**FLORIDA PUBLIC SERVICE COMMISSION**

**Fletcher Building**
**101 East Gaines Street**
**Tallahassee, Florida 32399-0850**

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

**December 5, 1991**

**TO :** **DIRECTOR, DIVISION OF RECORDS AND REPORTING**

**FROM :** **DIVISION OF LEGAL SERVICES [PALECKI]**
**DIVISION OF ELECTRIC AND GAS [WHEELER]**

**RE :** **DOCKET NO. 910056-PU - COMPLAINT OF CONSUMER JOHN FALK REGARDING RESALE OF ELECTRICITY AND GAS BY THE H. GELLER MANAGEMENT COMPANY.**

**AGENDA:** **12/17/91 - CONTROVERSIAL - PARTIES MAY NOT PARTICIPATE**

**CRITICAL DATES:** **NONE**

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## CASE BACKGROUND

H. Geller Management Corporation (Geller) contracted a service and maintenance agreement with Terrace Park of Five Towns, Number 15, Inc., a condominium association. John F. Falk (Falk) owns a condominium unit at Terrace Park and pays Geller for its management services, including the provision of gas (for individual units) and electricity (for all common areas).

This matter was initiated by complaint filed with the Commission's Division of Consumer Affairs, in which Falk alleged that Geller overcharged him. Specifically, Falk claimed that Geller bought gas and electricity from public utilities and then, contrary to law, resold those resources to individual customers at a profit. Staff apprised Geller of the complaint and said it intended to hold an informal conference pursuant to the Florida Administrative Code. Geller denied the allegation, claiming that it did not resell the resources--it merely used indices to determine maintenance fee increases. Thereafter Staff scheduled an informal conference to be held on November 27, 1989, in St. Petersburg, Florida.

Before the conference could be held, Geller filed a complaint in the circuit court seeking an injunction to stop the Commission from proceeding on the ground that the Commission had no jurisdiction. Over the Commission's objection, the circuit court entered a temporary injunction on November 17, 1989, and denied a subsequent motion to dissolve the injunction. The Commission then filed a petition for a writ of prohibition in the Florida Supreme Court.

In Florida Public Service Commission v. Bryson, 569 So.2d 1253 (Fla. 1990), the Florida Supreme Court ruled that the Circuit Court lacked jurisdiction to enjoin the Commission from reviewing a complaint which alleged that a property management company overcharged a condominium unit owner for gas and electricity. In its opinion issued November 8, 1990, the Supreme Court held that the Commission had, at the very least, a colorable claim of exclusive jurisdiction to consider the allegations and that the proper vehicle for the management company to contest the Commission's jurisdiction was by direct appeal after the Commission had acted.

After the time for rehearing of the Supreme Court's opinion had expired, Staff scheduled an informal conference in St. Petersburg for February 8, 1991. When the parties were unable to reach a settlement at the informal conference, a docket was opened, and the matter was scheduled for hearing.

A full evidentiary hearing on this matter was held in St. Petersburg, Florida, on April 19, 1991, before Commissioners Gunter and Deason. After Commissioner Gunter's death, Chairman Beard read the record of the proceedings in order to vote in place of Commissioner Gunter.

At the agenda conference on September 21, 1991, the panel voted to deny staff's recommended finding that Geller had resold electricity at a profit in violation of Commission rules. The panel's vote was memorialized in Order No. 25234, issued October 18, 1991. In Order No. 25234, the panel specifically found that Geller was not an electric utility engaged in the sale of electricity.

On October 31, 1991, Falk filed its Motion for Reconsideration of Order No. 25234. On November 7, 1992, Geller filed its response to Falk's Motion for Reconsideration.

## DISCUSSION OF ISSUES

ISSUE 1: Should the Motion for Reconsideration of Order No. 25234 filed by John Falk be granted?

RECOMMENDATION: Yes. Order No. 25234 provides a loophole wherein any management company or landlord can side-step the Commission's prohibition against resale of electricity, and charge tenants more for common-area electricity than it pays the electric company. This result is not intended by Commission rules and reconsideration of Order No. 25234 should be granted.

STAFF ANALYSIS: Staff believes that reconsideration of Order No. 25234 should be granted. The record reflects that Geller was reselling electricity. As Falk has pointed out in his Motion for Reconsideration, the contract itself provides that the maintenance fee increases "were to represent increases for public utilities." Geller's own witness, Carl Parker, who drafted the contract, testified that the increases in question were specifically intended to cover increases in electricity, and he further stated, "I don't believe you can interpret the contract any differently." It is thus clear from the contract and the testimony that the maintenance fee increases, which were the subject of Falk's complaint, were designed to pay for electricity, and not merely for services which require the use of electricity.

Furthermore the Commission's Rule prohibiting the resale of electricity at a profit (Rule 25-6.049(6), Florida Administrative Code), does not distinguish between occupancy units and common areas. While subsection (5)(a) of the rule specifically mandates the use of individual meters in occupancy units, subsection (6)(b), which prohibits resale at a profit, makes no mention of occupancy units. Research into the history of subsection (6)(b) reveals that its purpose is "to clarify that a customer of record may charge for electricity in a manner which only reimburses the customer of record for the cost of electricity." See Docket No. 870295-EI, Attachment 1, pp 1-12. No reference to occupancy units is made with regard to subsection (6)(b). The word "clarify" was used to describe the purpose of the proposed rule, because resale of electricity at a profit was already considered unlawful under the provisions of Chapter 366, Florida Statutes that vest exclusive authority in the Commission to set the rates and charges for electric service. Each electric utility's tariffs also reflected the prohibition against resale of electricity a profit. Resale of electricity at a profit is prohibited by Rule 25-6.049(6)(b) under

all circumstances across the board, for service to common condominium areas, as well as occupancy units.

In Florida Public Service Commission v. Bryson, the Supreme Court described the correct legal analysis of this case this way:

> The PSC in this case relied on the language in sections 366.04(1) and 366.02(1) as the basis of its jurisdiction. The PSC found additional support in Fletcher Properties, Inc. where the Court approved the PSC's conclusion that the managing agent and part owner of a private residential community in Jacksonville was a "utility" under the PSC's jurisdiction pursuant to chapter 367 of the Florida Statutes (1975) because of its operations relating to water and sewer service. The PSC's analysis approved by the Court said PSC jurisdiction is particularly appropriate where the company provides utility services to condominium units and others not tenants of the company. Fletcher Properties, Inc., 356 So.2d at 292.
>
> Additionally, the PSC is in this case relied on Florida Administrative Code, Rule 25-6.049(6)(b), which the PSC promulgated pursuant to its statutory authority. That rule instructs:
>
> (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.
>
> (Emphasis supplied by the Court.)
>
> 569 So.2d at 1255

On the basis of this authority, the Supreme Court ruled: "We conclude that the PSC has, at the very least, a colorable claim of exclusive jurisdiction to consider allegations that a management

company overcharged a condominium owner for gas and electricity." (569 So.2d at 1256).

Staff believes the record in this docket supports consumer Falk's claim that Geller overcharged him for electricity. In the face of such a record, it is ill-advised for this Commission to define its jurisdiction more narrowly than it has been defined by the Supreme Court of Florida.

Order No. 25234 will allow any management company or landlord to side-step the Commission's prohibition against resale of electricity and charge tenants more for common-area electricity than it pays the electric company. With "Geller" as their model, management companies will draft maintenance fee provisions in their management contracts that increase by a profitable margin every time the electric company increases rates. With "Geller" as their protection, condominium management companies will effectively insulate themselves from Commission jurisdiction and the legal effect of Chapter 366, Florida Statutes.

Staff respectfully requests that this Commission reconsider Order No. 25234.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: If reconsideration is not granted, this docket should be closed. However, if reconsideration is granted, the docket should remain open.

MAP:bmi
910056b.bmi

DOCKET NO. 910056-PU
DECEMBER 5, 1991

PUBLIC SERVICE COMMISSION

Fletcher Building
101 East Gaines Street
Tallahassee, Florida 32399-0850

M E M O R A N D U M

August 25, 1988

TO : DIRECTOR OF RECORDS AND REPORTING

FROM : DIVISION OF APPEALS (HARROLD) WMW
DIVISION OF RESEARCH (SALAZAR) CMS.
DIVISION OF ELECTRIC AND GAS (WRIGHT) RLW RLT

RE : DOCKET NO.: 870295-EI, PROPOSED AMENDMENT TO RULE 25-6.049, MEASURING CUSTOMER SERVICE

UTILITY: ELECTRIC UTILITIES

AGENDA: 09/06/88 - CONTROVERSIAL AGENDA - PARTIES MAY PARTICIPATE

PANEL : FULL COMMISSION

CRITICAL DATES: NONE

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ISSUE AND RECOMMENDATION SUMMARY

ISSUE 1: Should the Commission amend the rule on Measuring Customer Service to allow reasonable apportionment methods including submetering where individual metering is not required?

RECOMMENDATION: Staff recommends that the Commission amend Rule 25-6.049 to authorize reasonable apportionment methods, including submetering, where individual metering is not required. See page 6, subsection (6)(a).

ISSUE 2: Should the Commission add a sentence to the above-noted rule provision to provide that fees or charges collected by a customer of record

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for electricity shall reimburse the customer of record for no more than the customer's cost of electricity?

RECOMMENDATION: Yes, the Commission should add a sentence to the rule provision to indicate that fees or charges collected by a customer of record for electricity shall be determined in a manner which reimburses the customer of record for no more than the customer's cost of electricity.

ISSUE 3: Should the provisions of Rule 25-6.049 (5)(b) be renumbered as follows:

1. Rule 25-6.049 (5)(b)6(a) becomes subsection (6)(a).
2. Rule 25-6.049 (5)(b)6(b) becomes No. 6.
3. Rule 25-6.049 (5)(b)6(c) becomes subsection (7).

RECOMMENDATION: The staff recommends the indicated changes be made.

DISCUSSION:

The Commission previously voted, on May 17, 1988, to propose the rule amendment to provide for reasonable apportionment methods, including submetering, where individual metering is not required (Issue No. 1).

Based upon comments filed by Florida Power Corporation, staff believes it is appropriate and recommends that an additional sentence be added to clarify that a customer of record may charge for electricity in a manner which only reimburses the customer of record for the cost of electricity (Issue No. 2).

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DOCKET NO. 870295-EI
August 25, 1988

The comments of Florida Power Corporation also propose adding the definition "actual cost of electricity" in lieu of "cost of electricity". Staff believes this is not a substantive change and believes that the term "cost" as currently defined in the rule [25-6.049 (5)(b)6(b)] is sufficient.

The staff agrees with the comments filed by Florida Power Corporation which suggests renumbering the above-noted rules. The provisions of 25-6.049 (5)(b)6(a) are substantive in nature and are appropriately moved to a new subsection, subsection (6). Additional renumbering, as indicated above, is appropriate.

A copy of the initial proposed change and the revised staff proposed rule are attached, see page 4 - 7. The economic impact statement is attached, see pages 8 - 12.

The rule should be adopted as indicated herein.

WHH:kp

Attachments

1713G

25-6.049 Measuring Customer Service.

(1) All energy sold to customers, except that sold under flat rate schedule, 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 relative 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 li 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. This requirement shall apply whether or not the facility is engaged in a time-sharing plan. Individual electric meters shall not, however, be required:

1. In those portions of a commercial establishment

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1. In those portions of a commercial establishment

No Changes.

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;

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

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.

4. For separate, specially-designated areas for overnight occupancy at trailer, mobile home and recreational vehicle parks where permanent residency is not established and for marinas where living aboard is prohibited by ordinance, deed restriction, or other permanent means.

(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

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;

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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.

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No Changes.

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facility solely for the purpose of allocating the cost of the electricity billed by the utility.

(b) 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.

(c) 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.

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(6)(a) ~~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.

(6)(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) ~~(c)~~ 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. No. 6(b) renumbered to No. 6., No. 6(a) renumbered and amended to subsection (6)(a), subsection (6)(b) added, No. 6(c) renumbered to subsection (7).

Renumbered from 5(b)6(a) to (6)(a).
Amended to clarify the existing rule by stating that "reasonable appointment methods", including submetering may be used to allocate the cost of electricity.

New provision to clarify that a customer of record may only recover, through an allocation method, the actual cost of electricity.

Renumbered from (5)(b)6(c) to subsection (7).

determinable boundaries as described in the rental, lease, or ownership agreement for such unit.

2. "Time-sharing plan" means any arrangement, plan, scheme, or similar device, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives a right to use accommodations or facilities, or both, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years.

3. The construction of a new commercial establishment, residential building, marina, or trailer, mobile home or recreational vehicle park shall be deemed to commence on the date when the building structure permit is issued.

4. The individual metering requirement is waived for any time sharing facility for which construction was commenced before December 23, 1982, in which separate occupancy units were not metered in accordance with subsection (5)(a).

5. "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.

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

determinable boundaries as described in the rental, lease, or ownership agreement for such unit.

2. "Time-sharing plan" means any arrangement, plan, scheme, or similar device, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser, in exchange for a consideration, receives a right to use accommodations or facilities, or both, for a specific period of time less than a full year during any given year, but not necessarily for consecutive years, and which extends for a period of more than three years.

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5. "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.

6. ~~(b)~~ 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

Renumbered from 5(b)6(b) to Number 6.

DOCKET NO. 910056-PU
DECEMBER 5, 1991

MEMORANDUM

RECEIVE

April 7, 1988

TO: DIVISION OF APPEALS (HARROLD)

FROM: DIVISION OF RESEARCH (SALAZAR) CHS NPC

SUBJECT: ECONOMIC IMPACT STATEMENT FOR PROPOSED REVISION OF RULE 25-6.049, FAC, MEASURING CUSTOMER SERVICE

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SUMMARY OF THE RULE

Rule 25-6.049, FAC, Measuring Customer Service, requires all energy sold to customers, except energy sold under flat rate schedules or for uses where it is impractical to meter loads, to be measured by commercially acceptable measuring devices owned and maintained by the utility. Currently, the rule requires individual metering, except for commercial building units with variable floor plans, storage heating and cooling systems, specialized use housing (health care facilities, dormitories, hotels, etc.) and overnight occupancy areas (recreational vehicle parks and marinas where permanent residency is prohibited). The rule further specifies that where individual metering is not required and, therefore, master metering is used, submetering may be used by the customer of record to allocate the cost of electricity among occupants/tenants of the facility.

The original intent of the rule was to restrict the instances where master metering could be used and thereby require individual meters wherever possible as a conservation measure. The rule was revised to

prohibit reselling of electricity, that is, allocation of master meter charges in such a manner as to result in earned profit by the customer of record, in those cases where individual utility meters were not required. However, Rule 25-6.049, which currently prohibits resale for profit only when submetering is used as an appropriate allocation method, does not allow for the use of other types of cost apportionment methodologies by an owner of a facility to recover the cost of electric service. The proposed revision to the rule would permit use of other reasonable apportionment methods in addition to submetering.

DIRECT COSTS TO THE AGENCY

The proposed revision to Rule 25-6.049 would require a one-time cost to process corrective tariff filings by the electric utilities. However, additional costs are likely to be minimal and absorbed within existing staff resources.

COSTS AND BENEFITS TO THOSE PARTIES DIRECTLY AFFECTED BY THE RULE

Electric utilities regulated by the Commission would be affected by the revision of Rule 25-6.049. Also, customers of record, who charge tenants fees unrelated to consumption levels because they apportion charges by means other than submetering, would also be affected. Finally, tenants of such customers of record would be affected.

To monitor consumption by ultimate customers it is necessary that the customer of record install individual meters or use other types of cost apportionment methodologies. Where facilities have individually controllable appliances and electricity-consuming equipment, submetering

would ensure that each tenant is billed for costs associated directly with that tenant. Where submetering is not done because of the expense or physical limitations of the building that prevent the necessary wiring, then the customer of record often uses some other basis for apportionment. Examples of such a basis include square footage, length of time, load estimates, etc.

The major benefit of including other reasonable methods of usage-based apportionment in addition to submetering would be to ensure that the cost of electricity billed by the utility is allocated to ultimate consumers as directly and accurately as possible while recognizing variations in individual consumption and physical limitations of master-metered areas. In conjunction with the present rule, the proposed revision would prohibit the customer of record from marking up tariffed electricity rates in order to profit from electricity sale: explicitly excluded from allocated fees are charges for late payment, returned checks, facility-owned distribution systems, and other administrative expenses.

Adoption of the proposed revision to Rule 25-6.049 would require a one-time corrective tariff filing by the electric utilities. It would also allow utilities to respond adequately to complaints from ultimate users, regardless of the method of appropriation used by customers of record. The resulting costs of filing would likely be minimal and absorbed within existing utility resources since reselling is already prohibited.

There should be no effect on the rates that the consumers face. Any increase in costs experienced by the utilities as a result of

the amendment would not be of sufficient magnitude to elicit noticeable change in electric utility rates.

IMPACT ON SMALL BUSINESSES

None of the affected electric utilities qualify as a small business according to the criteria of Section 120.54, Florida Statutes (1985). Given that the proportionate mix of cost apportionment and submetering usage levels of different small customers of record is unknown, it is not possible to determine which of these methodologies would be used by the owner of a facility to recover the cost of electric service billed from the utility. To the extent that smaller customers of record may be less likely to undertake alternatives to submetering projects unsupported by increases in customer rent, any effect on them is expected to be small.

IMPACT ON COMPETITION

Because the proposed revision to Rule 25-6.049 would be applied equally to all electric utilities regulated by the Commission and those utilities do not compete across service areas, no change is expected in competition among Florida utilities. The proposed rule is not expected to have an effect on the short- or long-term viability of customers of record. Effects of the proposed rule are likely to be too small to significantly impact the relative competitive positions of customers of record.

IMPACT ON EMPLOYMENT

Since no significant change in ongoing workload is foreseen, effects on employment levels due to adoption of this proposed rule revision are expected to be negligible.

METHODOLOGY

Standard economic cost-benefit analysis was used to evaluate the impact of the proposed revision of Rule 25-6.049.

CMS:jn/2972R

Commissioners:
THOMAS M. BEARD, CHAIRMAN
BETTY EASLEY
J. TERRY DEASON
SUSAN F. CLARK
LUIS J. LAUREDO

**State of Florida**

STEVE TRIBBLE, Director
Division of Records and Reporting
(904) 488-8371

# Public Service Commission

April 10, 1992

Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

Re: Docket No. 910056-PU - John Falk
vs. Florida Public Service Commission

Dear Mr. White:

Enclosed is a certified copy of a Notice of Appeal, filed on behalf of John Falk on April 10, 1992. Also enclosed is a copy of Order No. PSC-92-0031-FOF-PU, the final order on appeal.

The index of record will be served on the parties to this proceeding on or before June 1, 1992.

Sincerely,

Kay Flynn, Chief
Bureau of Records

Enclosure
cc: David Smith
David A. Lamont
C. Everett Boyd