

State of Florida



**Public Service Commission**

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD  
TALLAHASSEE, FLORIDA 32399-0850

**-M-E-M-O-R-A-N-D-U-M-**

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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)  
Division of Economic Regulation (Floyd, Kummer, Matlock, Wheeler)  
Division of Regulatory Compliance & Consumer Assistance (Mills, Ruehl)

**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 – Decision Prior to Hearing – Motions for Reconsideration of Non-Final Orders – Oral Argument Not Requested; Participation at the Commission's Discretion

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\GCL\WP\030623.RCM2.DOC

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**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 ("petition for

hearing”) on some of the complaints addressed in the PAA Order.<sup>1</sup> FPL filed a protest of the PAA Order on the same date.

On September 8, 2004, Target Stores, Inc. (“Target”) filed a motion to amend that portion of Customers’ petition for hearing that identified the Target stores whose electric meters were affected by the PAA Order. Target asserts that its Bonita Springs store (meter number 1V5774D) was mistakenly included in the petition, while its Boca Raton store (meter number 1V5885D) should have been included in the petition. FPL filed a response in opposition on September 13, 2004. By Order No. PSC-04-0934-PCO-EI, issued September 22, 2004, which is attached hereto as Attachment A, Target’s motion to amend was denied. On October 4, 2004, Customers filed a motion for reconsideration of the order denying Target’s motion to amend. FPL responded in opposition on October 11, 2004.

On August 24, 2004, Customers filed a motion for leave to inspect the Customers’ meters at issue in this proceeding. On August 31, 2004, FPL responded in opposition to the motion. By Order No. PSC-04-0932-PCO-EI, issued September 22, 2004, which is attached hereto as Attachment B, Customers’ motion was denied. On October 4, 2004, Customers filed a motion for reconsideration of that order. FPL responded in opposition on October 11, 2004.

This recommendation addresses Customers’ motions for reconsideration. The Commission has jurisdiction over these matters pursuant to Chapters 120 and 366, Florida Statutes.

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<sup>1</sup> 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).

### **Discussion of Issues**

**Issue 1:** Should the Commission grant Customers' motion for reconsideration of Order No. PSC-04-0932-PCO-EI?

**Recommendation:** No. Customers' motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-04-0932-PCO-EI. (C. KEATING)

**Staff Analysis:** The standard of review for a motion for reconsideration of a Prehearing Officer's order is whether the motion identifies a point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1<sup>st</sup> DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3<sup>rd</sup> DCA 1959); citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1<sup>st</sup> DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Steward Bonded Warehouse, Inc. v. Bevis.

#### **Customers' Motion for Reconsideration**

In their motion for reconsideration, Customers address three concerns raised in Order No. PSC-04-0932-PCO-EI with respect to their motion for leave to inspect meters. First, Customers address the concern that their motion for leave to inspect meters was a questionable means of obtaining discovery when such inspection would typically be sought through a discovery request served pursuant to Rule 1.350, Florida Rules of Civil Procedure. Customers state that they had informally requested such inspection from FPL but were told in a letter from FPL that it would not allow the requested inspection absent an order of the Commission requiring FPL to do so. Customers assert that, based on FPL's position, they did not file a request to inspect the meters pursuant to Rule 1.350 because it would have necessarily spawned an objection from FPL and a subsequent motion to compel from Customers. Customers argue that their motion to inspect avoided the delay, expense, and resources involved in the multi-step process that would have been initiated by a discovery request made pursuant to Rule 1.350. Customers assert that the Prehearing Officer has the discretion to allow this discovery as the most expeditious and practical way to obtain the desired discovery.

Second, Customers address the concern that "although Customers broached the subject of inspecting meters with FPL prior to filing testimony, Customers waited to formally pursue this matter until a point at which Customers can no longer present the results of any meter inspections as part of their direct or rebuttal case." Customers submit that the proper question is whether the requested discovery is relevant and proper under Rule 1.280, Florida Rules of Civil Procedure. Customers assert that if their July 2004 informal request to inspect the meters is relevant and proper under Rule 1.280, FPL had no grounds to refuse to provide access to the meters and should not be rewarded for delaying allowable discovery. Customers further assert

that the opportunity to present information obtained from inspection of the meters may arise through cross-examination or redirect testimony at hearing.

Third, Customers address the concern that the requested inspection of the meters may compromise the integrity of the meters. Customers suggest that the Prehearing Officer may have overlooked an exhibit to their motion that detailed the requested inspections. Customers assert that their requested inspections can be made by simply removing the meter cover, which would not disturb the integrity of the meter.

Customers argue that denial of their motion for leave to inspect meters implicates the fundamental fairness of this proceeding. Customers note that FPL has consistently argued that Customers bear the burden of proving that they are entitled to refunds longer than twelve months by demonstrating that the meters began to over-register at a specific time and due to a specific cause. Customers further note that FPL has taken the position that changes to the physical characteristics of meter components can cause gradual over-registration. Customers submit that it is fundamentally unfair to allow FPL to deny Customers the opportunity to conduct an inspection of the meters that could prove or disprove FPL's position.

Finally, Customers note that their motion asked that FPL be required to produce these meters at hearing. Customers assert that this will not disturb the integrity of the meters and would provide the Commission with relevant, informative evidence regarding this case.

#### FPL's Response

In its response to the motion for reconsideration, FPL contends that Customers fail to identify any point of fact or law that the Prehearing Officer allegedly misapprehended or overlooked in rendering the Order, but attempt instead to inappropriately raise new arguments to persuade the Commission to reconsider the Order.

First, FPL addresses Customers' arguments concerning the portion of the Order that questions the appropriateness of Customers' motion for leave to inspect meters as a means to obtain discovery. FPL states that Customers' claim that they filed a motion for leave to inspect meters to avoid the delay, expense, and resources involved in filing a discovery request pursuant to Rule 1.350 is an improper new argument and is not a justification for failing to follow the Florida Rules of Civil Procedure applicable to discovery in Commission proceedings. Further, FPL asserts that Customers do not question the correctness of this portion of the Order.

Second, FPL addresses Customers' arguments concerning the portion of the Order that addresses the timing of Customers' motion with respect to the deadlines to prefile direct and rebuttal testimony. FPL asserts that the Prehearing Officer found Customers' lack of diligence to be pertinent in view of Customers' stated purpose for seeking inspection of the meters. Referring to exhibits to Customers' motion and FPL's response, FPL states that Customers initially requested FPL to allow inspection of the meters to assist in the presentation of their direct case through prefiled direct testimony. FPL states that, in its response on July 7, 2004, it asserted that the meters at issue were the subject of a pending docket and that it was imperative to maintain the integrity of the meters in the event further action was ordered by the Commission with respect to the meters. FPL further states that its response to Customers sought specific

details concerning the inspections Customers wished to conduct so that FPL would have the opportunity to respond to the specific requests and the Prehearing Officer could address and resolve any issues and preserve the integrity of the meters. FPL asserts that Customers did nothing following the July 7 response until they filed the motion for leave to inspect meters on August 24, after the time for filing testimony in the docket had expired. FPL asserts that these facts confirm “the lack of significance that Customers truly attached to access or inspection of these meters . . .”

FPL asserts that Customers, in their motion for reconsideration, attempt to fault FPL for Customers’ own lack of diligence in pursuing the requested inspections. FPL asserts that this provides no basis for reconsideration. Further, FPL asserts that Customers raise a new argument in their motion for reconsideration by asserting that their request for inspection of the meters could produce information that may be used on cross-examination or redirect at hearing. FPL argues that this argument is “speculative at best and, at worst, directly inconsistent with Customers’ original stated purpose for seeking access to the meters in this docket.” FPL contends that this argument is not a point of fact or law that the Prehearing Officer overlooked and is thus not grounds for granting reconsideration.

Third, FPL addresses Customers’ arguments concerning the portion of the Order finding that FPL’s concerns over maintaining the integrity of these meters is reasonable and justifiable. FPL asserts that Customers offer no point of fact or law on this point that was originally presented in their motion but was misapprehended or overlooked by the Prehearing Officer. FPL notes that its response to Customers’ motion indicated that the requested inspections would disturb the integrity of the meters and impact future testing of the meters.

FPL contends that the Prehearing Officer properly denied Customers’ motion. FPL points out that the discovery cut-off date was September 14, 2004, and argues that Customers should not benefit from the last-minute postponement of the September 23, 2004, hearing in this docket that resulted from Dillard’s filing a Petition for Writ of Prohibition that was denied by the First District Court of Appeal.

Finally, with respect to Customers’ request that FPL be required to produce the meters at hearing, FPL states that the Prehearing Officer did not grant this request and that Customers have offered no point of fact or law overlooked by the Prehearing Officer in connection with this request.

#### Analysis

Pursuant to Rule 1.280(c), Florida Rules of Civil Procedure, which governs discovery in the Commission’s proceedings, a court may issue any order to protect a party from annoyance, embarrassment, oppression, or undue burden or expense that justice requires by, among other things, directing that discovery not be had. Pursuant to Rule 28-106.211, Florida Administrative Code, the Prehearing Officer may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case.

In Order No. PSC-04-0932-PCO-EI, the Prehearing Officer determined that, given the timing of Customers' motion, FPL would be unduly burdened if it was required to respond to Customers' request:

Given the lateness of Customers' motion in this proceeding and the need to provide the parties adequate time to prepare for hearing with some reasonable end to discovery, I believe it would unduly burden FPL to require it to spend its time overseeing inspection of these meters to ensure that the integrity of the meters is not compromised.

Customers' motion for reconsideration fails to address the primary basis for Order No. PSC-04-0932-PCO-EI: given the timing of Customers' motion, FPL would be unduly burdened if it was required to respond to Customers' request. Instead the motion for reconsideration focuses on other statements in the Order and reargues matters already considered. Staff believes that Customers have not identified a point of fact or law that the Prehearing Officer failed to consider or overlooked in rendering the Order.

First, with respect to that portion of the Order questioning Customers' motion as a means to conduct discovery, Customers point out only that the Prehearing Officer has discretion to allow discovery to be conducted in an expeditious and practical manner. Customers essentially reargue their motion by suggesting that it represents an expeditious and practical means of conducting the desired discovery. Certainly, in rendering an order resolving a discovery matter, the Prehearing Officer did not overlook his discretion to render such orders. Further, while the Prehearing Officer questioned the appropriateness of Customers' motion as a means to conduct discovery, the order did not state that this concern represented an independent basis for denial. The Prehearing Officer made no finding that Customers' motion was an improper means to conduct discovery.

Second, with respect to that portion of the Order noting that Customers waited to pursue this matter until after all direct and rebuttal testimony had been filed in this proceeding, Customers do not identify any point of fact or law that the Prehearing Officer failed to consider or overlooked in making this purely factual statement. What Customers appear to be arguing is that the Prehearing Officer incorrectly determined that Customers' motion was "late" because he failed to consider that information gleaned through the discovery could possibly be used on cross-examination or redirect testimony at hearing. Staff believes that the Prehearing Officer, in reaching his conclusion, considered all possible uses of the information that may come from the requested discovery along with the timing of the motion in relation to the hearing and the burden on FPL. Further, while the Prehearing Officer noted that Customers did not formally pursue this matter until a point at which they could no longer present the results as part of their direct or rebuttal case, the order did not rely upon that fact as an independent basis for denial.

Customers suggest that, in noting the timing of Customers' motion, the Prehearing Officer failed to address the proper question of whether the requested discovery was relevant and proper under Rule 1.280, Florida Rules of Civil Procedure. Staff believes that the timing of Customers' motion and the relevance of the requested inspections are two completely distinct matters. Staff notes that the Prehearing Officer never questioned the relevance of the requested discovery.

Third, with respect to that portion of the Order finding that FPL's concerns over maintaining the integrity of its meters are reasonable, Customers merely reargue matters already considered by the Prehearing Officer. Customers assert that the Prehearing Officer may have overlooked an exhibit to their motion that details the requested inspections. Given that this exhibit is not only mentioned in the Order but also attached to the Order for reference, staff believes the Prehearing Officer clearly considered the exhibit. The Prehearing Officer found, based on the parties' pleadings, that concerns raised by FPL over maintaining the integrity of the meters in dispute were reasonable and justifiable concerns. The Prehearing Officer noted that the Commission could, in reaching a decision on this case, require some further testing or other action be taken with respect to these meters. Clearly, the Prehearing Officer took into account the nature of the specific inspections requested as well as FPL's concerns about the specific inspections requested.

Finally, staff recognizes that the Order does not explicitly address that portion of Customers' motion requesting that FPL be required to produce the meters at hearing. Staff notes that this portion of Customers' motion appears as only two sentences at the end of a paragraph that attempts to explain why the meters should be made available for inspection. In this regard, the motion simply states:

Customers also seek to have FPL produce these meters at hearing. These meters are the key evidence in this proceeding and should be available to the Commission during hearing.

Staff believes the Prehearing Officer viewed this request as part and parcel of the request to inspect the meters rather than as a separate request. The argument that the meters are key evidence in this proceeding was used throughout Customers' motion to support its request to inspect the meters. Staff believes that the Prehearing Officer considered this argument in rendering the Order and that Customers have failed to identify a point of fact or law that was not considered by the Prehearing Officer in rendering the Order.

Based on this analysis, staff recommends that Customers' motion for reconsideration of Order No. PSC-04-0932-PCO-EI be denied because it fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order.

**Issue 2:** Should the Commission grant Customers' motion for reconsideration of Order No. PSC-04-0934-PCO-EI?

**Recommendation:** No. Customers' motion for reconsideration fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering Order No. PSC-04-0934-PCO-EI. (C. KEATING)

**Staff Analysis:** The standard of review set forth in Issue 1 is applicable to this issue, too.

#### Customers' Motion for Reconsideration

In their motion for reconsideration, Customers assert that the only basis stated in the Order for denying Target's motion was that amending the petition would unduly prejudice FPL. Customers assert that the Prehearing Officer overlooked the fact that FPL's response to the motion did not assert that FPL would be prejudiced if Target's motion were to be granted.

Customers assert that they seek only to correct a scrivener's error in their petition for hearing. Customers contend that the only potential prejudice to FPL is that the prefiled testimony of FPL witness Rosemary Morley does not include a refund calculation for the meter that Target attempts to substitute. Customers state that Target would stipulate to FPL's substitution of testimony to include this meter. In addition, Customers cite to a portion of Newman v. State Farm Mutual Automobile Insurance Co.<sup>2</sup> which states:

... leave to amend pleadings "shall be freely granted where justice so requires." Although the policy in Florida to liberally allow amendments where justice requires diminishes as the case progresses to trial, in exercising its discretion to allow the amendment, the trial court should weigh the amendment in terms of the prejudice to the opposing party in the preparation for trial. If the amendment simply restates an issue already present in the case of which the opposing party is aware and needs no extensive preparation for trial, then there may be no prejudice to the opposing party and great prejudice to the moving party to deny the amendment. (Citations omitted)<sup>3</sup>

Customers assert that the Newman case describes the present situation. Customers contend that FPL was made aware that a meter was misidentified through the prefiled testimony of Customers' witness George Brown which referenced the meter Target now wishes to include. Customers assert that Target will be greatly prejudiced if this substitution is not allowed.

#### FPL's Response

In its response, FPL argues that Customers' motion for reconsideration should be denied because it fails to identify any point of fact or law that the Prehearing Officer overlooked in denying Target's motion to amend. FPL asserts that, instead, Customers seek to expand Target's motion to amend by alleging new facts and new legal argument. FPL contends that such new arguments could not have been overlooked by the Prehearing Officer because they were not

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<sup>2</sup> 858 So. 2d 1205, 1206 (Fla. 4<sup>th</sup> DCA 2003)

<sup>3</sup> Id.



raised in the initial motion to amend. FPL, citing Order No. PSC-92-0132-FOF-TL, notes that the Commission has previously found that it is inappropriate to raise new arguments on reconsideration.

FPL also contends that, as a matter of law, Target has waived its opportunity to protest the PAA Order with respect to the Boca Raton meter. As it argued in its response to the motion to amend, FPL argues that because Target did not timely place the Boca Raton meter in its petition for hearing, the Commission PAA Order is deemed final with respect to that meter pursuant to Section 120.81(13)(b), Florida Statutes. FPL notes that the Prehearing Officer found it unnecessary to reach this point.

### Analysis

Pursuant to Rule 28-106.202, Florida Administrative Code, “[t]he petitioner may amend the petition after the designation of the presiding officer only upon order of the presiding officer.” Until hearing, the “presiding officer” in Commission proceedings is the Prehearing Officer.

In Order No. PSC-04-0934-PCO-EI, the Prehearing Officer noted that by the time Customers filed their motion to amend, nine months had passed since the Customers’ petition for hearing was filed, all testimony had been filed, the prehearing conference had been conducted, and only 15 days remained prior to hearing. In addition, almost all discovery had been completed. The Prehearing Officer found:

At this very late stage in this proceeding, FPL would be unduly prejudiced if Target were permitted to remove and replace one of the meters that it specifically put at issue nine months ago and that FPL has prepared its case around. Under these circumstances, I decline to grant Target’s leave to amend.

Customers assert that the Prehearing Officer overlooked the fact that FPL’s response to the motion to amend did not assert that FPL would be prejudiced if the motion were granted. Staff believes the Prehearing Officer was well aware of the contents of the parties’ pleadings and, regardless, that the decisions of a Commissioner sitting as a Prehearing Officer should not be constrained by the arguments of the parties. The Prehearing Officer’s role, in part, is to “issue any order necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . . .”<sup>4</sup> In serving this role, the Prehearing Officer must be able to exercise some discretion beyond the scope of parties’ pleadings.

Customers’ reference to the Newman case in their motion for reconsideration was not included in Customers’ motion to amend. The Commission has previously found that where a motion for reconsideration “more fully develops the arguments in the initial request and adds entirely new arguments . . . not included in the Company’s initial pleading,” such new arguments

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<sup>4</sup> Rule 28-106.211, Florida Administrative Code.

and explanations are not appropriate matters for reconsideration.<sup>5</sup> Regardless, staff believes that the Prehearing Officer considered and weighed the potential prejudice to each party in reaching his decision, consistent with the Newman decision.

For the reasons set forth above, staff recommends that Customers' motion for reconsideration of Order No. PSC-04-0934-PCO-EI be denied because it fails to identify any point of fact or law that the Prehearing Officer overlooked or failed to consider in rendering the Order.

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<sup>5</sup> Order No. PSC-92-0132-FOF-TL, issued March 31, 1992, in Docket No. 900633-TL, In re: Development of local exchange telephone company cost study methodology(ies), at page 2

Docket No. 030623-EI  
Date: October 21, 2004

**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.