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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In The Matter of	:	DOCKET NO. 910056-PU
Complaint of Consumer	:	
John Falk Regarding Resale	:	<u>PREHEARING CONFERENCE</u>
of Electricity and Gas	:	
by the H. Geller	:	
Management Company.	:	

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 Florida Public Service Commission

Office of Commissioner Gunter
 Room 119, Fletcher Building
 101 East Gaines Street
 Tallahassee, Florida 32399
 Wednesday, April 10, 1991

Met pursuant to notice at 9:30 a.m.

BEFORE: COMMISSIONER GERALD L. GUNTER
Prehearing Officer

APPEARANCES:

C. EVERETT BOYD, JR., of Ervin, Varn, Jacobs,
 Odom & Ervin, Post Office Drawer 1170, Tallahassee,
 Florida 32302, Telephone No. (904) 224-9135, appearing
 on behalf of H. Geller Management Corporation.

DAVID A. LAMONT, Post Office Box 13576, St.
 Petersburg, Florida 33733-3576, Telephone No. (813)
 327-3935, appearing telephonically on behalf of John
 Falk.

DOCUMENT NO.
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 4/12/91

1 APPEARANCES CONTINUED:

2 MICHAEL A. PALECKI, Florida Public Service
3 Commission, 101 East Gaines Street, Tallahassee,
4 Florida 32399-0863, Telephone No. (904) 487-2740,
5 appearing on behalf of the Commission Staff.

6 PRENTICE P. PRUITT, Florida Public Service
7 Commission, Office of the General Counsel, 101 East
8 Gaines Street, Tallahassee, Florida 32399-0861,
9 Telephone No. (904) 488-7463, Counsel to the
10 Commissioners.

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19 REPORTED BY:

CAROL C. CAUSSEAU, CSR, RPR
Official Commission Reporter

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P R O C E E D I N G S

(Hearing convened at 9:37 a.m.)

(Commissioner Gunter made telephone contact with Mr. Lamont.)

COMMISSIONER GUNTER: Mr. Lamont, we have in the room Mr. Boyd representing the Geller Management Corporation, we have Mike Palecki, Prentice Pruitt, the court reporter and myself and we will follow -- do you have a copy of the draft prehearing order?

MR. LAMONT: I sure do.

COMMISSIONER GUNTER: Okay. Just procedurally, and before we get started, my process is to go through the Prehearing Order page-by-page, make sure that we have the positions of the parties, the exhibits, this kind of stuff, see how close we are on the draft Prehearing Order.

MR. LAMONT: All right.

COMMISSIONER GUNTER: Once we run through the suggestions, perhaps suggested changes or positions of the parties, or whatever, then this will be put into final form for my signature, which we will use a road map in the conduct of the proceeding.

MR. LAMONT: Very good.

COMMISSIONER GUNTER: First, I want to make sure and put onto the record that we are deviating from

1 our normal procedure, and primarily because of the
2 health of your client.

3 MR. LAMONT: For which he is most
4 appreciative.

5 COMMISSIONER GUNTER: And with the
6 notification that we have received from his physician,
7 we are deviating from, one, having the hearings, which
8 are normally held in Tallahassee, we are going to hold
9 the hearing, because of the advice of his personal
10 physician that he not travel, as well as to attempt to
11 minimize expense for somebody that is in your client's
12 condition.

13 MR. LAMONT: Ver, good. I appreciate that.

14 COMMISSIONER GUNTER: All right, the hearing
15 will come to order and Mike will read the notice.

16 MR. PALECKI: Pursuant to notice issued March
17 21, 1991 --

18 COMMISSIONER GUNTER: Can you hear him?

19 MR. LAMONT: I can.

20 COMMISSIONER GUNTER: Okay.

21 MR. PALECKI: -- a Prehearing Conference was
22 set for 9:30 a.m., April 10th, 1991, at 101 East Gaines
23 Street, Room 106, Fletcher Building, Tallahassee,
24 Florida. I would point out that this prehearing is not
25 being held in Room 106, it is being held in

1 Commissioner Gunter's office but that notices have been
2 placed on each of the entranceways of Room 106
3 indicating where the prehearing has been moved to.

4 COMMISSIONER GUNTER: All right. We will
5 take appearances, and we start with you, sir, Mr.
6 Lamont.

7 MR. LAMONT: I am David A. Lamont, appearing
8 on behalf of the complaining consumer, John Falk.

9 COMMISSIONER GUNTER: All right. Mr. Boyd?

10 MR. BOYD: I'm C. Everett Boyd, Jr., of the
11 law firm of Ervin, Varn, Jacobs, Odom & Ervin, Post
12 Office Drawer 1170, Tallahassee, appearing on behalf of
13 H. Geller Management Corporation.

14 MR. PALECKI: Michael A. Palecki, 101 East
15 Gaines Street, appearing on behalf of the Commission
16 Staff.

17 MR. PRUITT: And I am Prentice P. Pruitt, of
18 the same address, Counsel to the Commissioners.

19 COMMISSIONER GUNTER: All right. The process
20 we follow is we will go through page-by-page on the
21 Prehearing Order, and we will start on Page 1,
22 continuing on to the top of Page 3 on the background of
23 the case. Do you have any comments on the background
24 of the case, Mr. Lamont?

25 MR. LAMONT: No, I do not.

1 COMMISSIONER GUNTER: All right, Mr. Boyd?

2 MR. BOYD: Yes, sir. And, Commissioner, this
3 was just picked up about 5:00 yesterday afternoon, so I
4 am really looking at it for the first time. I just see
5 the first sentence refers to the service and
6 maintenance agreement with Terrace Park of Five Towns.
7 I think, Mike, that should be the full name of the
8 Association, it's just right off the contract.

9 MR. PALECKI: All right. Could you recite
10 that into the record?

11 COMMISSIONER GUNTER: You all are going to
12 have to speak up so that Mr. Lamont will make sure that
13 he hears it all.

14 MR. BOYD: Yeah. It's Terrace Park of Five
15 Town No. 15, Inc.

16 COMMISSIONER GUNTER: Okay, and that's
17 straight off of the contract?

18 MR. BOYD: Yes, sir.

19 COMMISSIONER GUNTER: Okay.

20 MR. PALECKI: We will make that change. Any
21 other changes that you can see in the background?

22 Most of the facts in the background were
23 taken from the Supreme Court opinion of Public Service
24 Commission versus Bryson. I lifted the facts out of
25 the opinion itself.

1 MR. BOYD: That appears to be okay.

2 COMMISSIONER GUNTER: Okay. It appears now
3 we are down to the order of witnesses on Page 3.

4 MR. PALECKI: We have an issue on the use of
5 prefiled testimony.

6 COMMISSIONER GUNTER: Oh, okay.

7 MR. PALECKI: The second paragraph, we would
8 point out that Mr. Falk, as a consumer, is unable to
9 compel Florida Power Corporation, which isn't a party
10 here, to prefile testimony. They have listed as a
11 witness Samuel Nixon, despite the fact that Mr. Nixon
12 has not prefiled testimony. And I think that the
13 complainant, as a private citizen, should be permitted
14 to call Mr. Nixon.

15 I have talked to Florida Power Corp and they
16 have assured me that Mr. Nixon will be present. We
17 have been requested to issue a subpoena by Mr. Falk and
18 we are going to issue that subpoena for Samuel Nixon.

19 COMMISSIONER GUNTER: Mr. Boyd?

20 MR. BOYD: Commissioner, I raised this with
21 Mike Friday when I received a copy of their prehearing
22 statement filed by Mr. Falk. And I object to Mr. Nixon
23 being permitted to testify in that Mr. Falk filed his
24 prefiled testimony some three weeks ago now, I believe,
25 or three and a half weeks ago. It was three weeks

1 prior to Friday, and Friday was the first time that we
2 had notice of Mr. Nixon testifying.

3 There is a letter, a two-paragraph letter of
4 Mr. Nixon that is attached to his complaint. But there
5 was no indication, no inquiry, no request for subpoena
6 or other notice to me. I take Mike's response to be an
7 attempt to try to accommodate Mr. Falk or to get the
8 testimony.

9 We object to him being permitted to testify.
10 If he is going to testify, we think that we should be
11 able to not only take his deposition, but also have the
12 opportunity to file responsive testimony to it.

13 COMMISSIONER GUNTER: In other words, file
14 rebuttal testimony?

15 MR. BOYD: Yes, sir.

16 COMMISSIONER GUNTER: Okay, let me ask a
17 question, and this question would be of you, Mr.
18 Lamont.

19 MR. LAMONT: Yes, sir.

20 COMMISSIONER GUNTER: Is the purpose -- and,
21 you know, this is unusual and I am asking some
22 questions that maybe I normally would not ask -- but is
23 the purpose of this testimony, is it rate testimony
24 that you are after from Mr. Nixon?

25 MR. LAMONT: Yes, sir, Commissioner. Mr.

1 Nixon prepared a letter which is attached to the
2 complaint filed by John Falk before the Commission.

3 COMMISSIONER GUNTER: Uh-huh.

4 MR. LAMONT: And the only reason, and the
5 only thing that Mr. Nixon would say that I would ask
6 him would be what he put in the letter. I don't know
7 if the Commission might have questions for him beyond
8 that, but the only purpose of his testimony, and the
9 only purpose of our listing him as a witness would be
10 to have him available in the event that the Commission
11 wanted to ask some questions about the letter that he
12 sent to John Falk after having done what he did, in
13 terms of looking at the various computations that
14 Geller made and that Falk made. That's the only
15 purpose.

16 If Mr. Boyd wants to depose him and file
17 rebuttal testimony, I certainly have no objection to
18 that. But Mr. Nixon's involvement in this would be
19 limited to whatever the Commission might want to ask
20 him about the letter that is a part of the complaint.

21 COMMISSIONER GUNTER: The letter, what does
22 the letter -- I have not read the letter, and I'm going
23 to ask both you and Mr. Boyd, Mr. Lamont, to
24 characterize the letter. What was the
25 characterizations made in the letter, was it rate

1 comments?

2 MR. LAMONT: Well, it was that under the
3 contract, under the maintenance contract there is a
4 formula for computing increases in maintenance fees.
5 The maintenance fees go up in accordance with increases
6 in the rate per kilowatt hour charged by Florida Power
7 Corporation. Mr. Falk is of the opinion that the
8 manner in which Geller had made computations of how
9 much the per kilowatt hour rate went up, that those
10 computations were wrong.

11 He wrote to, or contacted Florida Power, and
12 Mr. Nixon looked at the way that Mr. Falk computed the
13 increase in the per kilowatt hour rate and he looked at
14 the way that Geller computed the increase in the per
15 kilowatt hour rate, and Mr. Nixon drew the conclusion
16 that Mr. Falk was right and Mr. Geller was wrong. And
17 the letter that he wrote was simply to that effect. It
18 was a response letter back to Mr. Falk saying that he
19 had looked at the two methods of calculation and that
20 he believed that Mr. Falk's calculation to be correct.
21 That is the substance of the letter.

22 COMMISSIONER GUNTER: All right. Mr. Boyd,
23 do you read this thing the same way? Again, I have not
24 read it yet.

25 MR. BOYD: Yes, sir, that is essentially

1 correct. Apparently, Mr. Falk provided him some
2 calculations. I don't what else he may have provided
3 him, and he wrote, essentially, a two-substantive-short-
4 paragraph letter. From hearing Mr. Lamont, I assume his
5 testimony would be limited to explaining the letter, which
6 gets somewhat to the difficulty that we have because, in
7 effect, he is being called on to interpret this contract.
8 But certainly if he's going to be able to testify, then we
9 need to be able to either take his deposition and/or
10 respond to the testimony.

11 COMMISSIONER GUNTER: The reason I asked the
12 question the way I did, Mr. Lamont, if it had to do
13 with rates, and changes in rates, the Commission has
14 within its walls here, we've got the tariffs, the
15 approved tariffs of the company and probably -- and I
16 am saying "probably" -- have the previous tariffs.

17 MR. LAMONT: Uh-huh.

18 COMMISSIONER GUNTER: And it becomes a
19 relatively simple process for us to take notice of
20 tariffs that have been filed and approved by this
21 Commission for delivery of electric service. And
22 that's the reason that I asked did it have to do with
23 tariff rates as versus interpretation of contracts.
24 Because I would wonder if, in fact, somebody from
25 Florida Power Corp would be in a position to interpret

1 a contract between the parties.

2 MR. LAMONT: Yeah. I don't agree with Mr.
3 Boyd's characterization of Mr. Nixon's efforts as being
4 an interpretation of the contract. What Mr. Nixon did
5 was try to look at the manner in which Geller and Falk
6 were determining the increase in the per kilowatt hour
7 rate being charged by Florida Power. That is not a
8 matter of contract. I understand that there may or may
9 not be, from Mr. Boyd's perspective, an issue as to
10 what the per kilowatt hour rates means under the
11 contract. But Mr. Nixon's involvement was simply to
12 say that, "This is the difference in per kilowatt hour
13 rate being charged by Florida Power between X date and
14 Y date."

15 So it's not really a matter of contractual
16 interpretation as much as it is a matter of setting
17 forth what the change in the per kilowatt hour rate was
18 being charged by Florida Power.

19 COMMISSIONER GUNTER: If you want to call Mr.
20 Nixon solely for the purpose, Samuel Nixon, solely for
21 the purpose of presenting to the Commission the
22 difference in rates from whatever time to present, is
23 that what I am interpreting the purpose of calling him
24 for?

25 MR. LAMONT: That is correct.

1 COMMISSIONER GUNTER: And we already have
2 that data within the bowels of the Commission, in those
3 filed tariffs.

4 Mr. Boyd, if you -- you know, if we allow him
5 to be called, you know, subpoenaed on the part of Mr.
6 Falk --

7 MR. BOYD: Yes, sir.

8 COMMISSIONER GUNTER: -- and it's limited for
9 that very narrow purpose as to what the rates were at
10 Point A versus what the rates are at Point B, does that
11 in any way lessen your concern?

12 MR. BOYD: Yes, sir. If all he is going to
13 testify is to what their rates were, then it lessens my
14 concerns greatly.

15 COMMISSIONER GUNTER: And am I understanding
16 -- I want to make sure I am understanding this, Mr.
17 Lamont. If we are talking about Point -- like, for
18 instance, and I'm trying to understand this -- if they
19 were \$11, something is being charged at \$11 -- excuse
20 me, at \$10 -- and then they were changed to \$11, a
21 simple mathematical calculation would say that they had
22 increased 10%.

23 MR. LAMONT: Right.

24 COMMISSIONER GUNTER: Am I interpreting that
25 that is what you want to call Mr. Nixon for?

1 MR. LAMONT: That is essentially correct. I
2 mean, I don't know how deep into the facts that you
3 want to go, but what Mr. Nixon --

4 COMMISSIONER GUNTER: It's not my case.

5 MR. LAMONT: Well, what Mr. Nixon indicated
6 in his letter was that Geller, in making the
7 calculation as to the change in the kilowatt hour rate
8 that was being charged by Florida Power, was excluding
9 certain costs that show up on the bill, Mr. Nixon said
10 they have to be included in the per kilowatt hour cost
11 because they are a part of the per kilowatt hour cost.
12 And the sole statement that he made in his letter that
13 is pertinent to Mr. Falk's complaint is that you have
14 to include those certain costs. Geller didn't, Falk
15 did, and therefore, Falk's calculation for the increase
16 were correct.

17 MR. PALECKI: He is referring to fuel charges
18 and other charges that appear on there.

19 COMMISSIONER GUNTER: Sure, there are a
20 number of those. There is a customer charge, there is
21 a fuel charge, there is a conservation charge. There
22 are a number of elements that go into the bottom line
23 bill that a customer receives, and those are all
24 tariffed and/or approved by the Commission. Fuel
25 adjustment and conservation are approved by the

14 deposition and that he would have no objection to that
15 deposition being conducted over the telephone so that
16 the attorneys would not have to travel down to St.
17 Petersburg just to take that deposition. It may help,
18 as far as completing any discovery that has to be done.

19 MR. BOYD: Well, Commissioner, I think if we
20 can --

21 COMMISSIONER GUNTER: Why don't we just think
22 about this? We're going to move on and we will leave
23 this as an item that we will come back to and let
24 everybody just sort of, you know, subconsciously think
25 about it as we move along. But we will come back to

1 this.

2 On the order of witnesses -- we're just
3 temporarily passing that last paragraph under "Use of
4 Prefiled Testimony." So then under "Order of
5 Witnesses," are your orders of witnesses correct, Mr.
6 Lamont?

7 MR. LAMONT: That they are.

8 MR. PALECKI: I need one additional piece of
9 information from Mr. Lamont, and he can give it to me
10 later, but on Witness No. 3, Samuel Nixon, I need the
11 actual issues that he will be testifying to, and just
12 the issue numbers would be sufficient.

13 MR. LAMONT: Okay.

14 COMMISSIONER GUNTER: All right. Mr. Boyd,
15 are yours stated correctly, your witnesses, and in the
16 order that you would like for them to appear?

17 MR. BOYD: The order is fine, Commissioner.
18 And just skimming, it appears to be the summary that we
19 furnished in the prehearing statement, so it appears to
20 be okay.

21 COMMISSIONER GUNTER: Okay.

22 MR. PALECKI: Mr. Boyd, we would also like to
23 have from you information as to exactly what issues
24 Carl Parker and Charles Parmelee will testify to. Was
25 it all issues? I'm not certain that that appeared in

1 your prehearing statement. (Pause)

2 MR. BOYD: Mike, I will just have to double
3 check on that.

4 MR. PALECKI: If you could provide that to me
5 sometime later on today.

6 MR. BOYD: Sure, that's fine.

7 COMMISSIONER GUNTER: All right. And
8 rebuttal, for right now the only rebuttal witness that
9 we have is John Falk, and we will leave that open on
10 Witness No. 3, as well as providing -- you know, when
11 we come back, it may be that Mr. Boyd will want to have
12 a rebuttal witness to Mr. Nixon, as he talked about
13 previously.

14 On the exhibit list, we will not number
15 these, we will number these at the hearing. But are
16 there any additional exhibits that you know of, Mr.
17 Boyd?

18 MR. BOYD: No, Commissioner, those appear to
19 be all of the exhibits that we had put together.

20 COMMISSIONER GUNTER: Okay. And, Mr. Lamont,
21 you have one exhibit?

22 MR. LAMONT: Yes, Commissioner, that being
23 the complaint and all of the attachments thereto.

24 COMMISSIONER GUNTER: Okay.

25 MR. PALECKI: I would just like to advise Mr.

1 Lamont, as he doesn't practice in front of the
2 Commission regularly, that at the hearing we will need
3 copies of the exhibits for all participants.

4 MR. LAMONT: Okay.

5 COMMISSIONER GUNTER: That would be the court
6 reporter, the Commissioners, and all the parties that
7 are present at the proceeding.

8 MR. LAMONT: Okay.

9 COMMISSIONER GUNTER: Okay. We are on Page 8
10 now, the parties' statement of basic position.

11 Is yours stated correctly?

12 MR. LAMONT: It is.

13 COMMISSIONER GUNTER: Mr. Boyd, I know you
14 haven't had a chance to --

15 MR. BOYD: It is, subject to check,
16 Commissioner.

17 Mike, I assume that you drew this from our
18 prehearing statement?

19 MR. PALECKI: Yes, and if there are any
20 typographical errors, you can advise me of those and we
21 will correct them.

22 COMMISSIONER GUNTER: And for both you and
23 Mr. Boyd, Mr. Lamont, if you see anything in your
24 re-review, once we get through, if there are any
25 wordage changes, typos, things of that kind, if you

1 will get with Mr. Palecki he will make those
2 corrections, or what have you, so that when we have the
3 final prehearing order, we won't have to start off the
4 hearing trying to go through and dot the "i's" and
5 cross the "t's."

6 MR. LAMONT: Very good, I will do that.

7 COMMISSIONER GUNTER: Okay, fine.

8 All right, we are on Page 9, on the Statement
9 of Issues and Positions. Is your response to Issue 1
10 stated correctly, Mr. Lamont?

11 MR. LAMONT: Yes, sir, it is.

12 COMMISSIONER GUNTER: Mr. Boyd?

13 MR. BOYD: Yes, sir.

14 COMMISSIONER GUNTER: All right. Then on
15 Issue 2?

16 MR. LAMONT: Yes, sir.

17 COMMISSIONER GUNTER: It is stated correctly?

18 MR. LAMONT: It is, sir.

19 COMMISSIONER GUNTER: Mr. Boyd?

20 MR. BOYD: Yes, sir, Commissioner.

21 COMMISSIONER GUNTER: All right. Issue 3?

22 MR. LAMONT: Yes, sir, it is stated
23 correctly.

24 MR. BOYD: Yes, sir.

25 COMMISSIONER GUNTER: All right, Mr. Boyd's

1 is stated correctly. I'm not asking Staff because
2 Staff wrote it and they are sitting here.

3 MR. PALECKI: Ours are all stated correctly.

4 COMMISSIONER GUNTER: Issue 4?

5 MR. LAMONT: Yes, sir, it is stated
6 correctly.

7 COMMISSIONER GUNTER: All right. Mr. Boyd?
8 That's on Page 11, your response.

9 MR. BOYD: Yes, sir, that is correct.

10 COMMISSIONER GUNTER: Issue 5?

11 MR. LAMONT: Yes, sir, it is stated
12 correctly.

13 COMMISSIONER GUNTER: Mr. Boyd?

14 MR. BOYD: Yes, sir, that is correct.

15 COMMISSIONER GUNTER: Issue 6?

16 MR. LAMONT: Yes, sir, it is stated
17 correctly.

18 COMMISSIONER GUNTER: All right. Mr. Boyd,
19 on Page 13?

20 MR. BOYD: That is correct.

21 COMMISSIONER GUNTER: Okay. Let me ask a
22 question.

23 I am reading your response on Page 13, and we
24 address gas -- well, hold on just one minute. (Pause)

25 I just needed to understand that one myself.

1 Okay.

2 On the legal issues, now, you know, and, Mr.
3 Lamont, since you don't practice before us, on legal
4 issues, we don't really argue legal issues, you brief
5 them.

6 MR. LAMONT: Okay.

7 COMMISSIONER GUNTER: So in the hearing
8 process we don't get all cluttered up with lawyering.
9 (Laughter)

10 MR. LAMONT: That's a smart move.

11 COMMISSIONER GUNTER: Well, you know, down
12 here in the Gulf, we found that the University of
13 Florida had a great experiment down there, you know,
14 about having people out in the water and the attraction
15 to the fish, and what have you.

16 MR. LAMONT: I understand.

17 COMMISSIONER GUNTER: Well, they had the
18 thing where the sharks wouldn't even bite the lawyers
19 because it was professional courtesy. (Laughter)

20 Mr. Boyd didn't even smile about that one.
21 (Laughter) He lives up here where there are too many
22 lawyer jokes, and economist jokes, but the ones that
23 get the most are the Commissioner jokes.

24 Is your position on Issue 7, which will be in
25 the briefs, stated correctly?

1 MR. LAMONT: Yes, sir, it is.

2 COMMISSIONER GUNTER: All right. Mr. Boyd?

3 MR. BOYD: I think I would change it slightly
4 because the issue is framed in terms of whether the
5 issues in dispute are a matter of contract over which
6 the Commission should, or can assert jurisdiction. And
7 I think the position ought to be framed a little bit
8 more directed to the issue.

9 COMMISSIONER GUNTER: Are you on No. 7 or --

10 MR. BOYD: This is on Issue 8.

11 COMMISSIONER GUNTER: Okay, and you would
12 like to -- whether the issues in dispute between Falk
13 and Geller are a matter of contract over which the
14 State of Florida's Public Service Commission should or
15 can constitutionally assert jurisdiction. You would
16 want to change that?

17 MR. BOYD: Yes, sir, just to frame it a
18 little bit differently to say that: "No. The matters,
19 the issues in dispute between John Falk and H. Geller
20 Management Company are a matter of contract over which
21 the Florida Public Service Commission should or cannot
22 assert jurisdiction."

23 COMMISSIONER GUNTER: Okay, so that's a
24 change in your position on Issue 8, is that right?

25 MR. BOYD: Yes, sir.

1 COMMISSIONER GUNTER: All right. Is your
2 position stated correctly on Issue 8?

3 MR. LAMONT: Yes, sir, it is.

4 COMMISSIONER GUNTER: All right. On Issue 9?

5 MR. LAMONT: Well, let's go back. If Mr.
6 Boyd wants to change that to specifically refer to the
7 issues, then I would amend Mr. Falk's position to say
8 that the issues in dispute between he and the Geller
9 Management Company are not a matter of contract over
10 which the Public Service Commission is unable or should
11 not assert jurisdiction.

12 COMMISSIONER GUNTER: Okay. So you will
13 provide this language to -- you can fax the language up
14 to Mr. Palecki, any changes that you have?

15 MR. LAMONT: Yes.

16 COMMISSIONER GUNTER: On the Prehearing
17 Order, and Mr. Boyd being here locally -- hell, he
18 will probably fax it, too. (Laughter) That way we can
19 make sure that we have the proper language that you all
20 require on your positions on any of the issues, and
21 particularly on Issue 8.

22 MR. LAMONT: Okay.

23 COMMISSIONER GUNTER: All right. Issue 9, is
24 that correct?

25 MR. LAMONT: That is correct.

1 MR. BOYD: Correct.

2 COMMISSIONER GUNTER: Mr. Boyd's is correct.

3 Issue 10?

4 MR. LAMONT: That is correct.

5 COMMISSIONER GUNTER: All right. Mr. Boyd?

6 MR. BOYD: Correct.

7 COMMISSIONER GUNTER: Issue 11. Is yours

8 stated correctly?

9 MR. LAMONT: It is.

10 MR. BOYD: Yes, sir, that is correct.

11 COMMISSIONER GUNTER: All right, Mr. Boyd's

12 is stated correctly. Issue 12?

13 MR. LAMONT: It is stated correctly.

14 COMMISSIONER GUNTER: Okay. You all are

15 going to have fun with this brief. Most of the issues

16 are legal issues. Mr. Boyd?

17 MR. BOYD: Yes, sir, 12 is stated correctly.

18 COMMISSIONER GUNTER: Okay. Issue 13?

19 MR. LAMONT: That is stated correctly.

20 COMMISSIONER GUNTER: All right. Mr. Boyd?

21 MR. BOYD: That is correct.

22 COMMISSIONER GUNTER: Issue 14?

23 MR. LAMONT: That is correct.

24 COMMISSIONER GUNTER: All right. Mr. Boyd?

25 MR. BOYD: That is correct.

1 COMMISSIONER GUNTER: Issue 15?
2 MR. LAMONT: That is correct.
3 COMMISSIONER GUNTER: All right. Mr. Boyd?
4 MR. BOYD: Correct.
5 COMMISSIONER GUNTER: Issue 16?
6 MR. LAMONT: That is correct.
7 COMMISSIONER GUNTER: Mr. Boyd? (Pause)
8 MR. BOYD: That is correct.
9 COMMISSIONER GUNTER: All right. Issue 17?
10 MR. LAMONT: That is correct.
11 COMMISSIONER GUNTER: Mr. Boyd?
12 MR. BOYD: Correct.
13 COMMISSIONER GUNTER: Issue 18?
14 MR. LAMONT: That is correct.
15 COMMISSIONER GUNTER: Mr. Boyd?
16 MR. BOYD: That is correct.
17 COMMISSIONER GUNTER: All right. Issue 19?
18 MR. LAMONT: That is correct.
19 COMMISSIONER GUNTER: Mr. Boyd?
20 MR. BOYD: Correct.
21 COMMISSIONER GUNTER: Issue 20?
22 MR. LAMONT: That is correct.
23 COMMISSIONER GUNTER: All right. Mr. Boyd?
24 MR. BOYD: Correct.
25 COMMISSIONER GUNTER: Issue 21?

1 MR. LAMONT: Correct.

2 COMMISSIONER GUNTER: Mr. Boyd?

3 MR. BOYD: Correct.

4 COMMISSIONER GUNTER: All right. Issue 22?

5 MR. PALECKI: Commissioner, we would point
6 out that --

7 COMMISSIONER GUNTER: I want to ask what we
8 mean by "policy issues." I understand the substantive
9 issues and the legal issues, but what are we talking
10 about in policy issues? Are these for the Commission
11 to receive evidence and then establish a policy, make a
12 policy decision based on the evidence before the
13 Commission?

14 MR. PALECKI: Well, these were framed as
15 policy issues by Mr. Boyd, but I think that these are
16 mixed issue of fact and policy. They are the same as
17 some of the other factual and legal issues, so that is
18 basically a repeat of previous issues that we have
19 already discussed.

20 I discussed this with Mr. Boyd immediately
21 before we started on the record, and I don't know if
22 you would be willing to go ahead and take these up as
23 they appear previously under factual or legal issues.

24 COMMISSIONER GUNTER: Well, do we have
25 repeats of issues?

1 MR. BOYD: Yes, sir. I don't know how many.

2 COMMISSIONER GUNTER: What is the difference
3 between policy and fact?

4 MR. BOYD: Well, the order on prehearing
5 procedure asked separately for issues of fact, law and
6 policy.

7 COMMISSIONER GUNTER: Uh-huh.

8 MR. BOYD: So we responded accordingly.

9 COMMISSIONER GUNTER: Sure, I understand.

10 MR. BOYD: As it turns out, what it really
11 amounts to, Commissioner, is that some of the issues,
12 we believe, have some policy factors and considerations
13 to them in how either the rule is going to be applied
14 or how the rule, in effect, is going to be applied or
15 laid over the facts in the case. So we certainly would
16 have no objection to dumping the policy issues back
17 into the fact and legal, with the recognition that we
18 think that there are some policy considerations. There
19 is no need to do it twice, I agree with that.

20 COMMISSIONER GUNTER: Okay, I understand.
21 Some of the factual issues -- this is a first
22 impression for me, and this is my thirteenth year. And
23 I will be honest with both you and Mr. Lamont, I have
24 not had a proceeding, to my knowledge, on this
25 particular issue.

1 MR. BOYD: I don't think anybody has.

2 COMMISSIONER GUNTER: The only one that I can
3 recall, and it was early on, '79 or '80, in that time
4 frame, and it might even have been '81, had to do with
5 master metering. And that was an issue that had been
6 kind of ongoing, but I was in one master metering which
7 was prohibited.

8 MR. BOYD: Was that the Fletcher case in
9 Jacksonville?

10 COMMISSIONER GUNTER: I don't recall which
11 one it was.

12 MR. PALECKI: That was a water and sewer
13 case.

14 COMMISSIONER GUNTER: No, it was an electric
15 case.

16 MR. BOYD: Was it?

17 COMMISSIONER GUNTER: Yes, it was an electric
18 case, and it was so long ago. So this is kind of first
19 impression for me.

20 MR. BOYD: Yeah, and that was our only point;
21 that there are some first-impression type
22 considerations.

23 COMMISSIONER GUNTER: Well, which repeats do
24 we have, beginning on Page 21, Issue 22?

25 MR. LAMONT: It looks like all of them are.

1 COMMISSIONER GUNTER: Have you been through
2 this, Mr. Palecki?

3 MR. PALECKI: Yes, I have. I'm not sure
4 Issue 22 is identical to any other issue. I know that
5 23 through 29 all track the other issues, as close as I
6 can see, and I asked Mr. Boyd if he could go over it
7 just to make sure that they are the same.

8 COMMISSIONER GUNTER: And 22, you don't think
9 that has been --

10 MR. PALECKI: I'm not sure about 22.

11 COMMISSIONER GUNTER: Where would you think
12 Item 22, Mr. Lamont, would have been duplicated, which
13 one would have been duplicated? We will just take a
14 little bit and see what we have here because we don't
15 want any duplicate issues.

16 MR. LAMONT: I'm going to have to go back
17 here.

18 COMMISSIONER GUNTER: Okay.

19 MR. LAMONT: I recall seeing it before, I
20 thought, but perhaps I'm having lapses in my memory.

21 MR. BOYD: I'm not sure that that was
22 specifically stated that way, Commissioner. Perhaps it
23 ought to be inserted back as a legal issue.

24 COMMISSIONER GUNTER: Yeah, but when I'm
25 reading it, it looks like a legal issue. We could just

1 remove the words "policy issues" and then it just
2 becomes Issue 22.

3 MR. BOYD: Well, let me see. Let's look at
4 Issue No. 11.

5 MR. LAMONT: Yes, Issue 11 seems to be the
6 one.

7 MR. BOYD: Yeah, that's the same issue.

8 COMMISSIONER GUNTER: Okay. So if we don't
9 have any objection from the parties because of
10 duplication, Issue 22 through the remainder will be
11 removed.

12 MR. PALECKI: And we will recognize that
13 these issues do have policy implications that could be
14 argued by the parties.

15 COMMISSIONER GUNTER: Sure. Most of the
16 legal issues that are raised here, and most of the
17 factual issues except perhaps the issue of calculation
18 -- hell, we get into calculation all the time -- but
19 except for that very narrow portion, there can be
20 policy implications on almost every decision.

21 MR. BOYD: Yes, sir. I think Mike can take
22 care of that through a notation in the order. So
23 that's fine.

24 COMMISSIONER GUNTER: Okay. So from Issue 22
25 on have been struck, Mr. Lamont.

1 MR. LAMONT: Okay.

2 COMMISSIONER GUNTER: Now, we're back to Mr.
3 Nixon. Do you all want to restate any arguments for or
4 against Mr. Nixon? We'll start with Mr. Boyd, he gave
5 a chuckle.

6 MR. BOYD: Well, only that we do object to
7 him being inserted at this point.

8 COMMISSIONER GUNTER: I understand.

9 MR. BOYD: I think probably the easiest for
10 everybody, the way to handle it would just simply be to
11 -- we could probably by the end of the day get the
12 calculations that you referred to earlier,
13 Commissioner, and have those available by way of
14 stipulation. And then it will be a matter of applying
15 those back to the contract provisions. That's probably
16 the best or easiest way to do it, and we would agree to
17 doing it that way.

18 COMMISSIONER GUNTER: How about we research,
19 Mr. Lamont, and I do not want -- I want to make it very
20 clear that I do not want to prejudice your case or Mr.
21 Boyd's case, either way. And the reason I made this
22 suggestion is I don't know how long, how far back we
23 retain those previous tariffs. But if we have those
24 tariffs available that go back for the time period -- I
25 haven't read the letter, and I don't know, you know,

1 what the position was there -- but if those tariffs are
2 available, would you have the same need for Mr. Nixon?
3 If we stipulated those into the record, would you still
4 have the same need for Mr. Nixon that you have absent
5 those?

6 MR. LAMONT: To be real candid with you,
7 Commissioner, I don't know. (Laughter)

8 COMMISSIONER GUNTER: Okay. Well, to be
9 abundantly fair, Staff Counsel has indicated that he
10 has had conversations with Florida Power Corp and that
11 Mr. Nixon would be available by telephone, and that's
12 probably the cheapest way to do it if that's what Mr.
13 Boyd wanted to do, so depose him.

14 I'm going to direct to Staff, Staff Counsel,
15 to get with our Electric and Gas Department and see if
16 those tariffs are available. And we would have those
17 tariffs available for either you or Mr. Boyd to move,
18 to use, to do whatever. We would make those tariffs
19 available to both of you.

20 MR. LAMONT: Okay.

21 COMMISSIONER GUNTER: I think that levels the
22 playing ground, and then it gets into the matter of
23 nothing more than whose pencil is the sharpest because
24 those are the facts that would underlie.

25 I would strongly hope and suggest that Mr.

1 Nixon's testimony be limited for the purpose of
2 calculation of the charges that were made by Florida
3 Power Corp to whoever, and not try and get wrapped up
4 in our drawers about interpreting a contract.

5 MR. LAMONT: And Mr. Nixon has no desire to
6 do that.

7 COMMISSIONER GUNTER: Right, and certainly
8 Mr. Nixon -- the only person that should be involved in
9 interpreting the contract, you know, should perhaps be
10 a court of competent jurisdiction if you have a
11 contractual dispute.

12 MR. PALECKI: Commissioner, with regard to
13 this issue, I would point out that the Geller
14 Corporation has made available to our auditor
15 worksheets which contain all of the electrical charges
16 that were billed to the Geller Corporation during the
17 period in question, and that our auditor has done an
18 audit based on those figures. So, you know, we can
19 have the tariffs to back up these figures to make sure
20 that they are accurate.

21 COMMISSIONER GUNTER: Do we have a report
22 from the auditor?

23 MR. PALECKI: We have a draft report from the
24 auditor with will become a final report with, you know,
25 one or two minor modifications.

1 COMMISSIONER GUNTER: When will that final
2 report be available?

3 MR. PALECKI: I think it will go out today,
4 or within the next two days.

5 COMMISSIONER GUNTER: Well, that audit report
6 will be available to all parties then within the next
7 two days.

8 MR. PALECKI: We have made the draft
9 available to both parties.

10 COMMISSIONER GUNTER: Already?

11 MR. PALECKI: Already, but the final copy
12 will be provided within two days.

13 COMMISSIONER GUNTER: Okay. So on that
14 question of Mr. Nixon, I will allow you to subpoena
15 him, if that's what you want to do.

16 MR. LAMONT: Right.

17 COMMISSIONER GUNTER: And I'm going to allow
18 Mr. Boyd the latitude for any rebuttal that he wants to
19 make to that -- that's just being fair -- if he chooses
20 to do so. Mr. Nixon, by information from Power Corp,
21 they will make him available for deposition and it
22 could be done over the phone if that's the way they
23 want to do it. And I would think that since you are
24 there in St. Petersburg, if you wanted to participate,
25 you know, to monitor, or whatever, you could probably

1 drive over to Power Corp's office and sit there and
2 listen on the speaker phone.

3 MR. LAMONT: That's exactly what I would do.

4 COMMISSIONER GUNTER: Okay. I'm trying to
5 make this thing as easy as we can for everybody without
6 getting it too sticky.

7 Mr. Boyd?

8 MR. BOYD: Mr. Commissioner, can I just make
9 sure?

10 COMMISSIONER GUNTER: Sure.

11 MR. BOYD: Is Mr. Nixon's testimony going to
12 be limited to the matters that you have indicated; that
13 is, the charges by Florida Power Corp in effect, and
14 therefore charged to the Geller Company?

15 COMMISSIONER GUNTER: Mr. Lamont, isn't that
16 fair?

17 MR. LAMONT: I have no problem with that.

18 COMMISSIONER GUNTER: Is getting and
19 discussing the charges that Florida Power Corp makes to
20 whoever owns the meter?

21 MR. LAMONT: That is correct.

22 COMMISSIONER GUNTER: So whoever the billing
23 party is, that should be the only area that the Florida
24 Power Corp person -- I mean, you start then getting
25 outside their realm of knowledge, I would think.

1 MR. LAMONT: That's the only purpose that he
2 would be there, sir.

3 MR. PALECKI: Commissioner Gunter, I have an
4 idea that might solve this whole situation. It's my
5 impression that Mr. Falk's attorney only wants to have
6 Nixon available to introduce a letter into evidence. I
7 don't know if Mr. Boyd would be will to stipulate to
8 its authenticity and admissibility without admitting
9 the facts in the letter, and certainly those would be
10 open to dispute. But if the letter is the only purpose
11 that Mr. Nixon is needed, perhaps we could resolve this
12 just by stipulating the letter into evidence.

13 COMMISSIONER GUNTER: I don't know. That's
14 between the three of you all.

15 MR. BOYD: That just jumps us right back into
16 the fire because the letter goes beyond what we just
17 talked about.

18 COMMISSIONER GUNTER: Okay.

19 MR. BOYD: So I think that what we just came
20 up with is the way to handle it. It gets the
21 information into the record and then we can go from
22 there.

23 COMMISSIONER GUNTER: Yeah.

24 MR. PALECKI: All right.

25 COMMISSIONER GUNTER: So the purpose -- and I

1 want to make sure that I am clear, Mr. Lamont.

2 MR. LAMONT: Okay.

3 COMMISSIONER GUNTER: The purpose that you
4 would use Mr. Nixon would be on the rates and charges
5 that Florida Power Corp makes to Mr. Boyd's client?

6 MR. LAMONT: That's correct.

7 COMMISSIONER GUNTER: And that is the very
8 narrow purpose it is in there.

9 MR. LAMONT: Correct.

10 COMMISSIONER GUNTER: Okay. And I would
11 expect that if Mr. Boyd chose to depose Mr. Nixon that
12 he would get in touch with you and you could hot-foot
13 it over to the Power Corp building and participate in
14 whatever manner you chose.

15 MR. LAMONT: That will be fine.

16 COMMISSIONER GUNTER: Is that fine?

17 MR. BOYD: Sure.

18 COMMISSIONER GUNTER: Okay. Have you got
19 anything else, Mr. Lamont?

20 MR. LAMONT: I do not.

21 COMMISSIONER GUNTER: Mr. Boyd?

22 MR. BOYD: Let me just ask one point just to
23 clarify. There is a reference in the exhibits to all
24 the exhibits attached to the complaint. I think two
25 exhibits also refer to water. I don't think there has

1 been any mention of it here today, so I want to make
2 sure that we are not concerned with anything in those
3 exhibits relating to water.

4 MR. LAMONT: We are not.

5 MR. BOYD: Then that's all I have, too,
6 Commissioner.

7 COMMISSIONER GUNTER: Mr. Palecki?

8 MR. PALECKI: Nothing further, Commissioner.

9 COMMISSIONER GUNTER: Mr. Lamont, that's it.

10 MR. LAMONT: All right.

11 COMMISSIONER GUNTER: And we will see you
12 down when we see you.

13 MR. LAMONT: All right, good enough.

14 COMMISSIONER GUNTER: All right, thank you
15 very much.

16 MR. LAMONT: Thank you, sir.

17 COMMISSIONER GUNTER: Thank you all. Thank
18 you, Mr. Boyd.

19 MR. BOYD: Yes, sir.

20 (Thereupon, hearing was concluded at 10:17 a.m.)

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1 F L O R I D A)
2 :
3 COUNTY OF LEON)

CERTIFICATE OF REPORTER

4 I, CAROL C. CAUSSEAU, CSR, RPR, Official
5 Commission Reporter,

6 DO HEREBY CERTIFY that the prehearing conference
7 in the captioned matter, Docket No. 910056-PU, was heard
8 by the Florida Public Service Commission commencing at the
9 time and place therein stated; it is further

10 CERTIFIED that I reported in shorthand the
11 proceedings held at such time and place; that the same has
12 been transcribed under my direct supervision, and that the
13 transcript, consisting of 39 pages, constitutes a true and
14 accurate transcription of my notes of said proceedings; it
15 is further

16 CERTIFIED that I am neither of counsel nor
17 related to the parties in said cause and have no interest,
18 financial or otherwise, in the outcome of this docket.

19 IN WITNESS WHEREOF, I have hereunto set my hand
20 and seal at Tallahassee, Leon County, Florida, this 12th
21 day of April, A.D., 1991.

22
23 
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