate principles of fairness. In other words, Customers claim that if the Commission does not grant the requested variance or waiver, FPL will be allowed to treat similarly situated customers differently, thus violating principles of fairness. This argument is nearly identical to Customers' position on Issue 3, as shown in Attachment E.

At page 19 of Mr. Bromley's prefiled direct testimony, he indicates that refunds have been calculated for the customers in this docket using the meter test error that FPL interprets the rules to require, but not the "higher of" method used to calculate refunds for other customers. In

⁹ See Issue 2 from the Prehearing Order attached hereto as Attachment E.

¹⁰ See Attachment E.

the Customers' deposition of Mr. Bromley, he explained that all customers, including those involved in this docket, were offered 12-month refunds to be calculated using the "higher of" method in an attempt to resolve the customers' refund claims.¹¹ Upon deposition by FPL, Customers' witness George Brown confirmed that the customers who pursued action in this docket did not accept FPL's settlement offer because they believed they were entitled to a refund for greater than 12 months.¹² Thus, through their rule waiver petition, Customers are asking the Commission to require FPL to give them the benefit of a favorable term that was offered by FPL as part of a settlement rejected by Customers.

Based on these facts, staff believes Customers have not demonstrated that application of Rule 25-6.103(3) to them will violate principles of fairness. Customers' assertion that they will be treated differently from similarly situated customers is misleading. Customers were offered the same settlement terms that every similarly situated customer was offered to resolve their refund claims. Customers rejected the settlement offer, choosing to pursue litigation before the Commission. Customers are not entitled to a rule waiver on grounds of "principles of fairness" when Customers themselves chose to be treated differently by rejecting the settlement offer that other customers accepted.

For the reasons set forth above, staff recommends that the Commission deny Customers' petition for variance or waiver of Rule 25-6.103(3).

¹¹ Transcript p.156, line 8, through p. 163, line 1, from deposition of Dave Bromley taken August 5, 2004, in this docket.

¹² Transcript p.90, line 8, through p.92, line 24, from deposition of George Brown taken August 27, 2004, in this docket.

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Issue 3: Should this docket be closed?

Recommendation: No. This docket should remain open to allow this matter to proceed to hearing. (C. KEATING)

Staff Analysis: No. This docket should remain open to allow this matter to proceed to hearing.

(3) Conjunctive billing shall not be permitted. Bills for two or more points of delivery to the same customer shall be calculated separately for each such point of delivery.

(4) A customer operating a single integrated business* under one name in two or more buildings and/or energy consuming locations may request a single point of delivery and such request shall be complied with by the utility providing that:

(a) Such buildings or locations are situated on a single unit of property; or

(b) Such buildings or locations are situated on two or more units of property which are immediately adjoining, adjacent, or contiguous; or

(c) Such buildings or locations are situated on two or more units of property which would be immediately adjoining, adjacent or contiguous except for intervening streets, alleys or highways.

In all cases arising in paragraph (a), (b), or (c), it shall be the customer's responsibility to provide the electrical facilities necessary for distributing the energy beyond the single delivery point.

*The word "business" as used in this section shall be construed as including residences and educational, religious, governmental, commercial and industrial operations.

Specific Authority 366.05(1) FS. Law Implemented 366.03, 366.05(1) FS. History--New 7-29-69

25-6.103 Adjustment of Bills for Meter Error.

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

(2) Slow meters.

(a) Except as provided by this paragraph, a utility may backbill in the event that a meter is found to be slow, non-registering or partially registering. A utility may not backbill for any period greater than twelve (12) months from the date it notifies a customer that his or her meter is slow, non-registering or partially registering. If it can be ascertained that the meter was slow, non-registering or partially registering for less than twelve (12) months prior to notification, then the utility may backbill only for the lesser period of time. In any event, the customer may extend the payments of the backbill over the same amount of time for which the utility issued the backbill. Nothing in this subsection shall be construed to limit the application of Rule 25-6.104, F.A.C., or prohibit a utility from backbilling for four years pursuant to subsection (5) of this rule.

(b) Whenever a meter tested and not subject to Rule 25-6.104 or subsection 25-6.105(5), F.A.C., and is found to have an error in excess the minus tolerance allowed by Rule 25-6.052, F.A.C., the utility may bill the customer an amount equal to the unbilled error as determined by Rule 25-6.058, F.A.C., in accordance with this subsection. In order to determine the amount of undercharge, the recorded consumption shall be adjusted using the amount of error found by the meter to determine the correct consumption and the customer's bills in question shall be recalculated and computed to the actual bills rendered. If the utility has required a deposit for a meter test as permitted under subsection 25-6.059(2), F.A.C., the customer may be billed only for that portion of the unbilled error which is in excess of the deposit retained by the utility.

(c) In the event of a non-registering or a partially registering meter, unless the provisions of subsection (3) of this rule apply, the utility may bill the customer on an estimate based on previous bills for similar usage or on other sources of available data provided.

(3) It shall be understood that when a meter is found to be in error in excess of the prescribed limits, the figure to be used for calculating the amount of refund or charge in subsection (1) or paragraph (2)(b) above shall be that percentage of error as determined by the test.

(4) Creeping. Whenever a meter, upon proper testing, is found to have a registration error due to "creep" in excess of the tolerance allowed by Rule 25-6.052, F.A.C., the error shall be calculated by timing the rate of "creeping" and assuming that the creeping affected the registration of the meter for 25% of the time, unless a more accurate estimate of the percentage of time the meter should have been inactive can be obtained.

(5) Where a utility determines that a service location has not previously been properly metered through errors of an electrical contractor, the utility may backbill for up to four years from the date of notice to the customer that the error has been discovered. The customer may extend the payments of the backbill over the same amount of time for which the utility issued the backbill.

Specific Authority 366.05(1) FS. Law Implemented 366.03, 366.041(1), 366.05(1), (3), (4), 366.06(1) FS. History--New 7-29-69, Amended 4-13-80, 5-3-82.

25-6.104 Unauthorized Use of Energy.

In the event of unauthorized or fraudulent use, or meter tampering, the utility may bill the customer on a reasonable estimate of the energy used.

Specific Authority 366.05(1) FS. Law Implemented 366.03, 366.05(1) FS. History--New 7-29-69, Amended 4-13-80, 5-3-82, 11-21-82.

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PUBLIC OFFICERS, EMPLOYEES, AND RECORDS	ADMINISTRATIVE PROCEDURE ACT	Chapter

120.542 Variances and waivers.--

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

- (a) The rule from which a variance or waiver is requested.
- (b) The type of action requested.
- (c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursuant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

History.--s. 12, ch. 96-159; s. 5, ch. 97-176.

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CHAPTER 28-104 VARIANCE OR WAIVER

- 28-104.001 Purpose; Construction.
- 28-104.002 Petition for Variance or Waiver.
- 28-104.003 Comments on Petition.
- 28-104.004 Petition for Emergency Variance or Waiver.
- 28-104.005 Time for Consideration of Emergency Petition.
- 28-104.0051 Revocation of Emergency or Temporary Variance or Waiver.
- 28-104.006 Request for Information.

28-104.001 Purpose; Construction.

(1) The purpose of this chapter is to implement the provisions of Section 120.542, F.S., by setting forth the uniform procedures for **granting or denying petitions for variances from and waivers of agency rules.**

(2) **This chapter should be read in conjunction with the provisions of Sections 120.52(18), 120.52(19), and 120.542, F.S.**

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(3) FS. History--New 4-1-97.

28-104.002 Petition for Variance or Waiver.

(1) A petition for a variance from or waiver of an agency rule shall be filed with the clerk of the agency that adopted the rule, with a copy to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300.

(2) The petition must include the following information:

(a) The caption shall read:

Petition for (Variance from) or (Waiver of) Rule (Citation)

(b) The name, address, telephone number, and any facsimile number of the petitioner;

(c) The name, address, telephone number, and any facsimile number of the attorney or qualified representative of the petitioner (if any);

(d) The applicable rule or portion of the rule;

(e) The citation to the statute the rule is implementing;

(f) The type of action requested;

(g) The specific facts that demonstrate a substantial hardship or a violation of principles of fairness that would justify a waiver or variance for the petitioner;

(h) The reason why the variance or the waiver requested would serve the purposes of the underlying statute; and

(i) A statement whether the variance or waiver is permanent or temporary. If the variance or waiver is temporary, the petition shall **include the dates indicating the duration of the requested variance or waiver.**

(3) The petition for a variance or waiver may be withdrawn by the applicant at any time before final agency action.

(4) Upon receipt of a petition for variance or waiver, the agency shall furnish a copy of the petition to any other agency responsible for implementing the rule.

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(5) FS. History--New 4-1-97. Amended 3-18-98

28-104.003 Comments on Petition.

(1) Any interested person or other agency may submit written comments on the petition for a variance or waiver within 14 days after the notice required by Section 120.542(6), F.S. The agency shall state in any order whether comments were received by the agency.

(2) The agency shall maintain the comments as part of the record.

(3) The right to comment pursuant to this section does not alone confer party status in any proceeding arising from a petition for variance or waiver.

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(6), 120.542(8) FS. History--New 4-1-97.

28-104.004 Petition for Emergency Variance or Waiver.

(1) A person requesting an emergency variance from or waiver of an agency rule shall so state in the caption to the petition.

(2) In addition to the other requirements of Section 120.542(5), F.S., and this chapter, the petition shall specify:

(a) The specific facts that make the situation an emergency; and

(b) The specific facts to show that the petitioner will suffer an immediate adverse effect unless the variance or waiver is issued more expeditiously than the time frames provided in Section 120.542, F.S.

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(3), (5) FS. History--New 4-1-97

28-104.005 Time for Consideration of Emergency Petition.

(1) The agency shall grant or deny a petition for emergency variance or waiver within 30 days of its receipt by the agency. If such petition is not granted or denied within this time limit, the petition shall be deemed approved unless the time limit is waived by the petitioner.

(2) The agency shall issue a written order granting or denying the petition. The order shall state the facts and reasons supporting the agency's action. The agency may deny a petition based on its decision that the situation is not an emergency. The petition shall then be reviewed by the agency on a non-emergency basis as set forth in Section 120.542(7), F.S.

(3) The duration of an emergency variance or waiver shall be determined by the agency. The agency may also consider a petition requesting the same or similar variance or waiver on a non-emergency basis.

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(3) FS. History--New 4-1-97.

28-104.0051 Revocation of Emergency or Temporary Variance or Waiver.

(1) Upon receipt of evidence sufficient to show that the recipient of an order granting an emergency or temporary variance or waiver is not in compliance with the requirements of that order, the agency shall issue an order to show cause why the emergency variance or waiver should not be revoked.

(2) The recipient of an emergency or temporary variance or waiver shall respond to the order to show cause why the emergency variance or waiver should not be revoked within 15 days of the mailing date of the order to show cause. Failure to timely respond shall result in a final order revoking the emergency or temporary variance or waiver.

Specific Authority 120.54(5)(b)6. FS. Law Implemented 120.542(1), (3) FS. History--New 3-18-98

28-104.006 Request for Information.

(1) When a person inquires of the agency about the possibility of relief from any rule requirements or the remedies available pursuant to Section 120.542, F.S., the agency shall provide the information required by Section 120.542(4), F.S., within 15 days of the inquiry.

(2) In its response to a request for information, the agency shall indicate the name and address of the appropriate contact person for additional information and shall indicate how a petition for variance or waiver is filed with the agency.

Specific Authority 120.54(5)(b)6., 120.542(3) FS. Law Implemented 120.542(4) FS. History--New 4-1-97.

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ATTACHMENT D

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RAILROADS AND OTHER REGULATED UTILITIES PUBLIC UTILITIES

366.03 General duties of public utility.--Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission. No public utility shall be required to furnish electricity or gas for resale except that a public utility may be required to furnish gas for containerized resale. All rates and charges made, demanded, or received by any public utility for any service rendered, or to be rendered by it, and each rule and regulation of such public utility, shall be fair and reasonable. No public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect.

History.--s. 3, ch. 26545, 1951; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 16, ch. 80-35; s. 2, ch. 81-318; ss. 1, 15, ch. 82-25; ss. 20, 22, ch. 89-292; s. 4, ch. 91-429.

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RAILROADS AND OTHER REGULATED UTILITIES PUBLIC UTILITIES

366.041 Rate fixing; adequacy of facilities as criterion.--

(1) In fixing the just, reasonable, and compensatory rates, charges, fares, tolls, or rentals to be observed and charged for service within the state by any and all public utilities under its jurisdiction, the commission is authorized to give consideration, among other things, to the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; and energy conservation and the efficient use of alternative energy resources; provided that no public utility shall be denied a reasonable rate of return upon its rate base in any order entered pursuant to such proceedings. In its consideration thereof, the commission shall have authority, and it shall be the commission's duty, to hear service complaints, if any, that may be presented by subscribers and the public during any proceedings involving such rates, charges, fares, tolls, or rentals; however, no service complaints shall be taken up or considered by the commission at any proceedings involving rates, charges, fares, tolls, or rentals unless the utility has been given at least 30 days' written notice thereof, and any proceeding may be extended, prior to final determination, for such period; further, no order hereunder shall be made effective until a reasonable time has been given the utility involved to correct the cause of service complaints, considering the factor of growth in the community and availability of necessary equipment.

(2) The power and authority herein conferred upon the commission shall not cancel or amend any existing punitive powers of the commission but shall be supplementary thereto and shall be construed liberally to further the legislative intent that adequate service be rendered by public utilities in the state in consideration for the rates, charges, fares, tolls, and rentals fixed by said commission and observed by said utilities under its jurisdiction.

(3) The term "public utility" as used herein means all persons or corporations which the commission has the authority, power, and duty to regulate for the purpose of fixing rates and charges for services rendered and requiring the rendition of adequate service.

(4) No electric utility may collect impact fees designed to recover capital costs in initiating new service unless the utility can demonstrate and the commission finds that such fees are fair, just, and reasonable and are collected from the ultimate utility customer of record at such time as or after permanent electric service is provided. This prohibition shall not apply to underground electric distribution lines or line extension charges collected pursuant to approved tariffs.

History.--ss. 1, 2, 3, 4, ch. 67-326; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 53, ch. 78-95; ss. 4, 16, ch. 80-35; s. 2, ch. 81-318; ss. 3, 20, 22, ch. 89-292; s. 4, ch. 91-429.

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366.05 Powers.--

(1) In the exercise of such jurisdiction, the commission shall have power to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility; to require repairs, improvements, additions, and extensions to the plant and equipment of any public utility when reasonably necessary to promote the convenience and welfare of the public and secure adequate service or facilities for those reasonably entitled thereto; to employ and fix the compensation for such examiners and technical, legal, and clerical employees as it deems necessary to carry out the provisions of this chapter; and to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement and enforce the provisions of this chapter.

(2) Every public utility, as defined in s. 366.02, which in addition to the production, transmission, delivery or furnishing of heat, light, or power also sells appliances or other merchandise shall keep separate and individual accounts for the sale and profit deriving from such sales. No profit or loss shall be taken into consideration by the commission from the sale of such items in arriving at any rate to be charged for service by any public utility.

(3) The commission shall provide for the examination and testing of all meters used for measuring any product or service of a public utility.

(4) Any consumer or user may have any such meter tested upon payment of the fees fixed by the commission.

(5) The commission shall establish reasonable fees to be paid for testing such meters on the request of the consumers or users, the fee to be paid by the consumer or user at the time of his or her request, but to be paid by the public utility and repaid to the consumer or user if the meter is found defective or incorrect to the disadvantage of the consumer or user, in excess of the degree or amount of tolerance customarily allowed for such meters, or as may be provided for in rules and regulations of the commission.

(6) The commission may purchase materials, apparatus, and standard measuring instruments for such examination and tests.

(7) The commission shall have the power to require reports from all electric utilities to assure the development of adequate and reliable energy grids.

(8) If the commission determines that there is probable cause to believe that inadequacies exist with respect to the energy grids developed by the electric utility industry, it shall have the power, after proceedings as provided by law, and after a finding that mutual benefits will accrue to the electric utilities involved, to require installation or repair of necessary facilities, including generating plants and transmission facilities, with the costs to be distributed in proportion to the benefits received, and to take all necessary steps to ensure compliance. The electric utilities involved in any action taken or orders issued pursuant to this subsection shall have full power and authority, notwithstanding any general or special laws to the contrary, to jointly plan, finance, build, operate, or lease generating and transmission facilities and shall be further authorized to exercise the powers granted to corporations in chapter 361. This subsection shall not supersede or control any provision of the Florida Electrical Power Plant Siting Act, ss. 403.501-403.518.

(9) The commission may require the filing of reports and other data by a public utility or its affiliated companies, including its parent company, regarding transactions, or allocations of common costs, among the utility and such affiliated companies. The commission may also require such reports or other data necessary to ensure that a utility's ratepayers do not subsidize nonutility activities.

(10) The Legislature finds that violations of commission orders or rules, in connection with the impairment of a public utility's operations or service, constitute irreparable harm for which there is no adequate remedy at law. The commission is authorized to seek relief in circuit court including temporary and permanent injunctions, restraining orders, or any other appropriate order. Such remedies shall be in addition to and supplementary to any other remedies available for enforcement of agency action under s. 120.69 or the provisions of this chapter. The commission shall establish procedures implementing this section by rule.

(11) The commission has the authority to assess a public utility for reasonable travel costs associated with reviewing the records of the public utility and its affiliates when such records are kept out of state. The public utility may bring the records back into the state for review.

History.--s. 5, ch. 26545, 1951; s. 2, ch. 74-196; s. 3, ch. 76-168; s. 1, ch. 77-457; s. 53, ch. 78-95; ss. 5, 16, ch. 80-35; s. 1, ch. 81-131; s. 2, ch. 81-318; ss. 4, 20, 22, ch. 89-292; s. 51, ch. 90-331; s. 4, ch. 91-429; s. 3, ch. 93-35; s. 552, ch. 95-148; s. 72, ch. 98-200.

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RAILROADS AND OTHER REGULATED UTILITIES PUBLIC UTILITIES

366.06 Rates; procedure for fixing and changing.--

(1) A public utility shall not, directly or indirectly, charge or receive any rate not on file with the commission for the particular class of service involved, and no change shall be made in any schedule. All applications for changes in rates shall be made to the commission in writing under rules and regulations prescribed, and the commission shall have the authority to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service. The commission shall investigate and determine the actual legitimate costs of the property of each utility company, actually used and useful in the public service, and shall keep a current record of the net investment of each public utility company in such property which value, as determined by the commission, shall be used for ratemaking purposes and shall be the money honestly and prudently invested by the public utility company in such property used and useful in serving the public, less accrued depreciation, and shall not include any goodwill or going-concern value or franchise value in excess of payment made therefor. In fixing fair, just, and reasonable rates for each customer class, the commission shall, to the extent practicable, consider the cost of providing service to the class, as well as the rate history, value of service, and experience of the public utility; the consumption and load characteristics of the various classes of customers; and public acceptance of rate structures.

(2) Whenever the commission finds, upon request made or upon its own motion, that the rates demanded, charged, or collected by any public utility for public utility service, or that the rules, regulations, or practices of any public utility affecting such rates, are unjust, unreasonable, unjustly discriminatory, or in violation of law; that such rates are insufficient to yield reasonable compensation for the services rendered; that such rates yield excessive compensation for services rendered; or that such service is inadequate or cannot be obtained, the commission shall order and hold a public hearing, giving notice to the public and to the public utility, and shall thereafter determine just and reasonable rates to be thereafter charged for such service and promulgate rules and regulations affecting equipment, facilities, and service to be thereafter installed, furnished, and used.

(3) Pending a final order by the commission in any rate proceeding under this section, the commission may withhold consent to the operation of all or any portion of the new rate schedules, delivering to the utility requesting such increase, within 60 days, a reason or written statement of good cause for withholding its consent. Such consent shall not be withheld for a period longer than 8 months from the date of filing the new schedules. The new rates or any portion not consented to shall go into effect under bond or corporate undertaking at the end of such period, but the commission shall, by order, require such public utility to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid and, upon completion of hearing and final decision in such proceeding, shall by further order require such public utility to refund with interest at a fair rate, to be determined by the commission in such manner as it may direct, such portion of the increased rate or charge as by its decision shall be found not justified. Any portion of such refund not thus refunded to patrons or customers of the public utility shall be refunded or disposed of by the public utility as the commission may direct; however, no such funds shall accrue to the benefit of the public utility. The commission shall take final commission action in the docket and enter its final order within 12 months of the commencement date for final agency action. As used in this subsection, the "commencement date for final agency action" means the date upon which it has been determined by the commission or its designee that the utility has filed with the clerk the minimum filing requirements as established by rule of the commission. Within 30 days after receipt of the

application, rate request, or other written document for which the commencement date for final agency action is to be established, the commission or its designee shall either determine the commencement date for final agency action or issue a statement of deficiencies to the applicant, specifically listing why said applicant has failed to meet the minimum filing requirements. Such statement of deficiencies shall be binding upon the commission to the extent that, once the deficiencies in the statement are satisfied, the commencement date for final agency action shall be promptly established as provided herein. Thereafter, within 15 days after the applicant indicates to the commission that it believes that it has met the minimum filing requirements, the commission or its designee shall either determine the commencement date for final agency action or specifically enumerate in writing why the requirements have not been met, in which case this procedure shall be repeated until the commencement date for final agency action is established. When the commission initiates a proceeding, the commencement date for final agency action shall be the date upon which the order initiating the proceeding is issued.

(4) A natural gas utility or a public electric utility whose annual sales to end-use customers amount to less than 500 gigawatt hours may specifically request the commission to process its petition for rate relief using the agency's proposed agency action procedure, as prescribed by commission rule. The commission shall enter its vote on the proposed agency action within 5 months of the commencement date for final agency action. If the commission's proposed action is protested, the final decision must be rendered by the commission within 8 months of the date the protest is filed. At the expiration of 5 months following the commencement date for final agency action, if the commission has not taken action or if the commission's action is protested by a party other than the utility, the utility may place its requested rates into effect under bond, escrow, or corporate undertaking subject to refund, upon notice to the commission and upon filing the appropriate tariffs. The utility must keep accurate records of amounts received as provided by subsection (3).

History.--s. 6, ch. 26545, 1951; s. 4, ch. 74-195; s. 3, ch. 76-168; s. 1, ch. 77-457; ss. 7, 16, ch. 80-35; s. 2, ch. 81-318; ss. 8, 20, 22, ch. 89-292; s. 4, ch. 91-429; s. 5, ch. 93-35; s. 5, ch. 95-328.

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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).

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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

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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.

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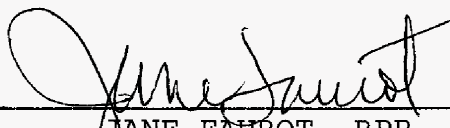
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of my notes of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 20th day of October, 2004.



JANE FAUROT, RPR
Chief, Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
(850) 413-6732