

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Proposed amendment : DOCKET NO. 981104-EU
of Rule 25-6.049, F.A.C., :
Measuring Customer Service. :

PROCEEDINGS: RULE HEARING

BEFORE: MARY ANNE HELTON
Hearing Officer

DATE: Thursday, December 2, 1999

TIME: Commenced at 9:30 a.m.
Concluded at 10:33 a.m.

PLACE: Betty Easley Conference Center
Hearing Room 152
4075 Esplanade Way
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL, RPR

BUREAU OF REPORTING

RECEIVED 12-16-99

DOCUMENT NUMBER - DATE

15350 DEC 16 99

FPSC-RECORDS-REPORTING

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JIM A. MCGEE, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, appearing on behalf of Florida Power Corporation.

JON C. MOYLE, JR., Moyle, Flanigan, Katz, Kolins, Raymond & Sheehan, 118 North Gadsden Street, Tallahassee, Florida 32301, appearing on behalf of Point Management, Inc. and Valencia Condominium Association.

DEBRA SWIM, 114-E Thomasville Road, Tallahassee, Florida 32303-6290, appearing on behalf of Legal Environmental Assistance Foundation.

RICHARD BELLACK, Associate General Counsel, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0862, appearing on behalf of the Commission Staff.

ALSO PARTICIPATING:

CRAIG HEWITT, FPSC, Division of Research and Regulatory Review.

DAVID WHEELER, FPSC, Division of Electric and Gas.

BOB VALDEZ, Florida Power & Light Company.

I N D E X
MISCELLANEOUS

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EXHIBITS

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2	Transcripts of 3/15/99 and 5/5/99 hearings, exhibits received, post-hearing comments, Staff recommendation, and notice of withdrawal	17	17
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P R O C E E D I N G S

THE HEARING OFFICER: I think we can go ahead and get started.

Good morning. My name is Mary Anne Helton. I'm an Associate General Counsel with the Commission, and I'll be the hearing officer today.

This hearing is being held pursuant to Section 120.54, Florida Statutes. The rule we are concerned with today is 25-6.049, Florida Administrative Code. The amendment to this rule was published in the Florida Administrative Weekly on October the 22nd, 1999. The purpose of the hearing is to allow the Commission to inform itself of matters bearing upon the rule amendment and to present evidence on the merits of the rule amendment.

We'll take appearances. Mr. Bellack, we can start with you.

MR. BELLACK: Richard Bellack, representing the Commission Staff.

MS. SWIM: Debra Swim, appearing on behalf of the Legal Environmental Assistance Foundation.

MR. MCGEE: Jim McGee, Florida Power Corporation.

MR. HOFFMAN: Kenneth Hoffman of the firm of Rutledge, Ecenia, Purnell & Hoffman, appearing on

1 behalf of Florida Power & Light Company.

2 MR. MOYLE: Jon Moyle, Jr., appearing on
3 behalf of Point Management and Valencia Condominium
4 Association.

5 MR. BEASLEY: Jim Beasley, appearing on
6 behalf of Tampa Electric Company.

7 THE HEARING OFFICER: Before we get
8 started, are there any preliminary matters that we
9 should bring up first?

10 MR. HOFFMAN: Mary Anne, let me bring one
11 up.

12 Mr. Moyle has represented that he's here on
13 behalf of Valencia Condominium Association and Point
14 Management, and I was concerned that he might do that,
15 so I just want to try to raise one issue before we
16 begin. And I wanted to point out that we would object
17 to Point Management's participation in this rulemaking
18 hearing on the grounds that they have no standing.

19 The Commission has already ruled in
20 response to Mr. Moyle's petition to intervene on
21 behalf of Point Management in the broader generic
22 docket that Point Management is not affected by the
23 potentially broad range of issues concerning
24 individual versus master metering in the generic
25 docket. In light of that order, certainly Point

1 Management has no standing to participate in this
2 rulemaking hearing, which deals only with a
3 housekeeping matter, the limited clarification of the
4 master metering grandfather provision.

5 THE HEARING OFFICER: On what grounds did
6 the Commission decide that Point Management didn't
7 have standing in the other docket?

8 MR. HOFFMAN: The order is -- Your Honor,
9 the order is Order No. PSC-99-1474-PCO-EI. It was
10 issued July 29, 1999 in Docket No. 990188-EI. On page
11 2, the statement in the order is, "After
12 consideration, I find that Point has not shown that it
13 will suffer an injury in fact which is of sufficient
14 immediacy to warrant a Section 120.57 hearing. Point
15 has merely alleged that it manages property that
16 receives electricity from various companies." And it
17 was on that basis that Point Management's request to
18 intervene was denied, but Valencia Condominium's
19 request to intervene was granted.

20 MR. MOYLE: Not being aware this was
21 coming, I guess my response would be twofold. One is
22 that clearly, on behalf of Valencia Condominium
23 Association, standing is here. But on a second point,
24 that's in a generic investigation, which is a docketed
25 proceeding which is separate and apart from what we

1 are here today on, which is a public rule hearing.

2 It's my understanding -- and, Mr. Hoffman,
3 correct me if I'm wrong -- that public hearings are
4 designed to receive input from the public as to a
5 proposed rule, and I'm not aware of public hearings
6 being limited only to people who have had a
7 determination made as a condition precedent that their
8 substantial interests are affected.

9 So I would say that the objection, if
10 that's what it is, is misplaced on that basis. I
11 mean, we have LEAF at the end of the table. I'm not
12 sure that they -- that there has been any ruling as to
13 whether their substantial interests are impacted by
14 this, yet they're here. Florida Power Corp., I'm not
15 sure there has been a determination that their
16 substantial interests are impacted. I think they
17 would be, but I just don't think it's a condition
18 precedent to being able to participate in a public
19 rule hearing that substantial interests have to be
20 shown.

21 THE HEARING OFFICER: Well, I can tell you
22 too from my perspective, anytime someone has filed a
23 petition to intervene in a rulemaking proceeding in
24 which I am involved on behalf of Staff, I have always
25 recommended to the hearing officer that that be

1 denied, because that's not necessary to participate in
2 a rulemaking proceeding. My understanding of 120 and
3 the Legislature's intent is that there be broad
4 participation in the rulemaking process, and I'm not
5 sure that it should be read so narrowly.

6 I wanted to look at the language as far as
7 who could request a hearing in 120, if you'll hold on
8 one minute.

9 In 120.54(3)(c), I think the standard is
10 that affected persons may request a hearing. Can you
11 read me the language again from the --

12 MR. HOFFMAN: Sure. Your Honor, first let
13 me point out that this rulemaking hearing is a
14 docketed proceeding like the generic docket. And just
15 for clarification, for the record, the petition to
16 intervene was filed by Mr. Moyle on behalf of both of
17 his clients in the generic docket, not in this docket,
18 and our objection is based on our position that Point
19 Management is not an affected person under the
20 rulemaking provisions of Chapter 120.

21 To answer your question, the language in
22 the order said, "Point has not shown that it will
23 suffer an injury in fact which is of sufficient
24 immediacy to warrant a Section 120.57 hearing. Point
25 has merely alleged that it manages property that

1 receives electricity from various companies."

2 Basically, because Point Management is
3 management company, Point Management Company is not a
4 customer that receives either individual metering or
5 master metering. The Commission found in the generic
6 docket that Point Management was not substantially
7 affected and did not have standing to intervene.
8 That's in a docket that clearly portends a broad range
9 of issues. My position is that in a docket such as
10 this, which has very limited scope, certainly there
11 would be no standing for Point Management to
12 participate.

13 THE HEARING OFFICER: Well, it looks like
14 to me that the Commission applied the Agrico test in a
15 generic investigation where the 120.57 proceeding
16 contemplated --

17 MR. HOFFMAN: That's accurate. That's
18 correct.

19 THE HEARING OFFICER: I've never heard of a
20 Agrico test being applied to any kind of participation
21 in a rulemaking proceeding. To me, the standards for
22 standing are very different. I think in a 120.57
23 proceeding you have to be substantially affected, and
24 here the Legislature has simply said that you have to
25 be affected. So I'm going to allow Point Management's

1 participation today.

2 Let me say this, though. Because they can
3 participate at this level before the Commission does
4 not in my mind mean that it would equate to them being
5 able to challenge the rule later in a 120.57
6 proceeding before DOAH.

7 MR. HOFFMAN: Okay. Thank you.

8 MR. MOYLE: Just one other point. I
9 appreciate the ruling. But if you took that argument,
10 then by the terms of your own notice, Mr. Hoffman
11 wouldn't be able to participate in this -- his client
12 wouldn't be able to participate in this either,
13 because in your summary of your statement of estimated
14 cost, you say that it's simply a proposed amendment
15 clarifying existing rule, and no investor-owned
16 utilities or individuals should be affected. So, you
17 know --

18 THE HEARING OFFICER: Well, clearly,
19 there's a room full of people here that think they are
20 affected by the amendment. And as I said, I think
21 Point Management can participate here today. I mean,
22 if we were to take any such statement and carry your
23 argument out to its logical conclusion, then there
24 would be some rulemaking proceedings where the
25 Commission would not offer a hearing because no one

1 could be affected, and I don't think that's what the
2 Legislature intend at all.

3 MR. MOYLE: I agree.

4 You asked for preliminary matters. I have
5 indicated, I believe, to all the parties and to
6 Mr. Bellack and to the hearing officer in this case
7 that because there was a procedural irregularity that
8 took place previously, and we have had a public
9 hearing on this rule before, that I would be willing,
10 if the other people here were willing, to simply
11 reference, incorporate, and adopt as if fully set
12 forth herein in today's hearing the records of those
13 two previous proceedings. One was on March 15th,
14 1999, commenced at 9:30 a.m. and concluded at 9:50
15 a.m., and the other was on May 5, 1999, commenced at
16 9:35 a.m. and concluded at 11:50 a.m.

17 There are a couple of legal arguments I
18 would like to make. But given the fact that my client
19 has already had an opportunity to pose questions and
20 whatnot, I'm not interested in necessarily re-creating
21 the wheel at this point. I do want to preserve for
22 the record the events that transpired below, and so I
23 guess that's appropriate as a preliminary matter.

24 THE HEARING OFFICER: I think it is
25 appropriate as a preliminary matter, and I would

1 certainly be amenable to that. That would be the
2 transcripts from the first hearing and then the
3 continuation of the hearing in May, all exhibits that
4 were accepted in both of those proceedings or
5 hearings, and also the post-hearing comments?

6 MR. MOYLE: Correct. I would say the
7 entire file, you know, the recommendation you made to
8 the PSC, just take the record that was made under this
9 proposed rule before and incorporate it and adopt it
10 as if set forth herein.

11 The only point of clarification I would
12 like to specifically have on the record would be the
13 time frame for which a potential rule challenge would
14 be filed on this rule. I think we talked previously
15 that it would be when a recommendation that you would
16 prepare goes back to the full Commission for their
17 action. I think that's what the record said below.
18 We could confirm that today.

19 THE HEARING OFFICER: I think the
20 Commission's interpretation of the final hearing for
21 rulemaking purposes has always been when the
22 Commission last acted, so that would be in this case
23 when I took a recommendation, hopefully timely, to the
24 Commission to recommend disposition of this amendment.

25 MR. MOYLE: Okay. I guess I shouldn't

1 argue the legal point now, but --

2 THE HEARING OFFICER: If you're talking
3 about the whole record, and you said Staff's
4 recommendation, then I think also included in that
5 should be the notice of withdrawal that was filed as
6 well.

7 MR. MOYLE: That's fine.

8 MR. HOFFMAN: If I may, may I make a couple
9 of comments in response to Mr. Moyle's objections?

10 THE HEARING OFFICER: Certainly.

11 MR. HOFFMAN: First, I guess as a point of
12 clarification, I think you said that we're going to
13 include the entire file up to this point in this
14 docket, basically, and that that would include the
15 transcript from the prior two hearings, the hearing
16 exhibits, and the post-hearing comments. Is there
17 anything else that was mentioned, the Staff
18 recommendation?

19 THE HEARING OFFICER: I think Mr. Moyle
20 mentioned the Staff recommendation, and I brought up
21 that if he thought that, then I think it would
22 appropriate also to do the notice of withdrawal.

23 MR. HOFFMAN: Okay. I would also want to
24 ensure that the transcript from the October 5, 1999
25 agenda conference and the vote sheet reflecting the

1 Commission's vote would also be included as a part of
2 the record.

3 THE HEARING OFFICER: Okay. I do not know
4 that a transcript was transcribed for that agenda
5 conference. It's not the Commission's normal practice
6 to transcribe its agenda conferences. Do you know
7 whether one was transcribed?

8 MR. HOFFMAN: Your Honor, I have a copy of
9 both documents, and I'll be happy to provide you and
10 the parties with a copy of those today.

11 THE HEARING OFFICER: Okay.

12 MR. HOFFMAN: Secondly, let me just state
13 that we do not object to Mr. Moyle's request, and we
14 think it's appropriate. During the course of the May
15 hearing, FP&L did raise essentially a continuing
16 objection to discussion, comments, testimony, what
17 have you, that concerned rate differentials and cost
18 differentials and conservation differentials and
19 conservation savings. And by agreeing to incorporate
20 the rate, I just want to make the record clear that
21 we're not waiving our objection as to the relevancy of
22 those issues within the limited scope of this docket.

23 Thank you.

24 THE HEARING OFFICER: Okay.

25 MR. MCGEE: If I may, I would like to say

1 that Florida Power also supports the adoption of the
2 previous record and the incorporation into this
3 proceeding. Florida Power would also like to make
4 clear that it continues to support the rule amendment
5 as proposed by Staff.

6 THE HEARING OFFICER: Okay.

7 MS. SWIM: And LEAF has no objection to
8 including the prior record.

9 MR. BEASLEY: Nor does Tampa Electric.

10 MR. MOYLE: I presume Commission Staff is
11 fine with that as well.

12 MR. BELLACK: That's correct.

13 THE HEARING OFFICER: Okay. Does anyone
14 else have any preliminary matters?

15 MR. HOFFMAN: Your Honor, at this time do
16 you want me to pass out and have marked for
17 identification the transcript from the October 5
18 agenda and the vote sheet?

19 THE HEARING OFFICER: Okay. I think
20 that's perfectly appropriate.

21 Well, let's do this. Let's identify as --
22 let me back up for a minute here.

23 We have prepared a composite exhibit for
24 Docket No. 981104 for today's hearing that includes
25 the FAW notice published on October the 22nd; the

1 materials provided to JAPC on October the 18th, 1999,
2 including a CERC; the Commission's notice of
3 rulemaking; Valencia and Point Management's request
4 for hearing; and FPL and TECO's comments that were
5 filed pursuant to the notice. Let's identify this
6 composite exhibit as Exhibit No. 1.

7 MS. SWIM: This is the one that was --

8 THE HEARING OFFICER: This is the one that
9 was over there on that table.

10 And let's identify as Exhibit 2 the record
11 from the March and May hearings, including -- so that
12 would be the transcripts, all exhibits accepted, and
13 the post-hearing comments, and then also included in
14 that, Staff's recommendation and the notice of
15 withdrawal.

16 And then as Exhibit Number 3, we'll do
17 yours.

18 MR. HOFFMAN: This was 3.

19 MR. MOYLE: Just for the record, that would
20 be a composite exhibit?

21 THE HEARING OFFICER: No. 2 would be a
22 composite exhibit. And No. 2 would also include --
23 well, never mind.

24 MR. MOYLE: And then No. 3 would be
25 Mr. Hoffman's transcript of the proceeding that

1 occurred on October 5, 1999?

2 THE HEARING OFFICER: Right.

3 MR. MOYLE: We have no objection to Exhibit
4 No. 3.

5 (EXHIBITS 1, 2 AND 3 WERE IDENTIFIED AND
6 RECEIVED IN EVIDENCE.)

7 THE HEARING OFFICER: Okay. Does anyone
8 have any other preliminary matters?

9 MR. HOFFMAN: Your Honor, are we at the
10 point from where Mr. Moyle is going to make some legal
11 argument?

12 THE HEARING OFFICER: I don't know.

13 MR. HOFFMAN: I'm trying to do this in an
14 orderly fashion. I do have an additional exhibit that
15 I would like to offer.

16 THE HEARING OFFICER: Well, what exhibit is
17 it, and I'll tell you whether I think this is an
18 appropriate time.

19 MR. HOFFMAN: It's an excerpt from the
20 Department of State's rule file concerning Rule
21 25-6.049, which dealt with an amendment to this rule.
22 There have been a number of amendments to this rule
23 over the years. And it contains a summary section
24 which provides the original intent of the rule, which
25 I think is relevant.

1 THE HEARING OFFICER: Okay. I don't know
2 that this is quite yet the right time.

3 MR. HOFFMAN: Okay.

4 THE HEARING OFFICER: In a rulemaking
5 proceeding, any person may present comments or make
6 suggestions concerning the rules. Those making
7 presentations are subject to questioning from others.
8 We will proceed informally without swearing witnesses.
9 The Commission Staff will make its presentation first
10 if it believes one is necessary, and then answer any
11 questions from other hearing participants, who may
12 make their presentations and receive questions after
13 the Staff. Brief rebuttal will be allowed.

14 Commission Staff, do you all wish to make
15 any statements?

16 MR. BELLACK: Staff has no additional
17 statement beyond what's being incorporated in the
18 record at this time.

19 THE HEARING OFFICER: Do any of the
20 utilities have any additional statements they wish to
21 make?

22 MR. MCGEE: None beyond those that are
23 incorporated.

24 THE HEARING OFFICER: Mr. Moyle?

25 MR. MOYLE: The Commission Staff has

1 previously, I think, given the basis for its proposed
2 rulemaking. I guess a question that I would have
3 would be what is the specific statutory authority that
4 the Commission believes expressly authorizes it to
5 adopt this rule.

6 THE HEARING OFFICER: I guess, Mr. Bellack,
7 that question would be directed towards you.

8 MR. BELLACK: I would like to look at the
9 statutes and reply further on in the proceeding, if
10 that's acceptable.

11 THE HEARING OFFICER: I'm sorry. Say that
12 again.

13 MR. BELLACK: I would like to consult the
14 statutes and reply further on in the proceeding, if
15 that's acceptable.

16 THE HEARING OFFICER: I guess before you
17 get started, I have a question of you, Mr. Moyle. In
18 your rulemaking hearing request, you request that a
19 statement of estimated regulatory cost be prepared.
20 Staff had prepared one after the May hearing, which
21 was included in the record. Is that one not
22 satisfactory, in your opinion? I'm a little bit
23 unclear as to what this request goes to.

24 MR. MOYLE: No. I think we simply were
25 exercising the ability we have under 120 to ask for

1 that. It has been prepared. I wouldn't say it's
2 satisfactory from my perspective. We disagree with
3 it, but it is what it is.

4 THE HEARING OFFICER: I guess my question
5 is, are you asking Staff to prepare another one?

6 MR. MOYLE: I'm comfortable, you know,
7 unless they have been persuaded by anything in the
8 intervening time. If they feel comfortable with the
9 previous statement they've prepared, you know, they
10 can redate it and submit it or stand by it.

11 THE HEARING OFFICER: Mr. Hewitt, do we
12 have a response?

13 MR. HEWITT: We're prepared to stand by it
14 as written.

15 MR. MOYLE: But just so record is clear, we
16 will preserve our right to challenge the statement as
17 prepared and its conclusions and whatnot, but I don't
18 necessarily need you to do another one that says the
19 same thing.

20 MR. BELLACK: Madam Hearing Officer, the
21 notice for the proposed rulemaking states the specific
22 authority that the Commission is relying on as Section
23 366.05(1) of the Florida Statutes. That responds to
24 Mr. Moyle's previous question.

25 MR. MOYLE: Thank you. I have no further

1 questions.

2 THE HEARING OFFICER: Well, was your
3 question as to the specific authority or the law
4 implemented?

5 MR. MOYLE: I asked as to the specific
6 authority. And I presume that is the answer that I
7 got; right?

8 THE HEARING OFFICER: Yes.

9 Mr. Moyle, did you have a statement that
10 you wanted to make?

11 MR. MOYLE: If there are any other
12 questions, I guess -- I mean, just for the record, the
13 law implemented is -- what is the statute being
14 implemented?

15 MR. BELLACK: It's listed as Section
16 366.05(3).

17 MR. MOYLE: Okay. And (1) is where you
18 believe you derive the express statutory authority?

19 MR. BELLACK: That's the specific
20 authority.

21 THE HEARING OFFICER: I think the reason
22 why I asked the question I did is because I think --
23 to me, the law implemented is also 366.05(1). I think
24 that's an error on our part. And I think the law
25 implemented is also in 366.05(1), and that should be

1 added as a law implemented when the rule amendment is
2 adopted, if it's adopted, or should be added to the
3 rule if the amendment is not adopted. I think that
4 should be added as the law implemented.

5 MR. MOYLE: Okay. The point I wanted to
6 make, which I think we may have some disagreement on,
7 is that I would argue that the Legislature in its last
8 session, the 1999 session, spoke to what is attempted
9 here today with respect to adopting a rule that has
10 retroactive impact, and would argue that it expressly
11 said, and I'm quoting from 120.54(2)(f), the last
12 sentence in there where it says, "An agency may not
13 adopt retroactive rules, including retroactive rules
14 intended to clarify existing law, unless that power is
15 expressly authorized by statute."

16 I would argue that this rule is doing just
17 what the Legislature said agencies are not permitted
18 to do, and would point out that the purpose and effect
19 as set forth in the notice of rulemaking says, and I
20 quote, "The purpose and effect clarifies that Rule
21 25-6.049(5)(a) only allows pre-1981 buildings to be
22 master metered that are not currently individually
23 metered." And for those reasons, I would argue that
24 the proposed rule is legally insufficient and should
25 not be adopted.

1 THE HEARING OFFICER: Does anyone care to
2 respond to that?

3 MR. MCGEE: Well, I think the same language
4 that Mr. Moyle read makes it clear that all the
5 Commission is doing is clarifying and codifying the
6 intent of the rule from the time that it was adopted.
7 There is no retroactive application here. And the
8 same with the assessment of the regulatory impact,
9 that there is no impact on the parties, because it's
10 simply a codification of existing Commission policy.

11 And for those reasons, it's perfectly --
12 it's appropriate, and it's consistent with the purpose
13 of codifying Commission policy so that anyone looking
14 at the rules of this Commission can understand and
15 discern just what the Commission's policy is with
16 respect to master metering and the prohibition that
17 restricts master metering for the purposes of
18 conservation and the other goals that we talked about
19 at the prior hearing, the transcript of which has been
20 incorporated into this record. So I don't see that
21 there's any concern with the retroactive application
22 when all we're doing is clarifying the intent of the
23 Commission that has been in existence since 1981.

24 MR. BEASLEY: I would endorse those
25 comments on behalf of Tampa Electric.

1 MR. HOFFMAN: On behalf of FP&L, I think
2 everyone understands by now that all this proposed
3 amendment does is clarify what has been longstanding
4 Commission policy in the application of this rule,
5 specifically, that a building that was built prior to
6 January 1 of 1981 simply cannot switch from individual
7 metering to master metering unless the building was
8 one of the types of buildings for which master
9 metering is expressly authorized under the rule, and
10 the building may only be master metered if it was
11 master metered prior to the January 1, 1981 date of
12 the rule. So there is no retroactive application by
13 virtue of this amendment.

14 And the only other thing I would add is
15 that this argument was raised at the October 5 agenda
16 conference and rejected by the Commission.

17 MS. SWIM: LEAF would join in the comments
18 of the utilities.

19 MR. MOYLE: That is on the record, isn't
20 it?

21 MS. SWIM: I know. Strange times.

22 MR. BELLACK: Madam Hearing Officer?

23 THE HEARING OFFICER: Yes, Mr. Bellack?

24 MR. BELLACK: The Staff would note that
25 what's prohibited in the statute are not rules

1 intended to clarify existing law, but only retroactive
2 rules intended to clarify existing law. And that
3 raises the question as to whether this is a
4 retroactive rule. And based on the arguments noted
5 previously, this is not a retroactive rule in the
6 understanding of the Commission Staff, because it's
7 not intended to have any retroactive effect, because
8 it doesn't differ from the policy already in place.

9 THE HEARING OFFICER: Mr. Moyle, did you
10 have anything further that you wanted to bring up?

11 MR. MOYLE: I would like to have an
12 opportunity to file a written brief like we did at the
13 last hearing, post-hearing comments. I think they
14 will largely address this issue and set forth some
15 legal argument as to why we have a differing view on
16 the retroactive impact of this proceeding.

17 THE HEARING OFFICER: Are you going to be
18 raising arguments different from what you have raised
19 today? I'm wondering whether the other parties or
20 participants here today should have an opportunity to
21 read those comments and respond or whether they can
22 they can file comments at the same time.

23 MR. MOYLE: I think the way we did it last
24 time is that everybody had three weeks or whatever it
25 was to file, had a uniform filing date. I would be

1 comfortable with doing it in the same fashion.

2 THE HEARING OFFICER: I don't think you
3 answered my question. Are you going to be raising
4 different arguments or additional arguments concerning
5 your presumed retroactivity of the rule?

6 MR. MOYLE: I believe that would be one
7 argument raised. I don't want to preclude myself from
8 raising others. I want to get a copy of the
9 transcript from today's proceeding -- and we've
10 incorporated and adopted the transcript of the
11 previous proceedings -- and have a chance to review it
12 and submit some post-hearing written comments.

13 THE HEARING OFFICER: Are you all
14 comfortable with filing at the same time?

15 MR. MCGEE: Well, the issue that you raised
16 certainly is one that has to be on the other parties'
17 minds. If there are arguments that are going to be
18 presented, in the interest of fully developing the
19 record on those arguments, the pros and cons, it would
20 be helpful to understand what those might be in
21 advance.

22 MR. HOFFMAN: I'm not sure what it is we're
23 supposed to brief other than what Mr. Moyle has raised
24 as this legal issue concerning the alleged retroactive
25 application of the rule. We've incorporated the last

1 record of the rulemaking hearing into this record, and
2 we filed post-hearing comments concerning that
3 record. So I guess to the extent that we can, I would
4 want notice of what it is we're supposed to brief
5 beyond that legal issue.

6 And the only other thing I would say is
7 that whatever it is that we decide here, Your Honor,
8 let's make sure we do it in a timely fashion so we can
9 get this thing done.

10 THE HEARING OFFICER: Well, I'm going to
11 address that.

12 MR. HOFFMAN: Okay.

13 MR. MOYLE: And I guess in response, it's
14 my present intent that most of the comments would be
15 addressed to this legal issue.

16 THE HEARING OFFICER: Well, although it's
17 highly irregular, let me make a proposal and see what
18 you think. What if you were to file your comments
19 first, and then the utilities, Staff, and LEAF, who
20 all seem to be united in this proceeding, could file
21 responsive comments to your comments, and then you
22 would have a chance for rebuttal. Does anyone object
23 to that?

24 MS. SWIM: Madam Hearing Officer, let me
25 raise a point that is a concern of LEAF's that I

1 haven't raised before. I don't really object to the
2 procedure that you proposed, but our perspective might
3 cause to you propose a different procedure.

4 THE HEARING OFFICER: Okay.

5 MS. SWIM: We agree with the intention that
6 Staff has here, but we're concerned that perhaps the
7 text could be interpreted in a different way. And I
8 wanted to express our concern and make a proposal to
9 perhaps clarify.

10 THE HEARING OFFICER: Okay.

11 MS. SWIM: My understanding is that, you
12 know, your intention is that these facilities can only
13 be master metered if they were master metered before
14 1981 and they've never been converted to an individual
15 meter. Is that an accurate statement of what the
16 purpose is here? Master metering is only permitted if
17 it was master metered before 1981 and they've never
18 been converted to an individual meter?

19 MR. WHEELER: Basically, the purpose of the
20 amendment was to clarify that grandfather provision.
21 In other words, if you were constructed pre-'81, but
22 you had individual metering, the rule would not allow
23 you to then at some subsequent date convert to master
24 metering. But if you were master metered prior to
25 '81, the grandfather provision will allow you to

1 remain master metered and to avoid those costs of
2 converting at that point.

3 MS. SWIM: And what if you were master
4 metered before 1981 and you converted to individual
5 meters? Could you then convert back if you decided
6 you wanted to?

7 MR. WHEELER: No.

8 MS. SWIM: Okay. I agree with those
9 intentions, and I'm concerned that the text could be
10 read to authorize a pre-'81 building that was
11 individually metered when it was built to convert to a
12 master meter because of the phrase "if not currently
13 individually metered." I think that might create an
14 incentive to convert.

15 THE HEARING OFFICER: Would you have a
16 suggestion to make it better?

17 MS. SWIM: Well, I think we could either
18 kind of add in the conversation that we just had that
19 stated the intentions, or we could add a provision
20 that says, "However, this provision shall not be
21 interpreted to authorize conversion of any such
22 pre-1981 facility from individual meters to master
23 meters."

24 MR. WHEELER: So you're saying that the
25 proposed language doesn't do what we wanted to do?

1 MS. SWIM: I'm concerned that it could be
2 read to authorize a conversion from a building that --
3 a pre-'81 building that was individually metered when
4 it was built to a master meter. And that concern
5 comes out of the text "if not currently individually
6 metered."

7 I mean, I have a level of comfort by the
8 fact that we now have on the record your intentions.
9 But since we are intending to clarify the rule here,
10 maybe we ought to think about how clear the rule is.

11 I feel like the way you described it just
12 now was very clear, and maybe we could look at that
13 text and put that in, or the suggestion that I have to
14 clarify the intention would work also.

15 THE HEARING OFFICER: Well, obviously, I
16 don't think Mr. Moyle is going to support any change
17 to further clarify it. So I think if we could still
18 hold to the schedule that I just proposed where
19 Mr. Moyle were to make his comments, then the
20 utilities, LEAF, and Staff could respond to Mr. Moyle,
21 and if they come up with any language to better
22 clarify the rule, they could include that in those
23 comments, and then Mr. Moyle could rebut.

24 MR. MOYLE: From my perspective, I guess
25 that's a little unusual with respect to a rulemaking

1 proceeding. Given the history of this one, I think it
2 seems to make some sense. I would just want
3 clarification that the comments that would be filed
4 would be in response to the comments filed by my
5 client, and it would not go out beyond what was raised
6 in our initial set of comments.

7 THE HEARING OFFICER: Except for to further
8 clarify the language of the rule.

9 MR. MOYLE: With respect to the point that
10 LEAF just raised.

11 THE HEARING OFFICER: Right. That would be
12 fine by me. Is that fine by everyone else?

13 MR. HOFFMAN: Yes.

14 MR. MCGEE: Yes.

15 MS. SWIM: Yes.

16 MR. BEASLEY: That's fine.

17 THE HEARING OFFICER: Because I think
18 everyone else has raised their -- made their
19 statements in the previous proceeding, which is now
20 incorporated into this one.

21 MR. MOYLE: That's acceptable.

22 THE HEARING OFFICER: Ms. Swim, was there
23 any other reason why you're here to participate? Was
24 there anything else that you wanted to bring up?

25 MS. SWIM: No, thank you.

1 THE HEARING OFFICER: Mr. Moyle, was there
2 anything else you wanted to bring up?

3 MR. MOYLE: I think that covers it. We
4 just need to I guess get the timing. We need to have
5 a transcript, and when the transcript is available --

6 THE HEARING OFFICER: Yes, we need to talk
7 about timing, which is what got us into trouble,
8 particularly the Staff into trouble the last time,
9 which is why we are here again.

10 MR. HOFFMAN: Your Honor, before you do
11 that, may I put another exhibit into the record?

12 THE HEARING OFFICER: Sure.

13 MR. HOFFMAN: I would ask that this
14 document be marked as Exhibit 4 and admitted.

15 THE HEARING OFFICER: Does the hearing
16 officer not get one?

17 MR. HOFFMAN: For the record, she does.

18 As I mentioned earlier, Your Honor, this is
19 a rule that has been amended over the years a number
20 of times. The amendment itself which is reflected in
21 this rule is not germane to the proceeding. However,
22 the fourth page of this document does contain a
23 summary of the rule, and in the second paragraph, the
24 document speaks to the original intent of this rule,
25 which we do believe is relevant.

1 THE HEARING OFFICER: So I'm assuming it's
2 that first sentence of the second paragraph under the
3 summary of the rule that you think is --

4 MR. HOFFMAN: Yes, ma'am.

5 MR. BELLACK: Could you read that into the
6 record?

7 THE HEARING OFFICER: "The original intent
8 of the rule was to restrict the instances where master
9 metering could be used and thereby require individual
10 meters wherever possible as a conservation measure."
11 And this is the certification filed by William Harrold
12 on September 14, 1988, of the Secretary of State -- or
13 it's dated September the 14th. It's not really clear
14 when it was filed.

15 Well, this exhibit, as well as the other
16 exhibits that have been identified today, are accepted
17 into the record.

18 MR. HOFFMAN: This would be Exhibit 4?

19 THE HEARING OFFICER: Yes.

20 (EXHIBIT 4 WAS IDENTIFIED AND RECEIVED IN
21 EVIDENCE.)

22 MR. MOYLE: I guess I just have -- I mean,
23 it says what it says, but -- I mean, are we familiar
24 enough with this to ask questions of it?

25 THE HEARING OFFICER: Well, Mr. Moyle, as I

1 recall, at the last hearing you brought forward some
2 exhibits that weren't even the complete exhibit, where
3 we were not even sure who the author was or didn't
4 have the complete one. So I think we were very
5 liberal in allowing those in, so I have no problem in
6 allowing this one in. Are you questioning the
7 authenticity of it?

8 MR. MOYLE: No, I don't have an objection
9 to it. I just want to ask a question about -- if it's
10 being offered as a summary of the rule, I wanted to
11 ask a question about one portion of the summary of the
12 rule, where specifically the last line says, "The
13 proposed revision of the rule would permit the use of
14 other reasonable apportionment methods in addition to
15 submetering," and ask what -- ask for clarification or
16 expansion on that point either from Mr. Hoffman's
17 viewpoint or from Staff's viewpoint.

18 THE HEARING OFFICER: I think that goes to
19 Subsection 6 or Paragraph (6)(a), where you can see
20 there was an amendment. But I guess I shouldn't be
21 the one talking.

22 MR. HOFFMAN: Your Honor, let me try to
23 respond. I know nothing more about this document
24 other than what the document itself says. And I
25 believe that that sentence is referring to the

1 amendment itself, which again is not germane to the
2 limited scope of this proceeding. I believe that was
3 an amendment, as reflected in this document, that
4 authorized other apportionment methods beyond
5 submetering for the owner of the facility, i.e., the
6 customer of record, to recover the cost of electric
7 service where master metering is authorized. I think
8 that's what this particular amendment in 1987 was
9 addressing.

10 MR. MOYLE: Do you think the amendment is
11 germane or not germane?

12 MR. HOFFMAN: I don't think it's germane.
13 I think the summary of the rule is germane, but the
14 amendment itself is not. But I wanted to include the
15 entire document, not just a portion of it.

16 MR. MOYLE: Just so we're clear, this
17 summary of the rule is not the summary of the rule as
18 the portion that we're debating today was originally
19 enacted; correct?

20 MR. HOFFMAN: That's incorrect. The reason
21 I have offered this exhibit is because the summary of
22 the rule clearly states that the original intent of
23 the rule, and this is Rule 25-6.049, was to restrict
24 the instances where master metering could be used and
25 thereby require individual meters wherever possible as

1 a conservation measure. And I think that's directly
2 on point.

3 MR. MOYLE: I don't disagree. All I'm
4 trying to find out is, from a timing perspective, is
5 this summary of rule the summary of rule that was
6 issued at the time the pre-1981 language was put into
7 the rule, or is this summary of the rule something
8 that was created four or five years down the road when
9 they did some amendments?

10 MR. HOFFMAN: Again, Mr. Moyle, my
11 knowledge of this document is no more than yours. I
12 can only look at the document. It appears as though
13 this was a document that was drafted and incorporated
14 in Docket No. 870295. That leads me to believe that
15 this summary of the rule was incorporated in 1987, if
16 not 1988. I don't know exactly when this was filed.

17 THE HEARING OFFICER: Well, I think that
18 the rule language attached answers your question. The
19 grandfather amendment that we're clarifying was
20 already a part of the rule.

21 MR. MOYLE: Okay. Again, I just wanted to
22 get it clear. I mean, this is the first time I've
23 seen the document. I just want to make sure I
24 understand what it's being offered for and the impact
25 of it.

1 MR. HOFFMAN: And just so we're clear, it's
2 being offered as evidence of the original intent of
3 this rule as it was adopted back in 1980 or 1981,
4 whichever it was, concerning the grandfathering of the
5 master metered buildings.

6 THE HEARING OFFICER: Does anyone have
7 anything else?

8 Okay. Let's talk about timing.

9 As I understand from my conversations with
10 JAPC concerning the new requirements in 120.54
11 concerning the timing of rulemaking, as long as we're
12 clear on the record, and if I publish a notice if
13 we're going to go past 45 days past the hearing as to
14 when the Commission will vote on my recommendation,
15 then we are smooth sailing.

16 I need to ask the court reporter how long
17 it will take for the transcript.

18 THE REPORTER: Joy determines that, but
19 probably a week.

20 THE HEARING OFFICER: A week? Okay. Today
21 is December the 2nd. If we get the transcript back by
22 December the 9th, three weeks from that is December
23 the 30th. That's with the Christmas holidays in
24 between.

25 Is that going to create a problem,

1 Mr. Moyle? Is three weeks sufficient from the date of
2 the transcript?

3 MR. MOYLE: I think it would work fine. If
4 I have a problem, I'll just let you know, maybe file
5 something. But I think that should work.

6 THE HEARING OFFICER: Okay. So Mr. Moyle
7 will offer his comments on December the 30th, and then
8 the utilities, Staff, and LEAF will have an
9 opportunity to respond to Mr. Moyle's comments, as
10 well as to suggest clarifying language to the rule if
11 you believe that's necessary. If we do three weeks
12 from there, that is going to be January the 20th. Is
13 that enough time?

14 MR. BEASLEY: Yes.

15 THE HEARING OFFICER: And then do you need
16 three weeks after that, Mr. Moyle, to --

17 MR. MOYLE: That will be fine.

18 THE HEARING OFFICER: So that would be
19 February the 10th. Mr. Moyle will have an opportunity
20 to rebut. And I recognize this is highly irregular to
21 do this in a rulemaking proceeding, but I think that
22 it is appropriate concerning the unique situation that
23 we are in here today.

24 So then from there, then I will file a
25 recommendation to the Commission. And typically when

1 there's a hearing officer like myself for a rule
2 hearing, then I'm the only one that will be able to
3 discuss the rule with the Commission, and I will be
4 the only one that signs off on the recommendation.

5 The only agenda in March on my calendar is
6 March the 28th. Let me check and make sure that's
7 right. It looks like the only agenda in March is
8 March 28th. So I will file my recommendation on March
9 the 16th and then take it to agenda on March the 28th,
10 and then act accordingly based upon the Commission's
11 decision from there. And this schedule does not
12 include filing any kind of revised CERC.

13 MR. MOYLE: We would stipulate that the one
14 that has been previously filed is incorporated and
15 adopted as if fully set forth after today's date.

16 THE HEARING OFFICER: So is everyone fully
17 aware of that schedule?

18 MS. SWIM: I have a question, Madam Hearing
19 Officer.

20 THE HEARING OFFICER: Okay.

21 MS. SWIM: I don't have any problem with
22 going with the current certification, but I'm
23 concerned -- I wanted to make sure that if Staff came
24 to believe or you came to recommend that there needed
25 to be a clarification of the text that that would be

1 possible without recertifying.

2 THE HEARING OFFICER: Yes.

3 MS. SWIM: Thank you.

4 THE HEARING OFFICER: You would have to
5 convince me in your post-hearing comments that your
6 suggested text is better than what's in the rule, and
7 I would have to recommend that to the Commission.

8 MS. SWIM: Right. But it wouldn't create a
9 need to recertify or anything like that?

10 THE HEARING OFFICER: No. But the thing is
11 that in order to do that, that has to be included in
12 the record of the hearing. I can't recommend a change
13 that's not already in the record.

14 MS. SWIM: Okay. Thank you.

15 MR. HOFFMAN: Let me raise the possibility
16 of an alternative.

17 THE HEARING OFFICER: Okay.

18 MR. HOFFMAN: I disagree that there's
19 anything particularly unique about this rulemaking.

20 Basically, where we're at compared to where
21 we were in the May, summer time frame of this process
22 is, we've republished the rule. The Commission has
23 ordered that the rule be republished, and in doing so,
24 rejected a recommendation to roll the rulemaking into
25 the generic docket. And at the agenda Mr. Moyle

1 raised and the Commission rejected, and he has again
2 raised today the issue of a potential statutory
3 impediment to this rule, the allegation that it would
4 violation the provisions of 120.54(2)(f).

5 What I would suggest and ask Mr. Moyle is,
6 unless there is some other issue that is out there
7 that he's not making us aware of, why don't we all
8 just address the retroactive statutory issue
9 simultaneously, together with the opportunity for LEAF
10 or anyone else to suggest alternative rule language,
11 and let's move forward?

12 THE HEARING OFFICER: That's fine with me.
13 I was simply trying to help you all out as far as --

14 MR. MOYLE: I thought we just agreed to an
15 unusual proceeding that would give them the benefit of
16 doing that. I thought that's what we just spent all
17 this time working out. I think it makes sense to me.
18 We ought to stick with it.

19 THE HEARING OFFICER: I mean, if you all
20 are comfortable filing comments at the same time as
21 Mr. Moyle, that's --

22 MR. HOFFMAN: I am very comfortable --

23 THE HEARING OFFICER: -- fine with me.

24 MR. HOFFMAN: All I'm trying to convey,
25 Your Honor, is that I don't think there's anything

1 unique about what has happened here other than the
2 time period has expired on the first go-round.

3 I do think that there was a clear statement
4 from the Commissioners on the record that they wanted
5 to move forward with this. And I think that the
6 process that's being discussed is not the type of
7 process that moves us forward in an expedited way and
8 an orderly way.

9 Now, it's not overly objectionable to me,
10 but I think that unless there is some issue that
11 Mr. Moyle has that he has not raised to date, why
12 can't we all agree to brief the issue of the potential
13 retroactive application of this rule simultaneously,
14 together with any proposed alternatives to the rule
15 language, and let's move forward with this thing?
16 That would be my alternative suggestion.

17 MR. BEASLEY: We would be willing to abide
18 by that suggestion.

19 MR. MCGEE: That presumes then that the
20 issue is the retroactive application, whether or not
21 there is that. And I guess the concern that we had
22 expressed before is whether or not there might be some
23 other issues that would come out. If it's agreed by
24 all the parties that that is the issue that will be
25 raised, I think that's perfectly acceptable.

1 MR. MOYLE: And I'm just not going to
2 agree to that. I told them -- I've been up-front with
3 everybody. I've given people a heads-up on things.
4 That will be an issue. But I'm going to take these
5 transcripts, and we're going to go back, and we're
6 going to go through them and look at what has been
7 raised and put together the best legal brief that we
8 can. And I'm not going to stipulate or agree that
9 it's going to be limited to one issue.

10 MR. HOFFMAN: Well, I think that Mr. Moyle
11 can raise the same issues that he raised in the
12 post-hearing comments that he filed last time based on
13 the same record, which makes up the bulk of this
14 record.

15 I am willing to move forward on a
16 simultaneous filing basis based on Mr. Moyle's
17 representation that he does believe there's an issue
18 concerning retroactive application and a problem under
19 Chapter 120. And if Mr. Moyle raises something else,
20 he raises something else.

21 THE HEARING OFFICER: Mr. Bellack?

22 MR. BELLACK: Well, I believe that the more
23 recent suggestion is the appropriate procedure for
24 rulemaking. And I would note that no amount of
25 briefing can conclusively determine that an issue is

1 exhaustively -- that either an issue or all issues are
2 exhaustively presented. So there's always a somewhat
3 arbitrary compromise as to the process coverage and
4 the process efficiency, and I think that the simpler
5 process is the appropriate process for this
6 proceeding.

7 But on the other hand, if any party raises
8 an issue that the bench feels needs more information
9 from the parties, the bench can always come back to
10 the parties and request further clarification on
11 whatever that additional issue may be.

12 THE HEARING OFFICER: I do agree with that.

13 So I guess it comes down to you, Mr. McGee
14 and Ms. Swim, whether you all are comfortable with the
15 schedule as I had just set it out or if you're
16 comfortable with filing comments at the same time as
17 Mr. Moyle.

18 MR. MCGEE: Well, with the opportunity that
19 you just referred to about opening it up if --

20 THE HEARING OFFICER: Well, that's if I
21 think I need more information.

22 MR. MCGEE: Right. And I'm not
23 uncomfortable in trusting your judgment on that,
24 certainly. And if that does allow to us to compress
25 the schedule, then I have no objection to that.

1 MS. SWIM: Either of the procedures is
2 acceptable to LEAF.

3 THE HEARING OFFICER: All right. So that
4 means that everyone's comments will be due on December
5 the 30th, the last filing day before the New
6 Millenium.

7 Then the next agenda date where I would be
8 able to file a recommendation would be for the
9 February 15th agenda, and that recommendation would be
10 due on February the 3rd. So everyone --

11 MS. SWIM: I wonder if we might -- since I
12 have some out-of-town travel plans and I'll be
13 returning on December 29th, if we could just make it
14 January 2nd. I don't have a calendar in front of me,
15 but it would be preferable if I could do it when I was
16 in town rather than out of town.

17 MR. MOYLE: Since we compressed it greatly
18 with the alternative suggestion, you know, with the
19 holiday time, why don't we throw another week or ten
20 days on that end, and you can still make your February
21 15th. We ought to try to do it so that whatever the
22 last day is, you can still make that February 15th.
23 And I apologize. I don't have a calendar in front of
24 me.

25 THE HEARING OFFICER: Well, I'll tell you

1 what. I can guarantee you that I'm not going to look
2 at it before January the 21st, so January the 21st is
3 when the comments will be due.

4 MS. SWIM: Thank you.

5 THE HEARING OFFICER: And that gives me --
6 okay. Just so we're all clear -- and that will give
7 you more time for the transcript. So the transcript
8 will be filed on December -- let's just go ahead and
9 give you -- I believe it's customary for us to give
10 you two weeks. Let's just go ahead and do that. The
11 transcript will be filed on December the 16th.
12 Everyone's comments are due on January the 21st. My
13 recommendation will be filed on February the 3rd for
14 the February 15th agenda.

15 Let me just check one thing and make sure
16 that's -- with the understanding that if I think that
17 I need additional information, I will request it of
18 the parties, which would more than likely change the
19 time for the agenda.

20 Does anyone have anything further?

21 MR. HOFFMAN: A concern was raised that
22 February the 3rd may fall on a weekend day. I just
23 don't know.

24 THE HEARING OFFICER: Well, according to
25 the Commission calendar, February 3rd is a Thursday.

1 And according to my calendar which I made myself,
2 which is probably following the Commission calendar,
3 February the 3rd is a Thursday. Does anybody have a
4 calendar that was printed by someone?

5 MR. VALDEZ: The only reason why I asked
6 is, we're due out in Albuquerque for a conference, and
7 on the 2nd I think I'm supposed to be flying out,
8 which I believe --

9 THE HEARING OFFICER: Is a Wednesday.

10 MR. VALDEZ: -- is a Friday.

11 THE HEARING OFFICER: Does anybody have a
12 checkbook?

13 MR. VALDEZ: If it's a Thursday, I stand
14 corrected.

15 MR. MOYLE: Thank you for your time.

16 THE HEARING OFFICER: This hearing is
17 concluded.

18 (Proceedings concluded at 10:33 a.m.)

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STATE OF FLORIDA)

:

CERTIFICATE OF REPORTER


COUNTY OF LEON)

I, MARY ALLEN NEEL, RPR,

DO HEREBY CERTIFY that the hearing in Docket No. 981104-EU was heard by Mary Anne Helton, Hearing Officer, at the time and place herein stated; it is further

CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript, consisting of 47 pages, constitutes a true transcription of my notes of said proceedings.

DATED this 15th day of December, 1999.



MARY ALLEN NEEL, RPR
100 Salem Court
Tallahassee, Florida 32301

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