

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities)
Services, Inc., on behalf of various customers) Docket No.: 030623
against Florida Power and Light Company) Filed: September 20, 2004
concerning thermal demand meter error.)

**CUSTOMERS' RESPONSE TO FLORIDA POWER & LIGHT
COMPANY'S MOTION TO DISMISS CUSTOMERS'
PETITION FOR VARIANCE OR WAIVER OF RULE 25-6.103(3)**

Ocean Properties, Ltd., Target Stores, Inc., J.C. Penney Corp., and Dillard's Department Stores, Inc. ("Customers"), by and through their undersigned counsel, file this response to Florida Power & Light Company's ("FPL") Motion to Dismiss Customers' Petition for Variance or Waiver of Rule 25-6.103(3) filed September 13, 2004, and state:

1. Customers filed a Petition for Variance or Waiver of Rule 25-6.103(3), Florida Administrative Code ("Customers' Petition), on August 23, 2004. Customers' Petition requests a variance or waiver of Rule 26.013(3) to allow: (1) the use of standard reference test point for determining the meter test error; and (2) the use of the higher of before and after billings or a meter test to determine the appropriate refund amount.

2. FPL's Motion to dismiss should be dismissed as being untimely. Customer's Petition, filed on August 23, 2004, should be treated as a Motion, for which a response is due seven days after the filing of the petition. See Rule 28-106-204(1) F.A.C. By not filing a response until September 13, 20 days after Customers filed their pleading, FPL has waived its right to respond. FPL is undoubtedly aware of the Commission's view that a "Petition" is to be treated as a motion for the purposes of filing a response, since it was a party to at least one proceeding in which that point was made clear. See In Re: Review of Investor-Owned Utilities Risk Management Policies and Procedures, Docket No. 011605 -- EI, Order No. PSC-02-0357-PCO-EI.

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3. FPL argues that the Customers cannot seek a waiver of Rule 25-6.103(3) because only those “subject to regulation by an agency rule” may avail themselves of the variance or waiver provision of the Florida Administrative Procedures Act, and relies on the case of Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 743 So. 2d 1121 (Fla. 1st DCA 1999). Mariner Properties had nothing to do with a motion to dismiss filed by a third party, like FPL is attempting to do here. (The Board of Trustees of the Internal Improvement Fund dismissed the Rule Waiver/Variance Petition on its own motion.) Mariner Properties simply held that the section 120.542 waiver/variance process “pertains to regulatory rather than proprietary matters.” Additionally, the Florida Legislature, in crafting section 120.542 made provision for third parties to file comments to rule waiver/variance requests, but did not authorize third parties to move to dismiss a waiver/variance request. Thus, FPL’s motion to dismiss Customers rule waiver petition is not authorized by section 120.542 and should be denied.

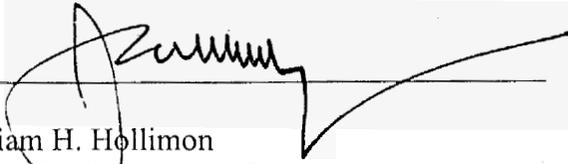
4. Furthermore, Customers are directly impacted by the rule in question, and hence “regulated”, since the rule could impact the amount of money that should be repaid to Customers by FPL due to FPL’s faulty thermal demand meters. Section 120.542, Florida Statutes, uses the phrases “subject to rule”, “subject to regulation” and “subject to regulation by an agency rule”. In the underlying docket, FPL has admitted that refunds are due Customers for certain meters, and the parties are arguing about the specific amounts due for specific time periods. The refund monies, property of Customers that is presently in the possession of FPL, are subject to PSC rule. Accordingly, it logically follows if Customers’ money/refunds are subject to regulation by the PSC, Customers themselves are subject to PSC regulation to the extent the PSC is applying its rules in a manner that affects Customers’ property. The Commission should not reason that it

has the power to regulate money wrongfully taken from Customers, but that Customers are not regulated to an extent that permits Customers to seek a waiver of a rule that affects their money. Thus, FPL's contention that no PSC regulations affect Customers, and thus the rule waiver/variance request must be dismissed, is misplaced. FPL has argued before this Commission, and in circuit court proceedings, that the PSC has exclusive jurisdiction to address meter refund issues between FPL and its customers. Now, FPL's argument appears to suggest that the Commission's "exclusive jurisdiction" is a one-way street upon which only FPL can travel, and Customers are precluded from seeking a waiver of rule that directly impacts their property rights. FPL's invitation to place Customers in a classic Catch – 22 should be politely declined.

5. FPL's motion points out two other points that warrant a response. FPL points out that a copy of the Customers Petition was not filed with the Joint Administrative Procedures Committee. Customers Petition has been filed with this Committee, allowing the Committee to perform its function of tallying the number of petitions filed each year and the resolution of said petitions. (See Exhibit 1.) FPL suggests the Petition did not indicate whether the waiver/variance request was permanent or temporary in nature. Even a cursory reading of the petition and filings in the underlying docket point out that the waiver is a one-time, temporary waiver of the rule, since the meters in dispute have all been removed from service and will not be placed back into service.

6. Wherefore, for the foregoing reasons, FPL's Motion to Dismiss Customers' Petition for Variance or Waiver of Rule 25-6.103(3) should be denied.

Respectfully submitted,



A handwritten signature in black ink, appearing to read "William H. Hollimon", is written over a horizontal line. The signature is stylized and cursive.

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CERTIFICATE OF SERVICE

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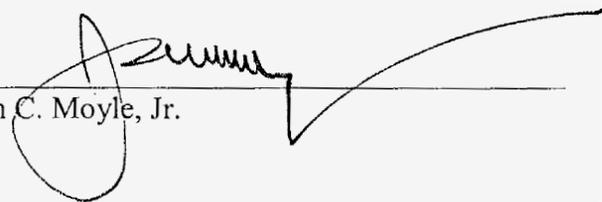
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In re: Complaints by Southeastern Utilities)
Services, Inc., on behalf of various customers)
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Docket no.: 030623

Filed: August 23, 2004

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PETITION FOR VARIANCE OR WAIVER OF RULE 25-6.103(3)

Ocean Properties, Ltd., Target Stores, Inc., JC Penney Corp., and Dillards Department Stores, Inc. ("Customers"), hereby petition the Florida Public Service Commission ("Commission") for a variance or waiver of Rule 25-6.103(3), F.A.C. As grounds for their Petition, Customers state:

1. Customers are currently Petitioners in this docket, and seek adjustments to bills for meter errors pursuant to Rule 26-6.103, F.A.C.

2. The subject of this variance or waiver request is Rule 25-6.103(3), which states:

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 (1) or (2)(b) above shall be that percentage of error as determined by the test.

3. Section 120.542(2), Florida Statutes (2003), provides the following two-pronged standard for granting waivers or variances to the requirements of an agency rule:

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.

4. Rule 25-6.103 identifies section 366.05(1), Florida Statutes, as the specific authority for the rule and sections 366.03, 366.041(1), 366.05(1), 366.05(3), 366.05(4), and 366.06(1), as statutory sections implemented by this rule.

5. Section 366.05(1) provides the Commission with its general rule-making authority

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and the 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”

Section 366.03 requires that a utility’s rates and charges for services, and the Commission’s rules regulating such rates and charges, “shall be fair and reasonable.” This section also requires a utility to treat similarly situated customers fairly and uniformly.

6. Section 366.05(3) requires the Commission to provide for the “examination and testing of all meters used for measuring any product or service of a public utility.” Section 366.05(4) provides consumers the right to pay for and receive a test of such meters. Section 366.06(1) provides the Commission the authority to determine and fix fair, just and reasonable rates charged by a utility for its services, and prohibits a utility from charging any rate not on file with the Commission.

7. 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 their customers; 2) to require utilities to treat their customers uniformly, fairly, and reasonably; 3) to require utilities to verify the accuracy of metering equipment through testing; 4) to provide utility customers the right to have meters tested; and 5) 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. Read as a whole, Customers submit that the purpose of the statutes implemented by Rule 25-6.103, particularly with regard to rule section (3), is to ensure that adjustments to customers’ bills for meter errors are fair, reasonable, and include no undue preference, advantage, prejudice, or disadvantage for similarly situated customers, and do not result in a utility indirectly (as a result of meter error) charging and collecting a rate not previously approved by the Commission.

8. The purpose of the underlying statutes will not only be achieved, but will be enhanced

by the requested variance or waiver of Rule 25-6.103(3). As identified in the testimony of Commission Staff witness Sidney W. Matlock, the Rules related to refund for “fast” meters are comprehensive with regard to the over-registration of kWh consumption – but “do not provide a specific method for determining refunds to customers for whom kilowatts (demand) have been erroneously measured by more than four percent of full-scale value.” (Matlock Testimony, Page 7, line 24 – Page 8, line 1). Accepting FPL’s interpretation of this Rule guarantees that Customers will receive a refund that is less than “the amount billed in error” and that Customers will, in effect, be charged a rate for demand that has never been approved by the Commission.

9. The purpose of the underlying statutes will be achieved through other means; namely, through the evidence presented in this docket 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. The Commission will also be able to ensure that all of FPL’s customers are treated fairly, reasonably, and uniformly.

10. To the extent that application of Rule 25-6.103(3) requires use of a meter percentage error (for calculating refunds) equal to a meter’s full-scale test error, this application works a substantial hardship on customers and violates principles of fairness.

11. Mr. Matlock explains why this practice works a substantial hardship and violates principles of fairness on page 10, lines 3 -11 of his August 2, 2004, testimony:

Q: Why do you not calculate a percentage error based on the full-scale reading of the meter?

A: For purposes of making refunds, the calculation of a percentage error based on the full-scale reading would not be fair to the customer. For illustration, assume that the customer’s meter is tested at the customer’s average billing demand level and reads 55 kW, when the reference (standard)

meter reads 50 kW. This yields an error of plus 5 kW. The percentage error as calculated in Step 4 would be 10% $[(55 - 50)/50 = 5/50 = 10\%]$. However, assuming a full-scale value of 100 kW, the percentage error based on full-scale would only be 5% $[(55 - 50)/100 = 5/100 = 5\%]$. **Calculating a refund based on 5% would not make the customer whole.** (Emphasis added).

12. As Mr. Matlock's example demonstrates, any meter test can be used to determine two forms of meter error: 1) the test-point error (which is 10% in the above example and represents the actual impact seen on a customer's bill); and 2) the full-scale error (which is 5% in the above example and represents only the full-scale accuracy of the meter). As Mr. Matlock correctly observes, basing refunds on a 5% over-billing is not fair to customers when the actual over-billing is 10%. Furthermore, this example demonstrates that for all meter tests conducted at test-points less than 100% of full-scale, the full-scale error will always be less than the test point error. For the meters in this docket, all tests were conducted at test-points less than 100% of full scale. Therefore, basing refunds on the meters' full-scale error will both create a substantial hardship for Customers, and treat them unfairly, as they will not be made whole.

13. Moreover, FPL itself recognizes the undeniable truth in the above-quoted portion of Mr. Matlock's testimony - at least for customers with meters not in this docket. For these customers, FPL did not calculate refunds based solely on the tested full-scale error of these meters. FPL witness David Bromley addresses this issue in his direct testimony on page 19, lines 6 - 23:

Q: Did FPL utilize a different error percentage than that obtained from the meter test in order to calculate refunds?

A: In some cases, yes. Again, FPL was attempting to remove any perceptions from affected customers that they were not being treated fairly. Therefore, to calculate refunds, FPL utilized the higher of: (1) the meter test error as determined and described above [the full-scale 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. For example, a customer with a 1V meter demand test error of +4.3% and a difference in demand readings of +4.7% (new electronic meter vs. 1V meter) would have a refund calculated with a 4.7% error.

Q: For the customers in this docket who have meters over-registering out of tolerance, are you suing the higher of the meter test error or the actual percentage difference, old vs. new meters, in order to calculate their refunds?

A: No. Since these customers have elected to utilize the Commission's process to resolve their complaints, FPL has utilized the meter test error as required by 25-6.058 and 26-6.103 [sic] to calculate their refunds.

14. Based on FPL's response to Interrogatory No. 3 of Staff's First Set of Interrogatories to FPL, FPL provided refunds to 263 customers (or meters) using its "higher of" method. Of these 263 refunds, at least 36% were based on the actual percentage difference change in monthly demand readings - not the meter test error. Many of these meters showed changes in monthly demand readings in excess of 30%, and one meter showed a change in monthly demand in excess of 63%. Under these circumstances, it is not difficult to understand why FPL's customers might have the "perception" that a refund based on the meter test error would be unfair.

15. Likewise, the Customers in this docket are entitle to fair treatment. Basing refunds solely on meter full-scale error ensures both that Customers will be treated differently from other FPL customers (not in this docket) and that Customers will be treated in a manner that violates principles of fairness.

WHEREFORE, for the above stated reasons, Customers respectfully request that the Commission grant this Petition for Variance or Waiver of the requirements of Rule 25-6.103(3), F.A.C., such that Customer's refunds may be determined in a manner that truly reflects "the amount billed in error," in a manner that treats Customers fairly, reasonably, and uniformly, and in a manner that does not result in an unapproved rate being charged and collected.



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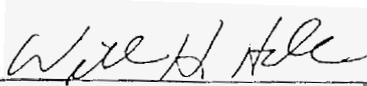
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