

**Matilda Sanders**

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**Sent:** Tuesday, May 31, 2005 2:26 PM  
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**Subject:** Electronic Filing for Docket No. 040208-EI / FPL's Exceptions to the May 13, 2005 Recommended Order Issued by Administrative Law Judge John G. Van Laningham

**Attachments:** FPL's Exceptions to May 13, 2005 Recommended Order Issued by Judge Van Laningham.doc



FPL's  
Exceptions to May 13, 2005 Recommended Order Issued by Judge Van Laningham.doc  
Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 040208-EI

In re: Complaint of Mrs. Leticia Callard against Florida Power & Light Company regarding backbilling.

c. Documents being filed on behalf of Florida Power & Light Company.

d. There are a total of 10 pages in the attached document.

e. The document attached for electronic filing is Florida Power & Light Company's Exceptions to the May 13, 2005 Recommended Order Issued by Administrative Law Judge John G. Van Laningham.

(See attached file: FPL's Exceptions to May 13, 2005 Recommended Order Issued by Judge Van Laningham.doc)

Thank you for your attention and cooperation to this request.

Sincerely,

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mrs. Leticia Callard	)	Docket No. 040208-EI
against Florida Power & Light Company	)	
regarding backbilling.	)	
_____	)	Filed May 31, 2005

FLORIDA POWER & LIGHT COMPANY’S EXCEPTIONS TO THE  
MAY 13, 2005, RECOMMENDED ORDER ISSUED BY  
ADMINISTRATIVE LAW JUDGE JOHN G. VAN LANINGHAM

Florida Power & Light Company (“FPL”) submits the following Exceptions to the May 13, 2005, Recommended Order Issued by Administrative Law Judge John G. Van Laningham.

I. **Exceptions.**

1. **Investigative Costs**

Administrative Law Judge John G. Van Laningham departed from the law when he ruled that FPL had no legal basis for recovering investigative costs in this case. See Recommended Order Paragraphs 59 and 60 (hereinafter cited to as R.O.). As FPL pointed out to Judge Van Laningham, the Florida Public Service Commission (hereinafter “PSC) has previously ruled that FPL is entitled to recover investigative charges for meter tampering cases. See In re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI (PSC September 24, 1996). Without valid reason, the PSC should not change its decision that a utility is entitled to recover investigative charges for meter tampering cases. See Cleveland Clinic v. Agency for Hlth. Care, 679 So. 2d 1237, 1241-42 (Fla. 1st DCA 1996) (reversing AHCA decision simply changing its mind, with no good reason,

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FPSC-COMMISSION CLERK

regarding established policy, practice and procedure); Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339-40 (Fla. 1966) (reversing a Commission order that modified an earlier final order because there was not a finding based on adequate proof that modification was necessary in the public interest because of changed conditions or other circumstances that were not present in the earlier proceedings); Order No. PSC-95-1319-FOF-WS, Docket No. 921237-WS (issued Oct. 30, 1995) (while “[a] change in circumstances or great public interest may lead an agency to revisit an order” ... “there must be a terminal point where parties and the public may rely on an order as being final and dispositive.”) There is nothing in the record demonstrating a valid reason for departing from the established ruling of the PSC that FPL is entitled to recover investigative costs for meter tampering cases. Therefore, the PSC should adhere to its prior ruling, that a utility is entitled to recover investigative charges for meter tampering.

In addition, pursuant to the tariff filed by FPL with the PSC, FPL is entitled to recover extra expenses incurred as a result of the customer’s meter tampering. As the PSC is aware, FPL is a public utility as defined by Florida Statute §366.02(1) and is regulated by and under the jurisdiction of the PSC. Pursuant to Florida Statute §366.05(1), the PSC is empowered to "prescribe...service rules and regulations to be observed by each public utility; ...and to prescribe all rules and regulations reasonably necessary...for the administration and enforcement of this chapter." The rules and regulations prescribed by the PSC are contained in the Florida Administrative Code, Chapter 25-6.

Florida Administrative Code, Chapter 25-6.33, mandates that utilities file tariffs containing "rules with which prospective customers must comply as a condition to

receive service and the terms of the contract required." Pursuant to this mandate by the PSC, FPL promulgated its tariff which, in pertinent parts, provides as follows:

1.7 Reimbursement for Extra Expenses: The Customer may be required to reimburse the Company for **all extra expenses incurred by the Company on account of violations by the Customer of agreements with the Company or the Rules and Regulations of the Company.** (emphasis added).

5.2 Damage to Company's Property: In the event of any loss or damage to property of the Company caused by or arising out of carelessness, neglect or misuse by the Customer, the cost of making good such loss or repairing such damage shall be paid by the Customer.

Under these Tariff provisions, FPL is not required to demonstrate the reasonableness of the incurred expenses. Rather, the Customer must pay FPL for all expenses incurred as a result of the violation of the Tariff and/or Rules and Regulations promulgated by the PSC. Clearly, metertampering/current diversion is a violation of Florida Administrative Code provisions allowing the utility to disconnect service to a customer. *See* F.A.C. Rule 25-6.105(5)(i). It is only fair and equitable that a Customer tampering with their meter, or benefiting from it, be required to reimburse FPL for the costs of investigating this deceptive behavior. The alternative would be to require the rate payers as a whole to bear the costs of the transgressions of individual rate payers.

It is well established that the provisions of a Tariff are binding on a Customer, regardless of his/her knowledge or assent thereto. Landrum v. FPL, 505 So.2d 552 (Fla. 3rd DCA 1987); Western Union Tel. Co. v. Esteve Bros. and Co., 256 U.S. 566, 41 S. Ct. 584, 65 L.Ed. 1094 (1921); Florida Power Corp. v. Continental Laboratories, Inc., 243 So.2d 195 (Fla. 4th DCA 1971).

Tariffs are even recognized as having the force and effect of law. Landrum, supra; Carter v. American Tel. and Tel. Co., 365 F.2d 486 (5th Cir. 1966); cert. denied, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 547 (1967). A justification for an electric company filing a tariff with the PSC is to regulate the rate practices for the services furnished. Florida Power & Light Company v. State ex rel Malcolm, 107 Fla. 317, 144 So. 657 (1932); Landrum, supra. "Therefore, a tariff validly approved by the Public Service Commission, including a limitation of liability for ordinary negligence,...is valid." Landrum, supra; (citations omitted).

Bert Cunill testified that FPL incurred \$348.21 of investigative costs as a result of the meter tampering that occurred at Leticia Callard's residence. (Record of Court Reporter Diana Kelly dated November 29, 2004, page 87, line 25 – page 88, line 6). He testified that total included the "field investigation activity, the meterman's activity, the actual cost of the meter test, [and his] time." (Record of Court Reporter Diana Kelly dated November 29, 2004, page 88, lines 3-6) As Judge Van Laningham stated, the amount of FPL's costs were not unreasonable on their face. (R.O. paragraph 55). As 1.7 of FPL's Tariff states, FPL can recover "all extra expenses incurred by the Company on account of violations by the Customer of agreements with the Company or the Rules and Regulations of the Company." Based upon the foregoing, FPL is legally entitled to recover the \$348.21 in investigative charges from the Petitioner, Leticia Callard. Therefore, Judge Van Laningham departed from the law when he ruled that FPL was not legally entitled to recover the costs of investigating the meter tampering from the Petitioner, and the PSC should decline to follow the Recommended Order of Judge Van Laningham in that regard.

2. **Reasonableness of FPL's method of calculating Backbill**

Administrative Law Judge John G. Van Laningham departed from the law when he ruled that FPL's method of calculating the backbill for Petitioner's meter tampering was unreasonable. Rule 25-6.104, F.A.C., provides that when there has been meter tampering, "the utility may bill the customer on a reasonable estimate of the energy used." The Commission has repeatedly approved the Average Percentage Use method for calculating a reasonable estimate of energy used. See In re: Complaint of Mrs. Blanca Rodriguez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 960903-EI, Order No. PSC-96-1216-FOF-EI (PSC September 24, 1996); In re: Complaint of Mr. Mario Martinez against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 980332-EI, Order No. PSC-98-1078-FOF-EI (PSC August 10, 1998); In re: Complaint of Thomas W. Hart against Florida Power & Light Company regarding backbilling, Docket No. 970047-EI, Order No. PSC-97-0215-FOF-EI (PSC February 24, 1997); In re: Complaint of Jorge Morales against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 961381-EI, Order No. PSC-97-0010-FOF-EI (PSC January 2, 1997); In re: Complaint of Francisco Mesa against Florida Power & Light Company regarding alleged unjustified charges for current diversion, Docket No. 961179-EI, Order No. PSC-96-1333-FOF-EI (PSC November 5, 1996); In re: Complaint of Mr. Michael Gizewski against Florida Power & Light Company regarding alleged current diversion/meter tampering rebilling for estimated usage of electricity, Docket No.

950673-EI, Order No. PSC-95-1309-FOF-EI (PSC October 25, 1995); In re: Complaint of Mark Shoff against Florida Power & Light Company regarding current diversion backbilling, Docket No. 911040-EI, Order No. PSC-92-0795-FOF-EI (PSC August 11, 1992); In re: Complaint of Janet Knauss against Florida Power & Light Company regarding Rebilling for Estimated usage of Electricity, Docket No. 910583-EI, Order No. PSC-92-0681-FOF-EI (PSC July 21, 1992); In re: Complaint of Jesus Fernandez against Florida Power & Light Company regarding current diversion/meter tampering rebilling for estimated usage of electricity, Docket No. 910670-EI, Order No. PSC-24767 (PSC July 8, 1991); In re: Complaint of Ms. Gloria Blair Against Florida Power & Light Company Regarding Backbilling, Docket No. 900689-EI, Order No. PSC-23669 (PSC October 25, 1990); and In re: Complaint of Herbert Wilson Against Florida Power & Light Company Regarding Backbilling Charges, Docket No. 870991-EI, Order No. PSC-19380 (PSC May 26, 1988). The PSC's is granted great deference in interpreting the laws and rules over which it governs. Pan Am World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

Without valid reason, the PSC should not change its decision that a utility is entitled to recover investigative charges for meter tampering cases. See Cleveland Clinic v. Agency for Hlth. Care, 679 So. 2d 1237, 1241-42 (Fla. 1st DCA 1996) (reversing AHCA decision simply changing its mind, with no good reason, regarding established policy, practice and procedure); Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339-40 (Fla. 1966) (reversing a Commission order that modified an earlier final order because there was not a finding based on adequate proof that modification was necessary in the public interest because of changed conditions or other circumstances that were not



present in the earlier proceedings); Order No. PSC-95-1319-FOF-WS, Docket No. 921237-WS (issued Oct. 30, 1995) (while “[a] change in circumstances or great public interest may lead an agency to revisit an order” ... “there must be a terminal point where parties and the public may rely on an order as being final and dispositive.”) There is nothing in the record demonstrating a valid reason for departing from the established rulings and policy of the PSC that FPL is entitled to calculate unmetered usage utilizing the Seasonal Average Percentage Use Method. The PSC should adhere to its prior rulings and established policy, that a utility’s use of the Seasonal Average Percentage Use Method is a reasonable method of calculating the backbill for unmetered usage in a tampering case. As stated in Florida Administrative Code, Rule 25-6.104, F.A.C., FPL is entitled to recover a reasonable estimate of the energy used from the Petitioner. Since the PSC has repeatedly approved FPL’s utilization of the Seasonal Average Percentage Use Method, the Commission should reject the decision by Judge Van Laningham to disregard this methodology.

**3. Time Period Meter Tampering Occurred**

FPL does not agree with Judge Van Laningham’s decision that meter tampering probably began in 1999. However, for the purposes of this case, FPL will not challenge this finding before the PSC. Therefore, FPL only seeks to recover the backbilled amount as calculated by FPL using the Seasonal Average Percentage Use Method, for the time period beginning January 1999, through August 5, 2002. For the reasons stated above, FPL believes this method of calculation was both reasonable and justified. Calculation of the backbill from January 1999 through August 5, 2002 is easily obtained by reviewing FPL’s Exhibit 1 introduced in evidence (without objection from the Petitioner) before



Judge Van Laningham. FPL's Exhibit 1, shows that, using the Seasonal Average Percentage Use Method, FPL should be entitled to rebill 134,906 kwh.<sup>1</sup> Subtract from the rebilled kwh, the kwh actually billed during that time span, 55,156 kwh<sup>2</sup>, and you reach the total amount of 79,750 kwh, which represents the reasonable estimate of unmetered electricity usage. When multiplying 79,750 kwh by .08476 per kwh<sup>3</sup>, the total of \$6,759.61 is reached. This represents the reasonable backbill for unmetered usage by the Petitioner from January 1999 through August 5, 2002. As previously discussed, this is a reasonable estimate of the unmetered usage by the Petitioner, and the failure of Judge Van Laningham to award this amount was a departure from the law. Therefore, the PSC should order the Petitioner to pay FPL \$6,759.61 for the unmetered usage from January 1999 through August 5, 2002.

WHEREFORE Florida Power & Light Company respectfully requests that the Florida Public Service Commission find that Administrative Law Judge John G. Van Laningham's Recommended Order departed from the law in failing to award FPL investigative costs and finding the Seasonal Average Percentage Use Method was not reasonable, and the Public Service Commission should enter an Order awarding FPL \$348.21 in investigative costs and \$6,759.61 in unmetered usage for a total backbill of \$7,107.82, and all other relief deemed just and proper.

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<sup>1</sup> Figure obtained by adding the Kwh Rebill column from January 1999 through August 5, 2002, from FPL's Exhibit 1 in evidence before Judge Van Laningham.

<sup>2</sup> Figure obtained by adding the Kwh Asbill column from January 1999 through August 5, 2002, from FPL's Exhibit 1 in evidence before Judge Van Laningham.

<sup>3</sup> Figure represents an average of the kwh rate during the applicable time period. This figure is less than the 8.8 cents per kwh used by Judge Van Laningham.

Respectfully submitted,

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By: s/ David M. Lee  
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of Florida Power & Light Company's Exceptions to the May 13, 2005, Recommended Order Issued by Administrative Law Judge John G. Van Laningham has been furnished by United States Mail this 31st day of May, 2005, to the following:

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