

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

Docket No. 030623-EI
Filed: December 16, 2004

CUSTOMERS' POST-HEARING BRIEF

Petitioners/Customers, Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. (collectively referred to as "Customers"), pursuant to Public Service Commission Order Number PSC-04-0933-PHO-EI, by and through their undersigned counsel, file their Post-Hearing Brief.

Introduction

Customers seek to be compensated in whole for monies FPL overcharged them due to FPL's use of faulty thermal demand meters which over-registered Customers' usage and demand charges. A key issue in this case is whether the meters in question gradually began over-registering demand, such that the date of over registration cannot be determined and a 12 month refund should be provided, or whether the meters in question were over-registering demand from the date they were originally installed at Customers' respective businesses, so that a refund for overcharges dates back to the date of meter installation. See Rules 25-6.103(1) and 25-6.094(1), Florida Administrative Code ("F.A.C"). The trier of fact is thus left with two distinct choices: The meters were over-registering demand when installed or the meters gradually over-registered demand while in use.

Compelling evidence suggests that the meters over-registered demand when installed. This fact was established by two credible witnesses, Bill Smith, an engineer who worked at Duncan Landis and Gyr Company, the manufacturer of the meters in dispute and who was involved in designing thermal demand meters, and Jim DeMars, the Chief Engineer for FPL.

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Mr. Smith, who is retired, had first hand knowledge of and experience with the thermal demand meters in question. Unlike FPL's purported expert witness, Mr. Malemezian, who on cross examination demonstrated both his bias and a complete lack of technical expertise and factual foundation for his testimony, Mr. Smith demonstrated unchallenged expertise in the area of thermal demand meters. He was involved in designing thermal demand meters while employed at Landis and Gyr and stated that the thermal demand meters in dispute most likely have been over-registering demand due to miscalibration, and thus overcharging Customers, from the date of initial installation¹. (TR 233/18-25; TR 239/4 to 243/2) The other witness who demonstrated that the thermal demand meters were over-registering demand from the date of meter installation, and effectively rebutted FPL's argument that the meters gradually over-registered Customers' demand, was Jim DeMars. Mr. DeMars, a 15 year FPL employee and FPL's product engineer for metering products, testified that he is FPL's technical expert regarding metering issues. (Exhibit 17; 15/23 to 16/1; Exhibit 17, 19/13-15). When asked if he believed that the thermal demand meters in dispute have gradually over-registered over time, Mr. DeMars answered truthfully and succinctly, "No, I don't have any evidence of that." (Exhibit 17, 53/1-4)

Customers' Post Hearing Brief will delve into detail about the issues in dispute, but Customers urge staff and the Commission to keep the above facts squarely in mind in deciding whether Customers should receive a refund beyond a 12 month period of time.

¹ Cites to the hearing transcript will be given in this manner. For example, "TR 408" means hearing transcript, page 408; "TR 584/12-21" means hearing transcript, page 584, lines 12-21; "TR 651/25-652/12" means hearing transcript, page 651, line 25 through page 652, line 12; and "TR Ex. 18", or "Ex. 18" when "TR" is already given earlier in the cite, means Exhibit 18 to the hearing transcript. "Ex. 17 15/23-25" means exhibit 17, page 15 lines 23 to 25 of the deposition exhibit.

Issue 1: Pursuant to Rule 25-6.052, Florida Administrative Code, what is the appropriate method of testing the accuracy of the thermal demand meters subject to this docket?

Customers: The meters are more accurate when tested at a higher percentage of full scale. However, in this case, un rebutted evidence established that the parties agreed to test the meters in dispute at 80% of full scale, and the parties' agreement should be recognized.

Exhibit 9 is an agreement the parties reached regarding the testing of the thermal demand meters that are in dispute. The parties and PSC staff recognized the validity of this agreement, and acknowledged that the parties previously agreed the meters would be tested at 80% of full scale value. (TR 78/1-9; TR 280/11-20;) Commissioner Deason asked staff witness Matlock if there was anything contained within the parties' agreement regarding meter testing that was inherently inconsistent with PSC rules. Mr. Matlock responded, "No sir, I don't think there was." (TR 291/16-25). No evidence was adduced at hearing that called into question the validity of this agreement in any way. Accordingly, the parties' agreement regarding the point at which to test the meters controls and must be recognized.

The Proposed Agency Action taken by the Commission in this docket expressly recognized the parties' Agreement to test the meters in dispute at 80% of full scale value. Specifically, PSC Order No. 03-1320-PAA-EI, states: "FPL and SUSI have agreed to test the meters at the single point of 80% of full scale. . . . This method is consistent with Rule 25-6.052(2)(a) as a reasonable means to determine whether a meter is inaccurate and whether a customer should receive a refund." Neither FPL nor Customers specifically challenged this

portion of the PAA.² Thus, by law, this agreement to test at 80% of full scale value is deemed stipulated, since this portion of the preliminary agency action was not specifically disputed. See Section 120.80(13)(b), Florida Statutes (provisions of PSC proposed agency action which are not disputed are deemed stipulated).

FPL's own expert witness, Ed Malemezian, suggested that thermal demand meters are more accurate when tested at a higher point or percentage of full scale. (TR 348/2-22) An authoritative document attached to Bill Smith's testimony as pre-filed Exhibit L, entitled Facts about Demand Metering, states: "[i]t is advisable to use demand meters as well as other any other indicating meter in the upper one-half of their scales." Further, as it relates specifically to meter testing, the document provides that the meters to be tested in series with the standard meter should have "a load of ¾ scale or higher applied." (Exhibit 13, Appendix L, p. 49-50) Mr. Malemezian recognized during cross examination that this meant 75% of full scale value. (TR 347/5-23) The governing ANSI standard, C12.1, recommends that the meters be tested at a point between 50% and 100 % of full scale value. (Ex. 17, 73/5-75/3). The meter manufacturer recommends the same thing. (Ex. 13, Ex. E, p. 6). FPL witness Malemezian referred to these ANSI standards as "the bible" of testing standards. (TR 341/2-8) Surely the Commission's goal should be to have the meters tested at a point of full scale value that renders the most accurate reading. Thus, if accuracy is the objective, the meter should be tested at the highest practicable point of full scale.³

² Counsel for FPL, in his opening statement, acknowledged that the meters in this docket were tested at 80% of full scale value, and that 11 of the meters in the docket over-registered demand above 4%, with one meter over-registering kWh above the allowable 2% limit. (TR 18/6-12) Thus, the issue of at what point to test the meters on full scale value has been resolved by agreement.

³ If the Commission seeks to articulate a new policy regarding the appropriate method of testing the accuracy of thermal demand meters, it should engage in rulemaking as set forth in Section 120.54 so as to allow all interested persons, such as Southeastern Utilities Services, Inc., who was dismissed as a party in this case and others, the opportunity to participate. Furthermore, FPL's idea of testing meters at average customer load runs afoul of ANSI standards and ignores recommendations contained in the Sangamo Facts About Demand Metering. Finally, FPL

FPL argues for an interpretation of Rule 25-6.052(4) that permits it to test thermal demand meters at any point between 25% and 100% of full scale. Such an interpretation should be refused. Staff witness Matlock testified that the selection of the meter test point is of critical importance. (TR 268/24-25) Mr. Matlock indicated during cross examination that as a meter is tested at greater full scale value, it is possible for the meter to register a greater percentage of error. (TR 282/10-21) FPL's expert, Mr. Malemezian, admitted during cross examination that the thermal demand meters were more accurate when tested at a higher point on the meter scale. (TR 347/2 to 348/22) (TR282/10-21) Mr. Matlock acknowledged that average customer demand varies. (TR 282/22 to 283/5) He testified that an interpretation that the meter must be within acceptable tolerance limits when tested at all points between 25% and 100% of full scale was logical. (TR286/6 to 287/1) Additionally, the interpretation urged by FPL is inconsistent with Rule 25-6.059(4), which provides for an independent meter test at a testing facility of the customer's choosing, and presumably at any test point between 25% and 100% of full scale value. Why allow for an independent test if, as FPL urges, the meter must only be within tolerance at any point between 25% and 100%? Thus, the meters should be tested at the highest practicable percentage of full scale.⁴

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 demand meters which test outside the prescribed tolerance limits?

developed its concept of testing at average customer load without consulting any experts. A change in how meters are tested should be considered in a duly noticed rulemaking proceeding, not made in passing during a proceeding which focused on appropriate customer refunds.

⁴ Under the interpretation urged by FPL, a utility could decide to test all meters at 25% of full scale value. That would likely result in more meters being found within acceptable tolerance levels, but would not be fair to customers.

Customers: Customers should be refunded the amount billed in error. Customer refunds in this docket should be based the higher of 1) a “before and after” review of billing records after the faulty meter was removed; or 2) the meter test error. This was the approach agreed to by the parties and the approach FPL used in calculating customer refunds for similarly situated thermal demand customers not parties in this docket, and Customers should be treated similarly.

FPL established a method for determining the amount of refunds due customer designed “to remove any perceptions from affected customers that they were not being treated fairly.” (TR 47/8-9). Specifically, FPL used the higher of 1) a “before and after” review of billing records after the faulty meters were removed from service; or 2) the meter test error. (TR 47/6-16) FPL and Customers also agreed to use this methodology for the meters in dispute in this docket. (Exhibit 9; TR 280/21 to 281/22) However, FPL does not want to use this “higher of” methodology for Customers because these “customers have elected to utilize the Commission’s process to resolve their complaint” and seek a refund beyond 12 months. (TR 47/21-22; TR 95/19-23) The parties entered into an agreement regarding how the meters in dispute were treated. For the reasons set forth above in Issue 1 regarding the parties’ agreement to test at 80% of full scale value, the parties’ agreement to use the “higher of” methodology to determine refunds should also be honored. The agreement to use the “higher of” methodology is completely independent of the issue related to the length of the refund. Moreover, nothing in this agreement indicates that the agreement is void if the issues are brought before the Commission. There is nothing contained in the parties’ agreement that is inconsistent with PSC rules, a fact acknowledged by staff witness Matlock. (TR 291/16-25) Thus, it is the agreement of the parties as evidenced in Exhibit 9 that controls this issue.

Additionally, for all the reasons discussed in response to Issue 3 (these reasons are hereby adopted by reference under this issue) the “higher of” methodology should be used to calculate Customers’ refunds in this proceeding. Thus, the approach to be used in determining and calculating customer refunds should be to use the higher of: 1) a “before and after” review of billing records after the faulty meters were removed from service; or 2) the meter test point error.

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?

Customers: Yes. By law, FPL cannot treat similarly situated customers differently. (See Section 366.03, Florida Statutes). FPL’s admitted business practice of using the “higher of” approach to determine the percentage of meter overregistration error is not prohibited by PSC rules, was not the result of settlement negotiations, and was applied to other customers with defective meters not in this docket. Customers should not receive less favorable treatment than other similarly situated customers.

Florida Statute Section 366.03 provides in pertinent part that “[n]o 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.” Utility policies, such as the use of the “higher of” approach described by FPL, must be applied without discrimination. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 718 (Fla. 1983). FPL witness Bromley testified that FPL used the “higher of” approach with affected customers not involved in this docket. (TR 94/7-15; 95/1-13) Also, an internal FPL document makes clear that FPL adopted the “higher of” approach as a policy to calculate customer refunds. (Exhibit 13, premarked exhibit K to Bill Smith’s testimony) FPL

witness Bromley suggests FPL tries to treat similarly situated customers in the same manner. (TR 64/11-14) FPL stated it developed this “higher of” approach “to remove any perception from affected customers that they were not being treated fairly.” (TR 47/8-9)⁵ Use of the “higher of” approach to determine refunds is a benefit to those to whom it is applied. (TR 94/25 to 95/7) However, in this case, FPL wants to treat Customers in this docket differently than other similarly situated ratepayers. FPL seeks to deny Customers this benefit solely because they are seeking refunds beyond 12 months, an option that is expressly authorized by PSC Rule 25-6.103. (TR 95/19-23) By not using the “higher of” approach to determine refund amounts for Customers, a policy FPL developed and applied to all other similarly situated customers with faulty thermal demand meters, FPL is in violation of Section 366.03, Florida Statutes.

FPL may try to justify its actions, and argue that it is able to treat these Customers differently because it settled with or offered to settle with other FPL ratepayers affected by thermal demand meters which over-registered demand. There is no evidence of an “offer” ever having been made to other affected customers, or “acceptance” of such offers. FPL developed a policy to address customers whose thermal demand meters over-registered demand, applied that policy, and then merely credited a customer’s account. (TR 95/24 to 96/6) FPL never informed other customers of their rights under PSC rules to seek refunds beyond 12 months or made them an express offer indicating that the credit being applied to a customer’s bill was an offer to resolve issues related to a faulty thermal demand meter, and that acceptance of the credit constituted acceptance of FPL’s offer. Case law does not support the notion that merely paying a bill which includes a utility generated credit is acceptance of an offer. Davis v. Southern Bell Telephone and Telegraph Company, 1994 WL 912242 (S.D. Fla.) (no agreement can be made

⁵ Presumably, FPL wants to also be fair to Customers in this docket.

unless the offer stated that offeror would assume assent if offeree did not reply; continued payment of phone bill does not constitute acceptance).

To the contrary, the record is clear that FPL never negotiated with any of its customers or entered into settlement agreements with these customers. (TR 95/22 to 96/11; Exhibit 18; Deposition of Chuck Cain; 62/12-22). Thus, the approach to be used in determining and calculating customer refunds should be to use the higher of: 1) a “before and after” review of billing records after the faulty meters were removed from service; or 2) the meter test point error. FPL’s desire not to follow its established “higher of” approach now, because it wants to disadvantage Customers who decided to litigate other aspects of FPL’s behavior related to the over-registering thermal demand meters, was specifically disapproved by the Legislature in Section 366.03, Florida Statutes. This Commission, which is charged with protecting ratepayers, should not allow FPL to disadvantage Customers by using only the meter test point error to determine refunds, as urged by FPL. To adopt FPL’s position would send a bad message: You may be treated less favorably in seeking redress from the Florida Public Service Commission than would otherwise be the case. Customers in this docket should be treated the same way that FPL treated other, similarly situated customers for the purposes of determining the percentage of meter over registration error.

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

Customers: The same rate schedule under which the accounts were originally billed should be used to calculate Customer refunds.

To calculate the refunds, FPL should use the same rate schedule under which the accounts were billed through the defective meters. Under FPL’s rate structure, accounts whose monthly demands are between 21 and 499 kilowatts (kW) are generally required to take service

under the General Service Demand (GSD-1) rate schedule. To qualify for service under the lower General Service Large Demand 1 (GSLD-1) rate, accounts must have monthly billing demands of at least 500 kW. As a result, when the historic billing demands of some accounts are adjusted downward to correct for over-registering thermal demand meters, it appears that the accounts may not have qualified for service under the GSLD-1 rate schedule under which they were originally billed.

FPL has asserted that it is appropriate to calculate refunds based on the rate that would have applied (i.e., the GSD-1 rate) had the meters been operating properly. Because the GSD-1 rate is higher than the GSLD-1 rate, such an adjustment results in lower refunds for Customers. Such an adjustment is not appropriate. Although a different rate schedule may have been applied had the metering error not occurred, the adjustment unfairly penalizes Customers who were billed at the incorrect rate through no fault of their own. It is FPL's responsibility to ensure that its meters are operating properly and that customers are billed under the correct rate schedule based on their monthly demand. For these reasons, FPL should apply the same rate schedule under which accounts were originally billed through the defective meter for the purpose of calculating refunds.

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

Customers: Customers should receive a refund beyond 12 months to the point in time when the defective meters were first installed. Evidence from an expert engineer who helped design thermal demand meters for the manufacturer suggests the disputed meters were over-registering when installed. FPL's chief engineer testified he was not aware of anything that could cause a thermal demand meter to gradually over-register.

FPL contends that Customers have the burden of proving an entitlement to refunds longer than 12 months. However, this issue is not as simple as FPL suggests. The genesis of this docket is the filing of complaints by Customers with FPL regarding 1V thermal demand meter over-registration. Pursuant to Rule 25-6.094(1), upon receipt of these complaints, FPL had a duty to “make a full and prompt investigation of all customer complaints and service requests. The word ‘complaints’ as used in this rule shall be construed to mean substantial objection made to a utility by a customer as to its charges, facilities, or service, the disposal of which complaint requires investigation or analysis.”

Rule 25-6.103(1) addresses refunds for fast meters and provides that when a meter is found to register outside of allowable tolerance, “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 on available records.”

Thus, upon receipt of a Customers’ complaints, FPL has the initial duty of performing “a full and prompt investigation” (under Rule 25-6.094) to determine “the amount billed in error” as required by Rule 25-6.103(1). Under this regulatory scheme, FPL bears the initial burden of proof with regard to calculating refunds. To meet this burden, FPL must determine if a refund longer than 12 months is warranted by first determining the “cause” of the meter error, and then determining if a date can be “fixed” regarding when the meter error began. If an FPL customer disagrees with FPL’s refund calculation, the burden of proof then shifts to that customer to prove entitlement to a greater refund.

However, for the meters in this docket (and all other 1V thermal demand meters) FPL took no action whatsoever to determine the “cause” of the meter error. (TR 97/1-9) For some reason, for these meters, FPL deviated from its prior practice of thoroughly investigating the cause of changes in meter accuracy and calibration. FPL witness (and former FPL employee) Edward Malemezian testified that FPL, in the past, conducted investigations related to “hundreds or thousands of meters.” (TR 351/12-24) For 1V thermal demand meters, it seems that maintaining the “integrity” of these meters is more important than investigating the cause of their failures.⁶

With regard to the “fixed” date, FPL performed only a perfunctory analysis of billing records. FPL did not establish any objective criteria for determining when a refund longer than 12 months is warranted. FPL did not perform any statistical analysis of the billing data. (TR 88/15 to 89/20) Notwithstanding the duty imposed under Rule 25-6.094(1) to investigate, FPL failed to take reasonable steps to determine why Customers’ 1V thermal demand meters over-registered demand and to determine how long these meters had been over-registering **demand**.⁷

There can be no dispute that under this regulatory scheme it is FPL, not the FPL customer, that bears the initial burden of determining “the amount billed in error.” FPL possesses both the meter and the billing information necessary to make this determination. FPL now seeks to be rewarded for its failure to comply with Rule 25-6.094(1) by shifting the burden to Customers to prove that its refund determination is wrong. This is patently and fundamentally unfair and the Commission should not reward FPL for these actions.

⁶ FPL’s desire to maintain the “integrity” of the meters is curious given that this proceeding authorized by Section 120.57(1) and 12.569, Florida Statutes, is designed to decide disputed facts presently in dispute, not those that may be in dispute in the future.

⁷ FPL provided refunds to approximately 250 other customers with over-registering thermal demand meters. Despite the fact that reductions in demand registration (comparing new, electronic meters to old thermal demand meters) on the order of 30%, 40%, and 50% were observed, FPL did not find any instance where a refund longer than 12 months was warranted. (TR 93/11-14).

Notwithstanding the burden of proof issue, Customers contend their meters have over-registered since they were last calibrated, and that refunds should be calculated from the date of the last calibration. FPL argues that it cannot be determined when the meters over-registered; therefore the refunds should be limited to a 12 month period of time. The trier of fact is left with two distinct choices: The meters over-registered when last calibrated or the meters gradually over-registered over time while in use. Compelling evidence as set forth below established that the meters were over-registering when initially installed.

Bill Smith, an engineer, worked for the company that designed and manufactured the thermal demand meter that is in dispute. (TR 231/17-15). Smith helped design thermal demand meters. He was familiar with the TMT thermal demand meters involved in this docket. According to Mr. Smith, based upon his knowledge of the thermal demand meter, it is unlikely that these meters gradually began over-registering as FPL contends. (TR 249/7-9) To the contrary, Mr. Smith testified that, in his expert opinion, the meters were over-registering when last calibrated. (TR 233/18-21) Mr. Smith testified that the cause of over registration was miscalibration. (TR 233/18-21) Mr. Smith's testimony was supported by others. FPL's technical expert on metering issues is Jim DeMars. Mr. DeMars testified that there was "no evidence" that Customers' thermal demand meters had come to gradually over-register demand. (Ex 17 p.53/1-4). It is compelling that FPL's own meter expert, in stating a professional opinion, indicated, consistent with the testimony of Customers' expert Smith, that he was unaware of anything that could cause the meters in question to gradually over-register demand. Another engineer, Bill Gilmore, was educated at Georgia Tech and worked with FPL for 17 years as an engineer. (TR 380/11-16) Mr. Gilmore performed a statistical analysis which supported the professional opinions of Mr. DeMars and Mr. Smith that the meters in question over-registered

demand since their last calibration . (TR 382/1-387/4; Ex. 16, premarked exhibits BG-1 through BG-4.)

FPL presented the testimony of Edward Malemezian. Customers objected to the admission of this testimony based on Mr. Malemezian's lack of expertise in the field of engineering in which he rendered opinions. Mr. Malemezian opined that changes in the material characteristics of 1V thermal demand meter components could cause these meters to gradually over-register demand over time. (TR 349/12-17) The cross examination of Mr. Malemezian, who admitted that he is not an expert in the engineering discipline of material science (TR 350/5-7), revealed that in addition to his lack of qualifications, Mr. Malemezian also had no factual basis for his testimony.

Mr. Malemezian has never even seen, much less performed any inspections or tests on, the meters in this docket. (TR 352/19-24) Mr. Malemezian had no specific recollection of any changes in material characteristics affecting the accuracy of 1V thermal demand meters. (TR 351/9 to 352/4) He could recall no specific discussions with thermal demand meter manufacturers about changing characteristics of material components. (TR 352/5-18) He had no idea if any of the material characteristic changes opined about actually occurred. (TR 353/3-6) Mr. Malemezian is not familiar with the materials, or the properties of these materials, that are used in 1V thermal demand meters. In short, Mr. Malemezian's testimony was not based on any factual basis; rather it is based entirely on supposition as to what "might" have occurred.

This is not competent expert testimony, and Customers renew their objection to its admission. See Carnival Corp. v. Stowers, 834 So. 2d 386, 387 (Fla. 3d DCA 2003) ("to be admissible an expert's opinion must be based on valid underlying data which has a proper factual basis"); United Technologies Communications Co. v. Industrial Risk Insurers, 501 So. 2d 46, 49

(Fla. 3d DCA 1987) (“not enough that a witness qualified in some general way . . . witness must be possessed of special knowledge about the discrete subject upon which he is called to testify”); Young-Chin v. City of Homestead, 597 So. 2d 879, 882 (Fla. 3d DCA 1992) (expert opinions must be based on facts - not supposition).

Additionally, cross examination revealed that Mr. Malemezian is biased against Customers. He runs a one-man consulting shop, whose primary clients are utilities like FPL. He admitted that his bread is buttered by FPL and that he does not accept engagements adverse to FPL or other utility clients. (TR 369/9 to 370/5) Mr. Malemezian’s biased, technically incompetent testimony should be stricken or, if admitted, given little, if any, weight.

The evidence of record is that thermal demand meters are simple, reliable, and stable devices that, as a result of their inherent design, have sustained accuracy. (TR 343/16-24; 345/20-25; 346/17-19) The meters in this docket were constructed in compliance with ANSI standard 12.5 which requires thermal demand meters to be constructed for stability of performance over long periods of time and over wide operating conditions with a minimum of maintenance. (TR 348/34 to 349/11) The bi-metal coils in these meters are “stable indefinitely” because of the aging processes performed prior to assembly into the meters, and the heating elements are “precisely” matched so as not to require further attention. (TR 347/11-20) Thus, as FPL has done no investigation as to the cause of these meters failures and has jealously protected the “integrity” of these meters, the only competent evidence in the record demonstrates that Customers’ thermal demand meters do not come to gradually over-register demand and therefore, have been over-registering demand for the entire period these meters were installed. This conclusion is further buttressed by the control charts prepared by Mr. Bill Gilmore, which

indicate a material, consistent change in demand registration upon meter replacement. (Ex. 17, BG-1, 2, 3, & 4)

FPL's trial strategy is twofold. First, under the guise of protecting the "integrity" of Customers' meters, FPL did no investigation to determine the cause of these meters' failure and objected to Customers having access to these meters to perform an investigation. Second, FPL asserts that Customers have the burden of proving the cause of these meters' failures. The Commission should not endorse and support FPL's "heads I win, tails you lose" strategy, particularly when it is premised on a clear failure to abide by the requirements of Rule 25-6.094(1).

Under the Commission's Rules, as acknowledged by FPL witness Rosemary Morley, Customers are entitled to a refund that makes them whole. (TR 128/10-21) The evidence of record establishes that a one year refund does not accomplish this purpose.

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

Customers: The Legislature clearly set forth a statutory scheme to determine interest due in "all" cases which do not involve a special contract for interest. See Sections 687.01 and 55.03, Florida Statutes. The Florida Supreme Court has expressly recognized that this statutory scheme applies to a utility refund case.

The Legislature enacted Section 687.01, Florida Statute. This section, entitled "Rate of interest in absence of contract", provides:

In all cases where interest shall accrue without a special contract for the rate thereof, the rate is the rate provided for in s. 55.03.

Section 55.03 requires the Chief Financial Officer to annually set the interest rate by averaging the discount rate of the Federal Reserve Bank of New York for the preceding year, then adding 500 basis points to the averaged discount rate.

This case pending before the Commission is one without a special contract for the rate of interest. Customers have been wrongfully charged monies by FPL and are entitled to interest on the refunded amounts. Customers have a right to receive interest on the sums FPL wrongly charged them. Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46, 47 (Fla. 1988)(“[W]e agree with the district court that a regulated public utility has a legal obligation to pay interest on overcharge refunds.”)⁸ While the parties do not dispute whether interest is due, the parties dispute the rate at which interest should be calculated. The Commission must decide whether the interest should be calculated using the approach adopted by the Florida Legislature as set forth above or the approach adopted by the Florida Public Service Commission in Rule 25-6.109. For the following reasons, interest should be calculated as directed by the Legislature.

The PSC has adopted a rule regarding interest rates. See Rule 25-6.109(4). However, no express legislative authority exists which gives the Commission the ability to adopt such a rule.⁹ The Administrative Procedures Act requires a specific grant of legislative authority for a rule to be valid. Specifically, Section 120.536(1) provides:

“A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. . . . No agency shall have the authority to a rule only because it is reasonably related to the purpose of the enabling legislation. . . .”

None of the statutes relied upon by the Commission for promulgating Rule 25-6.109(4) provide specific statutory authority as required for the PSC to establish an interest rate or to choose which interest rate it will apply in calculating interest due on electric utility overcharges¹⁰.

⁸ Below, the District Court found that a regulated utility has legal obligation to pay interest on overcharge refunds **under Section 687.01, Florida Statutes** and Argonaut Insurance Company v. May Plumbing Co., 474 So.2d 212 (Fla. 1985) (emphasis added).

⁹ The PSC rule is presently being challenged in a proceeding before the Division of Administrative Hearings. See case number 04-2250RX.

¹⁰ Section 350.127(2) is cited as specific statutory authority, while Sections 366.03, 366.06(3), 366.04(2), 366.071 and 366.071(2) are cited as statutes implemented by the Rule.

Thus, given the choice of applying a rule for which no express legislative authority exists or deferring to the Legislature and the statute it expressly created to govern interest in commercial relationships where no contractual rate of interest is present, the Commission should defer to the Legislature. The Public Service Commission derives all its powers to act solely from the Legislature. Tampa Electric Co. v. Garcia, 767 So.2d 428, 433 (Fla. 2000). The Legislature has adopted a statewide interest rate policy concerning the calculation of interest in “all” cases without a contractual interest rate.

Using the statutory scheme rather than Rule 25-6.109(4) is further supported by the Florida Supreme Court case of Kissimmee Utility Authority v. Better Plastics, Inc., 526 So.2d 46 (Fla. 1988). This case involved an electric utility customer of Kissimmee Electric Authority who received a refund due to being overcharged. The customer sought interest on the refunded sums and the Kissimmee Utility Authority opposed the request for interest. Litigation ensued. The 5th District Court found that a regulated utility has a legal obligation to pay interest on overcharge refunds under Section 687.01, Florida Statutes and Argonaut Insurance Company v. May Plumbing Co. 474 So.2d 212 (Fla. 1985). See Better Plastic, Inc. v. Kissimmee Utility Authority, 511 So.2d 402 (Fla. 5th DCA 1987)

The district court in Better Plastics, Inc. certified the following question to the Florida Supreme Court: “Is a regulated public utility in Florida liable to customers for prejudgment interest on overcharge refunds?” The Florida Supreme Court answered the question in the affirmative and expressly approved the decision of the lower court. The Florida Supreme Court concluded that Section 687.01 of the Florida Statutes was applicable, and that interest should be calculated and awarded pursuant to that statute.

FPL will undoubtedly argue that PSC Rule 25-6.109(4) trumps Section 687.01. A rule cannot contradict or otherwise supplant a statute, since rules may only be created by express legislative delegation of rulemaking powers. See Sections 120.52(8); 120.536(1), Florida Statutes.

FPL may also attempt to rely on PSC Order 20474 issued in 1988 In re: Kelly Tractor Company against Meadowbrook Utility Systems, Inc., Docket No. 880606-WS. Kelly Tractor did not involve an electric utility, but rather a water and wastewater utility. The rule being construed in Kelly Tractor was Rule 25-30.360 which is not the same rule as FPL now urges upon the Commission, Rule 25-6.109(4). Kelly Tractor can be distinguished and should not be followed. The reasoning and analysis set forth by the Commission in Kelly Tractor, that “Flawed by false premises, Kissimmee Utility cannot be accepted as dispositive here simply because of the superficial strength of the Florida Supreme Court’s affirmative answer to the question that was certified to it” is suspect and should not adopted.¹¹

The Kelly Tractor opinion was written well before certain changes to Section 120.536, Florida Statutes, were enacted which require that all agency rules be authorized by express and specific rulemaking authority¹². Consequently, agencies were less constrained in 1988 in adopting rules than they are today. Additionally, this PSC opinion apparently did not recognize the scope and breadth of the Kissimmee Electric case. Kissimmee is controlling authority that should be followed, not distinguished or disregarded.

Finally, it is better public policy to calculate interest using an approach that reaches back further in time to the point Customers were actually damaged, rather than applying an interest

¹¹ It should be noted that the Florida Supreme Court authored an opinion of greater length and analysis than the 5th District Court did in originally granting the statutory award of interest, drawing question as to how the Supreme Court’s opinion was judged to be superficial.

¹² Statutory history of Section 120.536 is as follows: s. 9 ch. 96-159; s. 3 ch. 99-379; s. 15 ch. 2000-151

rate that is based on commercial paper rates for the past 30 days as called for in Rule 25-6.109(4). The point and purpose of providing interest with refunds is to attempt to make the customer whole. Using an interest rate that more accurately reflects interest rate market conditions over a broader period of time is the preferred approach.

Customers should be awarded interest consistent with Section 687.01, Florida Statutes, Argonaut Insurance Company v. May Plumbing Co., and Better Plastic, Inc. v. Kissimmee Utility Authority.

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

***Customers: Evidence established that the impacts of the sun or radiant heat can impact thermal demand meters, causing them to over-register demand.**

The issue of the accuracy of thermal demand meters was first raised by George Brown when he witnessed the sun impacting the accuracy of a thermal demand meter and brought it to FPL's attention. (TR 65/6-25) Subsequently, FPL witnessed the same thing, i.e., the sun or radiant heat affecting a meter's accuracy. (TR 32/7-14 Bromley) Additionally, when FPL tested a larger portion of meters, it also found that radiant heat affected the accuracy of the meters. (TR. 34/5-7) Thus, it was established that the sun can impact thermal demand meters, causing them to over-register demand.

Because FPL resisted all efforts of Customers to inspect the meters and test them, Customers had difficulty providing specific evidence concerning the impact of the sun or radiant heat on the meters in this docket. However, Customers did establish that the sun or radiant heat can impact thermal demand meters and cause them to over-register demand. Accordingly,

Customers urge a factual finding that radiant heat produced by the sun can affect a thermal demand meters accuracy.

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

***Customers: Customers should be refunded “the amount billed in error.” The amount that should be refunded to customers is set forth in the chart below. The statutory interest rate should be applied to the refunded sums.**

Customers completely agree with the portion of the testimony of FPL witness Rosemary Morley which states:

As stated in Florida Administrative Code Rule 25-6.103, whenever a meter is found to have an error in excess of the plus tolerance allowed by rule, refunds should be based on “the amount billed in error.” Accordingly, any refund amount should be based on the difference between the amount actually billed the customer less the amount which would have been billed if the meter had accurately measured the customer’s kW demand and kWh usage. Using this method, the customer’s electric bill, less any refunds, is made equal to the electric bill which would have been rendered had the meter error not existed. (TR-109/19 to 110/5)

In other words, the goal of the refund process under Rule 25-6.103 is to make Customers whole - no more and no less. However, as recognized by Commission witness Matlock, using the full-scale meter error as a basis for calculating refunds ensures that Customers are treated unfairly as they are not made whole. (TR 272/3-11) Thus, Ms. Morley’s refund calculations, which are based on the full-scale meter error, do not equate to the “amount billed in error.” And, as FPL also recognized, refunds that are not based on the “amount billed in error” do not satisfy the requirements of Rule 25-6.103. (TR 129/22 to 130/1). Moreover, FPL’s refund calculations are not consistent with the parties’ agreement regarding how refunds are to be calculated. (Ex. 9)

In contrast, the refunds calculated by Mr. Brown are entirely consistent with the parties' agreement (Ex. 9) and do not include a built-in mechanism to ensure that Customers are undercompensated. Additionally, as refunds in excess of one year are required to make the Customers whole, Mr. Brown's testimony includes multi-year refunds while Ms. Morley's does not.

The evidence and testimony supports that the following principal sums should be awarded for each Customer and meter: (Ex. 6, premarked Ex. 6)

METER #	PRINCIPAL AMOUNT DUE TARGET
1V7001D	\$87,563.61
1V5192D	\$66,554.47
1V5025D	\$27,634.36
1V7019D	\$72,038.10
1V7032D	\$36,052.00
1V5887D	\$40,976.19
1V5871D	\$33,411.84
1V5159D	\$29,717.52

1V7179D	\$32,259.97
1V52475	\$11,868.36
1V7166D	\$22,684.28
1V5216D	\$15,979.81

Customers are also entitled to receive interest, at the statutory rate, on these principal amounts. Including this interest, the amounts due are as follows:

METER #	TOTAL AMOUNT DUE TARGET
1V7001D	\$145,807.86
1V5192D	\$107,192.11
1V5025D	\$46,130.87
1V7019D	\$113,577.57
1V7032D	\$55,980.34
1V5887D	\$64,333.34
1V5871D	\$46,599.65
1V5159D	\$47,910.92

METER #	TOTAL AMOUNT DUE
JC PENNEY	
1V7179D	\$50,687.44
1V52475	\$17,072.00
OCEAN PROPERTIES	
1V52093	\$80,064.83
DILLARD'S	
1V7166D	\$38,608.91
1V5216D	\$21,661.66


Conclusion

This case involves the failure of a key component of FPL's business: the meters used to measure the electricity and bill a customer based on usage. It is FPL's responsibility, not the Customers, to install and maintain accurate meters. (TR 62/16-2; TR 63/15-18) Customers have meters that over-registered demand. Customers are, quite simply, seeking to be made whole. Expert testimony provided ample evidence for the Commission, as the trier of fact, to conclude that the meters did not gradually over-register demand, as FPL contends, but over-registered demand when originally installed. FPL's efforts to reduce its financial exposure¹³ by tossing out a series of assertions, that the over registration could have been caused by various things, should be rejected, particularly when one considers FPL never investigated the cause of the meter over registration and fought against allowing Customers to have access to the meters.

If your local grocery store made an error, overcharged you for a gallon of milk, and you brought it to the grocer's attention, undoubtedly the grocery store manager would apologize, pay you the money you were overcharged, and probably give you the gallon of milk as a goodwill gesture to keep you as a valued customer. FPL, on the other hand, never apologized for using faulty equipment, refuses to pay monies that are owed, and seeks to have every doubt it raised resolved in its favor.

The Commission should, as set forth in Customers brief, award Customers refunds dating back to the date of installation of the faulty meters, plus statutory interest.

¹³ FPL formed a special SWAT team to react to the thermal demand issue. One of the issues examined was the total financial exposure of FPL related to these faulty thermal demand meters. (TR 80/24 to 81/25) Additionally, consistent with its quest to minimize its damages, FPL never provided any of its more than 250 other thermal demand meter customers (who are not parties in this docket) with meters that over-registered demand a refund beyond 12 months. (TR 87/11-17 Bromley)



William H. Hollimon
Florida Bar No. 104868
Jon C. Moyle, Jr.
Florida Bar No. 727016
Moyle, Flanigan, Katz, Raymond and Sheehan, PA.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
Attorneys for Customers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 16th day of December, 2004.

*Cochran Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Bill Walker
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, FL 32301

*Kenneth A. Hoffman
Rutledge, Ecenia, Purnell & Hoffman
Post Office Box 551
Tallahassee, FL 32302-0551

R. Wade Litchfield
Natalie Smith
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420



Jon C. Moyle, Jr.