BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 030623-EI ORDER NO. PSC-04-0928-PCO-EI ISSUED: September 22, 2004

ORDER DENYING MOTION TO STRIKE REBUTTAL TESTIMONY

On August 23, 2004, Florida Power & Light Company ("FPL") filed a motion to strike portions of the rebuttal testimony and exhibits of George Brown and Bill Gilmore which was filed on behalf of Ocean Properties, Ltd., J.C. Penney Corp., Dillard's Department Stores, Inc., and Target Stores, Inc. ("Customers"). On August 30, 2004, Customers responded in opposition to the motion.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "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 . . .." Based upon this authority, and having considered the motion and response, my findings are set forth below.

FPL's Motion

In its motion, FPL notes that on July 12, 2004, Customers and FPL filed their respective direct testimony and exhibits pursuant to the Order Establishing Procedure in this docket. FPL asserts that these filings were supposed to present the parties' respective cases-in-chief. FPL notes that on August 16, 2004, Customer and FPL filed their respective rebuttal testimony and exhibits. FPL asserts that these filings reflected each party's opportunity to respond to the opposing party's previously filed direct testimony and exhibits. FPL contends that portions of Customers' rebuttal testimony offered by George Brown and Bill Gilmore goes beyond the scope of FPL's direct testimony and contain arguments and analysis that should have been presented as part of Customers' case-in-chief to meet their burden of proof. FPL asserts that this represents an inappropriate attempt by Customers to expand their own direct case by presenting previously undisclosed analysis and exhibits as rebuttal testimony. FPL contends that this practice is prejudicial to FPL and is an impermissible expansion of the role of rebuttal testimony.

Specifically, FPL requests that Mr. Gilmore's rebuttal testimony and exhibits be stricken in their entirety and that the following portions of Mr. Brown's rebuttal testimony and exhibits be stricken: page 1, line 1, through page 3, line 20; page 13, lines 8-12; and Exhibit GB-7. FPL states that Mr. Gilmore's rebuttal purports to contain a statistical analysis of changes in demand registration that occurred following replacement of the meters at issue in this docket. FPL asserts that none of its prefiled direct testimony included any analysis changes in demand registration. Thus, FPL argues, Mr. Gilmore's rebuttal does not respond to any analysis

submitted by FPL but presents a completely new analysis to support Customers' claims that they are entitled to refunds for a period greater than twelve months. FPL states that because this analysis was submitted as rebuttal, Customers have precluded FPL from developing any testimony to respond to the assumptions and extrapolations made in the analysis.

In addition, FPL states that at page 13, lines 8-12, and in Exhibit GB-7, Mr. Brown also attempts to present through rebuttal a new analysis similar to Mr. Gilmore's to support the contention that refunds should be awarded for a period greater than twelve months. Further, FPL states that Mr. Brown's rebuttal includes extensive discussion at page 1, line 1, through page 3, line 20, regarding a testing methodology for meters to purportedly rebut direct testimony from FPL witness Bromley asserting that the meters were tested in accordance with Commission rules. FPL asserts that neither Mr. Bromley or Commission staff witness Matlock provided any analysis of the implications of justifications for testing the meters at full scale or any percentage thereof. Further, FPL asserts that Mr. Brown's contentions regarding the meter manufacturer's testing recommendations and ANSI standards do not respond to anything stated in the direct testimony of Mr. Bromley or Mr. Matlock. Again, FPL states that because this analysis was submitted as rebuttal, Customers have precluded FPL from developing any testimony to respond to the assumptions and extrapolations made in the analysis.

Customers' Response

In their response, Customers contend that the Mr. Brown's and Mr. Gilmore's rebuttal testimony and exhibits are proper rebuttal. Customers asserts that FPL is wrong in stating that its own prefiled direct testimony did not include an analysis of changes in demand registration. Customers note that FPL witness Bromley testified that FPL conducted a review of customers' historical demand billings and made a month-to-month and year-to-year comparison of these readings, determining that it could not distinguish a point in time when the meters at issue may have begun to over-register demand. Customers assert that this testimony opened the door to Customers to offer their own analysis to rebut FPL's analysis. In addition, Customers asserts that Mr. Brown's rebuttal at page 1, line 1, through page 3, line 20, is proper rebuttal of the assertion in Mr. Bromley's prefiled direct testimony that the meters at issue in this proceeding were tested consistent with Commission rules.

Findings

As stated in United States v. Delk, 586 F.2d 513, 516 (5th Circ. 1978), quoting Luttrell v. United States, 320 F.2d 462, 464 (5th Circ. 1963):

> [I]t is well settled that the purpose of rebuttal testimony is "to explain, repel, counteract, or disprove the evidence of the adverse party" and if the defendant opens the door to the line of testimony, he cannot successfully object to the

prosecution "accepting the challenge and attempting to rebut the presumption asserted."

Upon review of these pleadings and the parties' prefiled testimony in this docket, I deny FPL's motion to strike the rebuttal testimony and exhibits filed by Bill Gilmore and portions of the rebuttal testimony and exhibits filed by George Brown on behalf of Customers. Customers' rebuttal testimony and exhibits at issue are offered to rebut assertions made on behalf of FPL by Mr. Bromley in his prefiled direct testimony. Thus, Customers' rebuttal testimony and exhibits do not exceed the scope of FPL's direct case and do not constitute improper rebuttal.

Based on the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, as Prehearing Officer, that FPL's motion to strike portions of the rebuttal testimony and exhibits of George Brown and Bill Gilmore is denied.

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 22nd day of September, 2004.

CHARLES M. DAVIDSON
Commissioner and Prehearing Officer

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.