State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: FEBRUARY 3, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF APPEALS (HELTON, AS HEARING OFFICER) mat DES

RE: DOCKET NO. 981104-EU - PROPOSED AMENDMENT OF RULE 25-6.049, F.A.C., MEASURING CUSTOMER SERVICE.

AGENDA: 2/15/00 - REGULAR AGENDA - RULE ADOPTION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF

RULE STATUS: ADOPTION MAY BE DEFERRED

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\APP\WP\981104R2.RCM

CASE BACKGROUND

This is hopefully the last recommendation concerning the adoption of clarifying language for Rule 25-6.049, Florida Administrative Code, Measuring Customer Service, concerning master meters. As discussed below, the staff hearing officer recommends that the Commission adopt clarifying language for paragraph 25-6.049(5)(a), with changes.

The genesis of this docket was the Commission's Order on Declaratory Statement construing, at Florida Power Corporation's (FPC's) request, the grandfather clause in Rule 25-6.049(5)(a), Florida Administrative Code. In re: Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation, Order No. 98-0449-FOF-EI, 98 F.P.S.C. 3:389 (1998). Paragraph (5)(a) of Rule 25-6.049 currently requires individual electric metering by a utility:

> [F]or each separate occupancy unit of new commercial establishments, residential buildings, condominiums,

> cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction is commenced after January 1, 1981.

Rule 25-6.049(5)(a), Florida Administrative Code.

FPC sought a declaration from the Commission that individually metered buildings, which were constructed prior to 1981, did not automatically become eligible for master metering simply because they were constructed before 1981. FPC argued that the concept of grand fathering simply tolerates pre-existing non-conforming uses, it does not condone the creation of new ones. 98 F.P.S.C. at 3:390.

The Commission did not make the declaration sought by FPC because it was too broad. Instead, the Commission tailored its declaration to the two condominium associations at issue, and declared:

> [T]he individually metered occupancy units in Redington Towers One and Three are not eligible for conversion to master metering pursuant to Rule 25-6.049 by virtue of having been constructed on or before January 1, 1981.

Id. at 391. The Commission also directed staff to "initiate the rulemaking process to determine whether paragraph (5)(a) of Rule 25-6.049 should be amended." Id.

The staff initiated rulemaking, and published a notice of proposed rule development to clarify the rule. At staff's recommendation, the Commission proposed the following amendment to paragraph (5)(a) to clarify the language in the rule:

> Individual electric metering by the utility shall be required for each separate occupancy unit of ~~new~~ commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks ~~for which construction is commenced after January 1, 1981~~. Individual electric meters shall not, however, be required:
>
> > 1. For each separate occupancy unit of commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction commenced prior to January 1,

1981 and which are not currently individually metered.

Valencia Condominium Association and Point Management, Inc. (collectively referred to as Valencia) requested a hearing on the proposed rule, recommended as a lower cost alternative that the Commission not adopt the proposed amendments, and requested a Statement of Estimated Regulatory Costs be prepared.

A Section 120.54, Florida Statutes, rulemaking hearing was held on March 15, 1999, and continued on May 5, 1999, before an attorney from the Division of Appeals acting as the hearing officer. Representatives from Florida Power and Light Company (FPL), Florida Power Corporation (FPC), Tampa Electric Company (TECO), Commission staff, and Valencia participated in the hearing. FPL, staff, and Valencia filed post-hearing comments.

After the hearing, staff recommended that the rule be withdrawn because the time period established in Section 120.54(3)(e)2., Florida Statutes, had expired and accordingly the Joint Administrative Procedures Committee would not certify the rule amendment nor would the Secretary of State accept the rule amendment. Staff also recommended that the Commission merge the question of the need for the clarifying amendment into the ongoing generic investigation in Docket No. 990188-EI - Generic Investigation Into Requirement for Individual Electric Metering by Investor-Owned Electric Utilities Pursuant to Rule 25-6.049(5)(a), Florida Administrative Code. The Commission voted to withdraw the rule amendment, but denied staff's recommendation to merge the issues surrounding the amendment into Docket No. 990188-EI. Instead, the Commission voted to start the rulemaking process again and reproposed the rule amendment.

After the second notice of rulemaking was published, Valencia again requested a rule hearing. Representatives from FPL, FPC, TECO, Valencia, the Legal Environmental Assistance Foundation (LEAF), and Commission staff participated in the hearing. FPL, FPC, TECO, LEAF, Commission staff, and Valencia filed post-hearing comments.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission adopt the proposed amendments to clarify Rule 25-6.049, Florida Administrative Code, Measuring Customer Service?

RECOMMENDATION: Yes, the Commission should adopt the proposed amendments with an additional clarifying change.

STAFF ANALYSIS: According to staff, the utilities, and LEAF, the purpose of the proposed amendment is to clarify the Commission's longstanding policy concerning master meters, which is that master metered buildings constructed prior to 1981 need not be converted to individual meters, and concomitantly that individually metered buildings may not be converted to master meters. As noted by staff in its post-hearing comments:

> The January 1, 1981 date was chosen to follow closely the November 26, 1980 effective date of the individual metering requirement in Rule 25-6.049, Florida Administrative Code. . . . [F]acilities that were master metered at the time the requirement for individual metering was imposed would not be forced to undergo potentially costly conversion to individual metering. However, the rule would not allow pre-1981 buildings to convert from existing individual metering to master metering. In these situations, the application of the new individual metering requirement imposes no conversion costs, because the facilities are already individually metered.

(Staff's post-hearing comments, pp. 2-3)

The Commission has consistently maintained its policy. A 1988 Rule Summary filed with the Secretary of State concerning Rule 25-6.049 states that "[t]he original intent of the rule [25-6.049] was to restrict the instances where master metering could be used and thereby require individual meters wherever possible as a conservation measure." (Exhibit No. 4) The Commission reaffirmed this intent in its Order on Declaratory Statement, Order No. PSC-98-0449-FOF-EI, issued March 30, 1998, in Docket No. 971542-EI - Petition for Declaratory Statement Regarding Eligibility of Pre-1981 Buildings for Conversion to Master Metering by Florida Power Corporation. (Composite Exhibit No. 2)

Valencia argued that the proposed amendments are not a clarification to the rule since no one produced any evidence from the rule proceeding, during which the original requirement was adopted, that the exemption from individual metering applied only to master metered buildings constructed prior to 1981. Valencia argued that if this proposed amendment is simply a clarification of the rule, it is not authorized under Section 120.54(1)(f), Florida Statutes. Pursuant to Section 120.54(1)(f), "[a]n agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute." According to Valencia, the Final Legislative Staff Analysis for this law provides that Section 120.54(1)(f) was adopted to negate the holding in Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493 (Fla. 1st DCA 1998). (Valencia's post-hearing comments, p. 1-2) In Environmental Trust, the court found that "retroactive application of a rule may be proper if the rule merely clarifies or explains a previous rule." 714 So. 2d at 500. Valencia argued that since the rule violates Section 120.54(1)(f), it is an invalid exercise of delegated legislative authority and subject to invalidation in a Section 120.56 rule challenge proceeding. If the Commission were to accept Valencia's argument that Section 120.54(1)(f) prevents us from clarifying our rule, this would mean that the Commission would never be able to clarify its rules. This cannot be what the Legislature intended.

Valencia raised this issue before the Commission when the Commission voted to withdraw the rule and repropose the rule amendments. At this Agenda Conference, Commissioner Deason commented:

> I don't see where this is a retroactive application. We have had the policy in effect since the rule was adopted. The rule proposed would just simply clarify and is totally consistent with that. There is no change in that in trying to reach back in time and apply that in a retroactive fashion.

(Exhibit 3, p. 28 of Agenda Transcript) FPL argued that "[t]he proposed amendment seeks to avoid any confusion as to what the Commission's policy is and has been. Consequently, the proposed amendment would not retroactively alter the rights or obligations of any substantially affected party and would be applied prospectively." (FPL post-hearing comments, p. 3) Staff counsel argued that the proposed rule has no retroactive effect because it does not differ from the policy already in place. (12/2/99 hearing transcript, p. 25) FPC and TECO also argue that the rule has no

retroactive effect. (FPC's post-hearing comments, p. 3; TECO's post-hearing comments, p. 1)

As recognized by the Supreme Court of Florida, "when 'an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.'" Metropolitan Dade County v. Chase Federal Housing Corporation, 737 So. 2d 494, 503 (Fla. 1999)(citations omitted). Here, the proposed amendment is not a substantive change to the rule or the Commission's longstanding interpretation of its rule. The Commission voted to look at the need for a clarifying amendment when it resolved the Redington Towers controversy. Moreover, Valencia has not shown how the rule is retroactive. Since 1981, the Commission has consistently interpreted its rule to mean that individually metered units cannot be switched to master meters, regardless when the units were built. The grandfather provision simply allows master metered units built before the 1981 date to remain master metered and avoid the expensive process of conversion. It is nonsensical to suggest that the Commission would permit conversion to master meters when construction of master meters was impermissible under the rule. The amendment confirms the meaning intended by the Commission when the rule was originally adopted and is consistent with the manner in which the rule has been interpreted and applied by the Commission.

Valencia also argued that the proposed rule amendments should be withdrawn and the issue of individual metering versus master metering be considered in the ongoing generic investigation docket of the meter rule. According to Valencia, it is unwise to go forward with this amendment when the outcome of the generic investigation is unknown. (Valencia's post-hearing statement, pp. 2-3) When the Commission withdrew the rule because of failure to comply with the timing requirements in Section 120.54(3)(e)2., staff recommended that the Commission wait until the outcome of the generic docket before deciding whether to repropose the rule amendments. The Commission disagreed and voted to withdraw the rule and simultaneously proposed the rule amendments. All of the hearing participants except Valencia urged adoption of the proposed amendments to confirm the Commission's longstanding policy. Valencia did not produce any new reason why this issue should be merged into the generic docket.

When the rule amendments were proposed, Rule 25-6.049 listed only Section 366.05(3), Florida Statutes, as the law implemented. This statute provides that "[t]he commission shall provide for the

examination and testing of all meters used for measuring any product or service of a public utility." According to Valencia, the rule and the proposed amendments do not implement this law. However, staff argued at the hearing and in its post-hearing comments that Section 366.05(1), Florida Statutes, should also be added as a law implemented. (December 1999 hearing transcript, p. 21-22; Staff's post-hearing comments, p. 4) In fact, this law has already been added as a technical change through the process of the Commission's semi-annual review of its rules. This additional authority provides that the Commission has the power, among other things, to prescribe "classifications, standards of quality and measurements, and service rules and regulations to be observed by each public utility . . . ." Section 366.05(1), Florida Statutes. The policy at issue here concerning individual meters is authorized by this statute, and as such does not modify or contravene the specific provision of law implemented as argued by Valencia.

Valencia also argued other reasons why the rule should be withdrawn. It argued that there is little evidence that the policy of encouraging conservation is achieved by the proposed rule since the Commission has not completed any studies to prove energy savings in the last 10 years. Therefore, Valencia argued, the rule is not supported by competent substantial evidence and should be withdrawn. In addition, Valencia argued that the public would be better served through reduced electric bills if the rule amendments were withdrawn. Section 120.52(8)(f), Florida Statutes, provides that a rule is an invalid exercise of delegated legislative authority if it is not supported by competent substantial evidence. While an agency should be able to support its rule with competent substantial evidence, a Section 120.54 rule hearing is not designed as a formal evidentiary hearing with sworn testimony. Moreover, Valencia produced no counter evidence to show that the Commission would not be able to support its policy if challenged. I am not convinced that the rule could not be supported by competent substantial evidence if challenged.

Finally, Valencia argued that the Statement of Estimated Regulatory Costs (SERC) is flawed because the SERC views the proposed rule amendments as a clarification. According to Valencia, even though the proposed amendments greatly expand the rule, no complete cost/benefit study was performed. The SERC is consistent with the Commission's position and that of the utilities, LEAF, and staff, that the proposed amendment simply confirms the Commission's long-standing policy. Valencia has not shown that the SERC fails to meet the requirements of Section 120.541, Florida Statutes.

Staff and LEAF both suggested language to make clearer the Commission's proposed clarification of the rule. LEAF suggested that the following language be added as the last sentence to subparagraph 25-6.149(5)(a)1:

> Provided, however, that when any such pre-1981 facility was individually metered when built, it may not thereafter be converted to a master meter.

(LEAF's post-hearing comments, p. 1) Staff also suggested a sentence be added at the end of the same subparagraph:

> This paragraph shall not be interpreted to authorize conversion of any such facilities from individual metering to master metering.

(Staff's post-hearing comments, p. 3)

I recommend that the language of this subparagraph be further clarified to ensure that the Commission need not revisit a Redington Towers type situation. Because staff's language appears to be easier to understand, I recommend that the Commission adopt the proposed amendments to the rule with the addition of staff's recommended language at the end of subparagraph 25-6.149(5)(a)1. This recommended change is redlined in the attached rule.

I recommend that the Commission should not withdraw its proposed amendments to clarify the rule. I also recommend that the Commission find that the proposed amendments are not retroactive amendments to the rule and therefore not in violation of Section 120.54(1)(f), Florida Statutes.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes, the rule as approved by the Commission should be filed for adoption with the Secretary of State and the docket be closed.

STAFF ANALYSIS: After a Notice of Change is published in the Florida Administrative Weekly, the rule may be filed with the Secretary of State for adoption and the docket may be closed.

25-6.049 Measuring Customer Service.

(1) All energy sold to customers shall be measured by commercially acceptable measuring devices owned and maintained by the utility, except where it is impractical to meter loads, such as street lighting, temporary or special installations, in which case the consumption may be calculated, or billed on demand or connected load rate or as provided in the utility's filed tariff.

(2) When there is more than one meter at a location the metering equipment shall be so tagged or plainly marked as to indicate the circuit metered. Where similar types of meters record different quantities, (kilowatt-hours and reactive power, for example), metering equipment shall be tagged or plainly marked to indicate what the meters are recording.

(3) Meters which are not direct reading shall have the multiplier plainly marked on the meter. All charts taken from recording meters shall be marked with the date of the record, the meter number, customer, and chart multiplier. The register ratio shall be marked on all meter registers. The watt-hour constant for the meter itself shall be placed on all watt-hour meters.

(4) Metering equipment shall not be set "fast" or "slow" to compensate for supply transformer or line losses.

(5)(a) Individual electric metering by the utility shall be required for each separate occupancy unit of ~~new~~ commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks

~~for which construction is commenced after January 1, 1981~~.

Individual electric meters shall not, however, be required:

1. For each separate occupancy unit of commercial establishments, residential buildings, condominiums, cooperatives, marinas, and trailer, mobile home and recreational vehicle parks for which construction commenced prior to January 1, 1981 and which are not currently individually metered. This paragraph shall not be interpreted to authorize conversion of any such facilities from individual metering to master metering.

2~~1~~. In those portions of a commercial establishment where the floor space dimensions or physical configuration of the units are subject to alteration, as evidenced by non-structural element partition walls, unless the utility determines that adequate provisions can be made to modify the metering to accurately reflect such alterations;

3~~2~~. For electricity used in central heating, ventilating and air conditioning systems, or electric back up service to storage heating and cooling systems;

4~~3~~. For electricity used in specialized-use housing accommodations such as hospitals, nursing homes, living facilities located on the same premises as, and operated in conjunction with, a nursing home or other health care facility providing at least the same level and types of services as a nursing home, convalescent homes, facilities certificated under Chapter 651, Florida Statutes, college dormitories, convents, sorority houses, fraternity houses, motels,

hotels, and similar facilities;

54. For separate, specially-designated areas for overnight occupancy at trailer, mobile home and recreational vehicle parks and marinas where permanent residency is not established.

65. For new and existing time-share plans, provided that all of the occupancy units which are served by the master meter or meters are committed to a time-share plan as defined in Section 721, Florida Statutes, and none of the occupancy units are used for permanent occupancy. When a time-share plan is converted from individual metering to master metering, the customer must reimburse the utility for the costs incurred by the utility for the conversion. These costs shall include, but not be limited to, the undepreciated cost of any existing distribution equipment which is removed or transferred to the ownership of the customer, plus the cost of removal or relocation of any distribution equipment, less the salvage value of any removed equipment.

(b) For purposes of this rule:

1. "Occupancy unit" means that portion of any commercial establishment, single and multi-unit residential building, or trailer, mobile home or recreational vehicle park, or marina which is set apart from the rest of such facility by clearly determinable boundaries as described in the rental, lease, or ownership agreement for such unit.

2. The construction of a new commercial establishment, residential building, marina, or trailer, mobile home or

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recreational vehicle park shall be deemed to commence on the date when the building structure permit is issued.

3. "Overnight Occupancy" means use of an occupancy unit for a short term such as per day or per week where permanent residency is not established.

4. The term "cost", as used herein means only those charges specifically authorized by the electric utility's tariff, including but not limited to the customer, energy, demand, fuel, and conservation charges made by the electric utility plus applicable taxes and fees to the customer of record responsible for the master meter payments. The term does not include late payment charges, returned check charges, the cost of the distribution system behind the master meter, the cost of billing, and other such costs.

(6)(a) Where individual metering is not required under Subsection (5)(a) and master metering is used in lieu thereof, reasonable apportionment methods, including sub-metering may be used by the customer of record or the owner of such facility solely for the purpose of allocating the cost of the electricity billed by the utility.

(b) Any fees or charges collected by a customer of record for electricity billed to the customer's account by the utility, whether based on the use of sub-metering or any other allocation method, shall be determined in a manner which reimburses the customer of record for no more than the customer's actual cost of

electricity.

(7) Each utility shall develop a standard policy governing the provisions of sub-metering as provided for herein. Such policy shall be filed by each utility as part of its tariffs. The policy shall have uniform application and shall be nondiscriminatory.

Specific Authority: 366.05(1), F.S.

Law Implemented: 366.05(3), F.S.

History--Amended 7/29/69, 11/26/80, 12/23/82, 12/28/83, Formerly 25-6.49, Amended 7/14/87, 10/5/88, 3/23/97, _____.

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