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-04-0992-PCO-EI ISSUED: October 11, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

ORDER DENYING MOTION AND CROSS-MOTION FOR PARTIAL SUMMARY FINAL ORDER

BY THE COMMISSION:

Background

On November 19, 2003, this Commission issued Order No. PSC-03-1320-PAA-EI in this docket as proposed agency action to resolve complaints made by Southeastern Utility Services, Inc. (SUSI) against Florida Power & Light Company (FPL) on behalf of six commercial retail electric customers concerning inaccuracies in the customers' thermal demand meters. SUSI, four of the customers it represents (Ocean Properties, Ltd., J. C. Penney Corp., Dillards Department Stores, Inc., and Target Stores, Inc., collectively referred to as "customers"), and FPL protested the proposed agency action and requested a formal administrative hearing on these matters.[1] Consequently, this matter has been set for a formal administrative hearing.

On August 23, 2004, FPL filed a motion for partial summary final order on two of the issues, issues 3 and 4, set forth in Appendix A to Order No. PSC-0581-PCO-EI at page 15, issued June 9, 2004 (the Order Establishing Procedure). On August 30, 2004, the customers timely filed a response to the motion, or, alternatively, a cross-motion for partial summary final order on issue 4. On September 8, 2004, FPL filed a response to the customers' cross-motion. This Order addresses these matters. We have jurisdiction pursuant to Sections 366.04, 366.05, and 120.57(1)(h), Florida Statutes.

[1] Subsequently, by Order No. PSC-04-0591-PCO-EI, issued June 11, 2004, SUSI was dismissed as a party to this proceeding. We affirmed this dismissal by denying SUSI's motion for reconsideration by Order No. PSC-04-0881-PCO-EI, issued September 8, 2004.

Standard of Review

Section 120.57(1)(h), Florida Statutes, provides that a summary final order shall be granted if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final summary order. Rule 28-106.204(4), Florida Administrative Code, states that "[a]ny party may move for summary final order whenever there is no genuine issue as to any material fact. The motion may be accompanied by supporting affidavits. All other parties may, within seven days of service, file a response in opposition, with or without supporting affidavits."

Under Florida law, "the party moving for summary judgment is required to conclusively demonstrate the nonexistence of an issue of material fact," and every possible inference must be drawn in favor of the party against whom a summary judgment is sought.[2] The burden is on the movant to demonstrate that the opposing party cannot prevail.[3] "A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law."[4] "Even where the facts are undisputed, issues as to the interpretation of such facts may be such as to preclude the award of summary judgment."[5] If the record reflects the existence of any issue of material fact, possibility of an issue, or even raises the slightest doubt that an issue might exist, summary judgment is improper.[6] However, once a movant has tendered competent evidence to support his or her motion, the opposing party must produce counter-evidence sufficient to show a genuine issue because it is not enough to merely assert that an issue exists.[7]

Moreover, this Commission has recognized that policy considerations should be taken into account in ruling on a motion for summary final order. By Order No. PSC-98-1538-PCO-WS,[8] this Commission found that

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[2] Green v. CSX Transportation, Inc., 626 So. 2d 974 (Fla. 1st DCA 1993).

[3] Christian v. Overstreet Paving Co., 679 So. 2d 839 (Fla. 2nd DCA 1996).

[4] Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). See also McCraney v. Barberi, 677 So. 2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted, and that if the evidence will permit different reasonable inferences, it should be submitted to the jury as a question of fact).

[5] Franklin County v. Leisure Properties, Ltd., 430 So. 2d 475, 479 (Fla. 1st DCA 1983).

[6] Albelo v. Southern Bell, 682 So. 2d 1126 (Fla. 4th DCA 1996).

[7] Golden Hills Golf & Turf Club, Inc. v. Spitzer, 475 So. 2d 254, 254-255 (Fla. 5th DCA 1985).

[8] Issued November 20, 1998, in Docket Nos. 970657-WS and 980261-WS, In Re: Application for Certificates to Operate a Water and Wastewater Utility in Charlotte and Desoto Counties by Lake Suzy Utilities, Inc., and In Re:

We are also aware that a decision on a motion for summary judgment is also necessarily imbued with certain policy considerations, which are even more pronounced when the decision also must take into account the public interest. Because of this Commission's duty to regulate in the public interest, the rights of not only the parties must be considered, but also the rights of the Citizens of the State of Florida are necessarily implicated, and the decision cannot be made in a vacuum. Indeed, even without the interests of the Citizens involved, the courts have recognized that

> [t]he granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. . . . It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. . . . The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.[9]

Motion and Alternative Cross-Motion for Partial Summary Final Order

FPL moves for the issuance of a partial summary final order on issues 3 and 4 set forth in Appendix A to the Order Establishing Procedure. Accordingly, FPL requests that a partial summary final order be issued determining that: 1) any refunds ordered by the Commission in this proceeding should be for a period of one year pursuant to Rule 25-6.103(1), Florida Administrative Code; and 2) interest on such refunds should be calculated and added to such refunds in accordance with Rule 25-6.109(4), Florida Administrative Code. FPL attached the supporting Affidavits of David Bromley, Rosemary Morley, and Edward C. Malemezian, P.E., all of whom have prefiled testimony in this docket, and incorporates by reference all of the prefiled testimony and exhibits filed in the docket.

The customers respond that summary final order should not be granted in favor of FPL on either issue. The period of time for which refunds should be provided is a disputed issue of fact about which conflicting testimony has been filed. The Affidavit of George Brown is attached to the customers' response. Additionally, discovery is outstanding on this issue and related issues, making entry of a final summary order inappropriate. Moreover, the interest calculation is the subject matter of a pending rule challenge, which the parties agreed could be

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Application for Amendment of Certificates Nos. 570-W and 496-S To Add Territory in Charlotte County by Florida Water Services Corporation.

[9] Quoting BiFulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997) (citations omitted).

reactivated within 15 days after the entry of this Commission's final order in this case. Determining the issue by partial summary final order may interfere with that agreement. Alternatively, the customers argue that should a partial final summary order be entered on issue 4, it should be entered in favor of the customers.

Issue 3 – Pursuant to Rule 25-6.103, Florida Administrative Code, What Is the Period for which Refunds Should Apply?

FPL's Argument

With respect to Issue 3 of the Order Establishing Procedure, concerning the period for which refunds should apply, FPL argues that as the petitioners seeking affirmative relief in the form of multi-year refunds, the customers bear the burden of proof to establish that the meter error reflected in the most recent test result "was due to some cause, the date of which can be fixed," as required by Rule 25-6.103(1).[10] According to FPL, this requires the customer to establish that the inaccuracy of the specific meter at issue "can be traced to a specific cause and a specific time."[11]

FPL argues that the prefiled testimony submitted by George Brown and Bill Smith on behalf of the customers fails to establish any genuine issue of material fact that would support a refund claim beyond one year for any of the fourteen meters at issue. There is no evidence as to the specific cause or date of error for any of the meters tested. The customers' testimony contains general allegations that some FPL meter testers calibrated thermal demand meters in a manner inconsistent with the manufacturer's recommendations. However, the customers have offered no evidence that any of the alleged defective meter testing practices were performed on the meters at issue in this proceeding. Nor do the customers allege that FPL's meter testing practices violated a Commission order, statute, or rule. Moreover, the customers have presented no evidence quantifying the impact of any such alleged errors on the specific meters at issue. FPL witness Bromley's rebuttal testimony establishes that six of the fourteen meters at issue were never even calibrated by FPL. According to FPL, there is no genuine issue of material fact regarding the customers' contention that the meters at issue were miscalibrated, and a partial summary final order should be issued directing that a one-year refund is to be provided by FPL

[10] FPL cites to Florida Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1981) (citing Balino v. Florida Dept. of Health & Rehab. Serv., 348 So. 2d 349, 350 (Fla. 1st DCA 1977), for the proposition that the burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal; and to Order No. PSC-96-0483-FOF-EI, issued April 5, 1996, In Re: Complaint of Mr. Thomas R. Fuller against Florida Power Corporation regarding high electric bills in Orange County, for the proposition that a customer has the burden of proof in an overcharge proceeding and must show by a preponderance of the evidence that he was overcharged.

[11] Prefiled testimony of staff witness Matlock, at p. 10, lines 23-25.

for the accounts at issue based upon Rule 25-6.103(1). FPL cites to Order No. PSC-00-0341-PCO-SU[12] in arguing that such an order will conclusively resolve issue 3.

FPL further argues that there is no genuine issue of fact regarding the customers' contention that the meters at issue were influenced by the sun or radiant heat. The customers have presented insufficient evidence to support such a determination. In his direct testimony, Mr. Brown concedes that he "cannot say with certainty what part of these meters' demand errors in the docket were affected by the sun."[13] In his rebuttal testimony, FPL witness Malemezian explained that the potential effect of radiant heat on a meter will depend on where the sun hits the meter and that tests conducted by FPL on this phenomena demonstrated that external heating caused either no demand mis-registration or some demand under-registration.[14] FPL argues that this Commission should accordingly enter a partial summary final order determining that the customers have failed to meet their burden of establishing the fixed date for meter error required under Rule 25-6.103(1) and that therefore, any Commission-ordered refunds for the meters at issue can only be for a period of one year.

Customers' Argument

The customers argue that Rule 25-6.103(1) requires a utility to refund monies to customers for meters that exceed an acceptable degree of tolerance. After imposing a 12-month limitation on refunds, the rule provides that "if it can be shown that the error was due to some cause, the date of which can be fixed, the over charges shall be computed back to but not beyond such date based upon available records." The customers contend that the meters in dispute were over-registering from the date of installation at the customers' business. Thus, the date for which the meter error should be calculated is established.

The customers assert that evidence is also offered to show the cause of the over-registration. According to the customers, FPL did not calibrate and test the meters in question in accordance with the manufacturer guidelines, suggesting that the meters were likely miscalibrated or otherwise mishandled when originally installed.[15] Testimony from an engineer, the meter manufacturer, and FPL meter technicians indicate that they know of nothing that could gradually cause a thermal demand meter like the ones in question to gradually go bad over

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[12] Issued February 18, 2000, in Docket No. 990975-SU, In Re: Application for Transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to Realnor Hallandale, Inc.

[13] Brown direct testimony at page 10, lines 10-11.

[14] Malemezian rebuttal testimony at page 27 line 6, through page 28 line 19.

[15] George Brown direct testimony at page 4, lines 18-25, and pages 8-9, lines 5-12; Bill Smith direct testimony at page 8, line 23 to page 13, line 23.

time.[16] Additionally, the customers assert that evidence in the record suggests that the sun or thermal heat can have an affect on thermal demand meters, placing another fact in dispute about which conflicting evidence exists.[17] The customers argue that because conflicting evidence exists regarding the point in time the meters began over-registering, a summary final order on this issue is inappropriate.

The customers also argued that, at the time of the filing of their motion, evidence was still being gathered in the case and key discovery was still outstanding. Therefore, additional evidence regarding the cause and date of meter over-registration was likely to be forthcoming. Depositions had been scheduled of two FPL witnesses. Moreover, a motion was pending to require FPL to provide access and testing of the meters in dispute. Requests for production of documents and interrogatories were also outstanding. According to the customers, it is not appropriate for a summary final order to be entered when the opposing party has not completed discovery.[18]

Issue 4 – What Interest Rate Should Be Used to Calculate Customer Refunds?

FPL's Argument

Issue 4 concerns the question of which interest rate should apply to calculate customer refunds. According to FPL, this is purely a legal issue. FPL argues that Rule 25-6.109(4), Florida Administrative Code, clearly applies to the calculation of interest to be paid by FPL on any refunds ordered by this Commission in this proceeding. In their petition for hearing, the customers contend that interest on any ordered refunds should be calculated pursuant to Sections 687.01 and 55.03, Florida Statutes. By Order No. PSC-04-0591-PCO-EI,[19] the Prehearing Officer denied FPL's motion to strike this portion of the customers' petition upon a finding that FPL had failed to show that the customers' pleading was "redundant, immaterial, impertinent or scandalous" under Rule 1.140, Florida Rules of Civil Procedure, and that in light of the decision in Kissimmee Utility Authority v. Better Plastics, Inc.,[20] "there is a justiciable issue as to how the

[16] George Brown direct testimony at page 6, line 23 to page 7, line 5.

[17] George Brown direct testimony at page 9, line 18 to page 10, line 15; Bill Smith direct testimony at page 14, lines 4-22. We note that the customers did not provide a supporting Affidavit attesting to the veracity of Mr. Smith's testimony.

[18] Fleet Finance & Mortgage, Inc. v. Carey, 707 So. 2d 949 (Fla. 4th DCA 1998). See also Villages at Mango Key Homeowners Ass'n., Inc. v. Hunter Development, Inc., 699 So. 2d 337 (Fla. 5th DCA 1977); Brandauer v. Publix Super Markets, Inc., 657 So. 2d 932 (Fla. 2nd DCA 1995).

[19] Issued June 11, 2004, in the instant docket.

[20] 526 So. 2d 46 (Fla. 1988).

provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission."[21]

FPL argues that Rule 25-6.109(1), Florida Administrative Code, clearly provides that the interest rate provision in Subsection (4) of the rule applies to all refunds ordered by the Commission with the exception of deposit refunds, refunds associated with adjustment factors, or unless otherwise ordered by the Commission. This case does not concern deposit refunds or adjustment factors. Accordingly the only question is whether there is any basis for the Commission to "otherwise order" refunds.

According to FPL, the customers' reliance on the Kissimmee decision is misplaced. In that case, the Florida Supreme Court upheld the right of a customer properly suing a municipal electric utility in circuit court to prejudgment interest. The Kissimmee decision did not address whether Rule 25-6.109, a rule not at issue in the case, applied to a refund ordered by this Commission for payment by an electric utility that is subject to rate regulation by this Commission. Moreover, by Order No. 20474,[22] In re: Complaint by Kelly Tractor Co., Inc. against Meadowbrook Utility Systems, Inc., this Commission determined that Kissimmee was not controlling with respect to a determination of whether this Commission's refund and interest rate rules apply for public utilities that are subject to Commission rate regulation. The defendant municipal electric utility in Kissimmee was a governmentally owned utility and the extent of the Commission's jurisdiction over that utility was limited to rate structure. FPL argues that pursuant to the plain language of Rule 25-6.109 and the Kelly Tractor order, we should determine that Rule 25-6.109(4) applies to the calculation of interest to be paid by FPL on any refunds ordered in this proceeding.

Customers' Argument

The customers argue that interest on refunds should be calculated in accordance with Section 687.01, Florida Statutes, not Rule 25-6.019, Florida Administrative Code, which is the subject of a pending rule challenge petition.[23] The customers argue that interest sums cannot be determined until the refund amounts have been liquidated or otherwise ascertained with certainty. The customers believe that the better way to address this issue is by means of a final order after hearing.

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[21] Order No. PSC-04-0591-PCO-EI at page 5.

[22] Issued December 20, 1988, in Docket No. 880606-WS. This order was issued approximately seven months after the Florida Supreme Court's opinion in the Kissimmee case.

[23] A copy of the rule challenge petition is attached to the customers' response as Exhibit B.

Moreover, the customers argue that FPL seeks to dodge the import of the Kissimmee decision. The court ruled that a regulated electric utility in Florida is liable to customers for prejudgment interest on overcharge refunds, and stated that, in the absence of a controlling contractual provision, the rate is set by the Legislature as directed in Section 687.01, Florida Statutes.[24] Because FPL is a regulated public utility, the customers argue that it ought to be bound by this precedent. As spelled out in the pending rule challenge petition, the Legislature has not provided this Commission with express authority to enact a rule regulating interest rates that overrides Section 687.01. Finally, the customers argue that Order No. 20474 (the Kelly Tractor order) did not involve an electric utility or electric utility rules, and that we should follow the Kissimmee decision in this case.

The customers request that FPL's motion be denied, or alternatively, that the customers' cross-motion for partial summary final order regarding how interest should be calculated on refunds due be granted, and that interest be calculated in accordance with Section 687.01, Florida Statutes.[25]

Analysis and Ruling

In order to determine whether any genuine issue of material fact exists with regard to either of the issues for which partial summary final order is requested, we have reviewed the pleadings, attachments thereto, and the relevant testimony prefiled in the docket for which Affidavits have been provided attesting to the truth and accuracy of the testimony.[26] We find that genuine issues of material fact exist, or could exist, with respect to both issues 3 and 4 of the Order Establishing Procedure.

With respect to issue 3, the customers argue that conflicting evidence exists regarding the point in time the meters began over-registering, and that therefore, a genuine issue of material fact exists concerning the period for which refunds should apply. Drawing every possible inference in favor of the customers, we agree. FPL has not conclusively demonstrated that the

[24] Section 687.01, Florida Statutes, states that "[i]n 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." The Chief Financial Officer establishes the rate on an annual basis as set forth in Section 55.03, Florida Statutes.

[25] In its response to the cross-motion, FPL adopted and incorporated by reference its motion for partial summary final order filed August 23, 2004.

[26] See Booker v. Sarasota, Inc., 707 So. 2d 886, 889 (Fla. 1st DCA 1998) (finding that "[a] Florida court may not consider an unauthenticated document in ruling on a motion for summary judgment, even where it appears that the such [sic] document, if properly authenticated, may have been dispositive."). See also BiFulco v. State Farm Mut. Auto. Ins. Co., 693 So. 2d 707, 709 (Fla. 4th DCA 1997).

customers cannot prevail on this issue.[27] Moreover, a summary final order should not be entered on issue 3 because good faith discovery on the issue was still pending at the time of the vote.[28]

Issue 4 is primarily a legal issue involving the question of whether the interest on any ordered refunds should be calculated pursuant to Sections 687.01 and 55.03, Florida Statutes, or by Commission rule. Nevertheless, FPL has not conclusively demonstrated that the facts are so crystallized that nothing remains but a question of law. FPL points out that Rule 25-6.109(1), Florida Administrative Code, provides that the interest rate provision in Subsection (4) of the rule applies to all refunds ordered by the Commission with the exception of deposit refunds, refunds associated with adjustment factors, or unless otherwise ordered by the Commission, and that because this case does not concern deposit refunds or adjustment factors, there remains a question as to whether there is any basis for the Commission to "otherwise order" refunds. FPL has not conclusively demonstrated that any such basis does not involve a disputed issue of material fact. Moreover, by Order No. PSC-04-0591-PCO-EI issued in this case, the Prehearing Officer found that "there is a justiciable issue as to how the provisions of Rule 25-6.109 and Sections 55.03 and 687.01 should be harmonized with respect to any refunds ordered by the Commission." Certainly the resolution of issue 4 will involve issues as to the interpretation of the facts, even assuming *arguendo* that the relevant facts are undisputed.

In light of the foregoing, FPL's motion for partial summary final order on issue 3 is denied and the issue shall proceed to hearing. Moreover, based upon our finding that the possibility of a disputed issue of material fact exists with respect to issue 4, FPL's motion for partial summary final order on issue 4, as well as the customers' alternative cross-motion for partial summary final order on that issue, is also denied. Any possible disputed issues of material fact with respect to issue 4 shall proceed to hearing, after which time the parties may brief the remaining legal issue.

It is, therefore,

ORDERED by the Florida Public Service Commission that FPL's motion for partial summary final order is denied. It is further

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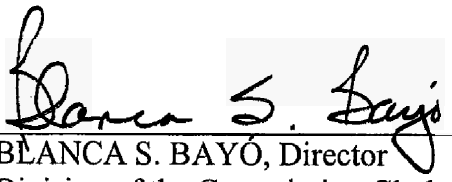
[27] FPL's reliance on Order No. PSC-00-0341-PCO-SU in arguing to the contrary is unpersuasive. By that order, this Commission granted a motion for summary final order on an issue involving ownership of a utility system upon finding that a circuit court order clearly stated that the certificate of title at issue conveyed title to one party over the other. The basis for the order did not involve the weighing of conflicting testimony, but instead involved a finding that the circuit court order conclusively resolved the issue.

[28] Fleet Finance & Mortgage, Inc. v. Carey, 272 So. 2d at 950 (finding that it is reversible error to grant summary judgment where depositions are still pending); Villages at Mango Key Homeowners Ass'n., Inc. v. Hunter Development, Inc., 699 So. 2d at 338 (finding that summary judgments should not be entered when properly noticed depositions are pending unless a protective order has been sought or entered.).

ORDERED that the customers' cross-motion for partial summary final order is denied. It is further

ORDERED that this docket shall remain open in order to proceed to hearing to resolve the protests to Order No. PSC-03-1320-PAA-EI.

By ORDER of the Florida Public Service Commission this 11th day of October, 2004.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(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.