STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARTURO TABOADA, Petitioner, vs. FLORIDA POWER & LIGHT COMPANY, Respondent, and FLORIDA PUBLIC SERVICE COMMISSION, Intervenor.	)	CASE NO. 91-0331

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on April 16, 1991, in Miami, Florida.

APPEARANCES

For Petitioner: Mr. Arturo Taboada, pro se
981 S.W. 137th Court
Miami, Florida 33184

For Respondent: Steve Feldman, Esquire
Florida Power & Light Company
Post Office Box 029100
Miami, Florida 33102-9100

For Intervenor: Robert V. Elias, Esquire
Florida Public Service Commission
101 East Gaines Street
Fletcher Building - Room 226
Tallahassee, Florida 32399

ISSUE PRESENTED

The issue presented is whether Respondent has correctly billed Petitioner in the amount of $5,070.51 for additional electricity consumed between January of 1983 and September 30, 1986.

PRELIMINARY STATEMENT

After Respondent Florida Power & Light Company backbilled Petitioner for additional electricity consumed, Petitioner filed a complaint regarding that backbilling with the Florida Public Service Commission. The Commission issued its Notice of Proposed Agency Action/Order Approving Backbilling of Estimated Usage of Electric Consumption, and Petitioner timely requested a formal hearing regarding that preliminary determination. This cause was thereafter transferred to the Division of Administrative Hearings for the conduct of that formal proceeding. The Florida Public Service Commission's Petition for Leave to Intervene was subsequently granted.

The Petitioner testified on his own behalf. Respondent presented the testimony of Kevin J. Burke, Emory B. Curry, Martha Liin, and Curtis J. Batman. Additionally, Respondent's Exhibits numbered 1-15 and Petitioner's Exhibit numbered 1 were admitted in evidence.

Petitioner and Respondent submitted proposed findings of fact. The Intervenor waived its right to do so. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Respondent's meter #5C50349 was installed at 11145 N.W. 3rd Street, Miami, Florida, in February of 1969.

2. Petitioner connected electrical service at that address on March 18, 1977, when he, his wife, and his daughter moved into a mobile home located at that address. They continued to reside there until approximately January 31, 1987. Petitioner was the customer of record during that time period and benefitted from the use of electricity at that address.

3. On September 30, 1986, Kevin Burke, a meter man employed by Respondent, inspected meter #5C50349 at Petitioner's residence. His physical inspection revealed that there were drag marks on the meter disc and that the disc had been lowered. Drag marks and a lowered disc indicate that energy consumption is not being accurately registered on the meter. In addition, the customer's air conditioner was on, but the disc was not rotating.

4. It was clear to Burke that the customer's meter had been physically altered. He replaced the tampered meter with a new meter on that same date. He carefully positioned the tampered meter in a foam-bottom meter can container and transported it to Respondent's storage room for safekeeping. The physical alterations to the meter were not, and could not have been, caused by improper handling by Burke.

5. On November 18, 1986, Petitioner's tampered meter was tested by Respondent's employee Emory Curry. He performed a physical inspection of the meter which revealed that the inner canopy seal had possibly been glued back together, the bearings had been tampered with, the disc had been lowered, and drag marks appeared on the bottom of the disc.

6. Curry then performed a watt-hour test. The full load portion of the test registered only 41.4%, and the light load registered 0. Each test should have resulted in a reading of 100%, plus or minus 2%. The mathematical weighted average for Petitioner's meter was 33.1%. This means that only 33.1% of the electricity actually used in the Taboada household was being recorded on the

meter. In effect, Petitioner was not being charged for 66.9% of the energy being consumed at the household.

7. Respondent verifies the accuracy of its watt-hour test weekly in accordance with industry standards. The watt-hour test has been sanctioned by the Florida Public Service Commission.

8. A veri-board test was also performed on the meter. The results of that test were 20 over 8. This means that Petitioner's meter was only registering 8 kw when 20 kw was placed on the meter. The meter should have registered 20 kw.

9. Using the weighted average registration of 33.1% from the meter test card, Respondent backbilled Petitioner's account for the 66.9% of the energy consumed that the meter was not registering. The as-billed amount was subtracted from the computer-generated rebilled amount to determine the amount to backbill. The rebilled amount was determined by a computer program which takes into account the varying franchise fees, fuel adjustment rates, taxes, and other rates in effect for each month of the rebilled period. Based upon that computer program, Respondent backbilled Petitioner for an additional 61,379 kilowatt hours consumed. Respondent's methodology for calculating rebillings is a reasonable estimate for determining the amount of energy consumed where there has been meter tampering.

10. Petitioner's account was backbilled $5,070.51 from January, 1983, to September 30, 1986, the date on which the new meter was set. The January, 1983, date was selected because Respondent had not retained Petitioner's billing records prior to January, 1983.

11. Since Respondent's investigation did not determine whether Petitioner physically altered the meter or whether it was altered by someone else, Respondent treated Petitioner's account as an inherited diversion. Accordingly, Respondent seeks no relief from Petitioner other than payment for the estimated electrical usage.

12. A comparison of Petitioner's bills after the new meter was set on September 30, 1986, with past bills shows that Petitioner's electric consumption almost doubled. Since electrical usage varies throughout the year, a comparison is done by comparing the same month for consecutive years. For example, January bills are compared to January bills, and February bills are compared to other February bills. A valid comparison cannot be done by comparing November to December and December to January.

13. In response to Petitioner's complaint that his tampered meter had been accurate but the new replacement meter was running fast, Respondent removed the replacement meter, replacing it with yet another. The replacement meter was then tested by Respondent and was determined to be 100% accurate.

14. Although Petitioner had some gas appliances, the electrical appliances which existed in his mobile home were capable of consuming the kilowatt hours per month which were rebilled by Respondent.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. Section 120.57(1), Florida Statutes.

16. Section 366.03, Florida Statutes, provides, in part, that "No public utility shall make or give any undue or unreasonable preference. . .to any person. . . ." In the case of Corp. De Gestion Ste-Foy, Inc., v. Florida Power & Light Co., 385 So.2d 124 (Fla. 3rd Dist. 1980), this statute was interpreted to mean that a public utility shall charge the same rates to all customers, that a public utility is required to collect undercharges from established rates even if the undercharges result from the public utility's own negligence, and that the customer of a power company has no defense to charges for electricity which was actually furnished but which had previously been underbilled.

17. The Florida Public Service Commission has promulgated rules which govern this situation. Rule 25-6.104, Florida Administrative Code, provides that "In the event of. . .meter tampering, the utility may bill the customer on a reasonable estimate of the energy used." This Rule does not consider the guilt or innocence of the party who may be benefiting from the meter tampering. It does, however, authorize Florida Power & Light Company to recover lost revenues using a reasonable estimate when a tampering condition has been identified. The methodology used by Respondent to calculate the amount to be rebilled to Petitioner is a reasonable estimate of the amount of energy consumed by Petitioner. Further, the one-year limitation on backbilling for undercharges does not apply in the case of meter tampering. Rule 25-6.106(1), Florida Administrative Code. Finally, Original Sheet No. 6.061, Section 8.3 of Respondent's approved tariff authorizes Respondent to adjust prior bills for services rendered due to meter tampering.

18. Respondent presented competent, substantial evidence to show that Petitioner's meter had been tampered. A visual inspection alone was sufficient to reveal that the meter had been tampered. Further, Respondent properly tested the meter in accordance with the rules of the Florida Public Service Commission and the manufacturer's instructions. The tampered meter registered a weighted average of 33.1% of the electricity consumed, which is well below the 98% weighted average standard for a properly functioning meter required by Rule 25-6.052(1), Florida Administrative Code.

19. Respondent used a reasonable methodology for computing the amount of energy which had been consumed at Petitioner's household for which Petitioner had not been billed. Since Respondent had not retained records prior to January of 1983, it was unable to determine when the tampering occurred. It therefore assumed that Petitioner had inherited the tampered meter and limited the relief it sought against Petitioner to the undercharged amount only and only back to January of 1983.

20. Further, in pursuing its claim against Petitioner, Respondent noted that Petitioner's energy consumption increased when his tampered meter was replaced with a new meter. In response to Petitioner's claim that his tampered meter was correct and that his new meter was running fast, Respondent removed the new meter and tested it. Those test results indicated that the new meter was accurately registering the amount of electricity being consumed. Respondent also verified that the amount of electrical equipment contained in Petitioner's mobile home was sufficient to use the amount of energy for which Respondent is seeking payment.

21. Petitioner contends that Respondent has made a mistake, that the alterations to his meter occurred after the meter was removed from his residence, that he did not have sufficient electrical equipment at home to justify Respondent's billing, and that Respondent's testing was incomplete. Petitioner presented no competent evidence in support of his allegations, and

Respondent has presented competent, substantial evidence to clearly refute Petitioner's allegations. Respondent tested Petitioner's meter and calculated his rebilling in accordance with Florida Statutes, the Rules of the Florida Public Service Commission, and Respondent's approved tariff regarding tampered meters, and Petitioner has presented no competent evidence to the contrary.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is,

RECOMMENDED that a Final Order be entered finding that Respondent has correctly backbilled Petitioner in the amount of $5,070.51 for additional electricity consumed between January of 1983 and September 30, 1986.

DONE and ENTERED this 22nd day of July, 1991, at Tallahassee, Florida.

LINDA M. RIGOT
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 1991.

APPENDIX TO RECOMMENDED ORDER

1. Petitioner's proposals labeled introduction and evidence #3 have been rejected as not being supported by the weight of the evidence in this cause.

2. Petitioner's proposal labeled evidence #1 has been rejected as not being supported by any evidence in this cause.

3. Petitioner's proposal labeled evidence #2 has been rejected as not constituting a finding of fact but rather as constituting argument.

4. Petitioner's proposal labeled evidence #4 has been rejected as being unnecessary for determination of the issues herein.

5. Respondent's proposed findings of fact numbered 1-19 and 22 have been adopted either verbatim or in substance in this Recommended Order.

6. Respondent's proposed findings of fact numbered 20 and 21 have been rejected as being unnecessary for determination of the issues herein.

7. Respondent's proposed findings of fact numbered 23 and 24 have been rejected as not constituting findings of fact but rather as constituting conclusions of law or argument of counsel.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.