BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed amendment of Rule 25-6.049, F.A.C., Measuring Customer Service.	DOCKET NO. 981104-EU ORDER NO. PSC-00-0635-FOF-EU ISSUED: April 5, 2000

The following Commissioners participated in the disposition of this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.
LILA A. JABER

ORDER ADOPTING CHANGES TO THE PROPOSED AMENDMENTS OF
RULE 25-6.049, FLORIDA ADMINISTRATIVE CODE

BY THE COMMISSION:

As discussed below, we have decided to adopt clarifying language for Rule 25-6.049(5)(a), Florida Administrative Code, with changes. The genesis of this docket was our Order on Declaratory Statement construing, at Florida Power Corporation's (FPC) 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 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 grandfathering simply tolerates pre-existing non-conforming uses, it does not condone the

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creation of new ones. 98 F.P.S.C. at 3:390. We did not make the declaration sought by FPC because it was too broad. Instead, we tailored our 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. We also directed staff to "initiate the rulemaking process to determine whether paragraph (5)(a) of Rule 25-6.049 should be amended." Id.

Our staff initiated rulemaking, and published a notice of proposed rule development to clarify the rule. We then 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 we 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. 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. Staff also recommended that we 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. We voted to withdraw the rule amendment, but denied staff's recommendation to merge the issues surrounding the amendment into Docket No. 990188-EI. Instead, we 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. Staff, Florida Power & Light Company (FPL), FPC, Tampa Electric Company (TECO), and the Legal Environmental Assistance Foundation (LEAF) argued that the purpose of the proposed amendment is to clarify our 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 their 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.

We have consistently maintained our 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." We reaffirmed this intent in our Order on Declaratory Statement, 98 F.P.S.C. 3:389.

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). 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. If we were to accept Valencia's argument that Section 120.54(1)(f) prevents us from clarifying our rule, this would mean that we would never be able to clarify our rules. This cannot be what the Legislature intended. Moreover, Valencia has not shown how the rule is retroactive.

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." Staff counsel argued that the proposed rule has no retroactive effect because it does not differ from the policy already in place. FPC and TECO also argued that the rule has no retroactive effect.

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 our longstanding interpretation of the rule. We voted to look at the need for a clarifying amendment when we resolved the Redington Towers controversy. Since at least 1981, we have consistently interpreted our 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 we would permit conversion to master meters when construction of master meters is impermissible under the rule. The amendment confirms the meaning intended by us when the rule was originally adopted and is consistent with the manner in which the rule has been interpreted and applied.

We 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.

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. 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 that Section 366.05(1), Florida Statutes, should also be added as a law implemented. In fact, this law has already been added as a technical change through our semi-annual rule review process. This additional authority provides that we have 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. 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. We are 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 our position and that of the utilities, LEAF, and staff, that the proposed amendment simply confirms our 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 our proposed clarification of the rule. We adopt the suggested changes recommended by staff to add as the last sentence to subparagraph 25-6.149(5)(a)1:

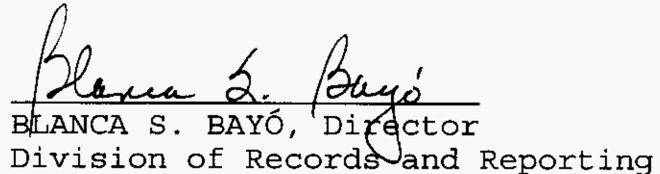
> This paragraph shall not be interpreted to authorize conversion of any such facilities from individual metering to master metering.

We adopt this additional clarifying language to ensure that we do not revisit a Redington Towers type situation.

It is therefore

ORDERED by the Florida Public Service Commission that the attached notice of change shall be published in the April 7, 2000, edition of the Florida Administrative Weekly.

By ORDER of the Florida Public Service Commission this 5th day of April, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

FLORIDA PUBLIC SERVICE COMMISSION

DIVISION OF APPEALS

DOCKET NO. 981104-EU

RULE NO:	RULE TITLE:
25-6.049	Measuring Customer Service

NOTICE OF CHANGE

Notice is hereby given that the following changes have been made to the proposed rule in accordance with subparagraph 120.54(3)(d)1., F.S., published in Volume 25, No. 42, October 22, 1999, issue of the Florida Administrative Weekly:

The following sentence shall be added to the end of paragraph (5)(a) in Rule 25-6.049:

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