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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, D.C. 20036-3457

SECRETARY OF LABOR, Complainant, v. FLORIDA POWER & LIGHT COMPANY, Respondent.	OSHRC Docket No. 10-0745

APPEARANCES:

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For the Complainant.

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For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site at the Miami International Florida airport ("MIA"), after an accident at the site on October 21, 2009. The accident involved several workers, one of whom was an employee of Florida Power & Light Company ("FPL"). The inspection took place from October 23 to 28, 2009. As a result of

the inspection, FPL was issued a three-item serious citation. All three items alleged violations of OSHA's electrical safety requirements for construction. FPL contested the citations. The hearing in this matter was held in Naples, Florida, on January 12 and 13, 2011. The parties have filed post-hearing briefs. FPL has also filed a reply brief.[1]

Background

FPL is an electric utility company that generates power and supplies electricity to customers in Florida. It maintains an office in the MIA. In that office are two employees who are assigned to oversee FPL's operations at MIA. They take care of FPL's equipment and make sure that it is working. They also deal with customers, the aviation department, and contractors who perform old and new construction work at the airport. [redacted] was one of the FPL employees assigned to MIA in October 2009. [redacted] was a cable splicer with FPL, and he held a journeyman cable splicer certificate. He had worked for FPL for over 32 years.[2] (Tr. 141, 152-54, 194).

Dato Electric ("Dato") is a subcontractor that performs electrical work at MIA under a general contractor, US Construction Corporation. Dato typically does electrical work for stores and restaurants at MIA. Around the time of the accident, Dato was doing electrical wiring work in conjunction with the construction of a new store located in MIA's North Terminal. Part of that work required changing a breaker and wires located in a "switchgear" or electrical room. The switchgear room ("SGR") was on the ground floor; the new store was on the second floor (the concourse level). The SGR contained the main breakers that received electricity from FPL's vault, as well as the individual

[1] The Secretary did not file a reply brief. After FPL filed its reply, the Secretary filed her Motion for Leave to File Response to Correct Misrepresentations of the Record in Respondent's Reply Brief ("Motion"). FPL opposed the motion, noting the Secretary had not followed the Court's instructions as to the deadline for reply briefs. (Tr. 512). FPL is correct. The motion is denied.

[2] [redacted][redacted] is now retired from FPL. (Tr. 152).

breakers and meters for customers.[3] The breakers and meters were housed in panels that were energized at 480 volts, and each panel contained a number of compartments called "meter cans." The meter can has slots into which the meter itself is inserted once the equipment is ready to provide service to a customer. A meter can is also called a "meter socket." (Tr.63-64, 179, 186-87, 287, 402-06). Once a meter can was ready for service, FPL would put a meter in it. The panel containing the meter can where Dato needed to do its work for the new store is depicted in Exhibit ("Exh.") C-21.[4] The meter can where Dato was to work is marked with a "B" in Exh. C-21. The breaker for that meter can is marked with an "A" in Exh. C-21. (Tr. 48-58, 63-64, 159-64, 171, 179, 186-87, 287, 401-06).

On October 20, 2009, Dato personnel accessed the SGR with their key.[5] [redacted], Dato's lead electrician for the job, disconnected the existing wires from the 200-amp breaker, removed the breaker, and installed a new 60-amp breaker to serve an airport customer in accordance with the contractor's blueprints. [redacted] could not change out the wires that went from the bottom of the meter can down to the new breaker as he could not access them at the point where they were connected to the meter can.[6] This was because FPL had placed a lock on the cover over the meter can to prevent currency theft. In the interim, [redacted] disconnected and taped the three loose ends of

[3] FPL has around 200 vaults at MIA, and each vault has at least one SGR. Only FPL can access the vaults. The SGRs and the equipment in them are not FPL's property. The SGR here had been recently upgraded by adding a new meter panel that would provide the new store and other customers with power. At the time of the accident, the new panel had been energized for about a month. (Tr. 64-65, 163-64, 168-69).

[4] Exhs. C-16 through C-29 are photographs that were taken by OSHA at the site on October 26, 2009. Exhs. C-11 through C-15 are photographs a Dato supervisor took at the site on October 21, 2009. Exhs R-12a through R-12e are duplicates of Exhs. C-11 through C-15.

[5] SGRs are kept locked. The aviation authority provides keys to the rooms to contractors, subcontractors, FPL and others who need access. FPL did not have a key to the subject SGR because it was still under the control of the construction general contractor. FPL had keys and access to SGRs that were not under construction. (Tr. 62-63, 159-60, 163).

[6] Dato needed to change Number 2 gauge wire to smaller Number 6 gauge wire from the meter to fit with the new breaker. (Tr. 58, 61, 66-67, 90, 117-18; Exhs. C-7b, R-12c, 12e).

the wires that went to the breaker. Later that same day, Trevor Millings, the Dato supervisor at MIA, went to FPL's office to arrange for FPL to provide access to the meter can so that Dato could finish the wiring work. Mr. Millings spoke to [redacted] about what Dato was doing in the SGR, and they agreed to meet at the SGR at 9:00 a.m. on October 21, 2009. (Tr. 48-49, 53, 58-62, 66-67, 92-94, 117-20, 142-47, 161, 187-88, 398-99; Exhs. C-19, C-21, C-23, R-12e).

[redacted] arrived at the SGR just before 9:00 a.m. the next day. The line or top side of the meter can to which Dato needed access was energized. The line side is the side where electricity enters the meter can. [redacted] did not wait for Mr. Millings to arrive at the SGR before proceeding with his work. He did not discuss with the Dato employees present what work, if any, had been done up to that point. He saw a circuit breaker on the floor and assumed it was the new breaker to be installed. [redacted] unlocked the lock on the cover of the meter can and removed the cover. [redacted] then told [redacted] to conduct a test to confirm that the load or bottom side of the meter can was de-energized; the load side is the side that provides electricity to the customer. [redacted] did as he was told and performed the test using a volt meter. [redacted] then asked [redacted] if the plastic plate that was inserted in the meter socket could be removed, as it was in his way.[7] Without inspecting the meter can or the area below it where the circuit breaker was, [redacted] raised the bypass handle to loosen the tension on the plastic plate so he could

[7] When there is no meter in the meter can or socket, there is a round plastic protective cover, also called a plate, with prongs that fit into the slots into which the meter is inserted. (Tr. 124, 129, 171-75, 403-06; Exh. 12b). The plastic plate is for safety and prevents anyone from inserting a finger or piece of equipment in the opening after the meter can is energized. (Tr. 175). The plastic cover in the meter can where the explosion occurred was secured by FPL after the accident and transmitted to Mr. John Bradley Shepherd, FPL's expert in this matter. (Tr. 395).

remove it.[8] Raising the handle causes electricity to instantly flow from the energized line side to the customer load side. When [redacted] raised the handle, an arc flash occurred. [redacted] testified that there was a "[h]orrendous explosion and a fire in front of my face." Three Dato employees, including [redacted] and his assistant apprentice Frank Hester, were working with [redacted] inside the SGR at the time of the explosion. The arc flash temporarily blinded [redacted], [redacted] and one other Dato employee. These three workers were also burned on their arms and faces.[9] [redacted] testified that sparks and dust entered his eyes. The two injured Dato employees were transported to the hospital. The employees all apparently recovered from their injuries. Mr. Millings testified that "[r]ight after the explosion" he inspected the meter socket. He stated that the breaker area was exposed and he could see the disconnected wires on the load side. He saw the wires that had been taped by [redacted]. (Tr. 69, 73-76, 81-83, 93-94, 122-30, 134, 137-38, 142-44, 169-85, 216-17, 264, 403-04; Exh. C-23).

Whether the Cited Standards Apply to FPL's Work at the Site

As noted at the beginning of this decision, OSHA cited FPL under the electrical safety requirements for construction. FPL contends that the cited construction standards do not apply to [redacted] work at the site. It asserts that his actions were typical utility operations done in the utility's work space. It further asserts that [redacted] did not participate in Dato's construction work and that Dato's work has no bearing on the

[8] Mr. Shepherd testified that when the bypass handle is down and no meter is in place, there is no passage of electricity from the source to the load side of the meter socket. [redacted] testified that the handle releases the pressure on the contacts that hold the meter in, or the plastic plate, and also bypasses the meter so that electricity flows from the top to the bottom without interference. He stated that FPL employees, including himself, generally install the plastic plates. He also testified that part of his job included removing the plates in energized meter cans for contractors. Mr. Shepard testified that the plastic plates are routinely removed as part of new construction. (Tr. 173-75, 193, 200, 403-04, 406, 408, 437; Exh. 12b).
[9] The Dato employee who was about to open the door for Mr. Millings was not injured. (Tr. 82).

actions of [redacted] at the site. (R. Brief, pp. 4-5, 20-22; R. R. Brief, pp. 7-9). The evidence in this regard follows.

Messrs. Millings and [redacted] testified that [redacted] actions at the site were not construction work, but, rather, typical utility operations.[10] They said that the meter can is the utility's work space, that Dato works only on the bottom or load side of the meter can, and that solely FPL can move the bypass handle and remove the plastic plate. (Tr. 71-73, 79-81, 96, 130-34, 147-49). [redacted] testified that what he did at the site the day of the accident was not construction work.[11] He also stated the meter can is the utility's work space and that his actions that day were utility operations. He said that utility construction would involve work like building a vault, digging a trench, and pulling cable for the utility. He indicated he had done that type of work on FPL's equipment, but had not done such work on MIA's or a customer's equipment. (Tr. 187, 190, 193, 200, 213-16). Michael Mays is FPL's principal safety specialist. He testified that [redacted] raising the bypass handle to remove the plastic plate was a routine utility

[10] Mr. Millings' testimony is contradicted by the statement that he made to CO Leorza on October 26, 2009 when he stated that "the FPL guy [[redacted]] and [redacted] were working together" at the time of the explosion. (Exh. C-7). He also testified Dato "work[ed] alongside of them [FP&L] lot of times" … even if FP&L is involved, as long as an FP&L employee is there, there are certain limits in the vault we go, we do work beside them. So on the load side, FP&L – on the line side of FP&L, we can go in there and work alongside them." [redacted] also testified that while in the SGR he and [redacted] just started "taking the stuff apart" and [redacted] "was taking off the cover. He was taking off the cover, getting ready to go ahead and lift the lever up." (Tr. 121-22). [redacted] was not a bystander fleetingly stopping by the SGR on the morning of October 21, 2009, as Respondent tries to portray. Clearly, [redacted] was involved in construction work at the SGR and, by his [[redacted]] actions, so was [redacted] as he worked alongside Dato's employees that morning. (Tr. 104-05). [redacted] was doing more than simply standing and looking into a panel box. At the time of the arc flash, he was actively engaged in moving the red bypass handle as part of the process to remove the plastic plate. *Cf. Shaw Envtl. & Infrastructure, Inc.*, 21 BNA OSHC 1329, 1336 (No. 04-1198, 2005)(employee not likely to have accidental contact with an energized part merely by standing and looking into a panel box.).

[11] [redacted] indicated that a Dato employee could have raised the handle and removed the plate. He further indicated that if a meter can was unlocked, "anyone" could get into it and do what they wanted. He said the meters at MIA belonged to FPL and were its responsibility, but the meter panels and SGRs did not belong to FPL. [redacted] did not know if Dato employees were authorized to work on the energized top or line side of a meter can. He himself could not work on the bottom or load side. (Tr. 163, 173, 187-91, 202, 214).

worker activity.[12] He said removing the plastic plate is utility operations work, as is installing a meter. In his opinion, the OSHA rules that apply to [redacted] work at the site are those set out at 29 C.F.R. § 1910.269, which address utility operations and maintenance. (Tr. 465-67, 480).

Mr. Shepherd is a board-certified electrical and forensic engineer with a company that provides consulting services. He worked for power companies for over 30 years, before he became a consultant, and he served on the safety committees of those companies. He also participated in drafting industry codes.[13] Mr. Shepherd testified that removing the plastic plate from a meter can is routine utility work. He further testified that [redacted] work at the site was utility operational work, not construction work, done in the utility's work space. He noted that utility construction involves utility poles, overhead wires and underground work. He opined that 29 C.F.R. § 1910.269 applied to the cited work; if the work had been utility construction, 29 C.F.R. § 1926.950 would have applied. (Tr. 373-92, 403-06, 423-29).

The Court has considered the testimony set out *supra*. In the circumstances of this case, however, the Court finds that FPL was properly cited. First, it is clear that Dato's work at the site was construction work. Mr. Millings, Dato's supervisor at MIA, and [redacted], Dato's lead electrician on the job, so testified.[14] (Tr. 48-49, 52, 59-62, 78, 96, 116-17, 137). FPL itself describes what Dato was doing as "construction."[15] (R. Brief, p.

[12] Mr. Mays stated that, when he had worked in the field, he had routinely removed plastic plates from meter cans in order to put meters in the cans. He had never removed a plastic plate upon the request of a non-FPL employee so that that person could work in the meter can. (Tr. 465-67, 494).
[13] The Court found Mr. Shepherd qualified to testify in regard to the 13 areas set out in the parties' joint pre-hearing statement. (Tr. 389-92).
[14] Mr. Millings testified that Dato had been performing construction work at the new store at MIA for six weeks. (Tr. 62).
[15] FPL's expert, Mr. Shepherd, agreed that Dato was engaged in construction work on October 21, 2009. (Tr. 457-58).

4). The Secretary notes that both the general industry and construction standards define "construction work" as "work for construction, alteration, and/or repair, including painting and decorating." *See* 29 C.F.R. § 1910.12(b) and 29 C.F.R. § 1926.32(g). She also notes that longstanding Commission precedent has held that changing out existing equipment, like the breaker and wiring in this case, constitutes "construction work." *See Jimerson Under-Ground, Inc.*, 21 BNA OSHC 1459, 1461-62 (No. 04-0970, 2006), and cases cited therein. (S. Brief, pp. 11-12). The Secretary is correct. The Court finds that Dato's work was "construction work."

Second, the Secretary points out that construction work also refers to "related activities that are an integral and necessary part of construction work." *Royal Logging Co.*, 7 BNA OSHC 1744, 1749-50 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir. 1981). In this case, to complete its work, Dato needed FPL to unlock the lock on the meter can cover so that it could access the meter can. It also needed FPL to remove the plastic plate over the meter socket so that it could finish its wiring work at the bottom or load side of the meter can.[16] In particular, [redacted] testified that he could not access the bolts where the existing wires were attached at the bottom of the meter can without the plastic plate being removed.[17] (Tr. 126-28). As the Secretary notes, the removal of the plate was the

[16] [redacted] indicated that Dato could have moved the handle and removed the plate. (Tr. 173, 202). Messrs. Millings and [redacted], however, testified they could not perform that work. (Tr. 71-73, 130-31, 147-49). Mr. Mays, FPL's safety specialist, testified that lifting the handle and removing the plate is something that FPL is routinely asked to do. (Tr. 130, 466-67). The evidence shows that the meter can is the utility's work space and that contractors like Dato work only on the bottom or load side. (Tr. 71, 80-81, 131-34, 147-49, 187, 193, 426). The Court finds that the Dato employees were not authorized to move the handle and remove the plate.

[17] [redacted] first testified he could not access any of the three bolts because of the plastic plate. He then testified, upon viewing Exh. C-19, that the bolts on the right and left could be accessed, but the plate was blocking his access to the middle bolt. (Tr. 126-28; Exh. C-19). Mr. Shepherd testified that Dato might have been able to complete its work without the plastic plate being removed. (Tr. 439). I credit [redacted] testimony in this regard. There is no evidence Mr. Shepherd ever viewed the subject can with its outside cover removed and the plastic plate in place. And there are no photographs in the record that show that can or an identical can in this condition. Mr. Shepherd did circle the area in Exh. R-12b, one of Dato's

next step in the construction work so that the wires could be changed out as required.[18] Removing the plastic plate was, therefore, integral to the ongoing construction work, and FPL, the company that was going to remove the plate, was engaged in construction within the definitions set out at 29 C.F.R. § 1910.12(b) and 29 C.F.R. § 1926.32(g).[19] (S. Brief, p. 13).[20] The Secretary cites to *Jimerson*, set out *supra*, and to *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1186 (No. 00-0553, 2005). Both of these decisions found that the cited work was construction because it was integral to the construction projects taking place in those cases. The Court finds that [redacted] work in the SGR on October 21, 2009, *e.g.*, removing the plastic plate, was an integral part of Dato's larger project involving the replacement of the existing breaker. *United Tel. Co. of the Carolinas*, 4 BNA OSHC 1644, 1646 (No. 4210, 1976).

Third, the Court agrees with the Secretary that 29 C.F.R. § 1910.269 does not apply in this matter because access to the SGR and the meter panels and cans was not restricted to "qualified employees." (S. Brief, pp. 13-14). As she notes, section 1910.269 covers:

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photographs of the subject can, to represent the position of the plate in the can. (Tr. 402-03). That circle is found to not be exact, but to depict the plate's position generally. Mr. Millings also testified that it was necessary to remove the plastic cover when changing the wire running from the load side of the meter socket to the breaker. (Tr. 73). In any case, the Court finds that Dato's work required the plastic plate to be removed.

[18] Mr. Shepherd said [redacted] did not have to move the bypass handle to remove the plate and he could have just pulled the plate off. (Tr. 404-05, 433). Messrs. Millings, [redacted], [redacted] and Mays said the handle had to be moved to release the pressure on the prongs so the plate could be removed. (Tr. 72, 129-30, 173, 466). [redacted] also said that just pulling a plate off could damage a can. (Tr. 173). Mr. Shepherd stated that this was no longer "a realistic concern today." He later agreed, however, that moving the handle to remove the plate was reasonable and a generally accepted practice. (Tr. 404-05, 439-40). The Court finds that moving the handle and then removing the plate were the next steps to be taken by FPL in order for Dato to be able to finish its work.

[19] [redacted] testified that he had performed construction on behalf of FPL during his career and that his FPL classification called for construction related tasks including the construction of electrical vaults and "hooking up electrical equipment." (Tr. 213).

[20] CO Leorza testified that, by his actions at the SGR, [redacted] inserted himself into the construction process taking place within the SGR. CO Leorza testified that the SGR was a "construction site." (Tr. 251, 256-57, 274, 342-43, 354-55).

> … the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment. These provisions apply to: (A) Power generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering, which are accessible only to qualified employees….

29 C.F.R. § 1910.269(a)(1)(i).

As she also notes, 29 C.F.R. § 1910.269(x) defines "qualified employee" as:

> One knowledgeable in the construction and operation of the electric power generation, transmission, and distribution equipment involved, along with the associated hazards.

The record shows that various persons, including Messrs. Millings and [redacted], had keys to the SGRs. (Tr. 62-63, 118). [redacted] did not have a key to the room because it was still under the control of the general contractor. FPL did have keys to other SGR's. (Tr. 159-60). The record also shows that while locks were placed on some meter cans to prevent currency theft, FPL did not always lock the energized cans that did not yet have meters in them. (Tr. 164-65, 188). Exh. C-21, a photograph taken by OSHA during its inspection, depicts the subject panel. The four cans in C-21 with meters in them are locked. The cans without meters are not locked.[21] As [redacted] indicated, anyone with a key to the SGR could access the unlocked, energized meter cans. FPL could not prevent access to the unlocked cans since it was not FPL's equipment.[22] (Tr. 188-90).

The record further shows that non-FPL electricians like Messrs. Millings and [redacted] are not authorized to work on the meter can assembly or on the top or line side of the can. Rather, their work is limited to the bottom or load side. (Tr. 71-73, 80, 83-84,

[21] As set out in the background portion of this decision, the subject can, marked with a "B" on Exh. C-21, was locked before [redacted] unlocked it on the day of the accident. (Tr. 119-20).

[22] Messrs. Millings and [redacted] said Dato could enter an SGR and do wiring work on the bottom or load side of an unlocked meter can without having to notify FPL or anyone else. (Tr. 63, 71, 117-19, 131-32).

131-34, 147-49). In addition, they cannot move the bypass handle or remove the plastic plate from the meter can.[23] This is so despite the fact they have worked as electricians for many years.[24] As the Secretary asserts, this limited authority indicates that they do not have the necessary training and experience to be "knowledgeable in the construction and operation of electric power generation, transmission, and distribution equipment" and "associated hazards" to be "qualified" to work on installations and equipment covered by section 1910.269. Like the SGRs, access to the meter cans is not restricted to "qualified employees." Section 1910.269 thus does not apply. S. Brief, p. 14.

For all of the foregoing reasons, the construction standards cited by the Secretary are the applicable standards in this matter. The Court has considered all of FPL's arguments to the contrary, and the Court does not find them persuasive.

Item 1

Item 1 of the citation alleges that "one employee was working in proximity of an energized electrical power circuit without a means of protection against electrical shock," in violation of 29 C.F.R. § 1926.416(a)(1). The cited standard provides as follows:

> (a) *Protection of employees*–(1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that the employee could contact the electric power circuit in the course of work, unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it effectively by insulation or other means.

To prove a violation of an OSHA standard, the Secretary must show that: (1) the cited standard applies, (2) its terms were not met, (3) employees were exposed to the cited condition, and (4) the employer either knew of the condition or could have known

[23] *See* footnote 17, *supra*.
[24] Mr. Millings has worked as a licensed journeyman electrician for 16 years. [redacted] is not a licensed electrician, but he has 14 to 15 years of electrical work experience. He has worked for Dato for four years. (Tr. 48-49, 114-16).

of it with the exercise of reasonable diligence. *Astra Pharm. Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69(1st Cir. 1982).

As the Secretary notes, to show that this standard applies, she must establish the employee came so close to the power circuit that he could have contacted it inadvertently in the course of his work. *Shaw Envtl.*, 2005 WL 1541107, at *10 (O.S.H.R.C.)(No. 04-1198, 2005). The Commission judge who decided *Shaw* cited to the Commission's decision in *Cleveland Consol., Inc.*, 13 BNA OSHC 1114 (No. 84-696, 1987).[25] There, the Commission held that:

> The standard speaks not of an employee working in "proximity" to an electric power circuit, but "in such proximity to any part of an electric power circuit that he may contact [it] in the course of his work…." The clear meaning and evident purpose of the standard is therefore that an employee shall not work so close to an energized power circuit that he may inadvertently contact it in the course of his work. Thus, the standard, when read in its entirety, prescribes a specific and ascertainable standard of conduct, for an employer can determine by objective means whether employees are within reach of, and therefore may contact, an energized power circuit while they work.

13 BNA OSHC at 1116-17. (S. Brief, pp. 15-16).

The record shows that the three line-side conductors at the top of the meter can were energized at the time of the accident. It also shows that those conductors had exposed wiring. (Tr. 69, 126, 172, 253-54, 257-59, 264, 347; C-16, 19-20; Exhs. R-12d, R-36, p. 3, ¶¶ 3, 5). The record further shows that [redacted] moved the red bypass

[25] As the Secretary points out, the Commission in *Cleveland Consol.* addressed the meaning of "proximity" as used in 29 C.F.R. § 1926.400(c)(1), the predecessor regulation to section 1926.416(a)(1). That standard states:

> (c) *Protection of employees* (1) No employer shall permit an employee to work in such proximity to any part of an electric power circuit that he may contact the same in the course of his work unless the employee is protected against electric shock by deenergizing the circuit and grounding it or by guarding it by effective insulation or other means….

13 BNA OSHC at 1115.

handle, depicted in Exhs. R-12a, b and d, so that he could then remove the plastic plate from the meter can. [redacted] did not complete his removal of the plate due to the arc flash. (Tr. 72, 121-25, 129-30, 173-74, 181-82, 200, 466). As noted in footnote 18, *supra*, there are no photographs in the record that portray the plastic plate in place in the cited meter can.[26] Mr. Shepherd circled an area on Exh. R-12b to show the plate's position in the meter can. As stated in footnote 18, the Court does not find the circled area to be an exact representation of the plate's position. It nonetheless shows that the energized conductors at the top of the meter can were not covered by the plate.

Miguel Leorza is the OSHA compliance officer ("CO") who inspected the site. He testified that due to the proximity of the energized line-side conductors, [redacted] could have inadvertently contacted them during the work he was doing that day. The CO said the bypass handle was insulated; but, even if [redacted] had not moved the handle, he still could have contacted the exposed line-side wires.[27] (Tr. 253-54, 257-59, 264-66, 347-48). The Court agrees with the CO's testimony. His testimony, together with the photographic evidence in the record, clearly shows [redacted]'s work that day caused him to be right next to the energized line-side conductors such that he could have contacted them. *See* Exhs. C-16, C-19-20, R-12a, b and d. For example, upon releasing the handle after raising it, [redacted] could have inadvertently contacted the exposed and energized wires on the far-right conductor. Or, in pulling off the plastic plate, he could have contacted the wires of one of the line-side conductors. As the Secretary puts it, the plate

[26] Mr. Millings testified that although he did not see the accident, he walked into the SGR and saw the meter can "right after" the explosion occurred; the plate was still in place at that time. (Tr. 74, 84-86).
[27] Mr. Millings also testified that the bypass handle was insulated. (Tr. 83).

was "just inches away" from those conductors.[28] And, if [redacted] had removed the plate, he would have been exposed to the energized socket. (S. Brief, pp. 16-17).

FPL notes certain statements of its expert, Mr. Shepherd, as to why the cited standard does not apply. Mr. Shepherd testified, for example, that [redacted] was properly trained to work in proximity to energized electrical circuits without de-energizing, grounding or guarding against electric shock. Mr. Shepherd also testified that [redacted] did not touch anything that was energized and that there was no electrical shock. (Tr. 420, 450) *See* R. Brief, p. 18; R. R. Brief, p. 10. That there was no contact with the energized conductors and no electrical shock is beside the point. The record establishes that [redacted] was in such proximity to the energized conductors that he could have contacted them. Such proximity required protection. Further, Mr. Shepherd agreed that there was a possibility of electrical shock when an employee worked on an energized meter socket.[29] (Tr. 439). Finally, [redacted] himself testified that when he set a meter in an energized meter panel he wore protective equipment. That equipment would include a hard hat, safety glasses, rubber gloves, proper work shoes, a long-sleeve fire retardant shirt, and, at times, a face shield. On the day of the accident, however, he wore only his safety glasses, a short sleeved shirt, jeans and his rated work shoes. Mr. Millings testified that on the morning of October 21, 2009, he went to his office to pick up safety gear that he usually wore when working on something "hot" before going to meet with [redacted]

[28] In *Cleveland Consol.*, discussed above, the Commission affirmed the alleged violation because the exposed employee "was within arm's reach of the energized lugs in the switchbox." 13 BNA OSHC at 1117. The Court finds that [redacted] in this case was within inches of the energized conductors.

[29] FPL notes that Mr. Shepherd qualified his answer by stating: "I would not normally expect the qualified electrical utility meter men working on an energized socket in a normal work method to be at any risk, whatsoever." (Tr. 439). The Court does not find this qualification persuasive under the facts of this case.

at the SGR at 9:00 a.m.[30] The safety gear consisted of a jump suit with a helmet to cover the face and insulated gloves. Mr. Millings testified that the meter's upper portion (line or source side) was "hot" and that the lower portion (load side) became "hot" when the meter was installed and the red handle pushed up a couple of inches.[31] He stated that the purpose of wearing the protective suit, helmet and gloves on the morning of October 21, 2009 was to protect against "[e]xactly what happened there, that accident. You could have an accident. So we always take precaution when we do stuff like that, yes."[32] On October 26, 2009, Mr. Millings told CO Leorza that "I was supposed to meet with the FPL guy at the site at 9:00 a.m., I had the suit (protective) with me because I knew our employee would have to wear [it] during this process." Mr. Millings reported to the SGR with safety equipment suitable for the task at hand. Dropping his guard, [redacted] appeared at the SGR with virtually no adequate safety equipment.[33] He was unequipped to tackle the work that he and Mr. Millings had discussed the day before. (Tr. 68-70,103-04, 180-82, 184-85, 207, 412; Exhs. C-7b, C-19).

The Court finds that the standard applies in this case.

As to the terms of the standard, the record establishes the meter panel containing the subject meter can could be de-energized by turning off the main breaker that fed the

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[30] Mr. Millings was at the door to the SGR with a bag containing safety gear when he heard the explosion. (Tr. 68, 74, 85).

[31] On October 26, 2009, Mr. Millings told CO Leorza that moving the handle too far up will energize the lower part of the system. (Tr. 103-04; Exh. C-7b).

[32] Mr. Millings further testified:

> Q So I mean, are you protecting against possible electrocution?
> A Yes.
> Q Are you protecting against possible shock?
> A Yes.
> Q Are you protecting against possible arc flash?
> A Yes. (Tr. 70).

[33] Mr. Shepard also agreed that leather gloves, fire retardant shirt, a hood, safety glasses, and hard hat would have offered [redacted] some protection. (Tr. 446-47).

meter can assembly.[34] (Tr. 165). It also establishes that the bypass handle was insulated. The plastic plate offered limited protection against contact with the energized socket since the cover did not extend over the top energized lugs and wires. (Tr. 83, 124, 129, 175, 257, 403-06; Exh. R-37g). As found above, however, [redacted] was exposed to contact with the energized line-side conductors due to the work he did in the meter can. The Secretary contends that [redacted] should have worn personal protective equipment ("PPE") that day, and CO Leorza testified to that effect. (Tr. 258, 356; S. Brief, p. 17).[35] FPL asserts there was no violation of the standard, noting there is no requirement for PPE set out in the standard.[36] FPL also notes the stipulation of the parties at the hearing, that is, that the cited standard does not contain the words "personal protective equipment." (Tr. 363). *See* R. Brief, p. 20; R. R. Brief, p. 10.

The Court agrees with the Secretary that the use of PPE was required. As the Secretary points out, Commission judges have found that the "other means" language of the cited standard includes appropriate PPE. *See R.G. Bigelow Elec. Co., Inc.*, 2001 WL 987459, at *4 (O.S.H.R.C.) (No. 00-1213, Aug. 13, 2001); *Valley Constr. Co.*, 1995 WL 455809, at *8 (O.S.H.R.C.) (No. 92-3644, July 20, 1995) ("It is reasonable for the Secretary to interpret 'other means' to include employee [PPE]. Adequate [PPE] could prevent an employee from coming into contact with the energized power circuit."). The Court also agrees with the Secretary that her interpretation should be given deference. *CMC Elec., Inc.*, 221 F.3d 861, 865 (6th Cir. 2000) (citing *Martin v. OSHRC*, 499 U.S.

[34] Doing so would shut off any power to the other meter cans in that bank, something FPL and Dato did not apparently want to do. If a circuit cannot be de-energized, as FPL contends here, other protective measures must be taken to comply with section 1926.416(a)(1).

[35] [redacted] admitted to CO Leorza that he should have been wearing a hard hat, fire retardant shirt, and rubber gloves. (Tr. 230; Exh. C-6).

[36] Although FPL indicates that this argument relates to the applicability of the standard, the Court concludes that the argument is more properly addressed in regard to what the terms of the standard require.

144, 148-52 (1991)). Based on the record and the foregoing precedent, the terms of the standard were not met.

With respect to employee exposure, the discussion above clearly demonstrates [redacted] was exposed to the hazard of electric shock due to his work in the meter can on the day of the accident. In regard to employer knowledge, the Court finds that FPL could have known of the cited hazard with the exercise of reasonable diligence. (Tr. 258-59).

The record shows that [redacted] had worked for FPL for over 32 years and that he held a journeyman cable splicer certificate. He worked mostly independently at MIA, as did his co-worker, but at times they worked together. [redacted]'s supervisor was not on site at MIA. FPL provided training to [redacted].[37] (Tr. 152-55).

The record also shows that, in October 2009, MIA's North Terminal was being expanded and Dato was working on the wiring for a new store. On October 20, 2009, Mr. Millings went to FPL's office to coordinate access to the subject meter can. Mr. Millings told [redacted] that Dato needed to access the meter can to replace the wiring and breaker. Upon arriving at the SGR the next day, [redacted] did not ask the Dato employees there what work, if any, had been done.[38] He saw a circuit breaker on the floor and assumed it was the new breaker to be installed. [redacted] unlocked the meter can and removed the metal can cover.[39] [redacted] told [redacted] to conduct a test to confirm the load side was de-energized. [redacted] did so using a volt meter, and then

[37] Exh. R-30 shows the training that [redacted] received from 2004 to 2009.
[38] [redacted] admitted that in hindsight he should have asked Dato employees what work they had done before moving the handle. (Tr. 185). He further admitted had he known that the cables were disconnected and loose, he would have told Dato employees to stop work and he would not have moved the handle. (Tr. 228).
[39] The meter panel cover is secured by two wing nuts. (Exh. C-17).

asked [redacted] if the plastic plate could be removed, as it was in his way. Without inspecting the meter can or the area below it where the breaker was, he raised the bypass handle so that he could remove the plastic plate. When [redacted] raised the handle, the arc flash occurred.[40] (Tr. 50-52, 58-59, 121-22, 125-29, 133-34, 137-38, 142-44, 156-57, 160-61, 169-85, 216-17).

[redacted] testified that he raised the handle because, as far as he knew, no work had been done and there was no indication anything was wrong. He admitted he had not inspected the breaker area below the meter can, but said that area was covered by a panel; the wiring was also behind the panel.[41] He agreed he could have removed that panel. [redacted] conceded that in hindsight, he should have asked Dato what work they had done; he then should have stopped and reevaluated the situation. (Tr. 174-86, 206-07).

[redacted] was issued Exh. R-35, a Report of Discipline, for violating FPL's safety rules.[42] The violations included not doing a hazard assessment before working in the meter can, not doing a visual inspection of the meter equipment to detect hazards, not testing the meter socket, and not wearing proper PPE. *See* Exhs. R-3, R-35. Similarly, Mr. Shepherd testified [redacted] could have investigated further to determine whether

[40] Messrs. Millings and Shepherd both testified that the arc flash occurred because the three loose ends of the disconnected wires going to the breaker had been incorrectly or insufficiently taped by [redacted] and came in contact with surrounding metal. (Tr. 94, 103-04, 431-32; Exhs. C-7b, R-12e; R. Brief, p. 17). Mr. Shepherd opined that the arc flash occurred in the meter socket can at a location he identified on photograph 12b, at "C". (Tr. 432-33; Exh. 12b; R. Brief, p. 18).

[41] Mr. Millings, however, testified that the metal panel over the breaker area was not in place at the time of the accident because "his guy" had removed it. Mr. Millings testified that the metal panel for the breaker area could not have been in place because the area included the wires that [redacted] was replacing. He testified that "the cover couldn't be where he [[redacted]] was working." [redacted] also testified that [redacted] removed the metal panel covering the meter can at Exh. C-21, identified as "B." The Court finds that metal panel was not covering the breaker area when [redacted] raised the bypass handle. (Tr. 73-76, 99-102, 122, 128-29; Exh. C-23).

[42] Exh. R-35 is dated November 9, 2009.

any rewiring work had been done; if so, he could have tested the equipment with his own volt meter, which would most likely have revealed the fault situation.[43] (Tr. 431-34).

Despite the foregoing, as the Secretary notes, FPL has not raised the defense of unpreventable employee misconduct. (S. Brief, p. 22, n.2). Rather, according to its affirmative defenses set out in its answer, FPL claims [redacted] was trained and qualified to work on energized and de-energized equipment and was working pursuant to FPL's standard metering procedure. (S. Brief, pp. 22-23). The record does not support FPL's claims. Mr. Mays testified that Rule 11.41 applied to [redacted]'s work on the day of the accident; that rule required meter checks to be taken on both the line and load sides before the bypass handle was operated. (Tr. 478-79). *See* Exh. R-3, Rule 11.41.[44] Rule 11.41, however, is not among the rules [redacted] purportedly violated in Exh. R-35.[45] Rule 11.41 is under the section in Exh. R-3 addressing "Meters and C&D." As the Secretary points out, [redacted]'s testimony shows that he understood that Rule 11.41 was one of the steps he had to follow when setting a meter. He did not understand, however, that those steps applied to removing the plastic plate from the socket so that someone else could work in the meter can.[46] (Tr. 203-06, 217-18; S. Brief, pp. 23-24).

[43] Mr. Shepherd testified he might have asked more questions of Dato employees and probably would have looked at the lower portion of the meter panel where the circuit breaker was to see if any wires had been disturbed, before proceeding as [redacted] did. Mr. Shepherd later qualified his testimony. (Tr. 443-46). The Court finds his original testimony, as set out above, more convincing. He also testified the condition of the taped wires was "knowable" and "recognizable," but then went on to qualify that testimony. (Tr. 445-46). The Court finds that the condition of the wires was "knowable."

[44] Rule 11.41 states: "Load side and phase to phase voltage readings must be taken prior to operating a manual bypass handle. *Note: If proper voltage is not present, the meter can must be de-energized.*"

[45] Rule 11.41 is included among the relevant rules in Exh. R-28, a report FPL prepared after the accident. (Exh. R-28, p. 11). Exh. R-28 is dated October 28, 2009. A later version of Exh. R-28 was not offered in evidence. (Tr. 481-92).

[46] [redacted] said there was a laminated sheet he followed when he installed a new meter. He also said he did not think he had to follow the procedures on the sheet to remove the plate on the day of the accident as the plate had been installed and the socket energized previously. (Tr. 203-06, 217-18).

As the Secretary notes, reasonable diligence requires adequate supervision as well as the formulation and implementation of adequate work rules and training. It also requires the employer to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent violations or accidents. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) (citations omitted); *Mosser Constr. Co.*, 15 BNA OSHC 1408, 1414 (No. 89-1027, 1991) (citations omitted). Constructive knowledge is imputable to the employer "unless [the employer] establishes that it took all necessary precautions to prevent the violations…." *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552 (No. 16265, 1982); S. Brief, p. 22.

The Court agrees with the Secretary that FPL did not have a work rule to address the hazard at issue here, *i.e.*, a situation where an FPL employee worked in a meter can that was accessible to others who could do work that put the FPL employee at risk. The Court further agrees with the Secretary that, assuming Rule 11.41 applied to [redacted]'s work on October 21, 2009, it was not specific enough to address the cited hazard. (S. Brief, p. 25). Also, the record contains no evidence of adequate supervision of the FPL employees at MIA. [redacted] testified his supervisor came to MIA to observe his work "occasionally." (Tr. 195). FPL offered no evidence through [redacted] or any other witness to show when a supervisor or safety personnel had last been to MIA to observe [redacted] at work. (S. Brief, pp. 25-26). As to anticipating hazards, the record shows that MIA's North Terminal was undergoing construction and that [redacted] received requests from contractors working in that area, as well as other areas. (Tr. 156-57). The Court agrees with the Secretary that, in light of the construction activity, FPL should have made an assessment to determine how that activity affected the safety of its employees. The

record establishes the SGRs could be accessed by anyone who had a key. It also establishes there was no system for one company or crew to inform others who might access an SGR that work on a particular meter panel had been done. (Tr. 62-63, 118-19, 163, 188; S. Brief, pp. 26-27). For all of these reasons, the Court concludes that FPL did not exercise reasonable diligence and that the violation of 29 C.F.R. § 1926.416(a)(1) is properly imputed to FPL.

This item is affirmed as a serious violation. It is clear that contact with an exposed conductor wire energized at 480 volts could result in serious injury or death. (Tr. 258, 266-68). The penalty discussion relating to this item and the other two items is set out at the end of this decision.

Item 2

Item 2 of the citation alleges that "one employee was working on a commercial multi-metering electrical equipment without knowing about its condition," in violation of 29 C.F.R. § 1926.416(a)(3). The cited standard states that:

> Before work is begun the employer shall ascertain by inquiry or direct observation, or by instruments, whether any part of an energized electric power circuit, exposed or concealed, is so located that the performance of the work may bring any person, tool, or machine into physical or electrical contact with the electric power circuit. The employer shall post and maintain proper warning signs where such a circuit exists. The employer shall advise employees of the location of such lines, the hazards involved, and the protective measures to be taken.

The discussion above shows that in the course of his work in the meter can, [redacted] could have contacted the exposed wires of the line-side conductors. It also shows that the taped wires going to the breaker resulted in a situation that caused the arc flash when [redacted] raised the bypass handle. As the Secretary notes, the cited standard requires an employer to engage in due diligence to assess conditions to determine

whether the work to be done may bring an employee or his tools into contact with an energized circuit. (S. Brief, p. 19). *See CMC Elec., Inc.*, 18 BNA OSHC 1737 (No. 96-0169, 1999), *aff'd in relevant part*, 221 F.3d 861, 870 (6th Cir. 2000). Here, [redacted] was not setting a meter, and FPL did not require him to inquire into what work had been done before his arrival at the SGR. [redacted] thus made no inquiry. He assumed that everything was fine since the plastic plate was in place and the meter can was energized. He also assumed the circuit breaker on the floor was the one to be installed. In addition, he did not inspect the breaker area below the meter can. If he had, he would have observed the taped wires.[47] (Tr. 216-17).

[redacted] was an authorized representative of MIA at the site. (Tr. 254-56, 261). As such, it was incumbent upon him to use due diligence to assess the situation and ensure the equipment was safe before proceeding with his work. And, it was incumbent upon FPL to use due diligence, through proper training and adequate supervision, to ensure that [redacted] was performing his work at MIA safely.[48] (Tr. 252, 260-61). Neither [redacted] nor FPL exercised such due diligence. *Id.* (employer would have discovered energized line if it had exercised reasonable diligence.) FPL could have known of the violative condition with the exercise of reasonable diligence. MIA was undergoing construction and [redacted] received requests from contractors engaged in construction who were working in several areas of the airport. (Tr. 156-57). As the Secretary notes in her brief, FPL should have undertaken an assessment to see how the

[47] [redacted] testified that the breaker area had a panel over it and that the panel also covered the wires. (Tr. 178-80). Mr. Millings testified that the breaker area panel had been removed. The Court has found that the breaker area panel was off when [redacted] raised the lever. *See* footnote 42. Even if the panel was in place, however, [redacted] agreed he could have taken it off himself with a screwdriver. (Tr. 180).

[48] Here, [redacted] training taught him to assume, incorrectly, that there was no need to be concerned about electrical hazards if the plastic plate was in place, unless he was setting a meter. (Tr. 217-18; S. Brief, pp. 24-25).

ongoing construction and these conditions affected the safety of its employees. (S. Brief, p. 26). Based on the record, the Court finds that the standard applies, that its terms were not met, that [redacted] was exposed to the cited condition, and that FPL had constructive knowledge of the condition. The Court finds that working on an energized circuit without inquiring about a system's condition, as here, could result in electrical shock, burns, and possible death. (Exh. C-5, at pp. 3-4). This item is affirmed as a serious violation.

Item 3

Item 3 of the citation alleges that both a main disconnect device and a circuit breaker "of a commercial multi-metering electrical equipment [were] not rendered inoperative and lacked tags," in violation of 29 C.F.R. § 1926.417(b). That standard states:

> Equipment or circuits that are deenergized shall be rendered inoperative and shall have tags attached at all points where such equipment or circuits can be energized.

CO Leorza testified that this item was based on the equipment not being tagged to warn others that work was being done. Dato should have tagged the equipment to indicate where it was working. This would have warned [redacted] of the condition of the equipment. And, [redacted] should have tagged the equipment before he raised the bypass handle.[49] This would have warned others, like the Dato employees who were working on the load side, that side would be energized. The CO explained that the tags could have warned others, for example, to use protection or to stay away or work at a distance from the equipment. (Tr. 261-63, 348-50).

[49] Mr. Shepherd's opinion that 29 C.F.R. § 1926.417(b) is inapplicable is rejected since it is based, in part, upon the faulty premise that [redacted] role at the SGR involved no work, only observations. The Court has also found that [redacted] was involved in Dato's construction related activities in the SGR that included his action to move the bypass handle to remove the plastic cover. (Tr. 422, 425).

In view of the above, the Court concludes that the standard applies, that its terms were not met, and that [redacted] was exposed to the cited condition. The Court further concludes that FPL could have known of the condition with the exercise of reasonable diligence. As set out in Item 1, *supra*, the SGR could be accessed by anyone who had a key. There was no system for one company or crew to inform others who might enter the SGR to perform work on a meter panel that the room had been accessed and work done on the meter panel. (Tr. 62-63, 118-19, 163, 188, 266). Based upon the Court's findings regarding knowledge in Item 1, FPL had constructive knowledge of the violative condition. The Court finds that in the absence of a proper tag, someone could come in contact with an energized area and sustain electrical shock, burns, and possible death. (Tr. 266-67; Exh. C-5). This item is affirmed as a serious violation.

Penalty Determination

The Secretary has proposed a penalty of $5,000.00 for each of the violations in this case. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* section 17(j) of the Act, 29 U.S.C. § 666(j). CO Leorza testified that the penalty factors were the same for all three of the violations. They all had high severity, as the worst possible outcome from contact with one of the energized conductor wires was death. They all had greater probability, due to [redacted]'s proximity to the conductors and the fact that he did not wear the appropriate PPE. And, no credit was given for the employer's size, history or good faith. The CO explained that FPL is a large employer, which negates any credit for size. He also explained that for a high-gravity violation, like this one, no credit is given for good faith. Finally, he explained that no credit for history

was due because FPL had received a previous citation within the three prior years. (Tr. 267-71; Exh. C-5).

Based on the above, the Court finds that the proposed penalties are appropriate. A penalty of $5,000.00 is therefore assessed for each of the violations in this case.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.416(a)(1), is AFFIRMED, and a penalty of $5,000.00 is assessed.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.416(a)(3), is AFFIRMED, and a penalty of $5,000.00 is assessed.

3. Item 3 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.417(b), is AFFIRMED, and a penalty of $5,000.00 is assessed.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: September 22, 2011
Washington, D.C.